examinations. As the number of notarial posts is limited, the mere passing of the examination does not guarantee an appointment. Vacant posts are therefore allocated to candidates achieving the highest results in the examination or on the basis of further competitive examination or according to a "waiting list" system. Whilst waiting for a post to become vacant, in some countries the prospective notary will work in the office of an appointed notary as that notary's "associate" or "substitute"; in some countries, he or she is known as a candidate-notary. Appointments are strictly territorial—that is to say for a particular town or district outside which the notary is not permitted to establish his practice.

UNITED STATES OF AMERICA

2–42 Notaries public in the United States do not need to be qualified lawyers and have limited functions relating chiefly to the administration of oaths, the taking of acknowledgments of deeds and the protesting of negotiable instruments. Notaries public are appointed by the individual states—in most cases the only requirements for appointment are residence in the state concerned, the obtainment of the age of majority and the furnishing of a bond, although in some states a written examination is required.[110] They have a defined local jurisdiction generally restricted to the county or district in which they reside, but in some cases they may be appointed notaries for the state at large. Their appointments are for a limited period.

Louisiana, whose legal system has many civil-law influences, is an exception to the general position described here. Also, certain other States are introducing a "civil law notary" qualification. In Florida, for example, attorneys-at-law who practise international law and have a need to authenticate an act or attest to the validity of a document may apply for a civil law notary appointment after undertaking special training and sitting an examination. A similar qualification has been introduced in Alabama.

[110] In some states an online course must be completed.

CHAPTER 3

THE COURT OF FACULTIES

In England and Wales a notary public obtains his faculty,[1] i.e. his authority to practise, from the Court of Faculties of the Archbishop of Canterbury.[2] No person in England and Wales is entitled to act as a notary public unless he has been duly sworn, admitted and enrolled in this court.[3] The president of the court is known as the Master of the Faculties. The Court of Faculties also appoints notaries in British possessions overseas and in various parts of the Commonwealth.[4] The faculty, or instrument, given to a notary on his admission, signed by the Registrar of the Court of Faculties is passed under the seal of the Office of Faculties. 3–01

It is important to note that following the entry into force of s.13 of the Legal Services Act 2007,[5] entitlement to carry on notarial activities is determined solely in accordance with the provisions of that Act, and the grant of a faculty does not of itself authorise the carrying on of such activities.[6] The effect of the new legislation will be considered in more detail later in this Chapter.[7]

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Appointment of Master. The Dean of the Arches and Auditor, who is a judge of both the Arches Court of Canterbury and the Chancery Court of York is now 3–02

[1] "The word faculty or facultas is used for a privilege or special power granted unto a man by favour, indulgence and dispensation to do that which by the common law he cannot do; and for the granting of this, there is an especial court under the Archbishop of Canterbury called the Court of Faculties, and the chief officer thereof is the Master of the Faculties whose power to grant, as aforesaid, was given by 25 Henry VIII c. 21.": Cowell's Interpreter.

[2] Stated by Coke to be "a court, although it holdeth no plea of controversie. It belongeth to the Archbishop of Canterbury, and his officer is called Magister ad Facultates.": 4 Inst., Ch.74, p.337.

[3] Public Notaries Act 1801 s.1. Although this provision does not apply to ecclesiastical notaries (s.14), the Court of Faculties nonetheless treats it as so applying. The section was partially repealed by the Legal Services Act 2007 Sch.23 para.1. For the effect of the new legislation, see below, this paragraph and paras 3–07 et seq.

[4] The power to appoint notaries overseas was originally conferred by the Ecclesiastical Licences Act 1533 s.2. Notwithstanding the repeal of that section, the Master of the Faculties continues to appoint notaries overseas in the exercise of the general authorities granted by s.3. The Master thus appoints notaries in, e.g. Gibraltar, Guernsey, Jersey, New Zealand, Papua New Guinea, and the Australian State of Queensland. The appointment of notaries in Scotland is regulated by the Solicitors (Scotland) Act 1980 (see paras 2–27 et seq., above). Notaries in Northern Ireland are appointed by the Lord Chief Justice of the Province (Judicature (Northern Ireland) Act 1978 s.112) (see paras 2–32 et seq., above). In the Republic of Ireland, they are appointed by the Chief Justice (Courts (Supplemental Provisions) Act 1961 s.10) (see para.2–35 et seq., above). Manx notaries are appointed by the First Deemster (i.e. the President of the High Court) (Advocates Act 1995 s.29).

[5] January 1, 2010.

[6] See Legal Services Act 2007 Sch.21 para.5 which inserts a new s.7A into the Public Notaries Act 1843 making provision to this effect; but see para.2–01 above in fine. The 2007 Act thus contemplates persons who are not notaries being authorised to the carry on notarial activities, a bizarre outcome which would inevitably lead to confusion in receiving jurisdictions and the rejection of "notarial" acts issued by individuals so authorised.

[7] See paras 3–07 et seq.

ex officio Master of the Faculties,[8] to whom all applications for the admission of notaries are made. Appointment to the offices of Dean of the Arches and Auditor is made by the Archbishops of Canterbury and York jointly with the approval of the Queen signified by warrant under the sign manual.[9] Except in disciplinary matters (where his place is taken by the Commissary[10]) he presides in the Court of Faculties and exercises jurisdiction over the appointment of notaries.

3–03 **Source of jurisdiction: Ecclesiastical Licences Act 1533.** The jurisdiction of the court to grant faculties was created by the Ecclesiastical Licences Act 1533 (the Act concerning Peter's Pence and Dispensations).[11] Prior to then, as we saw in Ch.1, the power to appoint notaries lay with the Pope who, in relation to the appointment of notaries in England, had exercised this power through English bishops acting by virtue of a specific papal commission.

The Act commences with a lengthy recital (now repealed) in which complaint is made that the subjects of the King had been greatly impoverished by reason of the "intolerable exactions of great sums of money" taken out of the realm by the Pope and the See of Rome for dispensations, faculties, and licences. Section 2 (also repealed) of the Act provided that neither the King nor any of his subjects, either in England or any other of his dominions, should thenceforth sue to the Pope, or to any person having authority from him, for dispensations, faculties or licences, for any cause or matter for which a dispensation, faculty, or licence, had been accustomed to be had and obtained from the See of Rome, or by authority thereof, or of any bishop of England. Thenceforth, every such dispensation, faculty, or licence, should be granted from time to time in England and other dominions of the King by the Archbishop of Canterbury.

3–04 **Exercise of jurisdiction under Ecclesiastical Licences Act 1533.** By s.3 of the Act, the Archbishop of Canterbury and his successors, after "good and due examination by them of the causes and qualities of the persons procuring faculties and licences, are given full power and authority by themselves, or by their sufficient and substantial commissary, or deputy, "by their discretions" to "grant and dispose" by an instrument under the name and seal of the Archbishop all manner of faculties and licences for any cause or matter, for which such faculties and licences had customarily been obtained at the See of Rome, or by the authority thereof, or of any bishop of England.

The Archbishop and his successors are authorised and empowered to "ordain, make and constitute" a clerk who shall write and register every such faculty and licence granted by the Archbishop, and take for his pains such sums of money as the Act allows. He is known as the Registrar of the Court of Faculties.

If the Archbishop refuses to grant a faculty or licence to any person who ought "upon a good, just and reasonable cause" to have it, the Lord Chancellor, upon complaint made, is empowered by writ addressed to the Archbishop to require him under a "penalty therein to be limited by the discretion of the Lord Chancellor" to grant the faculty or licence according to the request of the persons

[8] Under the Ecclesiastical Juridisdiction Measure 1963 s.13.
[9] Ecclesiastical Juridisdiction Measure 1963 s.3.
[10] See para.3–10, below.
[11] A number of sections of this Act were repealed as being "no longer of practical utility" by the Statute Law (Repeals) Act 1969.

applying for the same, or else certify to the Crown in the Court of Chancery on a certain day the reason for his refusal and if, after due examination, it appears from the certificate that the Archbishop refused to grant the faculty or licence without just and reasonable cause, the Lord Chancellor is authorised to issue a writ of injunction under the great seal, commanding the Archbishop to grant the faculty or licence by a certain day under a penalty therein contained. If the Archbishop, after the receipt of the writ, refuses to grant the faculty or licence, and shows no just or reasonable cause for so refusing, he shall forfeit to the Crown the penalty expressed in the writ.[12]

Grant of notarial faculty; refusal of grant; appeal. The Master may grant or refuse any application for admission as a notary public at his discretion.[13] However, a refusal without just or reasonable cause may give rise to the procedure contemplated by s.11 of the Ecclesiastical Licences Act,[14] as substantially re-enacted in s.5 of the Public Notaries Act 1843, substituting, however, the Master of the Faculties for the Archbishop as the defendant. The Constitutional Reform Act 2005[15] substitutes the Chancellor of the High Court[16] for the Lord Chancellor and enables him to nominate another judge to exercise his functions under s.5. 3–05

The translation into modern civil procedure of the remedies provided for in the Acts of 1533 and 1843 is not immediately apparent. First, it must be understood that the provisions in the legislation for complaint to be made to the Lord Chancellor operated to confer jurisdiction on the High Court of Chancery rather than on the Lord Chancellor personally. At the time of the 1533 Act, the Lord Chancellor or, if there was none, the Keeper of the Great Seal was the only judge of the Court of Chancery. The Lord Chancellor's jurisdiction under the 1533 Act was exercisable in this court. The form of writ described in the Act followed the ordinary medieval pattern: a command to afford the relief sought or show cause why it should not be given.

Secondly, by virtue of s.18(2)(a) of the Supreme Court of Judicature (Consolidation) Act 1925, the jurisdiction of the High Court of Chancery (both as a common law court and as a court of equity) vested in the High Court of Justice. To the extent that the control exercised is over the Master of the Faculties acting in an administrative capacity rather than over an inferior judicial tribunal, the jurisdiction thus transferred to the High Court is of an original rather than appellate nature and the complaint is heard in the Chancery Division, not the Court of Appeal. The proceedings are started in the ordinary way by the court at the complainant's request issuing a claim form which is served on the Master of the Faculties; the trial date counts as the return date contemplated in the Act of 1533[17] by which the Master of the Faculties is to certify the reason for his refusal to grant the faculty. The relief available is an injunction and, in the event of the

[12] Ecclesiastical Licences Act 1533 s.11. As to current procedure for bringing a complaint against a refusal to grant a notarial faculty, see para.3–05, below.
[13] Public Notaries Act 1843 s.4.
[14] See para.3–04, above.
[15] Sch.4(1) para.13(2), (3).
[16] Prior to the Constitutional Reform Act 2005, he was known as the Vice-Chancellor. He is vice-president of the Chancery Division of the High Court.
[17] s.11.

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Master's non-compliance therewith, the Act of 1533 provides for the appointment by commission under the Great Seal of "two spiritual prelates or persons" to grant the faculty in place of the Master. The commission would now be granted by the Chancellor of the High Court or a judge of that court nominated by him.[18]

In England and Wales the right to be admitted as a notary public is restricted to those who satisfy the requirements prescribed by the Master of the Faculties as set out in the Notaries (Qualification) Rules 2013.[19] In the case of an applicant for a faculty to practise overseas in a jurisdiction where notaries are appointed by the Master,[20] the appointment is left entirely to the discretion of the Master.[21] However, only in exceptional circumstances will faculties be issued to persons overseas who are not lawyers admitted and practising in the jurisdiction for which a faculty is sought.[22] In the case of Gibraltar, Guernsey and Jersey the Master now requires applicants to have passed an examination in notarial practice as a condition of admission.[23]

3–06 **Powers of the Master of the Faculties.** The powers of the Master are extensive, with regard both to the appointment of notaries and to the continuing jurisdiction he exercises over notaries actually in practice. Prior to the Courts and Legal Services Act 1990, the extent of the Master's powers was largely undefined by statute: they were said to reside within the inherent jurisdiction of the Master, by which was meant the totality of the powers exercised prior to the Reformation by the Pope over notaries in England and transferred to the Archbishop of Canterbury by the Ecclesiastical Licences Act 1533. The Courts and Legal Services Act 1990 removed any uncertainty concerning the basis and extent of the Master's powers.

The 1990 Act left intact the Master's power under s.4 of the Public Notaries Act 1843 to make orders, or rules of procedure, requiring testimonials, certificates, or proofs of the character, integrity and ability of persons applying to him for a faculty to practise either in England, or in any of Her Majesty's Possessions beyond the seas, and from time to time to alter or vary such rules as he shall think fit.[24] Additionally, the Act[25] gave specific powers to the Master to issue rules making provision amongst other things:

1) as to the educational and training qualifications which must be satisfied before a person may be granted a faculty to practise as a public notary[26];

[18] See above. The procedure outlined is substantially as advised by Master Ball of the Chancery Judges' Chambers to the Lord Chancellor's Office in a letter of November 9, 1979.
[19] See para.A2–20 et seq., below.
[20] See para.3–01 above.
[21] *Bailleau v Victorian Soc. of Notaries* (1904) P. 180.
[22] *Bailleau v Victorian Soc. of Notaries* (1904) P. 180 at 185.
[23] Notaries (Gibraltar) Admission Order 2012; Notaries (Jersey and Guernsey) Admission Order 2012.
[24] The rights of the Scriveners' Company to admit and regulate the activities of scrivener notaries were preserved by s.6 of the 1843 Act (repealed by Access to Justice Act 1999 s.106 and Sch.15 Pt II).
[25] Courts and Legal Services Act 1990 s.57(4).
[26] See the Notaries (Qualification) Rules 2013, para.A2–20, below.

2) as to further training which public notaries are to be required to undergo[27];
3) for regulating the practice, conduct and discipline of public notaries[28];
4) as to the keeping by public notaries of records and accounts[29];
5) as to the handling by public notaries of clients' money[30];
6) as to the indemnification of public notaries against losses arising from claims in respect of civil liability incurred by them[31];
7) as to compensation payable for losses suffered by persons in respect of dishonesty on the part of public notaries or their employees[32];
8) requiring the payment, in such circumstances as may be prescribed, of such reasonable fees as may be prescribed, including in particular fees for:
   (a) the grant of a faculty;
   (b) the issuance of a practising certificate by the Court of Faculties; or
   (c) the entering in that court of a practising certificate issued under the Solicitors Act 1974.

The Master or his surrogate is authorised to issue commissions to take any oaths, affidavits, affirmations or declarations required by law to be taken before the grant of any faculty or other instrument issuing from the Court of Faculties.[33]

LEGAL SERVICES ACT 2007

3–07 **Designation of Master of the Faculties as approved regulator.** The entry into force on January 1, 2010 of s.13 of the Legal Services Act 2007 left the regulatory role of the Master of the Faculties largely intact. However, in common with other "front line" legal regulators, the Master's regulatory functions are now carried on under the supervision of the Legal Services Board established by Pt 2 of the Act.

The Act[34] designates the Master as an approved regulator in respect of the following activities:

(1) reserved instrument activities, i.e. conveyancing;

[27] See the Notaries (Post-Admission) Rules 2009, para.A2–14, below; Notaries (Continuing Professional Education) Regulations 2010, para.A2–17.
[28] See the Notaries Practice Rules 2009, para.A2–15, below, Notaries (Conduct and Discipline) Rules 2011, para.A2–18, below.
[29] Notaries Practice Rules 2009, para.A2–15, below; Notaries Accounts Rules 1989, para.A2–03, below.
[30] See the Notaries Accounts Rules 1989, Notaries Trust Accounts Rules 1989; Notaries Accounts (Deposit Interest) Rules 1989, para.A2–03 et seq., below.
[31] See the Notaries (Practising Certificates) Rules 2012 r.6.1.1, para.A2–19, below.
[32] Notaries (Practising Certificates) Rules 2012 r.6.1.2.
[33] Public Notaries Act 1843 s.8; and see the saving in the Legal Services Act 2007 Sch.21 para.6.
[34] Sch.4 Pt 1 para.1.

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Chapter 8

POWERS OF ATTORNEY

8–01 Powers of attorney are the staple of the notary's practice, whether he is authenticating a power of attorney, advising upon the need for one, or drawing the instrument itself. In other cases the notary will be required to authenticate a document executed pursuant to a power of attorney and must determine whether the latter instrument is adequate in form and content to invest the attorney with the necessary authority to bind his principal.

8–02 **Nature and definition of a power of attorney.** Although there is no statutory or judicial definition of a power of attorney, it can be described as a deed by which one person authorises another to act on his behalf and in his name as his attorney, either generally or in a particular matter.[1] A power of attorney may be an independent instrument or incorporated in a deed relating to other matters, for example a mortgage, debenture or trust instrument. Execution as a deed is in all cases essential for the creation of a power of attorney in England and Wales.[2] The person who gives the power is known as the principal, donor or grantor, and the person to whom it is given, the attorney or donee.[3] The relationship thus created is one of agency and the law applicable to powers of attorney is to a large extent the law of principal and agent.

The foregoing description helps to distinguish a power of attorney from other agency appointments by its execution as a deed, but not to determine the circumstances and purposes for which a power of attorney is required instead of a less formal authorisation. English common law requires no special form for the creation of an agency relationship and, even if the agent is appointed to make a contract in writing, he does not need written authority to that effect. This applies equally where the contract itself is required by statute to be in writing in order to charge the parties thereto, such as a contract for the purchase of land[4] or a guarantee.[5] But statutory provisions exist requiring agents to be appointed in writing for other purposes; for example, an agent creating or disposing of an interest in land must be lawfully authorised in writing[6]; and where a trustee is

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[1] "... a formal arrangement whereby one person (the donor) gives another person (the attorney or donee) authority to act on his behalf and in his name": Report of the Law Commission on the Incapacitated Principal (Law Com. No.122, Cmnd. 8977), para.2.2; "a power of attorney is a document by which one person ('donor') gives another person ('attorney') the power to act on his behalf and in his name" (Aldridge, *Powers of Attorney*, 10th edn (London: Sweet & Maxwell, 2007), p.1). For the meaning of "person", see para.11–01 below, fn.2.

[2] Powers of Attorney Act 1971 s.1(1). As to execution in other jurisdictions, see paras 8–50 et seq., below, and as regards the formal validity of powers of attorney granted in relation to contracts subject to the Rome 1 Regulation see para.8–54, below.

[3] In the United States the term employed is "attorney-in-fact" (see para.11–42, fn.278 below).

[4] Law of Property (Miscellaneous Provisions) Act 1989 s.2.

[5] Statute of Frauds 1677 s.4.

[6] Law of Property Act 1925 s.53(1).

permitted to delegate the exercise of his trusts, powers and discretions the delegation can only be effected by means of a power of attorney.[7]

Written authorisation is not necessary for a person to act as the agent of a company, on whose behalf a contract may be made by any person acting under its authority, express or implied.[8] Any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.[9] Similar provisions apply to other forms of body corporate.[10]

Perhaps the most important exception to the general principle that the form of appointment is irrelevant to the creation of agency lies in the common law rule that where an agent is appointed to execute a deed his authority must be granted by deed, in other words by power of attorney.[11] Powers of attorney are nevertheless employed on a routine basis for purposes other than the execution of deeds or where statute does not require the agent's appointment to be by power of attorney. In many cases a simple authorisation, written or oral, might seem sufficient, yet powers of attorney have always been regarded as a specially effective form of authorisation, and are invariably required for an agent to conduct a private transaction or official business abroad on behalf of a foreign party. Where a notary is advising a client about a prospective agency appointment or authenticating a document signed by an agent, he needs to know whether the agent's authority should or does take the form of a power of attorney. If so, it will be subject to the statutory and other rules of the law of England and Wales which govern the execution, exercise and interpretation of powers of attorney, as well

[7] Trustee Act 1925 s.25, as substituted by the Trustee Delegation Act 1999 s.5(1); see paras 8–48 et seq., below.

[8] Companies Act 2006 s.43(1). As used in this chapter, "company" means a company incorporated under the 2006 Act or earlier Companies Acts.

[9] Companies Act 2006 s.43(2).

[10] Corporate Bodies' Contracts Act 1960. By s.2 (as amended by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941), Sch.1 para.8) the Act applies to all bodies corporate except companies registered under the Companies Act 2006, companies incorporated outside the United Kingdom and limited liability partnerships (LLPs). For other bodies, the making of contracts, capacity, execution of documents and so forth are governed by enactments applying or modifying or corresponding to the provisions of the Companies Act 2006: for **LLPs**, the Limited Liability Partnerships Act 2000 and the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (SI 2009/1804), regs 4, 6 and 7; for **open-ended investment companies**, the Open-Ended Investment Companies Regulations 2001 (SI 2001/1228); for **overseas companies** (companies incorporated outside the United Kingdom) the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009/1917) reg.4; for **unregistered companies** (defined in CA 2006 s.1043; typically they are companies incorporated by royal charter or private act of parliament), the Unregistered Companies Regulations 2009 (SI 2009/2436), reg.3 and Sch.1; for **companies authorised to register** (as defined in CA 2006 s.1040), the Companies (Companies Authorised to Register) Regulations 2009 (SI 2009/2437) reg.18; for **charitable incorporated organisations**, the Charitable Incorporated Organisations (General) Regulations 2012 (SI 2012/3012) regs 21, 22 and 23; and for **European Companies (SEs)**, the Community and United Kingdom legislation referred to in para.11–19, below. The above legislation covers a range of issues which are dealt with later in this chapter in relation to companies (as defined in fn.8 above), and therefore by reference to the Companies Act 2006.

[11] *Powell v London & Provincial Bank* [1893] 2 Ch. 555. The rule does not apply where an agent executes a deed by direction and in the presence of the principal: *Ball v Dunsterville* (1791) 4 T.R; in this case two witnesses must attest his signature (Law of Property (Miscellaneous Provisions) Act 1989 s.1(3)(a)(ii)). The former rule which required authority by one person to another to *deliver* an instrument as a deed on his behalf to be given by deed has been abolished (s.1(1)).

as the rights and duties of the principal and the agent thereunder and the rights of third parties dealing with the agent.

The only statute dealing with powers of attorney generally, the Powers of Attorney Act 1971, does not define a power of attorney, nor does a judicial definition exist to distinguish it from other forms of authorisation, but both the content and form of an authorisation offer potential guidance.

As to content, the category of powers of attorney has been said to include: documents in which the "principal is giving the agent wide general powers to act on his behalf"[12]; "a formal grant of power, especially of a general power to represent a person in all matters"[13]; an instrument formally appointing an agent "to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally"[14]; "a formal instrument by which one person empowers a person to represent him, or act in his stead for certain purposes", and which may confer general or particular powers[15]; "a document which appoints a person, called the donee . . . and invests him with power to act either generally or in a manner specified on behalf of . . . the donor . . . The exercise of the authority conferred . . . is generally left to the discretion of the donee, and this element of discretion in at least the timing, if not also the selection of the steps to be taken . . . may well be the distinguishing characteristic of a power of attorney."[16]

Mere authorisations, on the other hand, include a mandate requiring a company to transmit dividend warrants to a bank, or a bank to honour cheques signed by a nominee, or an estate agent to deliver keys to a purchaser[17]; other examples are an authorisation to vote at a meeting or in a parliamentary election (a voting proxy) or to accept a directorship or have an alteration made in a document (provided the document is not a deed). In cases of this kind the agent has no discretion as to what steps he is to take or when he is to take them: he is required to do a single act at a given time. Unlike an agent acting under a power of attorney, he is not required to do one or more acts over a period of time or to complete a transaction which involves several different steps.

On the basis of content, therefore, any of the following criteria might appear sufficient to distinguish a power of attorney from a mere authorisation: breadth of powers, formality of their expression and discretion in their exercise. This may seem a convenient rule of thumb for deciding what constitutes a power of attorney, but it does not cover every situation: a letter instructing a solicitor, for example, may grant wide powers, at least by implication, and permit discretion in their exercise, but it will not be a power of attorney; nor will a sales agreement, even though it sets out the agent's authority in great detail. Conversely, a formal power of attorney is frequently employed in commercial transactions in which the element of discretion is non-existent; for instance, where the attorney must not only take certain steps, but do so by a particular time, for example where he is to convey or charge property which is the subject of a contract stipulating that it shall be conveyed or charged by a certain date. The steps and the time may be

[12] Fridman, *Law of Agency*, 7th edn, p.57.

[13] *Bowstead and Reynolds on Agency*, 19th edn (London: Sweet & Maxwell, 2010), para.2–039.

[14] *Halsbury's Laws of England*, 5th edn, Vol.1 (2008), para.16.

[15] *Jowitt's Dictionary of English Law*, 2nd edn (1977), p.1399.

[16] Josling, *Powers of Attorney*, 4th edn, pp.8–9.

[17] Josling, *Powers of Attorney*, 4th edn, pp.8–9.

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specified in the power of attorney, but even if they are not, they are of the essence of the attorney's duties, and he is presumed to have knowledge of them or is expected by his principal to acquaint himself with them. In these circumstances he has no discretion whatsoever.[18]

Thus the notary needs a more reliable guide than content in determining whether an agency appointment is or should be a power of attorney, and form would seem to provide one. It is submitted that every existing or prospective agency appointment with which a notary has to deal should, regardless of its content, be treated as being or required to be a power of attorney if it falls into one of the following categories:

1) if it describes itself as a power of attorney, letter of attorney or appointment of attorney, or in comparable terms in a foreign language[19]; that apart, the name of the instrument should be disregarded in deciding whether it creates a power of attorney or not;
2) if it is required to be or be in the form of a power, letter or appointment of attorney by the law of England and Wales or the laws of the territory or territories in which it is to be executed or used;
3) if it contains or is required to contain words such as "appoint as . . . attorney" or their equivalent in a foreign language;
4) if it is executed by a person whose authority for executing it is an express authority to execute a power, letter or appointment of attorney or to appoint an attorney;
5) if it is required to be furnished with a notarial certificate stating that it has been executed in accordance with the law of England and Wales;
6) if it is to be used overseas in circumstances where an authorisation executed in England or Wales but not as a deed might be contested on the ground that it does not serve its purpose as a formal appointment because it is not validly executed under the law of England and Wales. This can happen, for example, where a lawyer is appointed to conduct litigation before a foreign tribunal, with the risk that in highly formalistic jurisdictions such as Spain or Italy his client's action will be struck off or adjourned for want of proper representation;
7) lastly—because of the common law rule that an agent empowered to execute a deed must himself be appointed by deed[20]—if the purposes of the appointment include or imply the execution of a deed. "Deed" should be understood here not only in the technical sense in which it is used in the law of England and Wales and other common law jurisdictions, but as meaning also, as regards civil law jurisdictions, any instrument of a formal nature.

[18] This situation arises frequently in ship conveyancing transactions.
[19] e.g. *delega*, *mandat*, *mandato*, *poder*, *pouvoir*, *procura*, *procuração*, *procuration*, *Volmacht* or *Vollmacht*. These terms (some of which, e.g. *mandat*, not only mean an instrument but are also the name of a particular contract) are not precise equivalents of "power of attorney", but they usually connote a formal document such as a public instrument. *Autorisation*, *autorização*, *autorización*, *autorizzazione* and *Genehmigung* do not seem to have this connotation.
[20] See para.8–02, fn.11, above.

Where an agency appointment meets none of the criteria indicated above, yet is executed as a deed notwithstanding, this may of itself make the document a power of attorney, and thus bring it within the scope of the Powers of Attorney Act 1971 and of other enactments which refer to powers of attorney. As a deed, a power of attorney will be construed more strictly than a less formal authorisation, at least under the law of England and Wales. This may affect the reciprocal rights and duties of the donor, the donee and the person or persons with whom the donee deals, and introduce a greater element of certainty into their relationships. For example, powers of attorney often contain wording in which the principal promises, expressly or by implication, to ratify the agent's acts. Circumstances may arise in which the agent seeks to enforce performance of that promise in order to avoid personal liability towards a third party with whom he has been dealing on the principal's behalf. Under the law of England and Wales a power of attorney is not regarded as a contract,[21] and moreover a promise contained in an instrument which is not a contract and not executed as a deed, if the promise is given without consideration, is not enforceable against the promisor, in this case the principal. If on the other hand the promise is contained in a deed the promisee, that is to say the attorney, does not need to establish consideration to sustain an action against the principal to enforce the promise.[22]

Further, even though an agent may for many purposes be properly appointed under an informal document or by parol, he may be required to produce formal documentary proof to third parties of the authority under which he acts. In these circumstances there can be no better evidence than a power of attorney and often it will prove to be the only evidence acceptable. In such cases a power of attorney may be considered as a manifestation of authority rather than an instrument whereby authority is actually conferred.

8–03

Capacity to act as principal. Every person capable of contracting on his own behalf, and not personally disqualified, is competent to appoint an attorney to do in his stead whatever he himself is legally entitled to do, to the extent that the acts to be performed by the attorney are capable of being delegated. The performance of certain matters by their very nature cannot be delegated, for example the taking of an examination, the swearing of an affidavit deposing to facts within the knowledge of the principal and other matters where the competency to do the act "arises by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise".[23] The Court of Appeal has held that

[21] A power of attorney is "a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract": *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 Q.B. 79 at 85, per Lindley L.J. But see fn.62 below in relation to the characterisation of powers of attorney for the purposes of the Rome I Regulation.
[22] For other effects of deeds, see para.11–01, below.
[23] *Halsbury's Laws of England*, 5th edn (2008), Vol.1, para.3. See *Clauss v Pir* [1987] 2 All E.R. 752 at 755: ". . . the obligation to swear a verifying affidavit which requires the deposing party to apply his mind to matters which are or should be within his own knowledge . . . is a clear example of a duty of a personal nature requiring skill or discretion for its exercise." *Clauss v Pir* was distinguished in *General Legal Council (on the application of Whitter) v Frankson* [2006] 1 W.L.R. 2803, where an affidavit sworn on behalf of the complainant was considered to be a procedural document in the nature of a pleading, and the personal knowledge of the deponent irrelevant.

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a litigant's right to appear in person before a court is a personal right which cannot be delegated in favour of a lay representative save with the permission of the court.[24] The making of a will cannot by law be delegated nor can the exercise of a trustee's discretion, except in circumstances permitted by statute. It is a general rule that without express authorisation of the principal, a person delegated to perform an act on behalf of another cannot delegate that power to a third person—*delegatus non potest delegare*.[25]

The question of capacity is relevant both at the time when the power of attorney is granted and at the time when the attorney acts on it. Thus, if a person grants a power of attorney but dies or becomes a bankrupt before the power is acted upon, acts of the attorney subsequent to the death or bankruptcy will be of no effect.

8–04 *Minors.* It has been said that a power of attorney given by a minor is absolutely void.[26] It seems, however, that a minor's capacity to grant a valid power of attorney is co-extensive with his capacity to enter into a binding contract and, to the extent to which a minor can lawfully do an act on his own behalf in a manner binding upon him, so he can appoint an agent to do that act on his behalf. In other cases, the act done by the agent on the minor's behalf may be voidable, but not void. In the words of Lord Denning[27]:

> "the correct proposition is that an infant cannot appoint an agent to make a disposition of his property so as to bind him irrevocably. A disposition by an agent for an infant is voidable just as a disposition by the infant would be so long as it is avoided within a reasonable time after attaining full age."

A lasting power of attorney[28] cannot be created unless the donor at the time he executes the instrument has reached the age of 18.[29]

8–05 *Corporations.* A corporation created by statute or a company[30] has no power to appoint an attorney or agent to do any act on its behalf beyond the scope of its charter or memorandum of association.[31] However, it is provided that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution[32] and, in favour of a person dealing with the company in good faith, the power of the directors to bind the company, or authorise others to do so, shall be deemed to be

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[24] *Gregory v Turner* [2003] EWCA Civ 83.
[25] *Sims v Brittain* [1832] 1 Nev. & M.K.B. 594. In certain cases authority to delegate may be conferred by statute; see *Halsbury's Laws of England*, 5th edn (2008), Vol.1, para.48. For cases where authority to delegate is implied, see para.8–27, below.
[26] *Zouch v Parsons* (1765) 3 Burr. 1794.
[27] *G(A) v G(T)* [1970] 2 Q.B. 643.
[28] See below, para.8–57.
[29] Mental Capacity Act 2005 s.9(2)(c).
[30] As defined in fn.8, above.
[31] *Ashbury Railway Carriage and Iron Co v Riche* (1875) L.R. 7 H.L. 653; *Baroness Wenlock v River Dee Co* (1885) 10 App.Cas. 354; *L.C.C. v Att Gen* [1902] A.C. 165. Since October 1, 2009 a company's objects are no longer specified in its memorandum of association, but may be stated in its articles of association; otherwise its capacity will be unlimited (CA 2006 ss.8, 31).
[32] Companies Act 2006 s.39(1). Different considerations apply to companies that are charities (s.42); and see further para.8–02, fn.10, above. For the purposes of CA 2006 (s.17) "constitution" includes "(a) the company's articles and (b) any resolutions and agreements to which Chapter 3 [Resolutions and agreements affecting a company's constitution] applies".

free of any limitation under the company's constitution.[33] A person "deals with" a company if he is a party to any transaction or other act to which the company is a party. He is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution and he is presumed to have acted in good faith unless the contrary is proved. A party to a transaction with a company is not bound to inquire as to any limitation on the powers of the directors to bind the company or authorise others to do so.[34] These provisions will be of obvious assistance to persons dealing with a company's attorney and would seem to render it unnecessary for them to inquire into the vires of the company or the powers of its directors to decide upon the transaction which the agent is empowered to undertake.

A corporation created by royal charter can deal with its property and bind itself by contract and act as a private individual,[35] as can a limited liability partnership.[36]

A company may by instrument executed as a deed empower any person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf,[37] and a deed or document so executed, whether in the United Kingdom or elsewhere, signed by such attorney on behalf of the company has the same effect as if it were executed by the company.[38] As an alternative to appointing an attorney, a company which has a common seal may choose to avail itself of the provisions[39] which enable it to have for use outside the United Kingdom an official seal which must be a facsimile of the common seal of the company, and must show on the face of it the name of the place or places where it is to be used.

A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose to affix the official seal to any deed or other document to which the company is party.[40] The person affixing the official seal must certify in writing on the deed or other document to which the official seal is affixed the date on which, and the place at which, it is affixed.[41]

The official seal when duly affixed has the same effect as the company's common seal.[42] The authority of any such agent continues as between the company and any person dealing with the agent during the period mentioned in the instrument conferring the authority, or, if no period is so mentioned, until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.[43]

The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in

[33] CA 2006 s.40(1).
[34] CA 2006 s.40(2).
[35] *Sutton's Hospital Case* (1612) 10 Co.Rep. 12: and *Jenkin v Pharmaceutical Society* [1921] 1 Ch. 392.
[36] Limited Liability Partnerships Act 2000 s.1(3).
[37] Companies Act 2006 s.47(1).
[38] CA 2006 s.47(2).
[39] CA 2006 s.49.
[40] CA 2006 s.49(4).
[41] CA 2006 s.49(6).
[42] CA 2006 s.49(3).
[43] CA 2006 s.49(5).

CHAPTER 12

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(ii) *Bill accepted payable elsewhere than at the place of residence or place of business of the drawee*

12–05

£[ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, at the request of A.B. LIMITED, the holder of the original bill of exchange whereof a true copy is hereunto annexed, did take the said original bill of exchange to C.D. BANK PLC, at (*address*), where the said bill of exchange is expressed to be accepted payable, and there exhibiting the said bill of exchange to E.F. , an officer of the said C.D. BANK PLC,[12] did demand payment thereof, WHICH DEMAND was not complied with but the said E.F. thereunto replied:

"No instructions to pay."

WHEREFORE (*continue as in para.12–04 above*)

(iii) *Bill payable elsewhere than at the domicile or place of business of the drawee, but no precise place of payment fixed*

12–06

£[ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, appeared A.B., a director (*or as the case may be*) of C.D. LIMITED, the holder of the original bill of exchange whereof a true copy is hereunto annexed, and producing to me the said bill drawn upon and addressed to (*here state name and address of the drawee as on the bill*), but accepted payable in [ ], and no precise domicile being fixed therein or thereby for payment thereof in this City declared that no provision had been made with C.D. LIMITED, the said holder, for payment thereof, but that the whole amount thereof is still owing and unpaid and by reason of the premises he required of me the said notary to protest accordingly.
WHEREFORE (*continue as in para.12–04 above*)

(iv) *Where acceptor's premises are found closed (or unattended)*

12–07

€[ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, at the request of A.B. LIMITED, the holder of the original bill of exchange whereof a true copy is hereunto annexed, did take the said original bill of exchange to C.D.

[12] See fn.10 above.

LIMITED, at (*address*), where the said bill of exchange is expressed to be accepted payable, in order to present the same and demand payment thereof, but the door was found locked and the place shut up and there was no one there to give an answer (*or* but the premises were unattended and there was no representative of the said C.D. LIMITED to give an answer *or* the premises had been demolished and there was no representative of the said C.D. LIMITED to give an answer).
WHEREFORE (*continue as in para.12–04 above*)

(v) *Where additional presentments are made at the holder's request*

12–08

Rupees [ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, at the request of A.B. LIMITED, the holder of the original bill of exchange whereof a true copy is hereunto annexed, did take the said bill of exchange to C.D. BANK PLC, at (*address*), where the said bill of exchange is expressed to be accepted payable and there exhibiting the said bill of exchange to E.F. , an officer of the said C.D. Bank plc[13], did demand payment thereof, WHICH DEMAND was not complied with, but the said E.F. thereunto replied:

"Refer to Acceptor."

FURTHER on the same day I, the said notary, at the request of A.B. LIMITED aforesaid, did attend at (*address*), which address was stated to me to be the place of business of J.K. LIMITED, the (*or* an) indorser of the said bill of exchange, and there exhibiting the said bill of exchange to G.H.[14] did demand payment thereof, WHICH DEMAND was not complied with but the said G.H. thereunto replied:

"We are not willing to pay this bill."

On attendance later the same day at (*address*), the registered office of the said J.K. LIMITED, the said indorser, the door was found locked and there was no one to give an answer.
WHEREFORE (*continue as in para.12–04 above*)

(vi) *For non-payment of balance of bill when part payment has already been taken by the holder under protest*

12–09

£[ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales,

[13] See fn.10 above.
[14] See fn.10 above.

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at the request of A.B. LIMITED, the holder of the original bill of exchange whereof a true copy is hereunto annexed, did take the said original bill of exchange to C.D. LIMITED, the drawee of the said bill of exchange, at (*address*), and there exhibiting the said bill of exchange to E.F.[15] did demand payment of the balance or sum of £ still owing and unpaid thereon (an officer of the said A.B. LIMITED having declared to me that the sum of £ had been received under protest in part payment and towards the discharge of the said bill), WHICH DEMAND was not complied with and the said E.F. thereunto answered that the said C.D. LIMITED would not pay the balance or sum of £ , for want of effects.

WHEREFORE I, the said notary, at the request aforesaid, did and do by these presents protest against the drawer of the said bill, and all others whom it may concern for exchange, re-exchange, and all costs, damages, and interest, present and to come for want of payment of the sum of £ , being the remaining unpaid part of the said bill.

Thus done and protested at in the presence of G.H. and I.J. (*signature, notarial seal etc. as in para.12–01 above.*)

Form of receipt to be indorsed by the holder on the bill:

Received under protest from C.D. LIMITED, drawee of the within bill of exchange, the sum of £ in part payment and towards the discharge of the said bill.

(*Signed*) A.B. (*Date*)

(vii) *When the original bill has been lost, and a copy, or the second of exchange of the same set, is presented for payment*

12–10

£[ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, at the request of A.B. LIMITED, E.F., a director (*or as appropriate*) of that company, having first declared to me that the said A.B. LIMITED is the holder of an original bill of exchange, a copy (*or* the second of exchange) of which he produced to me, did take the said copy (*or* the said second of exchange), a copy of which is hereunto annexed, to C.D. LIMITED, the drawee of the said bill of exchange, and by whom the said original bill (*or* the first of exchange of the same set) has been accepted payable, and which has been lost or mislaid, as the said E.F. declared unto me, the same being this day due (or having been due on 20 , the preceding business day to the day of the date hereof), and there exhibiting the said copy bill of exchange (*or* the said second of exchange) to G.H.[16] I demanded payment thereof, but the said G.H. answered that the company would not pay the same.[17]

WHEREFORE (*continue as in para.12–04 above*)

[15] See fn.10 above.
[16] See fn.10 above.
[17] If an indemnity was offered within the actual knowledge of the notary, it is advisable to add here "although security to indemnify the said acceptor was offered."

(viii) *Where the notary making presentment is offered payment of part only of the amount of the bill*

12–11

£5000

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, at the request of A.B. LIMITED, the holder of the original bill of exchange whereof a true copy is hereunto annexed, exhibited the said original bill of exchange at (*address*) to E.F., a director (*or as appropriate*) of C.D. LIMITED, on which company the same is drawn, and demanded payment thereof. The said E.F. answered that C.D. LIMITED would pay the sum of £2000 in part payment of the said bill, and no more for want of sufficient effects. The said A.B. thereupon requested and instructed me to accept and receive the said sum of £2000 and to protest for the remaining sum of £3000 due on the said bill.

WHEREFORE I, the said notary, at the request aforesaid, did and do by these presents protest against the drawer of the said bill, and all others whom it may concern for exchange, re-exchange, and all costs, damages, and interest, present and to come for want of payment of the sum of £3000, being the remaining unpaid part of the said bill.

Thus done and protested at in the presence of G.H. and I.J.

Then follows the receipt:

Received under protest this day of in the year two thousand and [ ] of C.D. LIMITED, the sum of £2000 in part payment of the within protested bill, I having given another receipt of the same tenor and date under a copy of the said bill.

(*signature*) N.P.

(*notarial seal*)

(*charges for noting and protesting as in paras 12–01 and 12–04 above*).

(ix) *Protest for non-payment of a promissory note*[18]

12–12

US$[ ]

On the day of in the year two thousand and [ ], I, **N.P.**, of the City (*or* Town) of , England (or Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, at the request of A.B. PLC did take the original promissory note, whereof a true copy is hereunto annexed, to CD BANK PLC at (*address*), where the said promissory note is expressed to be payable, and there exhibiting the said promissory note to an official[19] did demand payment thereof, WHICH DEMAND was not complied with but the said official thereunto replied:

[18] Whilst according to the Bills of Exchange Act 1882 s.89 a promissory note (including a foreign note) need not be protested in the event of dishonour, an English or Welsh notary may be called upon to protest a promissory note in order to preserve the rights of the holder or other parties to the note in a foreign jurisdiction.
[19] The notary must establish that he or she is dealing with someone with authority to pay or refuse to pay the promissory note (see fn.10 above).

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"Funds not available at our counters."

WHEREFORE I the said Notary, at the request aforesaid, did and do by these presents protest against all relevant parties to the said promissory note and all others concerned, for exchange, re-exchange, for all costs, charges, damages and interest, present and to come, for want of payment of the said promissory note.

Thus done and protested at (*City or Town*) , in the presence of E.F. and G.H.

(*signature*) N.P.

(*notarial seal*)

Noting £

Protesting £

(including VAT) £ 20

(c) Notice of dishonour to drawer and indorser

12–13

To (*drawer*). (*Address and date*)

Sir: Please take notice that a bill for £ , dated the day of 20 , drawn by you on , in favour of , payable days after sight [*or* date] was today dishonoured by non-payment [*or* non-acceptance].[21]

(*Signed*) A.B.

To (*indorser*). (*Address and date*)

Sir: Please take notice that a bill for £ , dated the day of 20 , drawn by on , in favour of , payable ( ) days after sight [*or* date] and indorsed by you [and , *if there are other indorsers*] was today dishonoured by non-payment (*or* non-acceptance).[22]

(*Signed*) A.B.

2. SHIP PROTESTS[23]

(a) Entry or note of ship protest

12–14 On the day of two thousand and [ ] at the offices of **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly

[20] See fn.6 above.

[21] In the case of a foreign bill add, "and protested", if it has been noted and protested.

[22] See fn.21 above.

[23] See Ch.9.

admitted and sworn, authorised to practise throughout England and Wales, personally appeared A.B., master mariner, and master of the motor ship or vessel called the "ADA" of the burthen of tons by register measurement, or thereabouts, belonging to the port of (*port of registry*) from (*port where voyage commenced or cargo loaded*) , laden with a cargo of (*e.g. steel coils, containers etc.*) , moored at on 20 , but fearing damage from gales of wind, high and heavy seas, and all unavoidable accidents,[24] enters this protest.

(*signature*) A.B.

Master

(b) Notarially certified copy of entry or note of ship protest

12–15 TO ALL TO WHOM these presents shall come I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, DO HEREBY CERTIFY that the photographic copy hereunto annexed purporting to be a copy of the minute of protest of the master of the therein named motor ship or vessel called the "ADA" dated the day of two thousand and [ ] is a true and correct copy of the said minute registered in my office with which it has been examined and compared.

IN FAITH AND TESTIMONY whereof I the said notary have subscribed my name and set and affixed my seal of office at (*City or Town*) , England (*or* Wales), this day of two thousand and [ ].

(*signature*) N.P.

(*notarial seal*)

(c) Commencement of an extended ship protest

12–16 By this public instrument of declaration and protest, be it known and made manifest to all to whom these presents shall come, that on the day of two thousand and [ ],[25] before me, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, appeared A.B., master of the motor ship "ADA", of the burthen of tons by register measurement, or thereabouts, belonging to the port of (*port of registry*) , and noted a protest in my office upon arrival of the said vessel from (*port where voyage commenced or where cargo loaded*) , with a cargo of (e.g. *steel coils, containers etc.*) , against damage from bad weather, gales of wind, high and heavy seas, and against all other unavoidable accidents. Afterwards on this the day of two thousand and [ ], before me, the said notary, again appeared the said A.B., and required me to extend his protest noted as aforesaid, and with the said A.B. came C.D., chief officer, E.F., chief engineer, and G.H., seaman, all belonging to the said vessel, who did severally duly and solemnly declare and state as follows, that is to say:

[24] Bad weather is generally the stated reason for the protest, but conceivably other causes may be given by the ship's master, e.g. piracy, industrial action, acts of war.

[25] Here the date of the initial protest should be inserted.

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(*signature*) A.B.

Thus protested in due form at (*City or Town*) aforesaid the day and year first before written before me,

(*signature*) N.P.

(*notarial seal*)

3. NOTARIAL ACTS—INDIVIDUALS

(a) Formal parts of a public-form notarial act[26] incorporating a power of attorney given by an individual

12–21 In the City of (*or* Town) of , England (*or* Wales) before me, **N.P.**, of the City (*or* Town) of , England (*or* Wales),[27] NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, and in the presence of W.W., the attesting witness hereto, appears **A.B.**, (*add such words of description as may be appropriate, e.g. "holder of United Kingdom of Great Britain and Northern Ireland passport number ", "born on ", "residing at* "), who states as follows:

THAT he (*or* she) appoints as his (*or* her) attorney C.D., (*add such words of description as may be appropriate, e.g. "holder of United Kingdom of Great Britain and Northern Ireland passport number ", "born on ", "residing at* ") to do the following acts and things on his (*or* her) behalf:

[Here set out *in extenso* the powers to be conferred]

The appearer having been informed of the contents of this instrument he approves, signs and delivers it as a deed in my presence and in the presence of the said W.W., a person of full age and competent to act as witness, as to all of which and that in the execution of this public instrument all the formalities required by the law of England and Wales have been observed, I the notary certify.

(*signature*) A.B.

(*signature*) W.W.

(*signature*) N.P.

(*notarial seal*)

(b) Direct notarial certificate verifying signature to a document

12–22 TO ALL TO WHOM these presents shall come I, **N.P.**, of the City (*or* Town) of , England (*or* Wales),[28] NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, DO HEREBY

[26] The format, structure and content of public-form notarial acts vary greatly from country to country. The precedent here is provided as an aid to the preparation of such an act where no instructions as to the required wording have been received from a practitioner qualified in the jurisdiction in which the act is to take effect.

[27] Here the notary's place of practice should be inserted. Sufficient information should be provided in (or accompany) the notarial act for the client or third parties relying on the act to contact the notary in case of need.

[28] See fn.27 above.

CERTIFY the genuineness of the signature "A.B."[29] at foot of the document hereunto annexed, such signature having been this day subscribed in my presence by **A.B.**,[30] (*add such words of description as may be appropriate, e.g. "holder of United Kingdom of Great Britain and Northern Ireland passport number ", or simply "therein named and described" or "whose identity I attest"*).

IN FAITH AND TESTIMONY whereof I the said notary have subscribed my name and set and affixed my seal of office at (*City or Town*), England (*or* Wales)[31], this day of two thousand and [ ].

(*signature*) N.P.

(*notarial seal*)

(c) Direct notarial certificate verifying execution of deed by an individual

12–23 TO ALL TO WHOM these presents shall come I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, DO HEREBY CERTIFY that the annexed instrument was this day (sealed and[32]) as and for his (*or* her) act and deed in due form of law signed and delivered by the therein named and described **A.B.**[33] in my presence and that the signature "A.B."[34] subscribed at the foot of the said instrument as that of the person executing the same is in the own, true and proper handwriting of the said A.B.

IN FAITH AND TESTIMONY whereof I the said notary have subscribed my name and set and affixed my seal of office at (*City or Town*), England (*or* Wales), this day of two thousand and [ ].

(*signature*) N.P.

(*notarial seal*)

(d) Direct notarial certificate verifying execution of deed by an individual and mentioning witnesses[35]

12–24 TO ALL TO WHOM these presents shall come, I, **N.P.**, of the City (*or* Town) of , England (*or* Wales), NOTARY PUBLIC duly admitted and sworn, authorised to practise throughout England and Wales, DO HEREBY CERTIFY that on the day of the date hereof I was present together with the

[29] It is customary to quote any signatures referred to in a notarial certificate. This is only possible where the signature is legible and in many cases personal signatures do not enable identification of the signatory's name. Where a signature cannot be quoted the certificate should be amended accordingly. Further description may be required to show clearly to which signature on the document being authenticated (if there is or may be more than one) the notary is referring, e.g. "the signature of A.B." or "the signature subscribed for and on behalf of [*name of party being represented*]".

[30] Names should always appear in full in a notarial certificate.

[31] Here the place at which the notarial act is issued should be indicated.

[32] Although sealing is no longer required under the law of England and Wales for the execution of deeds by individuals (see Ch.11, paras 11–02, et seq., above), some receiving jurisdictions may still require a seal to be affixed. The affixing of a seal does not of course obviate the need for a witness to attest a deed in order for it to be validly executed under the law of England and Wales.

[33] See fn.30 above.

[34] See fn.29 above.

[35] This form is recommended for documents intended for use in South Africa and Sri Lanka.

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cost of it or reimburse the shipowner. A copy of a protest or of the note thereof should not be delivered by the notary, unless by consent, to persons other than the master of the vessel, the shipowners or their agents.

9–33 **Protests relating to demurrage and other mercantile matters.** Besides ship protests strictly so called, there are protests relating to other matters, such as protests by a master against the charterers of a ship or against the consignees of goods for non-payment of demurrage, for not loading according to contract or for neglect or delay in providing a cargo, and protests by a charterer, shipper or consignee of goods against the master for refusal to sign bills of lading in the customary form, for not proceeding to sea with due dispatch, for the insufficiency or unseaworthiness of the vessel and for misconduct, drunkenness or other irregularities on the part of the master or crew. Protests of this description are often used in foreign countries in disputes with persons residing abroad and interested in ships or their cargoes. A note of any of these protests may be entered at a notary's office before making the regular protest. A precedent form of such a protest is to be found in Ch.12.[58]

[58] See para.12–20, below.

CHAPTER 10

BOND AND DEBENTURE STOCK OPERATIONS AND SHARE ISSUE BALLOTS

10–01 English notaries may be called upon to witness or carry out drawings and other operations relating to foreign bonds and debenture stock, and such proceedings as ballots for share issues. This Chapter sets out briefly the manner in which these duties arise and the methods by which they are performed.

BONDS

10–02 Foreign governments and institutions frequently contract loans whose repayment terms include an undertaking or an option to redeem a certain proportion of the loan before it matures. The terms are normally stipulated in the trust deed or the agreement governing the loan, or in numbered bonds of varying denominations issued to lenders in return for their subscriptions to the loan. Where part of the loan is redeemed before maturity it is customary for the bonds selected for redemption to be drawn by lot. This requirement is usually stipulated in the governing instrument or bond, which specifies when drawings are to take place and whether they are to be performed by or in the presence of a notary, who can be relied upon to act as a disinterested participant.

Where the drawing is a notarial one, the notary must carefully examine the instrument or the bond in order to ascertain the conditions under which the drawing is to take place. These must be complied with in every respect. Three methods are usually employed for bond drawings:

1) random extraction of numbered cards (also called "tickets") by hand from a mass of cards in a box;
2) pricking a numbered posting register with a pin;
3) selection of numbers by a computer.

Computerised drawings have virtually replaced the older manual methods. Whatever method is employed, the notary invariably acts on the instructions of the bank or similar institution which manages the loan.

10–03 **Drawing by cards.** In the case of a drawing by cards, either the notary or the bank arranges for cards to be written or printed with the numbers of all the bonds eligible for inclusion in the drawing. Some bonds may already have been redeemed at an earlier drawing or from a sinking fund. There will be as many series of numbered cards as there are bond denominations. The bond numbers are taken from the register of bonds maintained by the bank for each denomination, for example, £1,000, £500 and £100.

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It is the responsibility of the notary to check the cards against the bond registers so as to satisfy himself that all the eligible bonds participate in the drawing. In order to ensure a fair drawing the cards must be thoroughly mixed by the notary or under his supervision. In the intervals between checking, mixing and drawing, and also between individual drawings, the cards are bagged by denomination and subsequently placed in boxes, either under the notary's seal or under lock and key. They are then stored in safe custody, usually that of the bank, to await the next operation. Sometimes they are kept in boxes with double locks, the set of keys for one lock being kept by the notary and the set for the other by the bank.

On the day appointed for the drawing the notary attends at the bank and is told by the responsible bank officer how many bonds of each denomination are to be drawn that day to meet the conditions of the loan. In the presence of the bank's representative and any interested party entitled to be present, the required quantity of cards is drawn from each box, either by the notary personally if that is stipulated, or by a person acting under his supervision. As the drawing proceeds, the numbers appearing on the drawn cards are recorded on a previously prepared list of the numbers of all the eligible bonds by denomination. The drawn cards are put aside, arranged in numerical order and checked against the list. The undrawn cards are placed in safe custody if they are to be used again.

The notary then prepares his certificate setting forth the operations he has conducted or witnessed and listing the numbers of the drawn bonds.[1] The drawing may have to be advertised in a newspaper for the purpose of giving notice of it to bondholders, in which case the notary must check the text of the advertisement before it is sent to the newspaper for publication.

10–04 **Drawing by posting register.** By this method, a register prepared by the bank and containing the numbers of all the bonds eligible for redemption is pricked with a pin by or in the presence of a notary until the requisite quantity of bonds has been selected. The numbers thus obtained are recorded in the appropriate manner. The procedure for verifying bond eligibility and issuing the notarial certificate follows the lines described above for a drawing by cards.

10–05 **Drawing by computer.** In this case a computer is programmed in such a manner as to list the numbers of all the eligible bonds and to select the required quantity of each denomination from the list at random. The programming is normally done by a qualified employee of the bank. It goes without saying that this method of selecting numbers is inappropriate for a drawing required to be done by a notary personally, since he can do little more than receive and record the statements made by the bank's employees about bond eligibility and the programming of the computer. Unless the notary ascertains what bonds are eligible for redemption and employs his own technician to programme the computer with the necessary information, he cannot issue a certificate verifying the accuracy or impartiality of the drawing.[2]

[1] For a precedent form of certificate, see below, para.12–106.
[2] For a precedent form of certificate where the notary merely receives the statements of the bank's employees, see below, para.12–107.

DEBENTURE STOCK

10–06 Similar methods of drawing apply to the redemption of debenture stock, except that a notary usually receives his instructions from the trustees for the debenture stockholders. In these cases the notary examines the clauses set out in the trust deed and then, if the drawing is to be done by means of cards, prepares the requisite cards to agree with the lots of debenture stock issued. A list of debenture stockholders is usually prepared by the registrar or secretary of the borrowing company. As the amounts of holdings often differ, the list is prepared in lots of £1,000, £500 or £100 and the odd amounts held are placed together until a block of £1,000 or a smaller amount is arrived at. The blocks are numbered consecutively to agree with the drawing cards. When the drawing is completed a notarial certificate is issued.[3]

SHARE ISSUE BALLOTS

10–07 Where a share issue is over-subscribed and it is decided that the shares are to be allotted by ballot, the ballot procedure is sometimes attested by a notary. In this case the bank responsible for the issue instructs the notary to attend at its offices, where he receives a declaration concerning the number of share application forms which the bank has received, the total number of shares which those applications represent, the number of shares available for issue and the proportions in which the shares are to be allotted to the competing applicants. The notary then extracts the requisite number of application forms of the specified kind from the mass produced to him until the total quantity of issuable shares is exhausted.[4]

MISCELLANEOUS OPERATIONS

10–08 From time to time a notary may be called upon to witness and attest physical occurrences such as the destruction of redeemed bonds and similar securities by incineration or shredding, or the breaking of seals on packages of goods and the examination of their contents. He may also be asked to witness and attest other events, such as the opening of tenders. His certificate in all these cases simply records what has taken place in his presence.

[3] For a precedent form of certificate, see below, para.12–108.
[4] For a precedent form of certificate used for this purpose, see below, para.12–109.

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the signature (s.44(2)(b)) or by two such members (s.44(2)(a)) is duly executed by the SE as a document, and, if delivered, is validly executed as a deed for the purposes of s.1(2)(b) of the Miscellaneous Provisions Act (s.46). There appears to be nothing to prevent an SE formed in the United Kingdom from appointing an attorney to execute deeds or other documents on its behalf in the same manner and to the same extent as a domestic public company.[183]

It will be the duty of the authenticating notary to verify, from the public register[184] or the register of members of the supervisory organ maintained by SEs operating under the two-tier system,[185] the status and capacity of the organ member or members signing the instrument he is asked to attest. He may need to consult the company's statutes in order to satisfy himself that, if the instrument contemplates a transaction requiring authorisation, the authorisation has been given by the organ required to give it. He may also need to verify the due appointment of a natural person designated to exercise the functions of a member which is a company or other entity.

If an SE formed in the United Kingdom is made subject to a United Kingdom insolvency procedure, the provisions of the Insolvency Act 1986 will apply to it[186] and its insolvency officers will execute deeds and other documents in the manner described earlier for domestic companies.[187]

By virtue of the Companies Act 2006 s.1044, an SE formed outside the United Kingdom qualifies as an overseas company and its instruments are to be executed accordingly.[188]

11–20 Deed executed through an attorney. Any individual, if not legally incapacitated,[189] and any body corporate or other legal person, subject to what has been said earlier about the limits imposed by its constitution,[190] can by deed in the form of a power of attorney appoint another person to execute deeds on his or its behalf. A United Kingdom company is expressly enabled by s.47 of the Companies Act 2006, to appoint an attorney to execute deeds or other documents on its behalf in the United Kingdom or elsewhere. As a result of the amendments made by the 2005 Order[191] to the Miscellaneous Provisions Act, the Powers of

[183] 2006 Act s.47. However, its power to do so may be limited by its statutes.

[184] The term "registrar" has the same meaning in the 2004 Regulations as in the Companies Act 2006 s.1060(3): reg.3(2) as amended as indicated in fn.172, above. SEs are registered by the appropriate registrar of companies in the same manner as domestic companies (see fn.91, above) and the names of the members of their organs and the contents of their statutes are open to public inspection: art.12 and regs 4–14 (in accordance with the forms prescribed by the Regulations, the statutes must be attached to the application for formation of the SE).

[185] Reg.79.

[186] Art.63.

[187] Para.11–13, above.

[188] See s.1044 and para.11–18, above.

[189] See paras 8–03 et seq., above.

[190] For corporations see above, paras 8–05 and 11–10 in fine; for companies, paras 8–05 and 11–11 in fine; for open-ended investment companies, para.11–12 in fine and fn.109; for SEs, para.11–19, fn.182. Foreign corporations, including overseas companies, will also be bound by their constitution in the matter of appointing agents, whereas conventional partnerships and LLPs have unlimited capacity of action in this and all other respects (see paras 11–14 and 11–15, above).

[191] See para.11–02, above. The principal changes are enumerated in fn.15, above. The revised provisions are sufficiently broadly worded to apply to insolvency practitioners (see para.11–13, above) as well as attorneys.

Attorney Act 1971, the Law of Property Act 1925 and companies legislation, the manner of delegated execution has been placed on the same footing as direct execution; this means that the mode of execution of a deed by an attorney is subject to the same rules as if the attorney were executing the deed on his own behalf.[192] Accordingly, in order to execute a deed validly, an individual attorney must sign the instrument in the presence of a witness who attests the signature, or it must be signed at his direction and in his presence and that of two witnesses who each attest the signature; and it must be delivered.[193] Signing includes signing the name of his principal,[194] but he may instead sign with his own signature by the authority of his principal.[195] Both methods are available, whether the principal is an individual or a body corporate,[196] but the latter procedure is now the more usual. The deed must of course make it clear, for example in the attestation clause, that the attorney is executing on behalf of his principal, otherwise he may incur personal liability on the instrument.[197] A company which is an attorney may execute in any manner permitted by s.44 of the Companies Act.[198]

Alternative forms of execution are possible under the Law of Property Act 1925. An attorney may execute a conveyance of property by deed or other instrument on behalf of a corporation sole or aggregate by signing the name of the corporation in the presence of at least one witness who attests the signature[199] or, if he is an individual, by signing with his own signature.[200] Where an attorney is a corporation aggregate, it may execute such a conveyance on behalf of any other person through an officer authorised by resolution or other act of its board of directors or other governing body, who may sign the instrument in the name of such other person or, if the instrument is to be a deed, so sign it in the presence of a witness who attests the signature.[201] An attorney which is a corporation aggregate may also execute any instrument under its common seal.[202] Finally, any mode of execution authorised by law, practice or the constitution of a corporation is as effectual as the modes authorised by that section.[203] In all of these circumstances, delivery must follow if the instrument is to take effect as a deed.[204]

[192] The principal changes are enumerated in fn.15, above. The revised provisions were sufficiently broadly worded to apply to insolvency practitioners (see para.11–13, above) as well as attorneys.

[193] 1989 Act s.1(3) as permitted by s.1(4A).

[194] 1989 Act s.1(4)(a).

[195] 1971 Act s.7(1)(a), which applies to all instruments, not only deeds. In s.44(2)(b) of the Companies Act 2006 as adapted for overseas companies by reg.4 of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, the words "expressed . . . to be executed by the company" suggest that an attorney's power to execute in his own name does not apply to an attorney of an overseas company.

[196] 1989 Act s.1(4A) as amended by the 2005 order.

[197] See further on the exercise of powers of attorney para.8–30, above.

[198] s.44(8). For permitted modes of execution, see para.11–11, above.

[199] 1925 Act s.74(3).

[200] 1971 Act s.7(2).

[201] 1925 Act s.74(4). This form of delegation is an exception to the general rule that a deed is required for authority to be given to a person to execute a deed on another's behalf.

[202] 1925 Act s.74(1) in conjunction with s.74(1A).

[203] 1925 Act s.74(6).

[204] 1925 Act s.74A(1)(b).

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11–21 **Electronic deeds.** After centuries of unassailed authority, the common law rule that a deed must be a writing on paper or parchment[205] has succumbed to modern demands in one area of the law, namely real estate conveyancing. The move came about in response to pressure to simplify and accelerate land registration procedures in England and Wales, coupled with the ability of modern technology to meet that aim with a fully-fledged electronic conveyancing system. The change takes the form of s.91 of the Land Registration Act 2002, which provides that a document in electronic form which (i) purports to effect dispositions of registered land[206] or other similar dispositions, (ii) makes provision for the time and date when it takes effect, (iii) is electronically signed by each person by whom it purports to be authenticated and (iv) has each electronic signature certified is to be regarded both as a document in writing signed by each individual, and sealed by each corporation, whose electronic signature it bears,[207] and as a deed.[208] The section further provides that a document to which it applies, if authenticated by an agent, is to be regarded as authenticated by him under the written authority of his principal.[209]

The explanatory note to the statute enables us to spell out the implications of s.91.[210] The expression "document in electronic form" denotes the equivalent, generated by electronic means, of a signed and witnessed paper deed such as a transfer or charge or a signed and unwitnessed paper writing such as a contract; the requirement of time and date of effect replaces that of delivery; the expression "electronic signature" means not necessarily a signature in the ordinary sense of the word but the method whereby an electronic document can be authenticated as that of the party making it; and certification refers to the mechanism whereby an electronic signature is authenticated. The note explains that s.91 does not disapply the formal statutory or common law requirements relating to deeds and other documents but deems compliance with them by each individual or corporation who has attached an electronic signature to it. It also points out that the deeming provision as to authentication by an agent covers statutory provisions such as s.53(1) of the Law of Property Act 1925,[211] whereby an agent who creates or disposes of an interest in land by writing must be authorised to that effect by his principal *in writing*; and that, whereas at common law the authorisation of an agent to execute a deed must be given by deed,[212] this is not the case of a document covered by s.91, since the document is not itself a deed but merely treated as though it were a deed.

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[205] See fn.7, above.
[206] As defined by reference to s.132 of the Act and s.205(ix) and (x) of the Law of Property Act 1925.
[207] If the corporation is a company, its electronic signature may be that of two authorised signatories as provided in s.44(2)(a) of the Companies Act, but not that of a director whose signature is witnessed as provided in s.44(2)(b): Land Registration Act 2002 s.91(9) as substituted by the Companies Act 2006 (Consequential Amendments etc) Order 2008 (SI 2008/948) Sch.1 Pt 2 para.224.
[208] s.91(1) to (5).
[209] s.91(6).
[210] See para.1(146) to (148).
[211] See para.8–02, above.
[212] See paras 8–02, and 11–03, above.

SECTION B: PROOF OF DOCUMENTS

11–22 The term "proof", in the wider sense in which it is used in this Chapter,[213] denotes all the formalities necessary to enable a legal document executed in England and Wales to be accepted or acted upon by the judicial or other public authorities in a jurisdiction outside the United Kingdom without further evidence of its execution. Depending upon the nature of the document and the place where it is to be used, these formalities will generally include one or more of the following:

1) attestation;
2) notarial authentication;
3) legalisation by a diplomatic or consular agent of the country in which the document is to be produced, or if the Hague Convention of October 5, 1961 abolishing the requirement of legalisation for foreign public documents[214] is in force in that country, the affixing of an apostille.

11–23 **Attestation.** The term has been defined as "the signing of a witness to the signature of another of a statement that a document was signed in the presence of the witness".[215] Except where required by statute or statutory instrument (as, for example in the case of deeds[216] and wills[217]) attestation is not essential to the validity of a document under English law. In those cases where English law requires attestation, it is not necessary that the witness should hold any particular office or qualification. In certain circumstances, however, a person may be prevented from acting as a witness: for example, a gift made under a will to an attesting witness of the instrument will be void[218] and, in the case of a lasting power of attorney, the donor and the attorney may not witness the signature of each other.[219]

Attestation is a frequent requirement in other jurisdictions for the validity of certain classes of documents: by way of example, we may cite s.38 of the New South Wales Conveyancing Act 1919[220] ss.78 and 138 of the Cyprus Contract Law,[221] and the Italian Notarial Law of 1913.[222] Powers of attorney and other deeds intended for use in India or South Africa are invariably executed in the

[213] In Pt 2 below relating to the United States of America and in certain sections of Pt 3 the term "proof" will be used in a narrower sense, denoting the affidavit or declaration made by an attesting witness before a notary or other official to the effect that the witness was actually present and saw the deed or other document executed.
[214] See below, para.11–29. The Convention will be henceforth referred to in this section as the Hague Convention of October 5, 1961.
[215] *Jowitt's Dictionary of English Law*, 2nd edn (1997), p.157.
[216] See paras 11–08 et seq., above.
[217] Wills Act 1837 s.9.
[218] Wills Act 1837 s.15.
[219] Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, reg.9(8); the donor may not witness any signature required for the power. The donee may not witness any signature apart from that of another donee.
[220] See para.11–183, below.
[221] See para.11–136, below.
[222] See para.12–75, below.

presence of two attesting witnesses. In some cases, the laws of the place where the document is to be produced may prescribe that the attesting witness should hold a particular office or qualification. The categories of prescribed witnesses will often include notaries public as, for example, in the cases of the Powers of Attorney (Jersey) Law 1995,[223] s.145 of the Western Australia Transfer of Land Act 1893–1972,[224] and the British Columbia Land Title Act.[225]

In the last three mentioned cases, the attestation of the specified officer or qualified person is the only proof necessary of the execution of the document. However, in other cases, some further action by the witness will be necessary, such as his appearance before a notary public in order to make an affidavit or declaration that he was actually present at the execution of the document and saw it executed by the person whose signature he attested. Documents for production in Canada are generally proved in this manner by affidavit[226]; in the case of some West Indian countries, the affidavit or declaration is accompanied by a full notarial certificate verifying the swearing of the affidavit or the making of the declaration.[227]

11–24 Notarial authentication.[228] When considering this formality it is necessary to bear in mind the distinction made in Ch.5[229] between notarial acts which verify the execution of private documents and notarial acts in the public (or authentic) form.

In the majority of cases, the authentication required of the English notary will be a direct notarial certificate appended to or placed on a private document and verifying the physical fact of the execution of the document in the notary's presence. The direct notarial certificate is invariably used to authenticate documents of a purely mercantile nature that are not intended for production to a public authority, for example, agreements, undertakings, documents required under letters of credit or in support of tenders, and minutes of meetings. But it is also used to authenticate the many more important legal documents—powers of attorney, conveyances, leases, assignments, mortgages, releases, registrable contracts, etc.—which have to come before a public officer, for example a court official or a registrar, and which do not, by the law of the country of destination, require to be in the authentic form if executed outside that country.[230] In appropriate cases, the certificate may contain additional statements by the notary, confirming, for example, the capacity in which the signatory executed the document or the fact that it was executed in accordance with English law. In other cases, the laws or regulations of the place where the document is to be used will prescribe a particular form of certificate, the use of which is obligatory to enable the registration of the document or its production before a court or other authority. Examples include the certificate of acknowledgement required to

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[223] In respect of registrable powers of attorney; see para.11–134, below.
[224] See para.11–192, below. But see fn.451.
[225] See para.11–211, below.
[226] See paras 11–210 et seq., below.
[227] See for example the section on Trinidad and Tobago, para.11–260, below.
[228] Often referred to in the United States and elsewhere as "notarisation".
[229] See paras 5–02 to 5–04, below; also 11–04, above.
[230] A notarial jurat or declarat can be regarded as a further example of a notarial act placed on a private document.

enable the recording of a deed affecting land in the United States[231] and the certificate required in order to enable instruments to be registered in Kenya under the Land Registration Act 2012.[232]

In some cases the English notary's act will have to be in the authentic form. Bill of exchange and ship protests always take this form.[233] In most civil law countries it is obligatory by law for a wide range of other legal acts to be drawn up by a notary in the form of a public instrument. In some cases this formality must be observed even if the document embodying the transaction is executed outside the country in question and its execution takes place in a country such as England in which the solemnity of public form does not exist in the general law.[234] This is often the case, for example, with documents executed in England to take effect in Spain or in various Latin American countries.[235]

The "public instrument" referred to above is called an *acte authentique* in France,[236] an *öffentliche Beurkundung* in Germany, an *atto pubblico* in Italy and a *documento público* in Spain.[237] This implies the appearance before the notary or other competent public officer of the party or parties to the act and his recording of their statements in solemn form; it is more, therefore, than a mere certification by the notary of their signatures. Acts are sometimes done in the public form in civil law countries even where this is not obligatory; for instance, wills so made are probative of their contents and cannot be contested as forgeries. Mention was made above of the wide range of acts which by law must be embodied in a public instrument in civil law countries. As an example of this situation in Europe, acts required to be in the public form if done within the country concerned include[238]:

[231] See paras 11–32 et seq., below.
[232] See para.11–148, in fine, below, for the prescribed form.
[233] See Ch.12 for precedent forms.
[234] See further para.11–31, below.
[235] Documents such as powers of attorney are frequently received from civil-law countries for execution in public form with only the operative part fully drafted, preceded perhaps by an outline recital, the foreign practitioner having assumed that the authenticating notary will add whatever formal wording is necessary to perfect the document as a public instrument. Where it is permissible under the law of the country of origin for the document not to be in public form if executed in a common law jurisdiction, these drafts are often completed instead with the customary English forms of recital and testimonium and attestation clauses. The result is a hybrid document which was conceived by its originator as a public instrument but finishes up without a notarial recital and an eschatocol (see para.5–03, above). However, provided the document reads coherently and is executed in accordance with English law, and with the observance of any other formalities prescribed by the foreign law (see para.11–31, below), it will be formally valid for the country in which it is to take effect and can be attested by means of a separate notarial certificate.
[236] Civil Code art.1317. A public instrument drawn up by a notary is known as an *acte notarié* in order to distinguish it from one drawn up by other public officers having power to confer authenticity on acts. For the distinction between an *acte notarié en minute* and one drawn up *en brevet*, see para.5–05, fn.8, above. Any legal instrument, including an *acte authentique*, may be drawn up and signed in electronic form: Civil Code art.1316–3 as inserted by Law No.230 of March 13, 2000 and art.1317 as amended by the same Law.
[237] Germany: Code of Civil Procedure arts 415, 418; Italy: Civil Code art.2699; Spain: Civil Code art.1216. In Spain provision is made by law for the use of electronic signatures generally (Law 59/2003 of December 19, 2003) and by public authenticating officers (Directorate-General of Registers and the Notariat Instructions of October 19, 2000 and June 13, 2003).
[238] The lists which follow are not exhaustive. Moreover, as regards acts done outside the country concerned, a notarial document received from a jurisdiction in which the Brussels I Regulation, the Brussels Convention or the Lugano Convention applies (see above, paras 6–10 et seq.) must be in the