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Documents signed or executed with electronic signatures in English law

*Stephen Mason**

Chambers of Stephen Mason, Biggleswade, Bedfordshire, UK

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ABSTRACT

There remains concern among solicitors about the evidential weight of electronic documents, including document systems that are used to execute high value transactions. This article considers the meaning, in electronic terms, of document, book or paper, instrument, writing, record and map – both in terms of legislation and case law. Consideration is also given to primary evidence, original document and certified copies, the requirement that an agreement or communication be in writing and what is mean by a signature. The discussion then considers execution as a deed and the requirement for signing in the presence of a witness, including where the witness is remote.

1. Introduction

Two papers prepared by a joint working party of the Law Society Company Law Committee and the City of London Law Company and Financial Law Committees,[1] one with legal advice from Mark Hapgood QC, replicate what was already available (with the exception of a brief discussion of the conflicts of law) in previous editions of Paul Matthews and Hodge M. Malek, *Disclosure*[2] and Stephen Mason, *Electronic Signatures in Law*[3] (first edition in 2003) and the first three editions of *Electronic Evidence* (2007, 2010 and 2012).[4] The text in this article is taken from the third edition of *Electronic Evidence* and up-dated. The text was removed for the fourth edition of *Electronic Evidence* and will not be replicated in subsequent editions. The reader might find comfort in the fact that the combined work of the lawyers involved with the two papers noted above coincide with the previous and current views of Chancery Master Paul Matthews, Hodge M. Malek QC and the author.

This article sets out the law and case law relating to 'documents' and related meanings in English law, including the use of electronic signatures. We are in the middle of a change in

* Corresponding author: Chambers of Stephen Mason, Biggleswade, Bedfordshire, UK.
E-mail address: stephenmason@stephenmason.co.uk

[1] 'Guidance on execution of documents at a virtual signing or closing' (May 2009) available at http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf and 'Note on the execution of a document using an electronic signature' (13 July 2016), available at http://www.linklaters.com/pdfs/mkt/london/E_Signing_Guidance_Note.pdf, although neither document cannot be downloaded from the Law Society web site because they are considered to be premium content.

[2] (5th edition, Sweet & Maxwell, 2017).

[3] (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2016), available as open source at http://ials.sas.ac.uk/digital/humanities-digital-library/observing-law-ials-open-book-service-law/electronic-signatures.

[4] Stephen Mason and Daniel Seng, editors, *Electronic Evidence* (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017), available as open source at http://ials.sas.ac.uk/digital/humanities-digital-library/observing-law-ials-open-book-service-law/electronic-evidence.

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the way we communicate and exchange documents, as any law firm will appreciate – the legislation has been revised to accommodate the new reality, and although the larger law firms have been using bespoke software systems for some time to conduct business – mainly corporate work – nevertheless, the Law Society of England and Wales worked on the papers noted above after the practitioner texts had already dealt with the issues between them. The article begins by considering the meaning of 'document' and associated phrases used in English law, and then provides an outline of electronic signatures, discussing the practical issues that arise.

2. Document

The meaning of 'document' is set out in s 13 of the Civil Evidence Act 1995 as 'anything in which information of any description is recorded.' The same definition is provided in s 20D(3) of the Taxes Management Act 1970. This definition appears to include a very old form of document that of the tally stick. Tally sticks were made of wood, and they were used as receipts for money and other items, and as a record of an obligation to make a payment. The amounts were added to the tally by the use of notches of differing widths, depths and intervals. Like a chirograph, they were a bipartite record, in that once the notches were made to the satisfaction of both parties; the stick was split down the middle, providing each party with an identical copy of the record. Tally sticks also included the names of the parties and the nature of the agreement in ink on the wood, and some had a seal affixed to the side of the wood. Tally sticks were a sophisticated method of recording numbers, and in 1834, the Exchequer tallies stored at Westminster were burned after the passing of the statute abolishing the Receipt of the Exchequer. Apparently, it was this fire in which the tallies were consumed that spread to the Houses of Parliament.[5] This was not without irony, for, as Clanchy has noted, at the same time 'the Record Commissioners were busy publishing lavish volumes with spurious Latin titles the earliest medieval records in parchment' they would not have burnt the Domesday Book or the Chancery rolls, yet the tallies were consumed into ashes because 'they were in a medium, wood, which was too uncouth for scholars to appreciate.' [6]

Judicially, the meaning of 'document' has been construed widely. The emphasis is on the recording of the content by the application of (usually text) on to (usually) paper, although the members of the Court of Appeal in *Lyell v Kennedy (No. 3)*[7] admitted photographs of tombstones and houses as documents for the purposes of discovery (as it was previously called), and in *R v Daye (Arthur John)*,[8] Darling J suggested that the meaning of a document should not be defined in a narrow way:

> *I think that it is perfectly plain that the sealed envelope itself might be a document. Nothing but the sealed envelope itself might be a document. But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal. So I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence.*[9]

In *Hill v R*,[10] Humphreys J found, at 332–333, 'that a document must be something which teaches you something … To constitute a document, the form which it takes seems to me to be immaterial; it may be anything on which the information is written or inscribed – paper, parchment, stone or metal.' Although the meaning of 'document', as the discussion below indicates, has been construed widely, nevertheless it was held by the court in *Darby (Yvonne Beatrice) v DPP*[11] that a visual reading cannot be a document. This must be correct. A visual reading conveys information, and the person perceiving this information is capable of giving evidence of their perception. Unless the reading is stored in some way that enables it to be read at a later date, the reading is merely a transitory phenomenon that can only be captured by a person who can give evidence about what they saw.[12] In a number of breath specimen cases, counsel have submitted that it is necessary to provide the print-out in evidence of the output recorded by the machine. It has been argued that evidence given by a police officer indicating that they had seen the output of the machine is not admissible.[13] In *Thom v Director of Public Prosecutions*,[14] the print-out from an Intoximeter was not produced, and the police officer gave evidence of what he had seen on the print-out. It was contended that such evidence was not admissible. Clarke J addressed this point at 14G:

> *I can see no distinction in principle between evidence by a witness that he looked at his watch and read the time at, say, noon, and evidence from a witness that he looked at the Lion Intoximeter and that he read the proportion of alcohol in 100 ml of breath as being X.*

[5] Caroline Shenton, *The Day Parliament Burned Down* (Oxford University Press, 2012), 14 – 15; 50–53, 240.

[6] M. T. Clanchy, *From Memory to Written Record England 1066–1307* (2nd edn, 1993), Blackwell Publishing, p 124; see Plate VIII for an example of the tally sticks issued by the Exchequer to Robert of Glamorgan, sheriff of Surrey and Sussex, as receipts for payments into the treasury in the financial year 1293–4.

[7] (1884) 50 L.T. 730; for a discussion about the status of legal resources on the internet, included case reports, see Richard J. Matthews, 'When is case law on the web the "official" published source? Criteria, quandaries, and implications for the US and the UK', *Amicus Curiae* 2 (2007), pp 19–25.

[8] [1908] 2 K.B. 333 KBD.

[9] [1908] 2 K.B. 333 at 340; see Malek, *Phipson on Evidence* (18th edn, Sweet & Maxwell 2013), para 41-02 for a more detailed discussion of documents within the rule.

[10] [1945] 3 KB 329.

[11] [1995] RTR 294, (1995) 159 JP 533, DC.

[12] *Owen v Chesters* [1985] RTR 191 where a police officer gave evidence of the reading from a breath test machine; see also (this list is not exhaustive) *Denneny v Harding* [1986] RTR 350; *Mayon v Director of Public Prosecutions* [1988] RTR 281; *Greenaway v Director of Public Prosecutions* [1994] RTR 17, 158 JP 27, DC.

[13] When radar speed meters were introduced in the late 1950s, police officers had to note down the reading in their notebooks, because this was the only method of recording a reading: J. M. W. McBride, 'The radar speed meter' [1958] Crim LR 349.

[14] [1994] RTR 11.