The Rectification of Wills: *Marley v Rawlings*
The Edinburgh Tax Network and Trust Bar, 12 February 2015
Lord Hodge

Marley v Rawlings:

(i) The facts

The facts of *Marley v Rawlings* are simple. A solicitor prepares mirror wills for an elderly husband and wife. They had instructed him to prepare a testamentary provision by which each left his or her entire estate to the survivor of the first death and everything to Mr Marley on the death of the survivor.

Mr Marley was orphaned as a teenager and the Rawlings brought him up and treated him as a member of the family. He continued to live with them in adulthood and cared for them in their old age. Mr and Mrs Rawlings had two adult sons who lived elsewhere and who would have succeeded to their estate if their parents had died intestate.

The solicitor prepared the wills in accordance with his instructions. Unfortunately, when he visited the elderly couple to have them sign the engrossed wills, he presented the wife with the husband's will and vice versa. Each signed the will of the other. When Mrs Rawlings died in 2003 no-one spotted the mistake and her estate passed to her husband. But the problem was spotted after the death of Mr Rawlings in 2006.

The Rawlings' sons claimed their father's estate. Litigation resulted. Mr Marley had a claim against the solicitor for professional negligence but sought to mitigate his loss by pursuing a claim for rectification of the will and then probate of the will as so rectified.

(ii) The appealed decisions

The case was raised in the High Court and was heard by Mrs Justice Proudman. She thought that she could not grant the application for two reasons.

In English law there is a statutory power to rectify wills in section 20 of the Administration of Justice Act 1982. It gives a power to rectify "a will". The Judge asked herself a preliminary question: "was there a valid will?" She answered that in the negative.

Section 9(b) of Wills Act 1837 (as amended by s 17 of the Admin of Justice Act 1982) provides:

> "No will shall be valid unless: (a) it is in writing, and signed by the testator …; and (b) it appears that the testator intended by his signature to give effect to the will … ."

Thus formal validity requires that it appears that the testator intended by his signature to give effect to the will. Proudman J held that Mr Rawlings did not intend to sign the document which he signed: she suggested that, if he had been asked, he would have said "no, of course not – that is my wife's will". He intended to sign only the will which the solicitor prepared for him. As the will was not valid there was no "will" to rectify under s 20 of the 1982 Act.

Proudman J also held that, even if the will had been formally valid, she could not rectify it. Section 20 of the 1982 Act gave a discretionary remedy. But two conditions must be satisfied before the court could exercise that discretion.
First, the will must be expressed in a way which fails to carry out the testator's intentions. That was not a problem in this case. But, secondly, the cause of that failure to give effect to the testator's intentions had to be either (a) clerical error or (b) a failure to understand the testator's instructions. Neither of those errors caused the error of expression in this case. Here there was simply a defect in execution.

Mr Marley appealed. The Court of Appeal upheld Proudman J on s 9(b) of the Wills Act. The will was not signed by the testator (i.e. the person named in the text as such). The majority (Black LJ and Kitchin LJ) did not address section 20 of the 1982 Act and the meaning of "clerical error". But Sir John Thomas expressed view that section 20 should be given "a wide and generous scope".

(iii) The Supreme Court's decision

As is well known, the Supreme Court was not prepared to let matters rest on the basis that they regretted the blunder but could do nothing to repair it.

Mr Marley's counsel widened their challenge beyond the issue of rectification which they had argued in the courts below. They presented three arguments in the alternative in support of their appeal.

First, they argued that the will should be construed in a way that gave effect to Mr Rawkings' intention.

Secondly, they submitted that the will should be admitted to probate under deletion of the text which did not give effect to Mr Rawlings' intentions. That is that the bulk of the will be red-pencilled leaving only the gift to Mr Marley.

Thirdly, they argued that the court should rectify the will under section 20 of the 1982 Act by substituting references to the husband for references to the wife and vice versa.

The Supreme Court upheld only the third submission. In a judgment written by the President, Lord Neuberger, the court held that the will could and should be rectified under section 20 to give effect to Mr Rawlings' intentions.

The court addressed the first argument on interpretation in which the appellant argued that the court should read the two wills together which made it obvious what had occurred. Lord Neuberger suggested that the approach to the interpretation of commercial documents, which included not only bilateral contracts but also unilateral notices and patents, which had been set out in cases such as *Prenn v Simmonds*, *Mannai Investments* and *Rainy Sky*,[1] should be applied also to wills.[2] He derived support for that proposition from the terms of s 21 of the 1982 Act which set out special rules on the interpretation of wills where a part of the will was meaningless or ambiguous.

[1] Prenn [1971] 1 WLR 1381; Mannai [1997] AC 749; Rainy Sky [2011] 1 WLR 2900.
[2] He had earlier expressed similar views; see *RSPCA v Sharp* [2010] EWCA Civ 1474; [2011] 1 WLR 980, at paras 31-32.

Lord Neuberger acknowledged that the appellants' first submission raised an important and difficult issue of the boundary between interpretation and rectification. He questioned some of Lord Hoffmann's expansive statements on the scope of interpretation in *Investors Compensation* and *Chartbrook Ltd.* The boundary was a matter of substance. He stated:

> "If it is a question of interpretation, then the document in question has, and had always had, the meaning and effect as determined by the court, and that is an end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had delay, change of position, or third party reliance)"

But the court did not decide the point, because the appellant won on rectification.

The appellant's second submission rested on the principle that for a will to be valid, the testator must have known and approved its contents.[3] The court therefore should excise from Mr Rawlings' will everything that he had not approved, leaving as the only testamentary disposition the gift to Mr Marley. The court did not accept this argument as what was proposed was no severance of self-contained provisions or expressions but a reshaping of the will so that it could by happenstance comply with the testator's intentions.

It was in his contentions on rectification that the appellant succeeded.

First, the court held that there was no reason in principle why a court should not order a wholesale rectification which radically altered a document if, as here, there was certainly both as to what Mr Rawlings wanted and also as to how he would have expressed himself.

The court also overturned the rulings by the lower courts that there was not a formally valid will to which the statutory power of rectification could apply. Section 9 of the Wills Act was concerned with formalities. The "testator" in that section was the person who signed the document (not necessarily the person named in the document). Therefore the

[3] *Fuller v Strum* [2002] 1 WLR 1097, Chadwick LJ at para 59.

only question[4] was whether it appeared that Mr Rawlings intended to give effect to the will by signing the document. The court held that he did, even though he did not know that it was the wrong will and he had not approved its terms. Further, even if the will was not formally valid under section 9, the court held that it could rectify it to achieve that formal validity as rectification operated retrospectively.

Thirdly, disagreeing with Proudman J, the court held that the claim was within the ambit of section 20 of the 1982 Act. The question was whether the solicitor's mistake in organising the execution of the will, his muddling of the two wills, was a clerical error. A slip of the pen or mistyping was a clerical error, whether the mistake was that of the solicitor, his clerk or the testator himself. So also would be the cutting and pasting of the wrong provisions from a style as that would involve writing something you did not mean to write or omitting something that you meant to include. Further, there was no reason why section 20 did not allow the wholesale replacement of the provisions of a will. The court declined to give the phrase "clerical error" a narrow meaning, preferring in the context of section 20 a broader meaning which included giving a testator the wrong document to sign. This was consistent with the aim of section 17 to 21 of the 1982 Act, which was to make it easier to save wills than in the past. It would also avoid drawing artificial distinctions between different types of error which would lead to arbitrary results. In this case the error was "clerical" because it arose in connection with office work of a routine nature.

(iv) the Scottish postscript

Lord Neuberger, who often enquires about Scots law solutions when the court hears English cases, requested me to prepare a short briefing note on Scots law and suggested that I should summarise it in a short concurring judgment. That is why you have a few obiter paragraphs on Scots law in an English case.

I will return to the Scottish dimension after reviewing the response of the English legal commentators to the decision.

[4] Section 9(1)(b) of the Wills Act 1837.

The response to the decision[5]

The judgment was welcomed by several commentators, including (unsurprisingly) Robert Ham QC, who had appeared as the senior for the appellant.[6]

Luke Harris welcomed the broad construction of the statutory power to rectify. He saw the case as "a treasure chest for the probate practitioner" in other respects.[7] Lesley King on the other hand has suggested that Lord Neuberger's comments on interpretation were the most significant section of the court's judgment.[8]

There was a mixed response by Meryl Thomas in Trust Law International.[9] The judgment was a fair result which reflected how other jurisdictions coped with the erroneous signing of mirror wills. But she predicted an increase in rectification proceedings as courts map out new boundaries of an extended power.

Elizabeth Drummond[10] also welcomed the wide interpretation of the statutory power of rectification but questioned the boundary between clerical error and mistakes of substance as to the meaning and effect of words, for which s 20 does not provide a remedy. She also urged caution about the court's approach to construction.

Birke Haecker's comments[11] included the view that it was remarkable that I had written "an entire obiter judgment." That is not quite right. The first two words were "I agree".

Alexander Learmonth[12] (the Respondents' junior counsel in the appeal) writing before the SC's costs order pointed out the low value of the estate and that the solicitor benefited from the litigation: "the real winner is …the solicitor's insurers". He was not persuaded by the court's broad interpretation of what could be a "clerical error" and

[5] I am grateful to Rachel Barrett, my judicial assistant, for researching the responses to the decision.
[6] Trusts & Trustees Vol 20, No 9 (November 2014), pp 966-970.
[7] Private Client Business 2014, 6, 280-284.
[8] Private Client Business 2014, 6, 271-279.
[9] Trust Law International 2014, 28(1), 38-44.
[10] The Conveyancer and Property Lawyer, 2014, 4 357-365.
[11] [2014] 130 LQR 360-365.
[12] Trusts and Trustees Vol 20, No 7, September 2014, pp 725-731.

suggested that its established historical meaning was a slip of the pen or an inadvertent drafting error. He also questioned the court's view that rectification was available to cure a formal invalidity, asking whether one could rectify a missing signature or a missing witness.

A solicitor, Geoffrey Shindler,[13] expressed concerns about inconsistency in the court's approach to mistakes by trustees and its liberal approach to the rectification of wills. He contrasted *Futter and Pitt v HMRC* [14] in which the court had restricted the so called rule in *Hastings Bass* on the one hand and the decision in *Marley*, which he described as "Liberty Hall run riot".

Some have worried about opening the floodgates by extending the meaning of clerical error and have predicted more litigation. Others have suggested that the Supreme Court has over-extended the law of rectification because the Supreme Court's decision would allow any document to be transformed retrospectively into a will.[15]

The Scottish dimension

I turn to the Scottish dimension. On one view there is none. *Marley v Rawlings* is a decision of a United Kingdom court on English law. The operative decision involves the interpretation of English legislation which has no effect in Scotland, where there is no statutory power to rectify testamentary dispositions. Section 20(2) of the 1982 Act has a time limit of six months from the date of probate on bringing claims for rectification of a will, except with the permission of the court. This is sensible to prevent delayed challenges disrupting the distribution of estates. Section 20(3) also protects executors who have distributed the estate before the will is rectified after the six-month period. It shows that the English Act is not a helpful analogy when considering a Scottish common law power which might achieve the same result as rectification. Further the discussion of

[13] Trusts and Estates Law & Tax Journal September 2014.
[14] [2013] UKSC 26; [2013] WTLR 977 SC.
[15] Cumber & Kynaston, "Where there's a Will there's a Way: *Marley v Rawlings*" (2014) 25 KLJ 137-143.

interpretation of wills was in any event *obiter*. It may be that the judgment is one which the Scottish courts can treat as of no concern.

But that may be too narrow a view. First, the decision in *Marley* shows a general approach by the senior UK court to the question of rectification of testamentary dispositions which would be persuasive in Scots law, at least by analogy. Counsel would be aware that, unless there were good reasons for Scots law to strike a different balance between formality and giving effect to the testator's intentions, the Supreme Court might adopt the same approach if a Scottish case involving similar circumstances were to be appealed to London.

Secondly, counsel would have to consider the court's obiter discussion of the construction of wills. The court's tentative suggestion is that the same approach should generally be adopted in ascertaining the meaning of different types of legal document. A coherent approach to ascertaining the meaning of words in such documents means that you cannot keep wills in a hermetically sealed compartment, immune to developments in legal and philosophical thinking on the construction of other documents. But that does not mean that the Scots approach to interpreting wills will be the same as its approach to the interpretation of commercial documents. I have recently argued elsewhere that there is a strong imperative for Scotland, which has an open economy with both high levels of external trade and of non-Scottish ownership of its substantial businesses, to have a commercial law that people outside Scotland can readily understand. There is much less pressure for the modest harmonisation with English or European norms in our non-commercial private law, such as the law of wills.

Even in English law, differences will remain, as Lord Neuberger recognised. Section 21(2) of 1982 Act allows extrinsic evidence of subjective intention if any part of will is meaningless or ambiguous. It speaks of direct and indirect evidence of the testator's dispositive intention. It is likely that such evidence would include drafts of the will and notes of the testator's instructions. In commercial law earlier drafts of a contract and notes of parties' negotiating positions would not be admissible evidence to assist the interpretation of a contract. The House of Lords confirmed this position and the justification for the exclusion of evidence of prior negotiations in *Chartbrook Limited v*

Persimmon Homes Limited[16] and, in a Scottish context, I discussed the issue in the Inner House case of *Luminar Lava Ignite Limited v Mama Group plc*.[17]

The general rules on the interpretation of wills, which are set out for example in volume 25 of the *Stair Memorial Encyclopaedia*,[18] are in many ways similar to the approach of the Scottish courts to the interpretation of commercial documents. The objective approach to construction, the reading of the whole will to ascertain the testator's intention in part of it, the aim of avoiding intestacy, and placing yourself in the testator's armchair have their analogues in the construction of commercial documents. It may be that the Lord Neuberger's views on interpretation have caused a greater stir among Chancery lawyers than they would do among Scots lawyers if they had been made in a Scottish case. But it remains to be seen whether the Scottish courts identify any cogent policy reason to alter the current approach to the admission of extrinsic evidence.

Thirdly, I welcome the clear suggestion in *Marley* that there remains a relevant difference between construction and rectification. As Lord Neuberger stated, when the court construes a document it states what the document has always meant. There is no element of discretion in that exercise. With rectification the court is retrospectively altering a document and has a discretion to refuse the remedy if there were unjust outcomes. In addition as I sought to set out in the Outer House decision, *Patersons of Greenoakhill Ltd v Biffa Waste Services Limited,*[19] the evidence relevant to construing a contract differs from that which the court can consider in an application for rectification. There are pragmatic reasons for restricting the scope of the factual matrix relevant to the construction of contractual documents while allowing more extensive evidence to demonstrate error of expression in a claim for rectification. My inclination is to keep separate the law's approach to construction on the one hand and its rules on rectification on the other. There are of course cases where the error of expression is so obvious that the court can construe a contractual provision to make sense of it. An example in English law is a notice that gives the wrong day of the month as in *Mannai Investment Co*

[16] [2009] AC 1101, Lord Hoffmann at paras 27-42.
[17] 2010 SC 310, paras 39-45.
[18] "Wills and Succession", paras 817-833.
[19] [2013] CSOH 18.

Limited v Eagle Star Assurance Co Limited.[20] But that does not mean that one should ignore the real differences between construction and rectification.

Fourthly, the case has drawn attention both to the limitations of the statutory rectification regime in Scotland and also to the pre-existing power of the Scots common law to achieve rectification, albeit by a rather cumbersome procedure of reduction and declarator. While what I wrote is of course obiter and in no sense binds the Scottish courts, it may serve as a reminder of the scope of the common law.

There is no statutory rectification procedure in Scotland for testamentary dispositions because the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 expressly excluded them from its scope.[21] But it is important to recall that that exclusion was not for any reason of concluded legal policy but simply because the Scottish Law Commission, which produced a report leading to the 1985 Act, were proposing to review the law of succession and had thought it was not appropriate to pre-empt that more general review which would resolve problems and policies on the interpretation of testamentary dispositions after due consultation.

The Commission began its work in 1986. Its consultation did not throw up any good reasons for denying the remedy of rectification to wills. In their 1990 Report[22] the Commission recommended that it should be possible to rectify testamentary documents. They repeated that recommendation in their report on succession in 2009[23] and produced a draft bill with a clause (draft section 27) to give effect to their recommendation. The Commission proposed to confine the remedy to wills prepared by someone other than the testator for practical reasons, namely the great difficulty in obtaining evidence of intention that would satisfy the court of the need to rectify a home-made will. As yet there has been no such legislation. But it would be welcome if our law of rectification were to be made more coherent and an exclusion from its scope, which was intended to be only temporary, were now addressed.

[20] [1997] AC 749.
[21] Section 8(6) excludes any "document of a testamentary nature".
[22] Scot Law Com no 124.
[23] Scot Law Com no 215.

In the absence of a statutory remedy, we are forced back to the common law of Scotland. The two most famous cases in this field are of course the decision of the House of Lords in *Anderson v Lambie,*[24] and Lord Maxwell's Outer House decision in *Hudson v St John*.[25] The first involved a disposition of land which did not reflect the terms of the missives and was remedied by its reduction which had the effect of reviving the missives. The second case addressed the correction of errors in an irrevocable *inter vivos* deed of trust. It used the combined remedy of the deletion of erroneous text by partial reduction and a declarator of what the document was to be taken to have stated to achieve a retrospective correction.

In those cases the court was not concerned, as the Supreme Court was in *Marley*, with questions of the interpretation of statutes. Thus while in *Anderson* Lord Reid discussed the use of the phrase "clerical error", he was not constrained by the need to be faithful to Parliament's intention in the use of such words. Rather he was free, within the bounds that he recognised and discussed in his extrajudicial writing, to develop the common law. He suggested that it did not matter whether the error was that of the drafter of the deed or the agent who instructed the drafter to prepare it or who copied it. He thought that the remedy would be available where a solicitor who had two old contracts gave his clerk the wrong one to copy as a style for a new contract.[26] That itself is a wide view of the scope of the remedy which case law had in the past linked to clerical error.[27] But Lord Reid was not thirled to the concept of clerical error as a definition of the scope of the remedy. He went on to suggest that an error in a document might be a clerical error or an error caused in some other way.[28] But he also emphasised that the court cannot make a new bargain.[29]

Lord Keith of Avonholm saw no distinction between clerical errors which were not apparent and conveyancing blunders if either form of error resulted in the conveyance or contract being in different terms than the parties had intended or agreed. Again he also opined that the court could not make a new contract for the parties.[30]

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[24] 1954 SC (HL) 43.
[25] 1977 SC 255.
[26] Anderson at p 59.
[27] See *Krupp v Menzies* 1907 SC 903 and *Glasgow Feuing and Building Co v Watson's Trustees* (1887) 14 R 610.
[28] At p 60.
[29] At p 61.
[30] At pp 67-68.

In *Hudson* Lord Maxwell was dealing with a unilateral document. There was prior authority for the correction of unilateral documents. In *Waddell v Waddell*[31] the court dealt with an allegation by a father that he had lent money and had instructed a solicitor to draft a bond and disposition in security but that the solicitor through error had prepared a security in favour of the pursuer's son. But while the court treated the averments as relevant it did not reach a decision on the precise mechanism for relief. That was the task that Lord Maxwell undertook in *Hudson* where the error in an irrevocable discretionary trust was the omission of the intended principal beneficiaries, the truster's wife and children, from a list of the potential beneficiaries. The truster had given clear instructions as to his intention but the solicitor made a mistake in drafting the trust document which was not spotted when it was signed. The trustees also had known of the truster's intention but did not immediately spot the mistake. Lord Maxwell granted the remedy in two parts. First, he declared that the trust had always had effect on the basis that the potential beneficiaries were those stated in the declarator and, secondly, he pronounced partial reduction of the trust deed, namely by removing the erroneous incomplete list of potential beneficiaries. Thus the declarator acted as a substitute for the nullified schedule.

Lord Maxwell recognised that this mechanism would appear to the non-lawyer as unnecessarily cumbersome and obscure. That appears to be the genesis of the statutory remedy of rectification in Scots law which the Miscellaneous Provisions Act of 1985 introduced.

Like Lord Reid in *Anderson v Lambie*, Lord Maxwell thought that the court would in principle correct an error of expression unless there was some reason in justice for not doing so. He stated:

> "the principle is applicable whether the mistake is a big one or a small one and is not confined to 'mere errors *calculi*' or 'clerical errors,' whatever those expressions may mean." [32]

[31] (1863) 1 Macph 635.
[32] At p 260.

Thus it appears to me not only that there is no reason why the Scots common law means of rectification should not be available to correct testamentary dispositions but also that it would be wide enough to remedy the mistake that occurred in *Marley*. Many other jurisdictions including South Africa and the United States allow the rectification of wills and have case law which grants a remedy when a lawyer mishandles the signature of mirror wills.[33] Several jurisdictions allow wrongly signed wills to be admitted to probate.[34] It seems that the obvious nature of the mistake, the clarity of the testator's intention and the absence of danger of fraud have allowed the courts to give effect to a testator's intentions.

Concluding thoughts

It is not clear to me that *Marley* is pushing the boat out further than Scots law already allows if the courts were to follow Lord Maxwell's approach in *Hudson*.
Marley was dealing with a simple every day mistake; and there was complete certainty as to the testator's intentions as the courts had the engrossed will which the solicitor had prepared on Mr Rawlings' instructions.

I am sceptical about commentators who seek to take the decision to extreme logical conclusions and suggest that the court may face claims for rectification where someone has signed a guarantee, shopping list or a gas bill thinking that it is his will. I doubt if the decision will provide a template for more complex arguments about defective expression of intention. Section 20 of the 1982 Act is constrained by the expression "clerical error" which the court has treated as involving office work of a relatively routine nature rather than erroneous professional judgment. It is noteworthy that the proposals of the Scottish Law Commission both in 1990 and in 2009 were broader than the provisions in the 1982 Act.[35]

[33] In South Africa the common law provided a remedy in *Henriques v Giles* [2009] 4 All SA 116. In the United States see *Re Snide decd* [1981] 52 NY 2d 193
[34] New Zealand and Canada have also shown a similar approach. See the discussion of the more liberal approach to crossed wills in the Jersey case of *In the Estate of Vautier (née McBoyle)* 2000 JLR 351 at 356-361.
[35] Scot Law Com no 124, para 4.28 and Scot Law Com no 215, para 6.7.

There is also a limit to what the Scottish common law will do. I doubt whether it will fix a mistake about the consequences of the words which a party or his or her professional adviser has chosen to use. As Lord Reid said in *Anderson v Lambie*,

> "where the words are those which the parties agreed to put in but the Court attaches to those words a meaning other than that which the parties or one of them intended … the parties are held to their words; it is for the Court to construe the document and determine the meaning of those words; and neither party can attack the deed on the ground of error."[36]

Similarly a deliberate but mistaken choice of words which the drafter erroneously thought would have a desired legal result may not have a remedy because that would amount to making a new contract or a new trust deed. As Lord Walker has said, "rectification is not concerned with consequences".[37]

Postscript on costs

Litigation is expensive. In this case I doubt if the solicitor's insurers benefitted from the ultimate decision. The court ordered the insurers to pay the costs of both Mr Marley and the respondents. There was an added complication of the conditional fee agreement which the respondents' counsel had for the Supreme Court hearing which led to the court's pragmatic costs order, but I do not need to address that. The problem remained that the family home (valued at £400,000) passed to Mr Marley under a survivorship title. The rest of estate was worth no more than £70,000. Given the size of the estate which passed under the will, it is likely that the potential claim for negligence against the solicitor was worth much less than liability in costs which the insurers ultimately incurred. That at least remains a strong incentive to the solicitor to "get it right" in the first place.

[36] At pp 57-58.
[37] *Futter & Pitt V HMRC* [2013] UKSC 26, at para 131.