

Scottish Law Commission

(SCOT. LAW COM. No. 79)

OBLIGATIONS

REPORT ON RECTIFICATION OF CONTRACTUAL AND OTHER DOCUMENTS

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by the Lord Advocate
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SCOTTISH LAW COMMISSION

Item 2 of the First Programme

OBLIGATIONS

RECTIFICATION OF CONTRACTUAL AND OTHER DOCUMENTS

*To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate*

We have the honour to submit our Report on Rectification of Contractual and other Documents.

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PART I INTRODUCTION

1.1 In our Consultative Memorandum No. 43 “Defective Expression and its Correction”¹ we drew attention to the absence in Scots law of a remedy which is generally available in many other legal systems. The remedy in question is referred to as “rectification” and is available when it has been proved, for instance, that a document fails to express accurately a prior contract. The remedy enables a court to rectify the document so that it correctly expresses what both contracting parties intended it to express.

1.2 The central proposal of the memorandum was for the introduction into Scots law of a remedy of rectification. This proposal, and indeed most of the memorandum’s other reform proposals, received strong support from those consulted. We are grateful to all those who took the trouble to comment.²

1.3 Although the memorandum was published as one in a series we consider that its subject matter justifies separate attention. We shall primarily be concerned with rectification as it affects the law of contract, but shall also consider it in relation to unilateral writings³ and certain public registers.

PART II PRESENT LAW AND NEED FOR REFORM

The problem in context

2.1 In the past the problem under consideration has often been referred to as “error in expression”.⁴ We have avoided the use of the term “error”, however, which is normally associated with some failure in agreement between contracting parties, and instead have referred to the problem as one of “defective expression”. What we are concerned with is not an error in contractual understanding⁵ but simply a defect in the written expression of an agreement which has already been concluded. The defect in the writing may go unnoticed for some time and indeed it may only come to light when a dispute has arisen between the contracting parties. If the parties then agree that their written contract is incorrect, generally there should be no problem. But if one party seeks to rely on terms which the other disputes, or both parties consider that the writing fails to express their agreement but remain in dispute as to what that agreement was or how it should be expressed,⁶ then the matter is likely to end in litigation.

2.2 At present, certain types of defect create no real problems for the courts. These are defects which are apparent on the face of the writing. Such patent defects can be identified and corrected by properly construing the document in its full context. For example in the case of *North British Insurance Company v. Tunnock and Fraser*⁷ a couple had taken out life assurance on their joint

¹Published in November 1979 as part of a series of consultative memoranda on the law of obligations under Item 2 of our First Programme of law reform.

²A list of those who submitted written comments is printed in Appendix B.

³For an explanation of what we mean by the expression “unilateral writing”, see paras. 3.6 and 3.7 below.

⁴See *Anderson v. Lambie* 1953 S.C. 94 at p. 101.

⁵On this see our Consultative Memorandum No. 42—“Defective Consent and Consequential Matters”.

⁶e.g. *Grant’s Trs. v. Morrison* (1875) 2 R. 377.

⁷(1864) 3 M.1.

lives but the printed policy used by the insurance company had been a standard form policy normally used for life assurance on one life and, although it should have been fully adapted to meet the circumstances of the particular contract, in fact it had not been appropriately altered and still contained provisions inconsistent with the whole purpose of joint life assurance. On the death of one spouse, litigation ensued between the surviving spouse and the deceased's executors as to the true meaning and import of the policy in question. The court found no difficulty in recognising that "... on the face of the instrument without going further, it is clear that this instrument has been bungled".¹ The court gave effect to the policy as one taken on joint lives, as this was the clear purpose of the document. In other cases the courts have been prepared to delete words that in context were obviously inappropriate,² or to treat certain words as though they did not exist where they did not make sense and clearly were not intended.³ The courts also treat patent errors in calculation which affect the terms of a contract in a similar fashion, thus ensuring that the correct result will be reached.⁴

2.3 In practice the problem in the present law arises when the defect, or at least its means of correction, is not apparent on the face of the document. Such latent defects cannot be cured merely by construing the document and, accordingly, if the court is to give effect to the common intention of contracting parties it requires a power to discover the true terms of the parties' agreement and to substitute those for the terms found in the document. At present the courts lack a specific power of that nature and, therefore, cannot rectify a document by direct means. The cause of a latent defect may have been as simple a clerical mistake as that found in examples of patent defects, but the existence of the mistake or omission will usually not be apparent. For example, one person's name may have been mistakenly inserted in a document instead of another's;⁵ or more land than has been agreed to be sold may have been included in a disposition;⁶ or, two parties may have negotiated and agreed on the rental of a shop at £3,000 per annum, but the written lease signed by the parties may specify a rent of only £1,000 per annum; or, generally, obligations different from those originally agreed on may have been specified in the written contract.⁷ This type of defective expression could arise through simple typographical mistakes or as the result of some misunderstanding on the part of an intermediary instructed by the contracting parties to draw up the necessary documents. It may be argued that such mistakes perhaps should be obvious to the contracting parties, but the fact remains that they sometimes are overlooked, especially where the defect is subtle and therefore not immediately recognisable.⁸

¹per Lord Justice-Clerk Inglis at pp. 4 and 5.

²*Glen's Trs. v. Lancashire and Yorkshire Accident Insurance Company* (1906) 8 F.915.

³*Hunter v. Fox* 1964 S.C. (H.L.) 95.

⁴*McLaren v. Liddell's Trs.* (1862) 24 D.577.

⁵See *Waddell and Ors. v. Waddell and Ors.* (1863) 1 M.635 and *Hudson v. St. John* 1977 S.C. 255, or *Hudson v. Hudson's Trustees* 1978 S.L.T. 88.

⁶*Anderson v. Lambie* 1954 S.C. (H.L.) 43, 1954 S.L.T. 73.

⁷*Glasgow Feuing and Building Company v. Watson's Trustees* (1887) 14 R.610.

⁸e.g. as in *Krupp v. Menzies* 1907 S.C. 903 where a draftsman had been instructed to copy the terms of an agreement, which had made provision for payment of one-tenth of the annual profits of an hotel to its manager, but to halve that figure for the minute of agreement in question. As a result of an arithmetical mistake the draftsman had calculated half of one-tenth as one-fifth and had inserted that figure in the contract instead of one-twentieth.

2.4 Although it is convenient, in identifying difficulties in the present law to refer separately to patent and latent defects in expression we do not intend that any distinction should be made between these two categories for the purposes of our recommendations. The new remedy of rectification should be available for both types of defect.

Problems of proof and remedies

2.5 In the absence of a specific remedy of rectification the courts have sometimes been able to make use of existing remedies such as reduction when faced with problems of latent defective expression. Reduction, which normally leads to the annulment of an entire document is more usually sought in cases where, for example, a contract has been induced by fraud or entered under essential error. Indeed the use of reduction as a remedy for defective expression has sometimes led to confusion, with cases being treated as turning on essential error when the defects were really of expression and not consent.¹ Where the remedy of reduction for error is sought it is possible to lead extrinsic evidence of an agreement different from that expressed in the written document.²

2.6 Where a reduction has not been sought as a remedy it seems clear that the courts will not go behind the terms of a writing to investigate its accuracy.³ The case of *Krupp v. Menzies*⁴ stands out on its own as an example of a radical approach to the problem of the admission of extrinsic evidence where reduction has not been sought. In that case Lord President Dunedin justified parole proof being permitted on the equitable basis that:⁵

“ . . . there are cases in which it would be truly a disgrace to any system of jurisprudence if there were no way available of rectifying what would otherwise be a gross injustice”.

This approach, if taken further, might have led to the introduction of a remedy providing directly for rectification of latent defective expression. In practice, however, *Krupp v. Menzies* has been interpreted strictly. In the subsequent House of Lords case of *Anderson v. Lambie*⁶ Lord Reid, having considered *Krupp v. Menzies* went on to say:⁷

“ . . . a Scots court has no power to rectify a disposition or other deed in the sense of altering its terms so as to make them conform to some earlier contract or to the real intention of the parties”.

Lord Morton of Henryton also stated that the remedy available under Scots law was not rectification but reduction,⁸ and Lord Keith of Avonholm

¹*Waddell v. Waddell* (1863) 1 M.635; and *Anderson v. Lambie* 1954 S.C. (H.L.) 43 per Lord Keith of Avonholm at p. 68.

²This is an exception to the parole evidence rule which normally excludes resort to evidence outwith the terms of a written contract for the purposes of its interpretation and enforcement. See Walker and Walker, *The Law of Evidence in Scotland*, para. 240; and *Scottish Law Commission Research Paper on the Law of Evidence in Scotland* by Sheriff I. D. Macphail, paras. 15.31 to 15.39. See also *Anderson v. Lambie*, *supra*, per Lord Reid at p. 62.

³*McKinlay v. Life and Health Assurance Association Ltd.* (1905) 13 S.L.T. 102.

⁴1907 S.C. 903.

⁵At p. 908.

⁶1954 S.C. (H.L.) 43.

⁷At p. 61.

⁸At p. 50.

considered, at least for that case, that reduction was the only competent remedy.¹

2.7 In *Anderson v. Lambie* reduction of the disputed disposition, which conveyed both a farm and (by mistake) a colliery, was all that was required. On reduction of the disposition, the missives (the exchanges of letters between the parties' respective solicitors which of themselves, prior to being superseded by the disposition, had constituted a correctly stated, binding contract) revived. Under the missives an obligation to grant a disposition of the farm remained. If the missives had been defectively expressed, however, reduction alone would not have solved the problem.

2.8 In most cases reduction on its own would be too extreme a remedy. It would produce the annulment of a contract but would normally not lead to the emergence of a correctly stated enforceable contract. Partial reduction of a contract for the purposes of rectification can be used only in limited circumstances² and the extreme result of termination of an entire contractual relationship leaving nothing in its place, or writings which do not represent the parties' final agreement, may be in the interests of neither contracting party.

2.9 In some cases the courts have found it necessary to use a combination of reduction and declarator to provide a remedy for defective expression.³ By means of declarator it has been possible for the courts to declare the true terms which should have been expressed in a particular document. Declarator may be pronounced before or contemporaneously with the reduction of a document and provides an important formal explanation of the relationship between the parties most directly affected by the reduction. A declarator will in effect state the rights and thereby the corresponding obligations of the parties concerned and thus clarify the situation in a way which reduction alone usually will not achieve. In the case of *Hudson v. St John*⁴ Lord Maxwell accepted with some regret that it was not possible for the court by declarator alone to alter the terms of the defectively expressed deed in question and that a combination of remedies including reduction and declarator was necessary. He expressed regret because he considered that the combining of existing remedies to produce the desired substantive result was a technique which to the non-lawyer was "likely to appear unnecessarily cumbersome and obscure".⁵ Lord Maxwell concluded that as the House of Lords in *Anderson v. Lambie* had rejected the argument that an agreement must in substance be scrapped altogether or allowed to stand on its erroneous written terms "Lord Reid was looking on the absence of power the court to alter the terms of the deed more as a procedural than substantive disability".⁶

¹At p. 70.

²See *Anderson v. Lambie* 1954 S.C. (H.L.) 43 at pp. 60-61 where Lord Reid stated that partial reduction would only be competent where it was proposed to reduce part of a deed which was clearly severable from the rest and which would not result in the making of a new bargain for the parties. He considered that partial reduction would rarely be competent. See also *Glasgow Feuing and Building Co. v. Watson's Trustees* (1887) 14 R.610.

³See *Waddell v. Waddell* (1863) 1 M.635; *Hudson v. St John* 1977 S.C. 255.

⁴1977 S.C. 255.

⁵*Ibid.* at p. 263.

⁶*Ibid.* at p. 263.

Procedural difficulties

2.10 The lack of power to order rectification may give rise to procedural difficulties. For instance it may prove very difficult to obtain an interim order for the enforcement of a correctly expressed obligation in a document which is also the subject of an action for reduction due to a defect in another part of that document. Enforcement on the one hand and complete reduction on the other may seem to be incompatible objectives. Indeed, even when coupled with declarator, reduction of a defectively expressed contract will not necessarily lead to the automatic emergence of a contract expressed as it should have been—some further act, such as the renewed grant of consent, may be required. Under these circumstances a court may be very reluctant to make interim orders based on an assumption that a contract will exist. Were rectification as a direct remedy to be available, whereby only the defective part of a contract or other document would be the subject of attention, these difficulties should be diminished.

The need for reform

2.11 We consider that the law at present, in so far as it does not provide a clear, direct remedy for cases of defective expression, is unsatisfactory. In the past the courts have sought, where they could, to provide in substance a remedy which they considered ought to be provided, even if it were not available in direct terms. In order to do so they have had to “construe” documents fairly vigorously or to combine two or more remedies, such as reduction and declarator, to achieve the desired result. It is, however, by no means clear that such techniques would provide a satisfactory solution in all cases. If the rights of the parties depend entirely on a written document and if that document is set aside altogether by reduction, it is not clear that a declarator that it should have been in some other terms will be of much use to one party if the other refuses to enter into a new agreement. On occasion terminological confusion has also arisen when a problem of defective expression in a contract has been referred to as one of “essential error”, the latter category being more usually associated with the remedy of reduction. We have stated earlier in this report¹ that we consider the problem under examination is far removed from the circumstances of contractual error and indeed that the principal issue is not one of defective consent but simply one of the defective expression of an agreement which, if properly expressed, would in itself be valid. We are of the opinion that an appropriate analysis of the basis for a remedy of rectification is significant, and we consider that conceptual clarity in the law is likely to be productive of greater certainty regarding the availability and application of that remedy. In the past the courts have striven by a variety of means to provide a remedy of rectification, but in the absence of any clear guiding principle or rule directed at the specific problem of defective expression. Under the existing law, potential uncertainty in the availability of an appropriate remedy can be foreseen when the court has to approach the problem indirectly by a process of combining several remedies which individually are not designed to deal with that problem. Moreover, as we have indicated, the law as it stands can be productive of procedural difficulties which would not arise if a remedy of rectification were in existence.²

¹See paras. 2.1, 2.3 and 2.5 above.

²See para. 2.10 above.

2.12 We conclude that the law could with benefit be rationalised and reformed by the provision of a direct remedy of rectification. This approach found favour with the majority of those who commented on the memorandum. In the course of this report we shall consider the potential scope for such a remedy but, for present purposes, we **recommend** that:

The court should be empowered, subject to the limitations set out below, to order the rectification of a document which has been defectively expressed.
(Recommendation 1)

PART III RECTIFICATION—SCOPE AND REQUIREMENTS OF PROOF

Introduction

3.1 We next consider the categories of document which we consider should be subject to a court power of rectification and the requirements of proof of defective expression.

Contractual documents

3.2 We have so far concentrated our discussion on contractual documents as the present lack of a remedy of rectification has most often been highlighted by case law dealing with defectively expressed contracts. The contractual writing is probably the most obvious category of document which should be capable of being rectified.

3.3 In the memorandum we discussed criteria which potentially might have to be satisfied by a party seeking the rectification of a written contract.¹ Our provisional view was that rectification of a document giving effect to an agreement should not be confined to cases where the original agreement had in itself been an enforceable contract.² Some contracts will only be legally constituted when in formal writing, and it was our provisional view that this requirement would prove unduly restrictive. Most of those who commented on the memorandum shared this opinion.

3.4 We do not think that any particular restrictions should be imposed on an applicant for rectification other than that to be successful he should be able to satisfy the court that the terms of a written contract fail to express accurately the common intention which the contracting parties had agreed it should express. In the memorandum we referred to a rule of English law that where contracting parties have both used a particular expression with an intended meaning different from that which it would normally have, then rectification will be possible only if they have manifested some “outward expression of accord” that the expression was to have that special meaning.³ This requirement has met with adverse criticism from academic writers as being a quite

¹At paras. 72 to 82.

²This was, at one stage, a requirement of the English law on rectification. See *Mackenzie v. Coulson* (1869) L.R. 8 Eq. 368; *Lovell and Christmas Ltd v. Wall* (1911) 104 L.T. 85; *W. Higgins Ltd v. Northampton Corpn.* [1927] 1 Ch. 128; *Craddock Bros v. Hunt* [1923] 2 Ch. 136; and *United States of America v. Motor Trucks Ltd* [1924] A.C. 196. It no longer is. See *Joscelyne v. Nissen* [1970] 2 Q.B. 86.

³*Joscelyne v. Nissen* [1970] 2 Q.B. 86. See also *F. E. Rose v. Wm. H. Pim Ltd* [1953] 2 Q.B. 450, *London Weekend Television v. Paris and Griffith* (1969) 113 S.J. 222 and *Chitty on Contracts* 24th ed., vol. 1 at para. 315.

unnecessary restriction. It has been asserted that the difficulties of proof should adequately protect contractual certainty.¹ It has also been argued that if a common intention has been proved it would be ridiculous to refuse rectification purely because the ordinary meaning of the word in question had not been specifically altered by some “outward expression of accord” of the parties.² We do not favour the introduction of such a qualification for Scots law and those consulted on the memorandum have not expressed any desire that it should be introduced.

3.5 Our provisional proposals in the memorandum were in wide terms and were designed to permit, rather than restrict, the use of all relevant evidence in the proof of defective expression. We agree, however, with those commenting on the memorandum that there are some important criteria which should be satisfied if rectification is to be granted. The first is that the parties should have reached agreement.³ The second is that the document which was intended to give effect to that agreement defectively expresses the parties’ common intention at the time when they reached agreement. These apparently simple requirements may often prove difficult to satisfy and we consider that they should operate as adequate safeguards against unjustified claims. Accordingly we **recommend** that:

The court should be able to order the rectification of a document intended to give effect to a prior agreement when it is satisfied that the document does not express accurately the common intention of the parties to that agreement at the time when it was made. (Recommendation 2)

Unilateral documents

3.6 Although contractual writings have so far been at the centre of our discussion of defective expression, one of the cases which we considered in the memorandum was that of *Hudson v. St John*,⁴ which concerned a defectively expressed, irrevocable, *inter vivos* trust deed. In the memorandum we did not make specific provisional proposals regarding the possibility of rectification of unilateral documents, but we did discuss in detail the *Hudson* case and its close connection with the problems of contract law in respect of which we proposed reform.⁵ Unilateral writings do have specialities, however, which we consider deserve separate attention.

3.7 A unilateral document can be used for a wide variety of purposes, such as the creation of a trust, the making of a gift or promise, or the assignation or renunciation of a right. When we refer to unilateral documents in this report we mean documents which of themselves create or affect rights or obligations and as such are complete, but which do not give effect to an

¹See Leonard Bromley, “Rectification in Equity” (1971) 87 L.Q.R. 532 at p. 537.

²See J. R. Spencer, “Signature, Consent, and the Rule in *L’Estrange v. Graucob* (1973) C.L.J. 104 at p. 113; see also Glanville Williams, “Mistake and Rectification in Contract” (1954) 17 M.L.R. 154 and (1945) 23 Can. Bar Rev. 380 at p. 387.

³It will be a question of fact whether and to what extent an agreement has been reached; see *Walker v. Caledonian Railway Co.* (1858) 20 D. 1102, and also *Excess Life Assurance Co. Ltd v. Firemen’s Insurance Co. of Newark New Jersey* [1982] 2 Lloyd’s Law Rep. 599.

⁴1977 S.C. 255.

⁵The same general need for a remedy for both defectively expressed contracts and, in that example, trusts was recognised by Lord Maxwell, who saw no good reason why a just principle permitting rectification should not be applied equally for a trust as for a contract where appropriate (at p. 260).

agreement. We do not include offers in this category, as they require to be accepted if a right or obligation is to be created. Although difficulties can arise from the acceptance of a mistakenly expressed offer, these relate to problems of contractual error, which is not the subject of this report. We shall also consider testamentary writings separately.

3.8 Defective expression in a unilateral document may be attributable to acts or omissions very similar to those which cause problems for contracts—it may be a simple, typographical error, the misplacing of a decimal point, or the misunderstanding of instructions received by the agent who has to draft the document. The principal difference between contractual and unilateral writings, for the purposes of rectification, relates to the proof of the intention which it is claimed has been defectively expressed. With contracts a common intention would have to be established and we have in mind that this should be capable of being done by an examination of witnesses and any correspondence or other documentation which may have been exchanged by the parties.¹ In the case of unilateral writings proof of the grantor's intention will be inherently more difficult, for he is less likely to have communicated with any other party. It may therefore be difficult to establish what his true intention was and to what extent this has been misrepresented in the writing. Moreover, a court would not be satisfied that a document was defectively expressed purely on the basis of an assertion that the writing was not what the grantor had intended.

3.9 In the case of *Hudson* it was not disputed that the intentions of the trustor had not been accurately expressed in important respects in the trust deed as the result of a mistake made by his solicitors. Had this issue been in dispute, however, reference could have been made to a letter sent by the trustor to his solicitors instructing them to draw up the trust. It was plain that the trust deed as drawn did not match the intentions stated in the letter of instruction. The letter itself did not constitute a trust but the court considered that it would have been an important adminicle of evidence had the fact of defective expression been in dispute.² In similar cases the grantor of a unilateral document may be able to satisfy the court that the document fails to express what he intended it to state at the time of its execution, that time being a crucial factor given the capacity of the grantor to change his mind.

3.10 The practical difficulties in satisfying a court that a unilateral document did not reflect the intention behind it in many cases would be formidable. We think it desirable, however, that in cases where these difficulties can be overcome the law should provide a remedy for the rectification of the document. We also think it desirable that contractual and unilateral documents should be treated alike for the purposes of rectification, given the similarity of the problem of defective expression in both.³ We do not include testamentary

¹We discuss rules of evidence at para. 4.2 below.

²1977 S.C. 255 at p. 259.

³In various other jurisdictions rectification is currently available for unilateral deeds on a comparable basis to that provided for contracts. See *Re Butlin's Settlement Trust* [1976] 2 All E.R. 483; *Nevill's Concise Law of Trusts, Wills and Administration in New Zealand*, 7th Ed., 1980, by B. J. Blacktop, at p. 62; and the American Law Institute's Restatement (2d) Trusts, s. 333.

We discuss qualifications on the availability of the remedy for the purposes of the protection of third party interests in Part VI of the report below.

writings in this approach, as we think that for that particular category of document special considerations apply. We **recommend**, therefore, that:

The court should be able to order the rectification of a unilateral document intended to create, transfer, vary or renounce a right when it is satisfied that the document does not express accurately the intention of its grantor at the time when it was executed. (Recommendation 3)

Testamentary writings

3.11 In the memorandum we did not examine the question of rectification of testamentary writings, such as wills and testamentary trust deeds, as we were of the opinion that this could best be considered in the context of a review of the law of succession. We think that policy considerations of a different nature from those encountered with a general remedy of rectification are likely to arise in the case of testamentary writings. Questions such as whether a will, for instance, should be capable of being rectified, and if so to what extent and on the basis of what principles, may only be capable of being answered when more general problems and policies relating to the interpretation of wills have been resolved, after due consultation.¹ We think that such questions should be raised, therefore, in their proper context and accordingly we **recommend** that:

Testamentary writings should be expressly excluded from the categories of document whose rectification we have recommended should be capable of being ordered by the court. (Recommendation 4)

PART IV EVIDENCE AND THE STANDARD OF PROOF

The parole evidence rule

4.1 In recommending a new court power of rectification we have made no formal distinction between patent and latent defects in a writing. While in the case of patent defects it will generally be unnecessary to apply for rectification, we consider that the remedy should be available whether the defect is latent or patent.

4.2 Some distinction between latent and patent defects is important, however, in relation to evidence. Latent defects by definition can only be rectified if

¹Various options for the law of Scotland could be considered. For example, s. 20 of the Administration of Justice Act 1982 provides for the rectification of wills under English law. These provisions followed on from the Lord Chancellor's Law Reform Committee's 19th Report, "Interpretation of Wills". That report favoured the rectification of wills but on the basis that only a mistake in the language used, as opposed to a mistake in the meaning of the language, should be the subject of rectification. (This contrasts with the approach of Brightman J. when rectifying a trust in *Re Butlin's Settlement Trust* [1976] 2 All E.R. 483 at pp. 487-488). See also the Law Reform Commission of British Columbia's Working Paper No. 32, "Interpretation of Wills" (1981), which favoured a subjective approach to the interpretation of wills generally and did not consider that the Lord Chancellor's Committee's approach to rectification went far enough (at p. 72). The Law Reform Commission of Queensland, on the other hand, in their Report No. 22 "On the Law Relating to Succession" thought that the Lord Chancellor's Committee had gone much further than they would be prepared to go in recommending the rectification of wills (at p. 19).

it is possible for the court to go behind the terms of the writing in question and investigate all relevant evidence, whether written or oral, which can establish what the true agreement was and what the correct expression of it should be. Extrinsic evidence of that nature is currently admitted in cases of reduction,¹ in exception to the parole evidence rule,² for the simple reason that the remedy would not be a practical proposition were such evidence not admissible. For similar reasons of practicality we consider that a new power to rectify a writing would be of limited value unless specific provision were also made enabling the court to hear all relevant evidence as to how the defect in question came to exist. The majority of those consulted were in favour of a provision of this kind and they did not favour proof being restricted to writ or oath. Accordingly we **recommend** that:

In determining whether a document has been defectively expressed, the court should be able to have regard to all relevant evidence, whether written or oral. (Recommendation 5)

Standard of proof

4.3 In Scotland there are two separate standards of proof. Civil actions, with a few exceptions, require proof “on a balance of probabilities” whereas in criminal cases the required standard is proof “beyond all reasonable doubt”.³ The same is also true in most Anglo-American jurisdictions, but in addition some have introduced a standard of “convincing proof” which is applied in actions for rectification.⁴ A standard of “convincing proof” is unknown in Scotland.⁵

4.4 In *Anderson v. Lambie*, however, Lord Keith of Avonholm chose to follow the example of older English authority which at the time demanded not merely “convincing proof” in such actions, but proof “that will leave no fair and reasonable doubt upon the mind”.⁶ Lord Reid also concluded that there was a heavy onus on a party who sought the reduction of a deed and stated that he was satisfied that the appellant had proved his case “beyond reasonable doubt”.⁷ It is not clear, however, whether he considered it a pre-condition for the grant of the remedy that such a standard be satisfied, and if so whether that standard had to be applied in all cases of reduction, or whether he was merely saying that in that case the proof happened to have reached that standard.

4.5 In the memorandum we sought views on what the standard of proof should be for the purposes of a new remedy of rectification. We received a mixed response from those consulted, although none favoured a standard of “convincing proof”. Those who preferred “proof beyond all reasonable doubt” stressed the importance of the preservation of the written terms of a contract

¹e.g. *Anderson v. Lambie* 1954 S.C. (H.L.) 43.

²See para. 2.4 above.

³See *Scottish Law Commission Research Paper on the Law of Evidence in Scotland*, by Sheriff I. D. Macphail, at paras. 22.32 to 22.38.

⁴See *Joscelyne v. Nissen* [1970] 2 Q.B. 86 and A.L.I., Restatement (2d) Contracts Section 155, note (c).

⁵*Brown v. Brown* 1972 S.C. 123 at p. 126.

⁶See Lord Chelmsford in *Fowler v. Fowler* (1859) 4 De. G. & J. 250 at p. 265 and Lord Keith in *Anderson v. Lambie* 1954 S.C. (H.L.) 43 at p. 69.

⁷At p. 62.

and considered that a more strict standard of proof than normal was appropriate to emphasise that rectification should not be granted lightly.

4.6 While we agree with the view that rectification should be a remedy to be granted only when the onus of proof has been clearly discharged, we do not consider that it is necessary to impose standards different from the normal standards of civil proof. Proof of the grounds for rectification will in itself be an inherently difficult task and therefore we do not think it necessary to add further complications to the law on standard of proof.¹

PART V ANCILLARY POWERS

Other affected documents

5.1 The rectification of a defectively expressed document will not necessarily solve all the problems of the party who sought that remedy. For example, the description of land in a disposition may be rectified on proof by the seller that it included more land than had been agreed should be sold, but that same description may have been duplicated in a standard security granted by the purchaser to a third party. On rectification, the seller would wish to ensure that his title to the land was clear in all respects, but this would also require rectification of the standard security. Problems of a similar nature could occur where, in general, the terms of one document are dependent on those of another which have been defectively expressed. In empowering the court to rectify one document we consider it necessary, therefore, that the court should also be able to make consequential rectifications in other documents.

5.2 We shall later discuss the need to protect the interests of third parties who may be adversely affected by rectification,² such as the holder of the standard security in the above example, but in order to ensure that the courts are able to order rectification that will be fully effective for the purposes of the party seeking that remedy, we **recommend** that:

When a court orders the rectification of a document it should also have the power to order the rectification of any other related document which is defectively expressed by reason of the defect in the original document.
(Recommendation 6)

PART VI PROTECTION OF THIRD PARTY INTERESTS

General

6.1 In an action for rectification it may not be only the interests of the contracting parties or of the grantor of a document which are at stake. The terms of a defectively expressed document, be it a contract, a disposition or a trust, may have been heavily relied on in good faith by a person other than a party to the agreement or the grantor of the document. For the sake of brevity, we shall refer to such a person as the “third party”.³ The rectification of the document could substantially affect his rights or expectations. The third

¹See also the memorandum at para. 65.

²See paras. 6.1 to 6.11 below.

³In strict terms, of course, such a person need not necessarily be a “third” party.

party could be a creditor who has given a loan on the basis of the terms of a contract or disposition or he might be a beneficiary under a trust whose entitlement would be affected by the addition of further beneficiaries as a result of rectification. The interests of a third party could require evaluation in a great variety of different circumstances.

6.2 In the memorandum we proposed that a document should not be rectified unless the court was satisfied that no third party interests would be “adversely and unduly affected” by the grant of that remedy. The majority of those consulted agreed with this proposal which we consider to be an essential condition of the court’s power to rectify. We think it would be unjust if an innocent third party were to suffer to any material extent as the result of the rectification of a document upon which he has relied reasonably and in good faith and that rectification should be refused when necessary to protect the interests of such parties. For this protection to be available, however, we consider it essential (a) that the third party’s interests should be adversely affected to a material extent by the proposed rectification and (b) that the concept of “reliance” for this purpose should involve some action or forbearance on the part of the third party resulting in a material change in his position. A third party who stands to benefit gratuitously under a document should not, for example, be able to veto a rectification by saying “I relied on that document because I submitted such and such a return on the basis of it (even though I did not alter my position in any material way by doing so) and I would be adversely affected to a material extent by the rectification because I would lose the benefit of what was to be given to me under the erroneous document”.

6.3 Where, however, a third party does satisfy the conditions requiring protection of his interests we consider that the court should nonetheless be able to order rectification if the third party consents. For the purposes of obtaining the third party’s consent it would be open to the applicant for rectification to make some arrangement, acceptable to the third party, designed to compensate him for the prejudice he would sustain were rectification ordered. We envisage that Rules of Court should provide the necessary procedure to ensure that third parties receive intimation of any application for rectification which might affect their interests.

6.4 We therefore recommend that:

The court should not order a document to be rectified unless it is satisfied:

- (a) that the interests of a third party who has reasonably and in good faith acted or refrained from acting in reliance on the terms of the document, with the result that his position has materially changed, would not be adversely affected to a material extent by the rectification; or**
- (b) that the third party has consented to the proposed rectification.**
(Recommendation 7)

Further qualifications

6.5 We consider that there are some further qualifications which should be made in respect of the nature of the reliance of a third party if his interests are to be protected as recommended above.

(i) Good faith

6.6 We have referred to the need for the third party to have acted in “good faith” in his reliance on the defectively expressed terms of a document if his

interests are to be protected when an application is made for rectification. Indeed we do not see how it could properly be said that the third party had “relied” on the terms of a document if he were acting in bad faith. We think that the concept of “good faith” in this context could be further elaborated, however.

6.7 In particular, we consider that it should be made clear that for a third party to have been acting in good faith at the time of his claimed reliance on a document he should not have known of its defects, nor, in all the circumstances of the case, should he have had reasonable cause to be aware of those defects. Such a standard would not, we think, impose an unrealistic burden upon a third party to discover what lay behind the written terms of a document, but, on the other hand, it would not absolve him from turning a blind eye to facts which should at least have raised doubt in his mind.

(ii) *Reasonable reliance*

6.8 In addition to any requirement that a third party should not have relied in bad faith on the terms of a document, we consider that the nature of the third party’s reliance should in all other respects have been reasonable if his interests are to receive legal protection. We think it should be made clear that a reliance which in itself is unreasonable should not operate as a bar to rectification.

6.9 Accordingly we recommend that:

In its consideration of whether to order rectification of a document, the court should disregard the interests of a third party if it is satisfied that:

- (a) **at the time when that party claims to have relied on the document he knew or ought in the circumstances known to him at that time to have been aware that it was defectively expressed; or**
- (b) **his reliance on the document was otherwise unreasonable.** (Recommendation 8)

Third parties—post-rectification protection

6.10 In the event that a third party has not received notice of an application for the rectification of a document prior to the court ordering that it be rectified, and therefore in the absence of a consideration of the interests of that party when, in terms of the above recommendations, his interests should have been taken into account, we think that provision should exist to ensure the protection of those interests to the extent that this may be reasonably practicable.

6.11 One remedy for a third party under those circumstances could be the reduction of the court order for rectification. This may not always be practicable or just, however, if another third party has relied in good faith on the terms of the rectified document or acquired rights under it. Therefore, although we think that reduction should be one available remedy we also consider that it may be desirable to avoid reduction of a court order if a less radical remedy could adequately protect all third party interests. The alternative remedy which we think should be introduced would involve the court being empowered to order the original applicant to pay compensation to the third party in respect of his reliance on the terms of the unrectified document. We consider

that the original applicant, or his legal representative in the event of his death, incapacity or absence, should bear this liability as part of the risk undertaken by him when seeking rectification. The successful applicant could protect himself by obtaining insurance cover against the later emergence of relevant third party interests. We do not think, however, that such potential liability should continue for a period of longer than five years from the date of the order for rectification. We consider that certainty for all parties could be secured by a fixed period of that duration, which in most circumstances would be a reasonable length of time and which would also be comparable to the current short negative prescriptive period of five years.¹ We recommend therefore, that:

Where a third party has been unaware of an application for the rectification of a document prior to it being rectified, the court, on an application being made by the third party within five years from the date of the rectifying order, should be able:

- (a) to require the applicant for the rectifying order, or his legal representative, to pay to the third party such compensation as it may think fit in respect of the third party's reliance on the unrectified document;**
or
- (b) to reduce the rectifying order. (Recommendation 9)**

PART VII EFFECTS OF RECTIFICATION

Retroactivity

7.1 In cases where rectification has been sought and granted its effective date may be of great practical importance as, for instance, it could alter the tax liability of one of the parties.² In the memorandum we provisionally proposed that rectification should have retroactive effect, going back to the date when the defective document was executed. All those who commented agreed with this approach, which would return the parties involved to the position originally intended.³ Several, however, whilst approving of this general principle, considered that if it were expressed as an unqualified rule it could unnecessarily restrict the court in the exercise of its discretion to grant a remedy of rectification. Some expressed the view that one way of protecting the interests of third parties would be to enable the court to specify a date other than the date of the execution of the document from which the rectification would be effective. It was argued that, if all orders for rectification were automatically to have full retroactive effect, this could lead to the court refusing to grant the remedy in cases where it would otherwise be willing to do so.

7.2 We accept this argument and suggest, therefore, that although as a general rule rectification should be fully retroactive, this should be qualified by leaving the court with some discretion to depart from that general rule. We consider that this discretion should only be used for the purposes of the protection of third party interests, as we see no reason why the general

¹See Prescription and Limitation (Scotland) Act 1973, s. 6.

²e.g. *In re Colebrook's Conveyances* [1972] 1 W.L.R. 1397.

³This approach was adopted by Lord Maxwell in *Hudson v. St. John*, following the practical example of past authority. See 1977 S.C. 255 at p. 260.

principle should be departed from in cases where only the original parties are involved. We recommend, therefore, that:

Where the court orders the rectification of a document the rectification should have effect as from the date of the execution of the document, provided that the court may specify a later date for the purposes of the protection of the interests of a third party. (Recommendation 10)

PART VIII PUBLIC REGISTERS

Introduction

8.1 A document may be recorded or may require to be recorded in a public register, or an entry may be made in a public register which is derived from a document. If the document has been defectively expressed and the defect in turn has been transmitted to a register, the problem then arises as to how the recorded document or entry in the register can be rectified. Third parties have access to public registers and may often rely on the validity of the record which they find. As a matter of public policy, therefore, it would seem desirable that either the record in the register should be accurate or at least the interests of third parties who have relied in good faith on the register should be protected.

8.2 Some public registers already have detailed rules governing their potential rectification,¹ but we do not intend in this general context to examine all such registers, many of which will have their own special problems best regulated by the law governing the relevant field of activity. We do intend to turn our attention, however, to certain registers of wide application and also to those which affect interests in land. In particular we shall consider the Books of Council and Session and sheriff court books, where documents of a general nature such as contracts may be recorded, and, in respect of land, the Register of Sasines and the Land Register of Scotland. Our concern regarding the last two registers mentioned arises directly from our examination of the law on defective expression and indeed from one of the most important cases dealing with that problem namely *Anderson v. Lambie*.²

8.3 In the memorandum we asked whether the policy applied by the House of Lords in *Anderson v. Lambie* should be re-affirmed by ensuring that the courts had power to rectify a deed affecting the ownership of land even where it had been recorded or used as the basis of an entry in the Land Register. Although this proposal received a fair measure of support, some reservation was expressed regarding its potential impact on the new Land Register of Scotland. We shall first discuss the Land Register before returning to the Register of Sasines and the other registers which we have mentioned.

The Land Register of Scotland

8.4 The Land Register, unlike the Register of Sasines, is not a register of recorded documents but is a public record of interests in land. The Register is governed by the Land Registration (Scotland) Act 1979, which, in section 9, makes specific provision for rectification of the register. Section 9 gives the Keeper of the Registers of Scotland the power to rectify the Register and

¹e.g. s. 106G of the Companies Act 1948, applied with modifications by the Companies (Floating Charges and Receivers) (Scotland) Act 1972, s. 7(3), (4).

²1954 S.C. (H.L.) 43.

places him under a duty to rectify when ordered to do so by the court or Lands Tribunal for Scotland. The jurisdiction of the Keeper, the court and the Lands Tribunal is restricted, however, by section 9(3). This in effect means that where rectification “would prejudice a proprietor in possession” it is necessary that “the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession”.¹ The latter qualification will probably be difficult to establish in many cases and we doubt if these provisions are adequate to cope and correspond with the more general remedy of rectification which we have recommended. One can take the case of *Anderson v. Lambie* to illustrate this difficulty.

8.5 In *Anderson v. Lambie*, Anderson had disposed to Lambie more land than the latter had agreed to buy. The agreement had been for the sale of a farm, but the disposition had included a farm and a colliery. Lambie managed to “convince himself”, and the Lord Ordinary considered that this was his genuine belief,² that he had intended to buy the colliery as well as the farm. He subsequently informed the National Coal Board that he was their landlord and demanded rent. The Coal Board, on seeing that in the Register of Sasines Mr Lambie and his wife appeared to be infert proprietors, paid him one and a half years rent until the dispute between Anderson and Lambie had developed.³ Lambie therefore established natural possession of the farm and civil possession of the colliery. If translated into the context of land registration, Lambie would have been a “proprietor in possession” who would be “prejudiced by rectification of the register”. The court would therefore only be able to order rectification if it could be said that “the inaccuracy had been caused wholly or substantially by the fraud or carelessness” of Lambie. It may be argued, however, that a great part of the responsibility lay with Anderson, as disponent of the property, and his agents to ensure that the disposition conveyed the correct area of land. It is doubtful if the conditions of section 9(3)(iii) would be satisfied so as to allow a court order for rectification.⁴

8.6 It might be said that a problem such as that in *Anderson v. Lambie* is hardly likely to arise in future given that land registration is a map-based system which requires very accurate descriptions of the land if an application for registration is to be accepted. We think it foreseeable, however, that the instructions of a client can be misinterpreted by his solicitors or the solicitors can be misinstructed and problems can ensue. It seems possible that a third party such as the Keeper, with no knowledge of the transaction other than the formal deeds and maps presented to him, might be unable to detect a defect in the implementation of that transaction.⁵

¹S. 9(3)(iii).

²Noted by Lord Reid, 1954 S.C. (H.L.) 43 at p. 57. It was also shown, however, that this belief could only have arisen *after* the missives for the sale of the farm had been concluded.

³These details are taken from the full text of the Lord Ordinary’s (Lord Mackintosh) judgment, available in Session Papers.

⁴Anderson would probably also have no claim to an indemnity from the Keeper under s. 12(1)(b) of the 1979 Act as the loss would have arisen as a result of his own careless act or omission (see s. 12(3)(n)). In such cases a claimant might but would not necessarily have a claim for damages for professional negligence against his solicitors.

⁵See *Blacklocks v. J. B. Developments (Godalming) Ltd.* [1981] 3 W.L.R. 554 for an example of the unintentional inclusion of a piece of land in a conveyance under the English system of land registration.

8.7 Problems relating to the transmission of the defect in a document to an entry in the Land Register therefore are foreseeable and their resolution could equally foreseeably be hampered by the current restrictions on the court's jurisdiction regarding rectification of the Register. We consider that our recommendations for the introduction of a general remedy of rectification require consequential amendment of section 9 of the Land Registration (Scotland) Act. What we suggest is that the court should be empowered to order the rectification of an entry in the Land Register consequential upon the rectification of a document from which the entry had been derived. Although the Land Register is not a register of documents and although normally the documents in a transaction would be superseded by the entry in the Register, for the purposes of rectification, as with the reduction of a disposition, the relevance of prior documents re-emerges if the source of the problem is to be discovered.

8.8 Some anxiety was expressed on consultation at the prospect of new powers to rectify the Land Register. Some commentators pointed out that the system of land registration requires a high level of certainty for it to be of value to third parties who may rely on it. We entirely agree. We must emphasise, however, that we are not suggesting the introduction of a general equitable power to rectify the Register. All we are suggesting is a purely consequential power to rectify, which would be available only in those cases where the court had already used the power to rectify documents which we have recommended, with all its qualifications and safeguards for the protection of third parties. We have consulted the Department of the Registers of Scotland about this proposal and they consider that it would not adversely affect the system of land registration. We recommend, therefore, that:

The Land Registration (Scotland) Act 1979 should be amended so as to empower the court to order the rectification of the Land Register of Scotland consequential upon the rectification of a document from which the entry in the Register has been derived. (Recommendation 11)

Ancillary court powers—third party interests

8.9 In considering whether both rectification of a document and the consequential rectification of an entry in the Land Register should be granted, we think that the court should have to be satisfied that all relevant third party interests have been taken into account. Where third parties have registered interests in land these can be readily identified and brought to the attention of the court. We think that the interests of persons who have consulted a particular entry in the register should also be taken into account. Such persons may or may not have placed reliance on their findings, but we consider that the facts of each case should at least be investigated.

8.10 We have made enquiries of the Keeper and understand that he maintains administrative records of those who have requested Reports or Office Copies of Title Sheets from the Register, but that such records are not public and therefore an applicant for rectification of a document and an entry in the

Register would be unable to advise the court as to the existence of such third parties. At present the court has no power to require the Keeper to supply such information. Bearing in mind the need for the court to know of the existence of all relevant third party interests, we think that the court should be so empowered. We do not suggest the creation of any new obligation to keep such records but merely that the Keeper should supply such information as he may have. In the case of the Land Register all enquiries regarding registered interests in land are directed through the Keeper. Individuals, corporate bodies or their solicitors will find it a simple matter to make such enquiries without the need for the services of a professional searcher. The records of those enquiries are maintained by the Keeper in a readily accessible form and therefore it should be possible to identify fairly easily a party who may have relied on an entry in the Register.¹ We consider that the expense involved in providing such information should be borne by the applicant for rectification. We **recommend**, therefore, that:

The court should be empowered to require the Keeper of the Registers of Scotland to produce such information as he may have relating to any persons who have approached him regarding a title sheet of an interest in land in respect of which rectification is sought, and the applicant for rectification should bear the expense incurred by the Keeper in supplying such information.
(Recommendation 12)

Exclusion of indemnity

8.11 Section 12(1)(a) of the Land Registration (Scotland) Act 1979 makes provision for a person who suffers loss as a result of rectification of the register, entitling him to receive indemnification from the Keeper, subject to section 12(3) which lists many exceptions to that entitlement. In recommending an extension of the court's jurisdiction to rectify the Land Register, we have borne in mind that the Keeper is unlikely to have been aware of any inaccuracies of the kind we have been discussing at the time of registration.² Accordingly, we do not consider that the Keeper should bear any responsibility for loss sustained by a person as the result of the rectification of defective expression. We **recommend**, therefore, that:

Where the court has ordered the rectification of the Land Register as a consequence of ordering the rectification of a document which has been defectively expressed, and a person suffers loss thereby, he should not be entitled to indemnification from the Keeper in respect of that loss. (Recommendation 13)

Other Registers

8.12 The other public registers with which we have been concerned are the Register of Sasines, the Books of Council and Session and sheriff court books.

¹This can be contrasted with the different nature of the administration of the other registers mentioned in para. 8.2 above, under which such information as may be kept is likely to be less easily extracted, especially after the lapse of any significant period of time. Moreover, a very high percentage of searches in the Register of Sasines are made by professional searchers and information relating to them would be of remote value, given that the possibility of tracing a relevant third party would in turn be dependent on the searcher's own business records. Accordingly, we shall not make any recommendations in respect of the retrieval of information regarding persons who have consulted those other registers, upon which in any event less reliance can be placed than in the case of the Land Register, which is a register of title, not of documents.

²See para. 8.6 above.

The Register of Sasines will remain a public record of all transactions relating to or affecting land until it has finally been superseded by a fully operative system of land registration. The Register of Sasines will continue to function for a considerable time to come and will therefore remain of relevance for the purposes of the rectification of defectively expressed recorded documents affecting land. As we have discussed in Part II of this report, reduction is one of the remedies applied to bring about the rectification of defectively expressed documents recorded in the Register of Sasines and *Anderson v. Lambie* is an example of just such an application. The current practice in such cases is that the successful party will record an extract decree in the Register of Sasines. The public record will then stand corrected by the original document being read in conjunction with the extract decree. The party who has obtained the reduction will have an incentive to ensure that an accurate public record exists so as to protect his rights and avoid any dispute with third parties.

8.13 The current statutory provisions which govern the recording of extract decrees of reduction in the Register of Sasines are section 46 of the Conveyancing (Scotland) Act 1924 and section 41(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970. These provide specific rules relating to the effect the recording of an extract decree of reduction has as regards rights to land acquired for value by third parties acting in good faith, as well as in respect of the rights of the party who has obtained the decree of reduction which has been recorded. Given the similar effects which reduction and rectification may have as regards real rights to land, we consider that these established statutory rules governing the recording in the Register of Sasines of extract decrees of reduction could with benefit be extended to the recording of extract orders for rectification.

8.14 We recommend, therefore, that:

Section 46 of the Conveyancing (Scotland) Act 1924 and section 41 of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be extended to govern the recording in the Register of Sasines of an extract order for rectification of a document as they currently apply in respect of the recording of an extract decree of reduction. (Recommendation 14)

8.15 The need to record or register an extract order for rectification in the Books of Council and Session or sheriff court books would be less imperative than in the case of the Register of Sasines, given that the recording of a document in these registers does not have significance for the purposes of creating real rights. The recording of such an extract order would, however, be consonant with the concept of those registers although we do not think that this procedure need be governed by statutory rules.

Retroactivity

8.16 We have recommended earlier in this report¹ that the court should have a discretion to specify the retroactive scope to be given to an order for rectification, bearing in mind the need to protect third party interests. The general principle which we considered should apply, however, was that the rectification should have effect from the date of execution of the document. The date of recording of a document, or the date of registering an interest

¹See para. 7.2 above.

in land to which a document relates, may not necessarily be the same as the date of execution of the document. Nevertheless the recording or registration may itself have substantial legal effects and the effective date of recording or registration may therefore be of considerable significance.

8.17 Given our view that one of the principal objectives of rectification should be to restore the parties or party concerned to the position which would have obtained had the document in question been correctly expressed, we consider that as a matter of general principle rectification of an entry in one of the registers which we have specified should have effect from the date of recording or registration of that entry. On the other hand, we have stated that the protection of the interests of third parties acting reasonably and in good faith should be a paramount consideration in the court's assessment of whether rectification should be granted and, as in the case of the simple rectification of a document, we recognise that a court might not be able to make such an order with retroactive effect to the date of recording or registration if this would be to the prejudice of a third party's interests. We consider that a judicial discretion to depart from the principle of retroactive effect, where this is necessary for the protection of a third party's interests, should resolve this potential difficulty. Accordingly, we **recommend** that:

Where the court orders the rectification of an entry in the Land Register or where a court order for rectification of a document is recorded or registered in any of the other public registers which we have specified, the rectification, recording or registration respectively should have effect as from the date when the entry was made, or as from the date when the rectified document was recorded or registered, provided that the court may specify some later date for the purposes of the protection of the interests of a third party.
(Recommendation 15)

Litigiosity

8.18 Litigiosity, as a general concept prohibiting the voluntary alienation of property the subject of litigation, will only affect actions relating to land when a notice in the form of Schedule RR of the Titles to Land Consolidation (Scotland) Act 1868 has been registered in the Register of Inhibitions and Adjudications in the manner prescribed by section 159 of that Act.¹ Section 159 refers only to actions for reduction and adjudication. We consider that comparable provisions should be made in respect of applications for rectification affecting interests in land, as clearly one party to such proceedings should not be able to render them pointless by disposing of the disputed property. We **recommend**, therefore, that:

Provisions comparable to those found in section 159 of the Titles to Land Consolidation (Scotland) Act 1868 should be made so as to enable the registration of a notice of an application for the rectification of a document or conveyance relating to land in the Register of Inhibitions and Adjudications, with the effect that the land to which the application relates shall be rendered litigious from the date of registration. (Recommendation 16)

¹S.44(2) of the Conveyancing (Scotland) Act 1924.

PART IX MISCELLANEOUS

Jurisdiction

9.1 In the memorandum we inquired whether the term “court”, as used in our provisional proposals for the introduction of a new court power of rectification, should include the sheriff court as well as the Court of Session. While only one of those consulted was opposed to the extension of the new power of rectification to the sheriff court, of those who were in favour of such extension some at least took that view because they considered that there should be equal power in the sheriff court and Court of Session with actions of reduction and rectification.

9.2 At present the Court of Session has exclusive jurisdiction to hear actions for reduction, but by way of exception (*ope exceptionis*) it is possible for the validity of a document to be challenged as a defence to an action raised in the sheriff court, without the need for an action of reduction.¹ We have considered this possible approach to jurisdiction but, as we shall explain, we do not think that an analogy between reduction and rectification is appropriate, at least in the context of the *ope exceptionis* jurisdiction in the sheriff court.

9.3 The jurisdiction of the sheriff court to hear a challenge to a document by way of exception was introduced for very limited purposes, as is explained by Lord Justice-Clerk Macdonald in the case of *Donald v. Donald*:²

“The purpose of allowing documents produced in a process to be set aside *ope exceptionis* was to prevent unnecessary complications and delays in procedure when adminicles of evidence were put forward, and their genuineness or validity was challenged, as for example in a question where a claim for payment was met by the production of a receipt. . . .

In my opinion the law by which documents may be set aside *ope exceptionis* in the course of proceedings . . . was never intended, and is not in the enactments so expressed as, to apply to a document forming the basis of a party’s alleged right of action or the basis of a defence against an attack on title, in neither of which cases could a decision on exception have any effect beyond the then proceeding litigation. It could not invalidate the document. . . . The intention was to enable the judge to purge out what might be produced to affect his mind, if, for instance, it could be shown that the deed was not what it bore to be, or was invalid for want of formalities in signature, or was vitiated by erasure. It was never intended to give the power to consider questions of weakness and facility in the case of a will or settlement, which would be setting up a different process inside a process, a course which would have the very opposite effect from the intention of the statute—namely, to simplify procedure.”

This restricted jurisdiction permitting a limited challenge of a document, which could only be effective in respect of the litigating parties themselves, would, we consider, be inappropriate in the context of the remedy of rectification

¹See the Sheriff Courts (Scotland) Act 1907, Sched. 1, Rule 50: “When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof”.

²1913 S.C. 274 at p. 278; see also *Duke of Argyll v. Muir* 1910 S.C. 96 and *National Bank of Scotland Nominees Ltd v. Adamson* 1932 S.L.T. 492.

which we have recommended. Such a remedy we envisage would be of general application when granted and would always be based on the prior consideration and protection of the interests of good faith third parties. Moreover, rectification, requiring proof of the very basis of a contract or unilateral document, inevitably would affect the substance of a claim made by the party against whom it was sought and therefore it could not be equated with the limited challenges on the validity of documents currently admitted in the sheriff court. Consequently, we do not think that an *ope exceptionis* jurisdiction in the sheriff court would be suitable in the case of rectification.

9.4 A straight choice would seem to arise between exclusive Court of Session jurisdiction in actions for rectification and concurrent jurisdiction for that court and the sheriff court. We do not make any recommendation on this matter, however, as we have concluded that this question could best be examined by Government, given the wider considerations of policy, extending beyond the scope of this report, which would have to be evaluated when determining the most appropriate court jurisdiction.

Simulated contracts

9.5 A further question which we raised in the memorandum was whether rectification should also be available at the instance of third parties who claimed, for example, that contracting parties had deliberately mis-stated the true terms of their agreement in order to avoid some liability owed to the third party, such as the payment of commission as a percentage of a stated purchase price. The majority of those consulted considered that this was a problem distinct from that which we had been discussing and the view was expressed that in such instances the third party's remedy would be damages on the basis of fraud. We agree with this view and make no recommendations on this point.

SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations of this report, with cross-references to the paragraphs where they are made and to the Clauses of the draft Bill contained in Appendix A which implement them.

1. The court should be empowered, subject to the limitations set out below, to order the rectification of a document which has been defectively expressed. (Paragraph 2.12; Clause 1(1).)
2. The court should be able to order the rectification of a document intended to give effect to a prior agreement when it is satisfied that the document does not express accurately the common intention of the parties to that agreement at the time when it was made. (Paragraph 3.5; Clause 1(1), paragraphs (a) and (i).)
3. The court should be able to order the rectification of a unilateral document intended to create, transfer, vary or renounce a right when it is satisfied that the document does not express accurately the intention of its grantor at the time when it was executed. (Paragraph 3.10; Clause 1(1), paragraphs (b) and (ii).)

4. Testamentary writings should be expressly excluded from the categories of document whose rectification we have recommended should be capable of being ordered by the court.

(Paragraph 3.11; Clause 1(5).)

5. In determining whether a document has been defectively expressed, the court should be able to have regard to all relevant evidence, whether written or oral.

(Paragraph 4.2; Clause 1(2).)

6. When a court orders the rectification of a document it should also have the power to order the rectification of any other related document which is defectively expressed by reason of the defect in the original document.

(Paragraph 5.2; Clause 1(3).)

7. The court should not order a document to be rectified unless it is satisfied:

(a) that the interests of a third party who has reasonably and in good faith acted or refrained from acting in reliance on the terms of the document, with the result that his position has materially changed, would not be adversely affected to a material extent by the rectification; or

(b) that the third party has consented to the proposed rectification.

(Paragraph 6.4; Clauses 2(1) and 2(2).)

8. In its consideration of whether to order rectification of a document, the court should disregard the interests of a third party if it is satisfied that:

(a) at the time when that party claims to have relied on the document he knew or ought in the circumstances known to him at that time to have been aware that it was defectively expressed; or

(b) his reliance on the document was otherwise unreasonable.

(Paragraph 6.9; Clause 2(3).)

9. Where a third party has been unaware of an application for the rectification of a document prior to it being rectified, the court, on an application being made by the third party within five years from the date of the rectifying order, should be able:

(a) to require the applicant for the rectifying order, or his legal representative, to pay to the third party such compensation as it may think fit in respect of the third party's reliance on the unrectified document; or

(b) to reduce the rectifying order.

(Paragraph 6.11; Clause 2(6).)

10. Where the court orders the rectification of a document the rectification should have effect as from the date of the execution of the document, provided that the court may specify a later date for the purposes of the protection of the interests of a third party.

(Paragraph 7.2; Clauses 1(4) and 2(4).)

11. The Land Registration (Scotland) Act 1979 should be amended so as to empower the court to order the rectification of the Land Register of Scotland consequential upon the rectification of a document from which the entry in the Register has been derived.

(Paragraph 8.8; Clause 3(1)(a)(i).)

12. The court should be empowered to require the Keeper of the Registers of Scotland to produce such information as he may have relating to any persons who have approached him regarding a title sheet of an interest in land in respect of which rectification is sought, and the applicant for rectification should bear the expense incurred by the Keeper in supplying such information. (Paragraph 8.10; Clause 2(5).)

13. Where the court has ordered the rectification of the Land Register as a consequence of ordering the rectification of a document which has been defectively expressed, and a person suffers loss thereby, he should not be entitled to indemnification from the Keeper in respect of that loss. (Paragraph 8.11; Clause 3(1)(b).)

14. Section 46 of the Conveyancing (Scotland) Act 1924 and section 41 of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be extended to govern the recording in the Register of Sasines of an extract order for rectification of a document as they currently apply in respect of the recording of an extract decree of reduction. (Paragraph 8.14; Clauses 3(3) and 3(4).)

15. Where the court orders the rectification of an entry in the Land Register or where a court order for rectification of a document is recorded or registered in any of the other public registers which we have specified, the rectification, recording or registration respectively should have effect as from the date when the entry was made, or as from the date when the rectified document was recorded or registered, provided that the court may specify some later date for the purposes of the protection of the interests of a third party. (Paragraph 8.17; Clauses 3(1)(a)(ii); and 3(2).)

16. Provisions comparable to those found in section 159 of the Titles to Land Consolidation (Scotland) Act 1868 should be made so as to enable the registration of a notice of an application for the rectification of a document or conveyance relating to land in the Register of Inhibitions and Adjudications, with the effect that the land to which the application relates shall be rendered litigious from the date of registration. (Paragraph 8.18; Clauses 1(6) and 1(7).)

APPENDIX A

Rectification of Documents (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Rectification of defectively expressed documents.
2. Protection of other interests.
3. Consequential provisions relating to certain registers.
4. Short title commencement and extent.

DRAFT
OF A
BILL
TO

Provide as respects Scotland for the rectification of contractual and certain other documents which are defectively expressed, and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Rectification of Documents (Scotland) Bill

Rectification of
defectively
expressed
documents.

1.—(1) Subject to section 2 of this Act, where the court is satisfied, on an application made to it, that—

(a) a document intended to express or to give effect to an agreement; or

(b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above,

fails accurately to express—

(i) the common intention of the parties to the agreement at the date when it was made; or

(ii) in the case of a document falling within paragraph (b) above, the intention of the grantor of the document at the date when it was executed,

it may order the document to be rectified in any manner that the court may specify in order to give effect to that intention.

(2) For the purpose of satisfying itself under subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral.

(3) Subject to section 2 of this Act, in ordering the rectification of a document under subsection (1) above (“the original document”), the court may, at its own instance or on an application made to it, order the rectification of any other document falling within paragraph (a) or (b) of subsection (1) above which is defectively expressed by reason of the defect in the original document.

(4) Subject to section 2(4) of this Act, where a document is ordered to be rectified under this section, the document shall have effect as rectified as from the date when it was executed.

(5) Nothing in this section shall apply to a document of a testamentary nature.

(6) It shall be competent to register in the Register of Inhibitions and Adjudications a notice of an application under this section for the rectification of a conveyance or deed relating to land, being an application in respect of which authority for service or citation has been granted; and the land to which the application relates shall be rendered litigious only as from the date of registration of such a notice.

(7) A notice under subsection (6) above shall specify the names and designations of the parties to the application and the date when authority for service or citation was granted.

EXPLANATORY NOTES

Clause 1

Subsection (1) implements Recommendations 1 to 3 of the Report. It introduces a new court power to order the rectification of a defectively expressed contractual or unilateral document (see paragraphs 2.11 and 2.12). At present rectification of such documents can only be achieved by the use of a combination of remedies, such as reduction and declarator, and procedural difficulties can arise (see paragraphs 2.9 and 2.10). The court is given a wide power to amend the document's terms as appropriate to ensure that it is correctly expressed.

Paragraphs (a) and (i) implement Recommendation 2. These provide for the rectification of a contractual document which fails to express accurately the contracting parties' agreement. The court may rectify the document to express the parties' intention as at the time they made their agreement (see paragraph 3.5).

Paragraphs (b) and (ii) implement Recommendation 3. The court may order the rectification of any document which does not fall within paragraph (a) and which is intended to create, transfer, vary or renounce a right. It is thus intended to cover unilateral documents which do not express their grantor's intention. The grantor will have to establish what his true intention was at the time of execution of the document (see paragraphs 3.9 and 3.10).

Subsection (2) implements Recommendation 5. This makes a further exception to the parole evidence rule by permitting the court to examine all relevant evidence extrinsic to the document. A similar exception already applies in respect of actions for reduction of a document (see paragraph 4.2).

Subsection (3) implements Recommendation 6 and provides the court with an ancillary power to rectify any document which is defectively expressed as a consequence of the defect in the original document which it is in the course of rectifying. The reference back to "any other document falling within paragraph (a) or (b) of subsection (1) above" limits the class of document subject to the court's ancillary power to the same categories of document subject to its original power of rectification (see paragraphs 5.1 and 5.2). Special provision is made for the consequential amendment of certain public registers (see Clause 3).

Subsection (4) implements part of Recommendation 10. It provides a general rule that rectification should have retroactive effect, going back to the date of the execution of the document and thus restoring the parties to the position they originally intended. This rule is qualified, however, in Recommendation 10, and in Clause 2(4), by the provision of a court discretion to fix some later date for the effectiveness of the rectification in order to protect relevant third party interests (see paragraphs 7.1 and 7.2).

Subsection (5) implements Recommendation 4 by expressly excluding testamentary writings from those categories of document which may be subject to the court's power of rectification (see paragraph 3.11).

Subsections (6) and (7) implement Recommendation 16 and supply the new remedy of rectification with provisions comparable to those which already apply in respect of actions for reduction and which will enable a notice of litigiosity to be registered in the Register of Inhibitions and Adjudications, thus prohibiting the voluntary alienation of land which might be affected by an order for rectification (see paragraph 8.18).

Rectification of Documents (Scotland) Bill

Protection of other interests.

2.—(1) The court shall order a document to be rectified under section 1 of this Act only where it is satisfied—

- (a) that the interests of a person to whom this section applies would not be adversely affected to a material extent by the rectification; or
- (b) that that person has consented to the proposed rectification.

(2) Subject to subsection (3) below, this section applies to a person (other than a party to the agreement or the grantor of the document) who has acted or refrained from acting in reliance on the terms of the document or on an entry in the title sheet of an interest in land registered in the Land Register of Scotland to which the document relates with the result that his position has been affected to a material extent.

(3) This section does not apply to a person—

- (a) who, at the time when he acted or refrained from acting as mentioned in subsection (2) above, knew, or ought in the circumstances known to him at that time to have been aware, that the document or (as the case may be) the entry in the title sheet failed accurately to express the common intention of the parties to the agreement or the intention of the grantor of the document; or
- (b) whose reliance on the terms of the document or on the entry in the title sheet was otherwise unreasonable.

(4) Notwithstanding section 1(4) of this Act, the court may, for the purpose of protecting the interests of a person to whom this section applies, order that the rectification of a document shall have effect as from such a date, later than the date on which it was executed, as it may specify.

(5) For the purpose of satisfying itself under subsection (1) above, the court may require the Keeper of the Registers of Scotland to produce such information as he has in his possession relating to any persons who have asked him to supply details with regard to an entry mentioned in subsection (2) above; and any expense incurred by the Keeper under this subsection shall be borne by the applicant for the order.

(6) Where a person to whom this section applies was unaware that an application had been made under section 1 of this Act for the rectification of a document before the document was ordered to be rectified (“the rectifying order”), the court, on an application made by that person within 5 years after the making of the rectifying order, may—

EXPLANATORY NOTES

Clause 2

Subsection (1) implements Recommendation 7. This protects a third party who has relied on a defectively expressed document, or an entry in the Land Register related to such document (see Clause 2(2), Clause 3(1)(a)(i), Recommendation 11 and paragraph 8.8) where rectification would adversely affect the interests of that person to a material extent. The court cannot order rectification under this subsection unless it is satisfied that such a person would not be so adversely affected or that he has consented to the proposed rectification. Subsections (2) and (3) specify those persons to whom the Clause applies. Rules of Court should provide the necessary procedure for ensuring that such persons receive adequate notice of an application for rectification (see paragraphs 6.1 to 6.3).

Subsection (2) takes the “third party” to be protected under Recommendation 7 and defines him as being a person other than a party to the agreement or the grantor of the document. The term “third party” is avoided as, strictly speaking, a person other than the grantor of a unilateral document would not be a “third” party. This subsection also includes the concept of “reliance” from Recommendation 7 which requires some act or forbearance on the part of a person whose interests are to be protected such that his position has been affected to a material extent. This is subject to subsection (3) which also limits the nature of the reliance protected (see paragraphs 6.1 to 6.3).

Subsection (3) implements Recommendation 8. For a third party’s interests to be protected his claimed reliance must not have been in bad faith. If he knew or in all the circumstances ought to have known of the defective expression in the document, he could not have relied on it in good faith. This subsection also requires that the third party’s reliance must in all other respects have been reasonable (see paragraphs 6.6 to 6.8).

Subsection (4) implements the remainder of Recommendation 10, the first part of which is implemented by Clause 1(4), which provides the general rule that rectification should have full retroactive effect, back to the date of execution of the document. This subsection provides the court with a discretion to make the rectification effective from some later date where this is necessary in order to protect relevant third party interests (see paragraphs 7.1 and 7.2).

Subsection (5) implements Recommendation 12 and gives the court an additional power to require the Keeper of the Registers of Scotland to produce such information as he may have regarding persons who have consulted a title sheet of an interest in land which may be the subject of rectification as the result of rectification of a document. This provision is designed to protect the interests of those who have consulted the Register. The Keeper maintains his own administrative records of such persons, which are not open to the public. Power is therefore given to the court to require the production of such information in order that it may fully assess the interests of all relevant third parties (see paragraphs 8.9 and 8.10).

Subsection (6) implements Recommendation 9 and is designed to protect relevant third party interests after the grant of an order for rectification, where such a person has not received notice of the application for rectification and, therefore, the court has not had an opportunity to take his interests into account when making its order. For a period of five years from the date of the rectifying order the remedies available under this subsection for such a third party are the payment of compensation by the original applicant for rectification, or the reduction of the rectifying order (see paragraphs 6.10 and 6.11).

Rectification of Documents (Scotland) Bill

- (a) order the applicant for the rectifying order or his legal representative to pay such compensation to the aforesaid person as it thinks fit in respect of his reliance on the terms of the document or on the entry in the title sheet, or
- (b) reduce the rectifying order.

Consequential provisions relating to certain registers.

3.—(1) The Land Registration (Scotland) Act 1979 shall be amended as follows—

- (a) in section 9 (rectification of the register)—
 - (i) at the end of subsection (3)(b) there shall be added the words—

“or the rectification is consequential on the making of an order under section 1 of the Rectification of Documents (Scotland) Act 1983.”;
 - (ii) after subsection (3) there shall be inserted the following subsection—

“(3A) Where a rectification of an entry in the register is consequential on the making of an order under section 1 of the said Act of 1983, the entry shall have effect as rectified as from the date when the entry was made: Provided that the court, for the purpose of protecting the interests of a person to whom section 2 of that Act applies, may order that the rectification shall have effect as from a later date.”;
- (b) at the end of section 12(3) (exclusion of indemnity) there shall be added the following paragraph—

“(p) the loss arises from a rectification of the register consequential on the making of an order under section 1 of the Rectification of Documents (Scotland) Act 1983.”.

(2) The recording in the Register of Sasines of an order under section 1 of this Act rectifying a document, or the registration for execution in the Books of Council and Session or sheriff court books of such an order, shall have effect as from the date when the rectified document was so recorded or registered.

Provided that the court, for the purpose of protecting the interests of a person to whom section 2 of this Act applies, may order that the recording or registration shall have effect as from a later date.

(3) At the end of section 46 of the Conveyancing (Scotland) Act 1924 (extract decree of reduction to be recorded) there shall be added the following subsection—

EXPLANATORY NOTES

Clause 3

Subsection (1) implements Recommendations 11, 13 and 15, making consequential amendments to the Land Registration (Scotland) Act 1979.

Paragraph (a)(i) implements Recommendation 11 and extends the court's current jurisdiction to order rectification of entries in the Land Register of Scotland to situations where rectification of the register would be consequential on the making of an order for the rectification of a document under Clause 1(1) (see paragraphs 8.1 to 8.8).

Paragraph (a)(ii) implements Recommendation 15 in so far as it applies to the Land Register. It states the general principle that rectification of the register should be retroactive so as to have effect from the date when the entry in question was originally made, but also adding the proviso that the court should be able to specify a later date for the purposes of protecting the interests of third parties (see paragraph 8.16). This reflects the approach taken in Clauses 1(4) and 2(4).

Paragraph (b) implements Recommendation 13 and adds a further exception to the entitlement to indemnity from the Keeper of the Registers of Scotland in the event of a person suffering loss as the result of the rectification of the Land Register. The exception in this case would be where the rectification of the Register was a consequence of the rectification of a document under Clause 1 (see paragraph 8.11).

Subsection (2) implements Recommendation 15 in respect of the Books of Council and Session and sheriff court books and makes similar provision to that of Clause 3(1)(a)(ii) regarding the retroactive effects of rectification (see paragraph 8.16 and also Clause 1(4) and 2(4)).

Subsections (3) and (4) implement Recommendation 14, making statutory amendments to govern the recording of an extract order for rectification (see paragraphs 8.12 to 8.15).

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“(2) This section shall apply to the rectification of a document by an order under section 1 of the Rectification of Documents (Scotland) Act 1983 as it applies to the reduction of a deed but with the substitution for any reference to the decree of reduction of the deed of a reference to the order rectifying the document.”.

(4) At the end of section 41 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (restriction on effect of reduction of certain discharges of securities) there shall be added the following subsection—

“(5) This section shall apply to an order under section 1 of the Rectification of Documents (Scotland) Act 1983 rectifying a discharge as it applies to a decree of reduction of a discharge.”.

Short title,
commencement and
extent.

4.—(1) This Act may be cited as the Rectification of Documents (Scotland) Act 1983.

(2) This Act shall come into force at the end of a period of 2 months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

APPENDIX B

List of those who submitted written comments on Consultative Memorandum No. 43

Association of Sheriffs Principal
Committee of Scottish Clearing Bankers
Committee of Senators of the College of Justice
Department of the Registers of Scotland
Faculty of Advocates
Faculty of Law, University of Aberdeen
The Rt. Hon. the Lord Fraser of Tullybelton
Professor W. M. G. Gordon
Law Society of Scotland
Mr. H. M. MacQueen
The Hon. Lord Maxwell
Mr. J. F. Rankin
Scottish Law Agents Society