SCOTTISH LAW COMMISSION

MEMORANDUM NO: 43
VOLUNTARY OBLIGATIONS
DEFECTIVE EXPRESSION AND ITS CORRECTION
30 November 1979

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 30 May 1980. All correspondence should be addressed to:

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MEMORANDUM NO. 43

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DEFECTIVE EXPRESSION AND ITS CORRECTION

1. There are a number of situations which can be classified under the general heading of "error" but which, on closer examination, can be seen to differ widely, and to attract varying legal consequences. Most of these, but not all, have already been examined by us in earlier Memoranda. In Memorandum No. 37[1] (which concerned abortive constitution of voluntary obligations) we discussed under the heading of "error in declaration" the problem which arises where an offer is expressed in terms which do not accurately reflect the intention of the offeror. In that instance the error is unilateral and originates at a point prior to consensus in idem having been reached. We also discussed in Memorandum No. 37 the problem of error in transmission of an offer.[2] It can be seen, as in the case of Verdin Bros. v. Robertson,[3] that error there occurs at a point when no consensus exists between the parties. In Memorandum No. 42[4] we considered unilateral error in its various forms, for example where a party's declaration does not correspond with his true intention, or where his intention was based on a misapprehension.[5]

2. In Memorandum No. 42 we indicated that a separate study should follow to investigate the problem that arises when parties have reached agreement but their agreement is later recorded inaccurately in the document purporting to be the embodiment of the contract. The concern of this Memorandum, therefore is to consider the adequacy of Scots law's treatment of that problem.

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[1] Paras. 26 and 27. See also Memorandum No. 36, para. 68.

[2] At paras. 28 and 29.

[3] (1871) 10M 35.

[4] Defective Consent and Consequential Matters.

[5] Para. 1.14, footnote 6.

3. The difficulty is one created by both parties, for although only one may have drafted the written contract, both will have signed or accepted the document under the misapprehension that it expresses their original agreement. In that instance the defect in the expression of the document originates after the meeting of the minds of the parties.

4. In the past, as we hope to illustrate in the course of this Memorandum, confusion has arisen by the courts' description of the problem as one of "error in essentialibus". However that term denotes error affecting consent but, as we have indicated, the problem we are addressing is one which arises after valid agreement has been made. It is only the expression of consent which is defective. Additionally, as Lord President Cooper[1] has noted, modern text-book writers have referred to the problem as one of "error in expression". However, although that term has been used in association with an accurate description of the problem, we consider that to avoid conceptual confusion the use of the term "error", in the context of the law of obligations, could with advantage be restricted to error affecting consent alone. Potential confusion between two legal categories of error thus can be avoided. The alternative we favour, to denote the problem as outlined, is "defective expression". Accordingly, we shall use that term in the course of this Memorandum, wherever that concept arises for past or future application.

5. Our examination will involve both defective expression which is apparent on the face of a writing and that which is not. We therefore divide the topic into the basic categories of patent and latent defective expression respectively.

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[1] In Anderson v. Lambie 1953 S.C. 94 at p.101.

6. In the case of latent defects we will consider in particular the problems which arise when a party requests a court to provide a remedy that will amend the written expression of a contract or other transaction. This form of remedy may be required when the amendment cannot be provided amicably by the parties themselves or by a court on an objective construction of the writing. Disputes may arise either when one party denies the existence of any defective expression, or where both parties recognise their document's inaccuracy but disagree as to the terms of their prior informal agreement.

7. In these circumstances, a legal remedy offering correction of the writing will probably be sought either to confirm title to heritable property, give true meaning and effect to a contractual obligation, or, in the realm of obligationes literis, to supply a missing term to a document in order that the obligation in its entirety may be enforced. The problem for a court in resolving such disputes encompasses questions of remedy, evidence, proof, standard of proof, construction, equity between parties and third party rights. We aim to illustrate Scots law's past and present treatment of these problems and indicate in what manner this area of law might be rationalised and reformed.

B. THE MAIN PROBLEMS IN THE PRESENT LAW: Historical Background

8. The Institutional Writers to varying degrees have shown interest in the question of defective expression when they describe the general approach which, in their respective views, the courts would adopt towards the problem.

9. An early viewpoint is expressed by Lord Kames in his treatise of 1760 on "The Principles of Equity". He took a wide view of the courts' equitable power of correction for defective expression and of equity he wrote:[1]

> "It sometimes supplies a defect in words, where will is evidently more extensive; and sometimes supplies defect even in will, according to what probably would have been the will of the parties, had they foreseen the event. By taking such liberty, a covenant is made effectual according to the aim and purpose of the contracters; and without such liberty, seldom it happens that justice can be accurately done."

He also identified potential sources of the problem and placed it in the context of the policy of the law as he saw it:[2]

> "Every act of will to make it binding requires two persons; one who consents to be bound, and one in whose favours the consent is interposed. This new relation betwixt an obligor and obligee must be compleated by words at least, signifying to the latter the will of the former; for nothing that is circumscribed within the mind can be obligatory. Words, at the same time, are not always depended on as evidence of will. Words are transitory, and apt to escape the memory; and for that reason, in matters of consequence, the precaution is commonly used to take down the words in writing. But a man, in expressing even his own thoughts, is not always happy in his terms. Errors may creep in, which are often multiplied when improper words are used to take down the words in writing. Words and writing may inadvertently go beyond, or fall short of will and consent. The common law in neither case affords a remedy. This rigour is softened by a court of equity. It admits words and writing to be indeed the proper, but not the only evidence of will. Sensible that words and writing are sometimes erroneous, it endeavours if possible to reach will, which is the only substantial part; and if from the end of purpose of the engagement, from collateral circumstances, or other satisfying evidence, the will of the obligor can be gathered independent of the words, the will so ascertained is made the rule of judgement. The sole purpose of words is to bear testimony of will; and if their testimony prove false, they are justly disregarded.

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[1] 1st edn.1760, Introduction, p.vii.

[2] Chapter III Section 1, p.40 of Book I, Part 1.

10. Bankton, Erskine and Stair limit their discussion of defective expression to that which is apparent ex facie of the deed. They accept that "mere errors of the writer are overlooked"[1] and that the courts may "rectify"[2] such an error by exercising its "praetorian power of correcting"[3] a clause to conform to both parties' instructions.

11. Bell did not examine the problem himself. The Editor, however, of the Tenth Edition of "Bell's Principles" does provide additional comment that covers the issue in the following terms:[4]

> "Error has in itself no legal effect. It becomes operative on a man's legal position only in exceptional circumstances. Hence in written agreements when consent is not doubtful or disputed, obvious mistakes and omissions are to be corrected from the general meaning or context and even more serious mistakes may be set right if the instrument itself afford the means of doing so; or, being latent or mere clerical errors, by the appropriate extrinsic evidence."

In this extract Guthrie makes a distinction between "mistakes" which are "obvious" or patent and those which are "latent". Similarly we divide defective expression into "patent" and "latent" categories and examine their treatment by the law.

Patent Defective Expression

12. This category of defect may be divided, for the purposes of analysis, into the traditional sub-categories of "error calculi" and "clerical error", which for future purposes can be designated as "defective computation" and "clerical defect" respectively.

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[1] Stair I, xi, 57(5).

[2] Bankton I, xxiii, 63, see also I, xi, 5.

[3] Erskine III, iii, 87.

[4] Bell's Principles 10th Edn.by William Guthrie, 1899 - para. 11 (emphasis supplied), no authority is cited for this last statement.

(a) Clerical Error - Clerical Defect

13. A clerical defect in a writing easily may arise through, for example, a mistake in dictation, an omission of words, a typographical error, an error in factual detail or even the failure to remove a particular clause from a standard form contract. Again the defect is normally apparent on the face of the deed and its means of correction can be found from the general purpose of the writing as correctly expressed.

14. An example of correction of a patent clerical defect is seen in the case of North British Insurance Company v. Tunnock's Trustees.[1] The facts are set out clearly in the case rubric:

> "A and B, in contemplation of marriage, jointly effected an insurance of £400 on their joint lives, payable on the death of either of the spouses. In framing the policy, the officers of the insurance company made the sum assured payable, not to the survivor, as was agreed upon by the spouses and expressed in their proposal of insurance, but 'to the executors, administrators and assigns of the said assured,' as in the case of an insurance upon a single life."

The Second Division noted that the insurance policy was an adapted printed standard form policy applicable for the simple case of insurance on one life. Alterations to the form had been necessary to make the policy relevant for joint lives. What became apparent to the court, in determining the dispute between the surviving spouse (supported by the insurance company) and the predeceasor's trustees, was that the particular expression directing payment of the sum assured "to the executors, administrators and assigns of the said assured" was inconsistent with the true general purpose and meaning of a contract for life assurance taken on joint lives. Lord Justice-Clerk Inglis said of the contract:[2]

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[1] (1864) 3 M1.

[2] at pp. 4 and 5.

> "Looking to the nature of the arrangement which these parties were making, on the face of the instrument without going further, it is clear that this instrument has been bungled .... The policy itself suggests in the most forcible way that there has been some clerical blunder, not that one word has been written instead of another, because this part of the contract is printed; but it is plain that this printed form should have been altered in such a way as to express the true nature of the contract."

The court did not hear parole proof of the parties' intentions but construed, and thereby corrected the deed, finally presenting the true expression of the parties' agreement as a matter of obvious equitable necessity. The Lord Justice-Clerk placed his reasoning in this context:[1]

> "In proposing to put our judgment on the ground which I have expressed, I am quite satisfied that I am not transgressing any rule of evidence in the law of Scotland, or impugning the settled doctrine which prevents resort to extraneous parol testimony to contradict the written contract of parties. Here I think we are free to do what plain justice demands without violating any rule of law."

15. Another example of clerical defect, again found in an insurance policy, is presented by the case of Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Company[2] where it was held that a clause of exception to forfeiture only had any real meaning if the word "not" were deleted. Lord President Dunedin stated that the word "not" clearly had been inserted through a failure to notice that the preceding conjunction was "unless" and not "if". The court, therefore, simply deleted "not" from its reading of the clause.

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[1] At p.5; Lord Benholme also reached the same conclusion, but by a different route. Whereas he admitted that the insurance policy was "plainly bungled" in respect of the spouses' rights inter se, he described the function of the insurance policy as being primarily to fix the liability of the insurance company. Therefore, he preferred to examine the spouses' collateral agreement in the proposal for insurance in order to correctly express their intent as it is related to the principal contract of insurance.

[2] (1906) 8F 915.

16. A further illustration of this problem is the case of Hunter v. Fox,[1] where the House of Lords corrected a patently defective expression by construction of the deed as a whole. The problem arose from circumstances where two adjacent properties had originally been owned by A. In 1958 A sold one of the properties to B. This first property was conveyed by duly recorded disposition which contained the following reservation relating to the second property:

> "My said disponee and her foresaids shall not plant or allow to grow any shrubs, trees or other plants or build any erections of such a nature as to exclude at present (emphasis supplied) a clear and open view of the sea from the said adjoining ground belonging to me without consent of me or my successors as proprietors of the said adjoining ground."

In the disposition this reservation was declared to be a real burden on the first property. B in turn sold this first property to C and by 1959 A had sold the second property to D. It was then that D raised an action against C for declarator that a valid and effective servitude of prospect had been constituted in favour of the second property, and for interdict against certain alleged actings of C that would be in contravention of the servitude.

17. It was the words "at present" in the reservation which became the focal point for argument on the validity of the constitution of the servitude. The pursuers at first contended that the words "or prevent" should be substituted for "at present". This approach, which would have involved an examination of the intentions and agreement of A and B, was abandoned in favour of a simpler plea that sought merely to treat the words "at present" as pro non scripto. This was also the approach favoured by the Lord Ordinary (Hunter) who identified the problem as one of "error in expression", most probably caused by a typist's blunder. He stated:[2]

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[1] 1963 S.C. 481.

[2] at pp.487-8.

> "The words 'at present' are wholly out of place in a provision which has its eye fixed on the future .... If, as I hold, the error is apparent, it can be corrected by construing the deed .... Moreover, in such a situation fairly robust methods of construction appear to be legitimate."[1]

Lord Hunter did not consider that the words "at present" added to or substracted from the meaning of the remaining words in their context and he stated that if this finding resulted in treatment of the words "at present" as if they had been deleted, he did not shrink from that result.

18. The defenders reclaimed successfully to the First Division which dismissed the action as irrelevant on the basis that the intrusion of the words "at present" created "ambiguity" which was fatal for the valid creation of a real burden. The judgment was delivered by Lord President Clyde, Lords Carmont and Strachan concurring. However, the First Division in turn were over-ruled by the House of Lords who found that no problem of ambiguity existed. Lord Reid considered that no authority cited was precisely in point and reasoned his judgment on general principles. He rejected the approach of the Lord President which had contemplated the words the conveyancer could have intended to insert instead of "at present". He stressed that ambiguity involved the possibility of more than one meaning and in this context he considered that the disputed words, on the contrary, had no meaning at all and were "mere surplusage".[2] Additionally, he stated that, if the meaning of a writing was "clearly apparent" that was sufficient to satisfy tests of "strict construction" and he could see no authority to support the contention that defective drafting which does not obscure meaning could be enough to invalidate a provision.[3] Similarly Lord Guest agreed with the Lord Ordinary that in effect the court was entitled to treat meaningless words as

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[1] Authorities cited: Erskine, Inst. III, iii, 87, Johnston v. Pettigrew (1865) 3 Macpherson 954: Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Co. Ltd., (1906) 8F 915; Gloag on Contract, (2nd edn.) p.435.

[2] 1964 S.C.(H.L.) 95 at p.101.

[3] at p.99.

pro non scripto. Viscount Radcliffe and Lords Pearce and Upjohn concurred.

19. The bounds of clerical defect do not terminate on points of grammar or of expression immediately apparent on the face of the writing. Its bounds may extend to defects which become apparent on investigation of the deed in all its surrounding circumstances. Extrinsic evidence may be used to prove a state of facts from which the inevitable inference is that some clerical mistake has occurred. On the establishment of the existence of the defect, the process of correction is then identical to that where the clerical slip would be immediately apparent and the correct expression is obvious.

20. An example of the type of problem which can arise is seen in the case of Coutts v. Allan & Co.[1] where the literal terms of the contract were corrected from an examination of the circumstances of the case. The facts were that C's agent wrote to A on 14th September 1754 acknowledging a bargain struck for "crop 1754 good and sufficient oatmeal ... deliverable at the harbour of Irvine, as soon as wind and weather will allow; payable at Martinmas (11th November) next and the 1st January, in equal proportions". A in turn acknowledged this letter stating that he expected the meal to be delivered within three weeks. C duly delivered the oatmeal but A refused acceptance because the oatmeal was crop 1753. C then brought an action for the price maintaining that "crop 1754" had been inserted through his agent's slip and that it could not have been the parties' intention, since it was impossible to deliver that crop within three weeks "seeing that the gentlemen's farm-victual in that country are not deliverable till betwixt Yule (Christmas) and Candlemass (2nd February)". The Court accepted this explanation and found A liable for the price of the meal.

[1](1758) Mor. 11549.

21. It had been counter-argued on behalf of A that if the stated terms of the contract were "impossible" to perform then they were void and of no effect. However, the distinction between this situation and the general rule that "a contract to do something known by all reasonable men to be physically or legally impossible is void"[1] must rest in the court's observance and assessment of all the circumstances of the contract. In the instance of a clerical defect, there should be no element of impossibility through ignorance or frustration of purpose or subject matter.[2] Rather the contract itself should indicate that the only element of impossibility is the suggestion that the parties should have intended an obligation to arise in the form expressed, when an alternative expression had been available that would complete the sense of the writing in a manner obvious to its context. The case of Coutts v. Allan & Co. is an example of the situation.

22. A further example of the problem of clerical defects in a writing could be imagined from the following circumstances. A games manufacturer and retailer conclude an oral agreement for the manufacture and delivery of a certain number of dominoes of specified dimensions measured in millimetres. Through a clerical slip in the reduction of the agreement to writing the dimensions are given in metres. In these circumstances, and perhaps where the game of dominoes has ceased to be fashionable, the retailer may seek to avoid his true obligations under the agreement on the basis that the written contract guarantees him dominoes of different, albeit ridiculous, proportions from those delivered. However, under present law, a court should have no difficulty in correcting a patent clerical defect in expression. In this example, only measurement given in millimetres would produce reasonably

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[1] Gloag on contract p.334.

[2] See Memorandum No. 37, paras. 30-34.

sized dominoes that would be practicable for normal use. The price demanded also should indicate the most likely quantity or dimensions both parties must have wished to express. On receipt of averments to that effect a court is then able to construe the deed conform to the normal and reasonable results that may be presumed to have been intended.

23. In general, and although we hold a very different view on other aspects of the present law on defective expression, we find the law pertaining to clerical defect in a writing to be satisfactory. However, we provisionally propose that the law should be restated, as part of a complete legislative treatment of defective expression, to the effect that a court may correct a clerical defect in any writing if its intended terms are obvious and can be construed either from the writing itself or from its whole surrounding circumstances.

Comment is invited.

(b) Error Calculi - Defective Computation

24. The essence of defective computation is that it involves a mistake in computation which is apparent on the face of a document. This sub-category of patent defect was discussed by the Second Division in the case of McLaren v. Liddell's Trustees.[1] The action was one of count and reckoning, involving a contract of copartnery whereby, in the event of the death or insolvency of either partner, the partners' respective shares of firm capital were to be held as shown in the firm's last balance sheet. The pursuers here questioned the accuracy of the figures expressed in that final balance. Lord Justice Clerk Inglis held that the Court could consider only a patent defect in its assessment of the balance sheet and in particular referred to error calculi, which he defined as:[2]

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[1](1862) 24D 577.

[2]at p.584.

"... some mistake in the use of the ordinary rules of arithmetic in bringing out these figures; or that on the face of the documents there is some other palpable and obvious error, the means of correcting which are to be found in the writings themselves. Whether that latter kind of error is properly an error calculi may be doubted. I do not think it is, in the strict sense of the terms; .... But I am quite satisfied that nothing short of an error which is patent on the face of the writings themselves, and the means of correcting which are to be found in the writings themselves, can be looked to."

25. Lord Neaves did not wish to restrict himself to a limit of inquiry and stated:[1]

"I do not think it necessary to lay down all the kinds of objections which might be competently stated against it (i.e. the balance sheet). No doubt errors calculi and errors resulting from the insertion of an item on one side which should have stood on the other, might be so stated. If there be other errors that may be so stated, they must either, I think, be palpable, and appearing ex facie of the balance sheet, or at least they must be specially and precisely condescended on. If, for instance, as has been supposed in argument, £1,000 lying in a chest were forgotten, that omission would need to be specially condescended on as a matter of fact."

The latter point does not relate to defective computation strictly stated, as it goes beyond the deed. However, the court's problem of dealing with any form of defective expression can be seen from its requirement that "error" must be averred specifically and the correct solution presented if the court is to be in a position to grant rectification.

26. Lord Benholme also included accounting errors within the scope of the Court's review. He claimed that such errors could be as palpable as those of simple arithmetic

[1] at p.586.

where, for example "the parties had made two and two make five or three". He qualified this by stating that he was willing to consider "gross error in the items of account" and that they should be found "within the four corners of the balance sheet which is challenged".[1]

27. An alternative point of view is seen from the earlier House of Lords' judgment in Turnbull's Trustees v. Robertson.[2] The appellants had contended that a clear example of the defective application of accounting principle could be included under the term error calculi. However, this approach was not adopted by the House of Lords. This case related to the challenge of a decree arbitral, and it was the contention of the respondents, as a matter of established Scots law, that such challenge could be admitted only on the grounds of corruption, bribery or falsehood. The Inner House had not included error in accounting principle as being within the category of "error calculi" and, similarly, the House of Lords held that the defect could not be stated as "one which ranks with what are denominated errors of calculations," adding "if there be an error, it is that which has arisen in their minds on the application of the law to the principles on which they have decided."[3] The House of Lords then concluded that an award of arbiters could only be impeached on the aforementioned heads of corruption, bribery or falsehood and the case was determined on that point.

28. The question remains whether, as Lord Benholme suggested, a palpable error in accounting principle should be equated with arithmetical mistake and brought under the heading of defective computation. We recognise that in modern accounting practice, accountants now may operate within a very wide area of discretion and that it may be open to professional debate whether a particular accounting principle should be adopted or as to how

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[1] at p.585.

[2] (1825) 1W and Sh. App. 143.

[3] per Lord Gifford at p.153.

a particular item should be classified within a given system, but we consider that there may be instances of obvious misapplication of particular principles, or misclassification of items within a system, which could not be supported as correct or acceptable practice by any accountant. An example of this kind of defective computation might be where a system of historic cost accounting was in use, but principles of current cost accounting had been erroneously applied in respect of certain items of account.

29. In order to evaluate the potential extent of this problem we would particularly welcome the comment and advice of the accountancy profession, and individual accountants, on the likelihood of it being possible for courts to make objective assessment of defective accountancy practice. For this purpose, it would be extremely useful if examples of the kind of problem envisaged could also be provided.

30. Accordingly, in order to elicit comment on the matter we provisionally propose that the law be restated to the effect that the courts be empowered to correct not only defective computation apparent on the face of a writing, but also obvious misapplications of accounting principle or the misclassification of particular items within the accounting principle adopted.

Comments are invited.

31. Additionally, we consider that, in the event of an accounting defect, the potential complexity of an alleged defect in computation should be no obstacle to the court's act of correction. Section 13 of the Administration of Justice (Scotland) Act 1933 and Rule of Court 38, without prejudice to the provisions regulating the appointment of

Nautical or Patent and Designs assessors, provide the Court of Session with specific power, on the joint motion of parties, to summon to its assistance at the trial or proof or at any hearing, whether in the Outer or Inner House, a specifically qualified assessor. Similar provision is available for the Sheriff Courts[1] and consequently there seems to be no need for legislation on this matter.

Latent Defective Expression

32. Latent, or non-apparent, defective expression poses a different nature of problem from that where a defect is patent on examination of the deed itself. The defect cannot be corrected by obvious, objectively based means of construction, nor will the surrounding circumstances of the contract necessarily indicate any defect in its form. Although the cause of the defect may have been as simple a clerical mistake as that witnessed in the example of patent defects in expression, the mistake or omission is not such as to affect the apparent validity of the expression in the writing.

33. Illustrations of this problem can be seen in the following situations:

(a) two parties have negotiated the rental of a shop at £3,000 per annum, on which they are both agreed, but the written lease that is drawn up and executed states the much smaller sum of £1,000 as rental;

(b) in the context of an exclusive dealing agreement, A and B agree that A will sell and B will buy all the soft fruit B shall require for his jam manufacturing business over a three year period and, unfortunately, in framing the written contract B erroneously provides that he shall buy all the fruit he shall desire and A also fails to notice the mistake.

[1] See Sheriff Courts (Scotland) Act 1971 S.32, which grants power to the Court of Session to make acts of sederunt to regulate and prescribe Sheriff Court procedure and practice. S.32(1)(g) makes specific reference to the power to regulate the summoning, remuneration and duties of assessors in Sheriff Court actions.

It is at this stage that a party may seek to qualify that writing by use of extrinsic evidence that will disprove the apparent validity of the expression of the contract. This will be achieved not by evidence of individual intention but by demonstration of the fact that the writing to some material degree fails to represent the prior concluded consent of both parties to their agreement. The proof of prior agreement obviously would be a prerequisite for the court's consideration of correction. The question whether Scots Law permits the use of evidence extraneous to a written contract for such purposes is next considered.

Evidence of True Agreement and the Parole Evidence Rule

34. We have indicated already the broad terms in which both Kames and Guthrie recognised that extrinsic evidence could or should be produced to prove the intent of both parties to a contract where defective expression is alleged.[1] However, the reference back from a written contract to some informal agreement would appear to conflict with the parole evidence rule. This in turn can be classified as an example of the best evidence rule which also is explained by Bell, and his editor in the following terms.[2]

> "That is to say, in point of law (as well as in just reasoning) no evidence is to be received which necessarily implies, 'e.g. as parole adduced to prove the contents of existing writings', the existence of better evidence. 'Thus when a contract is embodied in a formal writing, the intention is to be gathered from the writing alone, which supersedes and excludes all preliminary negotiations or communings whether oral or in letters. But in construing the words of the deed or contract, it is proper to take into consideration the facts and circumstances with regard to which they were used'."

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[1] See paras. 11-14 ante.

[2] Bell's Principles para. 2258.

That is the rule strictly stated, but it is one that is subject to many exceptions.[1] The problem is whether the rules of evidence again recognise an exception to the general rule in order to accommodate with certainty the needs of a litigant attempting to establish latent defective expression.

35. An opportunity for consideration of this problem arose in the case of Waddell and Others v. Waddell and Others.[2] The facts of the case were that a father raised an action against his son and certain debtors in a bond and disposition in security to establish his right as the creditor of the bond which, he alleged, by error or inadvertance on the part of the agents who framed the deed, mistakenly had been taken and recorded in the name of his son. He concluded, first, for the reduction of the bond insofar as in favour of the son; second, for declarator that he, the father, was the true creditor in the bond; and thirdly for the adjudication of the lands and bond to him. The pursuer's allegations were averred in detail in the record.

36. One of the principal objections raised on behalf of the son in defence, was that the pursuer was seeking to vary the terms of the written deed by parole evidence. The Lord Ordinary repelled this objection by treating the problem as one of "error". He concluded that it was not sought to control the deed but to set it aside (or at least part of it) and that error normally was a good ground for doing so. He noted that it was common practice for error or fraud to be proved by parole evidence.

37. The First Division adopted a similar approach, categorising the matter as one of error in substantialibus.[3] However, the case was thought of as being unusual and both

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[1] See Walker & Walker, The Law of Evidence in Scotland s.240, and Scottish Law Commission Research Paper on the Law of Evidence of Scotland, by Sheriff I D MacPhail, paras. 15.31 - 15.39.

[2] (1863) 1M 635.

[3] See p.637.

Lord President MacNeill and Lord Ardmillan lay emphasis on the equitable nature of the grant of remedy to the action as raised. Lord Ardmillan claimed that:[1]

> "It would be deplorable if there were no remedy at all in a case where judicial interposition is absolutely necessary to do justice between man and man".

Issues were allowed in this case and it is clear that in principle the court was willing to grant a remedy, but on the basis of partial reduction, in the first instance, for essential error. This we consider overlooks the true nature of the problem which was one not of error affecting consent but of simple defective expression.

38. In contrast, a different approach was adopted in Grant's Trustees v. Morrison,[2] a case where both parties agreed that the writing was inaccurate but disputed the terms of their agreement. The problem concerned the meaning of terms in a back letter relating to a security transaction over heritable subjects, and the First Division held that proof of the allegations of defective expression was not limited to writ or oath but that the truth of the matter should be ascertained in the ordinary way. This case was directly followed in Grant v. Mackenzie[3] as is shown in the judgment of Lord McLaren:[4]

> "In the leading case on this subject, Grant's Trustees v. Morrison, the late Lord President made the observation that when parties are agreed that the written contract does not truly express the agreement, then parole evidence is admissible. This is the doctrine very well founded in principle, for if both parties are agreed that the writing does not express the contract, and yet differ as to what the real contract is then unless evidence were admissible, there would be a complete impasse - no solution being possible."

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[1] at p.639.

[2] (1875) 2R 377.

[3] (1895) 1F 889.

[4] at p.894.

This proposition, of course, remains qualified by the rule that if one party asserts that the deed truly expresses the parties' agreement or arrangement, proof that the agreement was different would be restricted to writ or oath.

39. Latent defective expression was again considered in the case of Glasgow Feuing and Building Company v. Watson's Trustees[1] where the terms of a feu contract were clear and unequivocal but nonetheless were alleged to be mistakenly expressed. The facts were that Watson, a feudal superior, undertook by feu-contract to make certain roads on the subjects feued. These were to be delineated and coloured brown on a plan attached to the contract. Owing to a plan-colourist's mistake, additional roads were coloured brown and this blunder was never noticed by the parties. Several years later, when the Feuing Company had acquired the land from the original vassals, it constructed these additional roads itself, and then discovered the conditions in the feu-contract. An action was brought by the Feuing Company against the superior for repayment of the cost of construction which was followed by the superior's action, the two actions later being conjoined, in which the superior sought reduction of the feu contract so far as it imported an obligation on him with regard to the additional roads. This remedy was based on the contention that the feu-contract originally had been signed under "essential error as to the import and effect in relation to the roads" which the superior would be bound to form.

40. The fact that the defective expression was identified in pleadings as "essential error" did not raise problems of admissibility of extrinsic evidence and the matter does not

[1](1887) 14R 610.

feature in either the Lord Ordinary's or the Second Division's opinions. Both parole and documentary evidence were adduced to prove the "error". However, Lord Young, delivering the judgment of the Second Division, did recognise the true charactertistics of the problem the court was dealing with:[1]

> "The mistake is thus of the nature of a clerical error, and indeed a plan colourist's error in "tinging" a road is perhaps of even a more mechanical character. It is not the case of both or either of two parties contracting under the influence of error, for here the parties were under none. It is the case of the instrument which was intended to express their contract, as to which they were quite agreed, failing through the blunder which I have mentioned to express it accurately. I agree with the Lord Ordinary that on satisfactory evidence of such a mistake this court would not hesitate, as between the original parties, to rectify it. Neither of them would be permitted to take advantage of such a mistake either by cancelling the contract altogether should he have repented of it, or by taking an unconscionable benefit to the prejudice of the other."

"Rectification" was granted in the form of partial reduction as concluded for by the superior.

41. The restrictiveness of the approach that admits extrinsic evidence of prior agreement only when linked with the remedy of reduction, is demonstrated by the case of McKinlay v. Life and Health Assurance Association Ltd.[2] The relevant facts are outlined succinctly by the Lord Ordinary (Johnston):

> "The species facti alleged are that, in June 1903, the pursuer was induced to transfer his insurance from another company to the defenders, by Mr Patrick Simpson Edinburgh, 'an agent of the defenders', provided that

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[1] at p.618 (emphasis supplied). The term "clerical error" here is used in a sense wider than "clerical defect" patent ex facie of a writing.

[2] 1905 13 S.L.T. 102.

> the terms of insurance were the same; that he was assured by Mr Simpson, as 'representing the defenders' that the policy which would be given him by the defenders would be in the same terms as that which he held; that relying on this assurance he agreed with Mr Simpson 'as representing the defenders' to insure for £100, at a premium of 23s., the other terms of the contract to be the same as those of the policy he held, which he handed to Mr Simpson; that on 24th June 1903 he filled up and delivered a proposal form for an indemnity of £100; that he paid his premium and received his policy on the same day, but that the policy, which he did not look at for months after, was disconform to his agreement with Simpson and his proposal .... The proposal, when filled up by the pursuer contained no limit of liability on any one accident. But after it was handed to the defenders' company a note was added by the defenders' officials, bearing 'limit for any one accident, £25'".

A third party made a personal injuries claim against the pursuer, who in turn filed against the insurer in this litigation claiming that, inter alia, having contracted in fact for an indemnity of £100 he was entitled to such indemnity for its full amount. However, the Lord Ordinary found that on the simple plea presented he could not hear evidence of the alleged prior agreement and held that:[1]

> "Had matters stopped with the proposal and the payment and acceptance of the premium, I think there would be much to say for there having been a completed contract of indemnity which the defenders could not modify by a private addendum of a limit of liability on any one accident and which was not held in abeyance pending the issue of the formal policy, McElroy v. London Assurance Corporation (1897,) 24R 287. But as soon as the policy was issued and accepted, the policy became the contract, or the embodiment of the contract, between the parties, and so long as it remains unreduced, the prior agreement for a policy cannot be looked at. Albion Insurance Co. v. Mills 1828, 3W & S 219 (Lord Chancellor, 231 et seq.). I can understand an action for reduction of the policy, and to compel the issue of one in terms of the alleged agreement or damages. But I do not think that it would be in accordance with Scots procedure to reform the instrument in accordance with the alleged true contract in a petitory action proceeding, not on the existing instrument, but on the alleged true contract."

[1] at p.103. Cf. Lord Benholme's approach in Tunnock's Trustees ante.

42. It has not always been the case, however, that Scottish courts have refused to provide an equitable solution to problems of defective expression where reduction has not been an available remedy. The opportunity to allow equitable principles to prevail in such circumstances was both provided and taken in the case of Krupp v. Menzies.[1] This case concerned a formal minute of agreement between the proprietor and the manager of an hotel, by which the proprietor bound himself to pay the manager "one-fifth part of the net annual profit of the business". The proprietor averred that he had instructed the draftsman of the deed to copy another, similar agreement between himself and the manager of another hotel, in which the amount agreed upon was one-tenth of the annual profits, but to half that figure. Unfortunately by an arithmetical mistake, the draftsman had calculated half of one-tenth as one-fifth rather than as one-twentieth. Five years later the manager brought an action against the proprietor for payment of one-fifth of the net profits of the hotel during that five-year period. The deed was ex facie valid and the hotel manager would not admit of any mistake in it. The defenders sought to lead extrinsic parole evidence to demonstrate the latent error. They were unsuccessful in the Outer House and reclaimed.

43. Lord President Dunedin described the case as having:[2]

> "nothing to do with the avoidance or re-formation of the contract. The only question is whether proof is admissible that a document which in ordinary circumstances would be held to express the intentions of the parties does not in fact do so."

Although he agreed with the contention that "it is a very delicate matter to interfere with a written contract expressed in clear terms", nonetheless he balanced this with the important consideration in equity that:[3]

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[1] 1907 S.C. 903.

2 at p.908.

[3] at p.908.

> "... 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."

In this example, the latter element of equity carried most weight with the Lord President and he concluded that he was in no doubt that proof of the true agreement should be allowed.

44. The remainder of the First Division concurred, though only Lord McLaren delivered a judgment. Lord McLaren's reasoning is short and principally based on the rules applicable to defects which are patent on the face of the writing. This method of equation of patent with latent error in expression is a further example of the confusion which permeates much of the Scots case law on the topic.

45. The present leading authority on latent defective expression is the case of Anderson v. Lambie[1] which provides a modern House of Lords ruling on the matter. Here the pursuer sought reduction of a disposition on the ground of "essential error on the part of both the pursuer's agents and the defender's agents" in the drafting of the deed, which subsequently had been recorded in the Register of Sasines. It was claimed that the disposition purported to convey more than the land agreed to be conveyed in missives concluded for the sale of a farm. In this instance, therefore, the mistake was in the dispositive clause of the deed itself.[2]

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[1] 1954 S.C.(H.L.)43.

[2] i.e. The defect existed in the most central provision of the transaction, affecting a real right in land - cf. Glasgow Feuing Co. v. Watson's Trustees (para. 39 ante) where the defective expression affected a personal right in respect of which it was held the principle of the "faith of the records could not apply (see para. 89 post).

46. The purchaser would not admit the inaccuracy and also argued that a registered conveyance could not be competently reduced. The Lord Ordinary (Mackintosh) preferred the authorities of Waddell v. Waddell and Krupp v. Menzies and allowed a proof before answer of the parties' averments on record.

47. On reclaiming to the First Division the opinion of the court was delivered by Lord President Cooper who held that the previous interlocutor should be recalled and the action dismissed. The Lord President also rejected the cases of Waddell and Krupp, in the former finding it impossible to discern "any clear and intelligible ratio which we are bound to follow", and stated:[1]

> "I cannot discover in the imperfect report that the case was laid upon error common to both parties, the indications rather pointing to unilateral error not induced by the other party to the contract."

He distinguished Krupp on its facts as a case concerned with a service agreement as opposed to an agreement relating to heritage. In law he found that the case did not bear to be a continuance or extension of Waddell (as it was not cited) and moreover that it was a case treated with suspicion by

[1] 1953 S.C. 94 at 105.

legal writers.[1] Lord Cooper here saw no scope for the operation of equity. On the contrary he emphasised that

[1]Lord Cooper refers to Gloag on Contract (2nd Edn.) p.437, fn: "Indeed Krupp v. Menzies (1907 S.C. 903) and Waddell v. Waddell((1863) 1 M 653) seem to indicate that the Court will go further, in allowing proof of a mistake in expression which one party does not admit, than the English courts would be prepared to go (see May v. Platt [1900] 1 Ch. 616; Craddock v. Hunt [1923] 2 Ch. 136."
In May v. Platt, the statement of Farwell J., which may seem relevant runs:
"If there is a latent ambiguity in the description of the property conveyed so that the words used are susceptible of two meanings, parole evidence is admissible to show that the facts within the knowledge of both parties agree with one only of the suggested meanings. But where there is, as here, no ambiguity at all, but the property is conveyed by a clear and definite description and plan, parole evidence to contradict the deed is altogether inadmissible." (at p.620).
For this proposition Farwell J. refers to Cato v. Thompson 9 Q.B.D. 616, but there Lindley L.J. (at p.620) also indicated that:
"an express bargain to make a good title cannot be modified by parole evidence. Such evidence would be admissible in an action to reform the contract, but it is not admissible for the purpose of construing it."

(Emphasis supplied - the term "reform" is here used in the American sense of "rectification" or "correction"). Indeed this principle is followed also by Farwell J. in May v. Platt (at p.621) as seen in his statement:
"In a suit for rectification, parole evidence of mutual mistake is of course admissible to show that the completed deed is not in accordance with the true agreement between the parties."
Similarly Craddock v. Hunt, and the authorities cited therein, follow this principle.

Therefore, although Gloag's statement is certainly correct, it may be appropriate to bear in mind also that as Scots law had not recognised a "suit for rectification" as such, a Scottish approach to a given problem in this area may not be directly comparable to the English example. If English law creates a procedural category of rectification which alone permits the production of extrinsic evidence to prove defective expression - a category not recognised in Scots law - any attempt by the Scottish legal system to achieve the same substantive result inevitably must do so by different means.

Lord Cooper's second reference is to the Encyclopaedia of the Laws of Scotland, Vol. 6, p.175, para. 380, Krupp v. Menzies is discussed and it is noted that "An English authority there referred to has been doubted in England." The English authority in question is Harris v. Pepperell 1867 L.R. 5 Eq. 1, but it is only referred to by the defenders and reclaimers and not by the court in its reasoning.

"the faith of the records is a cardinal and distinctive feature of the Scottish law of heritable rights"[1] and that therefore the use of extrinsic evidence to prove and later correct a defect in a recorded disposition should be deemed inadmissible

48. The House of Lords, in its turn, over-ruled the First Division. The leading judgments were delivered by Lords Reid and Keith. Lord Reid's first proposition was that:[2]

> "In my judgment, if the two parties both intend their contract to deal with one thing and by mistake the contract or conveyance is so written out that it deals with another then as a general rule the written document cannot stand if either party attacks it. That appears to me to be supported both by authority and by principle."[3]

He therefore established the problem as one of defective expression and not of essential error as originally claimed. However, the Court's general approach was one linked to the remedy of reduction as sought. The admission of extrinsic evidence to prove a prior contract or agreement was seen as one of the exceptions to the general rule prohibiting its use. Lord Reid reasoned:[4]

> "As Lord Watson said in Lee v. Alexander 10R (H.L.) 91: 'According to the law of Scotland the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract in toto, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties.'
>
> But when it is sought to reduce a deed it is necessary to go behind the deed and discover the real facts."

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[1] at p.103.

[2] 1954 S.C.(H.L.)43 at p.57.

[3] The authorities cited are Krupp and Glasgow Feuing Co.

[4] at p.62.

This perhaps highlights the fact that it was correction of a conveyance, and not a contract, which was required in that case. However, this presented no conceptual difficulty, as Lord Keith reasoned:[1]

> "It would appear to be true from an examination of the authorities that there is no precedent which discloses a case of common mistake affecting the subjects conveyed by the dispositive clause of a feudal conveyance. But I have not been able to bring myself to the view that common mistake in such a connection can or should have different results from what it has when it operates to affect any material term or clause of a contract or conveyance. The remedy sought does not seem to involve any peculiar application of equitable principles but to depend on the application of ordinary principles of contract law so far as these are consistent with the principles of feudal conveyancing."

49. Throughout the judgment of the House of Lords, the distinction between patent and latent defects was made. It was clear that extrinsic evidence was not just being admitted in order to construe the deed (as would be the case with patent error) but to prove the parties' real common intentions which later had been expressed wrongly through a mistake in drafting unnoticed by both parties. The court granted reduction, receiving an undertaking from the appellant that he would then grant a new (presumably correct) disposition conform to the agreement in the missives.

50. All of the previously cited authorities have been reviewed recently in the Outer House by Lord Maxwell in the case of Hudson v. Hudson's Trustees[2] which we next consider. This is a somewhat special example, as the issue centred on an erroneously expressed inter vivos trust deed to which

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[1] at pp.64-65.

[2] 1978 S.L.T. 88.

Lord Maxwell held that the principles of contract law applied.[1] The important distinction, however, between the relationship of truster and trustee from that of two contracting parties is that although the proof of the existence of a trust may be restricted to writ or oath, once the trust has been established its terms may be proved by other means.[2] The question of admissibility of extrinsic evidence to prove the intended expression of the trust was therefore not a problem for the court,[3] whose main concern was one of remedy.

51. It may be seen that the development of this area of Scots law has been fraught with difficulty. Indeed the case of Krupp (though criticised and doubted) stands alone as authority, not conceptually linked with the remedy of reduction, in justification of the admission of extrinsic evidence to prove defective expression.

52. We shall next examine remedies for defective expression, but we suggest, however, that the prerequisite for any remedy of correction should be the adequate proof of the defect sought

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[1] At p.90 he states "The relationship between a truster and his trustees is in a sense contractual (Allen v. McCombie's Trustees 1909 1 S.L.T. 296, 1909 S.C. 710, per Lord McLaren.) Lord McLaren also distinguished the situation of an inter vivos trust (where a contractual relationship may be said to exist between the truster and the trustees) from that of a testamentary trust where no contractual relationship exists between the trustees and the beneficiaries under the trust.

[2] Livingstone v. Allans (1900) 3F 233.

[3] In this instance, it was averred that the truster's then solicitors, contrary to his intention and through their fault had omitted the truster's children and their spouses and issue from the list of the trust's beneficiaries. The truster was able to produce a letter addressed to his solicitors, dated prior to the execution of the trust, which clearly indicated that "the trust in question was primarily intended for the benefit of his issue". Whereas this would normally have been an important, if not essential, adminicle of evidence as to the truster's intentions, the pursuer's intentions here were admitted by the trustees. (See Lord Maxwell at p.89).

to be rectified and of the true agreement sought to be recognised. We consider that for a litigant to be able to discharge his burden of proof in face of the denial of defective expression by the other contracting party (and therefore whose writ or oath as a means of proof would seem unavailable or unrealistic), the basis and the scope of the admissibility of extrinsic evidence should therefore be clear. The creation of a clear rule admitting such evidence could also eradicate the need to treat the problem of defective expression as one of "essential error" merely in order to obtain the benefit of a similar rule of evidence in the context of the remedy of reduction. On this point Gow, when discussing consensual error, concluded that:[1]

> "Once overt recognition is accorded to the proposition that even where parties have reduced their agreement into a probative writing parole evidence is admissible to show that the writing incorrectly expresses that agreement, cases such as Krupp v. Menzies, Waddell v. Waddell, Anderson v. Lambie and the like disappear from the rubric of error."

53. In light of the above considerations, we provisionally propose that when it is averred that a writing which purports to record accurately an agreement has failed to do so, proof should not be restricted to writ or oath and it should be competent to adduce extrinsic evidence, whether parole or written, of that agreement.

We invite comment.

Remedies

54. Modern Scottish legal writers have concluded that at present reduction is the competent remedy for defective

[1] Gow, op. cit., pp.56-57.

expression.[1] The fact that this is identified as the available remedy may be understood from the opinion of Lord Reid in Anderson v. Lambie where he was in no doubt that:[2]

> "... 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."

55. However, the reality of the operation of some form of equitable principle of correction in Scots law is seen by Lord Maxwell in Hudson v. Hudson's Trustees where he is able to state that:[3]

> "In every case cited to me in which it was agreed or proved or offered to be proved that, through error, a document failed to record the true intention of the parties to it the court has given a remedy by way of correction or held expressly or by implication that such a remedy would be available if the averments were proved. But the procedural nature of the remedy has varied with the circumstances of the case."

Hence in Waddell v. Waddell the remedies sought were reduction, declarator and adjudication, in the Glasgow Feuing Company case the court allowed correction by partial reduction; in Anderson v. Lambie reduction of the disposition was granted on an undertaking by the appellant to the court that he would grant a new disposition of the farm, conform to the missives (though thus changing temporarily the other party's right from one in rem to one in personam); and in Hudson v. Hudson's Trustees the pursuer was able to amend the closed record to conclude for first declarator and then reduction, decree being granted in terms of the amended conclusions. In

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[1] D M Walker Civil Remedies, at p.152, T B Smith Short Commentary on the Law of Scotland, at p.827.

[2] at p.61.

[3] at pp.91-92.

Krupp v. Menzies no such remedy was necessary, the pursuer's service having terminated before the action was raised, and non-enforcement of the erroneously expressed terms of the contract was all that was needed to prevent injustice.

56. Another aspect of the practical effects of the lack of a remedy of correction is illustrated by Lord Maxwell's statement that:[1]

> ".... The court has no power merely by declarator to alter the terms of the settlement and that to enable the pursuer to get the remedy which in substance he seeks, the court must get the existing erroneous settlement out of the way by reduction before or contemporaneously with the pronouncement of an appropriate declarator. I think, with some regret, that I must also accept this limitation on the court's power. I say 'with some regret', because I find it unfortunate that, if I am to achieve the substantive result which the pursuer seeks, I have to do so by means of an interlocutor which to the non-lawyer is likely to appear unnecessarily cumbersome and obscure."

This opinion may be seen to highlight the fact that, in the absence of a direct remedy of correction, the courts have to resort to a cumbersome combination of existing remedies in order to produce a just and therefore desirable result.

57. Such relief as the courts have been able to provide nonetheless has managed to avoid the "all or nothing" approach of an action for outright reduction. This would appear to stem from the litigant's need and wish to achieve a result that does not necessitate the termination of the entire contractual relationship. Additionally it may be foreseen that total reduction could produce inequitable results for a contracting party should his co-contractant seek to avoid his overall obligations by relying on a simple defect in the drafting of the deed.

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[1] Hudson's Trustees at pp.91-92.

58. In Anderson v. Lambie Lord Reid made it quite clear that:[1]

> "... it is beyond the power of a Court to make a new bargain for the parties, and if partial reduction would have that result it would plainly be incompetent."

Similarly, it is our opinion that the act of correction of a writing should not involve the court in the creation of new contractual terms, nor should it be seen as a means, for one party, of varying an existing contract. On the contrary, we think that the role of the court simply should be to hear proof of the parties' common intent and, when satisfied that the written contract has failed to express correctly their agreement, should provide formal recognition, and if necessary enforcement, of the agreement which it has been proved was actually made.

59. In the case of patent defective expression, correction is easily provided by proper construction of the deed. With latent defects all that may be necessary to produce correction may be the non-enforcement of the obligations as expressed. However, it may also be necessary to delete words, substitute new words, or even introduce some expression that has been omitted from the writing altogether. It is in these cases that Scots law fails to provide a direct remedy.

60. It may be seen that equity can only operate within the existing framework of positive or common law - a function which has been performed in what has been the awkward, uncertain manner outlined by Lord Maxwell and as seen in the examples of past case law. The solution of this problem, therefore, would seem to be in enabling the courts to correct

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[1] 1954 S.C.(H.L.)43 at p.61.

deeds, as a matter of equity, to the extent of ensuring conformity with both parties' proven common intentions. Moreover, in order to avoid further unnecessary duplication of procedure, it also may be thought necessary for a court to be empowered to rectify and enforce a contract in one action. There is and never have been any separate jurisdictions in equity and law in Scotland and so no conceptual problem should arise through simultaneous correction and enforcement.[1]

61. Accordingly, we provisionally propose that a court should be enabled to grant a decree providing simultaneously both for correction of latent defective expression, conform to the proven common intent of both parties, and for enforcement of the obligations thereby correctly expressed.

Comment is invited.

62. Additionally we would welcome opinion on whether the term "court", as used in the above provisional proposal, should include the Sheriff Court as well as the Court of Session.

Standard of Proof

63. In provisionally recommending statutory provision that would permit the use of extrinsic evidence in order to establish latent defective expression, we nonetheless recognise that departure from the written terms of a contract would continue to be an exception to the general rule which preserves

[1] D M Walker "Equity in Scots Law", 1954, 66 Jur. Rev. 103 at pp.145-146. The problem of the division of equity and law in England has been solved by s. 24 of the Judicature Act of 1873, designed to discourage multiplicity of legal proceedings. A court may now entertain "an action in which combined relief will be given simultaneously for the reformation of a contract, and for the specific performance of the reformed contract" - see United States of America v. Motor Trucks Ltd [1924] A.C.196 (P.C.) at pp.201-202, following Craddock Brothers v. Hunt [1922] 2 Ch. 809, and this rule may apply even in the case of conveyances of heritage.

the sanctity of its terms.[1] The policy objective behind the rule may be seen from the need to maintain, as far as possible, certainty in contractual relationships whereby a written contract, whether or not in the form of a probative writ, should be presumed to express its parties' agreement.

64. If it is considered desirable to continue to follow a policy that attaches considerable weight to the written terms of a contract, a heavy onus of proof will rest on a party who seeks to disprove apparent agreement which has been expressed formally. Thus, in Anderson v. Lambie, Lord Reid concluded that the appellant had "proved his case beyond reasonable doubt" and therefore was entitled to succeed. Similarly, Lord Keith chose to follow the example of Fowler v. Fowler[2] which required "a standard of proof that will leave no fair and reasonable doubt upon the mind." An alternative attitude, however, is seen in the modern English approach which is stated by the Court of Appeal in Joscelyne v. Nissen.[3] The court held that "convincing proof", as distinct from "proof beyond all reasonable doubt", should be the only standard applied. The same approach has been taken in the United States.[4] In the instances of both these legal systems it can be seen that the courts found a need to describe the particular onus of proof, in actions for correction of a writing, in terms stronger than "on a balance of probabilities".

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[1] See para. 34 ante.

[2] (1859), 4 De. G. & J. 250 at 265.

[3] [1970] 2 Q.B. 86.

[4] Restatement of the Law - Contracts, para. 511. Though this standard of proof is also applied in other areas of U.S. law e.g. the case of Frank O'Neall Addington v. State of Texas 60L Ed. 2d. 323, 99 S.Ct., April 30th, 1979, where the U.S Supreme Court held that a standard of "convinving proof" had to be met in cases for the indefinite commitment of individuals to hospitals for the mentally ill.

65. In seeking to assess what the above distinctions in terminology may mean in practice, attention is drawn to a dictum of Denning L.J. in Bater v. Bater[1]

> "... the difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best C.J., and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear'. So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard."

Whereas there may remain only two basic standards, Sir Rupert Cross explains:[2]

> "As certain things are inherently improbable, prosecutors on the more serious criminal charges and plaintiffs in certain civil cases have more hurdles to surmount than those concerned with other allegations."

In other words, the subject matter of the dispute itself should regulate the extent of evidence required by the court for the relevant standard of proof to be satisfied - the standards themselves not being fixed at rigid extremes.

66. Scots law so far has recognised only the two categories of "proof beyond reasonable doubt" and "proof on a balance of probabilities".[3] We doubt, therefore, if it would be necessary, or productive of certainty, to introduce a new standard of "convincing proof", following the Anglo-American example.

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[1][1951] P.35 at p.36.

[2]Cross Evidence pp.98-99.

[3]See Brown v. Brown 1972 S.C. 123 at p.126.

67. Of the two standards of proof Scots law already recognises, we would stongly favour the proposition that the standard of "proof on a balance of probabilities" should be applied in civil cases, including those involving latent defective expression, and that the standard of" proof beyond reasonable doubt" should be restricted to criminal matters wherever possible.[1] This policy, by avoiding unnecessary exceptions to general practice, we consider would be conducive to simplicity and clarity in the law.

68. Our contention that, in cases of latent defective expression, the standard of "proof on a balance of probabilities" should be applied in order to avoid unnecessary legal complexities, is supported a fortiori, in our opinion, by the consideration that if this standard is not chosen, it may be necessary to make a further distinction between latent and patent defective expression in this respect.

69. We consider that in cases where defective expression is patent it is not necessary for proof to be heard of the parties' common intentions. Proof of a patent defect should be simple and direct and therefore it would appear difficult to justify any departure from the normal civil standard of "proof on a balance of probabilities" for this category of defect.

70. In light of the fact that in Anderson v. Lambie the House of Lords applied the standard of "proof beyond reasonable doubt" for latent defective expression,[2] however,

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[1] Although at present "proof beyond reasonable doubt" can be seen to apply also: (a) in cases of rebuttal of the presumption against illegitimacy (Brown v. Brown 1972 S.C. 123); (b) in actions alleging contempt of court (Gribben v. Gribben 1976 S.L.T. 266); (c) in actions for contravention of lawburrows (Marrow v. Neil, 1975 S.L.T. (Sh. Ct.) 65 at p. 69); and (d) in civil actions involving allegations of the commission of a crime, although this rests on the authority of only one case and may be in doubt (see Lord Neaves in Arnott v. Burt (1872) 11 Macph. 62 at p. 74). See generally MacPhail, Research Paper on Evidence at paras. 22.32 to 22.38.

[2] See para. 64 ante.

we put forward to following options for consideration:

(i) The heavy onus of proof that requires to be discharged, in order to rebut the presumption in favour of a contract's written terms, should be made clear to both the courts and the public by fixing a standard of "proof beyond reasonable doubt", for cases of latent defective expression.
or

(ii) An additional civil category for "proof beyond reasonable doubt" need not be applied because the courts are capable of determining, "on a balance of probabilities" whether presumed facts have been disproved satisfactorily by alternative evidence, as in other civil matters where legal presumptions arise. Indeed the necessary process of first establishing latent defective expression and moreover of being required thereafter to prove the terms which in fact had been agreed to, may be seen in itself to promote a sufficiently high standard of probation. Following this reasoning the standard of proof in actions for correction of latent defective expression should be "on a balance of probabilities".

Comment is invited on the preferred standard of proof.

71. Whichever of the above standards of proof is preferred, it is provisionally proposed that the standard to be satisfied for correction of patent defective expression should be "proof on a balance of probabilities".

Comment is invited.

Requirement of Proof

72. The next question is whether there should be any restriction on proof. For instance, should a court only recognise a prior concluded contract, binding and enforceable in its own right, as evidence of antecedent agreement? Alternatively, if that restriction does not necessarily apply, should a court then consider any expression of common intention between the parties, or should a higher standard requiring some "outward expression of agreement"[1] be essential?

73. In England the approach was taken that it was:[2]

> "... necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument."

Despite a line of judicial recognition of this statement, Clauson J. in Shipley Urban District Council v. Bradford Corpn.[3] questioned, in an obiter dictum, the foundation of the principle, claiming that:[4]

> "... in the case of ordinary individuals, an instrument, on this theory, cannot be rectified except on proof of a previously existing legally binding document, proof which, in the case of most written contracts (though not, of course, as a rule in the case of conveyances) is not usually available, simply because negotiation has not, even where intentions have been found to coincide, crystallised into contract, until the moment of executing the written contract."

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[1] See para. 72 post.

[2] per Sir W M James V.-C. in Mackenzie v. Coulson (1869) L.R.8 Eq. 368 at 375. See also Lovell and Christmas Ltd v. Wall [1911] 104 L.T. 85; W Higgins Ltd v. Northampton Corpn. [1927] 1 Ch. 128 at 136; Craddock Bros. v. Hunt [1923] 2 Ch. 136 at 159 and United States of America v. Motor Trucks Ltd [1924] A.C. 196 at 200-201.

[3] [1936] Ch. 375.

[4] at pp.395-397.

This point was then directly considered in the case of Crane v. Hegeman-Harris Co. Inc.[1] Simonds J., referring to Clauson J.'s judgment, stated:[2]

> "The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties."

That reasoning also was adopted when the matter was referred to the Court of Appeal and has since been followed by that Court in the cases of Earl v. Hector Whaling Ltd[3] and the leading modern authority of Joscelyne v. Nissen.[4]

74. This question has not been fully explored in Scots law but, following the reasoning of Clauson J. in Shipley UDC v Bradford Corpn., we think that it is possible to recognise as a general statement of fact that in many circumstances prior to the formal conclusion of a contract, initial agreement may exist and be identifiable simply as such without ever taking the form of a binding contract.

75. The conveyance of land may produce particular problems as was observed by Lord President Cooper in Anderson v. Lambie:[5]

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[1] [1939] 1 All E.R. 662.

[2] at p.664.

[3] [1961] 1 Lloyd's Rep. 459 at 470.

[4] [1970] 1 All E.R. 1213.

[5] 1953 S.C.94 at pp.102-103.

> "But if, as in this case, the transaction relates to heritage, and if the Lord Ordinary is right in declining to look behind the missives of sale upon the ground that by our law a contract relating to heritage can only be constituted by writ, it is surely a curious brand of equity which insists on looking behind a recorded disposition in order to discover the real truth of the matter, but is promptly diverted from the pursuit of the real truth of the matter at the first encounter with a technical rule of common law now largely an archaism."

The House of Lords also agreed that the Lord Ordinary's reasoning could not be supported, as it would make the missives "the ruling document and the disposition merely a means of giving effect to the contract contained in the missives".[1] Although the missives would be an important adminicle of evidence, Lord Reid held that "when it is sought to reduce a deed it is necessary to go behind the deed and discover the real facts."[2]

76. It is submitted that it is at least foreseeable that the defective expression may have originated in the drafting of the missives themselves, the defect in turn being transmitted to the disposition. Evidence that extends beyond the missives therefore will be necessary to prove the defect and the reality of the parties' agreement, if this is at all possible. Whereas we recognise that fears may arise over any departure from the principle of law which requires that contracts relating to the sale of heritage should be constituted only by probative writ,[3] we nonetheless think that the inevitably high standard of proof required to be satisfied in an action for correction of a writing should

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[1] 1954 S.C.(H.L.)43 at p.62, per Lord Reid.

[2] Ibid. ditto, see also Lord Keith at p.65.

[3] For a full discussion of the topic and our alternative provisional proposals on Constitution and Proof of Voluntary Obligations, see Memorandum No. 39.

allay concern as to diminution of certainty in contractual relationships.

77. Consequently, we provisionally propose that in an action for correction of a writing the law should not require proof of a prior, concluded, binding contract as an evidentiary prerequisite for establishment of the parties' antecedent agreement.

Comment is invited.

78. It may be helpful, however, to consider the general nature of the evidence that should be led if the substantial burden of proof is to be discharged.

79. One minimum requirement of the English system of rectification is seen in Lord Justice Russell's qualifying statement of the general rule in Joscelyne v. Nissen:[1]

> "In our judgment the law is as expounded by Simonds J. in Crane's case, with the qualification that some outward expression of accord is required."

The term "outward expression of accord" stems from Denning L.J.'s judgment in F E Rose Ltd v. Wm H Pim Ltd.[2] The facts of this case were that buyers in London had received an order from their branch in Egypt for "Moroccan horsebeans described here as feveroles", which were intended for resale. Not being familiar with the term "feveroles" the buyers made enquiries with the sellers who assured them that the word was synonymous with "horsebeans", and that they were able to supply them. In fact "feveroles" are horsebeans of medium size and distinct from "feves" or large horsebeans which have less value. However, on the basis of their (the sellers') understanding of "feveroles" an oral contract

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[1] at p.1222 (emphasis supplied).

[2] [1953] 2 All E.R. 739.

was concluded for "horsebeans" and the contract in these terms was transmitted into writing. The sellers also entered a contract with Tunisian suppliers for "horsebeans" to be delivered in turn to the buyers' customer in Egypt. On delivery of "feves" to the Egyptian customer the mistake was discovered - the customer accepting the horsebeans but seeking damages from the buyers. Under the contract with the sellers, however, the buyers could not seek damages for non-delivery of feveroles and therefore they sought rectification of the written contract in order to make it comply with their alleged common intention whereby feveroles should have been delivered. This situation may present potential for discussion of the consequences of shared error,[1] however, we limit its example to a discussion of the general principles of rectification.

80. The Court of Appeal rejected the possibility of rectification in this instance. Denning L.J. reasoned as follows:[2]

> "Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner-minds of the parties - into their intentions - any more than you do in the formation of any other contract. You look at their outward acts, i.e. at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed .... I am clearly of the opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement."

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[1] See Memorandum No. 42, Vol. I para. 1.25 and Vol. II paras. 3.64 - 3.66.

[2] at p.747.

Our provisional view is that this attitude is unnecessarily restrictive and indeed it has been criticised by academic writers as an unwarranted extension of the objective theory of contract[1] - a theory which may have most direct relevance

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[1] J R Spencer "Signature Consent, and the Rule in L'Estrange v. Graucob" 1973 C.L.J. 104 at 113.

> "Denning L.J. held that although both parties meant to deal with feveroles, they were contractually bound to buy and sell horsebeans, because their agreement as outwardly expressed, both orally and in writing, was for "horsebeans". It is a platitude to say that the law of contract exists to enforce agreements, and that agreements are what people have agreed to do, not what officious people with no interest in the matter would think they had agreed to do.";

Glanville Williams "Mistake and Rectification in contract" 17 M.L.R. 154 at 155:

> "A contract is not enforced according to its 'outward appearance' if both parties concur in intending something else. It is not invariably true, therefore to say, as Denning L.J. does, that in the formation of a contract 'one does not look into the inner minds of the parties'."

See also Glanville Williams 1945, 23 Can. Bar Rev. 380 at 387 and, in the United States, Corbin on Contract (One Volume Edn.) para. 106, where both writers are of the view that the law of contract cannot be explained by either the "objective" or "subjective" theories of contract standing alone.

Of further interest is the article of Leonard Bromley "Rectification in Equity" 1971, 87 L.Q.R. 532 at 537-538.

> "It may be that the statement in Joscelyn v. Nissen that some outward expression of accord is required for rectification of an agreement stems from two sources, first, the fundamental common law principle that in the construction of contracts the courts seek to ascertain the meaning of the words used (adopting an objective approach), rather than searching out the subjective intention of the parties, and second that without some outward expression of accord there could be no certainty at all in business transactions. So far as the first is concerned, it is submitted that any such extension into rectification is contrary to both principle and authority and is simply erroneous. As to the second, the extension is unnecessary in practice to safeguard the sanctity of business contracts because of the high standard of proof required .... The presence of absence of an outward expression of accord may well go to whether the burden of proof can be discharged. It is not it is submitted, per se a requirement of rectification."

in the construction of contracts, but not necessarily so in the realm of rectification or correction, where the establishment of common intention may be the key to the proof of the true agreement. We submit that defects may exist in oral as well as written expression and that this may necessitate the discovery of what the contracting parties meant to say, albeit that this may be difficult to establish.

81. In the discharge of a high standard of proof it would appear essential to specify clearly the event or evidence that indicates a point where consensus in idem is reached between the parties and which, moreover, continues immediately prior to the conclusion of a formal contract. An example of failure to satisfy that standard is illustrated in Walker v. The Caledonian Railway Co.[1] The case concerned a written contract for the supply of horse haulage for three years, at a fixed rate per horse, which was entered into with a railway company. The contract did not specify any number of horses or make any reference to any other document or communings. The railway company later ceased to employ the number of horses at first required and an action was raised against it for breach of contract. The pursuer averred that in communings prior to the formal conclusion of the contract the railway company had exhibited to him a list showing the number of horses then employed and that the contract had been entered into with reference to that list. The Second Division rejected this contention, not only on the basis of the application of the parole evidence rule, but also, that rule apart, for the reason that the pursuer had made no averment of specific prior agreement nor had he identified the schedule that had been exhibited with any contractual understanding or relationship.[2] Similarly, we

[1](1858) 20D 1102.

[2]See Lord Justice-Clerk Hope at p.1105 at para. 5.

are of the opinion that in relation to a remedy of correction, it would not be sufficient for a party in his averments merely to refer to prior communings or statements of personal intent unless they also can be placed within the context of common intention and agreement. As one commentator has noted:[1]

> "Although the border-line may, in practice, be difficult to define, the distinction in theory is plain between an averment of a precise and distinct agreement and that of a series of previous communings or negotiations, possibly protracted over a considerable period."

82. Ultimately, it may be seen that it must rest within the discretion and good judgment of a court to determine whether, in any given circumstances, the burden of proof has been discharged. However, in making that assessment it may be necessary to understand the common intention of the parties and view their contract from this subjective standpoint.[2] We provisionally propose, therefore, that it should be competent to adduce extrinsic evidence[3] of both common intention and informal agreement between contracting parties, in the proof of latent defective expression.

Comments are invited.

Effect of Correction

83. On the proof of both defective expression and the common intent of both parties, it would then be open for a court to exercise its discretion in favour of correction of the writing. If it does so, the question arises as to the effect of this act on the parties' contractual relationships. Is a formally binding contract only to be recognised from the time of actual correction, or is recognition to be afforded to the fact that the parties will have intended to be bound either from the date of execution of the erroneously expressed deed,

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[1] Anon. G.G.R. "Notes on Parole Evidence as Affecting a Written Contract" 1930 S.L.T. (News) 37 at p.38.

[2] Cf. paras. 79 and 81 ante.

[3] (see also para. 49 ante).

or such later date on which they have agreed? On this question, Lord Maxwell, in Hudson v. Hudson's Trustees reasoned:[1]

> "in my opinion the principle operates to correct the mistake not merely from the date when the correction is made but retrospectively from the date when the mistake was made. This I think is logical, since the purpose is to put the parties in the position in which they intended to be and, so far as emerges from the authorities, this is what the court has in fact done."

We also favour this approach which gives effect to the contracting parties' common intent in all its aspects.[2] Accordingly, we provisionally propose that a court's act of correction of a writing should have retroactive effect, operative from the date of the deed's mistaken expression, or from such other date, or upon the occurrence of such other event, as the parties may have agreed should be determinative of the commencement of their contractual obligations.[3]

Comment is invited.

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[1] at p.90.

[2] See also the approach taken in Craddock Bros. v. Hunt [1923] 2 Ch. 136 per Lord Sterndale M.R. at p.151: "After rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had been originally drawn in its rectified form." and per Warrington L.J. at p.160 "It seems to me that, on principle, if an instrument of whatever nature is rectified it ought to be treated as if the necessary alteration had actually been made with the pen and had been part of the document at the date of its completion."

[3] This principle may not only affect the parties inter se, but also relationships with third parties and outside bodies, such as taxation authorities. Eg. in re Colebrook's Conveyances [1972] 1 W.L.R. 1397, where by three conveyances in 1954 and

C. ADDITIONAL CONSIDERATIONS

The Faith of the Register

84. The principle of the "faith of the register" traditionally has stood against any interference with the public records of ownership of heritable property. The principle is explained by Lord Reid in the case of Hunter v. Fox;[1]

> "This provision (ie the negative servitude in the disposition) appears in the Register of Sasines, which is open for all to see, and a purchaser is entitled to rely on the faith of the record. He is not concerned with the intention of the person who created the burden: he is concerned with the words which appear in the Register of Sasines."

(3 contd.)
1955 land was conveyed to the plaintiff and his son as joint tenants. In 1962 the son died and the plaintiff, as survivor became accountable for estate duty in respect of his son's share of the land. Evidence was led that the plaintiff and his son had intended that the share of each in the land conveyed should pass on death to his personal representatives - in fact duty had been paid out of the son's estate in respect of the half share. The plaintiff sought rectification by substituting the words "tenants in common" for "joint tenants", so that the effect of the conveyances would be that the plaintiff and his son had always been tenants in common of the land in question and whereby the plaintiff would no longer be liable for estate duty on his son's share. Here rectification would be meaningless unless it had retroactive effect. Having accepted the evidence and having made a full consideration of questions of equity (see Whiteside v. Whiteside [1950] Ch. 65), the court granted an order for rectification as asked for.

[1] 1964 S.C.(H.L.)95 at p.99.

In that instance, however, the defective expression was patent on the face of the deed and the House of Lords did not hesitate to correct it. Similarly, the Glasgow Feuing Company case illustrates the limits of the faith of the register. In that case partial reduction of a registered deed was granted on the reasoning that the defective expression related to a personal obligation, the later purification of which would never be recorded in the Register. It was held that the faith of the records did not extend to cover such obligations.

85. In Anderson v. Lambie, the situation was different, as the defect was in the dispositive clause of the deed. Lord Cooper strongly emphasised the principle of the faith of the register by refusing to amend this central provision of the deed. The House of Lords, however, expressed a different opinion as seen per Lord Reid:[1]

> "In the present case the error is in the dispositive clause to which, above all, the principle of the faith of the records applies and I agree with the Lord President that that principle is a cardinal and distinctive feature of Scots law. But its primary object is to enable third parties to acquire rights in safety and I do not see why giving a remedy in the present case should shake this principle in any way: I do not understand how the rights of any third party could be affected if this disposition is reduced."

86. Ultimately, it is a question of policy whether the approach of the Lord President or that of the House of Lords is to be considered more appropriate. Lord Cooper saw an alternative course of action, however, of which he stated:[2]

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[1] 1954 S.C.(H.L.)43 at p.61.

[2] 1953 S.C. 94 at p.103.

> "The ad valorem fees payable to conveyancers include an element of insurance against the risk of error in the preparation of the deed, and, if the conveyancer makes a mistake, he is liable in damages to his client."

We consider that although this is a possible remedy it may never be as satisfactory as full implementation of an agreement. Even a small strip of land may have great significance to its purchaser, and its loss might never adequately be compensated for by money, should its omission from a disposition materially affect the purchaser's enjoyment of the remaining area disponed. Moreover, the principle of the faith of the register need not be eroded if the court is bound to protect third party interests - a proposition that we consider later.

87. These factors lead one back, however, to the question of whether the policy of the House of Lords in Anderson v. Lambie should be reaffirmed by ensuring that the courts have specific powers to correct latent defective expression in recorded or registered deeds.

We invite comment on this question.

88. It may be arguable that Statute already enables rectification of either the Register of Sasines or the Land Register of Scotland to an extent that would comprehend correction of latent, as well as patent, defects. We next examined these Statutory provisions.

89. Under the Titles to Land Consolidation Act 1868, Section 143,[1] in the event of there being an error or defect in a deed, it can be amended and recorded of new. This wide provision relating as it does to a register of transactions,

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[1] See also Sections 66 and 67 for rectification of Crown writs.

as opposed to title, does not appear incompatible with the concept of correction of latent defects in recorded deeds. It does involve the re-recording of the deed, but at this stage in the history of the Register of Sasines we suggest that any change in its procedure or administration would produce only uncertainty.

90. Rectification of the new Land Register of Scotland is also provided for by Section 9(1)[1] of the Land Registration (Scotland) Act, 1979. This provision, however, is qualified by Section 9(3) where rectification would prejudice a proprietor in possession. The Keeper of the Registers of Scotland may only exercise this power to rectify, and the court may only order the Keeper to rectify where, inter alia, "the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession."[2]

91. When assessing whether the provisions of Section 9 of the 1979 Act are wide enough to enable the courts to order rectification in all cases of latent defective expression in deeds registered in the Land Register of Scotland, we were supplied with two interpretations of the meaning and extent of section 9(3)(iii).

92. One interpretation was that in the case where a disponer of land has included more in his disposition than in fact agreed upon, it is arguable that section 9(3)(iii) excludes the possibility of rectification of the Register, should the disponee resist the move, in that such an act not only would be to the prejudice of the proprietor in possession, but also the substantial blame for the inaccuracy would rest with the disponer's agents for not ensuring that the correct area of land was being disponed.

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[1]For text see Appendix II.

[2]Section 9(3)(iii).

93. An alternative argument was that the blame should be apportioned equally between the granter's and grantee's solicitors, in that they both should have ensured that the disposition accurately reflected their clients' agreement. Following that reasoning, the conditions of section 9(3)(iii) should be satisfied, in that substantial carelessness on the part of the proprietor in possession (or his agent) would be established, and the Court should be empowered to order rectification.

94. Of course the same degree of negligence on the part of the disponee's solicitors could result in their client receiving less land than had been agreed upon. In those circumstances, as rectification would be in the interests, and not to the prejudice, of the proprietor in possession, Section 9(3) would not apply and again the Court would be in a position to order rectification.

95. In light of these conflicting opinions on the correct interpretation of Section 9(3)(iii) of the 1979 Land Registration (Scotland) Act, we enquire whether the law requires to be clarified to ensure that all cases of defective expression in deeds registered in the Land Register of Scotland should be capable of rectification.

Comments are invited.

Equity and third Party Rights

96. We re-emphasise that the remedy of correction we have provisionally proposed should be one of equitable character. As such, in order that it may promote rather than conflict with principles of justice, the rights of innocent third parties who may have relied upon the terms of the defectively expressed deed should be taken into account by the court.

97. Generally stated, rules of law may be used for the protection of individual interests and rights and the promotion of certainty in relationships with others upon which reliance can be founded. If in fact an individual had a formal right, however, of which he is unaware, and therefore upon which he had never placed any reliance, he will have no expectation interest that requires protection. In these circumstances, it is submitted that a third party will not suffer any real prejudice from a court's act of correction which results in the removal of an apparent right upon which no substantial reliance has been placed. Thus, as seen in the Glasgow Feuing Company case,[1] the superior was able to prove that the feuing Company, as a third party purchaser for value, had bought the feu from the original vassal uninfluenced by the mistakes in the plan attached to the deed. The balance of equity was therefore in favour of the superior.

98. A further example might be where a standard security has been granted over heritable subjects whose formal description in the security writ has probably been copied directly from the disposition granted in favour of the debtor. It is discovered later that the disposition's description is defective in so far as it includes property which, it is proved, the seller had not agreed to transfer and which the buyer had not agreed to purchase. Should the seller seek to have the disposition corrected by a court, assuming that possibility is open to him, he would also wish to rectify the description in the standard security. The interests of the third party creditor would then require to be evaluated. If the loan had been secured at the time of purchase it would probably be for a slightly smaller amount than the price paid. Moreover, if the

[1] See paras. 35-36 ante.

purchase price reflected the fair market value of the subjects it had been agreed to be disponed the third party's security interest would not be prejudiced by the court's act of correction. However, the situation would be different if the loan had been granted at some later date for an amount that could only have been secured by subjects to the extent described in the disposition, upon which the creditor (or his agent) had placed reliance. In those circumstances the court might consider it inequitable to order correction of the description if this would substantially affect the bona fide creditor's security interest.[1]

99. If the third party's reliance interest is substantial, and therefore should be protected by the court's refusal to correct the writing relied upon, the problem of whether the party who has benefited from the defective expression should retain that benefit for ever, remains. For instance, in the above example of the disposition and standard security, it may be asked whether the disponee should always retain a right to the land erroneously disponed, even although the security may be redeemed at some later date? Alternatively, should it be possible for the disposition to be corrected but for the land to remain subject to the security interest of the third party, with the imposition of a personal obligation on the disponee to clear the record of that security right? Need any formal rules be devised where the courts could be left with a wide discretion to order correction of a writing in such manner as may be most equitable between contracting parties, whilst at the same time protecting third party interests?

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[1] These considerations would apply a fortiori in an example where two singular successors to a defectively expressed transaction were involved. Not only would there be practical difficulties in proving the terms of the original informal agreement, to which both were not parties, but also one of the singular successors would be in the same position as a bona fide third party acquirer who has placed reliance on the formal expression of the original transaction. Cf. Hunter v. Fox 1963 S.C. 481 at p.487.

100. The questions above raise potentially complex problems of conveyancing and accordingly we would welcome the advice and comment of practitioners and the professional bodies on correction of a recorded writing where a third party interest is involved. The problem of course may also extend to unrecorded writings and therefore accepting the premise that the reliance interests of bona fide third parties should be protected, we provisionally propose that defective expression in a writing should be corrected only when the party seeking correction has satisfied the court that no third party interests would be adversely and unduly affected by the grant of that remedy.

Comment is invited.

Simulated Contracts and Correction

101. A third party's interests may extend beyond mere opposition to an action of correction of a writing. Indeed it is foreseeable that he may be in favour of such action himself, even if it would not be contemplated by either of the contracting parties. The circumstances where this would be likely to arise would be where parties have entered a contract which is simulated either in respect of the nature of the contract itself or in repsect of its particular terms. An example of this situation would be where two parties deliberately express a lower price in their written agreement than the one which will actually be paid in order to reduce broker's percentage fees. In an action for payment of his full fee, the broker would wish to have this calculated and enforced on a correct statement of the contract.

102. It is foreseeable that a simulated contract could affect the interests of more than one third party. For instance, the seller of a house may conclude a private deal with a purchaser, whereby he is seen to accept what in fact is a falsely low sum of money as the purchase price for the property, the balance being paid in private. This act of deception would be in the interests of both transacting parties in so far as the falsely low price would have the effect of lessening the amount of estate agents' percentage fees and solicitors' scale fees, which would otherwise be due on the actual value of the transaction. The stated value of the sale could also affect the amount of stamp duty payable on recording of the disposition.

103. We have already discussed the problem of simulation and dissimulation in the context of constitution and proof of voluntary obligations in Memorandum No. 37.[1] There we concluded that, at present, Scots law would disregard a simulated contract as absolutely null, but at the same time would seek to give effect to the genuine agreement, if in form and substance that agreement was one which the law would recognise. The leading Scottish case on this topic is Scottish Union Insurance Co. v. Marquis of Queensberry,[2] where the House of Lords confirmed the First Division's equitable approach to the problem which permitted the use of "evidence dehors the deed",[3] in exception to the parole evidence rule, in order to discover the real intention of the parties and, further, to give effect to the true arrangment when proved. In effect the court can be seen to express and enforce an agreement in its true terms - in other words, this process may be considered to be directly comparable to that of correction of defective expression as previously discussed.

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[1] at paras. 35-40.

[2] (1842) 1 Bell's App. 183.

[3] per Lord Cottenham at p.199.

104. In turn it may be asked whether it would be useful for the same procedure to be followed in cases of falsely expressed contracts as with those that have been defectively expressed. A court could correct a simulated contract at the instance of one third party in the interests of all others, who could then rely directly on the correctly expressed agreement, or transaction, for the enforcement of their rights. We hold no firm views on this matter, but enquire whether, in an action for the enforcement of the true, or dissimulated terms of a contract, the court should also formally correct its simulated terms, following the same principles as applied in cases of defective expression?

Comment is invited.

Statutory Solemnities in Obligationes Literis

105. The question may be asked whether, or to what extent, the remedy of correction should be available to amend the terms of a transaction which requires not only to be constituted in writing but also to be expressed conform to specific statutory formalities.[1] It can be seen that the force of a statutory solemnity would be denuded of all substance if a contracting party, or parties, could seek to establish that it had been their common intention to comply with the formalities, when in fact they had materially failed to do so. Nonetheless, how restrictively should a statutory rule apply when the substance of its requirement has been met but its expression fails only through some obvious omission or slip?

[1] N.B. Memorandum No. 39 however provisionally presents alternative systems for the constitution and proof of voluntary obligations. Alternatives III and IV propose systems whereby obligations expressed in writing need not follow any special formalities.

106. At present, the law would appear to allow rectification of clerical slips in the observance of statutory solemnities, if the means of correction is obvious. An example in point is the case of Johnston v. Pettigrew.[1] In that action the formal validity of a disposition of heritable property was challenged on grounds, inter alia, that the deed had not been duly attested insofar as the testing clause did not specify the writer's name and designation to conform with the requirements of the Acts of 1593, c.179 and 1681, c.5. The testing clause in fact read:

> "In witness whereof, I have subscribed these presents, consisting of this and the two preceding pages of paper, stamped according to law, by William Maclean junior, Clerk to William Maclean, accountant in Glasgow ... etc."

It was held by the Second Division that the omission of the word "written" before the words "by William Maclean junior" was an obvious clerical defect. In particular, it was stated that the omitted verb could only have been the word "written" and that therefore this omission did not prevent the court from affirming that William Maclean junior was the writer of the deed.[2]

107. It may be seen that a clerical defect of this nature occurring in a writing where the statutory formalities have in substance been observed, should not be considered so serious as to affect the validity of the deed. We are of opinion, therefore, that so long as statutory solemnities for constitution of a written obligation continue to be

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[1](1865) 3M 954.

[2]See at p.961 per Lord Justice-Clerk Inglis, who is followed by Lords Cowan and Neaves. However, Lord Benholme delivers a strong dissenting judgment in which he states (at p.964): "Stamped according to law by William Maclean" is certainly a very strange and unnecessary statement to make in a texting-clause, but so it reads, and I do not think that we are entitled to alter the plain meaning of the sentence." Lord Neaves did not find Lord Benholme's interpretation a "possible supposition".

required, power should remain with the courts to correct any clerical defects that may have arisen. Accordingly, we provisionally propose, for the avoidance of doubt, that if a writing which requires the observance of statutory solemnities for its valid constitution contains a clerical defect, whose means of rectification is obvious, a court should correct that defect as a matter of construction and uphold the validity of the deed.

Comment is invited.

SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENTS ARE INVITED.

1. The law should be restated, as part of a complete legislative treatment of defective expression, to the effect that a court may correct a clerical defect in any writing if its intended terms are obvious and can be construed either from the writing itself or from its whole surrounding circumstances.
(para. 23)

2. The law should be restated to the effect that the courts be empowered to correct not only defective computation apparent on the face of a writing, but also obvious mis-applications of accounting principle or the misclassification of particular items within the accounting principle adopted.
(para. 30)

3. When it is averred that a writing which purports to record accurately an agreement has failed to do so, proof should not be restricted to writ or oath and it should be competent to adduce extrinsic evidence, whether parole or written, of that agreement.
(para. 53)

4. A court should be enabled to grant a decree providing simultaneously both for correction of latent defective expression, conform to the proven common intent of both parties, and for enforcement of the obligations thereby correctly expressed.
(para. 61)

5. We would welcome opinion on whether the term "court", as used in the above provisional proposal, should include the Sheriff Court as well as the Court of Session.
(para. 62)

6. In the proof of latent defective expression, the standard to be satisfied should be:
either (i) proof beyond reasonable doubt
or (ii) proof on a balance of probabilities.
(para. 70)

7. Whichever of the above standards of proof is preferred, the standard to be satisfied for correction of patent defective expression should be "proof on a balance of probabilities".
(para. 71)

8. In an action for correction of a writing, the law should not require proof of a prior, concluded, binding contract as an evidentiary prerequisite for establishment of the parties' antecedent agreement.
(para. 77)

9. It should be competent to adduce extrinsic evidence of both common intention and informal agreement between contracting parties in the proof of latent defective expression.
(para. 82)

10. A court's act of correction of a writing should have retroactive effect, operative from the date of the deed's mistaken expression, or from such other date, or upon the occurrence of such other event, as the parties may have agreed should be determinative of the commencement of their contractual obligations.
(para. 83)

11. Should the policy of the House of Lords in Anderson v. Lambie be reaffirmed by ensuring that the courts have specific powers to correct latent defective expression in recorded or registered deeds?
(para. 87)

12. In the example given in paragraph 98 and where the reliance interests of a third party are also in issue:

(i) Should the disponee always retain a right to the land erroneously disponed, even although the security may be redeemed at some later date?

(ii) Alternatively, should it be possible for the disposition to be corrected but for the land to remain subject to the security interest of the third party, with the imposition of a personal obligation on the disponee to clear the record of that security right?

(iii) Need any formal rules be devised where the courts could be left with a wide discretion to order correction of a writing in such manner as may be most equitable between contracting parties, whilst at the same time protecting third party interests?

(para. 99)

13. Defective expression in a writing should be corrected only when the party seeking correction has satisfied the court that no third party interests would be adversely and unduly affected by the grant of that remedy.
(para. 100)

14. We hold no firm views on the matter, but enquire whether, in an action for the enforcement of the true, or dissimulated terms of a contract, the court should also formally correct its simulated terms, following the same principles as applied in cases of defective expression?
(para. 104)

15. If a writing which requires the observance of statutory solemnities for its valid constitution contains a clerical defect, whose means of rectification is obvious, a court should correct that defect as a matter of construction and uphold the validity of the deed.
(para. 107)

16. In general, we invite comment on any matter dealt within, or arising out of this Memorandum.

APPENDIX I

COMPARATIVE SURVEY

The comparison is made along the basic divide of the Anglo-American and Civilian legal systems.

A. Anglo-American Systems

1. Both the legal systems of England and the United States, the latter having its origins in the former, respectively have developed their law of "rectification" and "reformation" of defective expression in contract. The similarity of approach can be seen from a brief comparison of each system.

2. (i) England

The remedy of rectification developed originally in the English courts of Equity, the underlying principal being explained by Cheshire and Fifoot:[1]

> "It has long been settled that oral evidence is admissible to prove that the intention of the parties expressed in the antecedent agreement, whether written or not, does not represent their true intention. Thus, rectification forms an exception, but a justifiable exception, to the cardinal principle that parol evidence cannot be received to contradict or to vary a written agreement. The basis of that principle is that the writing affords better evidence of the intention of the parties than any parol proof can supply; but to allow it to operate in a case of genuine mistake would, as Story has said, 'be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to promote it. In a practical view, there would be as much mischief done by refusing relief in such cases, as there would be introduced by allowing parol evidence in all cases to vary written contracts.' (Story "Equity jurisprudence" S.155)".

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[1] Cheshire and Fifoot Law of Contract 9th edn. p.221 and see Chitty on Contracts 24th edn. Vol. I, paras. 310-331.

According to Treitel, the conditions that permit rectification are:[1]

> "If the contracting parties have agreed on one set of terms and the agreement is later embodied in a written document not containing those terms, or containing different terms, the Court may rectify the document to bring it into line with the earlier agreement. The remedy is concerned with defects, not in the making, but in the recording, of a contract: 'Courts of Equity do not rectify contracts; they may and do rectify instruments'.[2] Rectification can be ordered although the contract is one which must be in, or evidenced in, writing."

3. The further qualifications of the English rule are that

   (a) not only must it be shown that the document does not represent the common agreement of its parties, but also the actual common agreement must be established;[3]

   (b) not only must a continuing common agreement be shown immediately prior to the final written expression of the contract but also a prior "outward expression of agreement" must be proved;[4]

   (c) the standard of proof to be met is that of "convincing proof"[5] - a high standard that exceeds the normal civil test "on a balance of probabilities" and yet is not restricted to the criminal standard of "beyond reasonable doubt";

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[1] G H Treitel, The Law of Contract 4th edn. pp.202-203.

[2] Mackenzie v. Coulson (1869) L.R.8 Eq. 369, 375.

[3] Crane v. Hegeman-Harris Co. Inc. [1939] 1 All E.R. 662.

[4] Frederick E Rose v. Wm. H Pim Jnr. & Co. Ltd [1953] 2 Q.B. 450. [1953] 2 All E.R. 739, Joscelyne v. Nissen, [1970] 2 Q.B. 86, [1970] 1 All E.R. 1213.

[5] Joscelyne v. Nissen, Ernest Scragg & Sons Ltd v. Perseverance Banking and Trust Co. Ltd [1973] 2 Lloyd's rep. 101.

(d) the remedy of rectification is equitable in nature and therefore respects the rights of innocent third parties. Rectification may be available against a third party taking a conveyance when he had notice of disputed expression in the original transaction and yet the remedy will be denied if the third party purchaser had acted bona fide without such notice. However, rectification may still be available after the death of one of the original parties to the agreement;[1]

(e) equally, rectification may be refused if restitutio in integrum is not possible, though this rule is not applied rigidly.[2]

4. (ii) United States

The American Restatement of the Laws: Contracts, refers to the remedy of "reformation" and explains it as follows:[3]

> "Where both parties have an identical intention as to the terms to be embodied in a proposed written conveyance, assignment, contract or discharge and a writing executed by them is materially at variance with that intention, either party can get a decree that a writing shall be reformed so that it shall express the intention of the parties, if innocent third persons will not be unfairly affected thereby."

The comment adds that the only necessary condition before reformation will be allowed is a complete mutual understanding of all essential terms of the bargain, which provides a standard whereby the writing might be reformed.

5. Corbin concludes that clear and convincing evidence will be required to bring the remedy into action - a remedy which analyses in the following terms:[4]

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[1] See Chitty on Contracts Vol. I, 24th edn. para. 329, p.152.

[2] Chitty, op. cit., para. 327, pp.151-152.

[3] American Law Institute - Restatement of the Law: Contracts (1932) s.504.

[4] Corbin on Contracts - One Volume Edn., 1952, at para. 540.

> "One who files a Bill for reformation of a written contract usually asserts that the written words do not express to others the meaning that he was trying to express; that he fully expressed that meaning outside the four corners of the document; and that the other party understood him, knew that meaning, and assented. He asks the Court to interpret those extrinsic expressions and to make them legally effective. This is what the Court does when it decrees reformation. It is the extrinsic expression as well as the words of the writing that are the subject of interpretation."

6. In both the English and American systems,[1] it is clear that equitable relief may be available to "rectify" or "reform" defective expression, not apparent on the face of the deed, if convincing extrinsic evidence can be produced to prove both the defect in expression and the prior agreement of both parties. Simple patent defective expression, where the true expression is obvious, is corrected as a matter of construction of the deed.

B. Civilian Systems

7. Post-classical Roman law took a wide approach to the treatment of defective expression which is explained by its emphasis on the agreement of the parties wills, rather than on any formal mode of expression or of theories of objective construction of contractual terms. Buckland explains the situation:[2]

> "In relation to contract there was no specially formal document like a deed. Nor was there any rule that a written agreement cannot be altered by parole evidence. Apart from certain well known statutory rules, affecting stipulations (Inst. III.19.12,17), writings were of the same weight as other evidence (C.4.21.15). The real question is: what was actually agreed on, and therefore amendment was always possible or rather unnecessary. This is laid down over and over again (D.44.4.4.3;

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[1] See also American Law Institute Restatement of the Law Second: Contracts, Tentative Draft No. 10 (1975) at para. 297, where the same basic principles for "reformation" of a contract are restated.

[2] W W Buckland Equity in Roman Law, 1911 edn. at p.34. See also Max Kaser, Roman Private Law 2nd edn. para. 8.II.1., p.47 on the principle of falsa demonstratio non nocet.

45.1.32; C.4.2.6; and especially C.4.22. passim; D.22.3.9; and D.22.4. passim). All these points are discussed in the hearing before the iudex. There is, therefore, no need for any special praetorian powers of amendment, such as are exercised by the Chancery Division."

8. This to some extent is reflected in modern civil codes, e.g.: France, Code Civil Article 1156:

> "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."

Germany, B.G.B., Article 133

> "In interpreting a declaration of intention the true intention shall be sought without regard to the declaration's literal meaning."[1]

However, the need for certainty in modern contractual relationships has brought restraint upon totally subjective interpretation. A French commentator, in a comparative note, states that in some instances:[2]

> "... le droit francais aussi bien que le droit allemand, rejette le système de la volonté interne. Notre Cour de Cassation a souvent affirmé qu'une clause claire ne s'interprète pas, mais s'applique ...; c'est le point de vue du droit allemand. Le Code Civil ne retient que certaines erreurs comme vices du consentement; les autres erreurs sont sans effet sur la validité du contrat, encore qu'il y ait discordance entre la volonté réelle et la déclaration de volonté; cette position est très proche de celle du droit allemand (Art. 119, al.2, B.G.B.). A l'égard des tiers, la contre-lettre est sans effet; seul l'acte apparent, simulé, leur est opposable (Art. 1321 C. Civ.)."

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[1] "The German Civil Code", translation by I.S. Forrester, S L Goren and H M Ilgen, (1975). See also Swiss Code des Obligations, Art. 18; Austrian Civil Code, Art. 914.

[2] Mazeaud & Mazeaud, Lecons de Droit Civil 5th edn. by Michel de Juglart, (1973) Vol. II, p.98. See also Marty & Raymond "Droit Civil" Vol. II "Les Obligations" paras. 217-220, at pp.198-203.

What may be seen to emerge in practice from these modern codes is a mixture of the subjective and objective approaches to contractual interpretation.[1] However, where intention may be relevant and in distinction to the Anglo-American systems, no attempt is made to identify "latent defective expression" as such. Rather the Civilian Systems have dealt with the problem as one of unilateral error which may effect the validity of the contract itself.

9. Sabbath, in a comparative essay on the subject concluded:[2]

> "Rectification of the contract however, as it developed in England and the United States, has no parallel on the continent, probably because in the civil law systems the distinction between writings and the other modes of manifestation of intention is not as patent as in the Anglo-American system.

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[1] Provision is made in further Codes, or Draft Codes, for circumstances going beyond mere common intent, introducing elements of public policy or objectivity e.g:
Draft Dutch Civil Code, Book 6, Obligations Art. 6.5.3.1. "A contract has not only the legal effects agreed upon by the parties but also those which after the nature of the contract result from statute, custom or reasonableness and equity." See also Unidroit "Draft of the Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods." Art. 3: 1. Statements by and acts of the parties shall be interpreted according to their actual common intent, where such an intent can be established. 2. If the actual common intent of the parties cannot be established, statements by and acts of the parties, shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was. 3. If neither of the preceding paragraphs is applicable, the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties.
Also see Civil Code of the Ethiopian Empire (1960) articles 1732 and 1734, which restrict review of the parties common intentions to situations where the contractual terms are ambiguous.

[2] E Sabbath "Effects of Mistake in Contracts", 1964, 13 I.C.L.Q. 798, at pp.823-824.

> ...A party who by error expressed something different from what he intended to declare is mistaken and therefore may avoid the transaction if his mistake is one which is operative under the law.
>
> ...However so far as mistakes are operative when they appear in such writings, they do not in general allow the rectification of the error but render the transaction invalid, because rectification is not with them a current and common relief for mistake."

However, he also gives an example where the French courts might seek to rectify, or in reality reform (in its widest sense) a contract, despite lack of provision for this in the Code Civil. A case in question was Petit v. Leclabart[1] where through non-fraudulent misrepresentation a vendor misled the purchaser of a business as to the amount of its past profits. The courts did not invalidate the contract but made a reduction in the price originally agreed upon. Although this may have been an equitable disposal of a problem different from that of defective expression, Sabbath comments:[2]

> "The way, however, in which the French Courts conceived the problem of rectification is completely different from the Anglo-American doctrine. First, they did not consider the rectification as connected exclusively with a written contract expressing a previous agreement. Secondly, the French Courts did not limit themselves to correcting an erroneous expression. They considered themselves empowered to 'reform' the contract, since by taking into consideration the mistake of the plaintiff and the circumstances involved, they ordered the reduction of the price, without taking into account what the parties in fact agreed upon. It seems that nothing is more opposed to the spirit of Anglo-American law, than the power of the Court to 'make agreements for the parties,' instead of compelling them to perform the terms agreed upon by themselves."

10. In contradistinction to these problems and differences between the Anglo-American and Civilian legal systems, a similar approach at least is adopted in respect of the

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[1] Court of Appeal, Paris, November 9th 1899 (1900) 2 Sirey 212, an example in the Cour de Cassation is Lecarpentier v. Rey (1898) 1 Sirey 72.

[2] op. cit. at p.824

correction of defective computation which appears on the face of the writing.[1] Nonetheless, it may be seen from this brief comparative survey that overall, the Anglo-American system should provide the most useful comparative material in the consideration of a potential remedy of correction for defective expression in Scots law.

[1] E.g. Swiss Code des Obligations, Art. 24(4)(3): "De simples erreurs de calcul n'infirment pas la validité du contract; elles doivent être corrigées." Also French Code Civil, Art. 2058; Italian Civil Code, Art. 1430; Ethiopian Civil Code, Art. 1701.

APPENDIX II

Rectification of the register.

9.-(1) Subject to subsection (3) below, the Keeper may, whether on being so requested or not, and shall, on being so ordered by the court or the Lands Tribunal for Scotland, rectify any inaccuracy in the register by inserting, amending or cancelling anything therein.

(2) Subject to subsection (3)(b) below, the powers of the court and of the Lands Tribunal for Scotland to deal with questions of heritable right or title shall include power to make orders for the purposes of subsection (1) above.

(3) If rectification under subsection (1) above would prejudice a proprietor in possession -

(a) the Keeper may exercise his power to rectify only where -

(i) the purpose of the rectification is to note an overriding interest or to correct any information in the register relating to an overriding interest;

(ii) all persons whose interests in land are likely to be affected by the rectification have been informed by the Keeper of his intention to rectify and have consented in writing;

(iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; or

(iv) the rectification relates to a matter in respect of which indemnity has been excluded under section 12(2) of this Act;

(b) the court or the Lands Tribunal for Scotland may order the Keeper to rectify only where sub-paragraph (i), (iii) or (iv) of paragraph (a) above applies.

(4) In this section -

(a) "the court" means any court having jurisdiction in questions of heritable right or title;

(b) "overriding interest" does not include the interest of a lessee under a lease which is not a long lease.