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## PREFACE

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In the summer of 1818, the Scottish-born and London-based genre painter David Wilkie (1785–1841) received a commission from Maximilian I Joseph, King of Bavaria, to produce a painting ‘as purely English as possible’ (letter by Wilkie to A Raimbach, 2 July 1818). The resulting picture is reproduced on the cover of this book. Entitled *Reading of a Will* (*Die Testamentseröffnung*), it was completed in 1820 and—after being exhibited to great acclaim at the Royal Academy—was despatched to Bavaria, where it was to grace the monarch’s bedchamber at his Tegernsee summer residence until his death in 1825.<sup>1</sup> Today the original may be admired at the Neue Pinakothek in Munich; preliminary sketches are held, inter alia, by the Fitzwilliam Museum in Cambridge, the Ashmolean Museum in Oxford, and in various collections around London.

Whilst on display at the Royal Academy in 1820, the painting was accompanied by the following text printed in the catalogue:<sup>2</sup>

Mr. Protocol, accordingly, having required silence, began to read the settlement aloud, in a slow, steady, business-like tone. The group around, in whose eyes hopes alternately awakened and faded, were straining their apprehensions to get at the drift of the testator’s meaning through the mist of technical language, in which the conveyance had involved it.

The passage is attributed to the ‘Author of Waverley’ and thus—unbeknown to anybody at the time—to Sir Walter Scott. It is a (slightly amended) quote from Scott’s successful novel *Guy Mannering or The Astrologer*, which had been published anonymously in 1815. In the book, the scene in question occurs after the funeral of an elderly lady, Mrs Margaret Bertram of Singleside. In Wilkie’s painting, by contrast, the deceased seems to have been a man (possibly an army officer) leaving behind a young family. Today’s observer will want to muse over the many fine details in the depiction of the room and the company gathered therein; yet when the painting was first exhibited, its style and popularity with the crowds

<sup>1</sup> For further details on the painting and its context, see eg F Dietrich, ‘A Picture for the Bavarian King: David Wilkie’s *The Reading of the Will* (1820)’ (2003) 4 *British Art Journal* 37; N Tromans, *David Wilkie: The People’s Painter* (Edinburgh, Edinburgh University Press, 2007), especially 48–51 and 122; AS Marks, ‘Wilkie, Hogarth, and Hazlitt: *The Reading of a Will*, Its Origins and Legacy’ (2009) 48 *Studies in Romanticism* 583. The present account is heavily indebted to these informative secondary sources.

<sup>2</sup> *The Exhibition at the Royal Academy, The Fifty-Second* (London, McMillan, 1820) 11.

elicited a scathing comment from the infamous Thomas G Wainewright, writing for *The London Magazine* under the pseudonym of Janus Weathercock:<sup>3</sup>

[I]t offends me to the soul, to see a parcel of chuckleheaded Papas, doting Mammias, and chalk-and-charcoal-faced Misses, neglecting that beautiful eccentricity of Turner's yonder, in the mahogany frame, and crowding and squeezing, and riding upon one another's backs, to get a sight—not of the faces of the folks hearing the Will, but of the brass clasps of the strong box wherein was deposited the Will.

On the Continent, the bourgeois setting of Wilkie's *Reading of a Will* hit a nerve with a public increasingly interested in domestic matters as the so-called Biedermeier era progressed. Many an artist came to look at the painting, and it proved to be the inspiration for a whole spate of similar compositions. Even Englishmen on their travels flocked to see it. The lawyer-turned-author Wilkie Collins, for instance, whose painter father William Collins had been friendly with David Wilkie (the latter boasting to William Collins in 1827 that '[t]he sale of my picture at Munich made an impression at Rome among all descriptions of artists'),<sup>4</sup> reports of his father's tour of the Continent 1836–38:<sup>5</sup>

It was ... from an expedition to the Royal Palace at Schleisheim, to see there Wilkie's celebrated picture, 'The Reading of a Will'; that he derived his most genuine enjoyment while at Munich. He found his friend's work (which had been purchased by the King of Bavaria) in perfect preservation, holding its ground triumphantly against the old pictures which surrounded it, by its fine colour and *chiaroscuro*, and its strikingly dramatic development of subject and character.

At about the time that William Collins was preparing to make his way back to England from Naples, via Rome, Venice, 'Innsbruck', 'Saltzburg', Munich and the Rhine Valley, there came into force back home a statute that was intended to simplify the thitherto fiendishly complex legal regime governing wills. The Wills Act 1837 set out (amongst other things) uniform formality requirements for wills relating to personalty as well as devises of realty. With minor amendments and supplemented by the Land Transfer Act 1897, the Administration of Estates Act 1925 and other statutes, it remains a basic cornerstone of probate proceedings and the administration of estates to this day.

Although many social, economic and political parameters have changed since the days depicted in Wilkie's *Reading of a Will*, a large number of fundamental issues are as topical today as they were then: how best to ensure that the testator's final wishes are genuine, unimpaired and accurately expressed in the executed document; what formal requirements this document has to comply with to constitute a valid 'last will and testament'; to what extent provision is—or ought to be—made for the testator's family and dependants; etc.

<sup>3</sup> 'Janus Weathercock's Dialogue on the Exhibition at Somerset-House' in the newly revived *London Magazine* (January to June 1820) 700 at 701.

<sup>4</sup> WW Collins, *Memoirs of the Life of William Collins, Esq., R.A.*, (London, Longman Brown Green and Longmans, 1848) vol 1, 288.

<sup>5</sup> *ibid* vol 2, 153.

The law of succession was always and remains hugely important in practice. Rather surprisingly, however, it is (still) a neglected subject from the academic point of view. Few English universities offer courses on it, and hardly anyone engages in-depth with the fascinating questions raised by current developments. Comparative scholarship, on the other hand, has recently flourished, with a number of high-profile edited collections appearing in the space of just a few years.<sup>6</sup>

The marked mismatch between succession law's immense practical importance and its regrettable theoretical neglect led to the idea for a conference on 'Current Issues in Succession Law' bringing together people whose work relates to—or in some way overlaps with—English succession law, so as to reinvigorate academic interest and debate in the subject. The conference took place at All Souls College, University of Oxford, on 10–11 July 2015 and was attended by leading scholars and practitioners, Chancery judges, a member of the Court of Appeal and a representative of the Law Commission.

In terms of subject matter, the papers ranged from reviews of recent legislative reforms and analyses of topics which the Law Commission intends to tackle in the future, via problems raised by the interaction of the law of succession with other areas of law, to modern pensions and tax issues impacting on estate planning. Discussions were lively and sometimes controversial. Recurrent themes concerned the tension between promoting legal certainty on the one hand and achieving 'just and equitable' results for individual cases on the other, and the ambiguity latent within certain statutory provisions between giving effect to testators' typical or hypothetical intentions and pursuing wider public policy objectives.

Although fact situations involving, in one form or another, testamentary dispositions lie at the heart of many of the chapters, the present volume begins by looking at scenarios where the deceased has not—or at any rate not necessarily—made a will. Roger Kerridge thus critically assesses the recent revision of the law of intestacy contained in the Inheritance and Trustees' Powers Act 2014 in Chapter 1, while Rebecca Probert in Chapter 2 discusses the other leg of that statute, namely the reform of the family provision regime. Chapter 3, by Ian Williams, is devoted to the operation of the common law forfeiture rule which—he argues—differs from the 'deemed predecease' rule recently inserted into the Wills Act 1837. In Chapter 4, Ben McFarlane considers the extent to which the law governing proprietary estoppel could be said to undermine the law of succession. Ying Khai Liew's contribution in Chapter 5 is related insofar as he seeks to explain the mutual wills doctrine in part by an orthodox constructive trust and in part by an estoppel-type analysis.

Chapter 5 is also the first of three chapters engaging with topics that feature on the Law Commission's future reform agenda, the Commission having announced

<sup>6</sup> See, in particular, KCG Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law, vol 1: Testamentary Formalities* (Oxford, Oxford University Press, 2011) and *Comparative Succession Law, vol 2: Intestate Succession* (Oxford, Oxford University Press, 2015); A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Oxford, Hart Publishing, 2016).

that it intends to ‘review the law of wills, focusing on four key areas that have been identified as potentially needing reform: testamentary capacity, the formalities for a valid will, the rectification of wills, and mutual wills’.<sup>7</sup> In Chapter 6, prompted by the recent Supreme Court decision in *Marley v Rawlings*,<sup>8</sup> Birke Häcker examines the rules pertaining to the interpretation and rectification of wills (and in this context also their relationship with the formality requirements), while Penelope Reed in Chapter 7 reviews the case law on testamentary capacity and its relationship with the so-called doctrine of ‘knowledge and approval’. Often connected with an alleged lack of capacity or a want of knowledge and approval is the problem of undue influence being brought to bear on testators. Brian Sloan explores this issue in the context of contemporary informal care scenarios in Chapter 8.

In Chapter 9, Lionel Smith asks whether and to what extent the actual or supposed principle against the delegation of testamentary power survives in the modern (English) common law. A different kind of delegation is addressed by Alexandra Braun’s contribution in Chapter 10. She looks at the ‘will substitute’ practice of pension schemes allowing their members to nominate beneficiaries to receive death benefits when the member dies, while usually leaving the trustees of the scheme discretion as to the actual distribution. Pension scheme death benefits are thus a significant (albeit somewhat haphazard) factor when it comes to estate planning. Tax considerations are, of course, typically the prime mover here. The volume therefore concludes with Emma Chamberlain in Chapter 11 scrutinising the extent to which business property can effectively be exempted from inheritance tax through the availability of ‘business property relief’. Her finding that the current UK regime contains many unjustified loopholes and anomalies, thereby increasing the complexity of estate and succession planning, is all the more topical as the equivalent German regime was recently held to be unlawful<sup>9</sup> and is now in the process of being reformed.

We, as the organisers of the conference, are extremely grateful to the Warden and Fellows of All Souls College for generously funding and hosting the event, and to all the presenters, session chairs and other participants for contributing to its success. Our thanks are also due to Bill Asquith and the whole team at Hart Publishing for publishing the proceedings in this collection and for securing the rights to reproduce Wilkie’s painting on the cover.

*Birke Häcker and Charles Mitchell*  
*Munich/London, 20 November 2015*

<sup>7</sup> See [www.lawcom.gov.uk/project/wills/](http://www.lawcom.gov.uk/project/wills/) (last accessed 20 November 2015).

<sup>8</sup> *Marley v Rawlings* [2014] UKSC 2, [2015] 1 AC 129, was a mirror wills case and potentially also a mutual wills case (though that question did not arise on the facts).

<sup>9</sup> Decision by the Federal Constitutional Court: BVerfG (17.12.2014) BVerfGE 138, 136.

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## What's in a Will?—Examining the Modern Approach Towards the Interpretation and Rectification of Testamentary Instruments

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BIRKE HÄCKER\*

### 1. Introduction

On 17 January 1768, Horace Walpole, Fourth Earl of Orford, wrote a letter to Sir Horace Mann, a British diplomat in Florence with whom he regularly corresponded. In the context of reporting that the recently deceased Royal Navy Officer Sir William Rowley had all but disinherited his son and grandson, Walpole remarks:<sup>1</sup>

It is rather leaving an opportunity to the Chancery, to do a right thing, and set such an absurd will aside. Do not doubt it. *The law makes no bones of wills. I have heard of a man who began his will thus: 'This is my will, and I desire the Chancery will not make another for me.' Oh! but it did.* (emphasis added)

The problem, of course, is that very often we simply do not know what a testator in his innermost mind really wanted, and we have to establish his intentions as best we can from the 'last will and testament' he has left behind. This formal instrument—it has aptly been observed—'carries the burden of communicating [to us his] last wishes.'<sup>2</sup> Our making sense of them occurs within the confines of what we might call a 'magic triangle' of testate succession law. This consists of,

\* An earlier version of this chapter was presented to the Annual Conference of the Chancery Bar Association in London on 17 January 2015. The author would like to thank all those who commented on the paper as it evolved, especially Dr Ian Williams and the other participants of the 'Current Issues in Succession Law' conference as well as Professor Robert Stevens. All errors are my own.

<sup>1</sup> *Letters of Horace Walpole, Earl of Orford, to Sir Horace Mann, His Britannic Majesty's Resident at the Court of Florence, from 1760 to 1785, now first published from the original mss.*, concluding series, vol 1 (London, Richard Bentley, 1843) 376 (letter CXVI).

<sup>2</sup> E Drummond, 'Whose Will is it Anyway?' [2014] *Conv* 357 at 357.

firstly, the statutory formality requirements, secondly, the principles of interpretation, and thirdly, the rules on the rectification of wills.

The recent landmark case of *Marley v Rawlings*<sup>3</sup> was by comparison rather unusual, in that everybody involved knew *exactly* what the testator wanted, both in terms of the wording of his will and in terms of the substantive dispositions he wished to enshrine in it. The testator, Mr Rawlings, wanted everything to go to his wife, or if she predeceased him<sup>4</sup> (which in fact she did) to the man whom the couple treated as their son, Mr Marley. The obstacle that looked for a while as though it might frustrate the testator's wishes and lead to an intestacy<sup>5</sup> was that the solicitor who had prepared Mr and Mrs Rawlings' mirror wills got them mixed up, so that each spouse mistakenly executed the draft document intended for the other.

In allowing the intended beneficiary's appeal against the rejection of his rectification claim at first instance and in the Court of Appeal,<sup>6</sup> the Supreme Court ruled that the term 'clerical error' in section 20(1)(a) of the Administration of Justice Act 1982<sup>7</sup> should be given a wide meaning, effectively encompassing any 'mistake arising out of office work of a relatively routine nature'.<sup>8</sup>

That specific point of statutory construction, which lay at the heart of *Marley v Rawlings*, must now be regarded as settled, at least under the current regime.<sup>9</sup> But there is a great deal more to the decision. Lord Neuberger PSC, with whom the entire panel of Justices of the Supreme Court agreed, took the opportunity to address a number of other issues pertaining to the 'magic triangle' of testate succession law. His judgment sets out the modern approach towards the interpretation and rectification of testamentary instruments, and it does so against the backdrop of the formality requirements imposed by section 9 of the Wills Act 1837.<sup>10</sup> There is so much in it about each of these basic tenets and about their relationship with one another that *Marley v Rawlings* has been described as a veritable 'treasure chest for the probate practitioner'.<sup>11</sup> And because probate cases so rarely reach the

<sup>3</sup> *Marley v Rawlings* [2014] UKSC 2, [2015] 1 AC 129, [2014] 2 WLR 213.

<sup>4</sup> Or survived him for less than a calendar month, a stipulation probably inserted to avoid the estate effectively passing twice in close temporal proximity, with the concomitant (potential) inheritance tax implications.

<sup>5</sup> From which the couple's disinherited biological sons—the respondents—would have profited.

<sup>6</sup> *Marley v Rawlings* [2011] EWHC 161 (Ch), [2011] 1 WLR 2146; aff'd [2012] EWCA Civ 161, [2013] Ch 271.

<sup>7</sup> The provision is set out in the text following n 63 below.

<sup>8</sup> *Marley v Rawlings* (SC) (n 3 above) [75]. Critical: A Learmonth, 'Marley v Rawlings in the Supreme Court' (2014) 20 *Trusts & Trustees* 725 at 730: "Clerical error" is not just a phrase that popped into the Parliamentary draftsman's head. It is a phrase with an ancient legal pedigree. It dates from the time before photocopiers, when clerks wrote out and copied legal documents in copperplate script. It had always been used to mean a slip of the pen, and by extension, of the word processor: an inadvertent drafting error, and never anything else'.

<sup>9</sup> The Law Commission is planning to review the relevant legislation: see the text accompanying n 13 below.

<sup>10</sup> That provision is set out in the text accompanying n 58 below.

<sup>11</sup> See the case note by L Harris, 'Marley v Rawlings: A Treasure Chest for the Probate Practitioner' [2014] *Private Client Business* 280.

highest judicial level,<sup>12</sup> we may expect this treasure chest to be exploited for quite some time to come.

A further aspect making the 'magic triangle' particularly topical is that the Law Commission in the summer of 2014 announced that its Twelfth Programme of Law Reform would include a project on wills. Two of the four key areas identified by the Law Commission as being most in need of review and potential reform are formality requirements and the rules on rectification.<sup>13</sup> The project was originally scheduled to commence early in 2015 and to take approximately three years, but has now been postponed, with a revised timetable expected to be published soon.<sup>14</sup>

Against this background, it is the purpose of the present chapter to explore five questions emerging from *Marley v Rawlings*. They are thrown up, but not fully resolved by the decision. On some of these, it will be necessary to take issue with the answers given or implied by the Supreme Court. The five questions, addressed in the following sections in this order, are:

- How are wills to be construed?
- Is rectification dispensable in the light of the modern canon of construction?
- Which comes first: interpretation or rectification?
- Does rectification presuppose the existence of a formally valid testamentary instrument, and what is the role of the testator's knowledge and approval?
- Do English courts have an innate power to rectify wills?

## 2. How Are Wills to Be Construed?

Given the order in which the Supreme Court decided to tackle the issues arising in *Marley v Rawlings*,<sup>15</sup> it is appropriate to begin by asking how wills are to be construed. This is a question which has vexed lawyers for a long time,<sup>16</sup> and much ink has been spilt on it over the years, simply because it is of such immense practical relevance. Except for a few very specific provisions in the Wills Act 1837 (to which the Supreme Court did not advert),<sup>17</sup> there is little legislative guidance

<sup>12</sup> R Ham, 'Thy Will Be Done: Construction and Rectification of Wills in the Supreme Court' (2014) 20 *Trusts & Trustees* 966, at 966, points out that the last time was in 1958 in *Wintle v Nye* [1959] 1 WLR 284 (HL).

<sup>13</sup> Law Commission, *Twelfth Programme of Law Reform* (Law Com No 354, London, 2014) paras 2.30–2.33. The other areas under review are 'testamentary capacity' and 'mutual wills', addressed by Penelope Reed and Ying Khai Liew in Chs 7 and 5 (respectively) of this volume.

<sup>14</sup> For the current project status, see [www.lawcom.gov.uk/project/wills/](http://www.lawcom.gov.uk/project/wills/) (last accessed 20 November 2015).

<sup>15</sup> See the text accompanying and following n 67 below.

<sup>16</sup> As Coke CJ famously stated in *Roberts v Roberts* (1611) 2 Bulstr 123 at 130, 80 ER 1002 at 1008, 'wills and the construction of them do more perplex a man, than any other learning, and to make a certain construction of them, this *excedit iuris prudentum artem*'.

<sup>17</sup> See ss 24–33 of the Wills Act 1837.

on it.<sup>18</sup> Although Lord Neuberger's comments on construction are—strictly speaking—obiter dicta,<sup>19</sup> courts, practitioners and academics are lapping them up eagerly.<sup>20</sup>

Endorsing a more general trend closely associated with the jurisprudence of Lord Hoffmann<sup>21</sup> and already supported by Lord Neuberger himself when he was Master of the Rolls,<sup>22</sup> Lord Neuberger held that the approach towards interpreting wills ought in principle to be the same as applies to any other document.<sup>23</sup>

[17] Until relatively recently, there were no statutory provisions relating to the proper approach to the interpretation of wills.<sup>[24]</sup> The interpretation of wills was a matter for the courts, who, as is so often the way, tended (at least until very recently) to approach the issue detached from, and potentially differently from the approach adopted to the interpretation of other documents.

[18] During the past 40 years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

[19] When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words,

<sup>18</sup> For the guidance that Lord Neuberger sought to extract (indirectly) from section 21 of the Administration of Justice Act 1982, see the text accompanying n 38 below.

<sup>19</sup> *Marley v Rawlings* was in the end decided on the basis of rectification alone, and it seems that the general 'modern' approach towards construction was conceded by counsel for the respondents: *Learmonth* (n 8 above) 728.

<sup>20</sup> From the case law, see especially *Burnard v Burnard* [2014] EWHC 340 (Ch) [61]–[66]; *Re Huntley (Brooke v Purton)* [2014] EWHC 547 (Ch), [2014] WTLR 745 at [11]–[15]; *Re Freud (Rawstron v Freud)* [2014] EWHC 2577 (Ch), [2014] WTLR 1453 at [11]–[13]; *Reading v Reading* [2015] EWHC 946 (Ch) [23]–[27], [40]–[47]; *Royal Society v Robinson* (17.11.2015, ChD, unreported). In the context of an *inter vivos* declaration of trust, cf the reference to *Marley v Rawlings* in *Richards v Wood* [2014] EWCA Civ 1314, [2015] 1 WLR 3238 at [14].

<sup>21</sup> See especially Lord Hoffmann's landmark restatement of the modern canon of contractual construction in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 (HL) 912–13. For the wills context in particular, see his observations in *Charles v Barzey* [2002] UKPC 68, [2003] 1 WLR 437 at [6]: 'The interpretation of a will is in principle no different from that of any other communication. The question is what a reasonable person, possessed of all the background knowledge which the testatrix might reasonably have been expected to have, would have understood the testatrix to have meant by the words which she used.' cf already Lord Denning's (minority) view in *Re Allsop (Cardinal v Warr)* [1968] Ch 39 (CA) 47, rejecting literalism and insisting that one 'must look at the will in the light of the surrounding circumstances'.

<sup>22</sup> *RSPCA v Sharp* [2010] EWCA Civ 1474, [2011] 1 WLR 980 at [31].

<sup>23</sup> *Marley v Rawlings* (SC) (n 3 above) [17]–[20].

<sup>24</sup> That is not quite accurate: see n 17 above and text thereto, and especially s 24 of the Wills Act 1837, stipulating that '[e]very will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will'. I have argued elsewhere that this provision—if taken at face value—is apt to mislead: B Häcker, 'A Case Note on *All Souls College v. Cod[d]rington* (1720)' (2012) 76 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 1051 at 1068, 1069–70, 1072.

(a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions ...

[20] *When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context ...* (emphasis added)

According to this approach, the fact that a will actually *differs* from a commercial contract in being made by only a single party is 'merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned', just as it would be if one were interpreting a unilateral notice or a patent.<sup>25</sup>

The law has therefore come a long way indeed from the literalism of the so-called *Wigram* rules.<sup>26</sup> It now subscribes to an avowedly intention-based approach.<sup>27</sup> Though it would be wrong to exaggerate the degree of assimilation,<sup>28</sup> one might say that the construction of wills has become much more continental or civilian

<sup>25</sup> *Marley v Rawlings* (SC) (n 3 above) [21]–[22], referring to *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 770–71 and 779–80; *Catnic Components Ltd v Hill & Smith Ltd (No 1)* [1982] RPC 183 (HL) 243; *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd (No 2)* [2004] UKHL 46, [2005] 1 All ER 667 at [27]–[32]. His Lordship did not say anything about statutory construction, but it has been suggested that the 'unified approach' to interpretation might actually extend that far: Goh Y and Yip M, 'Marley v Rawlings: Reflections from Singapore' [2014] *Singapore Journal of Legal Studies* 218 at 221–24, arguing that such a unified approach (supplemented by specific guidelines for particular types of documents) has several merits and should not be dismissed out of hand.

<sup>26</sup> See J Wigram, *An Examination of the Rules of Law, Respecting the Admission of Extrinsic Evidence in the Aid of the Interpretation of Wills* (London, Charles Hunter, 1831). The book was considered an authoritative manual and ran to four editions. A convenient summary of the propositions contained therein is provided by R Kerridge, *Hawkins on the Construction of Wills*, 5th edn (London, Sweet & Maxwell, 2000) (hereinafter '*Hawkins*') [2-17]–[2-27].

<sup>27</sup> The whole development, especially the abandonment of literalism by the House of Lords, is traced by *Hawkins* (n 26 above) [2-39]–[2-54]. As this treatment also indicates (at [2-02]), the 'intentional approach' had already been a serious rival to literalism well before the 19th century. Consider, for example, the following statement by Sir Joseph Jekyll MR in *Cowper v Cowper* (1734) 2 P Wms 720 at 741, 24 ER 930 at 937: 'I am sensible there is a diversity of opinions among the learned judges of the present time, whether the legal operation of words in a will, or the intent of the testator, shall govern? for my part, I shall always contend for the intention where it is plain, and I think the strongest authorities are on that side; for if the intention is sometimes to govern as it is admitted it must, and not always give way to the legal construction, and yet at other times shall not govern, there will then be no rule to judge by, nor will any lawyer know how to advise his client; a mischief which judges ought to prevent'.

<sup>28</sup> In particular, against the background of s 21 of the Administration of Justice Act 1982 (on which see the text accompanying and following nn 36–38 below), it would be rash to assert that English law now adopts the *same* approach towards the construction of wills as, for instance, German law (on which see the text accompanying nn 33–34 below). Though much of the detail is contentious in both legal systems, there would appear to remain substantial differences as regards what exactly is meant by the testator's 'intention' and how it is established in practice.

in spirit.<sup>29</sup> However, such an observation calls for an immediate caveat. If one looks at the modern English approach through civilian—in my case German—spectacles, then the suggestion that wills should in principle be interpreted in the *same* way as any other document is, as a matter of fact, rather surprising.

German lawyers construe contracts (as well as all types of legally relevant declarations by one party to another, such as unilateral notices) by reference to the declaring party's intention *as it would appear from the recipient perspective*.<sup>30</sup> This makes for an element of objectivity in their interpretation, not unlike the objective contextual circumstances Lord Neuberger mentions. The same is true of patents, which are construed as the notional 'person skilled in the art' would understand them.<sup>31</sup>

But wills, to a German lawyer, are different. They are different because they are not dependent for their legal validity on anybody receiving them or on their being published to the world at large in some official journal. Conceptually (though of course not practically), they take effect on death simply because they are there, whether or not they are actually found. People are said not to rely on them in the same way as they do on unilateral notices or patent claims.<sup>32</sup> This conceptual

<sup>29</sup> It is worth noting that the Law Reform Committee, whose 1973 Report on the interpretation of wills substantially promoted the intention-based approach, expressly drew on comparative work by the German émigré lawyer Ernst Joseph Cohn (1904–76): Law Reform Committee, *Nineteenth Report: Interpretation of Wills* (Cmnd 5301, London, 1973) para 56. See also n 61 and the accompanying text below.

<sup>30</sup> This is the combined effect of §§ 133, 157 BGB. The former provides: 'In interpreting a declaration of intention, the true intention is to be ascertained rather than adhering to the literal meaning of the expression'. Where, however, a declaration of intention needs to be communicated to the other party, § 133 is read in conjunction with § 157 BGB, which stipulates that '[c]ontracts are to be interpreted in accordance with the requirements of good faith and taking account of common usage'. In its generalised form, this approach is known as the 'objective recipient perspective' (*objektiver Empfängerhorizont*).

<sup>31</sup> See eg BGH (7.11.2000) GRUR 2001, 232 at 233; OLG Düsseldorf (28.6.2007) case ref I-2 U 22/06 (available via juris); BGH (22.12.2009) BGHZ 184, 49 at 57–58. For the UK, see *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd (No 2)* (n 25 above) [32]–[33], where Lord Hoffmann said: 'Construction, whether of a patent or any other document, is ... not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, "the meaning of the words the author used", but rather what the notional addressee would have understood the author to mean by using those words. ... In the case of a patent specification, the notional addressee is the person skilled in the art'.

<sup>32</sup> Since provisions in a will remain revocable (in most cases) until the testator's death, there can be no question of reliance before then. Afterwards, German law caters for reliance issues by means of generous rules protecting innocent parties' good faith, such as their reliance on a 'certificate of heirship' (*Erbschein*, roughly equivalent to a grant of probate) if this document fails to reflect the true legal position. As far as English law is concerned, Ham (n 12 above) 968 notes that '[i]n the context of wills ... there is no question of one party relying on an objective understanding of the meaning of the will'. But contrast the Law Reform Committee's *Nineteenth Report* (n 29 above) para 3 ('In formulating rules for disputes about the meaning of a will, the law must hold the balance between giving effect to the

difference leads German lawyers to hold that wills—and wills alone—have to be interpreted solely in accordance with the testator's innermost subjective intent so far as we can establish it,<sup>33</sup> and there are no restrictions on the admissible evidence. The classic example used to illustrate this proposition is the case of a testator who leaves his 'library' to a particular legatee. If it can be shown that the testator habitually (or arguably even, for some reason, just on this one occasion) referred to his wine cellar as his 'library', then the bequest will be one of wine and not of books.<sup>34</sup>

In English law, we would hopefully arrive at the same result,<sup>35</sup> but it is questionable whether context alone can get us there. Unless it is clear from the will itself that the testator used the term 'library' in a peculiar idiosyncratic sense, we need extrinsic evidence to establish what he meant. Such evidence is let in through section 21 of the Administration of Justice Act 1982,<sup>36</sup> which is a product of recommendations made by the Law Reform Committee in 1973.<sup>37</sup> It reads:

#### 21 Interpretation of wills—general rules as to evidence

- (1) This section applies to a will—
  - (a) in so far as any part of it is meaningless;
  - (b) in so far as the language used in any part of it is ambiguous on the face of it;
  - (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
- (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

testator's "true" intentions on the one hand and enabling those concerned to rely on the words actually used in it on the other.); Drummond (n 2 above) 364 ('Testators should expect their wills to be made public after death on grant of probate, and a will is a document prepared precisely in order to affect the rights of third parties'). See also s 20(3) of the Administration of Justice Act 1982, seeking to protect the personal representative from liability after the initial six-month period during which applications for rectification orders are to be expected.

<sup>33</sup> Wills are construed in accordance with §§ 133, 2084 BGB. The wording of the former provision is set out in n 30 above. The latter provides: 'If the content of a testamentary disposition admits of different interpretations, then that interpretation is to be preferred in the case of doubt which allows the disposition to be effective' (*favor testamenti*).

<sup>34</sup> See eg G Otte, *Erbrecht: Eine Darstellung der Grundzüge in programmierter Form* (Berlin, Walter de Gruyter, 1974) 34; KH Gursky, *Erbrecht*, 6th edn (Heidelberg, CF Müller, 2010) 29; B Boemke and B Ulrici, *BGB Allgemeiner Teil*, 2nd edn (Heidelberg, Springer, 2014) 146. More nuanced: D Leipold in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 9 (*Erbrecht*), 6th edn (München, CH Beck, 2013) § 2084 [18].

<sup>35</sup> See eg R Kerridge (assisted by AHR Brierley), *Parry and Kerridge: The Law of Succession*, 12th edn (London, Sweet & Maxwell, 2009) (hereinafter '*Parry and Kerridge*') [10-16] and [10-29].

<sup>36</sup> Our case would probably fall under subsection (1)(c): see *Parry and Kerridge* (n 35 above) [10-28].

<sup>37</sup> See Law Reform Committee, *Nineteenth Report* (n 29 above) especially paras 1–8 and 34–59; *Hawkins* (n 26 above) [2-47]–[2-65].

In *Marley v Rawlings*, Lord Neuberger adverted to this provision and in the light of it qualified his earlier statement somewhat. He said:<sup>38</sup>

[25] In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that ‘evidence’ is admissible when construing a will, and that that includes the ‘surrounding circumstances’. However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator’s intention is admissible, in order to interpret the will in question.

[26] Accordingly, as I see it, *save where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator’s actual intention* (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared). (emphasis added)

This clarifies how the Supreme Court wants to resolve the conceptual tension between the necessarily objective contextual approach of contract interpretation and the more subjective approach (sometimes) appropriate for wills, but at the same time it puts rather a lot of pressure on section 21. The question is: *how much* evidence is admissible as a matter of ordinary ‘context’, and *how much* can come in via section 21? More of the former will probably entail less of the latter. Conversely, a restrictive take on the former is bound to put into sharp focus the question of when the language used in a will is ‘meaningless’ or ‘ambiguous’. All in all, the broader the remit of section 21(1), the greater the difference in approach between the construction of wills and the interpretation of other documents will tend to be.

Looking at the case law, there appears to be a great deal of uncertainty concerning the admissibility of extrinsic evidence and the way it fits with the modern contextual approach. For example, where there was a mis-description of a party mentioned in the will, some judges have felt able to correct this without recourse to section 21 by taking a ‘practical and common sense view’ of context-sensitive construction,<sup>39</sup> while others have found the will to be merely ‘ambiguous in the light of surrounding circumstances’ and then relied on section 21 to admit extrinsic evidence.<sup>40</sup> In *Reading v Reading*, Asplin J recently combined both approaches. She held that although the term ‘issue’ did not normally include stepchildren, when one considered the overall context and purpose of the will in question and ‘appl[ied] common sense’, the ‘ordinary and natural meaning of the words “issue of mine” and “such of my issue” respectively include[d] both children and stepchildren and their children rather than descendants of all degrees’.<sup>41</sup> However, in

<sup>38</sup> *Marley v Rawlings* (SC) (n 3 above) [25]–[26].

<sup>39</sup> *Re Rogers* [2006] EWHC 753 (Ch), [2006] 1 WLR 1577 at [14]. Lightman J did not advert to s 21.

<sup>40</sup> *Burnard v Burnard* [2014] EWHC 340 (Ch) [64].

<sup>41</sup> *Reading v Reading* [2015] EWHC 946 (Ch), [2015] WTLR 1245 at [40]–[47], especially [47].

case she was wrong about this, she added that the admission of extrinsic evidence under section 21(1)(c) would have led to the same conclusion.<sup>42</sup>

As far as the width of the statutory gateway for extrinsic evidence is concerned, one recent decision maintained that ‘the concept of ambiguity in section 21 of the 1982 Act should be broadly interpreted’ and concluded that this allowed the relevant will to be treated as if one of its clauses was in fact omitted,<sup>43</sup> while in the litigation concerning the will of the late Lucian Freud, the parties took a much narrower view of the provision: it was common ground between them that extrinsic evidence (such as the instructions given to the solicitors who drafted the instrument) could *not* be admitted as an aid to interpretation.<sup>44</sup> This chimes with the statement of Proudman J in *Gledhill v Arnold* that, when construing a will, ‘the court is not engaged in an exercise in order to avoid an obviously absurd or unintended result.’<sup>45</sup> Nevertheless, as Richard Spearman QC observed, sitting as a Deputy Judge of the Chancery Division in *Re Freud*:<sup>46</sup>

To lay people involved in a single piece of litigation, this may seem surprising. Suppose a testator gives clear and unequivocal instructions in writing as to what he wants to achieve by his will, his solicitor sends him a draft will with a covering letter explaining how the solicitor has sought to reflect those intentions in the draft will, and the testator signs the will and returns it to the solicitor with a letter saying that he is happy that his intentions have been achieved? Some might think all that a good aid to interpretation.

The line becomes even harder to hold when one considers that extrinsic evidence is admissible without restrictions when it comes to rectifying (rather than merely construing) a will, bearing in mind that a rectification claim is often run alongside the interpretation argument. This leads us straight to the next question.

### 3. Is Rectification Dispensable in the Light of the Modern Canon of Construction?

Whether and to what extent rectification is now dispensable in light of the modern canon of construction is a question which has often been asked, but which is still

<sup>42</sup> *ibid* [48]–[49]. In the case of *Re Harte* [2015] EWHC 2351 (Ch), decided shortly after the ‘Current Issues in Succession Law’ conference, David Hodge QC, in his capacity as a judge of the High Court, relied on a combination of intention-orientated construction with the aid of evidence admitted via s 21 (in respect of some clauses of a will) and rectification under s 20 (in respect of other dispositions) to resolve the case at hand.

<sup>43</sup> *Re Huntley (Brooke v Purton)* [2014] EWHC 547 (Ch), [2014] WTLR 745, especially [14]–[15].

<sup>44</sup> *Re Freud (Rawstron v Freud)* [2014] EWHC 2577 (Ch), [2014] WTLR 1453, especially [13]–[15].

<sup>45</sup> *Gledhill v Arnold* [2015] EWHC 2939 (Ch) [23]. Although her Ladyship refused to construe the relevant will as contended for by the claimants (because there was ‘nothing odd about the Will as it stands’: at [23]), she did allow the alternative claim for rectification to succeed, observing by way of justification merely that, ‘[g]iven the width of the expression “clerical error” as explained in *Marley v Rawlings*, a failure correctly to record the instructions was the result of a clerical error’ (at [26]).

<sup>46</sup> *Re Freud* (n 44 above) [15].

not finally answered, in the realm of contract law.<sup>47</sup> *Marley v Rawlings* highlights that it is also a live issue in the realm of wills.<sup>48</sup>

Two of their Lordships, it seems, were at one point inclined to solve the case on the basis of construction,<sup>49</sup> but Lord Neuberger preferred the rectification route and left the matter of construction open,<sup>50</sup> although he did indicate that he saw some problems about simply ‘reading’ the document signed by Mr Rawlings as though it contained the words set out in the instrument signed by his wife.<sup>51</sup>

In *practice*, it is of course advisable to pursue both a rectification claim and the argument based on interpretation whenever possible, and it may not matter

<sup>47</sup> See eg J McGhee, *Snell’s Equity*, 33rd edn (London, Sweet & Maxwell, 2014) at [16-008]: ‘That an instrument can be interpreted broadly to correct a mistake clearly restricts the range of circumstances in which rectification will be necessary. However, in some situations the parties will still need to seek rectification rather than interpretation’. Compare and contrast A Burrows, ‘Construction and Rectification’ in A Burrows and E Peel (eds), *Contract Terms* (Oxford, Oxford University Press, 2007) 77 at 99, who predicted some years ago that at least ‘in the context of the rectification of *contracts* for mistakes of *fact*, rectification has not merely been rendered less important by modern developments in the law of construction but is on the point of being rendered largely superfluous’. Following *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, where the House of Lords refused to jettison the exclusionary rule (under which evidence of pre-contractual negotiations cannot be used as an aid to interpretation), R Buxton, ‘“Construction” and Rectification after *Chartbrook*’ [2010] *CLJ* 253 at 262 argued that ‘on any view of its reach rectification should in practice transcend its present status as a safety net in cases where the inadmissibility of prior negotiations in issues of construction produces a conclusion that those negotiations show to be plainly wrong. Rectification should in future occupy the whole of the field when it is necessary to correct errors in the formal expression of a contractual consensus’ (footnotes omitted).

<sup>48</sup> Various commentators specifically address the point, eg Drummond (n 2 above) 362–64; J Goodwin and E Granger, ‘Where There’s a Will There’s a Way: *Marley v Rawlings and Another*’ (2015) 78 *MLR* 140 at 145–46; M Thomas, ‘Where There’s a Will There’s a (Wrong) Way: *Marley v Rawlings and another*’ (2014) 28 *Trust Law International* 38 at 40–41.

<sup>49</sup> Robert Ham QC, who was counsel for the successful appellant in *Marley v Rawlings*, notes that ‘[d]uring the course of argument, at least two of the justices seemed strongly attracted by the construction argument’: Ham (n 12 above) 967.

<sup>50</sup> *Marley v Rawlings* (SC) (n 3 above) at [41]: ‘In my judgment, unless it is necessary to decide this difficult point, we should not do so on this appeal. Interpretation was not the basis on which the courts below decided this case and it was not the ground on which Mr Ham primarily relied. Furthermore, and no doubt because of those points, only limited argument was directed to the issue of whether the issue was one of interpretation or of rectification. For the reasons developed below, I consider that this appeal succeeds on the ground of rectification, so I shall proceed on the basis that it fails on interpretation.’

<sup>51</sup> *ibid* [42]. See also Drummond (n 2 above) 363: ‘This was the better course, since it is difficult to see *Marley* as a case of construction at all. The words “if my husband Alfred Thomas Rawlings ... survives me ... then ... I leave to him my entire estate” in the document signed by Mr Rawlings do not state that his estate was to be left to his wife Maureen Catherine Rawlings if she survived him. Looking outside the will for an explanation does not show us what he intended by those words; it tells us that he intended to use different words. No wonder that they appeared ambiguous or meaningless, in the language of s.21’; Learmonth (n 8 above) at 728: ‘[W]e [ie counsel for the respondents in *Marley v Rawlings*] pointed out that, as consistently held by the Supreme Court and the House of Lords before it, interpretation is an exercise in discovering *what the party or parties meant by the language* used in the document. The facts of the case showed that there was nothing wrong with the language of the will requiring any unusual construction. Where the document in question was never intended by its draftsman or its signatory for that party, that was a futile exercise; the words meant exactly what they said, and though they were meaningless in the mouth of the person who signed the document, there was no basis for construing them to mean what someone else would have meant’ (footnotes omitted).

much whether the claimant in the end wins on one or the other. But it is nevertheless worth considering, in *theory*, to what extent the modern canon of construction makes the rectification exercise superfluous, not least because rectification is normally subject to a six-month time limit,<sup>52</sup> while interpretation is not similarly confined. Lord Neuberger in *Marley v Rawlings* rightly emphasised that the demarcation line was not of purely academic interest:<sup>53</sup>

At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had been delay, change of position, or third party reliance).

It is submitted that there are *at least two* reasons why rectification of wills still has important roles to play and cannot simply be replaced by a liberal approach to construction. The first is somewhat contingent on what was said above about the uncertainties of interpretation. So long as there are cases where extrinsic evidence of the testator's subjective dispositive intention is not admitted as an aid to construction,<sup>54</sup> rectification will remain the vehicle of choice for bringing it to bear.

But even if the contextual approach, coupled with an extremely broad reading of section 21(1) of the Administration of Justice Act 1982, were to bring the intention-based interpretative method to perfection,<sup>55</sup> there would still be situations where rectification is indispensable. The reason is the following: While it may be possible in an appropriate case to construe 'library' to mean 'wine cellar',<sup>56</sup> one cannot read something into a will which is not there at all. Assume that the testator had intended to leave his wine cellar to another member of his gentlemen's club, but that amongst a whole long list of various bequests to individuals which he wanted to include in his will, this one for some inexplicable reason went missing from the final draft. There is just a plain gap in the will, a gap that one would not notice just from looking at the document, and one that no amount of interpretation can fill.<sup>57</sup> Formality requirements are the essential crux of the matter. A testator's wishes are only legally relevant in so far as they have been expressed in a way which complies with section 9 of the Wills Act 1837:<sup>58</sup>

<sup>52</sup> See Administration of Justice Act 1982, s 20(2), set out in the text following n 63 below. Note that courts have discretion to extend this period, which they appear to be making generous use of.

<sup>53</sup> *Marley v Rawlings* (SC) (n 3 above) [40].

<sup>54</sup> See the text accompanying nn 43–46 above.

<sup>55</sup> This is not to say that a completely subjective intention-based approach would necessarily be desirable under English law, particularly from the reliance point of view: *cf* the discussion in n 32 above.

<sup>56</sup> See the text accompanying and following n 34 above.

<sup>57</sup> If the gap is obvious on the face of the document, then interpretation could conceivably help.

<sup>58</sup> As substituted by the Administration of Justice Act 1982, s 17: see n 117 below.

### 9 Signing and attestation of wills

No will shall be valid unless—

- (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
- (b) it appears that the testator intended by his signature to give effect to the will; and
- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either—
  - (i) attests and signs the will; or
  - (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),
 but no form of attestation shall be necessary.

If an intended bequest is simply missing from the draft which has been signed and attested, it cannot take effect, however genuine the testator's intention may be.<sup>59</sup>

This is a predicament faced by any legal system which subjects wills to strict formalities. German lawyers try to address the problem by a doctrine known as the *Andeutungstheorie*. It maintains that a testator's subjective dispositive intent has to be at least hinted at or in some way alluded to in the formal instrument if it is to be enforced.<sup>60</sup> If there is no 'peg' to hang a particular interpretation on, then it quite simply fails.<sup>61</sup> That would be the end of the matter for German testators who forget individual bequests when copying out their wills from preliminary drafts.<sup>62</sup>

<sup>59</sup> Drummond (n 2 above) 364 makes the same point: 'Suppose ... that a will fails—for no apparent reason—to make provision for someone who was close to the testator; investigation shows that the testator did intend to make provision, but that the wording never made it to the will. Adding wording for the testator's intention into the will, on the basis that the background shows that something went wrong with the language of the will, would surely contravene s.9 of the Wills Act 1837 unless carried out by way of rectification under s.20 of the 1982 Act.'

<sup>60</sup> See eg BGH (9.4.1981) BGHZ 80, 242; BGH (8.12.1982) BGHZ 86, 41; BGH (16.7.1997) NJW-FER 1997, 252; Otte (n 34 above) 36–37; Leipold in *Münchener Kommentar* (n 34 above) § 2084 [14]–[16]; L Michalski, *BGB-Erbrecht*, 4th edn (Heidelberg, CF Müller, 2010) [336]–[340]; but cf U Foerste, 'Die Form des Testaments als Grenze seiner Auslegung' (1993) 44 *Deutsche Notar-Zeitschrift* 84.

<sup>61</sup> This is probably what Ernst Joseph Cohn had in mind when using the metaphor in his submission to the Law Reform Committee: see *Nineteenth Report* (n 29 above) para 56: 'There must be [under the proposed regime which was subsequently implemented in the Administration of Justice Act 1982, s 21] a legitimate dispute about the language of the will as a "peg" on which to hang the admission of the evidence—to borrow an idea expressed to us by Professor E.J. Cohn in a paper about the laws of the continental countries, for which all of us were particularly grateful. It appears that in those countries no exclusionary rules of evidence are in force today and the courts consider their task to be to give effect to the testator's intention, however proved, provided there is the necessary peg in the words of the will.'

<sup>62</sup> The German Civil Code recognises only holographic (ie handwritten) wills and those made in notarial form as 'regular testaments': §§ 2231–2247 BGB. It is worth mentioning, however, that in the specific circumstances of *Marley v Rawlings*, German law might have been able to treat Mr and Mrs Rawlings' mirror wills as a 'joint testament of spouses' (§ 2265 BGB), in which case the mix-up of drafts would not have been fatal. Indeed, such a mix-up is arguably far less likely to happen

But not all is lost for testators in England. The rules on rectification (for which there is no German equivalent)<sup>63</sup> ensure that the defect can be cured where the testator's wishes have accidentally not been committed to the correct form. Section 20 of the Administration of Justice Act 1982, which also goes back to the Law Reform Committee's 1973 recommendations, provides, so far as is relevant here:

### 20 Rectification

- (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
  - (a) of a clerical error; or
  - (b) of a failure to understand his instructions,
 it may order that the will shall be rectified so as to carry out his intentions.
- (2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.
- (3) ...
- (4) ...

Rectification is therefore possible if the reason why the testator's wishes have not found their way into the instrument is that the testator himself or a person aiding and advising him has made a 'clerical error' (a term given a very broad interpretation by *Marley v Rawlings*),<sup>64</sup> or if a person drawing up the will for the testator has failed properly to understand his instructions.<sup>65</sup> It may perhaps be that section 20 is drafted too narrowly as it stands,<sup>66</sup> but the provision is certainly not superfluous.

The clear answer to the second question (namely, whether rectification is dispensable in the light of the modern canon of construction) is thus 'no'—however generously one admits extrinsic evidence under section 21, and however intention-focused the interpretative exercise eventually becomes. Yet in order to understand exactly what role rectification can legitimately continue to play alongside the modern approach to construction, it is helpful to clarify the relationship between the two in another respect as well.

in the first place where testators have to write out their will by hand or where they undergo a fairly elaborate process of notarial attestation, including an obligatory reading-out of the entire document (§ 13 BeurkG). In England, it is standard practice for wills drafted by professionals to be read out to the testator before they are executed, but there are no comparable safeguards for home-made wills.

<sup>63</sup> German law does not allow for the rectification of wills, but a testamentary disposition which the testator did not intend, or in relation to the content or effect of which he was mistaken, is generally rescindable: § 2078 BGB. This means that individual provisions or whole wills may be struck out as ineffective, but nothing can be substituted or added.

<sup>64</sup> Section 20(1)(a). See the text accompanying n 8 above.

<sup>65</sup> Section 20(1)(b).

<sup>66</sup> See the text accompanying nn 215–216 below, but *cf* also the text following n 220 below.

## 4. Which Comes First: Interpretation or Rectification?

Are we first to construe the will and then rectify it as necessary to give effect to the testator's intention, or should rectification not rather *precede* interpretation proper?

Lord Neuberger in *Marley v Rawlings* was quite clear that he thought interpretation came first. He said:<sup>67</sup>

Although Mr Ham [counsel for the appellant] primarily based his contention that the will was valid on the ground of rectification (which was the sole basis on which the case was considered in the courts below), he accepted that the interpretation argument ought to be considered first ...

This has an intuitive appeal. It is a pragmatic approach which is also expressly or impliedly adopted by a number of other recent cases (including non-wills cases).<sup>68</sup> Why bother with rectification when we can arrive at the desired result by interpretation? In *Re Huntley*, for example, David Donaldson QC held that there was 'no need, nor indeed logical scope, for rectification' where the will—on its proper construction—already reflected the testator's intention,<sup>69</sup> and he doubted whether it was even possible and proper to rectify for the sake of clarity alone.<sup>70</sup> The 'interpretation-first' approach can indeed draw some support from the wording of section 20, according to which rectification depends on a court finding that 'a will is so expressed that it fails to carry out the testator's intentions'.<sup>71</sup>

However, it is worth noting that the Law Reform Committee, in whose recommendation sections 20 and 21 are rooted, took a very different view in 1973.

<sup>67</sup> *Marley v Rawlings* (SC) (n 3 above) [33].

<sup>68</sup> Beside *Re Huntley* (n 43 above), quoted and discussed in the text accompanying n 69–70 immediately below, see *Kevern v Ayres* [2014] EWHC 165 (Ch), [2014] WTLR 441 at [15]; *Burnard v Burnard* (n 40 above) [66]; *Reading v Reading* (n 41 above) especially [40]; *Gledhill v Arnold* (n 45 above); *Re Harte* (n 42 above).

<sup>69</sup> *Re Huntley* (n 43 above) [19].

<sup>70</sup> *ibid*: 'The power to make [a rectification] order nonetheless *ex abundanti cautela* is supported, if somewhat tenuously, by a decision of the Privy Council (see *Standard Portland Cement Co Pty Ltd v Good* [1982] 57 ALJR 151). To that may be added a more extensive Australian jurisprudence (reviewed in *Frankins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407), which has however not so far found any echo in English case law. For my own part, I find it difficult to understand what an order for rectification can contribute in such a case, and do not intend myself to take that course here, whether or not it is theoretically open to me' (footnotes omitted).

<sup>71</sup> *cf* Ham (n 12 above) 967–68, who draws attention to the opening words of section 20, but then asks—in the light of the 'sensible pragmatic conclusion' adopted in *Marley v Rawlings*, namely of leaving open whether the case could have been solved by interpretation—why parties should 'have to argue, and the court decide, a difficult point of construction, where there is clear evidence of intention upon which to grant rectification?'. Compare and contrast Learmonth (n 8 above) 728: 'Disappointingly, and rather illogically, Lord Neuberger ... did not actually decide the [construction] point. It was illogical to duck the question because the jurisdiction in section 20 of the 1982 Act to rectify a will arises only if it does not reflect the testator's intentions. Until one has determined the true construction of a will, therefore, one cannot say if it can be rectified.'

The Committee expressly considered the right order of doing things, identifying two diametrically opposed approaches,<sup>72</sup> and concluded that:<sup>73</sup>

The procedure would be *first* to rectify the will (wherever appropriate) in order to make it contain the words it was intended to contain *and then* to admit all such evidence relevant to discovering what meaning those words would have conveyed to the testator. (emphasis added)

According to this approach, rectification and interpretation are quite distinct exercises, and rectification is not merely ‘ancillary’<sup>74</sup> to interpretation. The first step is always to make sure that the document actually *says* what it was intended to say, ie that it contains the words the testator wanted to use. In a second step, one then considers what the testator *meant* by those words, ie what *sense* they bore for him.<sup>75</sup> That is the reason why the provision on rectification (section 20) actually precedes the rules as to the admissibility of evidence for the purposes of interpretation (in section 21).

This way of looking at things also explains why *Marley v Rawlings* was rightly solved by means of rectification. It was not a case where Mr Rawlings attributed to the words in the document he had signed some peculiar meaning. Rather, he thought he was putting his signature to a different set of words.<sup>76</sup> And that *intended* set of words conveyed to him exactly the same meaning as it would to anybody else. The problem therefore was not one of interpretation at all.<sup>77</sup>

<sup>72</sup> Law Reform Committee, *Nineteenth Report* (n 29 above) paras 15–16: ‘[15] Although interpretation and rectification merge indistinguishably into the fundamental problem of the proper extent of the court’s power to decide on the effect of a will, as a matter of procedure they must to some extent be separated. Two main views have emerged in discussion about which ought to come first. One view is that interpretation is all, or nearly all, and that rectification is merely ancillary to it. This view is held by those who start from the proposition that the duty of the court is to find out what the testator meant by his will, or even (as some contend) what he meant its effect to be. When the primary task has been accomplished, it may in some cases be appropriate to make a consequential amendment to the words of the will as a matter of record; this is then the role of rectification. [16] The other view is that the process should be the reverse. The court should first ascertain precisely what words the testator meant, or must be taken to have meant, his will to contain; if necessary it should rectify the words admitted to probate so as to make them conform with that intention. Then, and only then, should it proceed to the task of ascertaining what those words mean, in accordance with the rules of interpretation. It is this second view which we are inclined to think is the right one’.

<sup>73</sup> *ibid* para 49.

<sup>74</sup> *ibid* para 15, quoted in n 72 above.

<sup>75</sup> The Law Reform Committee did not seek to deny that ‘[t]here is a certain artificiality in trying to distinguish between the words which the testator intended to use and the meaning which he intended them to have’: *ibid* para 58.

<sup>76</sup> Drummond (n 2 above) 357 perceptively outlines the facts of the case by saying that ‘[u]nfortunately, the words [Mr Rawlings] had chosen were not those to which he put his signature’.

<sup>77</sup> Drummond (n 2 above) 363 makes essentially the same point in the passage already quoted in n 51 above: ‘Looking outside the will for an explanation does not show us what [Mr Rawlings] intended by those words; it tells us that he intended to use different words’. See also Learmonth (n 8 above) 728: ‘[I]t would have been useful for practitioners to know whether one can interpret the language of a will that was never intended for the testator as if it was’; Goodwin and Granger (n 48 above) 146: ‘rectification, as opposed to interpretation, allows for the kind of wholesale changes to a document that were necessary in this case’.

Of course the initial act of appraising the will after the testator's death always involves an interpretation of sorts (if only to assess the testamentary character of the instrument and to determine who should apply for probate), but thereafter the Law Reform Committee's favoured approach is arguably still the best way of rationalising the relationship between rectification and interpretation in the narrower sense.

When section 20(1)(a) of the Administration of Justice Act 1982 speaks of a will which is 'so expressed that it fails to carry out the testator's intentions' in consequence of a 'clerical error', what this must refer to is his *intention of using a particular set of words*. Hence, if the testator wanted to leave a bequest of £1,000 to charity, but by some transcription error or slip of the pen the figure in the instrument ended up as £100 or £10,000, that is a clear case for rectification.<sup>78</sup> By contrast, if the testator was a baker by profession and left 'a dozen casks of wine' to a colleague, meaning thirteen casks, we should get there by interpretation on the modern contextual approach.<sup>79</sup>

Section 20(1)(b) is more difficult to rationalise than subsection 1(a) because here the testator will typically have left the exact choice of words to the draftsman. Here, therefore, the word 'intention' must bear a slightly wider meaning and refer to the dispositions the testator had in mind and asked his legal adviser to implement. Rectification—we are told—is possible if the draftsman failed to understand the testator's instructions, but not if he understood them correctly and mis-implemented them without any clerical error occurring.<sup>80</sup> The best explanation is probably the following: If the draftsman misunderstands what the testator wants and faithfully transposes his (supposed) wishes, then something has gone wrong in the transmission of information between the testator and the draftsman. Were one to regard the latter as a kind of 'drafting machine' helping to translate the testator's lay language into precise legal concepts and terminology, then one could say that the error has occurred in the process of feeding the relevant information into the machine. In some respects this resembles a clerical error.

Compare and contrast the case where the draftsman *correctly understands* what the testator wants<sup>81</sup> and deliberately chooses words which he *thinks* implement

<sup>78</sup> See Law Reform Committee, *Nineteenth Report* (n 29 above) para 18, example (a), and para 19.

<sup>79</sup> If context alone is insufficient to show that the testator had in mind a 'baker's dozen' (rather than an ordinary dozen), then the use of the word 'dozen' must at least be regarded as ambiguous in the specific professional context, so that extrinsic evidence about his actual dispositive intent will be admissible under s 21 of the Administration of Justice Act 1982 for the purposes of determining whether he meant 12 or 13 casks.

<sup>80</sup> If the draftsman makes a clerical error in the process of drafting the will, then s 20(1)(a) applies in the same way as if the testator had made the error.

<sup>81</sup> There is a question about how to handle cases where the draftsman fails to clarify what exactly the testator wants. In *Re Martin (Clarke v Brothwood)* [2006] EWHC 2939 (Ch), [2007] WTLR 329, for example, the solicitor apparently did not notice that the testatrix's instructions left a large part of the estate undisposed of. He pleaded clerical error, and the judge allowed rectification under s 20(1)(a), so that a 'one-twentieth' share of the estate became '20 per cent' thereof. However, there was hardly a clerical error on the facts. It has been suggested that rectification should—if at all—have been ordered

that intention, but where these words actually fail to achieve the desired end.<sup>82</sup> Given that the testator effectively adopts the draftsman's words as his own by means of his signature, the situation is no different from one where the testator executes a badly drafted home-made will.<sup>83</sup> The draftsman's mistake becomes—vicariously—the testator's.<sup>84</sup> Unlike in the case of a clerical error, the problem does not lie with the actual words in the will. It lies with the reasons behind choosing them. And that is simply bad estate planning.<sup>85</sup>

This kind of bad advice may of course give rise to a negligence liability on the part of the draftsman under the principle recognised in *White v Jones*,<sup>86</sup> just as a clerical error made by the solicitor or a failure to understand or clarify the client's instructions will also typically give rise to liability in the tort of negligence.<sup>87</sup> In the latter two situations, a potential claim in the tort of negligence will compete with a potential rectification claim. Let us briefly consider such a scenario and its implications for the question we are considering.

Where the draftsman of a will has been negligent, it is generally assumed that, in order to mitigate his loss, the claimant has to try to have the will rectified before pursuing his damages claim.<sup>88</sup> Behind this postulate stands the idea that the

under s 20(1)(b), on the basis that '[a]ny competent lawyer should have queried whether Miss Martin really had intended to dispose of only part of the residue' and that, since he had not done so, 'the solicitor had failed to understand his "instructions" in the wider sense of the term': R Kerridge and AHR Brierley, 'Re Martin: Rectification of a Will—The Right Result for the Wrong Reason?' [2007] *Conv* 558 at 562.

<sup>82</sup> *Reading v Reading* (n 41 above) would have been an example of such a situation, had Asplin J not felt able to read the word 'issue' as including stepchildren in the circumstances of the case. There was no question of the draftsman having misunderstood the testator's instructions, and Asplin J held that he had not made a clerical error either when overlooking the fact that the term 'issue' does not normally cover stepchildren: 'Instead, in carrying out his professional duty and judgment as a draftsman of the will, he failed to use an apposite term' (at [52]).

<sup>83</sup> The Law Reform Committee, *Nineteenth Report* (n 29 above) para 20, made a similar point when discussing the 'situation ... where the testator (and possibly his solicitor as well) fails to understand the legal effect of the words actually used, and thus produces the wrong result, through using the intended expression. ... All concerned may know what the testator wants, but fail to use the right technique to achieve it'.

<sup>84</sup> The idea of 'vicarious mistake' in the rectification context is one the present author first discussed in B Häcker, 'Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines' (2008) 19 *King's Law Journal* 293 at 303.

<sup>85</sup> There is a question, which cannot be pursued further here, as to whether testamentary dispositions could—or should as a matter of principle—be treated as rescindable for 'sufficiently serious' motivational mistakes in the same way as voluntary *inter vivos* dispositions, by analogy with the ruling in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

<sup>86</sup> *White v Jones* [1995] 2 AC 207 (HL), establishing that a solicitor entrusted by the testator with the task of drawing up his will may under certain circumstances also owe a duty of care to prospective beneficiaries.

<sup>87</sup> *Parry and Kerridge* (n 35 above) [15–16] argue that whenever a professionally-drawn will can be rectified, it should always be possible to make out negligence on the part of the draftsman. There could thus never be a 'rectifiable but "non-negligent misunderstanding"'.

<sup>88</sup> *Walker v Medlicott* [1999] 1 WLR 727 (CA) 738–39, 742–44 (alternative ground). More critical *Hawkins* (n 26 above) [1–20]: 'Rectification is the best remedy in a case where negligence and rectification overlap, but it is surely the duty of the party who has been negligent to suggest it. It seems unfair to someone who appears to have suffered as a result of negligent will-drafting to be told that, even if

draftsman or his insurers will then ‘merely’ have to pay for the cost of the rectification suit which—if successful—puts everything right.<sup>89</sup> In *Marley v Rawlings*, that is in essence precisely what happened (except that the cost of the litigation there apparently *exceeded* the value of the estate).<sup>90</sup> Following a detailed discussion of the relevant allocation mechanisms, the Supreme Court eventually decided that the bulk of the cost should under the circumstances be borne by the insurers of the Rawlings’ negligent solicitor.<sup>91</sup>

It is submitted that the proper allocation of costs is another reason for preferring the Law Reform Committee’s ‘rectification-first’ approach to the ‘interpretation-first’ approach now apparently favoured by many judges. It better reflects the common law’s traditional two-stage process, distinguishing between the grant of probate on the one hand and the construction of the will as admitted to probate on the other, even where both functions are nowadays performed by the same court.<sup>92</sup> Procedurally and notionally, there is still a difference between the two steps,<sup>93</sup> and that should be made as transparent as possible to everybody involved. If, in *Marley v Rawlings*, in addition to the problem that the wills were switched, there had been a question about what the words to which Mr Rawlings had intended to put his signature meant, surely it would have been proper for the costs connected with *this* aspect of the litigation to be borne by one of the parties or by the estate, but not (or at any rate not necessarily) by the solicitor’s insurers.

## 5. Does Rectification Presuppose the Existence of a Valid Testamentary Instrument, and What Is the Role of the Testator’s Knowledge and Approval?

Moving from the relationship between rectification and interpretation to the relationship between rectification and formalities, a question which has recently

the draftsman denies negligence and denies that rectification is applicable, he (he victim) should apply for rectification in order to mitigate the damage caused by the person who (i) appears to have been negligent and (ii) is refusing to co-operate in undoing the effects of his own negligence’.

<sup>89</sup> Where a will is rectified, this also avoids the ‘windfall’ problem entailed by *White v Jones*-type claims.

<sup>90</sup> In this respect—though fortunately not in terms of duration or complexity—*Marley v Rawlings* could be said to resemble the famous case of *Jarndyce v Jarndyce* around which the plot in Charles Dickens’ novel *Bleak House* is spun.

<sup>91</sup> *Marley v Rawlings (No 2)* [2014] UKSC 51, [2015] 1 AC 157.

<sup>92</sup> It may be precisely because the (historically founded) distinction between a court’s probate jurisdiction and its jurisdiction to interpret wills is less pronounced in the civilian tradition than in England (owing to a different evolution of jurisdictional competition and procedural competences) that German courts tend first to determine what disposition the testator really wanted to make and only then ask whether his intentions have been manifested in a way which complies with the testamentary formality requirements: see especially BGH (8.12.1982) BGHZ 86, 41 at 45–47.

<sup>93</sup> The point is forcefully made, albeit in the Canadian context, by M Cullity, ‘Rectification of Wills—A Comment on the *Robinson Case*’ (2012) 31 *Estates, Trusts & Pensions Journal* 127.

puzzled commentators is whether or not rectification under section 20 of the Administration of Justice Act 1982 presupposes the existence of a formally valid testamentary instrument. In other words: Does the document one is putting before the court have to comply with section 9 of the Wills Act 1837 (as amended by the Administration of Justice Act 1982) already before or only after rectification? And what is the role of the testator's knowledge and approval in all this?

Proudman J at first instance and the Court of Appeal in *Marley v Rawlings* thought that when section 20 spoke of a 'will' failing to carry out the testator's intentions, it meant a formally valid testamentary instrument,<sup>94</sup> and for various reasons they held that the document signed by Mr Rawlings did not comply with section 9.<sup>95</sup> The Supreme Court disagreed on both counts,<sup>96</sup> which makes it quite hard to determine the exact *ratio* of the decision for the purposes of precedent.

Lord Neuberger began by saying that although Mr Rawlings had been handed the draft prepared for his wife, the resulting 'will' was his—and not his wife's—simply because he had signed it.<sup>97</sup> Nor could there be any doubt that he intended by his signature to give effect to the will.<sup>98</sup> Section 9 of the Wills Act 1837 was not therefore a problem.<sup>99</sup>

[W]hatever else may be said about the document, it is, on its face (and was in fact according to the evidence), unambiguously intended to be a formal will, and it was, on its face (and was in fact according to the evidence), signed by Mr Rawlings, in the presence of two witnesses, on the basis that it was indeed his will.

<sup>94</sup> However, it has been pointed out that, in the context of rectification, a 'will' is not actually the physical object on which the testator's testamentary wishes and dispositions are written down, but 'a set of words, put together in a particular order': R Kerridge, 'When a Husband Executes his Wife's Will' [2012] *Conv* 505 at 508.

<sup>95</sup> *Marley v Rawlings* (Ch) (n 6 above) [18]–[27], especially at [21], Proudman J ruling that 'section 9(b) of the 1837 Act provides a complete answer to the claim, namely that the testator did not intend by his signature to give effect to the will which he signed. If asked whether he did he would not have said, "yes, subject to correction of errors by substituting my wife's name for mine wherever it occurs". He would simply have responded, "no, of course not, that is my wife's will"': *Marley v Rawlings* (CA) (n 6 above), especially at [39]–[52], [94]–[95], [99]–[102], where the Court of Appeal agreed that the document signed by Mr Rawlings fell foul of section 9(b) and Black LJ further suggested (at [46]) that there was also a problem about section 9(a): 'There is, to my mind, a real question as to whether this will was signed by "the testator". The will had been drawn up for Mrs Rawlings and said that it was "the last will of me Maureen Catherine Rawlings". The obvious person to describe as the testator in relation to this will was therefore Mrs Rawlings and she did not sign it. Mr Rawlings was intending to be a testator but not through the medium of this will.'

<sup>96</sup> See *Marley v Rawlings* (SC) (n 3 above) [55]–[59] and [60]–[67].

<sup>97</sup> *ibid* [59]: 'It is true that the will purports in its opening words to be the will of Mrs Rawlings, but there is no doubt that it cannot be hers, as she did not sign it; as it was Mr Rawlings who signed it, it can only have been his will, and it is he who is claimed in these proceedings to be the testator for the purposes of section 9. Accordingly, section 9(a) appears to me to be satisfied.'

<sup>98</sup> His Lordship continued (*ibid*): 'There can be no doubt ... from the face of the will (as well as from the evidence) that it was Mr Rawlings's intention at the time he signed the will that it should have effect, and so it seems to me that section 9(b) was also satisfied in this case'. More precisely, one might say that Mr Rawlings was intending to give effect to the document as a will or rather perhaps as a testamentary instrument with the contents as he supposed them to be. For the rationale behind s 9(b), see the text accompanying nn 107–124 below.

<sup>99</sup> *Marley v Rawlings* (SC) (n 3 above) [57].

But then his Lordship added that, even if section 9 had not been satisfied by the original instrument, it would still have been possible to rectify. All that mattered was that the instrument should comply with section 9 *after* rectification.<sup>100</sup> On this view, section 20 of the Administration of Justice Act 1982 does not presuppose a formally valid will, but only a ‘document which is on its face bona fide intended to be a will’ or at any rate one ‘which, once it is rectified, is a valid will’.<sup>101</sup> Speculation is rife over whether that would include or exclude cases where the testator mistakenly signs—instead of the draft will prepared for him—a gas bill,<sup>102</sup> a shopping list,<sup>103</sup> a laundry ticket,<sup>104</sup> or indeed just a series of ‘loose blank sheets of paper’ with nothing written on them.<sup>105</sup>

Although Lord Neuberger’s judgment is thus somewhat ambiguous with respect to the correct interpretation of the word ‘will’ in section 20,<sup>106</sup> there are in fact two important lessons to be learnt from it. The first is that section 9 of the Wills Act 1837 should not be overstretched by reading too much into its requirements. Section 9(b) in particular is in danger of being turned from a purely formal into an essentially substantive hurdle if one takes it to mean that the testator must (apparently) have had more than a generic testamentary intention or *animus testandi*—more than a mere awareness that something is being signed and executed *as a will*.

There is a tendency to overcharge section 9(b) by insisting that ‘the testator must intend to make *this will* and not another one’.<sup>107</sup> Indeed, at times the formal postulate that the testator must have ‘intended by his signature to give effect to the will’<sup>108</sup> is even conflated with the need for him to know and approve the actual content of the document he has signed. Such an amalgamation of section 9 with the so-called doctrine of ‘knowledge and approval’ is evident in Proudman J’s first instance decision. Under the heading ‘Conformity with the Wills Act 1837’, her Ladyship discussed the well-known crossed wills cases of *Re Hunt*<sup>109</sup> and *Re Meyer*<sup>110</sup> and quoted with express approval Sir James Hannen’s statement to the

<sup>100</sup> His Lordship said that he ‘saw the force’ of insisting on a formally valid instrument in terms of ‘academic linguistic logic’, but gave five reasons why he thought the point was wrong: *ibid* at [61]–[67]. One of them was that ‘it seems to me to be equally logical, but plainly more consistent with the evident purpose of the amendments made to the law of wills by sections 17 (which contains the new section 9) and 21 of the 1982 [Administration of Justice] Act, to deal with the validity and rectification issues together, at least in a case such as this, where the two issues are so closely related’ (at [63]).

<sup>101</sup> *ibid* [65] and [66] respectively.

<sup>102</sup> Harris (n 11 above) 284.

<sup>103</sup> B Häcker, ‘Thy Will Be Done’ (2014) 130 *LQR* 360 at 362.

<sup>104</sup> See Learmonth (n 8 above) at 731, giving this example in order to throw doubt on the wide reading of ‘clerical error’ in s 21(1)(a) of the Administration of Justice Act 1982.

<sup>105</sup> H Cumber and C Kynaston, ‘Where There’s a Will There’s a Way: *Marley v Rawlings*’ (2014) 25 *King’s Law Journal* 137 at 143 (case study 4).

<sup>106</sup> *cf* the view set out in n 94 above.

<sup>107</sup> See *Marley v Rawlings* (CA) (n 6 above) [29] (Black LJ outlining the defendants’ submissions).

<sup>108</sup> See the wording of section 9(b), set out in the text accompanying n 58 above.

<sup>109</sup> *In the Goods of Hunt* (1875) LR 3 P & D 250.

<sup>110</sup> *In the Estate of Meyer* [1908] P 353.

effect that the deceased in *Hunt* 'did not in fact know and approve of any part of the contents of the [signed] paper as her will, for it is quite clear that if she had known of the contents she would not have signed it'.<sup>111</sup> From this, Proudman J concluded that 'section 9(b) of the 1837 Act provides a complete answer to the claim [in *Marley v Rawlings*], namely that the testator did not intend by his signature to give effect to the will which he signed'.<sup>112</sup>

Lord Neuberger in the Supreme Court, by contrast, emphasised that the requirement of knowledge and approval was separate from questions of formality under section 9.<sup>113</sup> He explained that a formally valid will may of course be invalid as a matter of substance.<sup>114</sup> As has variously been pointed out,<sup>115</sup> the current wording of section 9(b) is the product of amendments made in order to dispense with the original need for a will to be signed by the testator 'at the foot or end' thereof,<sup>116</sup> and was thus intended to lower rather than increase or expand formality hurdles.<sup>117</sup> That an instrument can be formally valid and yet be substantively invalid (in part or *in toto*) as far as its content goes is, moreover, evident from the case law on what is commonly termed 'rectification by omission'.<sup>118</sup> Prior to the enactment of section 20 of the Administration of Justice Act 1982, this was the only way in which courts could—in a very broad sense—'rectify' wills, namely by deleting and not admitting to probate passages which the testator had been shown not to know or approve of.<sup>119</sup>

Whether or to what extent the doctrine of 'knowledge and approval' has actually become superfluous in the light of various developments over the past few decades (such as the introduction of a statutory rectification mechanism,<sup>120</sup> the evolution of a more intention-based canon of construction,<sup>121</sup> and the refinement of the rules on testamentary capacity and undue influence) is a question which cannot

<sup>111</sup> *Marley v Rawlings* (Ch) (n 6 above) [19], quoting from *Re Hunt* (n 109 above) 252. Note that Sir James Hannen himself did not specifically advert to the formality requirements of section 9 of the Wills Act 1837 (as then in force).

<sup>112</sup> *Marley v Rawlings* (Ch) (n 6 above) [21].

<sup>113</sup> *Marley v Rawlings* (SC) (n 3 above) [55]–[56], [58], [60].

<sup>114</sup> *ibid* [55]: 'The fact that it is pretty clear from the provisions which it contains that a will may well face problems in terms of interpretation or even validity does not mean that it cannot satisfy the formality requirements' (emphasis added).

<sup>115</sup> See eg *Marley v Rawlings* (CA) (n 6 above) [12]–[15] (Black LJ); Ham (n 12 above) 966–67.

<sup>116</sup> The original section 9 of the Wills Act 1837 required the will to be 'signed at the Foot or End thereof by the Testator; by some other Person in his Presence or by his Direction'. The wording of the section was subsequently supplemented by various detailed provisos introduced through the Wills Act Amendment 1852 (Lord St Leonard's Act), s 1: 'if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will'.

<sup>117</sup> The current section 9 was substituted by the Administration of Justice Act 1982, s 17, implementing a recommendation by the Law Reform Committee, *Twenty-Second Report: The Making and Revocation of Wills* (Cmnd 7902, London, 1980) paras 2.7–2.8.

<sup>118</sup> On the omission of words from probate, see eg *Parry and Kerridge* (n 35 above) [5-40]–[5-41].

<sup>119</sup> Such an argument was also run—unsuccessfully—in *Marley v Rawlings*: see *Marley v Rawlings* (SC) (n 3 above) [43]–[49].

<sup>120</sup> See Häcker (n 103 above) 362; Ham (n 12 above) 969.

<sup>121</sup> See Section 2 above, especially the text accompanying nn 26–29.

be pursued here.<sup>122</sup> What may be hoped, however, is that when the Law Commission comes to review statutory formality requirements it will bear in mind the dangers of intertwining form and substance and of requiring section 9 to do too much work.<sup>123</sup> The testator's signature—or a signature made on his behalf and by his direction—is no more than the physical manifestation (at the moment still an indispensable physical manifestation)<sup>124</sup> that he had the requisite *animus testandi* and intended to give effect to the wording of the will *as he believed it to be set out in the instrument* (irrespective of whether it was in fact so set out).

This leads us to the second lesson contained in Lord Neuberger's judgment. It relates to his observation that issues of formal validity and rectification may have to be considered together in appropriate cases.<sup>125</sup> Although his Lordship has been criticised for 'over-extend[ing] the scope of rectification' and for potentially 'opening ... the floodgates of litigation',<sup>126</sup> it is submitted that he was exactly right to make this connection *with respect to the testator's intended wording*.<sup>127</sup> As explained above, one of the main roles of rectification operating beside the modern principles of interpretation is to make up for a lack of form where the testator's intended wording has, for some reason, not found its way into the executed instrument, so that there is no 'peg' allowing us to treat his wishes as validly expressed.<sup>128</sup> Recall the example of a whole self-standing passage being inadvertently missed out from a draft prepared by or for the testator on account of some clerical error. Here rectification supplies the words to which the testator—by his signature—intended to give effect, so that the wording as he *believed* it to be becomes congruous with the *actual* physical manifestation of his testamentary intent.

From the foregoing, it will also have become obvious, however, that there has to be some material base for the rectification exercise. A court cannot rectify a nothing, whatever view of section 9(b) of the Wills Act 1837 one chooses to adopt. There needs to be some physical instrument into which any passage which may have been accidentally omitted before a draft was executed can be 'inserted'.

<sup>122</sup> The relationship between testamentary capacity and the doctrine of knowledge and approval is discussed in Penelope Reed's contribution in Ch 7 of this volume. And, as Brian Sloan notes in Ch 8 (text accompanying fn 75), in practice '[m]ost claims of undue influence appear to be accompanied by claims of want of knowledge and approval and testamentary incapacity'.

<sup>123</sup> The 1980 Law Reform Committee seems to have partly succumbed to this danger when it formulated as one of its starting points for the consideration of *formality requirements* the aim 'to prevent the admission to probate of wills which, because they are forged *or for any other reason*, do not represent the true wishes of the testator' (emphasis added): Law Reform Committee, *Twenty-Second Report* (n 117 above) para 2.2.

<sup>124</sup> *cf* the text accompanying nn 133–136 below.

<sup>125</sup> See the text accompanying nn 100–101 above, and especially the quote set out at the end of n 100 above.

<sup>126</sup> Cumber and Kynaston (n 105 above) 142 and 143 respectively. Contrast Goodwin and Granger (n 48 above) 149, maintaining that 'the floodgates argument, as is often the case, does not stand up to scrutiny'.

<sup>127</sup> But see Thomas (n 48 above) 42, who finds Lord Neuberger's argument (that 'there is a logic in dealing with rectification and validity issues together at least in cases where the two issues are closely linked': *cf* end of n 100 above) 'a little incongruous after his argument about the difference in the role of the Court of Probate and Court of Construction'.

<sup>128</sup> See the text accompanying nn 56–66 above.

Section 20 of the Administration of Justice Act 1982 thus surely requires as a minimum that there exists<sup>129</sup> some properly signed and attested document,<sup>130</sup> and that the testator should have had *animus testandi* when the signature was applied.<sup>131</sup> In an extreme (but also highly unlikely) case, this physical instrument may well be a shopping list or arguably even an otherwise blank sheet of paper.<sup>132</sup> Yet what would certainly not be possible under any circumstances is for the testator's missing *signature* to be supplied via rectification. On no reading of Lord Neuberger's judgment does *Marley v Rawlings* introduce anything like a full-blown 'judicial dispensing power'<sup>133</sup> or a 'substantial compliance'<sup>134</sup> doctrine.<sup>135</sup> A general dispensing power, which would allow a court to admit to probate wills failing to meet the formal requirements of section 9 (either before or after rectification), was at one point considered by the Law Reform Committee, but ultimately rejected on account of its uncertain remit and application.<sup>136</sup> If the current Law Commission were to come to a different conclusion and were to recommend the introduction of a judicial power to dispense with the core formalities for executing a will (ie the writing, the testator's signature and its witnessing), then such a step could only be taken by Parliament.

## 6. Do English Courts Have an Innate Power to Rectify Wills?

This takes us straight to the last question. If *Marley v Rawlings* does not introduce a fully-fledged judicial dispensing power, can we at least infer from the decision that the Supreme Court will in the future look favourably upon an argument that

<sup>129</sup> Or existed, in the case where a will (the contents of which are known) was properly executed and never revoked: *Sugden v Lord St Leonards* (1876) 1 PD 154 (CA).

<sup>130</sup> The physical writing need not necessarily be on paper, of course. In the case of *Hodson v Barnes* (1926) 43 TLR 71, for instance, an eggshell was used for a seaman's will.

<sup>131</sup> Whether or not one would regard this document as a formally valid will prior to rectification would, in some cases at least, depend on one's exact view of s 9.

<sup>132</sup> See the text accompanying nn 102–105 above.

<sup>133</sup> Full-blown dispensing powers exist in various Australian States and in New Zealand, being first introduced in South Australia in 1975. For a detailed discussion see N Peart, 'Testamentary Formalities in Australia and New Zealand' in KCG Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law, vol 1: Testamentary Formalities* (Oxford, Oxford University Press, 2011) 329 at 349–55.

<sup>134</sup> See JH Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489. Comparing the South Australian 'dispensing power' with Queensland's 'substantial compliance' legislation, Langbein later preferred the former, describing it as a 'triumph of law reform', while he regarded the latter as a 'flop' on the basis that courts had treated 'substantial' to mean 'near perfect': JH Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 *Columbia Law Review* 1 at 1.

<sup>135</sup> But cf Drummond (n 2 above) 360, querying '[w]hether s 20 should generally enable a court "to rectify a document which was currently formally invalid into a formally valid will"' (footnote omitted).

<sup>136</sup> Law Reform Committee, *Twenty-Second Report* (n 117 above) paras 2.4–2.6, especially para 2.5: '[T]o attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve'.

English courts have an innate power to rectify wills, and not merely in the form of ‘rectification by omission’?

With regard to the latter,<sup>137</sup> Lord Neuberger’s judgment clearly explains why the selective deletion exercise which it entails is, for obvious reasons, haphazard at best.<sup>138</sup> In another passage, however, his Lordship hinted at a more proactive role for probate judges. He suggested that courts should—as a matter of common law<sup>139</sup>—be able to rectify wills in the same way as they can rectify any other instrument if a relevant type of mistake is made out:<sup>140</sup>

Rectification is a form of relief which involves ‘correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect the [parties’] true agreement’<sup>[141]</sup> ... It is available not only to correct a bilateral or multilateral arrangement, such as a contract, but also a unilateral document, such as a settlement<sup>[142]</sup> ... However, it has always been assumed that the courts had no such power to rectify a will<sup>[143]</sup> ... *As at present advised, I would none the less have been minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document: no convincing reason for the absence of such a power has been advanced.* (emphasis added)

His Lordship stopped just short of holding that courts did in fact have such an innate power only because Parliament had in 1982 provided them with the statutory power to rectify wills under section 20. It was therefore ‘unnecessary to consider [the] point further’,<sup>144</sup> and ‘it would be wrong for any court to hold, *at least in the absence of a compelling reason*, that it actually had an inherent power which was wider than that which the legislature conferred’ (emphasis added).<sup>145</sup>

This obiter dictum is bound to invite argument in future cases (eg where a rectification claim cannot be fitted under either limb of section 20(1) of the Administration of Justice Act)<sup>146</sup> to the effect that Parliament in 1982 only legislated because it was advised at the time that courts lacked a power to rectify

<sup>137</sup> On which see n 118 above and the accompanying text.

<sup>138</sup> *Marley v Rawlings* (SC) (n 3 above) [43]–[49], especially [48]: ‘The appellant’s proposed exercise in deletion ... would involve converting what is a simple and beneficial principle of severance into what is almost a word game with haphazard outcomes.’

<sup>139</sup> In the sense of judge-made law, rectification being in origin an equitable (not a common law) remedy.

<sup>140</sup> *Marley v Rawlings* (SC) (n 3 above) [27]–[28]. Indeed, his broad reading of the term ‘clerical error’ seems to have been partly inspired by this consideration: *ibid* [76]–[77].

<sup>141</sup> His Lordship here referred to *Agip SpA v Navigazione v Alta Italia (The Nai Genova and The Nai Superba)* [1984] 1 Lloyd’s Rep 353 at 359.

<sup>142</sup> His Lordship here referred to *In re Butlin’s Settlement Trusts (Butlin v Butlin)* [1976] Ch 251.

<sup>143</sup> His Lordship here referred to *Harter v Harter* (1873) LR 3 P & D 11 (Sir James Hannen) and to *In re Reynette-James (Wightman v Reynette-James)* [1976] 1 WLR 161 (Templeman J). Quotes from these cases are set out in the text accompanying nn 152–153 below.

<sup>144</sup> *Marley v Rawlings* (SC) (n 3 above) [28].

<sup>145</sup> *ibid* [30].

<sup>146</sup> Or possibly even where a claim is out of time under s 20(2) and the court refuses to grant permission for an extension.

wills,<sup>147</sup> and that Parliament certainly did not thereby mean to restrict any inherent power which may have latently existed all along as a matter of common law. Such a jurisdiction has already been openly asserted in Jersey.<sup>148</sup> Furthermore, as indicated by Lord Neuberger himself, the argument fits very nicely with the Supreme Court's endeavours to put wills on a par with other instruments, such as commercial contracts and voluntary settlement deeds. If courts are to adopt the same approach to their interpretation, at least as a starting point,<sup>149</sup> why not also apply the same principles of rectification?<sup>150</sup>

Yet it is not all that simple. Although the Law Reform Committee in its 1973 Report tried to discredit the explanation provided by some nineteenth-century cases for why the equitable doctrine of rectification did not apply to wills,<sup>151</sup> there is in fact considerable force in what, for instance, Sir James Hannen said in 1873: 'I think it is not in the power of the Court to supply words accidentally omitted from a will. The Wills Act ... admits of no qualification.'<sup>152</sup> Or, as Templeman J put it roughly a century later:<sup>153</sup>

Any document other than a will could be rectified by inserting the words which the secretary omitted, but in this respect the court is enslaved by the Wills Act 1834 [*sic*]. Words may be struck out but no fresh words may be inserted: see *In the Goods of Louis Schott* [1901] P. 190 and *In re Horrocks, Taylor v. Kershaw* [1939] P. 198, where Sir Wilfrid Greene M.R. delivering the judgment of the Court of Appeal said, at p. 216: 'The jurisdiction, where it exists, is admittedly confined to the exclusion of words and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act.'

In an 1865 case concerning the will of a certain Peter Birks, Sir JP Wilde in the High Court of Admiralty had already observed:<sup>154</sup>

The evidence in this case discloses that a blunder has been made, the effect of which is that certain portions of the intentions of the testator were not expressed in the paper which he last executed ... The question is, whether this blunder is one which it is within

<sup>147</sup> The absence of a judicial power to rectify wills was noted—with regret—by the Law Reform Committee, *Nineteenth Report* (n 29 above) paras 9–10: 'As the law stands, it is generally accepted that the equitable doctrine of rectification does not apply to wills ... It is not easy to perceive why ... In the end, we have been unable to discover any satisfactory reason for holding that the doctrine of rectification should not apply to wills.'

<sup>148</sup> *In Re Vautier (née McBoyle)* [2000] JLR 351 (Royal Court), drawing on Canadian precedents.

<sup>149</sup> See Section 2 above, especially the text accompanying nn 21–25.

<sup>150</sup> Unfortunately, Lord Neuberger's observations (set out in the text accompanying n 140 above) fail to make sufficiently clear that there are actually significant differences between the principles governing rectification of bi- or multilateral bargain transactions, such as commercial contracts, and those governing the rectification of unilateral gratuitous transactions, such as voluntary settlements: see Häcker (n 84 above) 294–304. It is submitted that *if* the analogy is to be pursued further, the rectification of wills should follow the guidance of the latter.

<sup>151</sup> Law Reform Committee, *Nineteenth Report* (n 29 above) para 10, referring inter alia to the passage set out in the text accompanying n 182 below.

<sup>152</sup> *Harter v Harter* (n 143 above) 19.

<sup>153</sup> *In re Reynette-James* (n 143 above) 166.

<sup>154</sup> *Birks v Birks* (1865) 4 Sw & Tr 23 at 30, 164 ER 1423 at 1426.

the power of the Court to set right,<sup>155</sup> as the Court would, no doubt, desire to set it right if it has the power. I quite admit that it is beyond the power of the Court to interpolate anything in a will, or to supply an omission by parol evidence, for, by so doing, it would give the force of a testamentary act to parol evidence, contrary to the statute.

Interestingly, if one goes back to the time when the Wills Act 1837 was passed, one finds that probate courts *did* have a power to rectify wills (in certain situations)<sup>156</sup> before the statute came into force, and that they regularly used it.<sup>157</sup> In the late-eighteenth-century case of *Blackwood v Damer*, for example, the testator had written to his attorney with instructions for a will. The attorney, by a ‘mere casual omission’, forgot to insert the desired residuary clause when preparing the draft later executed. The High Court of Delegates nevertheless decreed that ‘the residuary clause should stand as part of the will’.<sup>158</sup> In *Bayldon v Bayldon*, it appeared from the evidence that the testator had intended to leave a legacy of £5,000 to his nephew, but that<sup>159</sup>

this aged testator, in fair copying a draft will, occupying many sheets of paper, ... omitted the legacy in question (an omission, too, occurring where and as it does, in a series of consecutive legacies to eleven persons, several of the same sir-name), casually and by accident ...

Sir John Nicholl said that where it was proved that there was ‘some casual error in the body of the will’,<sup>160</sup>

the Court is at liberty, and is even bound, to pronounce for the will, not in its actual state, but with such error first reformed or corrected (either by the insertion, that is, of

<sup>155</sup> This language may, incidentally, have inspired Sir James Hannen in the crossed wills case of *Re Hunt* (n 109 above) to state famously (at 252): ‘I regret the blunder, but I cannot repair it’. Note that Sir JP Wilde in the circumstances of *Birks v Birks* did eventually find a way of repairing the blunder. He held (at 4 Sw & Tr 31, 164 ER 1426) that since there was an earlier document (‘paper A’) which had been properly executed as a will and contained the passages that were missing in the final instrument (‘paper B’), it was possible to read both together as containing Peter Birks’ last will and testament: ‘[I]t would be monstrous for the Court to come to the conclusion that the testator intended to revoke those portions of paper A which were omitted from paper B by accident. Looking at all the circumstances, and the total absence of any language in paper B tending to revoke paper A, I think that paper A is still alive as far as is not inconsistent with paper B’.

<sup>156</sup> See the text accompanying and following n 171 below.

<sup>157</sup> Beside the examples listed in the text which follows, see also *Travers v Miller* (1826) 3 Add 226, 162 ER 462; rev’d *sub nom Miller v Travers* (1832) 8 Bing 224, 131 ER 395. Rectification was also acknowledged to be available in principle (subject to there being an ‘ambiguity upon the face of the instrument’, casting doubt on the *factum*: cf n 161 below), but ultimately denied on the facts of *Fawcett v Jones and Codrington* (1810) 3 Phil Ecc 434, 161 ER 1375; *Harrison v Stone* (1829) 2 Hag Ecc 537, 162 ER 949; *Shadbolt v Waugh* (1831) 3 Hag Ecc 570, 162 ER 1267.

<sup>158</sup> *Blackwood v Damer* (1783) 2 Add 239, 162 ER 467 (note attached to the case of *Bayldon v Bayldon*, cited in n 159 immediately below). *Blackwood v Damer* is also discussed at some length *sub nom Damer v Janssen* before and by the Prerogative Court of Canterbury in *Fawcett v Jones and Codrington* (n 157 above).

<sup>159</sup> *Bayldon v Bayldon* (1826) 3 Add 232 at 236–37, 162 ER 464 at 466 (Prerogative Court of Canterbury).

<sup>160</sup> *ibid* at 238. Sir John Nicholl suggested that, in order for the accidental omission or insertion to be pleaded and proved in evidence, there had to be ‘some absurdity or ambiguity on the face of the will’ (*ibid*), but that was later refuted: see n 161 immediately below.

something omitted, or by the omission of something inserted, or as the case may be, in the will, contrary to the true mind and intention of the testator) ...

Shortly before the Wills Act 1837 was passed, the Prerogative Court of Canterbury came to decide *Castell v Tagg*, another case where it was alleged that a legacy had been inadvertently omitted from the executed copy of a will. Sir Herbert Jenner held 'that this is an allegation which ought to be admitted, and, if proved [as it subsequently was], that it will be sufficient to justify the Court in supplying the deficiency shewn in this will'.<sup>161</sup>

All this changed with the enactment of section 9. According to Edward Vaughan Williams, whose seminal *Treatise on the Law of Executors and Administrators* was at the time just between its second and third edition,<sup>162</sup> it was completely obvious that the statute had taken away the judges' ability to rectify wills:<sup>163</sup>

[W]ith respect to wills made on or after January 1, 1838, it is plain that, by reason of the provisions of the stat. 1 Vict. c. 26 [Wills Act 1837], the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the Act: Whence it follows, that the Court has no power to correct omissions or mistakes by reference to the instructions in any case to which the statute extends.

The point is essentially one about the separation of powers. If Parliament says that 'no will shall be valid' unless it complies with a specified form,<sup>164</sup> meaning that only that which is expressed in the prescribed form may be admitted to probate and enforced, then to rectify the instrument so as to make it contain words which were not there (albeit that the testator intended them to be there) would be to confer judicial validity on testamentary dispositions failing to meet the correct form. This problem does not exist with most<sup>165</sup> other instruments that courts routinely rectify. Where the parties to a commercial contract, for example, have decided to put their agreement in writing, judicial rectification of the instrument purporting to contain their agreement amounts to no more than the court overriding a *self-imposed* formality requirement (on the basis that there is some problem with an express or implied entire agreement clause).<sup>166</sup> Nor do courts challenge Parliamentary supremacy where they rectify voluntary settlements which happen to

<sup>161</sup> *Castell v Tagg* (1936) 1 Curt 298 at 302, 163 ER 102 at 103. In so holding, Sir Herbert Jenner also disposed of the—supposed—requirement that there had to be some 'ambiguity on the face of the instrument' before a court could rectify the will. He said that the omission of the residuary clause in *Blackwood v Damer* (n 158 above) 'must be considered a deficiency, but no ambiguity', and that the forgotten legacy in *Bayldon v Bayldon* (n 159 above) 'was an omission, not an ambiguity'.

<sup>162</sup> Although the second edition was published early in 1838, it could not yet take account of the Wills Act 1837, since—as the preface states—'the greater part of [it] was printed before the passing of the ... statute': EV Williams, *A Treatise on the Law of Executors and Administrators*, 2nd edn (London, Saunders and Benning, 1838) vol 1, vii (hereinafter '*Williams on Executors*, 2nd edn').

<sup>163</sup> EV Williams, *A Treatise on the Law of Executors and Administrators*, 3rd edn (London, Saunders and Benning, 1841) vol 1, 269 (hereinafter '*Williams on Executors*, 3rd edn').

<sup>164</sup> See the wording of s 9 of the Wills Act 1837, set out in the text accompanying n 58 above.

<sup>165</sup> Contracts for the sale of land and subsequent conveyances (where formalities are also an issue) are discussed in Section 6.2 below.

<sup>166</sup> For a more detailed exposition of this argument see Häcker (n 84 above) 318–20.

have been made by deed, if the relevant trust could just as well have been constituted informally.

There are two conceivable objections to the view advanced and defended here. They might be used to support an argument to the effect that the formalities introduced by the Wills Act *cannot in fact* justify the courts' abdication of their former power to rectify wills, whatever judges and commentators may have thought or said before *Marley v Rawlings*. It will be convenient to deal with them before concluding.

### 6.1. Rectification and Formalities Pre-1838

The first objection is that there were formality requirements for wills even before January 1838, namely at least since the Statute of Frauds 1677.<sup>167</sup> The Wills Act 1837 merely harmonised these after a Royal Commission had found that there were altogether 'ten different laws for regulating the execution of Wills under different circumstances'.<sup>168</sup> Broadly speaking, wills or testaments of personal property had to be in writing plain and simple,<sup>169</sup> while devises of real property had to be written, signed, witnessed and attested.<sup>170</sup> Yet far from undermining the argument made here, the pre-1838 law positively supports it on closer inspection. Leaving aside the additional complications caused by the division of competences between the ecclesiastical courts and the royal jurisdiction (especially that exercised by the common law courts),<sup>171</sup> it actually explains why judges in the early nineteenth century would insist that rectification was only possible where the testator's instructions related to personalty *and* where they had been committed to writing during his lifetime.

In *Rockell v Youde*, for instance, there was only oral evidence about some of the wishes regarding his personal estate which the testator had communicated to the

<sup>167</sup> With respect to realty, formalities had already been laid down in the Statute of Wills 1540 (32 Hen VIII, c 1) (see end of n 183 below).

<sup>168</sup> Real Property Commissioners, *Fourth Report Made to His Majesty by the Commissioners Appointed to Inquire Into the Law of England Respecting Real Property* (London, 1833) 12. R Kerridge, 'Testamentary Formalities in England and Wales' in KCG Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law, vol 1: Testamentary Formalities* (Oxford, Oxford University Press, 2011) 305 at 311 (fn 27), notes that if one takes deathbed wills into account, that number actually rises to eleven.

<sup>169</sup> Exceptionally, oral (nuncupative) wills were valid where the testator's personal estate was worth less than £30, in the case of deathbed wills, or if the testator was eligible to make a so-called 'soldier's will': see Statute of Frauds 1677 (29 Car II, c 3), ss 19–20 and 23.

<sup>170</sup> See Statute of Frauds 1677, s 5.

<sup>171</sup> Until the Court of Probate Act 1857, the ecclesiastical courts were responsible for the grant of probate and of letters of administration, which—at the time—related only to the testator's personal property. The subsequent interpretation of the will was for the most part left to the Court of Chancery (as a 'court of construction'). Devises of realty, by contrast, led to a direct transfer between the testator and the devisee and were under the jurisdiction of the common law courts, supplemented by Chancery. It was not until the Land Transfer Act 1897 that the testator's personal representative truly became his universal successor, through the estate administration mechanism being extended to realty.

solicitor before dying, while others had been taken down in writing. Although the solicitor had a 'perfect recollection' as to what the oral instructions were, Sir John Nicholl in the Prerogative Court of Canterbury held that to admit the claim 'would be to establish a precedent contrary to all the rules which have governed this Court subsequent to the passing of the Statute of Frauds,'<sup>172</sup> justifying the decision as follows:<sup>173</sup>

The Court has gone the greatest possible length when it has pronounced for instructions which have been reduced into writing during the lifetime of the deceased; but which have not been read over to him. The Court has always stopped short where the instrument has not been reduced into writing till after the death; and I cannot agree in the construction attempted to be put on the Statute of Frauds that this would be a will by word of mouth.<sup>[174]</sup> The Court is always anxious to carry into effect the intentions of a party; *but it must be when those intentions are shewn in a legal form*; it cannot act upon conjectures of its own. (emphasis added)

As the first edition of William's *Treatise*, published in 1832, explains:<sup>175</sup>

Though the instrument be written in another man's hand, and has never been signed by the testator, yet in many cases it will operate as a good testament of personal estate.<sup>[176]</sup> Thus, if a person gives instructions for a will, and dies before the instrument can be formally executed, the instructions, though neither reduced into writing in his presence, nor ever read to him, will operate as fully as a will itself.<sup>[177]</sup> ... It is, however, essential that the instructions should be reduced into writing in the life time of the deceased; otherwise it would be a mere nuncupative will, and then of no effect under the statute.<sup>[178]</sup>

<sup>172</sup> *Rockell v Youde* (1819) 3 Phil Ecc 141 at 144, 161 ER 1281 at 1282.

<sup>173</sup> *ibid* 145. See also *Harrison v Stone* (n 157 above) 552, where Sir John Nicholl observed: 'Here is no written document suggested to be forthcoming which can in any degree lay a foundation for, and corroborate, the existence of any error. No fair copy, containing the words struck through, was engrossed for execution; no cotemporaneous evidence of that sort on which the Court can rely can be furnished. In *Blackwood* against *Damer* ([n 158 above]) the Court had evidence of that description: but still what it most relied upon were the written instructions. So again, in *Bayldon* against *Bayldon* ([n 159 above]), there were the instructions: the very draft of the will, in Baron Wood's own handwriting, had the names of the parties who were to be benefited. But upon mere parol declarations, without any thing in writing, after such a length of time, to hold that the words in the executed instrument were "erroneously and incautiously struck through;" and for the Court to reinstate them would be a most dangerous precedent.'

<sup>174</sup> It had apparently been argued that the testator had made an oral deathbed will which might have been valid under ss 19–20 of the Statute of Frauds: *cf* n 169 above.

<sup>175</sup> EV Williams, *A Treatise on the Law of Executors and Administrators*, vol 1 (London, Saunders and Benning, 1832) 51 (hereinafter '*Williams on Executors*, 1st edn'). The passage is preserved in *Williams on Executors*, 2nd edn (n 162 above) 54–55.

<sup>176</sup> Reference to T Wentworth, *The Office and Duty of Executors*, 14th edn (London, J & WT Clarke, 1829) 15.

<sup>177</sup> Reference to a plethora of cases, including *Wood v Wood* (1811) 161 ER 110, 1 Phil Ecc 357; *Huntington v Huntington* (1814) 2 Phil Ecc 213, 1616 ER 1123; *Sikes v Snaith* (1816) 2 Phil Ecc 351, 161 ER 1167; *Lewis v Lewis* (1818) 3 Phil Ecc 109, 161 ER 1272.

<sup>178</sup> Reference to *Sikes v Snaith* (n 177 above) 355 and *Rockell v Youde* (discussed in the text accompanying nn 172–173 above). Williams proceeds to illustrate this proposition by discussing at some length the case of *Nathan v Morse* (1821) 3 Phil Ecc 529, 161 ER 1405.

With regard to rectification, Williams consequently writes that<sup>179</sup>

although it appears from [cases like *Blackwood v Damer*<sup>180</sup>] that ... casual omissions in a will may be supplied by the instructions given for such will, yet it is clearly necessary that those instructions should have been reduced into writing in the lifetime of the testator: otherwise they cannot, by reason of the Statute of Frauds, under any circumstances, even of the plainest mistake, be admitted to probate as part of the will.<sup>[181]</sup>

A case dealing with real property is *Earl of Newburgh v Countess Dowager of Newburgh*, where the late Earl of Newburgh wanted to leave to his wife a life estate in his Sussex and Gloucestershire estates, but by a transcription error only the Sussex estate was included in the fair copy of the will. Before the will was executed, the solicitor attending the Earl read it over to him, but from the *original* abstract which included references to both estates. It was thus indisputable that the testator believed to be signing his name to (additional) words which were not in the instrument, though they had at one point been committed to writing. Sir John Leach VC nevertheless found that, realty being involved, 'the Court had no authority to correct the will according to the intention':<sup>182</sup>

To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a deviser failed to comply with the statute by mistake or accident, and to operate this repeal, by admitting parol evidence of the intention of the deviser, which it was the very object of the statute to avoid ...

He added that 'the difficulty was not that the will was a voluntary instrument, but that there could be no will without the forms of the Statute of Frauds, and the disappointed intention had not those forms'.<sup>183</sup>

In *Miller v Travers*, the testator in his will as executed left 'all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick' to certain trustees. Although he had a small estate in the city of Limerick, he owned nothing in county Limerick. The claimant alleged that the testator had meant his considerable real estate in the county of Clare and wanted to prove in evidence that the original draft referred properly to Clare county, but that, in making certain requested alterations to the will, the conveyancer mistakenly struck this out

<sup>179</sup> *Williams on Executors*, 1st edn (n 175 above) 203–04; 2nd edn (n 162 above) 225.

<sup>180</sup> See the text accompanying n 158 above.

<sup>181</sup> Reference to *Rockell v Youde* (discussed in the text accompanying nn 172–173 above) and to the passage set out in the text accompanying n 175 above.

<sup>182</sup> *Earl of Newburgh v Countess Dowager of Newburgh* (1820) 5 Madd 364 at 365–66, 56 ER 934 at 935. The decision was apparently affirmed by the House of Lords on 16 June 1825, but the only evidence we have for this is indirect: see *Miller v Travers* (n 157 above) 254–55. The report about the original proceedings only speaks of a later rehearing before the Vice-Chancellor, where the parties purported to change the allegations of fact, but the Court refused to entertain new evidence.

<sup>183</sup> *ibid* 366. *cf* already *Towers v Moore* (1689) 2 Vern 98, 23 ER 673: 'Devise of land not to be explained by parol proof touching the declaration of the testator, or the instructions given by testator for the making his will' because '[d]evises concerning land must be in writing, and we cannot go against the act of parliament'. It is possible that the relevant devise in *Towers v Moor* dated from pre-1677. It would then have been governed by the Statute of Wills 1540, which required only simple writing.

and made unauthorised changes to the wording, which the testator subsequently failed to notice. Tindal CJ said:<sup>184</sup>

[I]t may be taken, for the purpose of the argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in Clare in the devise to the trustees. Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shewn from the description of the property in the city of Limerick, that some mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor *without altering or adding to the words used in the will*, such intention cannot be supplied by the evidence proposed to be given. (emphasis added)

## 6.2. Comparison with Rectification of Contracts for the Sale of Land

The other possible objection to the argument advanced here against an innate judicial power to rectify wills is one which the Law Reform Committee had placed great weight on: '[I]n the case of other documents the doctrine of rectification applies even though statute requires them to be in a particular form, for example, under seal'.<sup>185</sup> It is impossible within the confines of the present chapter to subject this argument to a full scrutiny comprising instruments as varied as marriage settlements,<sup>186</sup> trusts of land,<sup>187</sup> dispositions of equitable interests,<sup>188</sup> and conveyances of all sorts, but it is worth following up the example of contracts for the sale of land, to which Lord Neuberger in *Marley v Rawlings* specifically referred.<sup>189</sup> Ever since the Statute of Frauds, such contracts have had to be written or at any rate evidenced in writing and signed by (or on behalf of) the parties,<sup>190</sup> and yet courts routinely rectify such contracts.<sup>191</sup>

<sup>184</sup> *Miller v Travers* (1832) 8 Bing 244 at 247, 131 ER 395 at 396.

<sup>185</sup> Law Reform Committee, *Nineteenth Report* (n 29 above) para 10, adding that 'evidence of what words a will was intended to contain may fall far short of general evidence of the testator's dispositive intention'. Against the concern that 'the testator may have read his will in the actual form and have been satisfied with it', the Law Reform Committee pointed out that 'similar contentions can be advanced in the case of other instruments, and however potent they might be as an argument for resisting rectification, there seems to be no ground for saying that they would exclude the jurisdiction to rectify'.

<sup>186</sup> There appears to have been an equitable jurisdiction to rectify marriage settlements in order to make them conform with the parties' intentions, despite the formalities imposed by the Statute of Frauds 1677: C MacMillan, *Mistakes in Contract Law* (Oxford, Hart Publishing, 2010) 46.

<sup>187</sup> See Law of Property Act 1925, s 53(1)(b).

<sup>188</sup> See Law of Property Act 1925, s 53(1)(c).

<sup>189</sup> *Marley v Rawlings* (SC) (n 3 above) [67].

<sup>190</sup> See Statute of Frauds 1677, s 4; Law of Property Act 1925, s 40; Law of Property (Miscellaneous Provisions) Act 1989, s 2. Starting out as a mere evidentiary requirement, the stipulation as to form has now become a condition of substantive validity: see the text accompanying nn 203–207 below.

<sup>191</sup> See eg *Joscelyne v Nissen* [1970] 2 QB 86 (CA); *Domb v Izoz* [1980] Ch 548 (CA).

There are two answers to this objection. First, it is by no means obvious that the line of cases on the sale of land is to be preferred to the old case law on wills. Judicial rectification of contracts for the sale of land and subsequent deeds of conveyance was, it seems, not finally recognised or beyond dispute until the 1923 decision by the Court of Appeal in *Craddock Brothers v Hunt*.<sup>192</sup> Prior to that case, courts often either refused to rectify such documents on the basis that to do so would infringe the Statute of Frauds 1677,<sup>193</sup> or alternatively they found ways around the Statute, such as by saying that it had not been pleaded, that it may not be used as an instrument of fraud, or by invoking the doctrine of part performance.<sup>194</sup> In particular, a number of judges had gratefully adopted an argument first made by Sir Edward Fry<sup>195</sup> and suggested that rectification in such circumstances had *become* possible through the procedural merger of law and equity in the Judicature Act 1873.<sup>196</sup>

*Craddock Brothers v Hunt* concerned two plots of land which at one point belonged to the same person. He had fenced them off in such a way that a part of one plot was occupied by a newly erected house, while the remainder of that plot and the whole of the second plot were given over to a yard. After the owner's death, his personal representatives sold the house and the yard to different purchasers, without anyone realising that the relevant contracts of sale and deeds of conveyance still referred to the measurements of the old plots. When the error came to light, a dispute arose between the claimant purchasers of the yard and the defendant who had bought the house, about the part of the yard which lay on the plot with the house. Given the state of authorities, it is not surprising that the Court of Appeal was divided on the question of whether rectification could be granted in favour of the claimants. Lord Sterndale MR and Warrington LJ held that it could, the former saying:<sup>197</sup>

<sup>192</sup> *Craddock Brothers v Hunt* [1923] 2 Ch 136 (CA), soon afterwards approved in *United States of America v Motor Trucks Ltd* [1924] AC 196 (PC).

<sup>193</sup> See eg *May v Platt* [1900] 1 Ch 616 at 621–63 (Farwell J); *Thompson v Hickman* [1907] 1 Ch 550 at 561–62 (though Neville J there adopted a more cautious approach); cf also *Woolam v Hearn* (1802) 7 Ves Jun 211 at 219–21, 32 ER 86 at 89–90 (Sir William Grant MR), and *Davies v Fitton* (1842) 2 D & War 225 at 232 (Sir Edward Sugden, later Lord St Leonards), both cases concerning leases of land.

<sup>194</sup> See eg *In re Boulter* (1876) 4 Ch D 241 (Bacon CJ); *Olley v Fisher* (1886) 34 Ch D 367 (North J); *Craddock Brothers v Hunt* [1922] 2 Ch 809 at 823 (PO Lawrence J); cf also *Garrard v Frankel* (1862) 30 Beav 445 at 457–59, 54 ER 961 at 966–67, and *Harris v Pepperell* (1867) LR 5 Eq 1, where Sir John (Lord) Romilly allowed rectification, but gave the opposing party an option to annul the contract.

<sup>195</sup> E Fry, *A Treatise on the Specific Performance of Contracts*, 2nd edn (London, Stevens & Sons, 1881) 346–55, especially § 779 and § 799. For a fuller account of Fry's influence see MacMillan (n 186 above) 54–60, 248–49.

<sup>196</sup> Supreme Court of Judicature Act 1873, s 24(7), invoked by *Olley v Fisher* (n 194 above) 369–70 (North J saying that: 'under [s 24(7)], the Court can now have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the *Statute of Frauds* does not create a bar') and at first instance in *Craddock Brothers v Hunt* (n 194 above) 821–22. *Shrewsbury and Talbot Cab and Noiseless Tyre Co Ltd v Shaw* (1890) 89 *Law Times Journal* 274 is also often cited in this context, but note that the case actually concerned an agreement to purchase patents, where no statutory form was prescribed.

<sup>197</sup> *Craddock Brothers v Hunt* (CA) (n 192 above) 151–52, Warrington LJ agreeing (at 160).

I think I am at liberty, at any rate since the Judicature Act, 1873, to express my opinion that rectification can be granted of a written agreement on parol evidence of mutual mistake, although that agreement is complete in itself, and has been carried out by a more formal document based upon it. I think the contrary view is based upon an insufficient consideration of the result of rectification. *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,*<sup>[198]</sup> and it is that written document, and that alone, of which specific performance is decreed. (emphasis added)

There was, however, a strong dissent by Younger LJ, who observed that '[t]here can ... be little doubt ... that here we have in substance an attempt by the plaintiffs to obtain what in effect is specific performance of a written agreement with a parol variation'<sup>199</sup> and held that 'you can have no specific performance with a parol variation if thereby the Statute of Frauds would be infringed'.<sup>200</sup> His fundamental concern was the following:<sup>201</sup>

[O]n principle, it seems to me to be necessary, if the statute is not pro tanto to be repealed altogether, that no defendant shall be required to convey land to a plaintiff under agreement unless there is a signed note or memorandum of that agreement forthcoming or unless the statute on the ground of part performance<sup>[202]</sup> or by reason of countervailing fraud or otherwise is inapplicable.

But even accepting that rectification of contracts for the sale of land is possible (and has been since at least 1873 or 1923), there is another reason why modern judges should shy away from asserting an innate power to rectify wills. This second answer to the argument based on the analogy between the two types of instruments is connected with the above-mentioned equitable doctrine of part performance. Part performance allowed courts to dispense with formalities<sup>203</sup> precisely—and only—because the Statute of Frauds, and later section 40 of the Law of Property Act 1925, provided that contracts for the sale of land which were not evidenced in writing were generally *unenforceable*.<sup>204</sup> They were not irredeemably void. By contrast, section 9 of the Wills Act 1837 has always treated

<sup>198</sup> Reference to *Johnson v Bragge* [1901] 1 Ch 28 (Ch) 37, a marriage settlement case decided by Cozens-Hardy J.

<sup>199</sup> *Craddock Brothers v Hunt* (CA) (n 192 above) 166.

<sup>200</sup> *ibid* 167.

<sup>201</sup> *ibid* 167–68. In support of this proposition, his Lordship cited with approval passages from the US case of *Glass v Hulbert* 102 Mass 24 at 35 (1869).

<sup>202</sup> See *Craddock Brothers v Hunt* (CA) (n 192 above) 169–70, where Younger LJ explained why he thought that there had been no part performance in the present case.

<sup>203</sup> The doctrine of part performance is not uncontentious in its origin and has variously been described as an act of 'judicial legislation'. It can be traced back to the decision of Jeffreys LC in *Butcher v Stapely* (1685) 1 Vern 363, 23 ER 524, ordering specific performance of a partly performed contract.

<sup>204</sup> The Statute of Frauds 1677, s 4, stipulated that '*no action shall be brought ... upon any Contract or Sale of Lands ... unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, and signed by the Party to be charged therewith ...*' (emphasis added). The Law of Property Act 1925, s 40(1) was worded in similar terms, with s 40(2) expressly preserving the doctrine of part performance.

compliance with the prescribed formalities as an essential condition of *validity*.<sup>205</sup> Under these circumstances, no-one but Parliament is competent to dispense with them—neither private parties by their conduct, nor courts in the exercise of their inherent equitable jurisdiction.

Nowadays, of course, the doctrine of part performance is abrogated in respect of land, following a recommendation by the Law Commission.<sup>206</sup> A contract for the sale of land which does not incorporate all the agreed terms in the written form stipulated by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 is null and void.<sup>207</sup> It is therefore just worth highlighting that section 2(4) expressly envisages or preserves the possibility of rectification<sup>208</sup> and in this way gives legislative blessing to a judicial practice which could otherwise not be sustained.<sup>209</sup> For the very same reason, there can be no judicial power to rectify wills outside the statutory limits set by the Administration of Justice Act 1982.

## 7. The Way Forward

When the Law Commission comes to review the law of wills,<sup>210</sup> it has the unique opportunity to consider contemporaneously several key areas of testate succession law, among them two ‘sides’ of the ‘magic triangle’ outlined in the introduction.<sup>211</sup> It will form a view as to whether the formality requirements currently enshrined in section 9 of the Wills Act 1837 are still suited to fulfil their function,<sup>212</sup> and it

<sup>205</sup> ‘No will shall be valid unless...’. Note that the Statute of Frauds 1677 had already contained similar wording in s 5, which declared devises of land to be ‘utterly void and of none Effect’ if they failed to comply with the stipulated formalities, *cf* the text accompanying n 170 above.

<sup>206</sup> See Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc. of Land* (Law Com No 164, 1987) paras 4.13 and 6.4.

<sup>207</sup> Section 2(1) provides: ‘A contract for the sale or other disposition of an interest in land *can only be made* in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each’ (emphasis added).

<sup>208</sup> Section 2(4) provides: ‘Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section *by reason only of the rectification of one or more documents in pursuance of an order of a court*, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order’ (emphasis added). See also the recommendation by the Law Commission, *Transfer of Land* (n 206 above) para 5.6.

<sup>209</sup> But which it was crucial to maintain, given that the *entire contract* now fails if only one of the agreed terms is not properly recorded. Rectification therefore completes the contract and, in doing so, ensures its compliance with formalities. Yet note that rectification is not possible where the parties have deliberately decided not to record all of the agreed terms, even if they were under a misapprehension about the legal effect of the resulting document: *Oun v Ahmad* [2008] EWHC 545 (Ch).

<sup>210</sup> See n 13 above and the accompanying text.

<sup>211</sup> See the text following n 2 above.

<sup>212</sup> Kerridge (n 168 above) 327 has forcefully argued that their stringency is not the real problem: ‘what troubles the present writer, more than the way in which some wills are refused probate because they do not comply with the strict formality rules, is that it is quite possible for a will to obtain probate in England when it ought to be clear to everyone that there are grave doubts as to whether it represents the freely expressed wishes of a competent and independent testator’.

may wish to think again about introducing a dispensing power modelled on the Australian paradigm.<sup>213</sup> It will also have a chance to scrutinise how the statutory power to rectify wills has fared since its introduction in 1982. However, in doing these things, it is essential that the Commission pay attention to the *interaction* between the various provisions and doctrines pertaining to testamentary matters. This is why it is a pity that the Commission's remit does not extend to the interpretation of wills. It would be helpful to know, for example, how the modern 'contextual' approach to construction and section 21 of the Administration of Justice Act 1982 sit with the statutory rules of construction in sections 24–33 of the Wills Act 1837, which apply 'unless a contrary intention shall appear *by the will*' (emphasis added).<sup>214</sup>

If the argument made here is correct, then the main role of rectification today is to supply missing formalities where the testator's words have not found their way into the executed instrument. Given the modern canon of construction and the possibility of admitting extrinsic evidence under section 21 of the Administration of Justice Act 1982, section 20 has little or no role to play when it comes to endowing the testator's words with the meaning he intended them to bear. 'Library' can sometimes mean 'wine cellar'—rectification does not come into it. All depends on the testator's habitual use of language. It is only when the provision about the 'library' or 'wine cellar' goes missing in the drafting process, or when the draftsman fails properly to understand the testator's instructions and as a result writes 'books' or designates X rather than Y as the recipient, that rectification is the appropriate remedy (under section 20(1)(a) or (b) respectively).

A lesson to learn from the Supreme Court's decision in *Marley v Rawlings*, however, is that the current confines of section 20 of the Administration of Justice Act 1982 ought to be carefully reviewed and clarified. There is otherwise a risk of future courts trespassing on Parliamentary terrain by invoking a (supposedly) innate judicial power to rectify wills, although no such power could have survived the coming into force of the Wills Act 1837.

What, therefore, should be done about section 20? Section 20(1)(a) in particular may need broadening. The point would have become more obvious if—instead of effectively leaving open the proper interpretation of section 9(b) of the Wills Act 1837—Lord Neuberger had been more explicit in explaining how rectification operates as a process of 'welding together' a formally valid instrument which is (in part or *in toto*) substantively invalid or at any rate incomplete, with the wording actually intended by the testator and supported by his *animus testandi*, but hitherto not couched in the correct form. Looked at in this light, rectification ought to be available whenever the testator believed the document he was signing to contain additional or different words from those which were actually there. In order to reduce the risk of such a scenario being falsely alleged, it may be prudent

<sup>213</sup> See n 133 above and the accompanying text.

<sup>214</sup> The Law Reform Committee's *Nineteenth Report* (n 29 above) makes only a passing footnote reference to s 24 (at para 3, fn 2) and does not otherwise address the question. There is a brief discussion in *Parry and Kerridge* (n 35 above) [10-57]–[10-58], arguing that '[t]he conflict between the sections in the Wills Act and section 21 is more apparent than real'.

to insist on a clerical error or the like (more generally: some objective circumstance lending extra plausibility to the allegation) being established in evidence. Yet there seems to be no good reason for refusing rectification where, for example, it is proved that the draftsman has deliberately altered the testator's desired wording without alerting him to this change.<sup>215</sup>

It *could* similarly be argued with respect to section 20(1)(b) that rectification should be made available where the draftsman correctly understood the testator's instructions, but then proceeded deliberately to mis-implement them.<sup>216</sup> There are examples of broader rectification provisions capable of encompassing such cases in other common law jurisdictions,<sup>217</sup> some even coupled with a dispensing power as regards the testator's signature.<sup>218</sup> However, a word of caution is apposite. Section 20(1)(b) is potentially a gateway for executors and draftsmen having a second bite at the estate planning cherry, unless the requirement of a 'failure to understand [the testator's] instructions' is kept in close check.<sup>219</sup> At the moment, it is just about possible to rationalise section 20(1)(b) by analogy with section 20(1)(a),<sup>220</sup> but if the requirement of a failure to understand instructions were dropped, without it being made clear at the same time that rectification is primarily about the *words* or the *terms* that the testator intends his will to contain (and not about his motives for including them or the ultimate aims behind his dispositions), then that would open the floodgates for a whole deluge of unwarranted rectification claims.

The language of a will 'fail[ing] to carry out the testator's intentions' and it being 'rectified so as to carry out his intentions' is apt to (mis)lead one into thinking about rectification as bringing the testator's underlying wishes to fruition and achieving his ultimate goals. Outside the wills context, we are already witnessing a broadening along these lines.<sup>221</sup> It is most notable in the Canadian jurisprudence following the landmark Ontario case of *Juliar*,<sup>222</sup> where it was held that the

<sup>215</sup> To cater for this (admittedly rather unrealistic) scenario, the 'vicarious mistake' explanation of rectification operating where documents have been prepared by a draftsman (see n 84 above) would have to be adjusted as follows: *if* the draftsman made a mistake when preparing the will, then rectification should only be granted where the mistake is one which would warrant rectification had the will been the draftsman's own.

<sup>216</sup> See also Learmonth (n 8 above) 731, describing the current legal position with its insistence on a mistake as 'rather anomalous'. Note that the case posited here differs from the one discussed in the text accompanying n 82 above in that the draftsman there *thinks* he is implementing the testator's instructions correctly and is merely mis-judging the legal consequences of his chosen words.

<sup>217</sup> See eg Wills Act 1997 (Victoria), s 31(1); Wills Amendment Act 2007 (Western Australia), s 50(1); Wills and Succession Act 2010 (Alberta), s 39(1). These provisions make rectification depend on a clerical error *or* the will simply not giving effect to the testator's instructions, for whatever reason.

<sup>218</sup> See eg Wills and Succession Act 2010 (Alberta), s 39(2).

<sup>219</sup> *cf* the discussion in n 81 above of the case where the draftsman fails to clarify the testator's instructions.

<sup>220</sup> As attempted in the text following n 79 above.

<sup>221</sup> Often going hand-in-hand with a concomitant encroachment on the area properly occupied by rescission or the doctrine of common mistake.

<sup>222</sup> *Attorney General of Canada v Juliar* (2000) 50 OR (3rd) 728 (Ontario CA). Leave to appeal to the Supreme Court of Canada was denied: [2000] SCCA No 621.

remedy of rectification was available to modify a transaction so as to implement certain tax-saving objectives:<sup>223</sup>

(1) The court has a discretion to rectify where it is satisfied that the document does not carry out the intention of the parties. This is the basic principle. (2) Parties are entitled to enter into any transaction which is legal, and, in particular, are entitled to arrange their affairs to avoid payment of tax if they legitimately can ... (3) If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected ...

Although the role of rectification in relieving parties from the (unintended) tax consequences of their transactions is nowhere as pronounced as in Canada,<sup>224</sup> there are occasional forays in the same direction in England and Wales.<sup>225</sup> But it is a trend which should be resisted both for *inter vivos* transactions and also for testamentary dispositions. Rectification is there—literally—to put the record straight, not to make for deceased testators the will which they would or should have made had they been properly advised.

The upshot is that *Marley v Rawlings* has sounded a warning bell. The rules governing the rectification of wills are ripe for a sensitive modern reassessment. They have not been rendered superfluous by the more contextual approach to construction, nor can their statutory enshrinement be legitimately regarded as superseded by a newly discovered innate judicial power. The rectification remedy concerns the actual (physical) content of a will. It channels the testator's intended words and terms into the executed instrument, imbuing them with the requisite formality. Echoing the man who began his will thus: 'This is my will, and I desire the Chancery will not make another for me',<sup>226</sup> we might say that the words and terms the testator knows and approves are the essence of his 'will', and that courts should not be encouraged to make another for him by a well-meaning—but less disciplined—appeal to his broader testamentary 'intentions'.

<sup>223</sup> *ibid* [33], drawing on *Re Slocock's Will Trusts* [1979] 1 All ER 358 (Ch) 363.

<sup>224</sup> See, most recently, *Fairmont Hotels Inc v Attorney General of Canada* 2015 ONCA 441, and *cf* the discussion of the post-*Juliar* world by L Smith, 'Can I Change My Mind? Undoing Trustee Decisions' (2008) 27 *Estates, Trusts & Pensions Journal* 284, especially 288–91; C Brown and AJ Cockfield, 'Rectification of Tax Mistakes Versus Retroactive Tax Laws: Reconciling Competing Visions of the Rule of Law' (2013) 61 *Canadian Tax Journal* 563.

<sup>225</sup> For recent examples, see *Lobler v Revenue and Customs Commissioners* [2015] UKUT 152 (TCC), [2015] STC 1893; *Vaughan-Jones v Vaughan-Jones* [2015] EWHC 1086 (Ch), [2015] WTLR 1287.

<sup>226</sup> See the text accompanying n 1 at the start of this chapter.