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Codification of Private Law in Scotland: Observations by a Civil Lawyer

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This article discusses, by reference to Scotland, the problems of codifying a mixed system of private law, presenting an outline of some parts in a draft civil code. A civil code must resolve divergence between Civil Law and Common Law concepts. Such divergence is demonstrated here by reference to the conceptual conflict between the Scots (Civil) law of error and the English (Common) law of misrepresentation. The article outlines how codified provisions in this area might be drafted. It discusses the German, French, Swiss and Austrian rules (the last being remarkably similar to Scots law), and offers possible Common Law and Civil Law-style codifications of the Scots law of error. As Scots statutes follow the Common Law drafting style, it is argued that they are unsuitable for comprehensive codification. A code in a Civilian style, on the other hand, requires the adoption of Civilian statutory interpretation, but as this is inconsistent with Scots legal culture, the final question raised is whether codification of Scots private law is desirable at all.

A. INTRODUCTION: THE AUSTRIAN GENERAL CIVIL CODE AS AN EXAMPLE OF AN “OLD” CIVIL CODE.

Discussion of the codification of Scots private law in a civil code appears to have gained a more prominent role after devolution in 1999. At the Scottish Universities Law Faculties’ Conference in 2002, Professor Eric Clive presented a codification project and outlined the possible structure of a future code.¹ This article reflects

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1 E Clive, *Project for a Draft Scottish Civil Code. Paper for the Minister for Justice* (25 March 2002). The author is grateful to Professor Clive for providing a copy of an updated (July 2002) version of this paper. On the issue of codification see also E Clive, “A Scottish civil code”, in H L MacQueen (ed), *Scots Law*

on codification from the perspective of an author from a Civil Law background whose initial training and practical experience in private law was on the basis of a civil code.

The civil code in question, the General Civil Code of Austria or ABGB (*Allgemeines Bürgerliches Gesetzbuch*), is itself of interest for Scots lawyers, for it was promulgated as early as 1811,² about the time when the flow of the Civil Law tradition and scholarship between Scotland and Continental Europe was finally interrupted in the wake of the Napoleonic wars.³ As a result of the centuries-old common basis of the *ius commune* (*Gemeines Recht*) rooted in Roman law, certain features of Scots law can also be found in the Austrian civil code (ABGB), which retained them in a less modified way than more modern codifications. The ABGB is still in force, albeit heavily amended over the decades. The ABGB is undoubtedly old-fashioned beside the German BGB, the Swiss ZGB and OR, the Italian *Codice Civile*, or the new Dutch Civil Code. To a large extent it is an old code, in the spirit of Natural Law and abstract reason as the principal sources of law,⁴ and essentially reflecting the *usus modernus*⁵ of the Habsburg countries as shaped by the age of reason in the eighteenth century.⁶ In contrast with the older Prussian Code (ALR) of 1794, it has not taken over the conglomerate of the partly outdated and conflicting casuistic doctrines of the *usus modernus*.⁷ As a late product of the Austrian Enlightenment, it is short (1,502 sections),⁸ relatively precisely worded,⁹ and clearly structured.¹⁰ It uses a language not too remote from

into the 21st Century. *Essays in Honour of W A Wilson* (1996) (henceforth *Scots Law into the 21st Century*) 82; E Clive, "Current codification projects in Scotland" (2000) 4 *EdinLR* 341.

- 2 For a brief history of its codification see K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (tr T Weir) (1998) (henceforth Zweigert and Kötz, *Introduction*) 157; H Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte* (1979) 67; F Wieacker, *A History of Private Law in Europe* (tr T Weir) (1995) (henceforth Wieacker, *History*) 266; H Baltl, *Österreichische Rechtsgeschichte*, 3rd edn (1977) 209. On Franz von Zeiller (1751-1828), the draftsman of the final drafts of what was to become the ABGB, see Th Mayer-Maly, "Zeiller, das ABGB und wir", in W Selb and H Hofmeister (eds), *Forschungsband Franz von Zeiller* (1980) 1.
- 3 J W Cairns, "Historical introduction", in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) (henceforth Reid and Zimmermann, *History*), vol 1, 176; D M Walker, *The Scottish Legal System*, 8th edn (2001) (henceforth Walker, *Scottish Legal System*) 163, 180.
- 4 Compare §§ 7, 12, 16 ABGB.
- 5 See Wieacker, *History*, 159, 164 *et seq*.
- 6 Wieacker, *History*, 199 *et seq*, 240, 250.
- 7 Wieacker, *History*, 266, 268.
- 8 This brevity was, however, achieved at the expense of substantial gaps which had to be filled by case-law and doctrine during the nineteenth century: compare Zweigert and Kötz, *Introduction*, 163.
- 9 Compare Zweigert and Kötz, *Introduction*, 163.
- 10 The ABGB consists of three parts: 1. law of persons; 2.1. law of property (possession, ownership, pledges, servitudes, succession); 2.2. contracts, contracts concerning the matrimonial régime, damages; 3. common provisions (creation of debts and obligations, alteration of rights and obligations, discharge of rights and obligations, time-bar and prescription).

that of the (educated) people of its era, and contains provisions which were generally born out of common sense rather than excessively erudite scholarship – features that equipped it with a surprising versatility and adaptability,¹¹ essential hallmarks of a successful codification.

The example of the ABGB is also a reminder that one should approach the task of codification prudently. Once a code is enacted, it normally remains, even under most extraordinary circumstances, and grows old with dignity, but without necessarily becoming a better law. Following its promulgation, the ABGB was in force in most parts of the Austrian Empire, and, after 1867, of the Austrian-Hungarian Empire, though not in Hungary apart from a brief period from 1852. After the First World War it remained in force in Austria, and also in what was then Czechoslovakia, despite the obvious tensions between Austria and the “secessionist”/ successor state. In addition, it also stayed in force in the former Austrian parts of Poland (Galicia, Cracow) after Poland came into existence again in 1918 until a new civil code was enacted for the whole of Poland.¹² The ABGB even remained in force for the former Austria after its annexation by Nazi Germany in 1938, although, curiously, as from 1 April 1940 the “Land Austria” (the national-socialist bureaucratic term) ceased to exist completely as an administrative entity under public law within the Third Reich.¹³ Since the Second World War, the ABGB has continued in force in Austria until the present day. It still has substantial shortcomings, in spite of numerous fundamental amendments over the centuries¹⁴ and supplementary legislation in a large number of separate statutes. For every Austrian private lawyer it is, nevertheless, the “bible” (and appears to become more biblical and mysterious in some old-fashioned parts); it enjoys some ironic affection among Austrian lawyers; it stands pluckily beside the other codes; and it is a source of bewilderment especially for German lawyers (something Austrians tend to appreciate) with its slightly archaic brevity and directness, its generally down-to-earth provisions, and its perhaps idiosyncratic organisation following the scheme of the *Institutes* of Gaius: *personae – res – actiones*.¹⁵ The writer is not aware of any serious project to replace it by a more modern codification.¹⁶

11 Compare W Ogris, *Die Rechtsentwicklung in Österreich 1848-1918* (1975) 58.

12 The ABGB also survived in most parts of what was to become Yugoslavia.

13 W Brauner and H Lachmayer, *Österreichische Verfassungsgeschichte*, 3rd edn (1983) 249, 251.

14 The first large-scale amendments were made in the three “Partial Amendments” in 1914, 1915, 1916 (the last one being the most important one) under the influence of the then new German BGB. They led to a substantial revision of the code as a whole. See Ogris, *Die Rechtsentwicklung in Österreich*, note 11 above, 69.

15 Compare ABGB, § 14, and §§ 15 *et seq* (persons); §§ 285 *et seq* (things); §§ 859 *et seq* (obligations).

16 Reform of the ABGB is nevertheless frequently discussed, see C Fischer-Czermak et al (eds), *Das ABGB auf dem Weg in das 3 Jahrtausend* (2003).

Scotland's mixed system combining Civil Law and Common Law traditions,¹⁷ on the other hand, is viewed by some commentators as a model for harmonising legislation in Europe,¹⁸ or even as a "picture of what will be ... the law of the civilised nations".¹⁹ If that is indeed so, this particular characteristic should probably also be preserved in a future Scottish code. However, the assertion of mixedness in relation to legal systems is often questionable. For example, it has been argued, probably with some exaggeration, that the Civil Code of Quebec is in reality the result of a reinforcement of Franco-Canadian at the expense of Anglo-Saxon legal culture,²⁰ driven essentially by political forces, and so it represents Civil Law with a few minor Common Law influences.²¹ The notion of Scots law as a mixed system has also been qualified²² and criticised,²³ and the idea that a mixed system must be qualitatively superior because of its foundation on a critical choice of the best elements of both the Civilian and the Common Law traditions has been dismissed as a myth.²⁴

Adopting a property law analogy, is Scottish private law "mixed" in the sense of commixtion/confusion, or of specification? Put differently, is Scots law a conglomerate of fragments and parts of Civil Law *or* Common Law which are, in themselves, relatively pure and do not necessarily influence each other much, or is Scots law the result of a true mixture of Civil Law *and* Common Law, a new matter composed of these two ingredients?²⁵ A conclusive answer can probably only be given in relation to individual, narrowly defined, areas, but the writer tends to the conglomerate version. One gains support for this view by examining statute law –

17 See, e.g., H L MacQueen, "Scots Law and the road to the new *ius commune*" (2000) 4(4) *Electronic Journal of Comparative Law* available at <<http://www.ejcl.org/44/art44-1.html>>; W D H Sellar, "Scots law: mixed from the very beginning? A tale of two receptions" (2000) 4 EdinLR 3.

18 See Zweigert and Kötz *Introduction*, 204. Wieacker is much more cautious, *History*, 394: "It is perhaps only a question of time before the assimilation to English law becomes complete." (That was written, however, well before devolution).

19 H Lévy-Ullmann, "The law of Scotland" (1925) 37 JR 370 at 390. This enthusiasm is typical of the older generation of comparative lawyers, and understandable in the light of the strenuous efforts to build up a peaceful Europe after the world wars.

20 Including potential forced assimilation, e.g. ss 57 *et seq* (change of name) of the 1994 Quebec Civil Code could be used for this purpose.

21 See especially P Legrand, "Against a European civil code" (1997) 60 MLR 44, 53 and note 54: "the 1994 Quebec civil code's insidious marginalisation of the anglophone minority in Quebec as part of a broader political project"; and P Legrand, "Civil Law codification in Quebec: a case of decivilianization" (1993) *Zeitschrift für Europäisches Privatrecht* 574, 583.

22 E Örüci, "Comparative law as a tool of construction in Scottish courts" 2000 JR 27, 33, 36.

23 Some authors do not view the influence of English law as particularly desirable, see e.g. Walker, *Scottish Legal System*, 196. Others, however, stress the English law impact as very beneficial for the development of Scots law, particularly commercial law: see e.g. A Rodger, "The codification of commercial law in Victorian Britain", (1992) 109 LQR 570, 572, 588.

24 R Evan-Jones, "Receptions of law, mixed legal systems and the myth of the genius of Scots private law" (1998) 114 LQR 228, 232, 247-248.

25 See K G C Reid and R Zimmermann, "The development of legal doctrine in a mixed system", in Reid and Zimmermann, *History*, vol 1, 6.

which a civil code would also be. Scots statutes, both Acts of the UK Parliament for Scotland and Acts of the Scottish Parliament,²⁶ are unadulterated Common Law creations in respect of their drafting style, level of abstraction, and regulatory detail, and, due to their nature, they are arguably not appropriate as a basis for a successful codification.²⁷ Brevity and flexibility are essential for a codification and these are achieved by using the right level of abstraction when creating statutory provisions. This problem, as well as the whole complex debate of advantages and disadvantages of codification, can be more satisfactorily discussed if a concrete example is taken as a starting point. The example in the present case will be the Scottish law of error.

B. DRAFTING PROVISIONS ON ERROR

The draft of new provisions on error is likely to go through the following steps: (1) restatement of the existing law of error in Scotland in an analytical and succinct way; (2) identification of areas which may be improved in a new draft – effectively an amendment of the existing law; (3) examination of the provisions on error or mistake in other jurisdictions and, if possible, identification of existing foreign provisions which appear to come close to the envisaged Scots rules, so that the foreign rules may serve as a model for the draft (although such a model should be used with due caution); (4) analysis of the implications of the draft provision on error for the remainder of the private law system, especially its legal consequences, in order to achieve consistency and to create and preserve the civil code as a uniform body of law: this involves issues of reduction of contract and restoration of property transferred under the void (annulled) contract, but also, indirectly, the principal criteria of contract formation; and (5) draft of the provisions on error.

(1) Outline of the Scots law of error²⁸

The law of error²⁹ attempts to resolve the conflict arising from the discrepancy

26 On the drafting style of the Acts of the Scottish Parliament (then to come), see E Clive, “Law-making in Scotland: from APS to ASP” (1999) 3 EdinLR 131.

27 Compare A E Anton, “Obstacles to codification” 1982 JR 15, 18, 21, 30, and below.

28 A much more exhaustive treatment (on which this section is based) can be found in W W McBryde, *The Law of Contract in Scotland*, 2nd edn (2001) 351 *et seq* (henceforth McBryde, *Contract*); H L MacQueen and J Thomson, *Contract Law in Scotland* (2000) (henceforth MacQueen and Thomson, *Contract*) 154 *et seq*; W W McBryde, “Error”, in Reid and Zimmermann, *History*, vol 2, 72 *et seq* (henceforth McBryde, *Error*); D M Walker, *Principles of Scottish Private Law*, 4th edn (1988), vol 2, book 4 (Obligations), (henceforth Walker 2) 65 *et seq*.

29 Error in formation of a contract only is discussed, not error in performance, which is in the writer’s view not an issue of error at all, but of breach of contract and/or unjustified enrichment (on the latter, see McBryde, *Contract*, 379: *condictio indebiti*).

between intention (*volitio*) of a party to a contract and his or her declaration or expression (*signum volendi*)³⁰ on the one hand, and, on the other, the principle that the other party can rely on the representor's statement.³¹ A party may not always be bound by a contract if he or she has contracted under error because the party's error vitiates true contractual consensus. *Consensus in idem* must be tested objectively. Error can be defined as a misconception, or a wrong or incorrect belief about a matter of fact or a matter of law.³²

The following forms and situations of error can be distinguished:

(a) *Quality of error*

If the error is uninduced,³³ a contract can be reduced only if the error is an error *in substantialibus*, that is, going to the fundamental nature or root of the contract. It is difficult to define the exact meaning and ambit of the "substantials": one may use Bell's classification of error *in substantialibus* as being an error regarding the subject-matter of the contract, the contracting person (if personal identity is essential), the price, the quality of the thing engaged for, or the nature of the contract.³⁴ This list reflects the basic types of error in Roman law,³⁵ but it is not exhaustive, nor does it refer to any potential differences between unilateral and common error, so that this analysis is of limited assistance.³⁶

Where error is induced by innocent misrepresentation the error must be material or, it is sometimes said, "essential", an ambiguous term.³⁷ The notion of

30 This analysis of error in contract is the legacy of the jurists of Natural Law, see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) (henceforth Zimmermann, *Obligations*) 587, 613.

31 This "reliance theory" is the product of eighteenth-century *ius commune* jurists in central Europe (as opposed to the "will theory" of Grotius and Pufendorf), and could already be found in the Bavarian *Codex Maximilianeus Bavaricus Civilis* of 1765 (IV.1.25), and in the writings of the Austrian jurist K A von Martini. See also under B. (3), "Austria", below.

32 Compare Walker 2, 65; McBryde, *Contract*, 363: "Error arises when there is a discrepancy between reality and a party's belief."

33 The distinction between uninduced and induced error reflects the present situation of Scots law under the influence of the English law of misrepresentation. Before, there was no difference between uninduced and induced (essential) error. Misrepresentation became relevant only if it was fraudulent, see McBryde, *Contract*, 365. This reflected the position of the *usus modernus*: compare Zimmermann, *Obligations* 610, and as to classical Roman Law (Ulpian), 593.

34 Bell, *Principles*, 4th edn (1839) § 11.

35 Zimmermann, *Obligations*, 588-592.

36 McBryde, *Contract*, 353.

37 In the eighteenth and the early nineteenth centuries, "essential error" was also used in relation to uninduced error and could mean substantial (error in substantials) or material, i.e. less than substantial, although the use was not consistent. The difficulty in identifying the precise meaning of these terms started with inconsistent use by the Institutional writers (Stair: "error in substantials"; Erskine: "error in the essentials"): see McBryde, *Contract*, 352. See also definition of essential error (as error *in substantialibus*) in Walker 2, 68.

misrepresentation is an import from English law and theoretically distinct from that of error.³⁸ Within the realm of misrepresentation, “material” or “essential” error can be defined as an error that does not need to go to the root of the contract but must be sufficiently important to have induced a reasonable person to enter into the contract.³⁹ Thus the misrepresentation must have induced (caused) the error (“but for” test).⁴⁰ As a result, the English “innocent misrepresentation” and the Scots “essential error” appear to have become interchangeable.⁴¹ “Essential error” (*error in substantialibus*⁴²) under classical Scots law and “essential error” under modern Scots law after the import of innocent misrepresentation from English law (error as a result of an operative misrepresentation in the meaning of English contract law⁴³) denote two different concepts. It has therefore been recommended that the term should not be used in the context of innocent misrepresentation.⁴⁴

(i) Error in transaction, error in motive

An uninduced error is operative only if it is an error in transaction (*in negotio*). If the error was induced by the other party’s misrepresentation, the error has effect, independent of whether it is an error in motive (*in causa*), or an error in transaction.⁴⁵ The distinction derives from the German legal family (where an error in motive is operative in exceptional circumstances only⁴⁶) but has found its way into Scots law.⁴⁷ If the error is in respect of circumstances outside the actual transaction, it is an error in motive; otherwise it is an error in transaction. In the case of an error in transaction the question is *what* transaction a party wants to agree to (intention formed correctly, but expressed with an error), while in case of an error in motive the question is *why* the party wants to agree to a certain transaction (intention formed because of an error, but expressed correctly).⁴⁸ The

38 Accordingly, W M Gloag, *The Law of Contract*, 2nd edn (1929), discusses error and misrepresentation separately, see 435, 457. See also below.

39 *Ritchie v Glass* 1936 SLT 591. See also J Thomson, “Error revised” 1992 SLT (News) 215.

40 *Menzies v Menzies* (1893) 20 R (HL) 108, 142 per Lord Watson.

41 *Manners v Whitehead* (1898) 1 F 171; McBryde, *Contract*, 360 with further case references, and 370.

42 Following Stair and Bell who use the term “error in substantialis”.

43 That is, a false statement of fact which induces the other party to contract, e.g. *Smith v Chadwick* (1884) 9 App Cas 187; *Edgington v Fitzmaurice* (1885) 29 Ch D 459. In the concept of misrepresentation, the aspect of “error” on the part of the representee does not play a determining role.

44 McBryde, *Contract*, 372.

45 MacQueen and Thomson, *Contract*, 159.

46 Compare Germany: § 119 BGB; Austria: § 901 ABGB. Swiss law is less strict: see Art 24 (1) (4) OR, in contrast with Art 24 (2) OR. French law indirectly also recognises the distinction between error in transaction and error in motive: see the reference to “*la cause principale de la convention*” in Art 1110 *Code civil* and case-law.

47 *Angus v Bryden* 1992 SLT 884.

48 Compare A Ehrenzweig, *System des österreichischen allgemeinen Privatrechts I/1*, 2nd edn (1951) 226.

distinction is sometimes difficult to make in practice and not entirely satisfactory because in psychological terms both cases may often be identical.⁴⁹

(ii) Relevance of error in law?

Normally only an error in fact is relevant. Some cases went even so far as to exclude errors in law from having any effect whatsoever, at least when the contract in question was not in discharge of legal rights.⁵⁰ Other cases were less strict. If the error in law could be interpreted as a case of an error *in essentialibus*,⁵¹ (in other words if the error in law was considered as an error in the subject-matter of the transaction) then reduction of the contract was allowed.⁵² It now seems clear that if the error was as to the legal consequences of the transaction, the contract is not reducible, unless the error was induced by misrepresentation of the other party.⁵³ Reluctance to accept error in law as a ground for reduction can be traced back to Roman law.⁵⁴

(b) *Unilateral error not induced by the other party*

A unilateral error that was not induced by the misrepresentation of the other party is a ground for reduction only if the error is *in substantialibus* and an error in transaction.⁵⁵ Examples are errors in relation to the personal identity, if essential, of the party undertaking the obligation⁵⁶ (*error in persona*), or to the nature (*error in negotio*) or object (*error in corpore*) of the contract.

In the German legal family error in expression is often regarded as a sub-category of error in transaction,⁵⁷ and this view does not appear to conflict with Scots law.⁵⁸ Errors in expression⁵⁹ are defects in the declaration of the party's intention, such as a slip of the tongue or the pen, or the incorrect quoting of a price.⁶⁰ The incorrect quoting of a price should be distinguished from the quoting of an incorrect price. In the former case, the intention concerning a certain price has been communicated with an error: in the latter, it has not, but the price

49 See Zweigert and Kötz, *Introduction*, 413-414.

50 *Munro v Strain* (1874) 1 R 522, 525 per Lord Justice Clerk Moncreiff.

51 This is not necessarily the same as an error in *substantialibus*: see McBryde, *Contract*, 352, and 355, discussing *Menzies v Menzies* (1893) 20 R (HL) 108, and above.

52 *Mercer v Anstruther's Trs* (1871) 9 M 618, 628 per Lord President Inglis, and 652 per Lord Kinloch.

53 *McCallum v Soudan* 1989 SLT 523; *Royal Bank of Scotland v Purvis* 1990 SLT 262.

54 Zimmermann, *Obligations*, 604.

55 MacQueen and Thomson, *Contract*, 159.

56 This is a particular issue for marriage cases (now only of historic interest): see McBryde, *Error*, 73.

57 See, e.g., H Koziol and R Welser, *Bürgerliches Recht I*, 9th edn (1992) 126 (discussing Austrian private law).

58 Compare analysis in MacQueen and Thomson, *Contract*, 163-164.

59 Compare Gloag, *Contract*, 437; Walker 2, 87.

60 This also includes transmission errors, see Gloag, *Contract*, 439.

calculation itself was made wrongly. As a rule, the other party can rely on what the representor states. In other words, the representor is bound by his or her statement and cannot escape from a bad bargain.⁶¹ Thus there is no reduction on the ground of error if the price calculation is disadvantageous to one party,⁶² even when the other party is aware of this (right expression of a wrongly calculated price). However, if the other party knows from the prior negotiations which price the first party is actually prepared to accept, and the first party then mistakenly quotes another (typically lower) price, he or she can seek reduction (*error in pretio* – wrong expression of the price this party is prepared to agree on).⁶³ In such a situation the particular price⁶⁴ has become part of the contractual substantials.⁶⁵ Usually such a situation (not confined to erroneous prices only) is referred to as “taking advantage of the other party’s error”,⁶⁶ which is, it is submitted, a somewhat ambiguous label.⁶⁷

An uninduced unilateral error as to the nature of a contract (and its legal effects) which has been committed to writing can virtually never be annulled,⁶⁸ and there no longer seem to be exceptions to this rule.⁶⁹

The so-called *falsa demonstratio* is not an error in expression (“*falsa demonstratio non nocet*”⁷⁰): the parties use (in agreement) a description of the subject-matter of the contract which an outsider would consider as incorrect, but the parties do not err in respect of the subject-matter itself.⁷¹

Error in transaction (in the wider sense) can overlap with cases of, or be an example of, a breach of a contractual term or the nonpurification of an implied condition, as for example when the subject-matter of the contract is not in existence at the formation stage or its actual quality deviates fundamentally from the stipulated quality.⁷² The stronger emphasis on contractual terms or suspensive/

61 *Stewart’s Trs v Hart* (1875) 3 R 192.

62 This can be seen as a case of an irrelevant error in motive.

63 See already in *Sword v Sinclair* 1771 Mor 14241, although it is doubtful whether this case was indeed one of unilateral error: W W McBryde, “A note on *Sword v Sinclair* and the law of error” 1997 JR 281.

64 Also a calculation of the price or the basis of its calculation can become part of the contractual substantials if the parties so agree.

65 MacQueen and Thomson, *Contract*, 163.

66 *Angus v Bryden*, 1992 SLT 884; McBryde, *Contract*, 360 with case references.

67 E.g. “taking advantage” can also contain aspects of fraud: see *Stewart’s Trs v Hart* (1875) 3 R 192. Also, securing a good bargain means contracting at the expense of the other side, which the law does not normally prevent.

68 *Stewart v Kennedy* (1890) 17 R (HL) 25, 29 per Lord Watson; *McCallum v Soudan* 1989 SLT 523; *Royal Bank of Scotland v Purvis* 1990 SLT 262.

69 Thomson, “Error revised”, note 39 above, 217.

70 On the perceived common error *in nomine*, see Zimmermann, *Obligations*, 598.

71 E.g. the parties agree on the sale of a clarinet which, however, they refer to as a “flute”.

72 MacQueen and Thomson, *Contract* 160, 162.

resolutive conditions is a typical feature of non-codified (Common Law) systems where the parties cannot rely on an existing set of rules of *ius dispositivum*,⁷³ as are found in a code. This is one reason why the law of error has only limited relevance in practice.⁷⁴ Similarly, in English law, many mistake cases can be interpreted as breaches of a contractual term (for example, quality of the subject-matter), or as cases of frustration, and it has sometimes been suggested that there is in fact no law of mistake in English law.⁷⁵ Although Civilian academic discussion tends to deal with these areas more separately, in the doctrine and case-law of Civil Law systems there is an awareness of potentially competing claims arising from facts which could be construed as cases of error, initial impossibility to perform, or breach of (implied) contractual conditions (with different remedies or legal effects).⁷⁶

Some authors are of the view that the successful reduction of a contract for error renders the contract void; until then, it is valid, though voidable, and has all the legal effects of a sound contract.⁷⁷ Judicial opinion is less clear;⁷⁸ in some cases contracts under error are regarded as void in certain circumstances,⁷⁹ which would be the logically consistent consequence of retrospective legal recognition of absence of consent, hence no contract, due to the error *in substantialibus*. This leads to further questions, in particular whether or not ownership can validly pass under a contract under error, and, if so, up to which point. In this context it is also important whether there was an error regarding contemplation of transfer of ownership.⁸⁰ These matters would have to be decided in the course of a codification.

(c) *Error induced by misrepresentation of the other party*

This area of the law of error developed under the influence of, and follows largely, English law on misrepresentation. If a material⁸¹ error in motive or a material error in transaction, which does not need to go to the root of the contract (there is no

73 I.e. the parties can choose to adopt these provisions for their agreement or stipulate different rules.

74 Compare Thomson, "Error revised", note 39 above. The other reason is arguably the somewhat confused state of the present Scots law of error.

75 J C Smith, "Contracts – mistake, frustration and implied terms" (1994) 111 LQR 400, 408 *et passim*; C J Slade, "The myth of mistake in the English law of contract" (1954) 70 LQR 385.

76 This complicated subject goes beyond the scope of this article. For Swiss law, e.g., see A Koller in T Guhl, *Das schweizerische Obligationenrecht*, 9th edn (2000) 140 *et seq.*

77 MacQueen and Thomson, *Contract*, 158.

78 See McBryde, *Contract*, 376.

79 This would correspond with Stair's view: "Those who err in the substantial of what is done, contract not" (*Institutions*, 1.10.13).

80 K G C Reid, *The Law of Property in Scotland* (1996) (henceforth Reid, *Property*) para 617. Indirectly this touches upon the question whether a derivative acquisition of property is abstract or causal in Scots law: in the former case property can also pass under a void contract if the error does not encompass contemplation of transfer of ownership.

81 For the explanation of "material" error see text to note 39 above.

requirement of error *in substantialibus*), has been induced by an operative misrepresentation, the misrepresentee is entitled to seek reduction of the contract on the ground of his or her error. A misrepresentation is operative if the misrepresenter or his or her agent has made a false statement⁸² of existing (or past) fact⁸³ to the other party prior to the conclusion of the contract and the misrepresentation has actually induced the misrepresentee to contract with the misrepresenter.⁸⁴ The misrepresentation does not have to be the sole cause for the misrepresentee to conclude the contract but a causal link is necessary.⁸⁵

When the misrepresentation is innocent, the misrepresentee can seek reduction of the contract⁸⁶ and restitution of the price, but only if *restitutio in integrum* is possible.⁸⁷ This includes the return of the subject-matter in the same state as before the formation of the contract. Otherwise (typically, where a third party has acquired an unassailable title to the subject-matter) reduction is barred.⁸⁸ Before reduction the contract is voidable, in other words, valid, unless the error is *in substantialibus*,⁸⁹ in which case the contract is arguably void, although there is no clear authority on this point.⁹⁰ When the misrepresentation is negligent or fraudulent, delictual damages can be claimed in addition to reduction.⁹¹

(d) Error by both parties

It is useful to distinguish between common error, whereby both parties are under the same misapprehension, and mutual error, whereby the parties are at cross-purposes⁹² (although the terminology is not used consistently in this way).

Common error is a real situation of error because there is *apparent* consent between the parties, but *true* consent is defective, while in the case of mutual error even apparent consent is absent. Mutual error prevents the emergence of a *consensus in idem* and there is therefore *dissensus*.⁹³ On objective criteria, offer and acceptance do not match and no contract has been concluded. Strictly

82 Silence does not suffice except in cases of contracts *uberrimae fidei*, fiduciary relationships etc.

83 Thus trade puffs and statements of opinion or of future intention do not qualify.

84 For more details see e.g. MacQueen and Thomson, *Contract* 165-167; Walker 2, 75 *et seq.*

85 *Edgington v Fitzmaurice* (1855) 29 Ch D 459.

86 Where the misrepresentation is made in relation to a statement that is also a term of the contract, the misrepresentee can sue for breach of contract instead of seeking reduction: see *Lees v Todd* (1882) 9 R 807.

87 *Western Bank v Addie* (1867) 5 M (HL) 80.

88 *Boyd & Forrest v Glasgow and S W Ry Co*, 1915 SC (HL) 20.

89 McBryde, *Contract*, 374, 379.

90 McBryde, *Contract*, 378.

91 More details in McBryde, *Contract*, 374-375.

92 Compare Walker 2, 70.

93 E.g. in *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC (HL) 38.

speaking, *dissensus* is never a case of error,⁹⁴ because the contract does not even come into existence *ab initio*, in contrast to being reduced subsequently.

If there is a common error, the courts seem to judge this situation according to the rules of induced/uninduced error, although their analysis is not always clear, partly because of the obscure meaning of the term “mutual”.⁹⁵

(2) Areas for potential improvement

The Scottish law of error is perhaps an example of “commixtion” of the Civil and the Common Laws, rather than “specification”, and it also appears to represent confusion – in the ordinary meaning of the word.⁹⁶ The law of error (or mistake) is notoriously difficult and controversial in all legal systems,⁹⁷ and a mixed system does not necessarily provide a better result merely by mixing the ingredients from different legal families.

A codification of Scots law may attempt to resolve the conflict between the concepts of (innocent) misrepresentation and error: these concepts are, nevertheless, irreconcilable because the Scots law of error is a component of the law of contract and deals with defects in the contractual formation process, while the English law of misrepresentation is conceptually still a part of tort law, although it frequently appears in the context of the conclusion of contracts. The claim for negligent misrepresentation can appear alongside contractual remedies,⁹⁸ but the assessment of damages for misrepresentation is based on a tort.⁹⁹ Misrepresentation in English law comprises the tort of deceit,¹⁰⁰ statutory liability for negligent and innocent misrepresentation under the Misrepresentation Act 1967,¹⁰¹ and the common law tort of negligent misrepresentation as in *Hedley Byrne v Heller*.¹⁰² What is common to all of them is that they do not deal with (flawed) consensus in the formation of the contract but with a (mis)representation, and in order to

94 Compare McBryde, *Contract*, 363; R Black in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1996), para 692.

95 McBryde, *Contract*, 363. Walker 2, 70, cites mostly English cases.

96 McBryde, *Error*, 72: “After 500 years of development the law is in material parts uncertain and conflicting.”

97 Zweigert and Kötz, *Introduction*, 411.

98 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

99 That does not only apply to liability under *Hedley Byrne v Heller* [1964] AC 465, but also to damages for negligent misstatement under the Misrepresentation Act 1967, s 2 (1): *Royscott Trust Ltd v Rogerson* [1991] 3 All ER 294.

100 *Derry v Peek* (1889) 14 App Cas 337.

101 The claim under s 2 (1) is linked to the making of a contract, but still tortious in nature.

102 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

103 McBryde, *Contract*, 372.

104 A short account in the English language can be found in Zweigert and Kötz, *Introduction*, 410-419.

establish liability they are therefore concerned with the act and state of mind of the injuring party. The law of error, however, looks primarily at the state of mind of the injured party (from the point of view of tort law), in other words whether there is a discrepancy between intention and declaration (statement or act) which vitiates the party's true consent. Thus in the (classical) Scots law of error the focus is on the erring party, while in the English law of misrepresentation the focus is on the other party. This is also the reason why the term "essential error" under modern Scots law in the context of innocent misrepresentation is in effect redundant:¹⁰³ what is relevant is not whether one party is in error, but whether the other party makes a false statement of existing fact which induces the first party to contract. In a code this conceptual divergence can probably only be overcome, for example, by following the Civilian system of error with consistency, and by incorporating the advantageous elements of the otherwise abandoned Common Law system of misrepresentation, emulating its legal consequences within, rather than in addition to, the conceptual framework of the Civilian system. This may also serve to remove the terminological uncertainty of the expressions "substantial", "essential" and "material" error. An example of a foreign legal provision providing a solution broadly along these lines is shown below.

(3) The law of error in other jurisdictions¹⁰⁴

(a) Germany

In Germany, the law of error is regulated under § 119 of the BGB.¹⁰⁵ A party can rescind a contract¹⁰⁶ because of an error in transaction if either (a) it is an error in expression (*Erklärungsirrtum*), or (b) the expression, tested objectively, does not correspond to the meaning the party believed it would have (error as to content, *Inhaltsirrtum*). Thus a reasonable representee understands the representation in a way which differs from what the representor had imagined. Had the representor known of the true situation, he or she would not have contracted.¹⁰⁷

An error in motive is only relevant if the error relates to the quality of the person or the thing and this is a "characteristic regarded in business as essential" (§ 119(2) BGB). In the interpretation of the German courts, matters are "regarded in business as essential" if they relate directly to the thing itself (in a wide sense, also assets etc),¹⁰⁸ or to those qualities of the person which are relevant to contractual

¹⁰⁵ See Appendix under "Germany".

¹⁰⁶ The more abstract German concept of declaration of intention or will (*Willenserklärung*) is disregarded for present purposes.

¹⁰⁷ W Däubler, *BGB Kompakt* (2002) 248.

¹⁰⁸ BGHZ 70, 48.

performance. The newly enacted § 313(2) BGB follows existing case-law in recognising common error in motive.

(b) *France*

Provisions on error are contained in Arts 1109 and 1110 of the French *Code civil*.¹⁰⁹ Error is relevant where it relates to the very substance of the thing (*la substance même de la chose*, Art 1110) which, in the interpretation of the courts, includes qualities of the thing which go to its substance (*qualités substantielles de la chose*).¹¹⁰ An error is only relevant if it has been the determining motive for the party to enter into the contract (*motif principal ou déterminant*), that is, if the party would otherwise not have contracted at all. Reduction (*action en nullité ou en rescision*, Art 1304) is only available if the error was excusable.¹¹¹ If a party could have ascertained the accurate state of affairs but failed to do so, the error is inexcusable.

(c) *Switzerland*

The Swiss error provisions are Arts 23 and 24 of the Swiss Law of Obligations (*Obligationenrecht*, OR).¹¹² In Swiss law, a party can rescind only for substantial error. The law provides a non-exclusive list of instances of substantial error but, in a manner typical of the drafting style of the Swiss civil code, it is within the judge's discretion to determine what constitutes a substantial or an insubstantial error.¹¹³ The first three categories in Art 24 describe the usual categories of error *in negotio*, error *in corpore* and *in persona*, and error *in quantitate*.

The last category (Art 24(1)(4)) classifies an otherwise irrelevant error in motive (Art 24(2)) as substantial if the party's error concerns a certain set of facts which the party has (subjectively) considered as the basis of the contract, and which the party is also (objectively) entitled to hold as such, in accordance with good faith and normal commercial practice (error as to the basis of the contract, fundamental error, *Grundlagenirrtum*). Thus the error must have had a causal connection with the formation of the contract and both parties must have had a common idea about its contractual basis which was, on an objective view, an inevitable pre-requisite for entering into the contract.¹¹⁴ An important application of the error regarding the basis of the contract is the error as to the substantial quality of a thing (error *in substantia*).

109 See Appendix under "France".

110 See e.g. Cass Civ Ire, 28.6.1988, D.1989.450.

111 Cass Soc, 3.7.1990, Bull Civ, V, No 329.

112 See Appendix under "Switzerland".

113 Compare T Koller in T Guhl et al, *Das schweizerische Obligationenrecht*, 9th edn (2000) 138.

114 BGE 113, II, 25, 28.

(d) Austria

The Austrian law of error is contained in § 871 of the ABGB.¹¹⁵ Under this provision, only errors in transaction regarding the main object of the contract or a substantial quality thereof are relevant, and reduction is not permitted when there has been error in motive (§ 901). The party who was in error can rescind if the error was substantial, and either (a) the error was induced by the other party; (b) the other party ought to have noticed the error in the given circumstances; or (c) the error was resolved in good time. This “theory of reliance” (*Vertrauenslehre*) in the Austrian ABGB can be traced back to the draftsman of the ABGB, Zeiller, and even more so to his predecessor and teacher, Martini.¹¹⁶ It contrasts with the theory of intention or will (*Willenslehre*) by Grotius, Pufendorf and Christian Wolff.¹¹⁷

“Inducement” means that the other party has caused the error, and it is irrelevant whether this was done negligently or innocently.¹¹⁸ “Ought to have noticed” means that the other party has been negligent in failing to notice the representor’s error. The error is “resolved in good time” if the other party has not yet acted in reliance on the contract. This rule represents an application of the *res integra* doctrine of the *ius commune*:¹¹⁹ if the other party has already incurred expenses or disposed of property under the contract (for example, sold it to a third party), *restitutio in integrum* is no longer available and the contract cannot be reduced on that ground.¹²⁰ Common error has also been recognised as a ground for rescission in the case-law and in legal doctrine.

The Austrian error rule has been praised as “most original, attractive and satisfactory.”¹²¹ Whether or not one shares this opinion, the Austrian § 871 ABGB contrasts with the provisions of other jurisdictions in that it considers the intention and acts not only of the erring party but also of the other party. This brings the rule closer to Scots law, although, of course, it is not a misrepresentation section in the sense of the Common Law.

115 See Appendix under “Austria”.

116 Karl Anton v Martini (1726-1800) in his *Positiones de iure naturali* (1762, 2nd edn 1780), especially in § 451.

117 See G Wesener, “Zeillers Lehre ‘von den Verträgen überhaupt’”, in W Selb and H Hofmeister (eds), *Forschungsband Franz von Zeiller* (1980) 258-259.

118 OGH in SZ 46/84.

119 On this issue briefly, L Winkel, “Die Irrtumslehre”, in R Feenstra and R Zimmermann (eds), *Das römisch-holländische Recht, Fortschritte des Zivilrechts im 17 und 18 Jahrhundert* (1992), 225, 230.

120 H Koziol and R Welser, *Bürgerliches Recht I*, 9th edn (1992) 128-129.

121 Zweigert and Kötz, *Introduction*, 414.

(4) Implications of error provisions for the rest of the code

As error concerns a defect in the formation of the contract, the consequences of a successful reduction of the contract under Scots law must be considered, including the restoration of property (in the widest sense) previously transferred. This is one of the most essential parts when devising the plan of a code. It could even be argued that a draftsman has to have regard to the general underlying principles of transfer and re-transfer of property from the very beginning, as they pervade a code, even before formation and performance of contract are considered in detail. In some respects, the law of unjustified enrichment (restoration of property) is the mirror of the law of contract (transfer of property), not just its appendix. The planning of an unjustified enrichment system immediately prompts decisions as to the existence and extent of constructive trusts under a future code.¹²² Surprising though it may seem, a really consistent logical framework is achieved primarily by a comprehensive underlying system of unjustified enrichment and restitution, the “chassis” of a civil code.

A decision must therefore be made at an early stage whether the (derivative) acquisition of property in Scots law is to be causal, or abstract.¹²³ If ownership can only pass on the basis of an underlying reason recognised by the law (*iusta causa traditionis*), most commonly a contract capable of transferring ownership (e.g. a sale, but not a loan for use, *commodatum*), the system is causal.¹²⁴ Where the conveyance is in itself sufficient to transfer ownership, irrespective of the validity of any underlying contract, the system is abstract,¹²⁵ which is the present Scottish system,¹²⁶ although the authorities are not entirely clear in this respect.¹²⁷

Whether the system of transfer of ownership is causal or abstract determines legal solutions particularly in relation to double sales of property¹²⁸ and to the invalidation of contracts. Taking error as an example, first, it has to be determined whether the error renders a contract void or merely voidable, and, if the latter

122 On constructive trusts in Scots law see G Gretton, “Constructive trusts”, parts I and II, (1997) 1 EdinLR 281 and 408, especially at 284, 288, 291 (relationship with unjustified enrichment).

123 This theory of abstract delivery goes back to F C von Savigny, *System des heutigen römischen Rechts* (1840–49) vol 3, 312–313, (indirectly also) vol 4, 244–246, and can especially be found in Savigny, *Das Obligationenrecht als Theil des heutigen Römischen Rechts*, vol 2 (1853) 254–261, in particular at 257 and note (m): see now § 929 BGB. See also Reid, *Property*, para 608; D L Carey Miller, “Systems of property: Grotius and Stair”, in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law. A Tribute to Professor Sir Thomas Smith QC* (1992) 13, 28.

124 E.g. in Austria, Switzerland, The Netherlands.

125 E.g. in Germany.

126 At least outside the realm of the Sale of Goods Act 1979: compare s 17.

127 Reid, *Property*, para. 609; Carey Miller, “Systems of Property”, note 123 above.

128 See, with regard to land, S Wortley, “Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right” 2002 JR 291, 312.

applies, what the true effect of a reduction of the contract should be: does it render the contract void retrospectively, *ab initio* (or “*ex tunc*”), in the sense that it is deemed never to have been concluded? Or does the contract cease to have legal effect as from the successful reduction, but remain valid in respect of the time period before (“*ex nunc*”)? The latter approach probably conflicts with the concept of error as destroying the contractual consent. If the effect of reduction is the retroactive annulment of the contract, in a causal system the transferor can reclaim property passed under the reduced contract (for example by *rei vindicatio*, *condictio sine causa*¹²⁹ or a similar remedy). This is because the transferee never acquired ownership, due to the deemed absence of *iusta causa traditionis* as the result of the reduction. This is irrespective of whether or not the party has (also) erred in relation to the intention to transfer ownership. Where the basis of transfer is abstract, error can only vitiate transfer of ownership if the error is about the intention to transfer ownership, for the validity of the underlying legal relationship is irrelevant.¹³⁰ This is of obvious importance for the legal position of third parties to whom the transferee may have passed on the property in the meantime, and ownership of it, as the case may be.¹³¹ In an abstract system, redress is effected in such cases by way of unjustified enrichment, and that might tilt a decision in favour of a causal system, to avoid undue expansion of the law of unjustified enrichment.¹³²

(5) Draft provisions on the Scottish law of error

The suggested provisions are founded on three premises: (a) the issue of terminology and its conceptual aspects cannot be considered without large parts of a draft code in existence; (b) the current principles of Scots law of error are to remain generally unaltered; and (c) the problem of reduction of contracts, including its implications for the restoration of property transferred under these contracts, is dealt with elsewhere.

The following exemplifies the Common Law approach. An extreme example is given in outline for demonstration purposes without any suggestion that a possible future Scottish civil code would necessarily adopt such a style. The example is inspired by the South Australian Misrepresentation Act 1972,¹³³ and the Contract

129 As in Austria, § 877 ABGB.

130 Reid, *Property*, para 609, 617. See the discussion of error in this context already in Savigny, *System des heutigen römischen Rechts*, note 123 above, vol 3, 360 and note (e).

131 This is also directly relevant to the insolvency laws.

132 As it is in Germany. Compare the brevity of §§ 812-822 BGB on unjustified enrichment with the vast literature and the bulky commentaries on them.

133 South Australian Misrepresentation Act 1972 (no 46 of 1972).

Law Regulation 1961 of Bahrain.¹³⁴ Both are, or contain, misrepresentation provisions.

Error

1. Interpretation

In this Chapter the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

- (1) "Error" means, under an objective assessment, a misapprehension as to a matter of fact or a matter of law relevant to the contract;
- (2) "Substantial error" means an error but for which the party would have declined to contract and which relates to the fundamental nature of the contract. An error as to the fundamental nature of the contract includes an error regarding the subject-matter of the contract; the identity of the other contracting party, if made essential to the contract; the price, if made essential to the contract; the quality of the thing engaged for; the nature of the contract entered into;
- (3) "Material error" means an error, though not substantial, which is sufficiently important to induce a reasonable person to enter into a contract;
- (4) "Misrepresentation" means and includes:
 - (a) the assertion of that which is not true, by a person who believes it to be true;
 - (b) a false statement which is a breach of a duty of care owed to the person to whom the statement is made and which, without an intent to deceive, gains an advantage to the person committing it (negligent misrepresentation);
 - (c) a false statement made knowingly or without belief in its truth or recklessly whether it be true or false (fraudulent misrepresentation);
 - (d) a false statement made without deception and without being in breach of a duty of care to the person to whom the statement was made (innocent misrepresentation).

[...]

2. Reduction for error and misrepresentation

Where a person has entered into a contract

- (a) under error, or
 - (b) after an operative misrepresentation has been made to him;
- or both,

that person shall be entitled to reduce the contract and, in addition to the reduction, to claim damages, as the case may be, subject to the provisions under this Chapter of the Act.

3. Contract terms

If the error or the misrepresentation relates to a fact which subsequently has become a term of the contract, the party shall be entitled to claim breach of contract instead of reduction of the contract.

134 Regulation for Bahrain (under a British Order in Council), passed 25 Feb 1961, based on the Indian Contract Act 1872, published in W M Ballantyne, *Commercial Law in the Arab Middle East* (1986) 279. Sections 15, 20, 21, and 23-25 are especially relevant. Unlike most other countries of the Arab Middle East, Bahrain has a codified Common Law contract and tort law, but is influenced by the Civilian (French) jurisprudence of the surrounding states, such as Egypt and Kuwait, see Ballantyne, 4-6, 56.

4. Error

A person who has entered into a contract under an error shall not be entitled to reduce the contract if the error is not a substantial error, and if:

- (1) the error relates to the nature and the legal effects of a contract which has been reduced in writing; or
- (2) the error does not relate to the contract as such but only to the person's motive to enter into the contract; or
- (3) the error is an error as to law.

5. Misrepresentation

- (1) Where a person has entered into a contract after an operative misrepresentation has been made to him which has caused the person to contract under a material error, the person shall be entitled to reduce the contract.
- (2) The misrepresentation is operative if:
 - (a) the misrepresentation has been made to the person by the other party to the contract or by a person acting for, or on behalf of, the other party to the contract; and
 - (b) the misrepresentation is an incorrect statement of fact; and
 - (c) the misrepresentation is a statement or positive misleading conduct made before the contract has been concluded; and
 - (d) the misrepresentation has been the reason, or one reason, for entering into the contract, which has to be proved by the person seeking to reduce the contract because of the misrepresentation.
- (3) Where the party making the operative misrepresentation is not at fault, the person to whom the misrepresentation has been made shall only be entitled to reduce the contract if, following reduction, he is able to restore the positions he and the other party were in before the contract.
- (4) Where the party has made the operative misrepresentation fraudulently or negligently, the person to whom the misrepresentation has been made shall be entitled to damages in delict in addition to the reduction of the contract.

6. Common error

Where both parties to a contract are under a common error as to a matter of fact which is substantial to the contract, the contract is void.

[Remedies as to error and misrepresentation] ...

The following is an example of the Civil Law approach. Again, this is an extreme example, inspired by the provisions from the Civil Law countries above.

Section 1: Error

- (1) A party, who contracts under a substantial error, or under a material error induced by a statement of the other party, can reduce the contract.
- (2) An error is substantial if it relates to the elements which form the basis of the contract and without which the erring party would not have contracted. There is no reduction for a substantial error if it is the result of an error in the motivation to contract.
- (3) An error induced by a statement of the other party is material if it is deemed to be a sufficiently important reason to have induced a reasonable person to enter into the contract. If a material error has been induced without fault by a statement of the other party, and the erring party is unable to restore both parties to their positions before the contract, the contract is not reduced. If the other party has induced the material error fraudulently or negligently, the erring party is entitled to damages in addition to reduction [in accordance with section ...].

C. IMPLICATIONS OF CODIFYING THE EXISTING LAW

The example above from the law of error shows that it is unquestionably possible to codify Scots private law, but one has to reckon with significant changes as a result, perhaps less in Scots *law* as such, but certainly in Scottish legal culture. In this context, a “code” is understood as a comprehensive and coherent body of rules in a certain field of the law, with a consistent intellectual framework and terminology which form the backbone of its elements, legal concepts and areas of regulation. For present purposes, codification does not mean a restatement by “consolidation” or “statutorisation”¹³⁵ of existing laws, whether statutes or case-law, without incorporating them in a comprehensive and logical legislative framework:¹³⁶ that can be achieved in good textbooks.

The drafting of a statutory rule is the grouping and abstraction of sets of facts for which certain legal consequences (sanctions) are considered necessary. The higher the level of abstraction, the more types of facts are covered by the rule and its sanction. Conversely, the application or implementation of the rule puts the abstract principles back into concrete terms (“re-concretisation”) in relation to a real set of facts in order to subject them to the sanction of the rule. High-level abstraction is generally typical of Civil Law countries, low-level abstraction of Common Law systems. In Common Law countries, low-level abstraction is traditionally found in the *rationes decidendi* of court decisions, which contain general rules that are applicable beyond the special case at issue. Often such a set of rules appears in the shape of a “test”. Examples in private law are the “nervous shock” cases within the delict or tort of negligence.¹³⁷ This casuistic style of rule-making emanating from an individual case is then reflected or imitated in the statutory law of Common Law countries.

If the level of abstraction is too low, the test is only applicable to the facts of the present case and a few more cases with very similar facts. A code which tries to cover all these potential cases without attempting a higher level of abstraction becomes extremely extensive, structurally confused, unwieldy to apply and eventually unusable. It also resembles more a book of rigid compliance rules (with the need to amend them after a short period of time), rather than a framework of elastic and adaptable principles. One example of a “code” which shares many of

135 Consolidation could perhaps be defined as a private arrangement of the legal material, e.g. by academics and publishers, while statutorisation involves a legislative act. There is no consistent terminology, nor does the present author attempt one. See in respect of the French *codification compilation or codification à droit constant*, B Fauvarque-Cosson, “Modern developments in French codification” (2000) 4 EdinLR 350, 353.

136 Compare discussion of the terminology in W Dale (ed), *British and French Statutory Drafting. The Proceedings of the Franco-British Conference of 7 and 8 April 1986* (1987) 44, 72.

137 E.g. *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

these questionable qualities is the Companies Act 1985.¹³⁸ The main reason why this statute works at all is that it actually regulates only a small part of private and commercial law. The higher the level of abstraction, the more cases can be covered, and the rule enjoys more general application without ageing too quickly.

If the level of abstraction is too high, the rule becomes vague and its application criteria unclear. In order to ascertain these, the rule has to be restated in more concrete terms by way of supplementary “lower-level” abstractions, normally court decisions that apply this rule and that are given a particularly high importance through subsequent affirming court decisions, and through legal doctrine (academic writing). A good example is the French law of delict which has been regulated in only five general articles of the *Code civil* (Arts 1382-1386). It was left to French jurisprudence to ascertain and develop the concrete application of these articles.¹³⁹ This approach of filling the empty metal structure with walls (to use a building metaphor) entails certain dangers: case-law and academic doctrine may develop unsystematically and in a potentially conflicting way, which defeats the purposes of a code.

If a workable code is to be produced, the right level of abstraction, and a significantly higher one than in most current British statutes, must be chosen to ensure economy in drafting. This can be achieved when short statements of principle are used rather than extensive casuistic rules attempting to freeze fragments of existing case-law. The example above from the law of error shows that the Common Law version is unsuitable for much more than a single isolated statute (which is, however, acceptable in a Common Law environment). If Scotland decides in favour of a code, possible starting points for a drafting technique which endorses statements of principle can be found in the Sale of Goods Act 1979 (1893) and the Bills of Exchange Act 1882.¹⁴⁰ Although the Sale of Goods Act clearly has some of the features of a Civilian statute, it has been criticised as being incompatible with Scots law.¹⁴¹ This is true in respect of the content of certain provisions¹⁴² but not of their form, provided a more Civilian drafting style is sought.¹⁴³

138 See also critical comment in P L Davies, *Gower's Principles of Modern Company Law*, 6th edn (1997) 62.

139 B Fauvarque-Cosson, “Modern developments in French codification” (2000) 4 EdinLR 350, 352; Zweigert and Kötz, *Introduction*, 615.

140 Dale, *British and French Statutory Drafting*, note 136 above, 65. Good examples of concise provisions (as regards the form, not always the content) are ss 29, 31 of the Bills of Exchange Act and ss 16, 17, 20 (but not s 18) of the Sale of Goods Act.

141 D M Walker, *A Legal History of Scotland*, vol 6 (2001) 872.

142 For example, the distinction between contract and conveyance in relation to transfer of ownership, (which is made by Scots law) is unclear, s 18, rule 1, and there is effectively a causal theory of transfer, unlike classical Scots law, ss 1 and 17. See also Reid, *Property*, paras 606, 610.

143 A G Chloros, “Principle, reason and policy in the development of European law” (1968) 17 ICLQ 849, 862-863, advocates a Civilian drafting style (together with Civilian statutory interpretation) even for the *English* law (of contract).

Thus the paramount rule of drafting is: the code and its sections must be not only short,¹⁴⁴ but also truly concise: *lex moneat, nec doceat*. All the codification projects which have come up with unwieldy results have failed: for example, the Prussian *Corpus Iuris Fridericiani* (1751) which was, significantly, merely a comprehensive restatement of the *ius commune*; and the Austrian *Codex Theresianus* (1766)¹⁴⁵ which Maria Theresa herself rejected as too voluminous.¹⁴⁶ This rule may be difficult to follow, for lawyers are trained to have an eye for detail and to be as comprehensive as possible. Indeed current codifications have not always resisted the temptation to over-regulate and to obscure the framework of the code as whole. A nice little example of a redundant provision is § 118 of the German BGB, which deals with the legal relevance of jocular statements (“*Scherzerklärung*”, notably in the German code): such representations, as one might guess with little intellectual effort, do not lead to contractual relations.

Generally, however, terseness of the rules prevails over completeness in civil codes. This affects the interpretation of codified statutory law. Traditionally, a Common Law statute acts as a sword stabbing into the body of the common law to excise and rectify certain unwanted case-law developments. A Civil Law statute, especially if it is a code, is a skeleton around which the flesh of the case-law and doctrine can grow. In practice the difference is blurred, but it is mirrored in the interpretation rules. The construction rules of Common Law statutes, and their qualifications, are well known and need not be discussed.¹⁴⁷ In Civil Law countries, the rules of construction allow for more interpretative flexibility (and here I follow the model of the German legal family).¹⁴⁸ The canon of statutory construction comprises, in this order, the literal (or grammatical) interpretation, the systematic (or systematic-logical) interpretation, the historical interpretation, and the objective-teleological interpretation.¹⁴⁹ The literal (grammatical) interpretation is based on the meaning of the words according to their general (and sometimes more specialist) use and the grammatical structure in which they are embodied. The

144 See, e.g., Montesquieu, *De l'esprit des lois*, livre XXIX, ch 16.

145 On the Austrian “Compilationscommission”, which started its work in 1753, see P H von Harrasowsky, *Geschichte der Codification des österreichischen Civilrechtes* (1868) 38, 60 *et seq.*, 97.

146 Wieacker, *History*, 261, 267; H Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte* (1979) 54, 67.

147 See R Cross et al, *Statutory Interpretation*, 2nd edn (1987) 47; Walker, *Scottish Legal System*, 413; N Walker, “The crumbling pillars of statutory interpretation”, in MacQueen, *Scots Law into the 21st Century* 126.

148 On statutory interpretation in France, which is largely similar, see e.g. M Troper et al, “Statutory interpretation in France”, in D N MacCormick and R S Summers (eds), *Interpreting Statutes. A Comparative Study* (1991) 171.

149 F Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd edn (1991) 437. See also K Larenz, *Methodenlehre der Rechtswissenschaft*, 4th edn (1979) 307.

systematic-logical interpretation relies on a codified structure of the statutory law: in which context, in view of surrounding norms or the same chapter or the whole code, can the norm in question be found? Material considerations prevail over formal ones.¹⁵⁰ A historical interpretation tries to ascertain the legislator's intention by consulting the *travaux préparatoires*. If these construction methods are unsuccessful, the objective-teleological interpretation is used, which tries to explore the purpose of the rule (*ratio legis*), and foreign legal systems may be considered in this connection.¹⁵¹ There are additional methods, separate from the interpretation rules, when an unintended gap in the law as a whole (*echte Gesetzeslücke*) has been detected. These comprise the use of arguments *per analogiam*, arguments *e contrario*, *a minori ad maius* and *a maiori ad minus*, and as a last resort, of general ("natural"¹⁵²) principles of the law.¹⁵³

Even from this very short and incomplete account one can see that the continental laws can be, and often have to be, interpreted much more flexibly to apply general principles to concrete facts. A codification in a Civilian sense is likely to require Scottish judges and academics to adopt a more Civilian interpretation style. This may be one of the biggest stumbling blocks, although there is some familiarity with the continental type of construction because of European Union legislation,¹⁵⁴ and it is also true that Scottish judges are increasingly familiar with interpreting statutes which regulate given areas comprehensively.

A civil code should provide solutions for common and frequent problems, as well as flexible principles or yardsticks for less usual ones, which can then be solved by practitioners and academics guided by the existing rules in the code. Deliberate gaps in the law that are to be filled by judicial decisions are vital for a successful codification. The Swiss Civil Code shows awareness of that and orders in Art 1(2) that in the absence of statutory or customary law the court is to decide in the same way as it would do if it were a legislator.¹⁵⁵ In this respect, a code may also counteract the current movement to over-regulate, a spirit of our time which is in stark contrast with the motto of the Enlightenment, as expressed by Kant, to have the courage to use one's own reason.¹⁵⁶

150 Bydlinski, note 149 above, 444.

151 Bydlinski, note 149 above, 461.

152 That is the term used in § 7 of the Austrian ABGB.

153 Bydlinski, note 149 above, 472 *et seq.*

154 Walker, *Scottish Legal System*, 412; J A Holland and J S Webb, *Learning Legal Rules*, 3rd edn (1997) 184, 215.

155 Art 1(2) ZGB: "Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde." One feels reminded of Kant's categorical imperative.

156 Kant, *Was ist Aufklärung?* in *Berlinische Monatsschrift* (1784), reprint 1973, vol 4, 481.

D. IS A CODIFICATION DESIRABLE AT ALL: FOR SCOTLAND? OR FOR EUROPE?

The arguments for and counter-arguments against a civil code are well known, and it is interesting that they have changed little over the centuries,¹⁵⁷ so there is no need to reproduce them here.¹⁵⁸

As demonstrated above, the use of comparative law within a codification project is certainly useful. Comparative law (partly in connection with legal history) is able to separate, highlight and compare different methods with which functionally similar solutions to various problems are obtained. It can draw upon concrete legal rules from culturally diverse jurisdictions to distil general and abstract principles for legal solutions to similar social and economic problems. But comparative law should not be used to prove superiority of one legal system over another, or to prepare the introduction of foreign legal concepts into a new code without prior critical evaluation.¹⁵⁹

One may take the view that a codification of Scots private law is no longer necessary because there will soon be unification of European private law. While it is probably not possible to make an unqualified decision for or against a civil code in a particular single jurisdiction, there is, in my opinion, very much to be said against a civil code for the whole of Europe (assuming for the sake of argument that this is feasible at all¹⁶⁰). While it may appear obvious that a comparative lawyer should object to legal unification, on the grounds that he or she would thereby be

157 One of the well-known codification debates in history was in early nineteenth-century Germany between A F J Thibaut, *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechtes für Deutschland* (1814), who promoted codification, and F C v Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814, reprint 1892), who strongly opposed codification (see especially at 13 *et seq*, 29 *et seq*, 59 *et seq* (against the then new ABGB), 94 *et seq*).

158 In favour of codification in Scotland: e.g. Clive, "A Scottish civil code", note 1 above; Clive, "Current codification projects in Scotland", note 1 above; Walker, *Scottish Legal System*, 585, but see important qualifications at 588; and on a more cautious note MacQueen, *Scots law and the road to the new ius commune*, note 17 above. Against codification: e.g. A D M Forte, "If it ain't broke, don't fix it: on not codifying commercial law", in MacQueen, *Scots Law into the 21st Century* 92; A Rodger (now Lord Rodger of Earlsferry), "The bells of law reform" 1993 SLT (News) 339, and note 173 below; Anton, *Obstacles to codification*, note 27 above.

159 On the whole issue see Zweigert and Kötz, *Introduction*, chs 1 and 2.

160 The European Union, however, promotes the unification of private law of the Member States. See Resolutions of the European Parliament On Action to bring into line the Private Law of the Member States, OJ 1989 C158/400, and On the Harmonisation of Certain Sectors of Private Law of the Member States, OJ 1994 C205/518. See also O Lando et al *Principles of European Contract Law*, parts 1 and 2 (2000), part 3 (2003) (information on Lando Commission at <http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html>). In addition, the Study Group on a European Civil Code conducts comparative law research in private law of EU countries and has produced codified principles for the "Patrimonial Law" (essentially all private law excluding family law and succession) within European private law (information at <<http://www.sgecc.net>>).

rendered superfluous, this argument should not be dismissed lightly. It is the variety of human cultures and their differences which have enriched other cultures, not their uniformity. Law is one expression of human culture. The imposition of legal uniformity across the nations is a forceful act and inevitably a process of legal imperialism,¹⁶¹ despite the argument that some areas within the existing laws share many similarities.¹⁶² It is not too surprising that the basic principles of contract law do not differ a great deal as between various European countries.¹⁶³ Obviously, the very essence of a contract is an agreement between the parties. If the concept of contract is to work at all, it needs as a prerequisite an implicit agreement that the conceptual foundations of contract formation and performance are broadly similar everywhere.¹⁶⁴ The whole picture changes if legal relations are not based on consent, as with regard to delict and property.¹⁶⁵ One of the major arguments for unification is expediency and legal security.¹⁶⁶ Following this argument through to its logical conclusion, one should perhaps promote the unification of Scots and English laws first. There is no need to wait for a unified European private law.

The idea of codification itself can run counter to national character and culture. This may be the reason why a Civilian style codification of laws will never be successful in England, and a Common Law style codification (consolidation) will not be advantageous for either a Civil Law or Common Law trained lawyer.¹⁶⁷ The legal *mentalité* of the English, or their epistemological framework, is different from that found on the Continent – and both have the right to exist alongside one another. The French, for example, strive to eliminate any factual detail to establish a general idea or concept: the source of legal knowledge is the order, not the facts, and the emphasis is on universals. For the English the persuasiveness of a narrative

161 Legrand, “Against a European civil code”, note 21 above. See also Zweigert and Kötz, *Introduction*, 24-25, 28.

162 See e.g. K Riedl, “The work of the Lando Commission from an alternative viewpoint” 2000 ERPL 71. For strong reservations see P Legrand, “European Systems are not converging” (1996) 45 ICLQ 52, 61.

163 The *Principles of European Contract Law*, note 160 above, may be a starting point for codification on a national level.

164 And therefore one should not be surprised to find *broadly* similar contract law principles in jurisdictions even outside Europe before the time of substantial Western influence, for example in classical Islamic law: see J Schacht, *An Introduction to Islamic Law* (1964) 144-150.

165 See concerns expressed regarding the benefit of legal unification for the common market of the EU in H Kronke, *Brauchen wir ein europäisches Zivilgesetzbuch?* (Speech at the Institut für Rechtspolitik, University of Trier, 2002, no 11 of Rechtspolitisches Forum), available at <http://www.ird.uni-trier.de/11_Kronke.pdf> .

166 See e.g. Legrand, “Against a European civil code”, note 21 above, 51; A Pinna, “Drafting a civil code for Europe” *Tilburg Foreign Law Review Journal on Foreign and Comparative Law* (2002) 9(4), para 1.1.1.

167 A good discussion of the advantages and problems of codification from a Common Law (English) perspective can be found in M Clarke, “Doubts from the dark side – the case against codes” (2001) JBL 605.

must depend on the way in which it makes it possible for others to replicate an empirical demonstration to which it relates. Thus in the Common Law world, any construction of an ordered account of the law rests on the disorder of fragmented and dispersed facts.¹⁶⁸ In addition, the English are ill-at-ease with systems of rigid and formal rules, and a code could represent exactly that for them.¹⁶⁹ A code is an intellectual construct; it rests on principles, and not on precedents – on ideas and abstractions and not on past experience, at least not from the immediate past. But for the English, pragmatism triumphs over intellectual ideas.¹⁷⁰

Scotland, however, could be a borderline case. The stronger propensity in Scotland for abstractions and systematisation may make it more inclined to the abstract concepts and ideas which form the substrata of a code.¹⁷¹ Much will depend on how such a code is drafted.¹⁷²

E. CONCLUSION: WHO WOULD SUPPORT THE ENACTMENT OF A SCOTTISH CIVIL CODE?

The legal profession in Scotland does not wholeheartedly support a codification project. Indeed the judiciary is vehemently opposed to it:¹⁷³

[The judges] were of the view not only that codification would not contribute anything of value and would therefore be a waste of time and money, but that it would be positively harmful. They considered that it would hamper rather than promote the steady development of Scots law and, in particular, would tend to freeze it into some form determined, not by judges in the light of concrete practical problems, but by a small number of persons not immediately exposed to the realities of practice.

168 Excellently explained by Legrand, “Against a European Civil Code”, note 21 above, 49-50. See also W T Murphy, “The oldest social science? The epistemic properties of the Common Law tradition” (1991) 54 MLR 182, 192, 197, 201.

169 Legrand, note 21 above, 47, makes the contrast with Germany and is carefully supported by references to social studies.

170 See T Weir, “The Common Law system”, in R David (ed), *International Encyclopaedia of Comparative Law*, vol 2 (1984), “The legal systems of the world: their comparison and unification”, ch 2, no 82, at 77.

171 But cf Lord Goff of Chieveley, “The future of the Common Law” (1997) 46 ICLQ 745, 752: “Let us not forget that the Common Law is common not only to England, Wales and – dare I say it – to a substantial extent to my native land, Scotland”; and at 753: “Continental lawyers love to proclaim some great principle, and knock it into shape afterwards. Instead, the boring British want to find out first whether, and if so, how these great ideas are going to work in practice. This is not at all popular with the propagators of the great ideas.”

172 Clive, “A Scottish civil code”, note 1 above, sees a code as a fortification of Scottish cultural identity, although in the writer’s view this must be subject to various qualifications.

173 Letter of 4 June 2001 from the then Lord President Rodger, to Professor Clive, quoted in Clive, *Project for a Draft Scottish Civil Code*, note 1 above, 9.

Although the writer does not share the view expressed above, he has some sympathy for it, albeit perhaps for different reasons. The judges' major concerns are obviously based on the assumption that a code would be drafted according to the traditional style of Common Law statutes, and in this respect the concerns are not unfounded. The objections to a Common Law style of drafting for codification purposes have been raised above. In Britain, both north and south of the Border, a change of the drafting style is unlikely to happen.¹⁷⁴ A comprehensive ("codifying") Common Law statute adhering to the conventional drafting style is always an unsatisfying compromise. It kills ("freezes") the creativity of case-law in the regulated area, and that is, from a historical viewpoint, the very purpose of an Act of Parliament: to react remedially and to correct the common law. It then tries to distil rules from decided cases, which naturally focus on the facts in question and do not normally state broader principles. The statute, which may also incorporate existing partial codifications, thus usually consists of an aggregate (or patchwork) of detailed and casuistic rules established by decided cases.¹⁷⁵ Such a statute is not a flexible framework but potentially a straitjacket. For a judge, the application of such a statute, without the discretion he or she would otherwise have in the field of the common law, and without the freedom of statutory interpretation of the continental judge, is obviously a joyless exercise in the sense of Montesquieu's statement that *le juge est la bouche de la loi*¹⁷⁶ (although that statement was never true of the Civil Law systems). The real problem for codification of Scots private law (apart from political issues¹⁷⁷) is whether Scottish legal culture is prepared fundamentally to change its approach to statutory interpretation:¹⁷⁸ the actual drafting is then a secondary matter.

Codification along Civilian lines would undoubtedly change statutory interpretation. It is much less clear whether it would influence substantially the principle of *stare decisis* and the style and function of *rationes decidendi*.¹⁷⁹ It is arguable that the less detailed the code provisions, the less affected are the competence and discretion of the courts, given that the courts already deal with numerous detailed statutes which, in theory at least, do not permit as much freedom of interpretation as a Civilian statute. A code will not reverse the ranking of sources of law¹⁸⁰ because

174 Compare Lord Goff of Chieveley, note 171 above.

175 Dale, *British and French statutory drafting*, note 136 above, 56, 60, 67, 74. E Clive, "Law-making in Scotland: from APS to ASP" (1999) 3 EdinLR 144, advises that legislation must be specific to avoid litigation to resolve questions prompted by general and unclear rules.

176 Montesquieu, *De l'esprit des lois*, livre XI, ch 6.

177 Issues also arise with regard to the relationship between the Scottish civil code and UK statutes.

178 See also Anton, "Obstacles to codification", note 27 above, 15, 19.

179 On judge-made law in continental European codified systems, see Bydlinski, note 149 above, 506.

180 This, nevertheless, has been argued by Anton, "Obstacles to codification", note 27 above, 19.

Acts of Parliament have always ranked highest. It is not necessary, and presumably not beneficial, to replace all existing common law by the provisions of the code.¹⁸¹ The code should prevail only where they clearly conflict. Case-law, whether pre-existing, or post-dating the enactment of the code, can close gaps in the legislation. A Civilian-style code would not necessarily restrict the judges' power:¹⁸² it may change style and concrete content in given cases, but not its ambit or quality. Thus it should not be impossible to gain support for a codification project from the judiciary.

The last important point, although unfortunately neglected by lawyers, is that a code should have some aesthetic quality. A musical comparison can be made in that a layperson may not recognise a brilliant instrumentation but will immediately notice a mediocre one. It is not surprising that Blackstone took a very keen interest in architecture, which can itself be seen as solidified music if one follows the Ancient Greek myth of Amphion. A law which is painful to read is unlikely to be obeyed and enforced properly, and people will not be drawn to the study and practice of the law if they have to surround themselves with gruesome texts. The French novelist Stendhal is said to have taken the *Code civil* as a model for his own style¹⁸³ – even lawyers are not advised to do this with UK statutes. Inextricably linked with the importance of elegance and harmonic proportion is the fundamental necessity not to regulate too much in too detailed a manner. A codification should never strive for total completeness and extreme precision. Humans are never perfect: if their law were, it would be inhuman.

APPENDIX

Germany

§119 BGB:

1. A party making a declaration of intention, who was in error about its content or did not want to make a declaration with this content at all, can rescind the declaration if it can be assumed that he would not have made this declaration in full knowledge of the situation and with a sensible appreciation of the case.
2. An error as to the content of the declaration is regarded in the same way as an error as to those characteristics of a person or thing which are regarded in business as essential.

France

Art 1109 CC:

There is no valid consent, where the consent was given only by error, or where it was extorted under duress or induced by deception.

181 However, Clive tends to this approach, see *Project for a Draft Scottish Civil Code*, note 1 above, 2.

182 Anton's concerns in this respect are not convincing, see Anton, "Obstacles to codification", note 27 above, 24.

183 Wieacker, *History*, 273.

Art 1110 CC:

Error is a ground for annulment of an agreement only where it relates to the very substance of the thing which is the object of the agreement.

Error is not a ground for annulment where it relates only to the person with whom one has the intention of contracting, unless the particular identity of that person was the main cause of the agreement.

Switzerland

Art 23 OR:

A contract is not binding on a party who has been in a substantial error when concluding the contract.

Art 24 OR:

1. An error is substantial in particular in the following cases:
 1. if the erring party wanted to conclude another contract than that to which he has declared his consent;
 2. if the intention of the erring party was directed towards another thing or, where the contract was concluded in regard to a particular person, towards another person than he has declared;
 3. if the erring party has promised a performance on a considerably larger scale or has been promised a performance in return on a considerably smaller scale than was his intention;
 4. if the error concerned particular facts which the erring party, in accordance with good faith and normal commercial practice, regarded as a necessary foundation for the contract.
2. If an error relates only to the motive for entering into the contract, this is not a substantial error.
3. Mere errors in calculation do not prevent the binding effect of the contract, but are to be rectified.

Austria

§ 871 ABGB:

- (1) Where one party was in error about the content of a declaration made by him or communicated to the other party, which concerns the principal object or an essential attribute of it to which the intention was principally and expressly directed, then no obligation arises on his part, if the other party induced the error, or the error ought to have been noticed by the other party in all the circumstances, or it was resolved in good time.
- (2) An error of one party concerning circumstances about which the other party would have had to inform him under the law in force, is always deemed to be an error about the content of a contract and not merely an error in the motive or ultimate purpose for contracting (§ 901).