BOOK REVIEW

Mercantile Law of Scotland

by J. J. Gow

W. Green and Son, Edinburgh 1964, pp. cix, 779

To appreciate this book fully one ought to recall its background. Professor Gow, in origin, is a Scots lawyer who has long excelled as a penetrating writer on a variety of legal subjects. He is also now an authority on the Common law having taught, lectured and practiced in different parts of the Commonwealth. Secondly the Scots, for whom this volume is primarily written, share an island with the English and they have the smaller share. There are no barriers of any kind between the two countries except in law and to some extent in the church. Scotland has always had its own legal system, different in origin and early development from English law. There was an indigenous customary law which was limited in scope and when the early Scottish jurists could not find a remedy in their own laws they turned to Roman law, which has consequently a profound influence on Scots law. Many of our fundamental concepts are derived, with certain adaptations, from Roman law. The parliaments of the two countries were united in 1707 so that the legislature is in London and the final court of appeal for civil jurisdiction has been the House of Lords, which did not have a Scottish judge until 1876. In the circumstances it was inevitable that English concepts should be imported into Scots law, sometimes to the prejudice of the existing law, and the assimilation is more marked in the field of commercial law.

Nowhere is all this more eloquently explained than in Professor Gow's book for he is an admirer of Scots law. For this surrender of national principles he would lay part of the blame upon the practising lawyers, no doubt with good cause. His very first sentence sets the pace. "It is a matter of some irony that the language in which two Scots lawyers (Sir Walter Scott and Robert Louis Stevenson) wrote immortal novels should these many years past prove an awkward obstacle to the understanding by the Scots lawyer of the

institutions of the system of law which is our national and cultural heritage."

The difficulty with a book of this kind, covering as it does, the whole field of commercial law, is the wealth of material requiring to be dealt with and the fact that much of it is already available in greater detail in separate text books. The width and complexity of the field restricts an author in developing his personal views. Professor Gow, however, has succeeded remarkably well in making his own personal impact by original, if controversial, contributions. New thinking in law as elsewhere always gives rise to corresponding opposition and no doubt that will happen here but Professor Gow is well qualified to meet it.

The first chapter is on voluntary obligation and it is quite a masterpiece, as was to be expected, since it has always been one of his favourite themes. He begins with a discussion on promise pointing out that whereas English law does not enforce bare promise Scots law does. "The English generalisation may be 'where there is a promise for a promise there is a contract' ... with us the relevant generalisation is — 'where there is a *promise in law* there is an obligation'." The latter would be derived from the Roman law promise by stipulation.

In dealing with frustation of an obligation he prefers the Scottish attitude. On this he says (p. 36), "Until recently there has been a fundamental divergence between the Scottish and English attitude to frustration. The Scots view has always been that the court in the exercise of its inherent equitable jurisdiction does, upon a proper construction of the contract, what seems just in the circumstances. For long enough the English view, strongly influenced by the concept of the 'positive contract', has been that of the 'implied term' of which the apotheosis, and perhaps the requiem, was the speech of Lord Simonds in *British Movietone News Ltd.* v. *London & District Cinemas.* The artificiality of this theory scarcely merits comment. ... It requires the party taking the plea to excoriate the contract until he reveals a term which almost certainly the parties never had in mind, and which, if they had, would have failed to agree upon."

The effect of error (or mistake) in setting aside a contract is something on which the law of Scotland is not settled and for this the learned author also blames the influence of English law. He says (p. 53), "Unfortunately the ill-advised attempted anglicisation of our law of sale of corporeal moveables brought with it notions of English 'contract', and what with forgetting our own and better

concepts and misunderstanding English law there has emerged a brew of which the witches in Macbeth might well be proud, but which reflects little credit on Scots lawyers". The resulting brew is certainly all he says of it, but the strictures are not wholly deserved. Error or mistake appears to give trouble in all systems of law.

Another of his major chapers deals with the law of sale of goods and here again there are contributions formulated for the first time — sometimes controversial — but always stimulating. In approaching this chapter it must be kept in mind that the *Sale of Goods Act,* 1893, superseded the common law of Scotland as regards the sale of corporeal moveables. Scots law was based on the maxim *traditionibus non nudis pactis dominia rerum transferuntur.* The *Act* imported the classifying of goods as a condition of determining when the property passes and the learned author regrets the change. In particular he does not approve of the exaltation of the doctrine *caveat emptor.* On this he comments (p. 160), "Probably no other part of the law of sale so eloquently illustrates the divergent attitudes of Scots law and English law as does that part dealing with the obligation of the seller to supply goods worth the price he is getting for them. In principle English law adheres to *caveat emptor* that is, 'with regard to the goodness of the wares purchased, the vendor is not bound to answer, unless he *expressly* warrants them to be sound and good; or unless he knew them to be otherwise, and hath used any art to disguise them'. ... Scots law is and always has been otherwise, there is no need to prove express warrandice, the goods must be price-worthy. ... Sale is a bargain *bonae fidei* ... every man selling an article is bound, thought nothing is said of the quality, to supply a good article without defect, unless there are circumstances to show that an inferior article was agreed on." Although that is the law of Scotland it does not follow that we shall continue to apply it but Professor Gow earnestly hopes we shall. On this he says (p. 181), "There is nothing, therefore, save timidity and lack of confidence in the genius of our own system of jurisprudence to prevent our courts from applying our theory of price-worthiness under modern circumstances".

On hire-purchase the learned author has already written what is the standard work in Scotland on the subject. Significantly what he says here is (p. 249) "If never a concept should have found its way into Scots law that concept is the so-called 'hire-purchase', the spawn of the decision in *Helby* v. *Matthews* where it was held that the hirer of a piano who had the privilege of converting his hire into a purchase of the piano but was under no legal obligation so

to do was not a buyer who had agreed to buy and, therefore, could not give a good title to a third party... Had we in the realm of sale retained our freedom and exercised imaginative vigour, we would have continued to adhere to the concept of conditional sale expressed in *Murdoch* v. *Greig*." Having thus condemned it he proceeds to give a brilliant analysis of the transaction justifying his criticism as he does so.

It is impossible to comment on all that his book deals with but the chapter on negotiable instruments deserves special mention. Writers on this subject tend to avoid explanations of the practice of merchants and consequently tend to give the impression of not having practical experience but not so this learned author. After having laid about him on most of the other subjects he calms down and gives a splendidly objective account of this unexciting branch of the law so that many of his readers will close this chapter feeling that they have really understood this subject for the first time. Instead of beginning by uselessly quoting a definition he gives practical illustrations leading up to the definition.

This book then is an outstanding contribution to the law of Scotland which was sorely needed. In spite of its variety and the need to remain on basic principles it is a scholarly work; indeed there may be occasions when not only students but also the practising lawyer will be taken out of his depth. It is on the whole anything but an impersonal book but that is not a criticism. It may mean, however, that it will take longer to gain its proper place for too many in the professsion are interested only in collecting bare necessities without regard to how they are derived.

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CASE and COMMENT