

Commercial Law in Scotland

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& LAURA J. MACGREGOR

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COMMERCIAL LAW IN SCOTLAND

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DEDICATION

To Bill, Denis and Alexander.

PREFACE

It is customary in works like these to ask, "what is commercial law"? This is of course a legitimate question, as it is not one of those subjects with clearly defined boundaries. No two works on the subject seem to cover exactly the same aspects, and among any group of students, academics or practitioners there would no doubt be widespread disagreement as to what falls within its scope. This is chiefly because commercial law is a portmanteau term for a series of quite distinct subjects, which impact in their various ways upon trade and commerce. This work is aimed mainly at students undertaking courses in commercial law or mercantile law at one of the Scottish law schools, and this largely determines its character, in that it follows (more or less) the Law Society prescription for the subject. This will no doubt mean that there will be practitioners who will feel that the book does not cover the whole range of commercial law, as they understand it. This is unavoidable. Even those authors who aim to be as comprehensive in their coverage as possible readily admit that there are areas, which some might regard as commercial law, which they have been forced to omit. To have expanded on our coverage, we would have had to include subjects which would have been of little interest to our main target audience, increasing the size of the work to unwieldy proportions, and also increasing its cost. That being said, there might seem to be one conspicuous omission, in that the work contains no treatment of company law. To that it might be rejoined that, while the relevance of company law to the commercial world cannot be doubted, even those works which aim to be comprehensive tend to exclude company law, which is regarded as very much a subject in its own right. To have given company law anything like an appropriate treatment would have come close to doubling the size of the work, thus upsetting its balance. It was thus thought preferable to omit it, especially given that there are several excellent company law texts on the market.

The other oft-asked question is whether there is such a thing as commercial law. In other words, does commercial law operate as a coherent system, or is it merely a label attached to a set of quite separate branches of the law, which are linked only by the fact that they impinge on commercial life? The latter position is closer to the truth. Each area of commercial law is quite distinctive. Many concern the way in which the law regulates specific contracts. Sometimes those contracts are regulated for the most part by the common law, in other cases, they are mainly regulated by statute. Areas like bankruptcy deal with a statutory process, while rights in security are partly created by contract, partly by statute, and partly arise at common law. Those areas based on the common law tend to form a coherent whole, upon the foundation of a limited number of general principles. Areas which are organised around a single, dominant statute also tend to feature a coherent code, whether that statute seeks to codify the common law, or imposes a specially designed conceptual framework on the law, or gives effect to an international convention. There are other areas, however, which are not quite so coherent. Increasingly, moreover, the demands of consumer protection and of membership of the European Union (the two often being linked) have seen accretions to the law which, whatever their social utility, do little for its conceptual integrity. To a lesser extent, the same might be said of the influence of English law. Furthermore, even those areas of law which remain internally consistent are not designed by reference to other areas of commercial law. This is not to say that the system as a whole is dysfunctional, rather that those who look for evidence of some overall design will be doomed to disappointment. Ours is not one of those systems which boasts an integrated commercial code. Nonetheless, although each area of law has developed

along its own individual lines, there are numerous points at which two or more of the areas covered interact in practice. It is one of the aims of the book to detail those interactions, so that as well as gaining an understanding of the specific areas covered, the reader may gain an appreciation of how “commercial law” works.

Finally, we must record our appreciation for the assistance we have received in producing this book. Thus much thanks must go to our colleagues, Janeen Carruthers, Liz Crawford, Cowan Ervine, Jenny Hamilton, Parker Hood, Bill McBryde, Iain Macneil and Hector MacQueen and to Alexander Macgregor for his assistance with proofreading. Thanks also to all at Greens, especially the firm but fair Dr Valerie Malloch.

The law is stated as at May 1, 2003.

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