

Chathuni Jayathilaka, SALE AND THE IMPLIED WARRANTY OF SOUNDNESS

Edinburgh: Edinburgh Legal Education Trust (<https://edinburghlawseminars.co.uk/book-series>), 2019. Studies in Scots Law vol 6. xviii + 197 pp. ISBN: 9781999611804. £30.

In the first volume of the now well-regarded Edinburgh Studies in Scots Law series, writing on the subject of *Assignment*, Dr Ross Anderson stated that much of Scots law is “old, sometimes cosmopolitan and often undiscovered” (vii). Certainly it is the case that there is an astonishing lack of clarity in many areas of our law – even quite basic and fundamental areas of our law – although this is perhaps in the nature of any ancient and uncodified legal system. The various contributions to the Studies in Scots Law series have, since the publication of Anderson’s text in 2008, done much to shine light on under-studied, yet vitally important, subjects of Scots law. Dr Jayathilaka’s *Sale and the Implied Warranty of Soundness*, the sixth volume in this series, is a worthy addition to the canon.

Sale is, as Jayathilaka rightly posits at the outset of her work, “a transaction which lies at the heart of the Scottish economy” (para 1-01), but the common law rules relating to the concept have never been comprehensively rationalised. There has not been so much as an attempt since Mungo Brown’s *Treatise on the Law of Sale*, published two-hundred years ago in 1821. To a certain extent, the lack of literature is understandable, given that, in the case of corporeal moveable property, these common law rules are of no immediate practical significance, having been abrogated by Anglicising statutes in the nineteenth century. The sale of incorporeal property and heritable property alike are, however, thought to be still regulated by the – ostensibly arcane – rules of Scots common law. Any work which makes only a small effort to clarify or systematise the rules relevant to the sale of such property would be welcome and worthwhile; Jayathilaka’s work, however, does more than this and so absolutely must be commended.

In addition to presenting a historical – and in some sense pre-historical – account of the law of sale, Jayathilaka critically queries the veracity of the claim that prior to the Anglicisation of corporeal moveables, Scots law recognised a wholly “unified” law of sale. The first substantive chapter – chapter two – conducts a literature review of major texts concerned in whole or in part with the law of sale, whether of goods, heritage or incorporeals. Here, Jayathilaka concludes that though pre-1893 conveyancing textbooks and Bell’s *Commentaries* and *Inquiries into the Contract of Sale of Goods and Merchandise* did not take a unified approach in their discussion of the contract of sale, “on balance, most of the academic discussion... take[s] a unified approach... [which] indicates that many of the authors saw the Scots contract of sale as unified” (para.2-33). Given the focus of Bell’s *Inquiries* and the specialist conveyancing texts, this provisional conclusion seems sound; it is unsurprising that one who pens a work on, say, the subject of conveyancing might limit themselves to citation of cases concerning land, since these are naturally most relevant to the discussion at hand.

With this background sketched out, the remaining three parts of the work seek to further interrogate the thesis that the Scots common law of sale was indeed “unified”, as our institutional writers appear to have thought. The work seeks to carry out this investigation by considering the place of the “implied warranty of soundness” – that is, the guarantee that the thing sold is free of latent defects, said to be implied into all contracts of sale – in respect of sales concerning corporeal moveables, corporeal immoveables and incorporeal property. Each of the three chapters dedicated to the discussion of these subjects is much longer than the first substantive chapter, which functionally served as a review of pre-Anglicisation literature. It is thus in chapter three that the depth and dedication of Dr Jayathilaka’s scholarship is revealed.

Though the third chapter itself is ostensibly concerned with the now-defunct common law concerning sale of corporeal moveables, it nonetheless provides important exposition for practitioners and theorists alike since “the implied warranty of soundness was developed exclusively in the context of case law featuring corporeal moveable property” (para 3-01). The discussion here begins, as it logically must, with consideration of Justinianic Roman law, recognising that “the aedilician principles [arising from various edicts of the curule aediles of Rome], as embodied in Justinian’s *Corpus Iuris Civile*, passed through the *ius commune* tradition into Scots law” (para 3-06). Though the earliest Scots sources investigated by Jayathilaka did not generally discuss warranties of soundness whether express or implied (cf, *Regiam Majestatem*, III, 10, 9), by at least 1668 there emerged case law which suggests that Scotland, here, was conforming to the Civilian norm. Jayathilaka, however, expertly demonstrates

the truth of her claim that “the early stages of the warranty’s development in Scots law... is confusing” (para 3-07) by highlighting the ostensibly self-contradictory position espoused in Stair’s *Institutions*, subsequent case law which appeared to require an express warranty for protection of the buyer’s interest (*Morison and Glen v Forrester* (1712) Mor 14236) and thereafter the emergence of the “first definitive acknowledgement of the existence of an implied warranty of soundness” recorded in Forbes’s *Great Body of the Law of Scotland* (para 3-11). A minor issue with the book’s text should be noted here, however; there seems to be a typographical error where this case is mentioned. The footnote citation for *Morison and Glen v Forester* does not appear on page 19, where the case is mentioned in-text, but rather on page 20 where the erroneously citation (1639) M 14236 is given. This criticism is, of course, pedantic and minor and does not detract from the overall quality of the work.

Having espoused the origins of the doctrine, the remainder of the third chapter discusses the evolution of the implied warranty of soundness through its unequivocal recognition in the case law (*Ralston v Robertson* (1761) Mor 14238) until the nineteenth century. The chapter contains a discussion of the traditional Roman remedies arising from the *actio redhibitoria* and *actio quanti minoris* (the latter of which was rejected by Scots common law) as well as mooted the possibility of a novel remedy arising from a string of case law starting with *Baird v Aitken* (1788) Mor 13243, which suggested that Scots law might afford a remedy of pure damages in the face of a breach of the implied warranty. Jayathilaka’s analysis – that “while termination and diminution [arising from the *actio redhibitoria*] are useful remedies, they do not answer the need in every circumstance” thus necessitating the need for development of supplementary monetary remedies (which have, as she notes, been instituted as a result of modern legislation in Germany, South Africa and across the UK) – is generally well-presented and convincing. The chapter itself is an excellent resource for anyone with even a passing interest in this area of law, since it presents a systematised account of the development of the warranty illustrated with reference to the case law and the various treatises of the *ius commune* which implicitly or expressly informed the decisions therein.

The fourth chapter is of more immediate contemporary relevance, given that it concerns the sale of heritable property which – if the conclusion that Scots law does indeed recognise a “unitary” law of sale is indeed tenable – would logically continue to be governed by the rules which were discussed in the course of chapter 3. As Jayathilaka notes, in Roman law, in South Africa and in the Civilian jurisdictions of France and Germany, the implied warranty of soundness quite clearly applied and applies across corporeal moveable and corporeal immoveable property alike, though notwithstanding this “in Scotland there is an on-going debate as to whether the implied warranty of soundness did extend to corporeal immoveable property” (para.4-03). Here, the book makes a significant and sustained contribution; it sets out, in this chapter, to determine whether or not the implied warranty of soundness continues to apply in cases concerning the sale of heritable property in Scotland today. It does so by first conducting a comprehensive literature review which once again concludes with a convincing analysis: that there was (and is) presently a lack of consensus as to the application of the implied warranty of soundness to the sale of corporeal immoveable property, and that this lack of clarity might be thought to suggest “that the question may not have been seen as relevant or important” (para 4-50).

Of course, just because a question, or taxonomical distinction, has not been seen as relevant or important in the past does not mean that it is indeed irrelevant or unimportant. Clear conceptual thinking is necessary for the vitality of any intellectual pursuit, such as the study of law, and likewise the availability of lucid works which rationalise complex areas of the subject are necessary for practitioners. Thus, that chapter four of Jayathilaka’s work provides conceptual clarity, by separating the familiar warrandice of title known to conveyancing practitioners from the implied warranty of soundness, is most welcome. The lack of case law concerning the warranty in respect of heritable property could, as is recognised in the text, be explained somewhat circularly by the lack of case law; this lack “meant that there was neither a need nor an opportunity for the warranty to develop remedies that were [particularly] suitable to buyers of corporeal immoveable property” (para 4-198). Had a work of the kind produced by Jayathilaka been constructed at an earlier stage in the development of Scots law, this position might have come to be quite different.

The fifth and final substantive chapter, like the fourth, makes a significant and original contribution to Scots law scholarship, asking as it does if the implied warranty of soundness might apply, or be applied, in cases concerning incorporeal property. The chapter proceeds on the assumption

that Professor Reid's thesis that incorporeal rights can, in Scots law, be owned (a position with which the author of this review – with apologies to Professor Gretton – agrees) is correct and so a reader who takes a different view of this might object to some of the arguments raised in the course of the chapter. Nonetheless, it is, like the others, well-reasoned and well-constructed and the comprehensive literature review is again concluded with a period of incisive analysis. Once again, relevant case law is collated and discussed in context and the chapter comparatively notes the position in other Civilian (and mixed) jurisdictions. The conclusion that the implied warranty of soundness could conceivably be used, if thought appropriate, in cases concerning incorporeal property, in Scotland, seems like a reasonable one and is certainly worth deeper consideration by law reformers, practitioners and theoreticians alike.

The work itself concludes by noting that it would be useful if further research were conducted into other aspects of the law of sale, to further determine the extent to which the law as a whole might be regarded as “unified”. This research, of course, will likely throw up new points which could well be of contemporary relevance in practice and theory alike. The author herself reiterates in the conclusion that this research is something that she herself hopes to conduct. If she is indeed able to do so, and the outcome of this research is as lucid and well-constructed as the work under review, then Scots lawyers will come to owe Dr Jayathilaka an even greater debt.

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