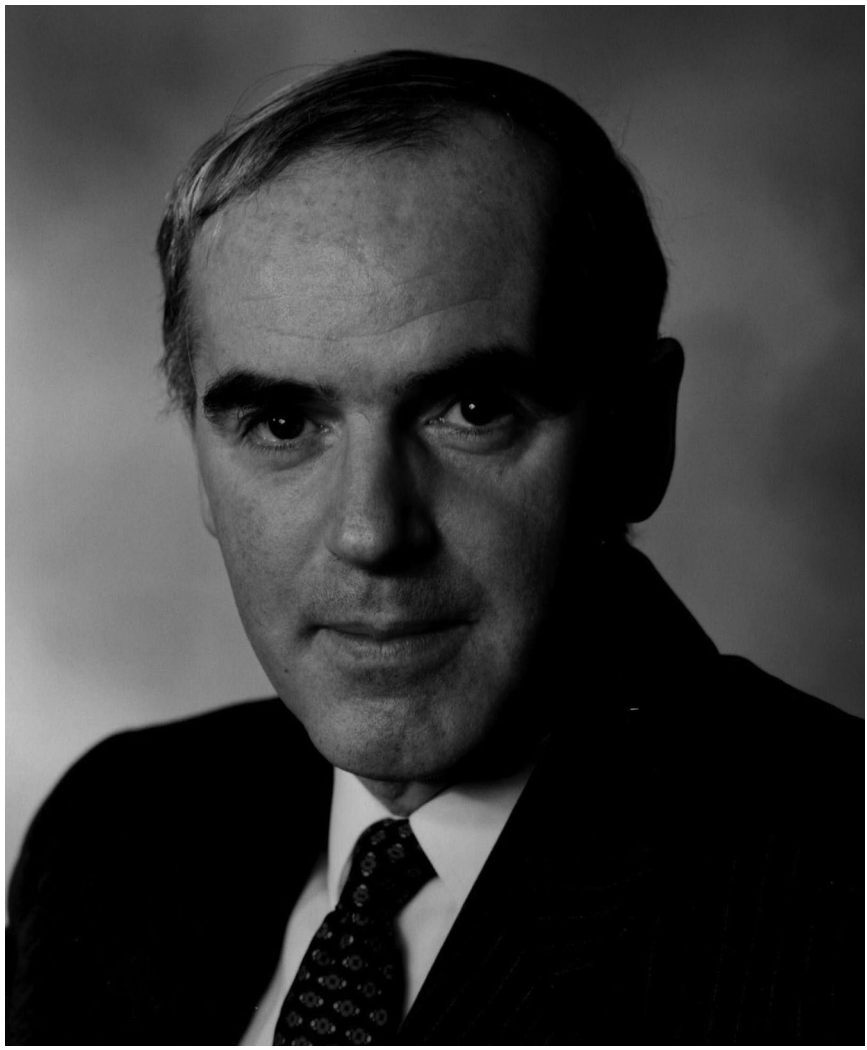

ALAN RODGER

Alan Ferguson Rodger
1944–2011

Lord Rodger of Earlsferry, Justice of the United Kingdom Supreme Court, died from the effects of a brain tumour on 26 June 2011 at the age of 66. He was not only a lawyer and public servant of the highest distinction but also a scholar with an academic publications record in Roman Law in particular that earned him election as a Fellow of the British Academy in 1991.[1] The bare facts of his glitteringly varied career can be simply told. Brought up and educated in Glasgow before taking a D.Phil. in Roman Law at Oxford under the supervision of Professor David Daube, in 1974 he was called to the Scottish Bar, becoming as soon as 1976 Clerk of the Faculty of Advocates. He was appointed QC and an Advocate Depute in 1985, and then became a Scottish Law Officer under the Conservative Government, first as Solicitor General for Scotland in 1989 and next as Lord Advocate in 1992. He was appointed to the Scottish Bench in 1995 and in 1996 succeeded Lord Hope of Craighead as Lord President of the Court of Session and Lord Justice General in the High Court of Justiciary. In 2001 he joined Lord Hope as one of the two Scottish judges in the House of Lords; and when that court was transformed into the UK Supreme Court in October 2009 the two became the

[1] He was also elected a Fellow of the Royal Society of Edinburgh in 1992, and a Corresponding Fellow of the Bayerische Akademie der Wissenschaften in 2001. He received honorary doctorates from Glasgow (1995), Aberdeen (1999), Edinburgh (2001) and, posthumously, the Erasmus University Rotterdam (2011). He was also an Honorary Bencher of Lincoln's Inn (1992) and of the Inn of the Court of Northern Ireland (1998), an Honorary Fellow of both Balliol and New Colleges, Oxford, from 1999 and 2005 respectively, and Visitor of St Hugh's College (from 2003) and Balliol (from 2010). He was appointed High Steward of the University of Oxford in 2008.

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first Scottish Justices in that institution. Alan was the greatest Scots lawyer of his generation; but he was very much more than that.[2]

I. Glasgow upbringing and education

Alan Ferguson Rodger, born in Glasgow on 18 September 1944, was the second of the three children of Thomas Ferguson Rodger and Jean Margaret Smith Chalmers. They had married in 1934. At the time of Alan's birth, his father, always known as Fergus Rodger to family and friends, was serving in the Royal Army Medical Corps as a consultant psychiatrist. He achieved the rank of Brigadier before the end of the Second World War. Alan's mother, a primary school teacher in Glasgow before her marriage, was believed in the family to be related to Thomas Chalmers, the leading figure in the Church of Scotland schism of 1843 known as the Disruption. Alan would later write a book on this drama without ever mentioning the possibility of a family connection; probably because he doubted it.[3] Fergus Rodger's job took him to the South East Asia Command area (India, Ceylon, Burma, Thailand, Indochina, Malaya and Singapore), and the family lived in Hampstead Garden Suburb. When the war ended, the Rodger family returned to Glasgow, contemplated emigration to Canada, but stayed put in the end when Fergus was appointed Senior Commissioner for the General Board of Control in Scotland (forerunner of the modern Mental Welfare Commission for Scotland). In 1948 he was appointed to a new Chair of Psychological Medicine in Glasgow University (where he had lectured in psychiatry before the war). Professor Rodger held the chair with great distinction until his retirement in 1973

[2] The following abbreviations are used in the footnotes to this memoir: AUL—Aberdeen University Library (Special Collections); GUA—Glasgow University Archives; *Judge and Jurist*—Andrew Burrows, David Johnston and Reinhard Zimmermann (eds.), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013).

[3] A search on the Scotland's People website, <http://www.scotlandspeople.gov.uk/>, reveals that Jean's father, Robert Condie Chalmers (b.1863), and grandfather, Condie Chalmers (who married in 1857), both became bakers in Glasgow, but that the latter was born at Kinghorn in Fife, probably around 1835. Since Thomas Chalmers was a Fifer (from Anstruther) a link is possible but seems unlikely to have been very direct. A highly detailed family tree for Chalmers, compiled and printed around 1913 and preserved amongst a collection of his personal papers held in the library of New College, University of Edinburgh (catalogue number CHA 6.26.21), makes no mention of Condie or Robert Condie, and neither can have been descended from Thomas's nine brothers, five sisters or six daughters other than through some (unlikely) illegitimate birth. See also Stewart J. Brown, 'Chalmers, Thomas (1780–1847)', *Oxford Dictionary of National Biography*, online edition, Oct 2007 <http://www.oxforddnb.com/view/article/5033>, accessed 19 Jan 2013.

following a serious illness. Amongst other things in 1965 he was elected President of the Royal Psycho-Medical Association, and became CBE in 1967. He retained links with the Army throughout his academic career, and played a significant role in establishing psychiatry as a tool in the selection of officers.[4]

One of Alan's earliest memories was of Glasgow University's quincentenary celebrations in 1951. The university probably also played a role in the friendship between the Rodger and MacCormick families, although the connection between Fergus Rodger and John MacCormick went back to the 1920s, when the two men gave up Labour Party affiliations to found the Glasgow University Scottish Nationalist Association together.[5] Fergus would later return to his original Labour loyalties as the National Party of Scotland moved rightwards,[6] while 'King John' became the leading figure in the post-war and centrist Scottish National Party, elected in 1950 by the students of Glasgow University as their Rector. But the two families lived in different parts of Glasgow: the MacCormicks in Park Quadrant near the university and the Rodgers (having moved from the West End in 1948) in Bearsden, on the city's north-western edge. John's older son Neil (born 1941) went to Glasgow High School,[7] while the slightly younger Alan Rodger was enrolled at Kelvinside Academy, one of Glasgow's many excellent private day schools.

Encouraged and inspired by fine teachers, Alan emerged from his schooling not only as a classicist and linguist, in particular as an accomplished Latinist who spoke French fluently as well as reading and writing the language, but also as an avid book collector, especially of classical Latin authors.[8] The gift of languages came from his mother rather than his father. Bearsden, once a fort on the Antonine Wall and with a main street named Roman Road not far from the Rodger home, was also a setting

[4] For T. Ferguson Rodger's career see the obituary by Gerald Timbury in *Bulletin of the Royal College of Psychiatrists*, 2 (1978), 169–70, and Wikipedia <http://en.wikipedia.org/wiki/Ferguson_Rodger>. His papers are held in Glasgow University Archive: <http://universityofglasgow library.wordpress.com/2012/08/30/ thomas-ferguson-rodger-collection-online/>. The Royal Psycho-Medical Association became in 1971 the Royal College of Psychiatrists.

[5] John M. MacCormick, *The Flag in the Wind: the Story of the National Movement in Scotland* (London, 1955, reprinted with an introduction by Neil MacCormick, Edinburgh, 2008), p. 18.

[6] See Lord Rodger of Earlsferry, 'What are appeal courts for?', *Otago Law Review*, 10 (2004), 517–36, 530 ('my father … a keen Labour party supporter').

[7] On Neil MacCormick, see W. Twining, 'Donald Neil MacCormick 1941–2009', *Biographical Memoirs of Fellows of the British Academy*, XI (2012), pp. 449–71.

[8] See Karen Baston and Ernest Metzger, *The Roman Law Library of Alan Ferguson Rodger, Lord Rodger of Earlsferry, with a Bibliography of his Works* (Glasgow, 2012), pp. 169–85 (especially at nos. 1143, 1149, 1159, 1168, 1235, 1239, 1247).

in which an awareness of things Roman might be fostered.[9] His family's foreign holidays in Austria, Spain and Switzerland (undertaken by car and ferry all the way from and back to Glasgow) helped trigger further interest in other languages, as may indeed have other trips to the Western Isles. Certainly it is a true story that, while at Glasgow University but during the summer vacation, he went to the university's Celtic Department because he wanted to learn Gaelic; finding nobody in, however, he went next door to the Russian Department instead and spent his holiday studying that language instead.[10]

It seems clear, however, that Alan always had ambitions in the law. When quite young he declared to a neighbour that he wanted to be a Lord of Appeal in Ordinary—that is, one of the judges in the judicial committee of the House of Lords, the court which until October 2009 occupied the pinnacle of the British judicial system and was then succeeded by the United Kingdom Supreme Court. When Alan went up to Glasgow University in the autumn of 1961 it was to take an MA, but his application stated that his professional ambition was to become an advocate, i.e. a member of the Scottish Bar.[11] He graduated with an ordinary MA in which his principal subjects had been Latin (winning the Muirhead Prize as the best student in Humanity and the Blackstone Medal in Classics under the formidable Professor C. J. Fordyce) and French (in which he was also a prize-winner). In 1964 he entered the Faculty of Law at Glasgow in order to take the LLB. Taking an MA, LLB had long been the conventional academic path to becoming an advocate. But the LLB had just undergone major reform and from 1961 a student could take a new Honours degree in Law as a full-time first degree and then enter the Faculty of Advocates without a preceding MA. Alan in some ways gained the best of both old and new worlds, since he took Honours in Law, spent three rather than the traditional two years over his degree and emerged in June 1967 with a first in Private and Civil Law—one of three students only

[9] The Roman Bath House remains which can now be seen on Roman Road, Bearsden, were however not uncovered by archaeological excavation until 1973.

[10] Colin MacKay, 'Tribute', in *Judge and Jurist*, pp. 3–5, 4. Alan's application for admission to the Glasgow Law Faculty, made in February 1964 (in GUA), reveals that he gained a Scottish Universities Entrance Board Higher in Russian in March that year. He had wanted to learn Gaelic because his mother's family had lived in Argyllshire, moving to Glasgow when she was about five years old. Thus, Alan's maternal grandmother was a Gaelic speaker—and so indeed was his mother—before they moved to Glasgow.

[11] All references to Alan's university applications and student record at Glasgow may be checked in GUA.

to graduate from Glasgow that year with an Honours LLB, and the only one with a first.[12]

Alan engaged, as an intending lawyer would, with all the relevant extra-curricular student activities available in Glasgow—debating competitively in its famous Union as a member of the university Liberal Club, and participating in the university's Dialectic and Alexandrian Societies as well as helping found the Glasgow University Royalist League.[13] He engaged in student journalism, reporting Union debates.[14] The surviving examples reveal that he had already found his characteristic authorial voice: prose that offered its writer's sometimes severely critical thoughts with dry wit as well as crispness and clarity. He reported on a golden era in the history of the University Union, when it featured names that would become very famous in later decades for eloquence amongst many other things: John Smith, Donald Dewar, Menzies Campbell and Neil MacCormick.

Roman (or Civil) Law was (and remains) one of the subjects in which a pass is required for admission to the Faculty of Advocates. Alan took advantage of the subject's availability in the Faculty of Arts as well as Law to take the ordinary class in Civil Law in 1962–3, gaining the Douglas Prize for the leading student in the subject that year. Later, he described his introduction to the subject in the teaching of the Douglas Professor of Civil Law, J. A. C. Thomas: 'I first encountered Tony Thomas in October 1962 … Then at the height of his powers, he was an exotic figure who captivated us by his wit, by his extraordinary ability to remember our names, and above all by his enthusiasm for the subject. Those lectures aroused my interest in Roman Law, an interest which he always encouraged and which has given me much pleasure.'[15] Thomas, who had held his chair since 1957 and had played an important role in the LLB revolution in Scotland, was 'a kenspeckle figure with horn-rimmed glasses and a bow tie … learned, [with] high standards and a real love of Roman law'.[16] Alan

[12] Note that despite later professed distaste for legal theory he did very well in Jurisprudence (then taught in Glasgow by Professor Alexander Anton, elected FBA in 1972).

[13] MacKay, 'Tribute', p. 5; GUA records. See also Gerald Warner, *Conquering by Degrees: Centenary History of the Glasgow University Union 1885–1985* (Glasgow, 1985); Roy M. Pinkerton, *Temperantes otio seria atque loco: Glasgow University Alexandrian Society, 1887–1987* (Glasgow, 1987).

[14] A search on 'Alan Rodger' in the online *Glasgow University Guardian* gives his Debate reports: see <http://www.gla.ac.uk/services/archives/guardian/> and open the Full Size page to read search results.

[15] A. Rodger, 'Concealing a servitude', in P. G. Stein and A. D. E. Lewis (eds.), *Studies in Justinian's Institutes in Memory of J. A. C. Thomas* (London, 1983), pp. 134–50, at p. 134.

[16] D. M. Walker, *A History of the School of Law The University of Glasgow* (Glasgow, 1990), p. 73.

also wrote of him: 'He was besides an intensely human man interested, as every real lawyer is, in the gossip and personalities of the law.'[17]

But by the time Alan came to study Roman Law at Honours level in the Faculty of Law, Thomas had departed Glasgow for University College London (UCL), to be succeeded in the Douglas Chair in 1965 by Alan Watson. Another brilliant Romanist, Watson had already published his *Contract of Mandate* in 1961, while his *Law of Obligations in the Later Roman Republic* appeared in the year of his arrival in Glasgow.[18] Crucially, Watson had been a doctoral student of David Daube, Regius Professor of Civil Law at Oxford, and remained in close personal and intellectual contact with his former supervisor. Alan would later write of 'the inestimable benefit which I received from being taught by [Watson]';[19] but the latter was also a vital link in enabling Alan in his turn to go on to doctoral work under Daube's supervision.[20]

There was however a second string to Alan's Honours LLB bow: Private Law. In his first year he had won the Royal Faculty of Procurators Prize as the best student in Scottish Private Law.[21] The principal teacher of private law was the Regius Professor of Law at Glasgow, David Walker (who would be elected as an FBA in 1976).[22] Like Thomas, Walker had been a leading player in the LLB revolution finally accomplished in 1961. He had also been a key figure in the revival of the academic study of Scots law after the Second World War, and was still in the middle of a career in which he was, it sometimes seemed single-handedly, creating a library for modern Scottish private law. His Honours courses in the subject had a Romanist structure—Persons and Domestic Relations, Obligations,

[17] A. Rodger, 'Mrs Donoghue and Alfenus Varus' (the Third J. A. C. Thomas Memorial Lecture at University College London), *Current Legal Problems*, 41 (1988), 1–22, at p. 2.

[18] Watson's *The Law of Persons in the Later Roman Republic* (Oxford, 1967) apears from its preface to have been completed in March 1965, i.e. before the author's move to Glasgow from Oxford.

[19] A. Rodger, 'The Praetor hoist with his own petard: the Palingenesia of Digest 2.1.10', in John Cairns and Olivia Robinson (eds.), *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in Honour of Alan Watson* (Oxford, 2001), pp. 127–41, at p. 127.

[20] A. Rodger, 'David Daube (8.2.1909–24.2.1999)', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 118 (2001), XIV–LII, at p. XLVII.

[21] Records in GUA show that Alan also took the Cunninghame Bursary with the best aggregate from Scottish Private Law I and II, Scottish Legal System and Criminal Law, as well as winning prizes in Mercantile Law and Jurisprudence in session 1965–6. A contemporary at Glasgow (Douglas Cusine) commented to me that Alan won prizes 'with monotonous regularity'.

[22] On Walker see Gordon S. Cowie, 'The "R.P."', in Alan Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D. M. Walker* (Edinburgh, 1990); James Chalmers, 'Resorting to crime', Inaugural Lecture delivered in the University of Glasgow, 17 Jan. 2013, accessible at <http://www.glasgow.ac.uk/schools/law/tercentenary>.

Property—and there was also in the Civil Law part of the degree a 'Comparative Topic in Roman Law and Scots Law'.[23] While Walker did not emphasise the Roman Law or Civilian dimensions of Scots law to anything like the extent of his Aberdeen and Edinburgh contemporary, Professor T. B. (later Sir Thomas) Smith (FBA 1957), Alan's Glasgow studies must have brought out the question of the nature of that relationship.[24] That Alan had become interested in Scottish legal history seems to be confirmed by his taking in his final year (and winning yet another class prize for) a course in the subject although it was not required for his Honours degree.[25]

II. Daube and Oxford

Alan's arrival in New College, Oxford in the autumn of 1967 to begin his doctoral research in Roman law was the key moment of his scholarly career. The extent of the intellectual debt he felt to his supervisor he himself made clear in many writings, especially after Daube's death in 1999.[26] An understanding of the nature of the source material upon which Roman law studies are built is necessary to appreciate what Alan took from his supervisor. The foremost sources are the writings of Roman jurists, most of which are known to us through the great sixth-century compilation of extracts ordered to be made under the Emperor Justinian and called the *Digesta* or Digest, because it digests the extracts in a series of chapters or titles on particular topics. These are themselves grouped into fifty books. The great bulk of the juristic literature comes from the 'classical period', i.e. from between the end of the Roman republic in 31 BCE and the middle of the third century. The Justinianic compilers were thus working with

[23] Information from the contemporary Glasgow University Calendar (then an annual publication).
[24] Note Alan's comment (in '"Say not the struggle naught availeth": the costs and benefits of mixed legal systems', *Tulane Law Review* 78 (2003), 419–34, at p. 422 n. 2), that T. B. Smith's *Short Commentary on the Law of Scotland* (Edinburgh, 1962) 'was placed on an *index librorum prohibitorum* by Professor David Walker in Glasgow University when I studied law there in the mid-1960s. Inevitably this did little to reduce its potential attractions.' See Walker's savage review of the *Short Commentary* in *Modern Law Review*, 26 (1963), 466–8, and Smith's forceful reply: ibid., 607–8.
[25] For an account by its teacher of that course and its accompanying social dimension, see Irvine Smith, QC, *Law, Life and Laughter: a Personal Verdict* (Edinburgh, 2011), pp. 70–2.
[26] Rodger, 'David Daube' (n. 18); *idem*, 'David Daube (1909–1999)', in Jack Beatson and Reinhard Zimmermann (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (Oxford, 2004), pp. 233–48; and *idem*, 'Law for all times: the work and contribution of David Daube', *Roman Legal Tradition*, 2 (2004), 3–21.

material that had already been transmitted in manuscript copies through at least some 300 years, selecting from that material (and actually omitting much the greater part of it all), and to at least some extent reworking it to bring it up to date or make it more internally consistent.

The Digest enables study of the whole course of Roman legal history, but only if one goes behind the text as we now have it. In the late nineteenth century the great German Romanist Otto Lenel laid the basis for modern Roman law scholarship with *Das Edictum Perpetuum* (1883, 3rd edition 1927) and *Palingenesia Iuris Civilis* (1889). The fundamental aim of the latter was to restore the context from which the Digest texts had been extracted, enabling one to see better what the jurist intended to say. Thus armed, the researcher could go on to show how perhaps the texts had been adjusted by the Justinianic compilers to bring them up to date and, more speculatively still, what the compilers had chosen to omit from their sources because it was no longer relevant. Lenel went even further in *Das Edictum Perpetuum*, reconstructing the Praetor's Edict (the list of legal remedies granted by the praetor, finalised in the early second century but which does not survive) from the jurists' reconstructed commentaries upon it.

To describe their method of working with the Digest, Lenel and his followers adopted from philosophy, theology and biology the word 'palingenesis' (or 'palingenesia'), a term for rebirth or recreation also covering the identification of the stages through which an entity passes in its life cycle. In the first half of the twentieth century palingenetic methods were perhaps carried to excess by the 'interpolationists' who saw virtually every text in the Digest as corrupted by the compilers and so not to be trusted; the best of these (notably Gerhard von Beseler[27]) did however succeed in showing those texts to which an at least cautious approach was needed before reliance was placed upon it for any given interpretation of Roman law, especially in its classical and earlier periods.

Before the rise to power of the Nazis compelled the Jewish David Daube to flee Germany in 1933, he had been a pupil of Lenel at Freiburg, and he remained a devoted admirer all his life.[28] While Alan Rodger must have encountered palingenetic methods at Glasgow in the teaching of Alan Watson, it was under Daube's influence above all that he developed

[27] His great work was the five-volume *Beiträge zur Kritik der römischen Rechtsquellen* (Leipzig or Tubingen, 1910–31).

[28] See further Stefan Vogenauer, 'Lenel and Daube; a cross-border friendship', in *Judge and Jurist*, pp. 277–96. This article, an act of piety as well as homage, is based on research first carried out by Alan in the Daube archive at Aberdeen University Library.

the skills and approach which was to inform not only his thesis but also almost all of his subsequently published work on Roman law. This may have been as much through Daube's palingenetic writings in the 1950s as through any direct instruction, since his own work had moved in other directions by 1967.[29] Daube's near-worship of Lenel and his achievement was however certainly transmitted to his pupil, who never ceased to delight in his place on the *arbor Leneliana*.[30] It was Daube who 'urged' Alan 'always to aim to write something which would have interested Lenel'.[31] Alan spent the very large sum of £104.19*s*. to buy his first copy of the *Palingenesia* in Oxford in 1968, and would go on to acquire copies of all the editions of *Das Edictum Perpetuum* as well as its French translations.[32] Alan also followed his supervisor's example in possessing a photograph of Lenel which latterly was on display in his office at the Supreme Court (alongside others of Daube and Daube's Cambridge supervisor, Buckland). Again like Daube, Alan also admired and frequently cited in his own writings the work of 'that monomaniacal genius Beseler'.[33]

Palingenetic and linguistic approaches were almost perfectly suited to Alan's particular suite of intellectual abilities and interests in languages, history and the classical world. A lecture about Daube that he gave in Aberdeen in 2001 set out what was involved as the 'disciplined examination of texts' by way of 'a kind of back engineering':

> Daube … admired in particular the way in which Lenel had done it: by looking at context, at inconsistencies, the emphasis given to particular words and phrases, and the order in which particular matters occurred in the texts. The identification of interpolations (that is, additions by later writers) was also a vital part of the enterprise. … In all cases the crucial thing for Daube is to notice

[29] See Rodger, 'David Daube', p. XLV, for references. In a letter dated 18 Jan. 1983 Alan told Daube that 'Zur Palingenesie einiger Klassikerfragmente', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 76 (1959), 149–264, was 'my favourite of all your articles' (AUL Acc 60, 3/253).

[30] Created to honour Lenel's eightieth birthday, the *arbor* was first published in Hermann Kantorowicz, 'Otto Lenels romanistischer Stammbaum', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 50 (1930), 475. It traces the direct descent of Roman law teaching from the figure of Irnerius in eleventh-century Bologna to Lenel, and can be extended to those taught by Lenel and those whom they in turn taught, and so on *ad infinitum*.

[31] Rodger, 'David Daube', p. XL.

[32] Baston and Metzger, *Roman Law Library*, nos. 603, 604, 605, 608, 611, 612. Nos. 606 and 607 are French translations of *Das Edictum Perpetuum*. Vogenauer, 'Lenel and Daube', *Judge and Jurist*, p. 280, estimates the cost of Alan's 1968 purchase as about £1,500 in today's values. See too Rodger, 'David Daube', pp. XL–XLII.

[33] The quotation is from a letter to Alan by Daube, dated 23 April 1982 (AUL, Acc 60, 3/253). See also Rodger, 'David Daube', pp. XLII–III.

> precisely what expressions are used. And then you have to ask yourself why. Why did the draughtsman or author use this word rather than another? Why does that item come at the end of the list rather than at the beginning? Does this text actually make sense or has it been modified and has something gone wrong in the process of modification?[34]

This is precisely the approach to be found in the version of Alan's D.Phil. thesis published two years after the award of the degree in June 1970.[35] By detailed back-engineering of the Digest texts the established wisdom, that classical Roman law left owners unlimited power over their property, especially an entitlement to build in such a way as to obscure their neighbour's light, is rejected. Alan clarified decisively the relationship in classical law between the servitudes *altius tollendi* (giving an entitlement to build so as to overshadow one's neighbour) and *altius non tollendi* (preventing one's neighbour from building to overshadow one's property).[36] These, he argued, provided no evidence of an unrestricted freedom to build, because such a system would have left no need for the first of these servitudes. Further, it was simply not believable that an owner's freedom from light-excluding activity next door depended on his own foresight in obtaining a servitude *altius non tollendi* from the neighbour. The basic argument was buttressed by a demonstration of an owner's right to light and to the prospect over certain valuable views in classical law even without a servitude *altius non tollendi* in place. The Justinianic compilers had reworked a statement of the classical jurist Ulpian (D 8. 2. 9) to become one of a general freedom to build subject only to servitudes whereas he had probably said there was an action against the blocking of light. Finally, the argument for limits on ownership rights could be further supported by consideration of the servitude of stillicide, where Alan proposed a basic rule under which emission of water from one property to another by alteration of its natural flow gave rise to no liability so long as no more than normal harm was done to the neighbour, tempered, as with the right to light, by the availability of two servitudes: one by which a neighbour could be prevented from causing any emission, the other by which an owner could impose upon his neighbour emissions causing him more than normal harm. Alan argued

[34] Rodger, 'Law for all times', pp. 11–12.

[35] A. Rodger, *Owners and Neighbours in Roman Law* (Oxford, 1972). The thesis title was the slightly less commercial 'Servitudes of Light and Stillicide in Roman Law', D.Phil. thesis, University of Oxford, 1970.

[36] '[A] servitude is a right inseparably and permanently attached to one piece of land (the "dominant" land) and exercisable against another (the "servient" land).… [C]hanges in the ownership of the land make no difference to the existence of the servitude.' (David Johnston, *Roman Law in Context* (Cambridge, 1999), p. 69).

that it was the Justinianic compilers, not the classical jurists, who favoured freedom to build: 'What emerges … is that the direction of the development of ancient thinking about the scope of ownership has been misrepresented in the literature: the classical has been mistaken for the Justinianic, the Justinianic for the classical.'[37]

This brief summary of what in its published form is a slim but densely argued book shows why, in the words of its preface, student and supervisor 'fought every inch of the way' in 'skirmishes across the fireplace in [Daube's] rooms in All Souls'.[38] The younger man was putting forward some quite radical departures from orthodoxy in the Roman law scholarship of the previous century, but neglecting no text nor any of the modern interpreters in Germany, Italy or, indeed, the United Kingdom.[39] Alan's letters home to his family in Glasgow suggest that the most intense struggles took place in his first year at Oxford, when he was developing his basic argument against an unrestricted right to build as the starting point of the classical law.[40] By 5 February 1968, however, he could dash off a triumphant note to his family:

> Just returned from lunch and chat with the Knave, and at long last I think he is very visibly cracking. He claims to have misunderstood a very fundamental part of my idea. When I explained what I really meant, he changed his attitude completely. He now says (though with a little caution) that I am 'very probably correct' and he is revising his outlook entirely.[41]

Later that month he wrote again:

> The Knave has fallen completely, I think. I went to a session yesterday, and he now seems to be almost entirely convinced, and very enthusiastic. If he did indeed call my discovery a 'fundamental breakthrough' as reported in your

[37] Rodger, *Owners and Neighbours*, p. 36.
[38] Ibid., p. vii. See also on the supervisions Rodger, 'David Daube', pp. XLVII–XLIX.
[39] The footnotes are replete with references to the great Romanists from Lenel on: Beseler, Glück, Karlowa, Kaser, Levy, Nörr (Germany), Biondi, Bonfante, Grosso, Riccobono, Solazzi (Italy) and Daube's supervisor Buckland for the UK. Alan must have been able to read, not only German but also Italian from his knowledge of Latin and French, even if his spoken fluency in the language was limited (see Luigi Labruna, 'Lord Rodger: an Italian tribute', in *Judge and Jurist*, pp. 23–6, at p. 23). Also much cited in *Owners and Neighbours*, although usually to be disagreed with, is Alan Watson, *The Law of Property in the Later Roman Republic* (Oxford, 1969). It is possible that Watson was already at work on this book when he taught Alan at Glasgow between 1965 and 1967; its chapter 8 deals with servitudes, but not with *altius non tollendi*. If reflected in Watson's Honours teaching, perhaps the project stirred Alan's interest in issues of ownership and servitudes in classical Roman law. But this is speculation only.
[40] These letters are in the custody of Dr Christine Rodger. Since they are not always fully dated, establishing their correct chronology is something of a palingenetic exercise.
[41] Letter dated only 'Monday, 3.15'; envelope franked 5 Feb. 1968.

> letter last week, Prof Daube yesterday called it 'quite fundamental', with the stress on the 'quite' as it should be. He also said the case for it was 'formidable'. All of which is a relief because I thought at one point that he would never shift. Still that was the result of a misunderstanding on his part.[42]

Letters like these also show incidentally that his admiration for his supervisor's scholarship and intellect did not entail absolute hero worship. From early 1968 at latest the letters give Daube the affectionate nickname of 'the Knave', which seems to be explained by his supervisor's absenting himself from the university during term time and his holding two other visiting chair appointments, one at Berkeley in California, the other at Konstanz: 'I've never heard of such an arrangement,' wrote the Glasgow professor's son; 'I'd love to know if he gets his full Oxford salary. I expect he does.'[43] The letters do however also reveal Alan from the start responding warmly to the personal care and generosity shown by Daube to him (and his family when they came visiting).

Alan's growing pleasure in the Oxford life is also very apparent in the letters home.[44] His descriptions of feasts at All Souls (Daube's college), the people he met at them, and his sharp-witted observations on college and university customs are an entertainment from beginning to end. There is also much to amuse in his letters from Münster in Germany, whence he was sent by Daube in the (wet) summers of 1968 and 1969 to continue his research at the *Lehrstuhl* of Dieter Nörr, with its much readier access to the full range of Continental Roman law scholarship than was possible even at the Bodleian Library in Oxford. It was also in Münster that Alan began to convert a reading into a speaking knowledge of German. There were other trips to the Continent: Alan met Peter Birks (then a lecturer under Tony Thomas at UCL) for the first time at a conference in Amsterdam in September 1969.[45] This was to become one of the key friendships of Alan's life.

[42] Letter dated only 'Friday, 11.35 p.m.' but referring to the lifting of 'foot and mouth restrictions' in the Oxford area which, with the letter cited in the previous note, makes this one most probably late February 1968. It appears from the quoted passage that Daube too was corresponding with the Rodger family by this time.

[43] Letter dated only 'Sunday', referring however to the great storm that blew through Glasgow and the central belt of Scotland on Monday 15 January 1968 (in which twenty people were killed and there was extensive property damage) as a very recent event.

[44] Some extracts from the letters are printed in David Edward, 'Tribute', *Judge and Jurist*, pp. 10–13.

[45] A. Rodger, 'What did *damnum iniuria* actually mean?', in Andrew Burrows and Lord Rodger of Earlsferry (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, 2006), pp. 421–38, at p. 438.

The letters home also reveal something of Alan's evolving political views: antipathy to the Labour Government of Harold Wilson, and to Scottish nationalism, both strongly expressed after the devaluation of the pound and Winnie Ewing's victory for the Scottish National Party in the Hamilton by-election in November 1967.[46] Rejection of his previous political sympathies is probably also to be inferred from the request two years later: 'Don't send anything more from the Liberals, for heaven's sake.'[47] But the letters, and indeed Alan's published writings, show little involvement with the academic debates that divided the Oxford law faculty in the late 1960s.[48] Despite much academic and social interaction with Neil MacCormick (then a Fellow of Balliol, which Alan himself joined as a junior research fellow in 1969), he notes only in passing in November 1968 news of the appointment of Ronald Dworkin to succeed Herbert Hart in the Chair of Jurisprudence. Alan's main concern was the severe disappointment this represented for Tony Honoré, a law don also at New College who had previously collaborated with Hart,[49] and who might leave Oxford as a result of Dworkin's appointment. Alan's reason for anxiety was that Honoré, a highly active Romanist specialising in the palingenesia of the Digest as well as being a legal theorist of distinction, provided supervisory cover during Daube's absences from Oxford.[50] In the event, however, Honoré did not abandon Oxford, and instead succeeded Daube in the Civil Law chair when the latter finally departed for Berkeley in 1970.

Daube's absences left Alan space to progress with other work as well. In Roman law, in particular, he began to collaborate with Honoré in detailed palingenetic and statistical analysis of the Digest aimed at finding out precisely how the compilers carried out their task. The first of what became three joint articles appeared in 1970.[51] Honoré also played a role

[46] Letter dated '24th Nov. 1967'.

[47] Letter dated '6 Nov. 1969'.

[48] See Nicola Lacey, *A Life of H. L. A. Hart: the Nightmare and the Noble Dream* (Oxford, 2004); A. W. Brian Simpson, *Reflections on* The Concept of Law (Oxford, 2011). See also Rodger, 'David Daube', pp. XXXII–IV.

[49] H. L. A. Hart and A. M. Honoré, *Causation in the Law* (Oxford, 1959). A second edition appeared in 1985.

[50] Letter dated '24 Nov'. Dating to 1968 is made possible by the fact that the letter is on New College notepaper. Dworkin seems to have been appointed in the autumn of 1968, and took up the appointment in autumn 1969 (see Lacey, *Hart*, pp. 291–2, where the '1969' on p. 292 is a misprint for '1968'). By the autumn of 1969 Alan was a junior research fellow at Balliol.

[51] A. M. Honoré and Alan Rodger, 'How the Digest Commissioners worked', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 87 (1970), 246–314; A. M. Honoré and A. Rodger, 'The distribution of Digest texts into titles', *Zeitschrift der Savigny-Stiftung für*

in relation to Alan's continuing interest and activity in Scots private law, especially with regard to the Roman law or Civilian influence in its development. What Honoré offered in this field was his own upbringing in and knowledge of South African law, where the Roman–Dutch system of private law had many substantive affinities with its Scottish counterpart and a far better developed tradition of academic and judicial scholarship on its Civilian dimension. There is particular evidence of South African input in Alan's article on third party rights in contract in Scots law, published in 1969.[52] But even more impressive is that the scope of Alan's research (which must have been carried out mostly in the period 1967–8) also extended to both unpublished manuscript material of seventeenth-century Scots law held in Edinburgh libraries and the writings of later medieval and early modern Civilian jurists ranging from Bartolus to the Spanish scholastic, Molina. If here he was a long way away from the Digest and the subject of his thesis, he was nonetheless still fundamentally engaged with questions of how to interpret texts: in particular a much-controverted passage on *jus quaesitum tertio* in the *Institutions of the Law of Scotland* by Viscount Stair, still the foundational work of modern Scots private law although largely written in the mid-seventeenth century. In essence Alan's article was on the palingenesia of Stair, I,10,5: what was the text that Stair wrote, upon what sources did he rely, why did he use the language he did, and what had been done to it by later editors (not to mention judges)?

III. Legal practice in Edinburgh

Alan's ongoing interest in Scots law (which included keeping up his subscriptions to the law reports as well as writing journal articles and commentaries on recent decisions in the Scottish courts[53]) also reflected the

Rechtsgeschichte (Romanische Abteilung), 89 (1972), 351–62; A. M. Honoré and A. Rodger, 'Citations in the Edictal commentaries', *Tijdschrift voor Rechtsgeschiedenis*, 42 (1974), 57–70. Honoré's tribute to Alan's contribution, despite the latter's protestations of being very much the junior partner, can be found in the preface to the former's *Tribonian* (London, 1978), p. xvii.

[52] A. Rodger, 'Molina, Stair and the *jus quaesitum tertio*', *Juridical Review*, 14 (1969), 34–44, 128–51 (2 parts). Alan acknowledged discussions with Neil MacCormick about this paper, and MacCormick published a response on the subject: '*Jus quaesitum tertio*: Stair v Dunedin', *Juridical Review*, 15 (1970), 228–46.

[53] See letter from Münster dated 'Sunday, 3 p.m.', probably late summer 1968, for the law report subscriptions. An untitled case note on *Kemp v Robertson* 1967 SC 229, published in *Juridical Review*, 12 (1967), 268–9, was developed to become A. Rodger, 'The Praetor's Edict and carriage

continuation of an ambition to go to the bar and practise as an advocate. As early as his first stay in Münster in 1968 he wrote home on 2 July to say: '… I really am, I think, more or less decided that I shall go to the Bar sooner or later. I haven't, of course, told the Knave or anyone, but that's how I feel—I don't think Scots Law can really do without me.'[54] A little later that summer he wrote again: 'I'm now absolutely certain that I want to practise.… I think that the Bar needs me.'[55] It is clear from these letters that this meant joining the Faculty of Advocates in Edinburgh. One of the then Scottish judges, Lord Kissen, a family friend of the Rodgers, offered encouragement, as indeed did Daube when Alan finally sought his opinion.[56] But it would be another four years before he finally took the plunge, and in the meantime he completed and published his thesis as well as taking up fellowships, first at Balliol in 1969 and then back at New College in 1970. It may well have been the publication of the thesis in 1972 that made him think that, at the age of almost 28, the time was ripe to make the long-contemplated move. In addition, his father became seriously ill that year in Glasgow, and he may well have felt a need to be closer to his family as a result.

Back in 1968 Alan had ruminated in another of his letters home from Münster:

> I also have this odd feeling a) that becoming a professor of Roman law would be too easy for words, and what would I do then, poor thing? and b) that I almost certainly have found at least the gist of the correct solution to the ius altius tollendi, the puzzle of Roman servitudes and a classic for Roman law. This means that I should almost certainly (999 times out of 1,000) never solve

by land in Scots law', *Irish Jurist*, 3 (1968), 175–86. A sheriff court decision led to 'Spuilzie in the modern world', *Scots Law Times News* (1970), 33–6, which irritated a sheriff in a subsequent case sufficiently for him to say: 'many may consider [the article] to be written in arrogant vein, coming as it does from the pen of one who is not (at least yet) qualified to represent another in a Scots court' (*Mercantile Credit Co Ltd v Townsley* 1971 SLT (Sh Ct) 37, 39). For Alan's thoughts on this forty years later, see his 'Judges and academics in the United Kingdom', *University of Queensland Law Journal*, 29 (2010), 29–41, at p. 33. Another longer and still influential article on Scots law from his Oxford period is A. Rodger, 'Pledge of bills of lading in Scots law', *Juridical Review*, 16 (1971), 193–213. The article refers inter alia to courts and writers misunderstanding Roman law, to South African case law, and to the fact that 'in September 1870 … Lenel was enjoying the Franco-Prussian War and had not taken up the serious study of Roman law' (at p. 206).

[54] Letter from Münster dated 'Monday, 2.30' but with an envelope franked '2/7/68'.

[55] Letter from Münster dated only 'Sunday', but probably not long after the one cited in the previous note.

[56] Letter from Münster dated only 'Sunday, 4.10', but from its content clearly following the ones already cited. Daube is quoted as saying of Edinburgh: 'a certain parochialism is no unmitigated evil'.

> anything so important again in Roman law. It would be always a bit of an anti-climax and I couldn't stand that.[57]

But it would be a mistake, I think, to see this as still the reason for his decision to leave academic life four years later. If in 1972 he surveyed those British chairs of Roman or Civil Law that might have attracted him, he would by then have seen them all occupied by men admittedly older than him, but each of them with apparently long careers still ahead—Honoré as Daube's successor in Oxford, Peter Stein in Cambridge, Tony Thomas at UCL, Bill Gordon in Glasgow, Alan Watson in Edinburgh and Geoffrey MacCormack in Daube's former university, Aberdeen.[58] Moreover Alan had already moved on to new issues in Roman law: on the compilation of the Digest itself with Honoré, not to mention fresh original work emerging from his own thesis research, on Roman rainwater,[59] and on the *actio confessoria* and the *actio negatoria*,[60] as well as a new departure on the *lex Aquilia*.[61] Roman law puzzles remained in abundance for him to explore, and he would indeed go on exploring them for the rest of his life. We must see the decision of 1972 as primarily about pursuing the realisation of ambitions the formation of which had preceded his first exposure to Roman law ten years before, coupled with some frustration at having to teach relatively unfamiliar modern English law,[62] pressure within the faculty generally to focus on the contemporary and 'relevant' in teaching, and, perhaps, a certain boredom with the more mundane aspects of academic life—disappointments with indifferent students, the tedium of examining, the frequent meetings to debate non-academic issues, and the all-pervasive bureaucracy.

[57] Another letter from Münster dated only 'Sunday' but taking its place in the sequence of letters on this subject in the summer of 1968.

[58] All the persons named in this sentence are still alive (if retired) at the time of writing, apart from Thomas, who died in 1981 at the age of 58, and Gordon, who was able to complete a contribution to Alan's *Gedächtnisschrift* before his own death in September 2012 ('Communis error facit ius', *Judge and Jurist*, pp. 447–54).

[59] A. Rodger, 'Roman rain-water', *Tijdschrift voor Rechtsgeschiedenis*, 38 (1970), 417–31.

[60] A. Rodger, 'Actio confessoria and actio negatoria', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 88 (1971), 184–214.

[61] A. Rodger, 'Labeo, Proculus and the ones that got away', *Law Quarterly Review*, 88 (1972), 402–13; A. Rodger, 'Damages for loss of an inheritance', in A. Watson (ed.), *Daube Noster* (Edinburgh, 1974), pp. 289–99. Other, shorter notes seem to have been by-products of his thesis research: A. Rodger, 'D.35.2.2', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 89 (1972), 344–8; A. Rodger, 'A note on A. Cascellius', *Classical Quarterly*, 22 (1972), 135–8.

[62] Alan taught English family law at Oxford from 1969 on, as well as lecturing on Roman law.

In the autumn of 1972 Alan began a bar apprenticeship with Allan McDougall & Co, a leading Edinburgh court firm of solicitors. In January 1973 he told Daube: 'The practice in which I am currently engaged is not v. high class but it is rather fun and has an element of variety which I found singularly lacking in the pleasant pastures of New College.'[63] It is worth noting that not long after Alan began there the firm (and the counsel it had retained for the case, Kemp Davidson, QC, and Hugh Morton) enjoyed a great triumph in the House of Lords, with an unexpected victory for the pursuer in the causation case of *McGhee v National Coal Board*.[64] Over thirty years later Alan as a Lord of Appeal in Ordinary would do much to reinstate the authority of the decision.[65]

The commitment to Scotland and Scots law apparently entailed in starting his apprenticeship was however not quite complete. An interest in perhaps eventually qualifying in England also emerges in the letter to Daube already mentioned, where Alan explains that he had 'decided to go to the English Bar and am doing their exams when they permit me. This means in September last year, June or September this year and May next year.'[66] But so far as I have been able to discover, this latest adjustment to the life-plan was never brought to final fruition.

His office apprenticeship completed, Alan devilled in the Faculty of Advocates under, first, Hugh Morton, and then George Penrose (both later to become Court of Session judges). He enjoyed the latter's company, tax and general commercial work more than the former's rather stereotyped industrial injuries practice, but still found time to write for publication, putting into print for the first time his views on the use of Roman law in modern Scots law. A Scottish Law Commission Report on antenatal injury was attacked for purporting to find support for its suggested approach in a brocard (*nasciturus pro iam nato habetur quotiens de eius commodo agitur*) derived from three Digest texts the palingenesia of which

[63] AUL, Acc 60, 3/253, letter dated 7 Jan. 1973. Something of the atmosphere of civil court practice in the early 1970s may be captured in Karen Bruce Lockhart, 'Thoughts from nearly forty years ago', in Hector L. MacQueen (ed.), *Miscellany Six* (Edinburgh, Stair Society, vol. 54, 2009), pp. 321–43, with comment on Allan McDougall & Co at pp. 332–3.

[64] 1973 SC (HL) 37; [1973] 1 WLR 1 (HL). See further 'Kemp Davidson', *Scots Law Times News* (2008), 157–60, at p. 158; Lord Hope of Craighead, 'James McGhee—a second Mrs Donoghue', *Cambridge Law Journal*, 62 (2003), 587–604.

[65] See *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; *Barker v Corus* [2006] 2 AC 572 (in which Alan dissented); and Compensation Act 2006, s 3 (reversing *Barker*). See further Lord Hoffmann, '*Fairchild* and after', in *Judge and Jurist*, pp. 63–70.

[66] Letter cited above, n. 63.

the Commission had failed to investigate and which, upon analysis, showed no support at all for its recommendations.[67]

Alan was called on 12 July 1974. By now the practice of law had gripped him, as he explained in another letter to Daube: '[I]t is quite amazing the problems which occur. I think it is a leading heresy to teach undergraduates that when they go into practice they can burn their books because it is all a question of the facts. Legal points are forever raising their heads in my experience.'[68] Alan's engagement with his new life was reflected in his election as Clerk to the Faculty of Advocates in 1976, by when he was set fair for the distinguished career to follow in Edinburgh's Parliament House, culminating in his taking silk and becoming Queen's Counsel in 1985. Even before then, in 1981, he had followed in his father's footsteps with appointment as a member of the Mental Welfare Commission for Scotland while, in 1984, he was a member of the UK delegation to the Council of Bars and Law Societies of Europe (the CCBE).

Alan's practice at the junior bar was mainly in civil, i.e. non-criminal, matters but, in the Scottish way, was not otherwise particularly specialised.[69] He was appointed as Standing Junior Counsel (Scotland) to the Department of Trade in 1979 and to the same department in Competition and Consumer Affairs in 1981, perhaps reflecting his interest in commercial law. He did however appear at least once on the defence side in a criminal case, the sensational private prosecution for rape in 1982 reported as *X v Sweeney*.[70] His research skills and historical knowledge were deployed to produce an ultimately unsuccessful argument that once a public prosecution had been abandoned (as in this case) a private prosecution was barred.[71] Perhaps the best-known civil case in which he appeared during this period, at least amongst private lawyers, was *Junior Books v The Veitchi Co Ltd*,[72] in which, along with his senior Douglas Cullen, QC, he

[67] 'Report of the Scottish Law Commission on antenatal injury', *Juridical Review*, 19 (1974), 83–90. The gist of the brocard is that in matters affecting its interests an unborn child should be treated as though it had been born where that would be to its benefit. The article induced a response: D. L. Carey Miller, 'The use of Roman law in Scotland; a reply', *Juridical Review*, 20 (1975), 64–9. See below, the text accompanying n. 87.

[68] AUL, Acc 60, 3/253, letter dated 23 April 1974.

[69] Paul Cullen (Lord Pentland), 'Lord Rodger and the criminal law', in *Judge and Jurist*, pp. 399–411, at pp. 399–400.

[70] 1982 JC 70.

[71] See further Cullen, 'Criminal law', p. 400. Alan reported his involvement in the case in a letter to Daube dated 15 February 1982, adding the comment: 'You will be glad to know I am for the alleged rapist.' Daube replied: '[D]o not ask me to support your rape-suspect. The feminists here are so militant …' (letter dated 26 March 1982). Both letters are in AUL, Acc 60, 3/253.

[72] 1982 SC (HL) 244; [1983] 1 AC 520.

was unable to persuade the House of Lords not to uphold the claim in delict of an employer in a construction contract against a specialist subcontractor in respect of the latter's faulty work under its subcontract. The fate of the case—virtually never followed, almost always distinguished if not ignored, but never yet formally overruled—suggests that the arguments for the defender/appellants have in some sense won out in the longer run.[73]

Apart from his first few years of practice as he established himself at the bar, when the bibliography shows a slight lull in output, Alan continued to make a significant contribution to the literature of Roman law throughout the period leading up to his taking silk. The acceleration in output after 1980 may have been helped by the arrival of personal computers with word processors; Alan had learned to type when young and he typed much faster than he wrote. He remained in touch with the law faculties and the latest developments in Roman law, and most of my initial meetings with him were at the Edinburgh and London Roman Law discussion groups in the early 1980s. I well remember the excitement with which Alan, Peter Birks (appointed to the Edinburgh Chair of Civil Law in 1981) and John Richardson presented to the groups their paper on the recently discovered *tabula Contrebiensis*, a first-century BCE inscription found in Spain recording the adjudication of a dispute in accordance with Roman procedural rules.[74]

Two other memorable contributions at this time were review articles in the newly instituted *Oxford Journal of Legal Studies*. In the first, on David Walker's remarkable *Oxford Companion to Law*, the reviewer's rapier wit, together with a breadth of knowledge of law more than rivalling that of his erstwhile teacher, skewered its subject.[75] The other piece was in contrast a carefully balanced review of Tony Honoré's trilogy on the compilation of the Digest which, published between 1978 and 1982, represented the first culmination of the work begun in collaboration with Alan at the end of the 1960s.[76] Honoré's books had attracted fierce criticism, especially for their

[73] For Alan's own later thoughts on the case see his 'Some reflections on *Junior Books*', in P. B. H. Birks (ed.), *The Frontiers of Liability* (Oxford, 1994), vol. 2, pp. 64–70.

[74] Peter Birks, Alan Rodger and John S. Richardson, 'Further aspects of the *tabula Contrebiensis*', *Journal of Roman Studies*, 74 (1984), 45–73. See too a letter to Daube dated 24 March 1984 (AUL, Acc 60, 3/253); and Alan Rodger and Andrew Burrows, 'Peter Brian Herrenden Birks 1941–2004', *Proceedings of the British Academy*, 150, *Biographical Memoirs of Fellows*, VI (2008), 3–34, at pp. 14–15.

[75] A. Rodger, 'Good companion?', *Oxford Journal of Legal Studies*, 1 (1981), 257–64.

[76] A. Rodger, 'Behind the scenes of Roman law', *Oxford Journal of Legal Studies*, 3 (1983), 382–404, reviewing Tony Honoré, *Tribonian*; Tony Honoré, *Emperors and Lawyers* (London, 1981); and Tony Honoré, *Ulpian* (Oxford, 1982). The second and third of these appeared in

claim to identify from statistical analysis of the styles of the Digest texts not only the work-rates but also the personalities and legal preferences of the jurists and the Justinianic compilers.[77] The tone of the criticism worried Alan enough for him to seek to persuade Daube to enter the debate.[78] Daube, however, characteristically declined to involve himself in conflict;[79] and Alan's article may perhaps represent what he wished Daube had said instead. But the weight of Alan's own scholarship was actually more than enough to convince the serious reader that, while Honoré's work was naturally not beyond criticism, it was indeed a major development in the study of Roman law.[80]

IV. Public service: prosecutor and law officer

When Alan became a silk, there was one step in the usual *cursus honorum* of Scots law that he had yet to take. That was to spend some time specialising in criminal prosecution, a necessary step for those of the bar with judicial ambitions, since much of a judge's time would be spent sitting in criminal trials. Thus it was that in 1985 Alan was appointed as an Advocate Depute. Scottish criminal prosecutions in the High Court of Justiciary are undertaken in the name of the Lord Advocate, but counsel who actually conduct most of the cases in court are his deputes. The role is essentially full-time, and involves working closely with the Crown Office which administers the prosecution service. This was another fresh challenge for Alan, involving the abandonment of his thriving civil practice, but one that he took up with gusto and success. No doubt this was, once again, because there was so much of law and life in it.[81] Within a year he had

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second editions as, respectively, Tony Honoré, *Emperors and Lawyers: with a Palingenesia of Third-Century Imperial Rescripts, 193–305 AD* (Oxford, 1994) and Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford, 2002).

[77] See e.g. reviews by Alan Watson in *Law Quarterly Review*, 94 (1978), 459; *Tijdschrift voor Rechtsgeschiedenis*, 50 (1982), 409; *Times Literary Supplement*, 18 Feb. 1983; Averil Cameron, *Journal of Roman Studies*, 69 (1979), 200. Other references in Rodger and Burrows, 'Peter Birks', 14.

[78] Letters dated 15 Feb. 1982, 24 Feb. 1983 (AUL, Acc 60, 3/253).

[79] Letter dated 26 March 1982 (AUL, Acc 60, 3/253).

[80] Honoré's final statement of his views can be found in his *Justinian's Digest: Character and Compilation* (Oxford, 2010), in the acknowledgements to which Alan is thanked for his help with the work.

[81] Cullen, 'Criminal law', pp. 401–2.

been appointed Home Advocate Depute, i.e. the senior amongst his brethren, a post he held until 1988.

The real surprise for those observing Alan's career from a distance, however, was his acceptance of appointment in 1989 as Solicitor-General for Scotland, the junior Law Officer under the Lord Advocate. It was not that this was a political appointment under the government of Margaret Thatcher—Alan's political sympathies by now were well known—but more that it entailed a continuation of engagement with criminal prosecution rather than civil work. In 1992, after a surprise Tory victory in the General Election of that year, John Major (Mrs Thatcher's successor as Prime Minister) appointed Alan as Lord Advocate; and he would hold this office until he appointed himself to the Scottish Bench in 1995.[82] By then, he had spent the greater part of a decade, when possibly at the height of his powers and appetite as an advocate, in public prosecution work and the wider services to government in which Law Officers of necessity become involved.

On the criminal prosecution side there was of course much with which to engage, not least the investigation of the terrorist destruction of Pan-Am Flight 101 over Lockerbie in Dumfriesshire in December 1988.[83] But the role of a Law Officer is not confined to dealing with crime. It also involves the provision of legal advice and opinions to government on civil as well as criminal matters, plus representation of government in courts and other tribunals.[84] Alan was almost certainly the first Scottish Law Officer to represent the United Kingdom in the International Court of Justice, in 1992,[85] and to lead for the Government in an English judicial

[82] On the Lord Advocate's predevolution power of appointment to the Scottish bench, and the different system that has developed since 1999, see Robin M. White, Ian D. Willock and Hector L. MacQueen, *The Scottish Legal System*, 5th edn. (Edinburgh, 2013), pp. 58, 103.

[83] Alan's involvement with the Lockerbie case as a prosecutor later meant that, as Lord Justice General, he could not himself sit or take any part in choosing the judges to sit at the eventual trial at Camp Zeist in the Netherlands in 2001 (see The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (SI 1998 No 2251), articles 4, 5 and 7).

[84] See e.g. *Lord Advocate v Dumbarton District Council, Lord Advocate v Strathclyde Regional Council* 1990 SC (HL) 1 (on the application of statutes to the Crown, where Alan as Solicitor General appeared for the Crown); *Monckton v Lord Advocate* 1995 SLT 1201 (on the lawfulness of payments to the European Communities budget by the United Kingdom, where Alan as Lord Advocate appeared for the Government).

[85] The case is *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie Libyan Arab Jamahiriya v United Kingdom*, decided 14 April 1992, *ICJ Reports 1992*, p. 3; *International Law Reporter*, 94 (1994), 478.

review case.[86] There are other tasks to be undertaken: answering for government in Parliament (it was to permit this that he was ennobled as Lord Rodger of Earlsferry in 1992), determining and implementing policy in the administration of the legal system, overseeing the preparation of legislation, and then piloting the result through the legislative process. As Lord Advocate, he had ministerial oversight of the law reform activities of the Scottish Law Commission, a body of which, as already noted, he had previously been somewhat critical.[87] More generally as a Law Officer he also found himself in the vanguard of radical legislative challenges to the 'monopolies' of both solicitors and advocates and other economically driven reforms of the legal system, and so having to respond in kind to vigorous criticisms of government policy in the media and elsewhere.[88] The experience of public life and service was, in other words, rich and varied; and it both informed, and was informed by, the development of Alan's scholarly interests.

This is most obvious in the lecture he gave to the Holdsworth Club in Birmingham some years afterwards, in March 1998. There he considered the form and language of legislation, drawing heavily on his experiences as the government minister with responsibility for the Scottish parliamentary draftsmen, but also on, as he put it, 'things which I have noted and which have puzzled me when looking at Roman Law texts'.[89] The argument was at least in part for recognition of the value of palingenetic techniques in understanding modern legislation: 'studying not only *what* the text says but *how* it says it'.[90] It was a technique that he would deploy as a judge in the interpretation of difficult statutes. A most striking example is his dissenting judgment in a Supreme Court case on the division of devolved and reserved powers under the Scotland Act 1998, and the withering criticism of his colleagues' failure to tackle all the relevant statutory

[86] *Regina v Secretary of State for the Home Department,* Ex parte *Fire Brigades Union and Others* [1995] 2 AC 513.

[87] See above, text accompanying n. 67; and note A. Rodger, 'The bell of law reform', *Scots Law Times News* (1993), 339–46.

[88] See e.g. *The Scotsman*, 31 Jan. 1990 (A. Rodger, 'Why Scots law is safe in our hands'; responding to an article in the same newspaper by W. A. Wilson, 'The death sentence for Scots law', on 24 Jan. 1990); A. Rodger, 'Marching to an alien tune?', *Juridical Review*, 36 (1991), 1–8; A. Rodger, 'A civil justice system in motion', in Hector L. MacQueen (ed.), *The Costs of Justice* (Edinburgh, 1994), pp. 9–17.

[89] A. Rodger, *The Form and Language of Legislation* (Holdsworth Club, University of Birmingham, 1998), p. 1 (republished in a 'lightly revised and slightly updated' version in *Rechtshistorisches Journal*, 18 (1999), 601–35).

[90] Rodger, *Form and Language of Legislation*, p. 3.

wording.[91] In another palingenetic point, the Holdsworth lecture also highlighted the individuality of the parliamentary draftsman's style. Although Alan made no mention of it, a quirky example lurks in Schedule 5 of the Criminal Procedure (Scotland) Act 1995, where the initials used in the specimen criminal charges there provided spell out not only the name of the Lord Advocate but also those of the draftsman of the text and the Crown Agent, along with the initials of other Scottish parliamentary draftsmen at the time.[92]

Work as a Law Officer was supported by highly able staff lawyers carrying out research, drafting opinions and providing advice. This meant that not all of Alan's prodigious intellect and capacity for work had necessarily to be devoted to his day job. He stayed in touch with non-criminal law by acting as an assistant editor of two editions (1987 and 1995) of the standard Scots law text known after its original authors as *Gloag & Henderson*. So also was he able to carry on with his palingenetic studies of the Digest, which continued in a steady flow throughout the later 1980s and 1990s.[93] Alan also became fascinated by another inscription discovered in Spain, a text of Roman provincial law labelled from the place where it was found in 1986 as the *lex Irnitana* and throwing much new light on questions of jurisdiction and procedure. David Johnston has already explained how, unable for security reasons to open government papers on trains and planes between Edinburgh and London, Alan would instead read and make notes on his copy of the *lex Irnitana*, and how these led ultimately to a number of published studies of the subject.[94]

[91] *Martin v HM Advocate* 2010 SC (UKSC) 40. See further Lord Walker of Gestingthorpe, 'Lord Rodger and statute law', in *Judge and Jurist*, pp. 133–40; also Lord Brown of Eaton-under-Heywood, 'Dissenting judgments', in *Judge and Jurist*, pp. 29–37, at p. 36; Lord Reed, 'The form and language of Lord Rodger's judgments', in *Judge and Jurist*, pp. 121–31, at pp. 128–9. There may well also be implications for our understanding of Alan's sometimes complex views on interpretation of contracts: see e.g. *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657; *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101; *Multi-Link Leisure Developments v North Lanarkshire Council* 2011 SC (UKSC) 53.

[92] For the detail see *Scots Law News (blog)*, 27 June 2011, comments, accessible at <http://www.law.ed.ac.uk/sln/blogentry.aspx?blogentryref=8692>. Alan was deeply involved in the preparation for the 1995 Act in a prior consolidation as well as in the final 'programme' Bill.

[93] See Ernest Metzger, 'Alan Rodger's writings on Roman law', in Baston and Metzger, *Roman Law Library*, p. 193 n. 13 for citations too numerous (15) to be listed here.

[94] David Johnston, 'Alan Rodger (18 September 1944–26 June 2011)', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 129 (2012), 993–1001, at p. 996, citing A. Rodger, 'The jurisdiction of local magistrates: chapter 84 of the *lex Irnitana*', *Zeitschrift für Papyrologie und Epigraphik*, 84 (1990), 147–61; A. Rodger, 'The *lex Irnitana* and procedure in the civil courts', *Journal of Roman Studies*, 81 (1991), 74–90; A. Rodger, 'Postponed business at Irni', *Journal of Roman Studies*, 86 (1996), 61–73; and A. Rodger, 'Jurisdictional limits in the *lex*

When corrigenda to the text of the *lex* were published in 2008, the editor noted: 'Most of the corrections are due to the sharp eye of Alan Rodger.'[95]

V. Studies in Scots law

During his period in public service Alan also found time for a return to research on Scottish legal history. It is not altogether clear what inspired this. He was certainly aware of a deepening interest in the area in the Scottish law faculties, and it was he who first arranged for the annual meetings of the Scottish Legal History Group, founded in 1981, to take place from 1983 in the reading room of the Advocates Library in Parliament House. But I cannot recall him very often attending the Group's meetings; and he never joined the Stair Society, the body which has published more or less annual volumes relating to the history of Scots law since 1936. He told me he suspected the Society of being too much of the Edinburgh establishment, and he also disapproved of its tendency to publish reprints rather than critical new editions of historical texts. When Alan investigated the life story of Mrs May Donoghue of Glasgow, pursuer in the most famous of all Scottish, indeed British, cases,[96] his first communication of the results came, not in Scotland, but in the third Tony Thomas memorial lecture at University College London in 1987.[97] He explained the investigation as simply based on curiosity about Mrs Donoghue, first triggered by a short note in *The Sunday Times* colour supplement as long before as 1976,[98] and then reinvigorated as to methodology by Professor Brian Simpson's investigations of who the parties were and what really happened in some leading English cases, which had begun to appear a few years before.[99] No particular points were made about how *Donoghue v Stevenson* transformed

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Irnitana and the *lex de Gallia cisalpina*', *Zeitschrift für Papyrologie und Epigraphik*, 110 (1996), 189–206.

[95] Michael H. Crawford, 'The text of the *lex Irnitana*', *Journal of Roman Studies*, 98 (2008), 182. Yet another inscription that attracted Alan's attention after its discovery in Spain in 1999 led to his '*Attractio inversa* in the Edict of Augustus from El Bierzo', *Zeitschrift für Papyrologie und Epigraphik*, 133 (2000), 266–70.

[96] *Donoghue v Stevenson* 1932 SC (HL) 31; [1932] AC 562.

[97] Rodger, 'Mrs Donoghue and Alfenus Varus'.

[98] *The Sunday Times* Colour Magazine, 8 Feb. 1976, 30; as cited in Rodger, 'Mrs Donoghue and Alfenus Varus', p. 3 n. 17.

[99] A. W. Brian Simpson, *Cannibalism and the Common Law* (Chicago and London, 1984) is cited in Rodger, 'Mrs Donoghue and Alfenus Varus', p. 2 n. 7. Simpson also published articles of the same kind on other leading cases from 1984 on. These are collected in his *Leading Cases in the Common Law* (Oxford, 1995).

the law of negligence, however, or about leading cases and their reporting in general. Instead the lecture finished with a rather abrupt turn to Roman law and a text of the jurist Alfenus Varus which, Alan showed, had been always mistranslated, and so never correctly understood as simply an example of liability without fault allied to the contract of mandate.

Despite all this, the article on Mrs Donoghue can be seen as the start of Alan's interest in the modern history of Scots law, taking the modern period as stretching from around 1800 to the mid-twentieth century. There was to be one more contribution on what rapidly became a mini-industry of studies of what really happened in *Donoghue v Stevenson*,[100] but he first went back to the early nineteenth century in examining another House of Lords decision, *Hyslops v Gordon* in 1824.[101] The chief interest of this case was that the First Division of the Court of Session had in 1977 treated it (erroneously, in Alan's view) as no longer binding for its apparent ruling that money judgments could only be given in pounds sterling.[102] Alan showed this was not what Hyslops decided. But more significantly the parties (Scottish merchants trading in New York and Jamaica) and the focus of the decision on Jamaican pounds, Halifax pounds and sicca rupees 'speak to us of an era of colonial trade which was very much part of British and Scottish history, however unfashionable it may be to recall it'.[103] The theme of Empire and Scots law was one to which he returned in giving the first W. A. Wilson Lecture at Edinburgh in 1995, when he argued that Scots lawyers 'from the later years of the nineteenth century onwards [saw] themselves as part of a larger English-speaking family of lawyers scattered throughout the Empire and the United States of America'.[104] When he gave the British Academy's Maccabaean Lecture in

[100] A. Rodger, 'Lord Macmillan's speech in *Donoghue v Stevenson*', *Law Quarterly Review*, 108 (1992), 236–59. On this article see below, the text accompanying n. 135. For the literature on *Donoghue v Stevenson* sparked by Alan's initial contribution, see Elspeth Reid, 'The snail in the ginger beer float: *Donoghue v Stevenson*', in John P. Grant and Elaine E. Sutherland (eds.), *Scots Law Tales* (Edinburgh, 2010), pp. 83–99.

[101] A. Rodger, 'The strange demise of *Hyslops v Gordon*', in Alan J. Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D. M. Walker* (Edinburgh, 1990), pp. 1–12.

[102] *Commerzbank v Large* 1977 SC 375. See also A. Rodger, 'Thinking about Scots law', *Edinburgh Law Review*, 1 (1996), 3–24, at pp. 12–13, for criticism of the mistranslation and consequent misuse of Thomas Craig's sixteenth-century *Jus Feudale* by the First Division in this case.

[103] Rodger, 'The strange demise', p. 10. See also Rodger, '"Say not the struggle naught availeth"', p. 431 ('contract cases steeped in the romance of imperial and international trade and embodying rules that have been tested by the experience of generations of merchants'). The quotation in the title of the latter article is the opening line of the poem of the same name by the Victorian poet Arthur Hugh Clough (1819–61).

[104] Rodger, 'Thinking about Scots law', p. 18.

1991, his theme was the movement for codification of commercial law in Victorian Britain which eventually gave rise to a number of quasi-codifying statutes—the Bills of Exchange Act 1882, the Partnership Act 1890 and the Sale of Goods Act 1893. Showing that it was by demand from Scots lawyers and businessmen that these originally England-only statutes were extended to Scotland, Alan noted that there was also a call for codification of commercial law for the Empire as a whole, with again the leading spokesman being a Scotsman, Professor John Dove Wilson of Aberdeen.[105] A new thread emerged in his Jean Clark Lectures of 2007, the legal as well as socio-religious significance of 'the most important event in the whole of Scotland's nineteenth-century history', the Disruption of the Church of Scotland in 1843. This was the most sustained attack ever mounted against the authority of the Court of Session, with juridical effects and constitutional resonances which Alan showed enduring down to the present day.[106] Moreover, he might have added, the attack was from within Scotland rather than from without.

While all these investigations by Alan must be seen as first and foremost simply on things he found interesting for their own sake, many prepared initially as public lectures to general audiences, they were also at least in part reactions against the standard view of what had happened to Scots law in the nineteenth century. Led in particular by T. B. Smith, the period was seen as a time during which the essentially Civilian law of Scotland stated by the institutional writers before 1800, and the guarantees of its continuation in the Anglo-Scottish Union Agreement of 1707, had been overpowered by an anglicising tide flowing from the unifying tendencies of the legislature and the dominance of English lawyers in the final court of appeal provided by the House of Lords. While Smith and his followers had always acknowledged that Scots lawyers themselves had also contributed to the process of anglicisation, they tended to attribute that to failures of legal education and legal writing in Scotland, so that English law was much the most readily accessible source when new issues came up for discussion.[107]

[105] A. Rodger, 'The codification of commercial law in Victorian Britain', *Proceedings of the British Academy*, 80 (1991), 149–70; also published in *Law Quarterly Review*, 108 (1992), 570–90. References henceforth to the former version.

[106] A. Rodger, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (Edinburgh, 2008). The quotation is from Michael Fry, *Patronage and Principle: a Political History of Modern Scotland* (Aberdeen, 1991), p. 52.

[107] On Smith see Elspeth Reid and David L. Carey Miller (eds.), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law* (Edinburgh, 2005).

Alan for his part did not deny that anglicisation was indeed a feature of nineteenth-century Scottish legal development but argued that it was to be explained, not so much by ignorant passivity as by positive enthusiasm, in particular within a British economic and, indeed, imperial framework. His contribution was based on impressive primary research in archives and the dustier corners of the Advocates Library in Edinburgh. He drew attention to a significant group of Scots lawyers who studied law in Germany in the course of the nineteenth century, as Pandectist legal science reached its zenith; but, he argued, the lesson these men drew from their German experience was not to resist the anglicising tide but rather to embrace ideals of legal unity and codification.[108] The turn away from the Roman Civil Law was not an exclusively Scottish phenomenon; all across Europe 'countries were abandoning Roman law for modern codes, often of course founded on some version of the preceding Civil Law, but definitely tricked out in a new and much less obscure guise'.[109] He also noted the presence in Scotland of observers from other legal systems—the famous Heidelberg professor, Carl Mittermaier, in 1850, and the much more obscure Waldemar Peters, also from Germany, in 1906—who saw Scots law in an essentially British context from which lessons might be learned by German lawyers.[110]

Alan's dislike of Scottish nationalism has already been noted.[111] He was especially against bogus appeals to national traditions, which he perceived in some of the attacks on reform of the courts, legal aid, and the legal profession during his time as a Law Officer.[112] The dislike extended to the neo-Civilian legal nationalism most often associated with the name of T. B. Smith. Against Smith's Civilian system under siege in the nineteenth century Alan posed a legal profession, a judiciary and mercantile class looking outward to the world and markets of Britain and its Empire, and to modernisation. Alan's Disruption book also posed a challenge to the Smithian argument, based on the great case of *MacCormick v Lord*

[108] See A. Rodger, 'Scottish advocates in the nineteenth century: the German connection', *Law Quarterly Review*, 110 (1994), pp. 563–91; also Rodger, 'Codification of commercial law', pp. 168–9.
[109] Rodger, 'Thinking about Scots law', p. 14.
[110] Rodger, 'Scottish advocates', pp. 588–90; Rodger, 'Thinking about Scots law', p. 11; A. Rodger, 'What Waldemar saw: a young German's view of the Scottish legal system', in Mark Hoskins and William Robinson (eds.), *A True European: Essays for Judge David Edward* (Oxford, 2003), pp. 11–20.
[111] See above, text accompanying n. 46.
[112] See above, text accompanying n. 88.

Advocate (the 'E II R' case),[113] that the 1707 Union Agreement should be seen as a fundamental law or constitutional instrument by which Scottish distinctiveness might be judicially preserved within the United Kingdom. The roots of the Disruption lay in a statute passed by the Westminster Parliament in 1711 in fairly clear derogation from the Articles of Union. Yet, although the Union was much referred to in the general debate surrounding the Disruption, it was never used in court to found an argument that the statute in question was unconstitutional and so null and void. The status of the Union Agreement was essentially political rather than legal.[114]

The question of what exactly the Civilian dimension in the development of Scots law meant for its modern practice was one that Alan frequently addressed in the 1990s.[115] As he had long made clear,[116] he was strongly opposed to any deliberate or calculated effort to re-Civilianise the law: 'Nor indeed should we yearn to make Scots law into some kind of civil law theme park.'[117] There was no question of reviving the nineteenth-century enthusiasm for codification, especially if it was stimulated by renewed influences from the Continent of Europe.[118] He accepted that Roman law had been a historical source of much of private law and did not actively seek to prevent its use as a source in the modern law either. His argument was rather that the occasions so to use it are rare, with the answer to most legal questions much more likely to be found in legislation, judicial precedent and authoritative writing within which any relevant Roman law would long ago have been incorporated. While it might sometimes be necessary to refer to these Roman origins in order to obtain a full understanding of the present law, 'our courts are most likely to be asked to look at Roman law texts in those cases where they do not actually provide an answer. If they had provided an answer, the point would probably not have been litigated today because it would have been settled long

[113] 1953 SC 396. The lead pursuer was John MacCormick, friend of Alan's father and himself the father of Neil MacCormick.
[114] Rodger, *The Courts, the Church and the Constitution*, pp. 6–7, 29, 35–6.
[115] A. Rodger, 'Potestative conditions', *Scots Law Times News* (1991), 253; A. Rodger, 'Roman law in practice in Britain', *Rechtshistorisches Journal*, 12 (1993), 261–71; A. Rodger, 'Roman law comes to Partick', in R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, Stair Society supplementary series, 1995), pp. 198–212; A. Rodger, 'The use of the Civil Law in Scottish courts', in David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997), pp. 225–37.
[116] See above, text accompanying n. 67.
[117] Rodger, 'Civil Law in Scottish courts', p. 231.
[118] Rodger, ' "Say not the struggle naught availeth" ', pp. 422, 430–3.

ago.'[119] In any event, the source material, whether in the Digest or the European *ius commune* of the medieval and early modern periods, did not lend itself to ready use by legal practitioners and judges neither possessed of the necessary linguistic and analytical skills, nor aware of the latest scholarly insights on the subject.[120] A skilled intermediary able to synthesise the materials to make it all accessible for practitioners might help; but otherwise the danger of a 'horrid mess' was all too great.[121]

This approach casts some light on the use Alan himself made of Roman law in his practice as a judge, which has already been briefly discussed by Ernie Metzger and David Johnston.[122] They rightly sense that, while Alan often referred to Roman law in his judgments, he was reluctant to make it the basis of any decision.[123] Reference to Ulpian in court cases provided 'welcome balm' rather than any *ratio decidendi*.[124] At least some of the references he did make were to show the Roman jurists' view of a subject being driven more by considerations of policy and expediency than of principle: 'The life of the Civil Law, no less than of the Common Law, "has not been logic: it has been experience".'[125] In the end, what Alan seemed to favour was a kind of mixed legal system, in which, to paraphrase remarks he made in 1995, we should not worry too much about which elements of the Scottish mix—native, Roman or English—are called into service at any given moment, but rather let the law develop as seems best suited to the demands and fashions of the times.[126] No element should be privileged over any other in the mix.

But the Civilian inheritance of Scots law had at least one strong point in its favour:

[119] Rodger, 'Civil Law in Scottish courts', p. 234.
[120] A useful example of what Alan intended by this is worked through in his 'Developing the law today: national and international influences', *Tydskrif vir die Suid-Afrikaanse Reg*, 17 (2002), 1–17, at pp. 11–16.
[121] The quotation is from a letter dated 7 April 1980 sent to Daube, commenting on *Sloan's Dairies v Glasgow Corporation* 1977 SC 223 (AUL, Acc 60, 3/253). The draft article referred to in the letter became A. Rodger, 'Emptio perfecta revisited: a study of Digest 18, 6, 8, 1', *Tijdschrift voor Rechtsgeschiedenis*, 50 (1982), 337–50. Alan later provided a critical analysis of *Sloan's Dairies*: see his 'Roman law comes to Partick'.
[122] Metzger, 'Alan Rodger's writings on Roman law', pp. 196–7; Johnston, 'Alan Rodger', pp. 999–1000.
[123] See also Rodger, 'Developing the law today', pp. 12–13.
[124] *Gibbs v Ruxton* 2000 JC 258, 262.
[125] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123, 1143. The reference is to Holmes's famous fourth sentence in his *The Common Law* (Boston, 1881), p. 1 ('The life of the law has not been logic; it has been experience'). See also *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, paras 158–60.
[126] Rodger, 'Thinking about Scots law', p. 24.

> For me one of the chief advantages of having a mixed system of law is that it has been expounded and analysed in the past by reference to some version of the template to be found in Roman law: persons, property, obligations, succession, actions, etc.… [W]e have these systematic expositions of the law and we had them indeed long before there was anything similar in English law. We have the advantages of the case law approach of English law coupled with a degree of civilian rigour. That is a benefit of our civilian background that I, for one, would very much wish to foster.[127]

And in another piece Alan wrote: '[W]e have inherited a system whose different elements interlock and, to some extent, overlap—and are intended to do so.'[128] 'One may hope,' he added, 'that our private law is indeed relatively coherent since the familiar method of reasoning by analogy from one situation to another presupposes that it is.'[129] Lawyers and judges working from case to case therefore need to be reminded of the law's overall coherence and the interconnectedness of its rules. In many of the decisions that he made as a judge Alan demonstrated his own awareness of the framework of principle holding Scots private law together: for example, the sharpness of the distinction between real rights of ownership and personal rights under contracts and other obligations;[130] the general entitlement of a creditor to specific implement of its debtor's obligations;[131] and the significance of a specific category within the law of obligations for the reversal of unjustified enrichment.[132] None of these matters could have been stated with such assurance in the context of English law.

[127] Rodger, '"Say not that the struggle naught availeth"', p. 425. Note also his 'Developing the law today', p. 2.

[128] A. Rodger, '"Only connect"', *Juridical Review*, 52 (2007), 163–78, at p. 171. 'Only connect the prose and the passion, and both will be exalted, and human love will be seen at its highest. Live in fragments no longer', is the epigraph to E. M. Forster's novel *Howards End* (London, 1910).

[129] Rodger, '"Only connect"', p. 169.

[130] *Burnett's Trustee v Grainger* 2004 SC (HL) 19.

[131] *Highland & Universal Properties Ltd v Safeways Properties Ltd (No 2)* 2000 SC 297.

[132] *Shilliday v Smith* 1998 SC 725. Alan's view of the law of unjustified enrichment was much influenced by the work of Peter Birks for English law, and he also wrote more about the subject extrajudicially than about any other part of private law. See the chapter on 'unjust enrichment' in *Gloag & Henderson The Law of Scotland* (10th edn., Edinburgh, 1995) which Alan substantially revised; also his 'Civil Law in Scottish courts', pp. 227–30, 233–4; A. Rodger, 'Recovering payments under void contracts in Scots law', in William Swadling and Gareth Jones (eds.), *The Search for Principle* (Oxford, 2000), pp. 1–21; and Rodger, 'Developing the law today', 3–10. But so far as I know Alan never published any substantive comment on Birks's celebrated *volte face* on the basic approach to be taken to enrichment questions (although see Rodger and Burrows, 'Peter Birks', p. 32, and A. Rodger, 'An introduction to *Sempra Metals Ltd*', in Simone Degeling and James Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pyrmont, 2008), pp. 317–31). See further Hector MacQueen, 'Peter Birks and Scots enrichment law', in Burrows and Rodger, *Mapping the Law*, pp. 401–17.

VI. The judge

Once he became a judge, Alan grew increasingly interested in the texts constituted by judicial opinions.[133] While at one level this was a purely practical concern—what form should be followed and what language used?—on another there were questions which brought into play once more the techniques and analytical skills which he had first honed in the study of Roman law. Daube had taught that literary forms are the products of their setting in life and that these forms can remain unchanged even when the setting changes. Judicial opinions had once been generally oral but became typically written and also reported in the nineteenth century. That transformed and lengthened them, since they would now reach a much wider audience, although they long retained features only explicable as a result of their originally oral form. The Disruption cases showed the transition still at an early stage in the mid-nineteenth century, as judges perhaps not yet fully conscious of their wider readership outside the courtroom expressed differing views on sensitive subjects in much more forceful language than would normally be considered appropriate today.[134] The change to written judgments as the norm provided a new setting with its own effects on judicial opinions. For instance, the influence which a written opinion may command depends significantly upon the manner and style of its composition. An example could be provided by Lord Macmillan's speech in *Donoghue v Stevenson*, which, as Alan discovered, was a second rather than a first draft.[135] It appeared that in its original form Macmillan's speech focused almost entirely on the relevant Scottish authorities, whereas the second and finally delivered version embraced the argument of counsel that Scots and English law were the same on the point in issue, and proceeded largely on a discussion of the English sources. This, Alan suggested, was the result of pressure from Macmillan's colleague, Lord Atkin, who had already written his famous 'who then is my neighbour' speech with a view to using the case as a vehicle to develop English law, and did not wish to see any room left for English lawyers to regard it as an authority for Scots law only. Thus Macmillan's powerful

[133] See especially A. Rodger, 'The form and language of judicial opinions', *Law Quarterly Review*, 118 (2002), 226–47.

[134] Rodger, *The Courts, the Church and the Constitution*, pp. 71–80. As already noted, see above, n. 91, Alan as a judge sometimes used strongly critical language against his colleagues in his dissents.

[135] 'Lord Macmillan's speech in *Donoghue v Stevenson*'.

sentences written originally for Scots law alone—'The law takes no cognisance of carelessness in the abstract'; 'The categories of negligence are never closed'—helped ensure that *Donoghue v Stevenson* became part of the law of negligence throughout the United Kingdom and, in due course, the British Empire and the later Commonwealth.

Alan himself was of course a fine writer whose judicial opinions in the Court of Session, House of Lords, Privy Council and Supreme Court seem likely to stand the test of time. The volume of essays in his honour published in 2013 contains a number of valuable analyses of his judicial style by his fellow judges.[136] Some of his judgments were memorably brief. Was a burglar who threatened someone with his hand in his pocket to look as if he was carrying a gun guilty of an offence under section 17(2) of the Firearms Act 1968, which provided for an offence of having possession of a firearm or an imitation firearm? Alan found the route to the answer in Ulpian:

> My Lords, *Dominus membrorum suorum nemo videtur*: no-one is to be regarded as the owner of his own limbs, says Ulpian in D. 9.2.13. pr. Equally, we may be sure, no-one is to be regarded as being in possession of his own limbs. The Crown argument, however, depends on the contrary, untenable, proposition that, when carrying out the robbery, the appellant had his own fingers in his possession in terms of section 17(2) of the Firearms Act 1968. I agree with my noble and learned friend, Lord Bingham of Cornhill, that for this reason the appeal should be allowed.[137]

It seems clear from the analyses of his fellow judges that Alan's judicial writing was designed to have effect beyond the case immediately in hand, deploying writing techniques he identified in others, whether amongst ancient jurists or modern judges,[138] to help him do that—or perhaps to avoid bad practice such as he saw developing at first instance in the Court of Session:

> [I]t occurs to me when I read Court of Session judgments that many judges spend an enormous amount of time simply recounting the submissions of the parties. . . . It does not appear to serve any very useful purpose. What matters is not for the judge to tell the parties what counsel argued, but to tell them what the judge has decided in the light of the argument.[139]

[136] *Judge and Jurist*, Part II (featuring contributions from all of Alan's contemporaries on the Supreme Court at the time of his death as well as Lord Hoffmann and Lord Reed).
[137] *R v Bentham* [2005] 1 WLR 1057 (HL), para 14.
[138] For example, the US Supreme Court judge Antonin Scalia: see especially A. Rodger, 'Humour and law', *Scots Law Times News* (2009), 202–13, at pp. 210–11.
[139] A. Rodger, 'Civil justice: where next?', *Journal of the Law Society of Scotland*, 53 (Aug. 2008), 14–18, accessible at <http://www.journalonline.co.uk/Magazine/53-8/1005571.aspx>.

But perhaps more still could be learned about Alan's judicial style by observing how he applied what he learned from David Daube. Alan himself furnished us with one example from the criminal law, his opinion reworking the rules of diminished responsibility in *Galbraith v Her Majesty's Advocate*.[140] Daube had frequently observed that the emergence of a noun or noun phrase describing a particular rule marks the point when a doctrine is recognised in a legal system.[141] 'Diminished responsibility' had emerged in Scots law only after 1945; before then, there was no coherent doctrine, and even afterwards its content had been left largely opaque. Hence the court was free to develop the doctrine that had never previously been articulated. A more complex example from late in Alan's short Supreme Court career is *Inveresk Paper Co Ltd v Tullis Russell Ltd*,[142] where he explored and explained why the word 'retention' had come to have a variety of meanings in the Scots law of contract, and sought to provide it with a stable platform for the future. Only a fuller study of his judicial writing than is possible here will bring out the full extent of this sort of thing; but the study would be well worth attempting.

While then consciously seeking to influence the development of the law, and certainly supportive of the idea that the judges had a role to play in law reform, Alan nonetheless was always at pains to deny any accusation against the courts of 'judicial activism' in the sense of having predetermined agenda or strategies in relation to particular issues.[143] It was litigants who came to the court, not the other way round. The judges were appointed and determined cases as individuals, not as a group, and different cases were decided by different panels selected from the available judges. Neither the House of Lords nor the Supreme Court heard cases *en banc*, i.e. with all the members of the court sitting together, so there was no opportunity for a concerted view to take hold. It was not insignificant that British appellate judges on the whole used the first person singular rather than the 'we' characteristic of judicial pronouncements in, for

[140] 2002 JC 1. See Rodger, 'Law for all times', p. 14.

[141] See also Alan's observation that the concept of 'intertemporal law', found in Continental legal systems, is unknown in the legal systems of the UK (A. Rodger, 'A time for everything under the law: some reflections on retrospectivity', *Law Quarterly Review*, 121 (2005), 57–79, at pp. 60–2). He speculates that this is due to the continuity of the UK legal traditions whereas Continental systems have often suffered significant breaks in their development as a result of both political and legal changes.

[142] 2010 SC (UKSC) 106.

[143] See Rodger, 'What are appeal courts for?'; Rodger, *The Courts, the Church and the Constitution*, pp. 56–7, 79–80.

example, the US Supreme Court.[144] While an individual judge's opinions might subliminally reveal something of his or her personal attitudes (another insight gleaned from Daube), for all each case was to be decided only according to that judge's view of the law. Finally, the outcome of a case depended on the view which commanded the support of the majority of the judges. The lack of a common 'agenda' could be seen in the dissents of minorities. Alan, it is worth noting, seems to have dissented more than most.[145]

As a judge Alan was in the forefront of what has turned out to be the greatest challenge ever to face the courts, not only in Scotland but also in the United Kingdom as a whole: the impact of the Human Rights Act 1998 coupled with the Scotland Act of the same year, both subjecting domestic law to a requirement of compliance with the European Convention on Human Rights. While some of the judges' analyses and conclusions may be challenged on legal and (for Alan, irrelevantly) political grounds, there can be no doubt of the rigour and vigour which he with others brought to what has turned out to be an enormous and far-reaching task. The *Cadder* case on the right of detained persons to immediate legal representation was perhaps his last major contribution in this area, and a very typical one for those looking for examples of his judicial style. A detailed analysis shows how and why Scots law had reached the legislative position that there was no such right, and how that was now clearly contrary to Convention rights as developed by the European Court of Human Rights sitting in Strasbourg.[146] As Alan had already put it in Latin in an earlier decision: '[I]n reality, we have no choice: *Argentoratum locutum, iudicium finitum*—Strasbourg has spoken, the case is closed.'[147]

[144] Rodger, 'Law for all times', pp. 15–20. As a Scottish Law Commissioner, I note that Commission publications tend to be written in terms of 'we' and 'our', so perhaps (if Alan's analysis here is correct) reflecting a sense of institutional continuity whoever the individual Commissioners may be from time to time. Or it may be that the Commissioners assume collective responsibility for the particular publication only, unless (as happens relatively rarely) one or more dissent from its conclusions in whole or (more usually) in part.

[145] Lord Brown of Eaton-under-Heywood, 'Dissenting judgments', *Judge and Jurist*, p. 29 (citing unpublished research of Professor Alan Paterson); Chris Hanretty, 'Dissent in the UKSC, Update' (UKSC blog, 29 Aug. 2012) <http://www.ukscblog.com/dissent-in-the-uksc-update>.

[146] *Cadder v Her Majesty's Advocate* 2011 SC (UKSC) 13 (decision published 26 Oct. 2010).

[147] *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, para 98. 'Argentoratum' was the medieval form of the Roman name for the area where there later grew up the settlement of Strasbourg, home today of the European Court of Human Rights. Lord Reed observes ('The form and language of Lord Rodger's judgments', in *Judge and Jurist*, 126) that the Latin phrase adapts a Canon Law maxim—*Roma locuta, causa finita*—itself an adaptation of language in one of the sermons of St Augustine (131.10) referring to the authority of the

Thus in *Cadder* there was only one lawful decision to be made, no matter the political consequences and no matter that the system of criminal law, evidence and procedure in which Alan himself had operated so effectively for so many years would probably have to be completely overhauled in consequence.[148]

Alan however dissented from a popular view so widespread that it could be found even amongst his fellow judges, that litigation itself, especially between private individuals, was an evil to be discouraged and avoided as much as possible. Perhaps he expressed his point most memorably in the Shetland servitude case, *Moncrieff v Jamieson*:

> Your Lordships have variously described it as an 'unfortunate case', as a 'sad one' and as an 'unfortunate matter'. The parties are, however, adults and the dispute between them is genuine. Since the point at issue is difficult, it is not surprising that they have been unable to resolve it for themselves. In these circumstances they have simply chosen to exercise their right to have it resolved by the courts. Those on one side have decided to spend their own money on doing so; the Legal Aid Board has financed the other side. As a judge, I would not describe the resulting situation as sad or unfortunate: after all, courts exist and judges are paid to resolve such disputes, which are indeed the life blood of the common law.[149]

In Scotland, as he pointed out elsewhere, the problem for the law was too few rather than too many cases; and even in England one effect of diversion to arbitration and other means of dispute resolution in such areas as commercial and family law was a growing lack of up-to-date precedents in those vital areas of legal business. Even where the law was statutory, the meaning of statutes could be controverted, and who was to supply

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Apostolic See. Professor Michael Crawford, FBA, noting that in Roman times the feminine form 'Argentorate' would have been preferred, suggests that, as a Romanist rather than a medievalist, Lord Rodger should have said: '*Argentorate locuta causa finita*'. See further on the point of law in Alan's dictum Lord Phillips of Worth Matravers, '"Strasbourg has spoken"', in *Judge and Jurist*, pp. 111–20.

[148] See the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, passed by the Scottish Parliament as an emergency measure the day after the *Cadder* decision was handed down. Further reform by way of a Criminal Justice Bill, including the abolition of the evidential requirement of corroboration in criminal cases, is anticipated at the time of writing (April 2013): see The Carloway Review: Report and Recommendations (2011), accessible at <http://www.scotland.gov.uk/About/CarlowayReview>, and a Scottish Government Consultation on Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration (Dec. 2012), accessible at <http://www.scotland.gov.uk/Publications/2012/12/4628/0>.

[149] *Moncrieff v Jamieson* 2008 SC (HL) 1, para 66. The whole of Alan's speech in this case is a superb example of his judicial style, no doubt especially inspired by the case being about servitudes.

authoritative, generally known, rulings on such contested questions if not the courts?[150]

A final point on which Alan published views, but on which, perhaps uncharacteristically, he seems to have changed his mind over the course of his career, was the nature of the relationship between judges and academic lawyers. In 1994, when he was still Lord Advocate, he first observed and generally welcomed a change that seemed to have taken place in the 1980s, with judges becoming much more willing to cite the work of living academic writers in their opinions, and indeed to engage generally with the academic world on equal terms.[151] But sixteen years on, his experience as a judge had seemingly made him more pessimistic about the state of the relationship: the United Kingdom law schools were turning away from the substantive law studies that were most useful to the judges and practitioners, and in many cases it was difficult to find any relevant academic material that would be of assistance in reaching a decision.[152]

Lord Justice Beatson (a former Cambridge law professor) has addressed Alan's pessimism in the volume of essays in his honour.[153] The only point which may be made here is to wonder about the effect on Alan's views of the death in 2004 of his great academic friend, Peter Birks (successor of Daube and Honoré as Regius Professor of Civil Law in the University of Oxford). Birks was certainly one of the academics enjoying enormous influence in the highest courts in the 1990s, with his reformulation of the law of restitution in England also influencing Alan himself, as he openly acknowledged, in his own fundamental reorientation of the parallel Scots law of unjustified enrichment in *Shilliday v Smith* in 1998.[154] Birks's premature death aged just 62 saddened Alan greatly—the only time I ever saw him choked with emotion was as he concluded his address at the memorial service held in the University Church of St Mary the Virgin at Oxford[155]—and perhaps the sadness coloured his thinking thereafter. Certainly, however, no judge engaged more fully than Alan with and in academic law.

[150] See on these themes Rodger, '"Only connect"', pp. 167–8; Rodger, 'Civil justice: where next?', pp. 14–16; and Rodger, *The Courts, the Church and the Constitution*, p. 62.
[151] A. Rodger, 'Savigny in the Strand', *Irish Jurist*, 30 (1995), 1–20.
[152] Rodger, 'Judges and academics in the United Kingdom'.
[153] Jack Beatson, 'Legal academics: forgotten players or interlopers?', *Judge and Jurist*, pp. 523–41.
[154] 1998 SC 725.
[155] For the address see Burrows and Rodger, *Mapping the Law*, pp. x–xv.

VII. Conclusions

The argument of this tribute to Alan Rodger is that fundamental to an understanding of his work as judge as well as jurist is what he took from the studies he made in Roman law at the outset of his intellectual maturity. Others are better able to assess Alan's contribution to Roman law studies as such. But his D.Phil. work on Roman servitudes still holds the field, while his later work also enjoys high standing in a worldwide field of scholarship, and is likely to retain that status for a long time to come. His enthusiasm for and excitement from it was undimmed to the end: so for two sessions after the death of Peter Birks the Lord of Appeal in Ordinary taught the *lex Aquilia* to very small classes at Oxford on Fridays to cover the gap until the appointment of a new Regius Professor of Civil Law. This teaching bore published fruit in further contributions on the subject, the last appearing in 2009.[156] He continued to pay homage to Daube and his English mentor, Buckland, and if spared would have added more on Lenel.[157] Following not only Daube but also A. E. Housman,[158] for Alan the interest of a subject was in the end quite sufficient justification for its study; but that did not mean that wider lessons could not be drawn. From Daube too (and, through him, Lenel) he learned to start with words and work his way to conclusions (or, at least, more general observations) from the bottom up. That approach is apparent in all his published work, whether as judge or jurist. It illuminates another important strand in his publications, writings on the language used by legislators and judges, in Britain and elsewhere.

The vast bulk of Alan's output in Roman law was in the form of articles rather than large-scale projects. Apart from his D.Phil. work, therefore, it is difficult to say where his influence was decisive beyond the application of his methodology, of which he was undoubtedly at least the leading British proponent. He saw himself as contributing to an ongoing discussion rather than as necessarily providing the conversation-stopping answer, although he could certainly show that some other answers were

[156] See Rodger, 'What did *damnum iniuria* actually mean?'; *idem*, 'The palingenesia of the commentaries relating to the *lex Aquilia*', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanische Abteilung)*, 124 (2007), 145–97; and *idem*, 'Body language: translating some elementary texts on the *lex Aquilia*', in Holger Altmeppen, Ingo Reichard and Martin Schermaier (eds.), *Festschrift für Rolf Knütel zum 70. Geburtstag* (Heidelberg, 2009), 951–71.

[157] See Vogenauer, 'Lenel and Daube'.

[158] Rodger, 'Mrs Donoghue and Alfenus Varus', p. 1. Housman is also referred to in Alan's celebrated judgment in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, para 79, and in his speech in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 122.

untenable. The essence of Alan's approach was problem-solving—the hall-mark of his most serious academic work as of his judging and professional practice. Ernie Metzger suggests that where he surpassed his predecessors was in being the lawyer 'committed to proving every argument [and] proving the hypothesis with evidence', who understood intimately the words and syntax in which Roman lawyers expressed their own legal arguments.[159]

Alan's writing on other topics, especially Scottish legal history, also poses and explores problematic issues, while resisting sweeping conclusions or grand theory. Something of this may explain his resistance to codification of law, and his preference for case law systems giving full scope for individual judgments on particular legal questions. His strong opposition to the idea of a European private law contrasts interestingly with an enthusiasm for the worldwide scope of the Common Law in the context of the Anglophone countries that had once made up the British Empire and now formed the British Commonwealth.[160] Perhaps he thought that European private law would inevitably take the form of an authoritative code as distinct from what he saw in classical Roman law, the pre-codal European *ius commune*, and the modern Common Law world alike, namely a variety of approaches lacking any central authority finally to settle an issue in law, but with a continuous stream of new questions being posed by litigants and answers proposed by those called upon to determine their disputes.[161] It may not carry speculation too far to suggest that he saw the modern codifiers and would-be codifiers as being like the Justinianic compilers who had discarded most of the accumulated learning of the past, and thereby distorted, froze and ultimately put almost beyond recovery whatever they thought should remain.

Any suggestion that all this makes Alan just another detached judge and scholar wholly absorbed by daunting intellectual work would, however, be completely wide of the mark. His career can be seen as a series of moves from one challenge to the next—doctoral research to the highest level, followed in turn by private legal practice, public and political service, and, finally, being a judge at the very apex of the British legal systems. But he was also a highly entertaining companion and correspondent who loved discussion, debate, wining and dining, and gossip with his friends. He enjoyed fiction classical and modern, films and opera. The

[159] Metzger, 'Alan Rodger's writings on Roman law', pp. 190–1.
[160] Rodger, 'Time for everything under the law', pp. 71–3.
[161] Ibid., p. 73.

friendships were strong, deeply felt, and moved by personality, not academic standing or popularity: witness his illuminating and moving tributes not only to David Daube and Peter Birks, but also to the Crown Agent, Duncan Lowe,[162] Edinburgh solicitor advocate David Williamson,[163] the Scottish judge and Law Commission chairman, Lord Davidson,[164] and Lord President Emslie.[165] The same human sympathy is apparent in his interest in the lives of people he never knew, whether jurists like Otto Lenel, the lawyers involved in the Disruption cases, or litigants like May Donoghue.[166] His eye for the uniqueness of individuals likewise led him to Leone Levi who, born in Ancona, Italy, but a naturalised Briton dwelling in Liverpool later to be a professor at King's College London, used the Advocates Library in the middle of the nineteenth century to conduct his research for a campaign to produce a global code of commercial law.[167] Alan's empathy and wit made him much in demand not only as a lecturer but also as an after-dinner speaker.[168] He was openly delighted if you brought him something that interested him. I remember worrying about him patiently chairing a crowded conference programme on the new subject of Internet law in Edinburgh one Saturday early in March 1997 and then my relief at his saying afterwards with genuine enthusiasm as we walked away together, 'I never thought there would be so much law in it!'[169] His mock-querulous tone if he thought he had caught you out in absurdity or irrationality (for example, by proposing a European contract

[162] A. Rodger, 'Duncan Lowe', *Scots Law Times News* (1998), 266–7.
[163] A. Rodger, 'David Williamson', *Scots Law Times News* (2004), 55–7.
[164] Rodger, 'Kemp Davidson'.
[165] A. Rodger, 'Emslie, George Carlyle, Baron Emslie (1919–2002)', *Oxford Dictionary of National Biography*, online edn., Jan. 2009 <http://www.oxforddnb.com/view/article/88686>, accessed 9 April 2013. Alan contributed 'Stealing fish' to Robert F. Hunter (ed.), *Justice and Crime: Essays in Honour of The Right Honourable The Lord Emslie* (Edinburgh, 1994), pp. 1–14.
[166] See too Alan's revision of the *Oxford Dictionary of National Biography* entry 'Gloag, William Murray (1865–1934)', <http://www.oxforddnb.com/view/article/37461>, also accessed 9 April 2013. Gloag was a distinguished holder of the Glasgow Regius Chair of Law between 1905 and 1934.
[167] Rodger, 'Codification of commercial law in Victorian Britain', pp. 152–3.
[168] For some of the reasons why, see Rodger, 'Humour and law'; also Rodger, 'Time for everything under the law', p. 75.
[169] The conference was published as Lilian Edwards and Charlotte Waelde (eds.), *Law and the Internet: Regulating Cyberspace* (Oxford, 1997). We should have asked Alan to contribute at least a preface. His interest in and engagement with information technology and all its possibilities was complete. It was on his watch as Lord President that the Scottish Courts Service initiated its website and the Internet publication of court decisions using the neutral citation system. He loved the knowledge retrieval and discovery possible through Google, Wikipedia and other such Internet phenomena. In his final weeks he was given an iPhone and used it extensively to remain in touch with his friends and the world.

code or becoming a Law Commissioner), was always pitched just so as to induce a smile (unless, perhaps, you were counsel appearing before him in court). His encouragement was inspiring and infectious—'You must *do* it! You *must* do it!'—and the pleasure he could give by telling you that you had produced 'the real thing' was all the more intense for its rarity (at least in my case). His interest in, and support of, young people making their way in the law is widely attested, and no one who worked with him, in whatever capacity, seems to have failed to enjoy the experience.[170] In the nature of things he did not preside over a school of doctoral student disciples, but those who devilled to him at the Scottish bar form a distinguished and devoted group of lawyers.[171] The Ciceronian epigram quoted at the packed memorial services in the Kirk of St Giles, Edinburgh, and the University Church, Oxford—*non nobis solum nati sumus ortusque nostri partem patria vindicat, partem amici*[172]—was entirely apt. Brilliant, contrarian, serious, funny and above all engaged: Alan Rodger is deeply missed but all who knew him should be thankful that they did, and that so much of him is still here for us to cherish as well as to admire.

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Fellow of the Academy

Note Alan Rodger once wrote that he found 'nauseating' the 'academic habit [of] thanking their "partners" and "kids" for tolerating their absence during the long hours needed to produce' a piece for publication.[173] But he did nonetheless in his own writings occasionally indulge in acknowledgement of others' help in his research, and it would be quite wrong for me to pass over in silence the support I have enjoyed in writing this memoir. I am deeply grateful to Alan's siblings, Christine and Ian Rodger, for sharing with me recollections of their brother's life as well as his letters home from Oxford and Münster between 1967 and 1970. I have received great assistance and kindness from the staff of Aberdeen University Library Special Collections and Glasgow University Archive, and from Jonathan Daube. With characteristic helpful-

[170] See e.g. Andrew Steven, 'Lord Rodger of Earlsferry 18 September 1944–26 June 2011', *Fundamina*, 18 (2012), 189–92; *Judge and Jurist*, pp. 99–110 (Tetyana Nesterchuk), 251 (Helen Scott), 291–2 (Stefan Vogenauer), 325 (Reinhard Zimmermann).

[171] They are Elizabeth Jarvie, QC (now retired as a sheriff), Paul Cullen (now a Court of Session judge as Lord Pentland), Robert Reed (now Lord Reed, Alan's successor in the UK Supreme Court), Mungo Bovey, QC, David P. Sellar, QC, and Gerry Moynihan, QC.

[172] Cicero, *De Officiis*, 1.22 ('We are not born for ourselves alone; and our country, our friends claim a share in our being').

[173] Rodger, 'Form and language of judicial opinions', 237. I took pleasure in drawing Alan's attention to the gratitude of my good friend Dr Norman Macdougall (St Andrews) to his labradors: see his *James III: A Political Study* (Edinburgh, 1982), p. vi; *James IV* (Edinburgh, 1989), p. iv; *James III*, 2nd edn. (Edinburgh, 2009), p. xii.

ness Andrew Burrows made arrangements with Oxford University Press to enable me to have access to a full set of the first proofs of *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013) so that I could draw upon their content. The book contains a bibliography slightly amplified from that in Karen Baston and Ernest Metzger's invaluable *The Roman Law Library of Alan Ferguson Rodger, Lord Rodger of Earlsferry, with a Bibliography of his Works* (Glasgow, 2012). I am also heavily indebted to many others, too numerous for them all to be mentioned here by name, who shared information, recollections and insights, answered importunate questions, commented on drafts, and generally helped me to do the best I could in honour of our mutual friend, Alan Rodger.