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Alan Ferguson Rodger: A Tribute Given at the Memorial Service Held in the University Church of St Mary the Virgin, Oxford on 11 February 2012

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It seems such a short time since I was standing here with Lord Rodger delivering the tributes to his great friend Peter Birks. I first came to hear of Lord Rodger through Peter who described him as the cleverest man he had ever known. ‘Alan knows everything’, Peter used to say. I first met Alan myself in the 1990s when I was an English Law Commissioner and I was presenting a paper in Edinburgh arguing against a statutory codification proposal of the Scottish Law Commission. At the end of my paper, Alan came over, introduced himself, and said, with that characteristic repetition of a phrase, ‘You’re absolutely right, Andy. You’re absolutely right.’ Of course, it wasn’t long as I got to know him better that I often had the reverse reaction with a phrase such as, ‘You really think that, don’t you, Andy. You really think that.’

It is important at the outset to say something about Alan’s extraordinary career. Everyone here will know that he became a Law Lord and, when the House of Lords was replaced by the Supreme Court in 2009, he became a Justice of the Supreme Court of the United Kingdom. Most will also know that Alan was an internationally renowned expert on Roman law and that his list of publications would be the envy of most eminent law professors. That list includes some 80 published articles or essays, two books, and no fewer than seven articles in the leading law journal, the *Law Quarterly Review*. Of his published work, while about half is on Roman law, the rest covers a wide field, including especially Scots law and legal history but also such diverse topics as the language of statutes and judgments, time and the law, humour in the law, and the evocatively named ‘Savigny in the Strand’ in which he examined the relationship between judge and jurist which, by reason of his own career, he was ideally placed to analyse.

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What may not be so well known is that, prior to becoming a judge, Alan was a Scottish law officer, first Solicitor-General for Scotland and then Lord Advocate. In other words, between 1989 and 1995 Alan was part of the Government and had to deal, for example, with the Lockerbie bombing. Such was the relationship at the time of Scottish law officer and judge, that it was Alan wearing his hat as Lord Advocate who in effect appointed himself to the Scottish bench.

What may also not be so well known is that when Alan left his Fellowship at New College to go into practice, he went to train as a 'bar apprentice' at Allan McDougall, a firm of solicitors in Edinburgh specializing in personal injury. From there, he joined the Faculty of Advocates (that is, he became a Scottish barrister) at the age of 30, taking silk 11 years later in 1985.

If we put the career together, one can see why to describe it as extraordinary is no overstatement. Lord Rodger was not only a world-class academic lawyer and one of the most high-ranking judges in the United Kingdom, but earlier he had been not only a barrister and silk but also a government law officer; and he had even started his practising career in a solicitors' office. It is hard to think of any other lawyer ever with such a career profile.

What, then, were the qualities that made Alan the scholar, the lawyer, and the person that he was?

I start with the depth and range of Alan's knowledge. One always had the feeling in talking to him that one's comments were merely scratching the surface and that Alan had layer upon layer of further knowledge to draw upon. He also had an insatiable thirst for knowledge and a ferocious appetite for hard work and for meticulous in-depth research to get to the bottom of a point. The story has been relayed in more than one of the obituaries that, as a student at Glasgow University, during a summer vacation, Alan taught himself Russian just for the fun of it. His writings on Roman law are characterized by their painstaking attention to the detail of the Latin words used and to the context of the particular text. As a judge, Alan did not regard himself as confined to what counsel had presented in their submissions and he might sometimes conduct his own research. So it is that you find in his judgments references to material that was certainly not put forward by counsel. This might occasionally include Roman law as, perhaps most famously, in the 2005 criminal case of *R v Bentham*. There the House of Lords had to decide whether using one's fingers from inside a jacket to give the impression that one has a gun can amount to the offence of having an imitation firearm in one's possession. Alan's short speech ran as follows:

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.¹

¹ [2005] UKHL 18, [2005] 1 WLR 1057, at [14].

It follows from the meticulous high standards that he set himself that Alan had no time for laziness, shoddy research, or sloppy thinking in others. In one of his best-known book reviews, he methodically and in devastatingly fine detail, exposed error after error in the work in question. He once attached to an email sent to me, by way of introduction to Ben Sullivan, an artist in residence at All Souls, a copy of the portrait of his sister, Christine, that had been painted by Ben. I emailed him straight back saying, 'What a wonderful portrait'. Just after I pressed the send button, I thought 'that's a bit stupid' because I had not then met Christine. Sure enough, Alan's immediate reply was, 'You would know that it was a really good portrait if you had ever met Christine.'

But if Alan had an almost Calvinistic zeal for work, allied with a strong sense of public and moral duty, and if some who did not really know him, including some students and barristers, could find him austere, what made Alan the person he was was that just below the learned seriousness, waiting to pounce, was a very much lighter side to his character. Alan was endlessly fascinated by people and their foibles and he enjoyed teasing and gossip. His sense of humour pervades many of his writings. We are told, for example, in the piece 'Behind the Scenes of Roman Law' that such is the trend against accepting interpolations in the Digest that 'identification of interpolations . . . is apparently regarded by many scholars as a practice scarcely to be permitted even for consenting adults in private.'² In the article I mentioned earlier on 'Savigny in the Strand', he teases his friend Peter Birks for his excessive enthusiasm for the new law of restitution. 'For my part I feel rather sorry for restitution which—unlike its older relatives, contract and tort—is not to be allowed an exuberant youth in which to sow a few wild oats before settling down. The academics will be watching its every move.'³ My favourite is in the article 'Thinking about Scots Law' where, with heavy irony, he undermines Lord McCluskey's call for Scotland to be independent from England on every matter of legal policy:

In that happy land which [Lord McCluskey] describes, one can almost see the simple workman standing in the gloaming outside his cottage, the peat smoke curling from the chimney and his wife cooking herrings on the stove while the bairns turn from their play to call a greeting to Dr Finlay, the local doctor, and Mr Sutherland, the procurator fiscal, as they pass on their way to fish the nearby loch.⁴

It must also be recalled that, while Lord Advocate in charge of Scottish legislation, Lord Rodger and the parliamentary draftsmen, drafted the forms of complaints and charges in Schedule 5 to the Criminal Procedure (Scotland) Act 1995 in such a way that their names are hidden in the text. A bit of 'innocent frivolity' is how Alan described it.⁵

And Lord Brown recounts that, while sitting next to him in the Supreme Court, Alan would occasionally pass him a note. For example, when Lord Brown in

² (1983) 3 *Oxford Journal of Legal Studies* 382, 383.

³ (1993–95) 28–30 *Irish Jurist* 1, 13.

⁴ (1996) 1 *Edinburgh LR* 3, 6.

⁵ 'Humour and Law' 2009 *SLT (News)* 202, 205.

questioning had forced a concession from leading counsel, a certain Jonathan Sumption QC, Alan passed him a note saying, 'I would quit now while you are ahead.' In contrast, in another case, where Lord Brown had asked a question which had backfired, Alan passed him a note saying, 'That will be 100 lines. I will see you in my study at lunchtime.'

Alan was also modest and self-effacing, in many ways quite untypical of a barrister and judge. So, for example, when made Visitor at St Hugh's in 2003, his one condition was that at college functions he should sit with the students and not on High Table. And he really cared about those who were working for him, for which he earned their enduring loyalty and affection. He was also keen on nurturing talent, so that, for example, he was instrumental in breaking the traditional male-only clerking system in the Faculty of Advocates by leading a campaign to have Christine Ferguson—who had been head of the typing pool during his time at Allan McDougall—appointed as the first woman advocate's clerk. He was particularly enthusiastic about encouraging students, and the new system of judicial assistants in the House of Lords could not have suited anyone better than Alan. He revelled in the opportunity of discussing his cases with the young assistants and he regularly used to tell me how terrifically clever he or she was. He was as fond of them as they were of him.

But what about Alan's relationship with Oxford? Having graduated from Glasgow University, he came to New College on the recommendation of his Glasgow Roman law tutor, Alan Watson, to be a doctoral student of the Regius Professor of Civil Law, David Daube. Brilliant, original, and controversial, Daube was a German Jewish émigré who had studied under Otto Lenel and whose academic passion was the close study and reconstruction of texts, in particular the Digest. Although very different characters—Daube had no interest in modern legal problems and left Oxford for a hippy-like existence in California—there is no doubt whatever that Daube was the single greatest intellectual influence in Alan's life. A picture of Daube hung in Alan's room in the Supreme Court, and Alan kept in touch with him until his death in California in 1999. In his obituary of Daube, Alan gave a wonderful description of his doctoral supervisions with him. Alan wrote:

When [Daube] closed the door [to his room in All Souls], the atmosphere changed completely. Gone were all general conversation and all traces of light-heartedness. Across the empty fireplace he conducted a detailed, and at times, brutal discussion, which would often last for two or three hours and which I found physically and emotionally exhausting. . . . Always we would hammer away at the detail of the Digest texts. . . . When [at the end of the supervision] he returned his copy of the paper [that I had had handed in in advance], it would be covered with pencil comments, which were only the most visible sign of the real effort which Daube had put into preparing himself for the encounter. . . . [U]nsurprisingly, I and all his [doctoral] pupils regarded [our] sessions with him as the most challenging, and hence as the defining, intellectual experience of [our] lives.⁶

⁶ 'David Daube (8.2.1909–24.2.1999)' (2001) 118 *ZSS (RA)* xiv, xlviii–xlix.

In his letters home from Oxford during that period, Alan also recounts his great excitement in working with Tony Honoré on how the Digest was compiled which led to their joint articles on that subject in the early 1970s.

Having finished his doctorate, which solved one of the great Roman law problems on the right to light, and after being a Junior Research Fellow at Balliol, Alan was elected Law Fellow at New College. But he lasted only two years before heading off for practice in Scotland. For many academics it is something of a mystery why Alan left academia when, on the face of it, he would have quickly risen to be a distinguished professor of Roman law. I think the most likely explanation lies in the facts that, first, Alan did not care for some aspects of academic life and that, secondly, he had always intended to practise law. As regards the first, I well recall him asking me, 'How do you stand those Governing Body meetings, Andy?' As for the second, Christine tells me that Alan declared at the age of 7 that when he grew up he wanted to be 'a Lord of Appeal in Ordinary'. As it turned out, of course, Alan managed to continue with his scholarship despite having a rather demanding day job.

Alan remained loyal to Oxford throughout and was a great friend of the law faculty. When Peter Birks died, a death which hit Alan very badly, and there was no one suitable to cover Peter's lectures in the advanced course on the Roman law of delict, Alan stepped into the breach. For two academic years, while a Law Lord, he would spend his Friday afternoons in Oxford lecturing to the small number of students who took that course. He was made Visitor first at St Hugh's College and later at Balliol and in 2008, in succession to Lord Bingham, he became High Steward of the University and ex officio Visitor of Linacre and Wolfson. In his role as High Steward I am told that his sound judgement, practical common sense, and approachability proved invaluable in dealing with a number of difficult issues.

What do I miss most about Alan? After Peter died, he became something of a mentor to me—and how I miss his wise advice and encouragement and the joy of talking law with him albeit that I am not a Roman lawyer. And, of course, I miss his sense of fun. I want to leave you with the very last conversation I had with him. I rang him some time after he had had the operation to try to remove the brain tumour. How cheerful he sounded. He was talking about returning to sit in October. And he finished by saying how wonderful the nursing had been. You may know that Alan was one of the few people who could actually speak Latin. He recounted this exchange to me, with great merriment. He said, 'Just before I was going to go under the knife, I said to the nurse, "Will I lose my Latin?" She replied, "I'm really sorry. I don't know. I've never been asked that question before."'

Christine and Ian, and Jinty, and David and Alan, have lost a dear and much loved brother, brother-in-law, and uncle; and our thoughts continue to be with you. Many of us here have lost an inspiring friend or colleague. The United Kingdom has lost one of its pre-eminent judges, and academia one of its greatest legal scholars. But in our deep sadness, there is much, so very much, to be thankful for.

