Obituary

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Lord Rodger of Earlsferry
18 September 1944 – 26 June 2011

To say that someone was the pre-eminent Scottish lawyer of his generation is to make a statement with which not everyone will agree, but of Alan Rodger it is true. This is because he had two outstanding careers, one academic and the other as public servant and judge.

Alan Ferguson Rodger was born in Glasgow during the final twelve months of the Second World War. Four years later, in 1948, his father, Dr Thomas Ferguson Rodger, was appointed to the new chair of Psychological Medicine at the University of Glasgow, a post which he held until 1973. Alan Rodger was educated at Kelvinside Academy, Glasgow, going on to his father’s University where he graduated MA and then LLB. He then went south to the University of Oxford to study under the great Romanist Professor David Daube, graduating with an MA (by decree) and a DPhil. His doctoral thesis was subsequently published under the title *Owners and Neighbours in Roman Law* (1972). He was Dyke Junior Research Fellow at Balliol College from 1969 to 1970 and then a Fellow of New College from 1970 to 1972. At this stage it would have naturally been assumed that he would have pursued an academic career in Roman law and go on to hold a chair in little time. While he did pursue such a career by writing learned articles of the highest quality over the next four decades, he did not become a full time academic. Instead he returned north to work in legal practice.

In 1974 Alan Rodger was admitted to the Faculty of Advocates, in other words the Scottish Bar. Only two years later he became Clerk of Faculty, a post which he held until 1979. In 1985 he became a Queen’s Counsel. He had a particular interest in medical cases, influenced by his father’s work and that of his sister, a consultant cardiologist. He was appointed as Solicitor General, the junior Scottish law officer position in the government in 1989. In 1992 he became the senior law officer and head of the prosecution service in Scotland, that is to say Lord Advocate. The post by convention then (prior to Scottish devolution) required the holder to be in the Westminster Parliament and a member of the Privy Council. Alan Rodger was given a peerage and became the Right Honourable the Lord Rodger of Earlsferry QC.

After being Lord Advocate for three years, Lord Rodger was appointed in 1995 to the High Court (criminal) and Court of Session (civil) bench. His judicial career began. He rose meteorically to become Lord Justice General and Lord President of the Court of Session (the head of the Scottish judiciary) only one year later when Lord Hope of Craighead became a House of Lords judge (Lord of Appeal in Ordinary). In 2001 Lord Rodger followed in Lord Hope’s footsteps and went to London. He remained a House of Lords judge until 2009 when the new Supreme Court of the United Kingdom was established and he became one of its first Justices. He held that position until his death.

Lord Rodger’s ongoing academic contribution during his life in practice was recognised by a number of awards and distinctions. He became a Fellow of the British Academy in 1991 and a Fellow of the Royal Society of Edinburgh in 1992. He received Honorary Doctorates from the Universities of Aberdeen, Edinburgh and Glasgow. A doctorate from Erasmus University, Rotterdam was awarded posthumously. From 2008 until his death he was High Steward of the University of Oxford. His funeral service took place in Clydebank in July 2011 and there were memorial services in Edinburgh in November 2011 and in Oxford in February 2012.

It is simply not possible to do justice to such a huge academic and judicial legacy in this appreciation. The reader is directed in the first instance to the dedicated webpage set up by
Professor Ernest Metzger of the University of Glasgow which attempts to list all Alan Rodger’s publications, as well as providing links to other obituaries and to the tributes paid in the Supreme Court. See http://www.iuscivile.com/people/earlsferry/.

Lord Rodger’s judicial decisions combine the utmost learning with the common touch and the not infrequent linguistic flourish. In Shilliday v Smith 1998 SC 725, as Lord President of the Court of Session, he helped reshape the conceptual basis of the Scots law of unjustified enrichment, moving away from a categorisation based on remedies to one which says that enrichment at another’s expense should be reversed unless justified by a legal ground. In Burnett’s Trustee v Grainger 2004 SC (HL) 19, in the House of Lords he had to decide the question of whether the holder of a delivered but unregistered disposition (deed of transfer of land) should prevail against an insolvency official who had registered his title. The traditional analysis was that there was a “race to the register” here, but that had been thrown into doubt by the recent earlier House of Lords decision in Sharp v Thomson 1997 SC (HL) 66. It had involved a floating charge and had challenged the fundamentals of Scottish property law. In a judgment which contains a superb analysis of the historical sources Lord Rodger reaffirms the traditional approach, but comments (at para 141): “For modern readers at least, the image of a race tends to conjure up a sporting contest played according to rules . . . Nothing could be more misleading. In Scots law the competition between the [insolvency official] and . . . purchaser . . . is a struggle in deadly earnest with the aim of destroying the other competitor’s chance to obtain the real right by recording the relevant deed . . . first. Those taking part in this race are no Corinthians and swear no Olympic oath of sportsmanship . . . Nice guys finish last and don’t get the real right.”

In the final years of his judicial career and life, much of Lord Rodger’s time was taken up with cases which involved human rights issues. The European Convention on Human Rights had been made directly enforceable in the United Kingdom from 2000 under the Human Rights Act 1998. Further, the Scotland Act 1998, which gave devolution to Scotland allows certain cases on criminal law eventually to get to London if they have a human rights element. Formerly, the House of Lords had no jurisdiction. In the landmark decision of Cadder v HMA [2010] UKSC 43, Lord Rodger and his colleagues in the Supreme Court allowed an appeal on the basis that the human right of an accused to a fair hearing had been breached by not having access to a lawyer prior to questioning by the police. This overturned a ruling by the High Court in Edinburgh and longstanding practice in Scotland. The decision generated much heat and the fallout continues to this day, but as a former head of the prosecution service in Scotland and former Lord Justice General, Lord Rodger was well placed to rule on the matter. In his decision he was heavily influenced by a judgment of the European Court of Human Rights in Strasbourg, which he considered to be binding on the matter. This was not the first time that he had reached this conclusion. In Secretary of State for the Home Department v AF [2009] UKHL 28 at para 98 he memorably stated: “Argentoratum locutum, iudicium finitum - Strasbourg has spoken, the case is closed.”

While the firm foundation of Lord Rodger’s academic contribution was in Roman law, he ranged considerably more widely. He was the author of the first ever article published in the Edinburgh Law Review: “Thinking about Scots Law” (1996) 1 Edinburgh Law Review 3. In it he stresses the importance of the English common law influence on Scots law, which of course is striking as it comes from someone steeped in Roman law. He co-edited the ninth and tenth editions of Gloag and Henderson’s The Law of Scotland, the Scottish equivalent of Wille’s Principles. With Professor Andrew Burrows, he co-edited Mapping the Law: Essays in Memory of Peter Birks (2006). Lord Rodger and Peter Birks had been great friends and the
former helped cover Roman law teaching at Oxford after the latter’s death. Like Peter Birks, Lord Rodger died too young. His last book was The Courts, the Church and the Constitution: Aspects of the Disruption of 1843 (2008) in which he provides a compelling account of the legal cases on the right of a lay patron to appoint a minister to a Church of Scotland parish, the result of which was the schism which led to the founding of The Free Church of Scotland. One of his last articles was on Daube, who had so greatly influenced him, and his colleague W W Buckland: “Buckland and Daube: A Cambridge Friendship” (2010) 27 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung 245. This demonstrated another great theme in Lord Rodger’s life: an interest in people.

Like his judgments, many of the statements made in his articles were eminently quotable and he rarely held back from giving his view. I take as an example his “Developing the law today: National and international influences” 2002 TSAR 1, which is a revised version of his keynote address to the annual South African banking law update conference in 2001. In it he considers the relevance of Roman and other historical sources to the modern questions of bank payments in error and the ability of a bank to adjust the interest rate on a loan at its discretion. Echoing Maitland he notes the value of such sources but states (at 11) “that, for courts, history is a good servant but a bad master”. The law requires to meet the needs of today’s society and commerce. Roman law should be used cautiously, not least because there may be translation difficulties from the Latin. (In this regard he refers to NBS Boland Bank Ltd v One Berg River Drive CC 1999 4 SA 928 (SCA) where the court referred to an English translation of D 50 17 22 1, Ulpian 28 ad Sabinum, which he demonstrates is inaccurate.) He adds later (at 16-17): “I certainly do not wish Scots law to resemble a civil-law theme park in which antiquarians can inspect the last working model of some Roman law institution.” His views on Scots law becoming a model for a future European Civil Code, expressed elsewhere, were equally uncompromising. He wrote: “From time to time it is said that Scots law has come to prominence in recent years because of the development of interest in a uniform system of private law, especially, of contract law. If so then, for me at least, the sooner it returns to its former obscurity the better . . . it is boring enough to find branches of McDonalds, the Body Shop and Benetton in every major European city without finding exactly the same law too.” (“Say not that the struggle naught availeth”: The Costs and Benefits of Mixed Legal Systems” (2003) 78 Tulane Law Review 419 at 430-431).

Lord Rodger’s academic contribution stretched beyond his research and publications to encouraging younger scholars. For example, he was a faithful teacher at the University of Aberdeen’s annual Law Summer School and acted as an external examiner in relation to doctoral theses. At a retirement dinner some years ago he asked me what I would be publishing next. I explained to him that I was working up my doctoral thesis into a monograph. Such was Alan Rodger’s interest and kindness that I decided to send him a copy of my book a few days after it was published. I was too late. He had already bought it.

We have lost much with the death of Lord Rodger, but his legacy is a great one. In words he used in his tribute to Peter Birks: “he achieved an extraordinary amount and his influence was felt all over the legal world.”

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