Alan Rodger's Writings on Roman Law

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ALAN RODGER’S WRITINGS ON ROMAN LAW

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This is an introduction to the bibliography that follows. It describes briefly the character of Alan Rodger’s work in Roman law and the subjects of his research. The treatment here is very general; a great deal awaits to be written.

Rodger’s work owed a good deal to the influence of his teacher at Oxford, David Daube, whom he took several occasions to remember in print.1 Rodger in fact greatly improved the character of scholarship his teacher introduced to Britain.2 John Kelly once heard a German colleague describe the romanist scholarship practised by English speakers as elegante Jurisprudenz; Kelly understood this to be directed mainly at Daube, and to describe a taste for adding to one’s scholarship ‘a dimension of human interest and excitement’.3

This cannot be done without employing the historical imagination, and the use of the imagination, admittedly, tends to be more enjoyable than the severe and solid brand of juristic archaeology — identifying strata, fitting together scattered fragments, deciding on criteria (which themselves are controversial) whether a particular relic

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really belongs to the era in which it is found, or got there much later because the site was disturbed. . . . The truth is that both methods are fruitful and each is nourished by the other.4

But Kelly has misunderstood Daube’s work. Daube never neglected ‘juristic archaeology’; it would have been unthinkable for a pupil of Otto Lenel to do so. Rodger himself points out, in what reads like a reply to Kelly, that Daube entertained the reader, but not at the expense of traditional, palingenetic research.5

What made Daube different was his attention to the execution of a text. A text has part of its history in its writer’s mind, and Daube tried to discover that history. To succeed required sensitivity to the traits of the individual writer (a trend in scholarship contemporary with Daube) but also to the writer’s choice of words in a single context. If that choice of words were unique or unusual, Daube would construct a learned and imaginative proof, showing why the words were chosen. ‘[Y]ou have to ask yourself why’, Rodger says, describing his teacher’s method.6 It is a difficult exercise, because one is not explaining the formulae of juristic speech with the aid of similar texts, but the natural language of a particular jurist, of a particular time, in the context of a particular legal problem.

This is where Rodger surpassed his teacher. To take the obvious point first: he was committed to proving every argument. He never simply announced his impressions or asked the reader to trust his instincts. He allowed his imagination to play only long enough to bring the solution into view; it was then a matter of proving the hypothesis with evidence. But where Rodger was evidently the master was in his understanding of the law and of the characteristic ways in which the Roman jurists chose to express it. He appreciated that the jurists did not simply ‘write rules’ but gave away

4 Id.
5 A. Rodger, TRG, 75 (2007), 95 (reviewing C. Carmichael, Ideas and the Man: Remembering David Daube (2004)). See also ‘David Daube (8. 2. 1909 – 24. 2. 1999)’ (note 1), xlii, for Daube’s dedication to traditional palingenetic research.
6 Rodger, ‘Law for All Times’ (note 1), 12.
their opinions in less obvious ways. Locating those opinions in the subtleties of a jurist’s manner of expression was his extraordinary talent. For example:

D.5.3.27 pr. (Ulpian 15 ad ed.). Ancillarum etiam partus et partuum partus, quamquam fructus esse non existimatur, quia non temere ancillae eius rei causa comparantur et pariant, augent tamen hereditatem.

Although the offspring of a slave woman and the offspring of those offspring are not considered to be fruits, nevertheless, because, not without reason, slave women are acquired for the purpose of bearing offspring, the offspring increase the estate.

It is Ulpian’s utter lack of apology in non temere (‘not without reason’) that gives away the syntax of the passage and ultimately Ulpian’s meaning: people acquire female slaves for breeding, and therefore obviously they increase the hereditas.7 Another example:

D.19.5.23 (Alfenus 3 dig. a Paulo epit.). Duo secundum Tiberim cum ambularent, alter eorum ei qui secum ambulabat rogatus anulum ostendit et respiceret: illi excidit anulus et in Tiberim devolutus est. Respondit posse agi cum eo in factum actione.

When two men were walking beside the Tiber, one of them when asked showed a ring to him (ei) who was walking with him (secum) so that he might look at it: the ring fell from him (illi) and rolled into the Tiber. He replied that it was possible for an action in factum to be brought against him (eo).

Alfenus’ careful choice of excidit (‘fell’) is an effort to expunge any notion of fault from the text, and this is the key to the text’s origins in the law of mandate.8 Another example, exceptionally good:

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8 A. Rodger, ‘Mrs. Donoghue and Alfenus Varus’, Current Legal Problems, 41 (1988), 12. The translation is by Rodger, trying to be as literal as possible to make his point.
Gaius, *Institutes* 3.212. Item si ex gemellis vel ex comoedis vel ex symphoniacis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius id quoque computatur quod ceteri, qui supersunt, depretiati sunt.

Likewise, if one of a pair of twins or of a group of actors or musicians is killed, not only is a valuation made of the one who was killed, but, more than that, the fact that those who have survived have been reduced in value is also taken into the reckoning.

This well-known text on the *lex Aquilia* speaks of damages beyond the value of the *occisus*. Gaius appears to be saying that one includes the extent of loss in the property left behind (as indeed Justinian, *Institutes* 4.3.10, puts it: *id quoque computatur, quanto depretiati sunt qui supersunt*). Yet Gaius’ careful *id* . . . *quod* construction suggests, not that the amount of the reduction in value is invariably the proper measure, but that the fact of the reduction is included in some manner in the final reckoning. Reductions in value, after all, can be subtle: a twin is irreplaceable, while an actor or a horse is much more easily replaced.9

These are examples where Rodger sought to uncover a jurist’s meaning from his manner of expression. Naturally the same sensitivity to expression could be applied to the condition of the text. In a 1998 address he said:10

The crucial point is that all these materials on ancient Roman law — even Gaius — are incomplete. Those who want to build up a picture of the system and its history must therefore scrutinise the pieces of text which we have in order to try to deduce from them things which they do not tell us directly. For this purpose modern scholars have devised a variety of techniques, but common to them all is that they depend to a large extent on studying not only what the text says but how it says it. For these purposes,


for example, the order in which items occur in a text may be a clue as to their relative dating, while any disruption in the grammatical structure of the text may indicate that the text was altered at the point where the disruption occurs. In such studies inconsistencies and grammatical infelicities are to be welcomed as clues, rather than to be deplored as signs of slipshod work.

Earlier generations had developed an understanding of how the texts of the Digest ought to be expressed, with famously controversial results. The conservatism that followed — more accepting of the Digest as transmitted — will have been irksome to Rodger who, skilled in seeing what a jurist was thinking, was necessarily also skilled in seeing where the jurist’s thoughts had been corrupted. An unconservative but meticulous approach to interpolations is a distinct feature of romanist scholarship in Britain;¹¹ one recalls that Rodger’s teacher, no fan of mechanical interpretation, was exceptionally respectful of Beseler.¹² Rodger himself customarily noted interpolations in the course of correcting and improving Lênèl’s Palingenesia; indeed Rodger often used the Palingenesia as a framework for discussing together expression, interpolation, transmission, law and legal development. A great many of his publications contained palingenetic studies.¹³ A favour-

ite sport was to locate a short and mysterious text. One readily appreciates the skill needed to do this well.

Rodger’s approach to Roman law showed the best qualities of a common law judge: he located problems and solved them without wasted words; he stopped before he said too much; and he occasionally cited outlandish views, otherwise ignored, simply to point out how very wrong they were. In the first part of his career he collaborated with Tony Honoré on a series of articles discussing how the Digest committees read and extracted texts. He also wrote a good deal on interdicts and servitudes, always with a special affection for the servitude altius non tollendi and the actio aquae pluviae arcendae. He then turned to the study of inscriptions, especially the lex Irnitana. For a scholar who had devoted
so much attention to the writings of individual jurists, this was an opportunity to consider a very different kind of text. A statute is prepared by several hands; it is more attentive to forensic realities; there are lacunae to be filled, engravers' errors to be ignored, juristic texts to be reconciled (or not). As a lawyer and judge Rodger was the perfect scholar to take this on, not because modern statutes are like ancient ones, but because he knew that statutes are special and require to be read differently from juristic texts. When corrections to a critical edition of the *lex Irnitana* were published in 2008, the editor wrote: 'Most of the corrections are due to the sharp eye of Alan Rodger.'

Rodger also wrote regularly on certain matters of private law — for example sale and succession — but throughout his career he gave special attention to the *lex Aquilia* and contributed a great deal to its literature. It happens that the *lex Aquilia* was also a favourite subject of Rodger's great

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18 See e.g. Rodger, ‘Jurisdictional Limits in the Lex Irnitana and the lex de Gallia Cisalpina’ (note 17), 189–94 (lawsuits whose subject matter is craftily divided in order to evade the limitations on the amount in controversy).

19 Rodger discusses, in broad terms, the reading of ancient legislation in ‘The Form and Language of Legislation’ (note 10), 619–24.


friend Peter Birks, who died in 2004. After Birks’s death Rodger conducted seminars on the *lex Aquilia* at the University of Oxford, and this led to a redoubled engagement with the subject and two lengthy treatments. Readers will know that this is a subject on which Rodger and Birks disagreed a good deal, and with their early deaths two very different books have been lost, along with the great profit we might have taken from comparing them.

On several occasions Rodger wrote more broadly on the civilian tradition, often expressing his uneasiness with the uses of Roman law in modern jurisprudence. As a Scots jurist, Rodger had every opportunity to embellish his judicial opinions with Roman authority. But that is exactly the sort of thing he despised. Roman authority could occasionally be cited to support a Scottish decision, but the abundance of native authority would usually make it unnecessary. [Scottish] 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 ago. Even where a judge might properly use Roman authority, the difficulty of the source material was an obstacle, and Rodger expressed the hope — without expecting much — that the judge would use modern scholarship to help his understanding. Rodger certainly had no aspiration to make Scots law more Roman, and if there was any virtue in

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24 Rodger, ‘What did Damnum Iniuria Actually Mean?’ (note 23); ‘The Palingenesia of the Commentaries Relating to the Lex Aquilia’ (note 13).
its being a mixed system, it lay in the ability to draw the best from several traditions.\textsuperscript{29}

Rodger himself carefully avoided Roman law in a decision where many thought it belonged: \textit{McDyer v. The Celtic Football and Athletic Club}.\textsuperscript{30} A man was injured by a piece of falling wood in a football stadium and sued (among others) the stadium’s lessee, which had erected the temporary structure from which the wood had fallen. Among other claims the pursuer argued that the defender was liable without fault under (rather loosely) the two Roman edicts giving respectively the actions \textit{de effusis et deiectis} and \textit{de posito et suspenso}. But are these actions part of Scots law? There is certainly authority that the first of these is part of Scots law: many years ago Peter Stein argued to that effect, citing Bankton, \textit{Institute} 1.4.\textsuperscript{31} But Rodger, in \textit{McDyer}, rather than commending Bankton’s reading of Scots law, instead commended Stein’s reading of Bankton. This cleverly avoided the issue of reception.\textsuperscript{32} And on deciding that neither of the Roman actions would be granted to a person \textit{within} a stadium, Rodger rendered the entirety of the Roman law discussion \textit{obiter}. Any reader who knew Rodger’s background will notice straight away that nothing in the opinion reveals its author as an expert in Roman law. This is Rodger very deliberately showing the reader how any able judge should deal with Roman authority.

Rodger was not attracted by discussions of Britain and Europe and their Roman law heritage. Indeed the more broad the discussion, the less likely that he would take part — except as a critic of the discussion itself. From his writings it appears he preferred the slow and careful improvements of

\textsuperscript{29} Rodger, “Say Not the Struggle Naught Availeth” (note 25).
\textsuperscript{30} 2000 S.C. 379.
\textsuperscript{32} I would therefore disagree with Wallinga that the \textit{McDyer} court accepted the actio \textit{de effusis et dejectis} as received into Scots law on the authority of Bankton. T. Wallinga, ‘Effusa vel dejecta in Rome and Glasgow’, in \textit{Edin. L.R.}, 6 (2002), 121–22. See A. Rodger, ‘Developing the Law Today: National and International Influences’, \textit{J. South African Law}, (2002), 12–13: ‘We were invited to consider the Roman law texts on the provision in the praetor’s edict dealing with things which fell from buildings. In the end we were able to distinguish them.’
the common law, with the aid of acute, but not overly ambitious, academic lawyers. So he treated these discussions as would a judge who is pressed to reform the law, and as a judge he would not be swayed by arguments based on the purity of the law or some idealised version of it, by sentimental evocations of a golden past, or by appeals to harmonisation or warnings against the collisions of different traditions. His position on each of these is defensible, though some will regret his reluctance to see them as fit subjects for academic discussion.

In 2001 the family of David Daube donated a collection of academic papers and books to the University of Aberdeen. The papers included a large amount of correspondence between Daube and Buckland during Daube’s time in Cambridge. This correspondence was the subject of Rodger’s last article on Roman law. Rodger expressed the hope that the correspondence would soon be published.

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33 See Rodger, ‘The Use of the Civil Law in Scottish Courts’ (note 25), 231: ‘Nor indeed should we yearn to make Scots law into some kind of civil law theme park in which visitors can inspect the last working model of an *actio communi dividundo*.’ See also id., 236; “Say Not the Struggle Naught Availeth” (note 25), 423, 426; ‘Thinking about Scots Law’ (note 25), 7–9; ‘Developing the Law Today’ (note 32), 16–17.


35 See Rodger, ‘Roman Law in Practice in Britain’ (note 25), 261–63; “Say Not the Struggle Naught Availeth” (note 25), 430–33; “Only Connect” (note 25), 169–70.

36 ‘Buckland and Daube: A Cambridge Friendship’ (note 1).

37 Id., 245 n.2