

Law for All Times

The Work and Contribution of David Daube

Lord Rodger of Earlsferry

The First CMS Cameron McKenna Lecture, given at King's College, University of Aberdeen, on November 2, 2001.

Introduction:

Professor Paul Beaumont, Head, University of Aberdeen School of Law

Chair:

Lord Hope of Craighead, Lord of Appeal in Ordinary, House of Lords, London

Speaker:

Lord Rodger of Earlsferry, Lord of Appeal in Ordinary, House of Lords, London

Professor Beaumont welcomed all attending. He announced the first in a series of lectures sponsored by CMS Cameron McKenna. He thanked Mr. Alexander Green, a partner in the Aberdeen office of that firm, for his help and support for the event, and Professor David Carey Miller, Professor of Property Law in the University of Aberdeen, for his considerable time and effort. The School of Law, he said, was honored to welcome the two Scottish law lords.

Lord Hope of Craighead

Well, ladies and gentlemen, life is full of surprises. When I was invited to chair this lecture I was told that the lecturer was to be the Lord President. The Lord President has moved on; we now

have Alan Rodger, who was the Lord President, as a Lord of Appeal in Ordinary, and there is as yet no Lord President to take his place. So there we are.

This evening we have brought together two of the most respected names in the field of Roman law: those of the master, Professor David Daube, and of his disciple, Lord Rodger of Earlsferry. As you will all know, Professor Daube was Professor of Jurisprudence here from 1951 to 1955.* He then became Regius Professor of Civil Law at Oxford University in 1955. As it happens Alan Rodger, if my arithmetic is correct, was then aged eleven. But it was not long before he too found his way to Oxford, came under David Daube's spell, and was inspired by his personality and scholarship.

Now, those who know something about the University of Aberdeen will appreciate that the study of Roman law here in the modern era owes everything to David Daube. Those who knew him, and one of those was Professor Sir Thomas Smith (whose tribute to him is in *Studies Critical and Comparative*), will understand that there is a lasting memorial to him in the library, because a very large benefaction of civil and canon law works was received here, amounting to some 1,500 volumes, the majority from continental Europe and a priceless resource to the University. I'm quite sure that they came here because of the immense reputation which he had created for that kind of scholarship in this city. But it is not really for me to dwell on David Daube's work and his contribution, as that after all is the subject of Lord Rodger's Lecture.

As for Lord Rodger, his progress from Oxford to the Court of Session, where he was Lord President until just a few weeks ago before moving south again, is well known to all of you. But, as has just been said, it's not just as a pupil of David Daube and as a distinguished judge that we welcome him here this evening. He too has attained the highest level of scholarship, and it shines through his judgments. Who better than he, to say as he did, in the well known case of *Shilliday v. Smith* in 1998, that "Discussions of unjust enrichment are bedevilled by language which is often almost impenetrable." And we can be sure, when he refers to other scholars who have pondered over what is meant by these words, that he too was in their company. And who else but he, in *Gibbs v. Ruxton*, would welcome the citation of Roman law as a "welcome balm" after several hours immersed in the technicalities

* See note.

of statutory construction. I am quite sure that David Daube would have much appreciated the discussion in *McDyer v. The Celtic Football and Athletic Co.*, where Alan Rodger discusses the edicts *de his qui deiecerint vel effuderint* and *ne quis in suggrunda* in the context of an accident which befell a spectator at Celtic Park, who happened to be hit on the hand by a piece of wood falling from the canopy of the stadium. Now these are just a few of the gems which those who read through Alan's writings will find. I give them only as examples, to make the point that nobody is better placed to tell us about David Daube and his contribution to legal scholarship than Alan Rodger himself.

Lord Rodger of Earlsferry

Thank you David, for your words of introduction and for all that you have done to make this evening a success.

As you know, I have been asked this evening to give the first of these, what is intended to be a series of lectures, and to give a talk about David Daube. In the audience — and I wrote this before I had seen the audience, but it is more true now that I see it — in the audience, there are many, and not least his family, who know a great deal about David Daube, indeed in some cases far more than I ever could. But there are others for whom he is perhaps largely just a name, a distinguished name, but really a name more than anything else. So I intend this evening to start by saying something about his life. I shall then discuss some aspects of his work, and for a general audience of this kind it would not be sensible to discuss in detail the technicalities of his work on Roman law. What I intend to do instead is to indicate why I believe that his work should be studied, not merely by historians of ancient law but indeed by anyone who is interested in law, whether as an academic discipline or in practice.

David Daube was born in 1909 in Freiburg-im-Breisgau in Baden, his beloved Baden, and died just after his ninetieth birthday in 1999 in Pleasant Hill in California. He was the younger son of a prosperous Freiburg wine merchant, Jakob Daube, and his wife Selma Ascher, who came from Bavaria. The family were observant orthodox Jews. David went to school at the Berthold-Gymnasium in Freiburg, where he studied classics. He was taught Hebrew and Aramaic privately by a rabbi.

In 1927 he left school and went on to study law at Freiburg. In 1931 he passed his *Referendarexamen* and went to study for a doctorate in Göttingen, where Kunkel was the Professor of Roman law. Among his teachers there was Johannes Hempel in biblical law. In February 1932, Daube passed the oral examination for his

doctorate with a thesis on "Blood-law in the Old Testament." And he passed *summa cum laude* — a quite exceptional grade, as he always liked to point out, awarded only once before. But the doctorate was not to be conferred until January 1961, since in January 1933 Hitler came to power. It then became impossible for Daube's thesis to be published and, of course, in effect all hopes of an academic career were extinguished for him as a Jew in Nazi Germany. And a few months later in 1933 he decided to leave Germany for Britain. Whether he thought that would be for good, of course we don't know. But armed with a marvellous recommendation from Otto Lenel, describing Daube's departure as the loss of a great prospect for German learning, armed with that letter to Professor Jolowicz in London, David arrived here in the summer of 1933.

Jolowicz advised him to go to Buckland in Cambridge, which he did. To begin with, Daube's English was unequal to conversation and the two men spoke together in French. But they quickly formed a remarkably close bond. Photographs and portraits of Buckland that we have make him look as many men of that era look, rather formal. But it is obvious from all we read about him and hear about him that he was a warm-hearted man who, with his daughter Maidie Heigham, did much to help young Jewish scholars in Cambridge at that time. And above all to help David Daube.

Daube became a member of Caius College and set to work on his Ph.D. He submitted his thesis, written half in German and half in English, on "Formalism and progress in the early Roman law of delict." It was completed in June 1935 and he was duly awarded his Ph.D. Even more importantly, in the summer of the same year he became a Senior Research Fellow of the college, and a few years later he became the Unofficial Tapp Fellow, also in Caius College, a position which, with various extensions, he held until the end of the War.

In 1936 he returned to Germany and married Herta Aufseesser in Munich. The couple had met the previous year when she came to an English-language course in Cambridge. They set up home in Cambridge and the following year their first child, Jonathan, was born. In November 1938, in the purges after *Kristallnacht*, Daube's father and father-in-law were rounded up and taken to Dachau. In an astonishingly short time, Daube was able to make the necessary complex financial and other arrangements for both families to come to Britain. In these arrangements he had the help of Buckland and of John Cameron, the President of the College, people to whom he felt, as a result, an undying

bond of gratitude. A young colleague, Philip Grierson, flew to Germany and negotiated the release of the two men. Shortly after, the families (including Daube's much loved brother Benni, who had suffered from tuberculosis) left Germany and settled in Britain, Daube's parents in London, Herta's parents with the Daubes in Cambridge. There is no doubt whatever, and the families always recognized this, that by his speedy actions David saved the lives of both these families.

During the War he continued to work in Cambridge, except for a short period while, along with many other German and Italian refugees, he was interned on the Isle of Man. During the War, also, he was invited to join C. H. Dodd's seminar on the New Testament in Cambridge, and that was a moment of the greatest significance, since it marked the start of his hugely important work on the rabbinic background to the New Testament. Indeed, to judge by his publications, much of his research at this period was on the New Testament and on Jewish law. He continued, of course, to teach Roman law, holding supervisions in his study at home, where indeed he did most of his work, very much in the manner of a Continental professor. Among his pupils was a formidable duo of the future, Professor Sir William Wade, and the future Governor of the Bank of England, Lord Richardson. Interestingly enough, Daube declined all attempts to make him teach modern law.

He remained in Cambridge until 1950 when he was invited to take up, as David has already said, the newly created Chair of Jurisprudence in Aberdeen. He always recalled his time here with the greatest affection, and it is clear from contemporary accounts that his teaching was eminently successful, his witticisms being particularly appreciated by the students. Besides the routine general lectures, he taught a smaller advanced class, and a transcript of some of these lectures to that class, on the law of sale, has long been a treasured possession of most British romanists. It shows him in absolutely sparkling form. His period here in Aberdeen however was short. Unexpectedly in 1954 Jolowicz died and Daube succeeded him as Regius Professor in Oxford, where he remained until leaving for California in 1970.

During his time in Oxford he was again an outstanding teacher, his lectures achieving something of a cult status. In addition, he gave leadership to a band of scholars who were interested in Roman law, including Barry Nicholas, Tony Honoré, Alan Watson, and a number of others. He also continued with his series of doctoral pupils which had begun earlier with Peter Stein:

Reuven Yaron, Calum Carmichael, Alan Watson, Bernard Jackson and I all worked with him during this time.

To begin with he enjoyed life in Oxford but by the mid-1960s his marriage had broken down and he became increasingly attracted by the opportunities in California, where he also had formed a relationship with Helen Smelser, who lived in San Francisco. He would travel backwards and forwards over a number of years, but in 1970 he accepted the offer from Berkeley to become the Director of the Robbins Hebraic and Roman Law Collection, and so he moved to California where he was to live for the rest of his life.

In Berkeley he continued to teach with great success and to write, mostly on biblical law and on the New Testament. He worked rather less on Roman law. He did all his work in a tiny little room in the stacks in the library crammed with books and with hardly space left on his desk on which to write, so covered and strewn with papers was it. More generally, he adopted what he regarded as a less formal lifestyle. He abandoned the practice of orthodox Judaism and stopped wearing a tie, but continued invariably to wear a suit. He found considerable personal happiness with Helen and enjoyed the mild climate, which meant that his trademark, chronic asthma, no longer really troubled him. In this way the decades passed until eventually he became too unwell to work and had to go into a nursing home. But happily, flashes of his old spirit remained until the end.

That mere outline of the externals of David's life tells us little about what made him so remarkable. Different aspects would strike different people of course, but no one, I think, could fail to be struck by his quite outstanding intelligence. He was, quite simply, unbelievably clever. His intelligence showed itself not least in his sparkling, mischievous eyes. In addition, contrary to what he would like us to believe, he had not wasted his youth. His knowledge of ancient languages and of their literature was staggering. He had read and remembered the great classical authors in German, English, French, and Russian, for example. But he interested himself in all kinds of subjects. He was a great friend of another fellow of All Souls, the geneticist Sir Edmund Ford, and this meant he became well informed about genetics and would speculate endlessly on the importance of genetic factors in history, not least in the history of the Jewish people. His mind was, in effect, a treasure house of information on all kinds of subjects. But it was the use which he made of the information that made him so remarkable. He could see connections between various situations and underlying patterns which would escape the

notice of almost anyone else. So the problem of some colleague might make him call to mind a dilemma that had faced Winston Churchill during the War or, equally probably, the dilemma of a hero in Greek tragedy or in a Russian novel. You simply could never tell. The effect was that he was able to put particular situations into a much wider framework and so to give the commonplace a much greater significance. And that, in a way, is the first of the reasons why I consider his work to be important for those who are concerned with law today.

It is, as we all know, extremely difficult for those engaged in law, day in and day out, whether as academics or as practitioners, to raise their eyes from particular everyday problems and to see what they are doing as part of a larger pattern. But that is precisely what Daube helps us to do.

Since we are here in Aberdeen, it is appropriate to take as an example — one of many — the inaugural lecture which he delivered fifty years ago this year, on the Scales of Justice. Surely, no symbol is more familiar to us, yet how little we ever think about it, about what that symbol implies, about the nature of justice which it portrays. We think of little except the idea of keeping a fair balance. But, of course, David had thought deeply about it. He points out that the model of justice which it portrays is a very particular one, and one which is by no means the only possible model. Nor is the symbol universal. For instance he points out that, although the symbol of the scales can be traced back to ancient Greece, it formed no part of Roman thinking or iconography until a late period. The system which the scales portray has dramatic and harsh outcomes; it is one where people either win or lose everything. One side or the other of the scales goes down. Moreover since the scales remain in balance only when each of the sides is exactly even, one side may win or lose everything by the very smallest margin.

It is the image, of course, which anyone in practice associates with a civil court case. If the pursuer satisfies the judge to 51% that his version of the facts is correct, then he wins and gets his damages. If on the other hand he reaches only 49%, he loses and gets nothing. Indeed under our system, worse still, he has to pay his opponent's expenses. Indeed in our system the pursuer loses if the scales remain balanced at 50% because the onus of proof has not been discharged. It is a winner-takes-all system.

But Daube's lecture prompts us to enquire whether that really is the model of our legal system today. In criminal law he points out, in Scotland, despite the technical position, the not proven verdict is a way by which the jury tries to avoid, or may

try to avoid, making the crude choice between guilty or not guilty — between a pure win and a pure loss. Other systems do not permit this. In our civil law, as he also pointed out, the Law Reform (Contributory Negligence) Act 1945 changed the old system, by which any contributory negligence was enough to defeat the pursuer and hand total victory to the defender. Now the court apportioned blame and with it damages. I also notice the court's statutory power to apportion liability among the defenders, which has a somewhat similar effect.* These measures suggest that the traditional model of justice is changing.

In recent years the courts and tribunals have increasingly had to wrestle with problems of future loss. There, they seem to have abandoned the old idea that a pursuer had to prove everything on the balance of probabilities. The point came very much to the fore in a series of cases before the employment tribunals a few years ago, brought by servicewomen who had been wrongly made to resign when they became pregnant. When compensation was being assessed by the tribunals, counsel for the Ministry of Defence argued that even if the servicewomen had not resigned with their first pregnancy, they would probably have resigned with their second child. Or else they were not particularly good at their job; they would not have been kept on anyway. Or they would have resigned to follow their husband to a job overseas. There were endless contingencies which the Ministry could conjure up and which would have made it extremely difficult for the servicewomen to prove their claim on a balance of probabilities. So what in practice happened was that the tribunals assessed what chance there was that the particular servicewoman would have continued in her career, and they based her compensation on that. So if there was only a 30% chance, the servicewoman would get 30% of her projected future earnings; if 60%, she would get 60% — not all of it, 60% — of those earnings. So in some respects the servicewoman's task was easier, in others more difficult. The same kinds of issues arise in cases involving damages for the loss of the hope value of development land. And again we can see that we are moving a long way from the simple kind of justice exemplified by the image of the scales.

Similarly, a court which under the Woolf Reforms chases certain of the litigants away and tells them to settle their dispute is quite different from the model of justice which the scales represent. Adjudications and arbitrations also do not follow that

* See note.

model, and yet adjudications at least are popular with contractors and others who clearly think that the cost of justice in the balanced model can be too high.

So Daube's exploration of the familiar symbol of the scales of justice prompts us to take an overall view of these quite scattered developments and makes us ask first, whether there is any considered idea of how our system of justice should operate and secondly, if so, what is that idea and to what extent is it being followed through consistently.

I do not pause even to try to answer these questions but turn instead to what is surely the hallmark of all David's scholarly work, his treatment of texts. Virtually all of that work revolves around the detailed and sensitive analysis of the language and style of texts, whether they be legal, biblical, rabbinical, or literary. Daube was not a lawyer in any ordinary sense. He never read the law reports and I am confident that it would never have occurred to him to visit a court or to consort with judges. His fascination was with texts, with any text, with what that text could tell us if properly interpreted. Very often, the texts would reveal to him far more than merely appeared on the surface. In Roman law Daube developed his skills under the influence of Otto Lenel, whom Daube simply worshipped: his photograph stood at his bedside. And he was right to idolize him, for it was by the most meticulous analysis of the texts in the *Digest* that Lenel had been able to reconstruct the Praetor's Edict, containing the edicts and actions which lay at the heart of classical Roman law. He did it by a kind of back engineering. He looked at the excerpts from the commentaries, which the great classical jurists had written on the Edict, and in that way he worked out the text of the provisions on which they had been commenting. It was, quite simply, a stupendous work of genius and it changed for ever the study of Roman law. Thanks to Otto Lenel we can actually understand the *Digest* texts in a way that no one could before he wrote, and any serious work on Roman law has to start from there.

Not only did Daube admire this gigantic achievement but, of course, he 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, the additions by later writers) was also a vital part of the enterprise. These among many other features are to be found in Daube's discussion of texts of all kinds.

Lawyers, both academic and practicing, have to spend a very great deal of their time analysing texts. Indeed, apart from those

appearing in criminal courts, it is likely that most lawyers spend most of their time and earn most of their money reading and analysing texts in the form of statutes, contracts and statements of all kinds. Yet we get remarkably little actual training as to how this is to be done. Of course, one learns a number of rather dry and unhelpful rules of statutory construction: the Mischief Rule, the Golden Rule, rules which used to have Latin names such as *eiusdem generis* or *expressio unius*. (What they are now to be called in the Latin-free courts of England, I am not sure. I was amused this week to see one of my colleagues in the House of Lords obviously wondering whether the ban on Latin meant that we were really meant to devise some new expression for *eiusdem generis*.) But what we do not seem to be taught is a kind of disciplined examination of texts. In Germany, the traditional form was the *Digestenexegese*, but we have no similar tradition here.

Yet Daube's work provides endless models of how we should proceed. For it matters little whether the text is a statute, a *Digest* text or a line of Ovid or Homer. In all cases the crucial thing for Daube is to notice 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? These are the kinds of issues which regularly present themselves, or should present themselves, when a reader is trying to understand a modern text just as much as an ancient text.

I was acutely conscious of Daube looking over my shoulders a few years ago when the High Court had to construe section 28 of the Misuse of Drugs Act, which deals with the defenses available to someone found in possession of drugs. In broad terms the accused could say that, although he actually had possession of the drugs, he had not been aware of it because they were in a sealed container, in a parcel or something. In one case they said they were assuming that they were carrying a package of pornographic videos. But by a peculiar process, the courts had quite deliberately come to ignore subsection (2) of section 28 and treated the section as if the whole defense was contained in subsection (3). As a result you had a situation where counsel and judges coughed quickly and jumped over subsection (2) in the apparent belief that it was either meaningless or that it gave an outrageous advantage to the Crown.

There is no reason or possibility of going into the details this evening. But when counsel was addressing the Court on these

provisions, I kept on hearing Daube's voice, an echo of supervisions in *All Souls*, saying "but why did Parliament use the words 'substance or product' in subsection (3) — words which had never been discussed in any of the cases? Why these exact words, rather than, say, more general words such as 'article'?" And on further consideration it turned out that the use of these words, when properly understood, was the key which unlocked not only that subsection but the preceding subsection which, when brought back into the light and duly inspected, turned out to be entirely sensible and helpful to the defense. That is simply an example of the value of the close reading of the kind which Daube constantly practiced and which he encouraged others to practice.

But some of his more particular insights are equally applicable to practice and again I can illustrate it from a case in the Criminal Appeal Court, this time from earlier this year. The case involved Kim Galbraith, who had been convicted of murdering her husband. She appealed and her appeal was allowed and a re-trial ordered. And since the case is not completed, I say no more about the facts except that her appeal was taken on the basis that the judge at her trial had misdirected the jury on the doctrine of diminished responsibility. Putting the matter broadly, this rule — of course, as many of you will know — allows the jury to convict the accused of culpable homicide rather than of murder if they are satisfied that due to her mental condition, her responsibility for her actions was diminished, that is, less than that of an ordinary person. The doctrine seems to have emerged for the first time in Scots law here in Aberdeen, in directions given by the very stern Lord Deas in the case of *Dingwall* in 1867. In the *Galbraith* case there was no possible criticism of the judge's directions as an exposition of the existing law — they were in effect the standard directions. The criticism, rather, was that the leading decisions on diminished responsibility were themselves unsatisfactory. Particularly, it was said, a much-quoted passage in the case of *Savage* in 1923 misrepresented the law as it had developed over the years since 1867. And to make good her argument, counsel for the appellant took the Court through the cases from 1867 right on down to the 1990s. And as she did so, two things in particular struck me.

First, although supposedly the cases were all dealing with the same rule, the judges explained and justified their directions to the jury in completely different ways. Secondly, as was to be seen on closer examination, no judge used the term "diminished responsibility" in the reported cases until 1933 and, even then, it was only to refer to the terms of a plea in the court below, the

judge himself preferring to use a different phrase. The term "diminished responsibility" became firmly established only from about 1946 onwards.

The reason why I looked at the terminology so carefully was, of course, that I had firmly in mind the various books and articles in which David made the point that the emergence of a noun or a noun phrase describing a particular rule is a significant step in the development of the law, since it marks the point when a doctrine comes to be recognized in a legal system.

So he would make the point that the Roman jurists did not themselves coin the technical terms *accessio* or *specificatio*, and therefore one should not expect to find a coherent doctrine applying to all these cases of cups with new handles and the making of mead from A's wine and B's honey, which are all too often trotted out as if they were the summit of Roman legal thinking. Similarly, the fact that *perceptio* was not found in the *Digest* to describe the rule by which a usufructuary acquired ownership only of those fruits which he gathered suggested to Daube that the rule itself had not been worked out by the classical jurists.

In just the same way, the history of the terminology of "diminished responsibility" in Scots law was instructive. The fact that the terminology remained completely unstable until after the Second World War was a clear signal that during the earlier period we should not expect to find a coherent doctrine. And, of course, the more we looked at the cases, the clearer it became that there had indeed been no coherent doctrine. There was simply a series of cases with little more in common than that the jury had been told that they could return a verdict of culpable homicide because of some feature of the accused's state of mind, short of insanity. And indeed, even after 1946, the judges had carefully avoided spelling out the doctrine in any kind of detail. It was left to the court in *Galbraith* to try to repair that omission.

What matters tonight is that I can attest that Daube's work on the development of terminology had the greatest possible influence on me when I was working on the case, but since I was writing the opinion of the Court, and the other members had not read Daube's work, I did not feel able to refer to it in that joint opinion. I therefore particularly welcome this opportunity to acknowledge publicly my debt to that work and, of course, at the same time to his teaching, and also to point out that, far from being of purely academic interest, insights of this kind into how you should read texts are of the greatest practical importance for lawyers of all kinds.

Time does not permit us to examine other similar examples where Daube's approach to subtleties of language would assist practitioners and courts. An obvious example is the recent case in the House of Lords in *Uratemp Ventures Ltd. v. Collins*, where Lord Steyn and Lord Millett had to consider, with the help of the Central London Yellow Pages, the Prayer Book, Milton and *The Mikado*, what is meant by a "dwelling house" and whether you can be living in a "dwelling house" even if you have no cooking facilities and order in all your meals from the local take-away.

Instead of exploring that, I must conclude with another point. Daube showed time and again how a careful study of the text can be particularly revealing about some underlying attitude of the author. The scholars of ancient texts have more incentive to engage in this kind of work perhaps, since they have a finite body of material on which to work. They also have very little concrete information about the authors. By contrast, scholars of modern law have a vast and ever-expanding body of materials to look at. They turn on their computers and they can always find a new case from Scotland, England, Australia, the United States. Their complaint is of information overload: they have too many sources. It is as if the Spanish metal detectors were uncovering bronze plates with a new clause of the Praetor's Edict every day of the week. Perhaps for that reason, scholars of modern law do not scrutinize the available materials with the same degree of minute care as romanists spend on the finite body of material which they have to study. There is no magic about ancient sources that makes them peculiarly suitable for the kind of attention to style of language which Daube taught us. On the contrary, he applied it to texts of all periods and so should we.

In previous lectures I have tried to suggest how certain of his insights can tell us much about modern British statutes and judgments.* I do not go over the same material this evening. Instead I underscore the point by looking briefly at two examples.

In the case of *Carmichael v. Carmichael* in 1920, the House of Lords had to consider third-party rights in contract. In particular, the point was whether a provision in favor of a third party was automatically irrevocable or whether, rather, the third party only had a right under the contract if the provision in his favor was made irrevocable in some particular way. So supposing A and B agree that A will pay C £1,000, are A and B prevented from cancelling the agreement? Or does it only become irrevocable if,

* See note.

say, they inform C of the intention to make the payment to him? In a relevant passage in Stair's *Institutions* which dealt with the matter, Stair seemed to favor the first version, that is, that such provisions in favor of third parties were always irrevocable, whereas later authorities in Scots law supported the second version.

When the case came to the House of Lords, Lord Dunedin was faced with what he plainly regarded as an uncomfortable dilemma. Either he could say that Stair was wrong, or else he could uphold Stair, but then he would have to overrule all the subsequent authorities which would, he said, amount to a holocaust. Undaunted, Lord Dunedin took a remarkable course. He argued that the true meaning of the passage in Stair could be discovered by rearranging the text. Where it said that, if there was a provision in favor of a third party, he acquires a right which cannot be recalled, what you should do is swap round the clauses, so that Stair would now say, if there was a provision in favor of a third party which cannot be recalled, the third party acquires a right. In order to dignify the process, Lord Dunedin even went so far as to translate some of the English texts into Latin.

When many years ago, I first looked at what Lord Dunedin had done, I simply thought that he had taken leave of his senses. And in effect I still do. But what I did not then know — what Lord Dunedin did not know either, of course — was that this amazing technique of rearranging a text, in order to avoid an apparent difficulty (and to make it say what was somehow required by other authorities) has a long history. And, of course, it was David Daube who drew attention to it.

In a wonderful article, "Alexandrian Methods of Interpretation and the Rabbis" he traced this method back, under the technical name of *anastrophe*, to Sosibius, a scholar who worked in Alexandria in the second century A.D. What is interesting is what it tells us about Lord Dunedin's attitude to Stair. As Daube notes,

[T]he method of interpretation by rearrangement is anything but universal. It presupposes a belief that the piece of literature concerned possesses supernatural qualities; that it is perfect, but only for those who have the key; that it is a riddle "which neither speaks out nor conceals but indicates."

Now perhaps it would be going too far to say that Lord Dunedin actually believed that Stair was supernaturally inspired or possessed other supernatural qualities, but the fact that Lord Dunedin was prepared to adopt this extraordinary approach to the

interpretation of the passage does show that he saw Stair as, in effect, an infallible oracle on the law of Scotland, as having written a text which is perfect if only we know how to interpret it. Of course, that is quite simply nonsense and I for one would like to think that nowadays the courts would approach any statement of the law by Stair or any other institutional writer in an entirely rational manner. One would give it due weight, of course, but not pretend that it is necessarily correct, and not overlook the fact that other lawyers at the time may have held a different view. By putting Lord Dunedin's curious method of interpretation into this much wider historical context, Daube's work reveals for us an important underlying aspect of Scottish legal culture of the 1920s which we do well to keep in mind when reading the judgments of those days.

I turn to my last example. To me at least, one of the most striking features of the judgments of the United States Supreme Court is the way in which the justices of any given period associate themselves directly with the decisions given by their predecessors, sometimes long in the past. They do this by referring to a case decided by the Supreme Court, perhaps 100 years before, and saying words to the effect, in *Smith v. Jones*, "we" decided X so and so. This usage occurs both in *per curiam* opinions and in the opinions of single justices. For convenience, I take my examples from the opinions issued last December in the Florida election case, *Bush v. Gore*. (Incidentally, whatever one's views on the substance of the decision, one should recognize that the opinions are notably well written, given the speed and conditions under which they were composed.) In the *per curiam* opinion, the justices refer to

An early case in *our* one person, one vote jurisprudence . . .

and go on to say that

We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie* [in 1969].

Similarly in the separate opinion of Chief Justice Rehnquist with Justices Scalia and Thomas, when dealing with the provisions in the Constitution for appointing electors for President and Vice-President, they refer to a case from 1892 in which they said

[W]e explained that Art. II, §1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the [state] legislature exclusively to define the method" of appointment.

Of course, the justices do not always refer to their past decisions in that way; sometimes they simply say that "the Court" took a particular view. Notably perhaps, in his opinion in the landmark school desegregation case *Brown v. Board of Education* in 1954, Chief Justice Warren, when referring to the Supreme Court's 1896 decision in *Plessy v. Ferguson* permitting segregation by the means of equal but separate facilities, spoke of the decision of "the Court" rather than of "our" decision. He may perhaps have wished to dissociate the Court in 1954 from that earlier decision. But from a rapid perusal of some of his opinions, my impression is that in general Warren or his clerks tended not to refer to "our" previous decisions or to what "we" had decided. So something may turn on the personal preference of individual justices.

But the use of "we" and "our" is certainly not to be put down simply to a preference of certain justices, or of most justices, for this form of expression. If that were all that were involved, we should expect to find the same expressions cropping up in the opinions of British appellate courts, but they do not. Occasionally a court will refer back to a very recent case and say "we decided the same point recently in *Black v. Brown*," but you would search the whole of the British law reports in vain, I suggest, for a passage which remotely resembles the passages I have quoted from *Bush v. Gore*. And they are only one example. So there must be something which accounts for the usage being adopted in the Supreme Court but not in British courts.

Now it is at this point, as indeed so often, that I would love to turn to David. He would have given a thousand reasons to explain these phenomena, all better than any we can devise, and in private, at least, he would have quickly shown the weaknesses in any explanations which we put forward. And for what it is worth — and David would say "not much" — my own explanation is that the expression used in the Supreme Court opinions reflects the justices' strong sense of the continuing identity of the Supreme Court over the centuries. The justices today see themselves as part of the same Court that sat under John Marshall, 200 years ago. Justices may come and go but the Court continues and, as justices of the Court, they are all members of an elite body, existing over time. The views and decisions of the Court are in a real sense views and decisions for which they share a measure of responsibility when they join the Court. It is a sort of judicial equivalent to the Communion of Saints. The facts that there never have been more than nine justices at any one time, and that wherever possible all of the justices sit to hear the case, are powerful factors which reinforce that perception of the institution.

But if that is correct, then the fact that our appellate courts do not use similar phrases must equally tell us something about the way in which the judges regard themselves and the courts to which they belong. Basically, it would appear, they do not have the same sense of continuity, of being members of a single body stretching back over the centuries. And at first sight that seems rather surprising, since the House of Lords antedates the Supreme Court as a court of appeal and the Inner House of the Court of Session has existed since the days of John Marshall. In the case of the House of Lords, the fact that technically the judges are simply a committee of the House may be a factor. It would be unusual, to say the least, for any one peer to claim to speak for the whole House by saying "we declare this or consider that." In the case of the Court of Session, though, there would be something rather strange in the members of the First Division appearing to identify themselves with the decisions of their predecessors in that division by saying "we decided X," while appearing to distance themselves from the decisions of the Second Division by saying, "the Second Division decided." (In a case a couple of years ago I confess that I was sorely tempted to do exactly that but in the end resisted the temptation.)

More importantly perhaps, the panels making up the Judicial Committee of the House of Lords vary greatly from case to case, and they of course include retired judges. You rarely step into the same House of Lords twice. Similarly, especially with the increased demands of time, both at first instance and at appellate level, the composition of the divisions of the Inner House of the Court of Session — even supposing they ever have a Lord President again — fluctuates enormously with Outer House judges sitting frequently. All these factors may serve to reduce any sense of identity.

And that reduced sense of identity is not simply a cultural phenomenon which we may find it interesting to observe. It has practical effects too. In the days of Lord Denning, when the Court of Appeal was still a relatively compact body, it was not hard to identify particular lines of thought and trends in the case law. Nowadays, with the hugely expanded Court of Appeal, that is quite simply impossible. Two divisions may decide the same point simultaneously and in opposite directions, without being even aware of the fact that there are two cases. There is therefore little ownership of previous decisions. The same lack of a firm identity has also been detected even in the Privy Council. Even though it is a much smaller organization than the Court of Appeal, the composition of the Judicial Committee can vary greatly from case to

case, with retired lord justices and Commonwealth privy counselors sitting. In a capital appeal from Jamaica last year, Lord Hoffmann made the point that these changes in the composition of the Board could lead to inconsistent decisions, even within a very short period. And as he pointed out, this was particularly undesirable in a court exercising a constitutional jurisdiction. By contrast, he said, the stable composition of the United States Supreme Court made for consistency and ensured that there was less scope for violent shifts in approach.*

I put forward what occur to me as possible explanations for the particular phrases to be found in the judgments of the United States Supreme Court but not in the judgments of our appeal courts. For present purposes it doesn't matter the slightest whether those explanations are right or wrong: other people will come up with better ideas. What matters, however, is that we should observe the phenomenon itself. And we shall do so only if we read these modern materials as Daube taught us: looking closely not merely at what the judges are saying, but at how they are saying it. If we analyse the texts in this way we may hope to discover things about how the system operates which the judges themselves might not wish to reveal, or of which they might even be entirely unaware. My fear is, however, that for the most part such matters are ignored. In other words Daube's work shows that there is a vast field of research lying unexplored. As he so often liked to say, research in Roman law is decades ahead of research in modern law.

I have suggested this evening that David Daube's work is of significance far beyond the confines of the particular areas in which he wrote. It is, besides, attractively written, a joy to read. It should, I believe, be studied by all those who are concerned as lawyers, in whatever capacity, in analysing documents and in thinking about our legal system. But you here in Aberdeen have an additional reason for cherishing his work. During his time here, as David has reminded us, he was a member of a remarkable team, including Tom Smith and Hamish Gow, who were pioneers in the reform of legal education, not only in Scotland but as part of a general movement in the United Kingdom as a whole. The Centre for the Study of the Civil Law Tradition is in one sense a particular monument to David. We are all the beneficiaries of the new system which these men helped to create. In cherishing the work of David Daube and drawing inspiration from

* See note.

it, you are drawing on the rich inheritance of this wonderful, ancient, University of Aberdeen.

Lord Hope of Craighead

Well, I am sure you will agree that we have listened to a most attractively presented, deeply thoughtful, and far-reaching lecture.

Alan began of course with the very moving account of David Daube's early years and told us how it was that he and his family came, under very difficult circumstances, to Britain from Germany. And then we had what I think can best be described as a portrait of the man himself, of his style, his appearance, and his intelligence. Then we were told about the enthusiasm for connections between situations and underlying patterns, and above all, the treatment of texts.

But in the later part of the lecture it did seem to me that Alan was telling us a good deal about himself. Indeed that really is how the teacher would like, I am sure, to view his own pupil or disciple. It has struck me that, in some of the published lectures which one finds in the various quarterlies which Alan has written, he too has had a fascination in drawing a comparison between some text taken from the *Digest* and some modern example in a modern case, and seeing how the two can reflect upon each other. There is also the drugs case of *Salmon v. HM Advocate* you remember he told you about, where he had rediscovered the importance of section 28(2) of the Misuse of Drugs Act 1971, which was a remarkable achievement on his part, considering that English judges had overlooked that subsection ever since the Act was enacted. I am glad to say that Alan's work on that subsection has found its way back to England through a very recent decision called *R v. Lambert*, where his reasoning was referred to and applied. I stress that case, and in a way the importance of what we have been hearing from Alan, for the future of Scots law and the Scots method, and indeed the Daube method, in the work of the House of Lords. It was only because the two Scottish judges in the House of Lords were aware of what Alan had written that his judgment surfaced in London at all. It wouldn't have been referred to otherwise, and indeed it took a little bit of effort on our part to have the case read. Of course once it was read, the value of it was immediately apparent. For my part, I think it's wonderful that we now have Alan in the House of Lords in a position to influence what goes on there at first hand with the benefit of the scholarship which has so influenced his career.

So, in a way, we are at a threshold. I think we can all look forward, Alan, if I may say so, to your future in the House of Lords, against the background of the fascinating account that you have given us of a wonderful man and of his influence on you. I thank you very much indeed for what you have told us about him.

Editor's Note. Professor Peter Stein writes to tell us that, contrary to what one sometimes reads, Daube was Professor in Aberdeen only to 1955. Professor Stein himself did not succeed Daube in the Chair until 1956, serving as Acting Head of the Department of Jurisprudence during the intervening year, 1955-56.

The statute which deals with contribution among co-defenders, to which Lord Rodger refers on page 10, is the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

The lectures to which Lord Rodger refers on page 15 are these: "The Form and Language of Legislation" [Pamphlet], Birmingham Holdsworth Club (Birmingham, 1998), *revised and reprinted in* "The Form and Language of Legislation," 18 *Rechtshistorisches Journal* 601 (1999); and "The Form and Language of Judicial Opinions," 118 *Law Quarterly Review* 223 (2002).

The remarks of Lord Hoffmann, to which Lord Rodger refers on pages 19-20, are in *Lewis v. The Attorney General of Jamaica* [2001] 2 A.C. 50, 89 (PC). Other sources mentioned by Lord Rodger and Lord Hope are these —

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Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
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