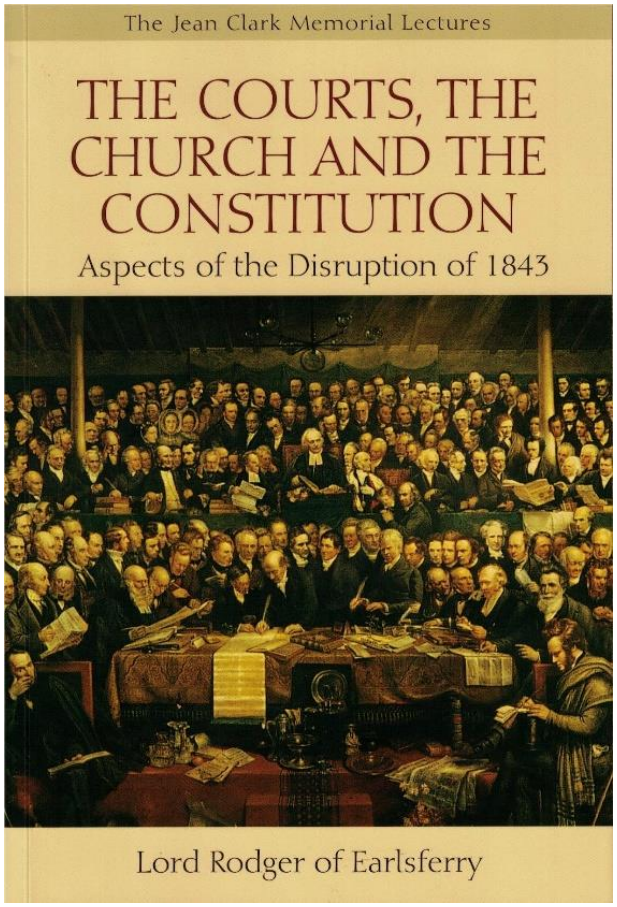
Ian Mitchell's Scotland-related BOOK RECOMMENDATIONS

28 – The Courts, the Church and the Constitution (20 December 2018)



THE COURTS, THE CHURCH AND THE CONSTITUTION – Aspects of the Disruption of 1843

Author: Lord Rodger of Earlsferry

Publisher: Edinburgh University Press, 2008
(*available on Amazon, click on cover image for link*)

Descriptor: Story of the fraught interaction between law and the Church in nineteenth-century Scotland, and the resulting cases in the Court of Session and the House of Lords, told by a judge of the highest eminence who sat in both courts

Rus&RoL relevance: An important aspect of the rule of law is the implied CONTRACT between the state and society, whereas the relationship between the Christian and the state raises issues of STATUS as it involves a higher power with whom, if the Church is genuinely free, no agreement can be made. No fudge or compromise can be intellectually honest—as the parties in the Disruption cases recognised. One is above the other, or the other above the one; hierarchy is unavoidable.

Reason to read: A riveting insight into the way one of the greatest Scottish judges of the late twentieth century thought and wrote about one of the greatest crises of the mid-nineteenth century Scotland. The Church may be irrelevant to most Scots today, but it was quite the opposite a century and a half ago (and by no means irrelevant to Lord Rodger). The schism in the Church of Scotland that created the Free Church, had been a long time coming—arguably since the Patronage Act of 1711 (in flagrant contradiction to the terms of the Treaty of Union with England). It was probably more explosive as a result. The arena in which the battle for control of Scotland's "spiritual parliament", the Established Church, was fought was the Court of Session. Lord Rodger was a past Lord President in that Court and was one of the Law Lords in London when he wrote this book. It takes the form of three lectures he gave at the University of Aberdeen to inaugurate the Jean Clark Memorial series. They were delivered in 2007. This book was published, with extensive footnotes and some extra material added, in 2008. Lord Rodger died, sadly, in 2011.

To read this book is to get an idea of what an extraordinary mind was lost to Scots law by his

untimely departure for the destination in dispute in 1843. I like books which offers a ramble around the mind of an interesting human being. This one is sometimes chatty, always personal, and never less than supremely authoritative both on the history and on the law which framed that history. Lord Rodger also comments on law and the courts today. I found this one of the most absorbing and illuminating books I have read in a long while. It is also about something of fundamental importance to the rule of law, namely the boundary between conscience and the courts.

Main talking points:

1. "Never forget: the Disruption cases represent the most sustained challenge to its authority which the Court of Session has ever faced. In that crisis for the court, the integrity of the judges was unquestionable and the intellectual level of many of their judgements was enviably high. Above all, we can only admire the way the judges, whether in the majority or the minority, refused to be swayed by pressures on the court." (p. 80)
2. Writing about a recent Church of Scotland case in which his predecessor as Lord President, **Lord Hope**, gave judgment on appeal against it (in an employment case[1]), Lord Rodger says: "The week after the decision in the House of Lords, I asked Lord Hope if, that weekend, hordes of rioters had been dispatched by Church HQ at 121 George Street in Edinburgh to break his windows. He assured me that his windows were intact and that all had been quiet." (p. 92) That in itself represents a triumph for our judiciary. The losers accepted the verdict of the "ref". In other words, law worked as a way of avoiding violence. That is the ultimate compliment that life can pay to wise judging. It is the essence of civilisation.
3. Lord Rodger starts his second lecture by observing that, under Scots law, the Court of Session had (and has) the power "to compel the Crown to do its duty or to restrain the Crown from exceeding its duty" and that this is "a powerful basis for [the] argument that the presbytery, too, must be subject to the jurisdiction of the court." (p. 58) However, in the 1840s, "the position of the majority party in the Church could not have been more different. They considered that the Church courts had exclusive jurisdiction in ecclesiastical matters and that, consequently, the Court of Session had no jurisdiction at all in these matters…. Christ alone was head of the Church, including the Church of Scotland as the Established Church, which was not, therefore, subject to the authority of the State in ecclesiastical matters. Indeed that belief underlay the entire position of the Evangelicals [i.e. the future Free Church]." (p. 59) The court's position was the opposite, namely that the Church was defying its authority. "The so-called 'war' went on for more than six years." (p. 60) And "the more enthusiastic and romantic members of the Evangelical party were only too keen to see themselves as heroic figures from Covenanting times." (p. 61)
4. Lord Rodger then steps back and comments: "The reaction of the prototypical modern judge—whose main duty, many appear to think, is to express dismay if the parties have been remiss enough not to settle their dispute without troubling the courts—may well be to ask whether all these battles, all these judgements and all these legal expenses were really necessary. If it had arisen today, surely, he would suggest, the dispute could have been resolved by the modern miracle of mediation? *Happily not.* The crucial dispute was about jurisdiction and, for that reason

[1] *Percy v Board of National Mission of the Church of Scotland* (2005) UKHL 73

> alone, it was unavoidable." (p. 62, emphasis added) I respectfully submit that this is on all fours with my argument in *The Justice Factory* that there is something politically debilitating in the obsession with compromise and consensus. On issues of fundamental principle, clear decisions have to be reached. You are either subject to the jurisdiction of the Court of Session or you are not. Fudging such issues is an abuse of the civilised requirement for rational decision-making. Mediation is for minutiae or for commerce—which the Evangelicals would have thought were much the same thing.

Thought(s) provoked: Nonetheless, commerce and industry is important if we are to sustain culture, which includes sophisticated legal analysis and commentary outside the courts. Jean Clark, who was heir to the Saxone Shoes fortune, used her inherited wealth to promote the study of Scots law, and that included commissioning thee lectures. Lord Rodger comments rather charmingly in his Preface: "In one sense, the origins of these lectures go back to the day, about thirty years ago, when, in the (then) dusty back room of Wildy's shop in Lincoln's Inn Archway, I picked up a copy of Robertson's two-volume report of the Court of Session proceedings in the first *Auchterarder* case. Some years later, I bought a copy of Orr's report of the *Free Church* case in the House of Lords. But I would never have got round to writing anything based on those finds without the invitation from the Trustees of the Jean Clark Foundation." (p. viii)

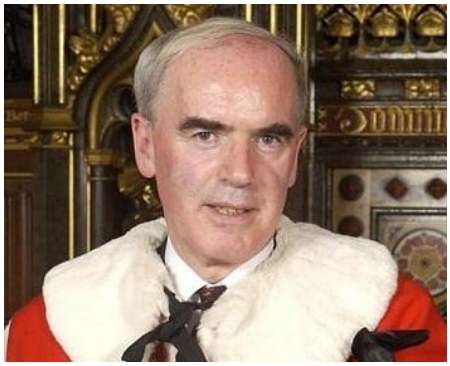
Incidental interest: "Even today, in a small jurisdiction such as Scotland, it quite often happens that a judge has some, more or less remote, involvement with a case that comes before him. All the more so in the confined milieu of Edinburgh in those days, 'when everyone knew everyone else and much of their business besides'… But it is the judge's duty to sit unless, as a matter of law, he cannot properly do so…. This is one respect in which I believe these cases would have been handled differently nowadays… modern ideas prevent judges from pursuing any but the most innocuous outside activities. Since the *Pinochet* case the judges have, if anything, become even more cautious." (p. 70)

Surprising points: An amusing example of late nineteenth century judicial wit, which could be applied a thousand times a day in the modern, more bureaucratic world, is given in Lord Rodger's account of the action by which the Free Church hoped to recover a share of the Church of Scotland's real property on behalf of members who had left it to form the Free Church. The ferociously learned, Richard (later 1st **Viscount**) **Haldane** (of Edwardian Army Reform fame), represented the United Free Church in 1899. But he proved to be too clever by half. Lord Rodger appears to have enjoyed the story of the intellectual elitist upended in court. "His failure to communicate his arguments on predestination and the Atonement makes his speech a textbook study in the art of bad appellate advocacy… His sense of his own superior knowledge of the topic was to prove his undoing before the House of Lords. Success would have depended on explaining the theological distinctions between Calvinism and Arminianism which were not just fine, but invisible or incomprehensible to those unfamiliar with the subject… Haldane's task was to make what was actually complicated appear simple…. Any sensible onlooker would have seen that Haldane was doing his case no good at all when, for example, Lord James of Hereford said, 'With the greatest deference, I have not the slightest idea how that last answer of yours answers what I have put to you." (p. 102) Later, the same judge—"a jovial old whig"—"gave up. 'I never knew how incapable I was of understanding these things until I heard your argument.'" (p. 103)

Negative issue(s): The text is very densely written due to the astounding breadth and depth of Lord Rodger's knowledge of this issue and the constraints of the lecture format. Perhaps this is a counsel of perfection, but I would have preferred a slightly more amplified and roomy, Russian-style text. That would have given us an even more interesting ramble through the mind of this extraordinary author. Specifically, I would also have liked a little more detail and background concerning those intellectually colourful churchmen who fought the law so dauntlessly, and then a brief account of their fate, and that of their churches, after the law won.

Publishing quality: Impeccable

Smile(s): Noting in closing how much of interest he had been forced by lack of space to omit, Lord Rodger writes gravely that he had been unable "to look at Lord Medwyn's theory of Church and State… or at Lord Jeffrey's theory of the Court of Session's power of review." Then he swings off into the blessed realms of unembarrassed enthusiasm: "Nor have we opened the box of delights which awaits those with a proper taste for the competency of pure declarators, the scope of defences to interim interdict, the reconciling of overlapping jurisdictions and much, much more." (p. 120)



Author: Alan Rodger was a gifted student of law, especially Roman law, at Glasgow University then Oxford. He went to the Bar, took silk, became Solicitor General then Lord Advocate, then Lord President of the Court of Session, then a judge in the House of Lords and finally on the Supreme Court. He is referred to extensively in chapter 5 of *The Justice Factory*. In 2000 I saw him try an appeal from the RSPB in the famous (and absurd) Islay goose case. The charity had gone to court to argue that EU law gave the geese "absolute priority" in an SPA (EU Special Protection Area), so licenses to shoot fifty of the 50,000 that wintered on the island, where they ate the farmers' cultivated grass, were issued unlawfully. The result of Lord Rodger's judgement was that up to 750 could be shot each year, basically because there could be no "absolute priority" of that sort.

Link(s): You can download a summary of Lord Rodgers life and judicial achievements as presented by Hector MacQueen, Professor of Private Law at the University of Edinburgh: https://www.researchgate.net/publication/272991304_Lord_Rodger-Jurist_then_Judge

Overall recommendation level: COULD HARDLY BE HIGHER

About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory.* He is writing a comparative study of Russian and Western constitutional history to be called *Russia and the Rule of Law*—hence the "Rus&RoL Relevance" section at the top. He can be contacted at: ianbookrec@gmail.com. For other reviews in this series, see Ian Mitchell's Book Recommendations.