

**WILLIAM DAVID HAMILTON SELLAR, MVO, BA, LLB, LLD, FRHistS, FSA(Scot)**  
27 February 1941 – 26 January 2019

David Sellar, who has died at the age of 77 after a period of increasing ill-health, was a long-serving member of the Faculty (later School) of Law in Edinburgh University who was also Lord Lyon King of Arms from 2008 to 2014, having been a herald as Bute Pursuivant since 2001. It was for his service in the ancient heraldic role of Lyon that, in anticipation of his final retirement from it, he was awarded the Membership of the Royal Victorian Order in the New Year Honours List for 2014. The MVO is a dynastic order of knighthood awarded at the monarch's sole discretion for distinguished personal service to her. David's distinction in office has been well written about elsewhere.<sup>1</sup> Therefore, this short memoir focuses most upon his academic contribution, as also a very distinguished legal and Highland historian and genealogist.

David was born and brought up near Glasgow. He was educated first at Kelvinside Academy in Glasgow and then (as a boarder) at Fettes College in Edinburgh. His first degree was in history at Oxford, where he was a student in St Edmund's Hall ("Teddy Hall", as he called it). He then took the two-year LLB for graduates at Edinburgh before completing an apprenticeship as a solicitor with the well-known firm of Shepherd & Wedderburn WS (then based in Charlotte Square). It was during this time that he first encountered the Lord Lyon, in the person of Sir Thomas Innes of Learney (Lyon 1945-1969). David always enjoyed relating how when you phoned the then reception-less Lyon Court you got Sir Thomas' rather squeaky-voiced greeting: "Lyon here!"

Much as David relished his apprenticeship, once qualified as a solicitor, he joined the Scottish Land Court in 1967 as one of its legal assessors. The Court was established in 1911 to deal with issues relating to crofts and agricultural small holdings. When David joined, the Court was, under the leadership of Lord Birsay, undertaking its recovery from a long troubled period when Lord Gibson was its chair (1941-1965).<sup>2</sup> Its appeal to David, however, lay in the opportunity its business gave to spend time in the Highlands and Islands, gaining all sorts of knowledge about the history, traditions and geography of the areas where the Court found itself working. Indeed, he could see still surviving in the present customs that reached far back into the past. The experience also provided him with a ready fund of stories with which he would later entertain friends, colleagues and students.

---

<sup>1</sup> Obituary, *The Scotsman*, 11 February 2019.

<sup>2</sup> See the collection of essays marking the centenary of the Scottish Land Court: *No Ordinary Court: 100 Years of the Scottish Land Court* (Edinburgh: Avizandum, 2012), particularly the contributions of Lord McGhie ("The Gibson Years"), Walter Mercer ("The Post-Gibson Chairmen", especially at pp 79-83, where Lord Birsay's time is covered: one can readily see from this why David admired and empathized with Birsay both personally and politically), and Isabel Steel ("Circuit Life – from Horse to Helicopter", from which an impression of the typical experiences of a legal assessor in the Court can be gained).

In 1969, however, David decided to take up an appointment as a lecturer in the Department of Scots (later Private) Law, then headed by the charismatic Professor T B Smith. David always said that Smith wanted him to be the legal historian in the department, and this promise sometimes led to frictions with subsequent departmental heads after Smith left the university in 1972 to become a full-time Law Commissioner. But David's teaching in general private law, in areas such as succession and unjustified enrichment, actually fed into his legal-historical scholarship, while his historical approach produced significant contributions to the study of contemporary Scots private law.

As I can attest from personal experience, David's honours class in History of Scots Law was a wonderfully colourful exploration of his central interests, ranging from Celtic law through Canon Law to specific topics in marriage, divorce, delict and criminal law. Once heard, his account of the "salmon leap" with which the Celtic groom proved his virility on his wedding night could never be forgotten – if not emulated. Counting the severed heads on Sueno's Stone, near Forres, was another memorable experience, although perhaps their full historical significance escaped at least one student at the time.<sup>3</sup>

David was promoted to senior lecturer in 1975. In 1987, with John Cairns and myself, he set up another innovative course in legal history in 1987, entitled Scots Law and the Western Legal Tradition. But by 1995 he had become disillusioned with what he perceived as the ever more managerial and bureaucratic culture of the university system, and took early retirement in order to carry on exploring the subjects closest to his heart in his own way. In 1997, however, he re-engaged with the Faculty of Law as an Honorary Fellow, and continued to be much involved in its life and work for the rest of his time, even after he became Lord Lyon. Many in the School of Law today still have fond memories of the slightly old-fashioned courtesy and congeniality with which, on their first introduction into Old College, he helped ease them socially into the company of other colleagues.

David was also a very effective and engaged supervisor of PhD students. At least three of those who studied legal history in depth under his guidance have gone on to hold chairs in law in Scottish universities and make substantial contributions to the history of Scots law.<sup>4</sup> The Dutch legal historian Remco van Rhee (now a professor at Maastricht) was another who, as a regular visitor to Edinburgh as a postgraduate researcher in the 1990s, came under David's wing and maintained academic and social contact ever after. It is also rare indeed to find first articles on Scottish legal history published by others in the 1970s and 1980s in which David's help and guidance are not acknowledged by the writer. He was generous with his knowledge, his time and his encouragement – and, in my own case, in steering me so as not to swim out of my depth in matters of

---

<sup>3</sup> See David's "Sueno's Stone and its Interpreters", in W D H Sellar (ed), *Moray: Province and People* (Edinburgh: Scottish Society for Northern Studies, 1993), pp 97-116.

<sup>4</sup> Professors John Finlay and Mark Godfrey, who hold their chairs in Glasgow, and myself.

Celtic law, genealogy and succession. David also led occasionally doubting colleagues in the foundation of the Centre of Legal History in Edinburgh in 1991, a venture which flourishes to this day. But he was receptive to others' ideas and suggestions on his own material, and was as generous in his acknowledgement of those as he was in giving out his own.<sup>5</sup>

The contributions David himself made in his various fields of interest were legion. Law Faculty colleagues did not perhaps always fully realize the path-breaking and field-leading quality of his scholarship in medieval Highland history and genealogy. His very first article, on "The Origins and Ancestry of Somerled", published in the *Scottish Historical Review* for 1966 just as he completed his apprenticeship at Shepherd & Wedderburn, was seen for forty years as the definitive discussion of its particular subject (the twelfth-century ruler of Argyll and progenitor of the Clan Donald, who was killed in battle at Renfrew in 1164 while leading a rising against the king of Scots).<sup>6</sup> It only ceased to be the primary point of reference with the uncovering of fresh evidence on the matter. The article also brought him into the company of Celticists at Edinburgh University, notably John Bannerman and Ted Cowan, and later on Ronnie Black; they formed what was in effect a discussion group on things Celtic in the University's Staff Club in Chambers Street, the debate helped along by the flow of drams from the Club's famous collection of malts.

Many of David's later articles in the field of Highland history and genealogy were also pioneering works of scholarship on particular topics. Perhaps their theme is best epitomised by one of their titles: "Highland Family Origins – Pedigree Making and Pedigree Faking".<sup>7</sup> A strong thread was the interplay of British, Gaelic and Norse blood in clan origins and descents. He drew extensively on comparisons with Ireland in particular, and also with Wales. Towards the end of his career he became very interested in the possibility that DNA evidence could throw new light on historical genealogical questions.<sup>8</sup> Amongst the families whose medieval and earlier history he explored, Clan Donald and the Lords of the Isles held a particular fascination,<sup>9</sup> but numerous other clan genealogies were illuminated by his studies: for example, those of the

---

<sup>5</sup> See for example his "Courtesy, Battle and the Brieve of Right, 1368", in W D H Sellar (ed), *Miscellany II* (Edinburgh: Stair Society, 1984), pp 1-12.

<sup>6</sup> "The Origins and Ancestry of Somerled", (1966) 45 *Scottish Historical Review* 123-142.

<sup>7</sup> Published in L Maclean of Dochgarroch (ed), *The Middle Ages in the Highlands* (Inverness: Inverness Field Club, 1981), pp 103-116.

<sup>8</sup> See "Clans, Castles and DNA", in P Martin (ed), *Castles and Galleys: A Reassessment of the Historic Galley-Castles of the Norse-Gaelic Seaways* (Isle of Lewis: Islands Book Trust, 2017), chapter 3.

<sup>9</sup> See e.g. "MacDonald and MacRuari Pedigrees in MS 1467", (1986) 28 *Notes and Queries of the Society of West Highland and Island Historical Research* 3-15.

Campbells,<sup>10</sup> MacDougalls,<sup>11</sup> MacLeods,<sup>12</sup> MacSweens, Lamonts,<sup>13</sup> MacArthurs, MacAulays,<sup>14</sup> and many others. . Much of this (and, indeed, much more) found its way into his numerous contributions to the *Oxford Dictionary of National Biography*, first published in the 1990s.

The most comprehensive account of any clan produced by David was however a commissioned one, a history of the Clan MacNicol, Nicolsons of Scorrybreac in Skye.<sup>15</sup> David liked to refer affectionately to one of the book's commissioners as "the Coca-Cola baron", because his father had been President and Chairman of the Coca-Cola company, the son and his brother had also followed business careers in that organization, and the first son had in 1994 acquired the ancient barony and castle of Balvenie in Banffshire. The commission's end result, published in 1999, is a handsomely produced and copiously illustrated volume. David's contribution is a *tour de force*.

Sometimes genealogical links took David into more lowland territory: it was a Campbell connection, for example, which led to a study of the genealogy and the heraldry of the family of Spens of Lathallan (Angus). Heraldry provided crucial evidence of genealogy: in the Spens case, for example, the arms included a Campbell gyronny quartered, pointing to the marriage of a Spens with a Campbell heiress which could then be corroborated with documentary evidence.<sup>16</sup> It was particularly appropriate for David himself to become armigerous as a way of marking his appointment as Lyon. His arms are

---

<sup>10</sup> "The Earliest Campbells – Norman, Briton or Gael?", (1973) 17 *Scottish Studies* 109-125.

<sup>11</sup> "MacDougall Pedigrees in MS 1467" (1986) 29 *Notes and Queries of the Society of West Highland and Island Historical Research* 3-18; "Hebridean Sea Kings: The Successors of Somerled", in E J Cowan and R A McDonald (eds), *Alba: Celtic Scotland in the Medieval Era* (East Linton: Tuckwell Press, 2000), pp 187-218.

<sup>12</sup> "The Ancestry of the MacLeods Reconsidered", (2000) 60 *Transactions of the Gaelic Society of Inverness* 233-258.

<sup>13</sup> "Family Origins in Cowal and Knapdale", (1971) 15 *Scottish Studies* 21-37.

<sup>14</sup> "The Lairds of Ardincaple and Darleith: MacArthurs and MacAulays", (1974) 21 *The Scottish Genealogist* 46-54.

<sup>15</sup> W D H Sellar and A Maclean, *The Highland Clan MacNeacail (MacNicol): A History of the Nicolsons of Scorrybreac* (Isle of Skye: Maclean Press, 1999). David was solely responsible for Part I of the book, dealing with the history of the clan. Scorrybreac House still exists under the hill of Scorrybreac outside Portree. The last time the present writer looked, the house was inhabited by Donnie Munro of Runrig fame.

<sup>16</sup> "Spens of Lathallan – The Campbell Connection", (2005) 28 *The Double Tressure: Journal of The Heraldry Society of Scotland* 10-19. See also a previous contribution by David on the topic: "Spens Family Heraldry", (1983) 22 *Notes and Queries of the Society of West Highland and Island Historical Research* 21-27 (with an addendum at (1984) 23 *Notes and Queries of the Society of West Highland and Island Historical Research* 16-17).

published in the article about him on Wikipedia.<sup>17</sup> His ensigns armorial take the form of an escutcheon (shield), *Azure, on a chevron argent between in chief two open cups Or in base and a blacksmith's hammer Proper shafted, of the Third an open book Proper binding and fore-edges gules*. The two cups (with their presumed content) offer a punning play on David's surname, with the book representing his learning and the hammer his own descent ultimately from generations of blacksmiths in Banffshire. The motto is "DOCENDO DISCES" (teach and learn).<sup>18</sup>

As the Spens example well demonstrated, heraldry is also a way of linking names: "one of the most cherished rules of Scottish heraldry [*is*] that all those of the same surname, related or not, should have arms which are recognisably linked."<sup>19</sup> David also enjoyed speculative discussions about the possible significance of first names occurring across successive generations of families and as, perhaps, reflections of a name-holder's parentage in either or both of the male and female lines of descent. But I am aware of only one published study of a first name by David.<sup>20</sup> Documents give the first name of the Countess of Atholl in the mid-thirteenth century in a variety of puzzling forms. David pinned it down as the Gaelic *Forbflaith*, carrying the meaning of "overlordship" or "sovereignty", denoting the Countess' high aristocratic status and descent.

All historians are conscious of the intellectual debts they owe their predecessors. David acknowledged his to William Forbes Skene (1809-1892) as a historian of Highland Scotland in a Rhind Lecture given to the Society of Antiquaries of Scotland in 2001.<sup>21</sup> This was a remarkably interesting account of Skene's life and work, not only as a historian and editor of key documents, but also as a practising lawyer, antiquarian, administrator of Highland famine relief between 1846 and 1850, and churchman. David naturally provided a genealogy of the Skene family back to the fifteenth century, and also one of the Forbes of Pitsligo (from which Skene's mother came), giving rise to a number of important business and antiquarian connections in his career. There is also a thoughtful account of the controversies about Gaelic history to which Skene's work gave rise. Finally, and reflecting yet another of David's many interests, Skene's contribution to Arthurian studies is assessed.

Discussions of genealogy and descent inevitably involve consideration of the social and legal worlds in which the subjects lived, and David's earliest published works on legal history are visibly connected to his genealogical and

---

<sup>17</sup> See [https://en.wikipedia.org/wiki/David\\_Sellar](https://en.wikipedia.org/wiki/David_Sellar).

<sup>18</sup> The grant of arms, which narrates David's paternal ancestry back to the late 19<sup>th</sup> century, is registered at the 128<sup>th</sup> page of the 86<sup>th</sup> volume of the Lyon's Public Register of All Arms and Bearings in Scotland.

<sup>19</sup> "Spens of Lathallan", p 10.

<sup>20</sup> "Forflissa/Forbflaith/Hvarflöð", in D Edwards (ed), *Regions and Rulers in Ireland, 1100-1650: Essays for Kenneth Nicholls* (Dublin: Four Courts Press, 2004), pp 51-53.

<sup>21</sup> "William Forbes Skene (1809-92): Historian of Celtic Scotland", (2001) 131 Proceedings of the Society of Antiquaries of Scotland 3-21.

Highland interests. Following his own motto, they also reflect themes that he had initially developed through his honours course at Edinburgh in the 1970s. "Marriage, Divorce and Concubinage in Gaelic Scotland", first delivered as a lecture to the Gaelic Society of Inverness in 1978, explored the subject of what, following Kenneth Nicholls, he termed "Celtic secular marriage", the rules of which were quite distinct from those of medieval Canon law. This explained many otherwise puzzling successions in the clan genealogies to quite a late period.<sup>22</sup> A notable review article on Dr Alfred Smyth's volume on early Scotland tackled the topic of matrilineal succession amongst the Picts, on which Smyth had espoused doubts that in David's view were untenable.<sup>23</sup> In 1985 he delivered an O'Donnell Lecture in Edinburgh, entitled "Celtic Law and Scots Law: Survival and Integration", in which he set out a mass of evidence for the survival of originally Celtic law and custom into, again, a much later period than hitherto assumed (including estate accounts from his own time at Shepherd & Wedderburn showing "cane" (i.e. Gaelic *cain*) as a column heading for renders made by tenants).<sup>24</sup>

Another theme of David's honours course was "continuity", by which he countered the previously prevailing orthodoxy of Scottish legal history as, in Lord President Cooper's words, "a series of false starts and rejected experiments".<sup>25</sup> The survival and integration of Celtic into general Scots law was one example of how wrong this characterisation was. Another, David argued, was the influence, from the twelfth century onwards, of the developing English Common Law. The Wars of Independence between the 1290s and the 1330s did not bring this influence to an end, as Cooper had suggested. David contended in 1981 that this continuing English influence could be detected in Stair's *Institutions of the Law of Scotland* (1681; 2nd edition 1693), in particular in the law of succession to land, and in Stair's use of court decisions as recent custom and a source of law.<sup>26</sup> The theme was developed even more strongly in a 1988 paper entitled "The Common Law of Scotland and the Common Law of England".<sup>27</sup> Only in the sixteenth century had the two systems begun to move

---

<sup>22</sup> Published in (1981) 51 Transactions of the Gaelic Society of Inverness 464-493.

<sup>23</sup> "Warlords, Holy Men and Matrilineal Succession", (1985) 36 Innes Review 29-43, reviewing A P Smyth, *Warlords and Holy Men: Scotland AD 80-1000* (London: Edward Arnold, 1984).

<sup>24</sup> "Celtic Law and Scots Law: Survival and Integration", (1989) 29 Scottish Studies 1-27.

<sup>25</sup> A good sense of the way the content of the honours course challenged the Cooper thesis is to be found in David's contribution, "A Historical Perspective", in M C Meston, W D H Sellar and Lord Cooper, *The Scottish Legal Tradition* (Edinburgh: Saltire Society and Stair Society, 1991), pp 29-64. This publication includes Lord Cooper's original 1949 pamphlet of the same title, whence the "false starts and rejected experiments" quotation.

<sup>26</sup> "English Law as a Source", in D M Walker (ed), *Stair Tercentenary Studies* (Edinburgh: Stair Society, 1981), pp 140-150.

<sup>27</sup> Published in R R Davies (ed), *The British Isles 1100-1500: Comparisons, Contrasts and Connections* (Edinburgh: John Donald, 1988), pp 82-99.

significantly apart, with the establishment of the Court of Session as a College of Justice in 1532 being a critical event in that process.

An example mentioned in the 1988 paper as worthy of fuller study, the law of homicide, received that study in “Forethocht Felony, Malice Aforethought and the Classification of Homicide”, published in the proceedings of the British Legal History Conference in 1991.<sup>28</sup> Here, however, the importance of continuing Canon law influences alongside those of English Common law was highlighted. This study remains the point of departure for current discussions of the subject, with David himself returning to it to show its importance in understanding contemporary perceptions of Robert Bruce’s killing of his rival John Comyn of Badenoch at Dumfries in 1306 and King James II’s assassination of the eighth earl of Douglas in Stirling castle in 1452.<sup>29</sup>

All these publications presented a challenge, not only to Lord Cooper’s false starts and rejected experiments, but also to the widely-held view that by 1707 Scots law was essentially a Civilian system of law which began to be overlaid with English law only as a result of the Anglo-Scottish Union. David took the view that much of the *ius commune* influence in pre-Union Scots law was the result of the significance of Canon rather than Roman law within the overall legal system in Scotland after as well as before the Reformation of 1560. This view emerges particularly clearly in a study of marriage by cohabitation with habit and repute (MCHR) published in 1992 in a volume honouring the recently deceased Sir Thomas (T B) Smith. David argued that historically MCHR derived from Canon law, in which it had been merely evidence of the parties’ exchange of consent, the sole basis for Christian marriage. MCHR was not therefore an independent form of constituting marriage.<sup>30</sup>

In a further paper, contributing to the quincentenary celebrations of the University of Aberdeen in 1995, David argued for the resilience of the medieval Scottish common law, drawing in particular on the writings of Thomas Craig around 1600 (which, like those of Stair and also Lord Kames, he greatly admired) to suggest that in the hierarchy of legal sources at that time Roman law ranked

---

<sup>28</sup> “Forethocht Felony, Malice Aforethought and the Classification of Homicide”, in W M Gordon and T D Fergus (eds), *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (London and Rio Grande: Hambledon Press, 1991), pp 43-59.

<sup>29</sup> “Was It Murder? John Comyn of Badenoch and William, Earl of Douglas”, in C J Kay and M A Mackay (eds), *Perspectives on the Older Scottish Tongue: A Celebration of DOST* (Edinburgh: Edinburgh University Press, 2005), pp 132-138.

<sup>30</sup> “Marriage by Cohabitation with Habit and Repute: Review and Requiem?”, in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (Edinburgh: Butterworths, 1992), pp 117-136. See also David’s “Marriage, Divorce and the Forbidden Degrees: Canon Law and Scots Law”, in W N Osborough (ed), *Explorations in Law and History: Irish Legal History Society Discourses, 1988-1994* (Blackrock: Irish Academic Press in association with The Irish Legal History Society, 1995), pp 59-82.

after Canon law, with native written and customary law ranking above both.<sup>31</sup> As hinted in some of the other contributions to the volume in which David advanced these arguments, his case may have been over-stated; but it is important to realise that he was at least in part reacting to previous over-statements in the opposite direction. David certainly opened the way towards the much more nuanced understandings of these matters which now prevail. A carefully balanced contribution on these themes from David himself came in his 1997 Stair Society Lecture.<sup>32</sup> His most powerful example of the combination of English and Canon law influence was always the law of succession, on which he produced a final contribution in 2007.<sup>33</sup> There he concluded that the most important influence on the Scots law of succession to heritage was the English Common Law, while moveable succession rules resulted from a blending of customary law and Christian practice rather than Canon law as such. Roman law influence was more terminological than substantive.

In the early 1990s David began a near-two decade-long collaboration with me that ultimately produced contributions to each of three volumes in the Gerda Henkel Stiftung series of Comparative Studies in Continental and Anglo-American Legal History as well as developing individual and joint contributions to *A History of Private Law in Scotland*, published in 2000. The subjects of the collaboration were the doctrinal histories of unjust (as David preferred to call it) enrichment, negligence, and promise and *jus quaesitum tertio*.<sup>34</sup> We both enjoyed and gained a great deal from extensive interactions over several years with English and Continental European legal historians under the leadership of

---

<sup>31</sup> “The Resilience of the Scottish Common Law”, in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin: Duncker & Humblot, 1997), pp 149-164.

<sup>32</sup> “Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions”, (2000) 4 *Edinburgh Law Review* 3-18, at p 15.

<sup>33</sup> “Succession Law in Scotland – a Historical Perspective”, in K G C Reid, M J de Waal and R Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (Edinburgh: Edinburgh University Press, 2007), pp 49-66

<sup>34</sup> H L MacQueen and W D H Sellar, “Unjust Enrichment in Scots Law”, in E J H Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin: Duncker & Humblot, 1995), pp 289-321; H L MacQueen and W D H Sellar, “History of Negligence in Scots Law”, in E J H Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Berlin: Duncker & Humblot, 2001), pp 273-307; H L MacQueen and W D H Sellar, “Scots Law: Ius Quaesitum Tertio, Promise and Irrevocability”, in E J H Schrage (ed), *Ius Quaesitum Tertio* (Berlin: Duncker & Humblot, 2008), pp 357-383. The article on “Negligence” also appears in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, 2 vols (Oxford: Oxford University Press, 2000), vol 2, pp 517-547. David’s article on “Promise” and mine on “Third Party Rights in Contract: Ius Quaesitum Tertio” appear in the same volume at pp 220-251 and 252-282 respectively.



Professor Eltjo Schrage of Amsterdam.<sup>35</sup> David would go on to edit (with Professor Richard Helmholz) and contribute to another volume in the Gerda Henkel Stiftung series, this time on the law of presumptions.<sup>36</sup> He also became (with Martin Hogg) the Scottish contributing team for an unjustified enrichment volume in the series *Ius Commune Casebooks for the Common Law of Europe*; this appeared in 2003.<sup>37</sup>

David's European reputation as a legal historian, perhaps first manifested in an invitation to contribute to the *Zeitschrift für Neuere Rechtsgeschichte* in 1987,<sup>38</sup> was further confirmed by his participation during the 1990s in two projects of the Société Jean Bodin pour L'Histoire Comparative des Institutions: one on *actes à cause de mort* (again reflecting David's interest in the law of succession);<sup>39</sup> the other on *l'assistance dans la résolution des conflits*, where he briefly explored kin- and clan-based justice, arbitration, regular judicial process and the customary institution of the "birlawmen". The last, he suggested, was, etymologically at least, of Old Norse origin.<sup>40</sup> As will be seen below, he would return to this last topic later in his career.

All these European projects led to a deeper appreciation of the complex contexts for and influences in the development of Scots law. In particular David gained a great deal for the work he was doing at the same time on the modern law of unjust enrichment for volume 15 of the *Stair Memorial Encyclopaedia*, which appeared in 1996. Essentially finished before the great case of *Morgan Guaranty v Lothian Regional Council* in 1995 began a process of re-orienting Scots enrichment law completely,<sup>41</sup> David's article is in many ways a final and definitive statement of what is now seen as the old law of the three Rs (restitution, repetition and recompense), together with an analysis of its many difficulties and uncertainties. It still repays study as a discussion of the pre-*Morgan* cases, even though the law finally took off in a different direction in

---

<sup>35</sup> An enduring memory of this period is of a boat trip on the canals of Amsterdam and the great interest shown by many distinguished legal historians as well as me in the canal-bank activities as we passed through the city's well-known "red light" district.

<sup>36</sup> *The Law of Presumptions: Essays in Comparative Legal History* (Berlin: Duncker & Humblot, 2009). David's contribution (at pp 203-226) is entitled "Presumptions in Scots Law".

<sup>37</sup> J Beatson and E Schrage (eds), *Cases, Materials and Texts on Unjustified Enrichment* (Oxford: Hart Publishing, 2003). Other contributors included Mindy Chen-Wishart, Barry Nicholas, Martin Schermaier, Danie Visser and Floor Gras.

<sup>38</sup> "Legal History in Scotland", [1987] *Zeitschrift für Neuere Rechtsgeschichte* 74-87 (a survey article).

<sup>39</sup> "Juridical Acts Made in Contemplation of Death in the Law of Scotland", in *Actes à Cause de Mort; Acts of Last Will* (Brussels: De Boeck Université, 1993), pp 159-170.

<sup>40</sup> "Assistance in Conflict Resolution in Scotland", in *L'Assistance dans la Résolution des Conflits; Assistance in Conflicts Resolution* (Brussels: De Boeck Université, 1997), pp 267-275.

<sup>41</sup> *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151.

*Shilliday v Smith* in 1998.<sup>42</sup> David remained critical of *Shilliday's* recasting of the three Rs as remedies rather than actions,<sup>43</sup> but he refrained from any further contribution on what is still a vexed subject.

Another interest of David's from early in his academic career was custom as a source of law. "In a sense," he wrote, "the story of custom as a source is the story of the common law of Scotland itself."<sup>44</sup> But he was fully alert to its role in a more local fashion when he contributed a substantial article on the subject to the *Stair Memorial Encyclopaedia* in 1987.<sup>45</sup> His general interests made it inevitable that he would also wish to engage with the survival of Norse or Udal law in Orkney and Shetland, which had formed a significant part of David's honours course in the history of Scots law in the later 1970s. The subject had also been one of intense interest to T B Smith. When the latter died in 1988, David took over the *Encyclopaedia* article on the subject (although when published in 1989, Smith's previously written "editorial excursus" on Norse law and Scots law and on issues of sovereignty in the Northern Isles was retained to follow David's contribution.)<sup>46</sup>

This work on Udal law led later to David's involvement in a research project on landscape, law and justice led by Professor Michael Jones (Trondheim), within which David's principal output was an article in the *Norsk Geografisk Tidsskrift* on the Land Reform (Scotland) Act 2003.<sup>47</sup> But the project also stimulated David's most original investigation of customary law, into the already mentioned subject of birlaw courts and birleymen. In this he was greatly helped by working with Scandinavian scholars. Birlaw courts and birleymen in Scotland enjoyed a highly localised jurisdiction over economic matters and "good neighbourhood" issues, and vestiges of their work can still be identified today: another example of survival and integration. David's initial hypothesis, already referred to, was that the institution was of Scandinavian origin. His detailed paper on the subject, first advanced at the British Legal History Conference in Dublin in 2003, then further developed as a contribution to the Stair Society's

---

<sup>42</sup> "Obligations Imposed by Force of Law: (1) Unjust Enrichment", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (Edinburgh: Butterworths for the Law Society of Scotland, 1996), paras 10-86; *Shilliday v Smith* 1998 SC 725.

<sup>43</sup> "*Shilliday v Smith: Unjust Enrichment Through the Looking Glass*", (2001) 5 *Edinburgh Law Review* 80-84.

<sup>44</sup> *Stair Memorial Encyclopaedia*, vol 22, para 355.

<sup>45</sup> "Custom as a Source of Law", *Stair Memorial Encyclopaedia*, vol 22, paras 355-393. At the insistence of its General Editor, T B Smith, David was an informal historical consultant on all *Encyclopaedia* articles that had relevant content.

<sup>46</sup> "Udal Law", *Stair Memorial Encyclopaedia*, vol 24, paras 301-316.

<sup>47</sup> "The Great Land Debate and the Land Reform (Scotland) Act 2003", (2006) 60 *Norsk Geografisk Tidsskrift* 100-109. See also "Medieval Glebes – Canon Law in the Swedish Landscape", in T Peil and M Jones (eds), *Landscape, Law and Justice: Proceedings of a Conference at the Norwegian Academy of Science and Letters, Oslo 15-19 June 2003* (Oslo: Novus, 2005), pp 110-117.

seventh Miscellany volume published in 2015,<sup>48</sup> confirmed that hypothesis with a wealth of detail. The immediate origin for Scotland was the Danelaw of the eleventh century in northern and eastern England; whether the birlaw customs there came from Scandinavia or were, perhaps, born of specifically Danelaw conditions from which the customs could then spread, not only to Scotland, but also back to Scandinavia, was a question David chose to leave open.

Re-reading half a century of scholarly work reminds me not only of David's considerable intellectual powers, but also of his ability to write with ease and fluency on the most rebarbative of subjects, including a gift for adding into the mix telling stories from his many encounters in the field from his time in the Scottish Land Court on. He was an incisive, yet always kindly, reviewer of others' work; criticism was almost invariably tempered with praise.<sup>49</sup> He was also very active in the Scottish Legal History Group from its foundation in 1981, when it was set up to add something to the study of the subject beyond what was offered at the time by the possibly somewhat staid approach of the Stair Society.

The trust and confidence which he inspired in others in his special fields is apparent from the many positions of responsibility to which he was appointed or elected before he became Lyon: secretary of the Company of Scottish History Ltd (publishers of the *Scottish Historical Review*) 1972-1977; Literary Director of the Stair Society 1979-1984, Vice President 2013-2017; President of the Scottish Society for Northern Studies 1984-1987; Chairman of Council in the Scottish History Society 1998-2001; Vice-President, Society of Antiquaries of Scotland 1999-2002; Chairman, Conference of Scottish Medievalists 2000-2003; Honorary President, Scottish Genealogy Society, from 2009; and member of the Ancient Monuments Board 1991-1997.

Although David liked to joke that he had begun his professional life in a court for crofters and was finishing it in a court for chiefs, appointment as Lord Lyon did not quite bring his scholarly career to an end. Issues arose in the Lyon Court which brought his legal-historical scholarship into play. For example, in 2010 Lyon Sellar refused the petition of Willi Ernst Sturzenegger of Arran to be recognized as "Feudal Earl of Arran" (given that there is already an Earl of Arran, one of the subsidiary titles of the Duke of Hamilton). The Lyon's Note in explanation of his decision discussed the history of the Scottish peerage styles and the meaning of "baron" and "barony" in Scots law, to draw the conclusion that pre-fixing those or any other title of dignity with words like "feudal" or

---

<sup>48</sup> "Birlaw Courts and Birleymen", in P Brand, K Costello and W N Osborough (eds), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference, Dublin, 2003* (Dublin: Four Courts Press with the Irish Legal History Society, 2005), pp 70-87; "Birlaw Courts and Birleymen", in H L MacQueen (ed), *Miscellany VII* (Edinburgh: Stair Society, 2015), pp 163-177.

<sup>49</sup> See e.g. (1987) 66 *Scottish Historical Review* 200-203; (1998) 42 *American Journal of Legal History* 105-106; (2005) 9 *Edinburgh Law Review* 340-341.

“territorial” was legally meaningless.<sup>50</sup> David also investigated the early history of the Lyon in a lecture to the Heraldry Society of Scotland.<sup>51</sup> There he reiterated his belief that the office descended from that of the *seannachie* of the kings of Scots, who recited a new king’s pedigree as a key part of the royal inauguration ceremony, perhaps from as far back as the ninth century. Much else of his research and writing over the years – ranging from King Arthur to the dynasties he identified amongst the early modern Scottish bench, bar and jurists – lay still unpublished at his death. Perhaps most unfortunately for us, he was never one to rush into print.

Tall, always fair-haired, and heavily bearded from the mid-1970s on, David cut a fine figure in his Lyon’s tabard of office, worn for State occasions. The portrait of him presented to the Lyon Office in 2015, painted by Guy Kinder and commissioned by Alexander McCall Smith (a friend who had been a colleague in the Edinburgh Law Faculty from the early 1970s), shows him in the tabard together with his baton and collar of office.<sup>52</sup> A memorable photograph of Lyon Sellar shows him stiffly on guard with Garter King of Arms on the steps of St Paul’s Cathedral in London during the National Service of Thanksgiving for the Queen’s Diamond Jubilee on 5 June 2012. Apparently both gentlemen felt that they stood stock still on their heels on a narrow step above a steep drop for what seemed like an eternity. One consolation was that David became the first Lyon to be represented in a Peter Brookes cartoon in the *Times* newspaper.<sup>53</sup> A physically less demanding occasion, which nonetheless involved the donning of another colourful robe and hood, was the award of an honorary Doctorate of Laws by Glasgow University in 2016, with a fine oration being given on that occasion by David’s former student, Professor Mark Godfrey.<sup>54</sup>

David had known family tragedy before his marriage and bore its long-term consequences with great dignity and fortitude.<sup>55</sup> Marriage with Sue at St Columba’s by the Castle in Edinburgh in 1981 brought him much personal happiness, a stepson (Andrew) and, in due course, three sons (Duncan, Niall and Gavin). He took huge pride and pleasure in them all and was further delighted by the eventual arrival of five grandchildren (most of them, as the genealogist no doubt noted, girls). The attendance at his funeral in Warriston Crematorium on 23 February 2019 made manifest how widespread was the affection and

---

<sup>50</sup> *Sturzenegger Petitioner (No 2)* 2015 SLT (Lyon Ct) 2. The note is also available on the Lyon Court website:

[https://www.courtofthelordlyon.scot/index\\_htm\\_files/ARRAN.PDF](https://www.courtofthelordlyon.scot/index_htm_files/ARRAN.PDF).

<sup>51</sup> This lecture has not been available to me in preparing this memoir; but see *The Scotsman* obituary published on 11 February 2019.

<sup>52</sup> See <https://www.scottishlegal.com/article/alexander-mccall-smith-presents-lord-lyon-portrait>.

<sup>53</sup> *The Times*, 5 June 2014.

<sup>54</sup> <https://www.uofgschooloflaw.com/blog/2016/06/28/david-sellar-historian-of-scotland-and-scots-law-receives-an-honorary-lld>.

<sup>55</sup> See *Sellar’s Curator Bonis v Glasgow Victoria and Leverndale Hospitals* 1973 SLT (Notes) 3.

admiration for David; the University flag at half-mast over Old College that day symbolised its grateful respect for one of its own.

Hector MacQueen  
University of Edinburgh Law School

*I am grateful to many of David's friends and mine for help readily and freely given in the preparation of this memoir.*