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SOME OBSERVATIONS ON THE LAW LECTURES OF PROFESSOR MILLAR AT THE UNIVERSITY OF GLASGOW (1761–1801)

THE life and work and thought of John Millar, Professor of Civil Law at the University of Glasgow in the later eighteenth century, has been dealt with by the present author in his *John Millar of Glasgow*.[1] The author has also prepared a paper, as yet unpublished, on Millar's "Lectures on Government" given during all, or nearly all, of the forty years of his occupancy of the Glasgow law chair. In the present paper he proposes, however, to confine himself entirely to Millar's lectures on the "Civil" or Roman law and on the municipal law of Scotland and latterly also of England, except for mere passing references to the "Lectures on Government" or "Public Law." Of materials pertinent to the present subject previously published only so much will be reintroduced here as is indispensable to a comprehension of the bearings of the present subject by those of his readers who have not had an opportunity to consult these earlier publications.

John Millar (1735–1801), a student at Glasgow from 1746 to 1751, and a protegé of Adam Smith in the latter's first years at Glasgow, and of Lord Kames of the Court of Session at Edinburgh, in whose home he served as a tutor to his son for two years, was with the support in particular of these two men appointed to the Crown Chair of Civil Law at Glasgow at the early age of twenty-six. This chair he occupied with great distinction from 1761 up to his death in 1801. His lectures throughout this period attracted students not only from all over Scotland but also from prominent Whig families elsewhere in the British Isles, and some even from abroad, and, by the testimony of contemporaries, added not a little to the reputation of the University. James Mill, a near-contemporary,

[1] Published by the Cambridge University Press in 1960 as No. IV in the Social and Economic Studies series of the Department of Social and Economic Research of the University of Glasgow, and more briefly elsewhere. (See his "John Millar, Professor of Civil Law at Glasgow" in the *Juridical Review* (Edinburgh), 1961, Pt. 3, pp. 218–233; "John Millar, Historical Sociologist" in *British Journal of Sociology*, March 1952, pp. 30–46. Also, editorial introduction to a German translation of Millar's *Ranks* published by Suhrkamp Verlag, Frankfort a/M, Germany, in late 1967. Also brief biographical sketch *s.v.* "Millar, John" in *International Encyclopedia of the Social Sciences*.)

deemed his lectures "among the most instructive things that ever were offered to the minds of youth." David Murray calls Millar "the most celebrated and most successful teacher of his time"; and John Rae, biographer of Adam Smith, calls him "the most effective and influential apostle of liberalism in Scotland in that age." [2]

Our knowledge of the content and general quality of his lectures is derived chiefly from the surviving student-notes, in manuscript, taken in the class-room on his various courses of lectures and preserved chiefly in the David Murray Collection in the library of the University of Glasgow, but some also in other places, such as the National Library at Edinburgh and the Edinburgh University Library. Of his lectures on the Pandects of Justinian and on the law of England we have only single sets; on other courses we have two or more; and on those on the Institutes, generally called simply on "Civil Law," we have no less than eight sets, some of them incomplete and others so badly interlarded with shorthand notes as to be scarcely legible to us today. One set on the "Civil Law" (incomplete) and one on the "Lectures on Government" are by Millar's own son James.

There are also accounts and characterisations by his nephew, John Craig, who attended most of these lectures, in the biographical account of his uncle prefixed to the fourth edition of Millar's *Origin of the Distinction of Ranks* [3]; and there are briefer characterisations and accounts of Millar's style of lecturing and of his impact on his students by a number of his former students and by other observers, particularly by the poet Thomas Campbell and by Francis Jeffrey, principal creator and long-time editor of the *Edinburgh Review*.[4] Announcements of his courses, especially in the earlier years, are to be found in the Glasgow newspapers of the time, a few weeks before the beginning of the session, and printed "lecture-heads" or course-outlines, lecture by lecture, are still available for some of the courses.

During most of the forty years of his occupancy of the chair he gave the following courses with apparently but little variation in the general programme except for the late introduction of the course last to be mentioned.

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[2] For these and similar appraisals see the author's *John Millar of Glasgow*, pp. vii, 36, 132 *et seq.*

[3] John Craig, *Account of* [*Millar's*] *Life and Writings* prefixed to his 1806 reprint of the third edition of Millar's *Origin of the Distinction of Ranks.*

[4] See citations and observations in Chap. 4 of the author's *John Millar.*

First, there was the basic course on the Institutes of Justinian, the class meeting five times weekly for the entire session. This course was however broken down into two parts of about equal length, sometimes spoken of as separate courses, the first reviewing objectively and commenting but briefly on the main provisions of the Roman law, following chiefly Heineccius as a text-book; the second, sometimes also spoken of as the "Lectures on Jurisprudence" attempting to explain and illustrate with much comparative material the "principles" underlying the particular rules of that body of law.

A second course, introduced not at the very beginning but early in his occupancy of the chair, was a course on the Pandects of Justinian, the class also meeting five times each week for the entire session. Some details will be given below.

A third course, also running for the entire session and given every year, but with the class meeting but three times each week, was a course in public law, generally spoken of as his "Lectures on Government." This course consisted really of three parts. The first fifteen or so lectures dealt with what he called the "principles of government," but really embodied in essence his whole social and political theory; the next fifteen to twenty lectures were addressed to an application and illustration of these "principles" in an historical survey, first of the ancient governments of Athens, Sparta and Rome, then of the "modern nations" or governments, the German, the French and the British, with several lectures dealing with all these "modern" European nations, and some further lectures reviewing "ecclesiastical government" from apostolic times down to the Reformation. The final fifteen or so lectures dealt with "The Present State of the English Government" and provided really an analytical study of the British constitution. This course will not concern us in this paper.

A fourth course, given only in alternate years, with the class meeting but twice a week, dealt with the peculiarities of the law of Scotland. This course was aimed chiefly at students within the university already familiar with the "civil" law and definitely expecting to enter the law as a profession in Scotland, and at others, no doubt usually apprenticed in law-chambers in Glasgow, who were preparing for the bar examinations.

In his last year but two and his last year he introduced a fifth course dealing with the peculiarities of the law of England. This

course alternated with the Scots law course, using the same twice-weekly hours left free in the alternate years.

General observations

Before addressing ourselves to the general character and specific content of these several courses of lectures, some general observations will be in place here on these lectures as a whole.

In the first place, in all the law lectures proper Millar followed, with minor variations, a classification and arrangement of rights suggested in the main by the *Corpus Iuris* of the Roman lawyers themselves, but improved upon, as he viewed it at least, by his own ideas of the most logical divisions and arrangement and the most clarifying distinction of the various rights. This classification and arrangement can be readily traced in the surviving printed " lecture heads " and other outlines in the student notes. It is most clearly set forth, however, by one of his former students, James Reddie, in his *Inquiries in the Science of Law*, first published in 1840 and in revised form in 1847. His description of Millar's scheme follows:

> " The objects of law are two: rights and actions, or the judicial means of enforcing these rights. Rights arise either from the distinction of persons or from the distinction of things. The distinctions of persons arise from their different relations in society, as husband and wife, parent and child, master and servant, and hence so many rights. On the other hand, rights from the distinction of things arise from the various objects of right, and the different exertions made to obtain them. They are either real or personal. In a real right, we have an immediate connection with the thing itself, and direct power over it. In a personal right we have merely a remote connection with the thing, through the medium of another person; a power over another person so as to obtain the thing. Real rights are four —property, with its limitations, servitude, pledge, and exclusive privilege. Personal rights or obligations, are of three different kinds, as they arise from convention, delinquency or equity and utility.
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> " Of all the classifications of private law we have yet considered [*i.e.*, in Reddie's previous discussion] this is clearly the most simple, and the most comprehensive; and will merit particular attention when we come to inquire what is the best

arrangement. At the same time, in some of its parts, it is not, perhaps, quite exceptionable." [5]

A further fact to be noted is that Millar never published any of his lectures as delivered. He did prepare a syllabus for his students, apparently chiefly for the Pandect lectures, but this has not come down to us. Nor did he publish any other work of a strictly juridical nature. To be sure, both of his principal published works, his *Origin of the Distinction of Ranks*, with the telling subtitle, " Or an Inquiry into the Circumstances that Give Rise to Influence and Authority in the Different Members of Society," and his *Historical View of the English Government*, draw heavily on, and in fact are in most respects, an enlargement or expansion of portions of his lectures—the former drawing chiefly on the " Lectures on Jurisprudence " (*i.e.*, Part II of the lectures on " civil law ") and on Part I of the " Lectures on Government," the latter chiefly on Part II of these latter lectures. But they clearly take on a socio-political, a sociological, a philosophical-historical, much more than a purely juridical character. Social institutions, socio-political development and the dynamics of institutional characterisation and change, are their underlying theme.

This leads one strongly to suspect that while his scholarship in the field of law was broad and solid, and while he manifested a keen understanding of the problems of law, as is clear from the scope of his reading, from his citation of legal sources when he chooses to give them, and from his critical analysis of technical points of law when he has occasion to discuss them, he yet seemed to have a livelier interest, at least a livelier *teaching* interest, in the broadly philosophical, socio-political and socio-historical bearings of his subject than in the strictly juridical, as will appear more clearly in the sequel.

This impression is further borne out by the fact that his course of " Lectures on Government," which, as we have seen, dealt chiefly with problems of a socio-political and broadly civilisational nature and only secondarily with matters of law, at least of private law—and with a distinctly citizenship appeal—was clearly the most popular of his courses and always attracted " a much larger number of students " than did any of his law courses proper. It would seem, too, that it was on these lectures, along with those on general " jurisprudence," more than on his lectures on law proper, that his

[5] James Reddie, *Inquiries in the Science of Law*, 2nd ed. (1847), pp. 159–160.

fame abroad and his fondest recollections in the memory of his erstwhile students chiefly rested, this in spite of the fact that even his critics admitted that he "taught civil law with great ability and diligence," and that "it is agreed that he made many excellent scholars [and that] in fact, his general views of jurisprudence were masterly."[6]

True, one of his former students, the poet Campbell, once observed in fond reminiscence, "I heard him when I was but sixteen lecture on Roman law. A dry subject it would have been in common hands; but in his hands Heineccius was made a feast to the attention. . . . His students were always in the class before him, waiting for a treat."[7]

It was the same man of lively imagination who also observed of his former teacher:

> ". . . To say that Millar gave me liberal opinions, would be understating the obligation which I either owed or imagined I owed to him. He did more. He made investigation into the principles of justice, of the rights and interests of society, so captivating to me that I formed opinions for myself and became an emancipated lover of truth. [Millar] had the magic secret of making you so curious in inquiry and so much in love with truth as to be independent of specific tenets."[8]

Whether or not in retrospect this former student distinguished clearly between different courses, will be a matter of opinion. More important is the fact that after some forty years, on the passing of the Parliamentary Reform Act of 1832, he still exclaimed, in effect: "How Millar would have rejoiced, were he still alive, to see this day!" Anyway, all this reflects Millar's qualities as a teacher no less than it does the direction of his scholarly interests and the qualities of his scholarship.

It may not be without significance in this connection that in his account of his uncle's various courses of lectures Craig devotes some twenty pages to the lectures on "jurisprudence" and another seventeen to those on "government," while passing up those on private law with little more than the observation that "it would be uninteresting to many of my readers were I to enter into details respecting the lectures on Roman, Scots and English law." Of

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[6] Lehmann, *John Millar*, p. 36.
[7] *Ibid.*, p. 31.
[8] *Ibid.* pp. 39 *et seq.*

Millar himself he observes, rightly or wrongly, that "the employment of the whole winter in tracing [in the course on the Institutes] with utmost curiosity and tedious erudition the exact line of the Roman law seemed to him a mere waste of time and study. Whatever it was useful to know of the Institutes, he thought might be sufficiently taught in half of the session or term." [9]

A further general observation that applies to all of these lectures, whether on law proper, on general jurisprudence or on government, is that he applied to his exposition an historical, comparative, rather than merely a descriptive and analytical, to say nothing of a predominantly speculative method or approach. That is, he would have his students see particular rules of law, or a whole system of law, and particular political institutions, not only in their historical setting and in a comparative viewpoint, but also in their developmental aspects, as ever undergoing changes in adaptation to changing situations and under the operation of various forces in the general social, economic and political situation. This will appear more clearly as we proceed with our analysis.

In line with this, there are also frequent attempts at historical generalisation. A few examples may be given.

> "In all countries where marriage is usually contracted by the relations of the parties and from prudential considerations, much use will be made of a contract of engagement, called *sponsalia*, often made very early and strictly enforced; whereas where marriages are entered into by the inclination of the parties themselves, the enforcement of such a contract of engagement comes to be looked upon with disfavour as dangerous to future marital happiness."

Or again, personal rights, that is, rights involving an obligation of one person to another, as distinguished from real rights, that is, rights involving merely a right to things, are more frequent in polished than in primitive societies; and the rules by which they are governed are often more difficult and less easily determined. With the advance of judicial experience and knowledge, considerations of utility are more likely than considerations of the feeling of justice to guide the enforcement of these rules.

As a final general observation we may note that in all these lectures a prominent place is given to the discussion of causal factors

[9] Craig, *op. cit.*, p. xx.

in the rise, enactment, maintenance, modification or abrogation of given rules of law, in the shaping of entire systems of law and of social and political institutions. And, as has been abundantly made clear elsewhere, among such causal factors, the first place is usually given to economic factors. "As the Romans became a more rich and luxurious people," to give but one example, "their manners [in matters of marriage and divorce] became more relaxed." Their opulence tended to discourage marriage in a variety of ways, and among other things led to a considerable increase of concubinage, and called for new laws to regulate both marriage and concubinage. The impact of Christianity, however, under and following Constantine, upon Roman laws and customs in this regard, is also recognised.

Again in a somewhat broader view, "constant attention to war produced a strong attachment to every old usage by preventing advances in refinement in the arts." The right of *patria potestas* is seen as contributing greatly to the support of the authority of the magistrate. "The division of labour among separate artificers gives rise to an agreement that labour should be given for hire."

As a kind of footnote to these general observations we may be permitted to quote Mr. Craig again on Millar's broadest objectives in his lectures as follows: "[Millar] was not merely desirous," he holds, "to convey to his students just and accurate information; but he was anxious to convey them in the manner most likely to seize the attention, and to produce habits of original thought and philosophical investigation, thus rendering lectures formerly considered as useful only to lawyers, the most important school of general education." [10]

Craig further considers his lectures, particularly those on jurisprudence and those on government, "so important to all and so instructive in the views they exhibit of human nature" that it becomes a matter of regret that, "never having been committed to writing, they cannot now in perfect form be submitted to the public."

Descriptive accounts: lectures on the Institutes

After these general observations we may now proceed to a brief description of the objectives, scope and general character, and any distinctive features of these various courses of lectures on law, so far as our sources permit such description.

[10] *Ibid.*, p. xii.

The course or " courses " on the Institutes can first of all be characterised in Millar's own words as reported by a student:

> " [In the first part] I endeavoured to explain the facts of the Roman law, which seems to have been the chief thing intended in the Institutes of Justinian. In doing so I have avoided reasoning on the principles whereon their decisions were founded. [But] in going over the subject a second time I think these principles ought to be the chief consideration, and in the course of the investigation we shall be led to compare the Roman law with that of other nations. This is not done merely with a view to obtaining a knowledge of the Roman law whereby to regulate our practice [it having no authority with us], but it is valuable as it is the experience of a numerous body of lawyers who in a large empire must have had a very extensive practice, and therefore deserves our notice as being an enlarged and improved system; and in order to judge rightly of it we must compare it with the system of other countries and our own feelings."

Or to quote his biographer to a similar effect:

> " After going over the Institutes according to the arrangement of Heineccius, and explaining the nature and origin of each particular right as it occurred, he began a new course of lectures in which he treated of such general principles of law as pervade the codes of all nations, and have their origins in those sentiments of justice which are implanted in the human heart."

In carrying out the objectives of the first part Millar usually began with a brief discussion of the nature of law, as distinguished from both morals and government, and followed this with a broad survey of the development of the Roman law, its codification from Hadrian to Justinian, and the " fate of the Roman law " both in practice and in its teaching in the universities in Western Europe in medieval and modern times. In this survey he points out, among other things, that " of all the countries of Europe England is that in which the Roman law has had the least influence." While it is made use of in some minor courts there and is sometimes taught in the universities, " in the courts of common law little regard has been had to that system; and the study of it has not been considered as a necessary part of the education of a practitioner in those courts."

After noting the different kinds of law distinguished by the Romans, and its division into rights and actions, he proceeds to review and comment on the various rights, following in general the arrangement already indicated but guided in detail by Heineccius, by Book and Title, as a text book.

It would be as futile to attempt here to treat this exposition in any detail as it seemed unnecessary to his biographer. A few comments and illustrations may, however, not be out of place.

Husband–wife relations, for example are discussed under the headings: (1) How marriage is contracted; (2) The legal influence of marriage; and (3) How marriage is dissolved. Under these heads are discussed such matters as the requisites or qualifications of the parties for marriage, the different forms of marriage among the Romans at different times, the rights of both parties to the union in matters of property and other matters, the frequency and the conditions of divorce, and the changes in these matters over the years. Under parent–child relations much is made of the Roman *patria potestas* and of the changes, both in custom and in law, in this matter. Under master–servant relations much is made of slavery in Rome under such heads as: (1) What was the condition of the Roman slaves? (2) How might slaves be acquired? and (3) How might they obtain their liberty? The subject of slavery and other forms of servitude always received much attention in Millar's lectures and writings.

Under real rights, the rights of property, its kinds, the various modes of its acquisition, the manner and conditions of its transfer, the rights of succession, by testament or intestate, how estates are divided, etc., are all discussed in considerable detail. Always attention is paid to changes, both in custom and in law, in these matters. Such phrases as " by degrees, however, certain limitations were introduced " in this or that power, are not infrequent. Where there are conflicting laws, or a lack of clarity in their interpretation, these are discussed, usually in footnotes or marginal notes.

Nothing that was said above, either in quotations or in our own commentary should be allowed to convey the impression, as it might easily do, that Millar's treatment of the civil law, even in this first course, was in any way superficial or merely cursory in character. Many technical matters are discussed in considerable detail and with a critical insight and erudition that would belie any charge of superficiality. Not all provisions of the law could, of course, be treated

in such detail. He had of necessity to be selective in his treatment of the whole, guided by his own conception of what was essential for the audience and the purpose at hand.

In the second half of this basic course the same ground is gone over again but on an entirely different level of interpretation as already indicated. Craig characterised these lectures as follows:

> " [Here Millar] began by investigating the origin and foundation of each right in the natural principles of justice; and afterwards traced its progress through the different conditions of mankind; marking such deviations from the general rules as the known circumstances of particular nations might be expected to occasion, and accounting in the most satisfactory manner for those diversities in laws which must otherwise have appeared irreconcilable with the idea that there is anything stable or precise in the moral sentiments of mankind." [11]

He begins with devoting six or seven lectures, usually, to the foundations of law in human nature, in the principles of morality, in " natural law," in the moral meaning of that term, in the principles of justice. In fact he devotes a number of lectures to an historical review of the different ethical theories in attempting to arrive at his " principles " of ethics. One of these introductory lectures is, properly enough, devoted to " progressive inquiries of mankind in relation to law," that is, to the rise of jurisprudence and of judicial establishments; and a final one, strangely to our thinking today, to aesthetics or the appreciation of beauty and order in society as in art.

Under husband–wife relations he now attends at greater length to marital institutions and the relations of the sexes in different stages of civilisation, to property institutions, etc., than to the rules of law governing these relations in various societies. Attention is paid to " forms and ceremonies in the celebration of marriage " in various societies, some of them legally required, others but customary. The status of women in various stages of social evolution, a theme which becomes central in his *Origin of the Distinction of Ranks*, receives major attention, as does also the prevalence in various societies of polygamy, the causes leading to this practice, its evil consequences, and the reasons for its decline. The psychological and utilitarian bases of the prohibition of the marriage of

[11] *Ibid.*, p. xxxvi.

near relatives in most societies, including incest in nearly all, come under discussion, along with the religious sanctions usually attaching to these prohibitions. Under parent–child relations he discusses not only the rights and obligations of parents toward their children and those of children toward their parents, but also " the progress of society with respect to the parental power " and the influence of the progress of regular government, of civilised manners and of improvement of the arts, upon parental power, particularly upon the *patria potestas.*

Similarly under master–servant relations he now passes briefly in review the history of servitude, attends particularly to the excesses, but also to the varying fortunes of this practice both in Rome and in modern times, to the forces that have contributed to its introduction, and to its mitigation and abolition in most countries in the modern world. He emphasises strongly the dis-economy of slavery in modern economies, and this leads him also to discuss the rise and the advantages of wage or employer–employee arrangements in modern industrial societies. In his discussion of this subject there are repeated references in footnotes to his already published *Origin of the Distinction of Ranks.*

Similar observations might be made on other areas of his discussion in these lectures—property rights, for example, or judicial establishments. But these cannot be further gone into here.

Whether such a broadly socio-historical, socio-anthropological and even socio-psychological treatment of his subject shall be looked upon as a straining almost to the breaking-point of the boundaries of the stated functions of his chair, in accommodation to his conception of educational values and of the educational needs of his students, or whether it represents his conception of law itself and the requirements of law-education at a time when there was as yet little specialisation in " social science," must remain a matter of conjecture. At any rate it is clear that he deemed such an orientation of the mind of youth in the world in which they lived essential to their education, whether for the legal profession or for the responsibilities of citizenship regardless of future profession. In his more advanced courses he does not wander so far afield of the central functions of his chair.

The Pandects

In his first years, Millar tells us, he tried also to cover, or at least to deal with, the Pandects in his basic year-course on civil law.

But he soon found that he could not do justice to this subject in the time allotted, without unduly burdening his students, and so decided to devote another course to it, running throughout the session and like the other course on a five-times-weekly schedule. To bring some kind of order into these lawyers' commentaries that lacked any kind of logical order in the text of the Pandects themselves, he provided a syllabus to guide the students' reading as already indicated.

Our only known surviving set of student-notes on this course of lectures is rather unsatisfactory. These notes cover 116 lectures in some 360 pages of script in the usual 5″ × 7¾″ note books, thus giving, on the average, little more than three small pages to a lecture, though some of the lectures are covered more extensively. These notes, therefore, often do little more than announce the topics and sub-topics discussed by Book and Title, thus throwing but little light on the discussion itself. The fifty books of the Pandects themselves consist, of course, of the opinions and commentaries of Roman lawyers at various times on the various rules making up the body of the Roman law—opinions often in conflict with one another.

Our comments here must therefore of necessity be confined to a few general observations, based on a hasty perusal of these notes, with only an occasional illustration.

In the first place, it will be well to remember that these lectures, or lectures and exercises, which they probably were, were intended for students who had already attended the first year course, as is clearly evident from frequent cross-references to points made in that course. More of his students here than in the other course, though not necessarily all of them, would be looking to law as a vocation. The discussion here was therefore much more largely confined to the provisions of the Roman law itself rather than to broader problems of jurisprudence, the more so since in Scotland this was considered an essential part of a lawyer's education.

This leads us, next, to the reminder that these were indeed lectures on the Roman or "civil" law and not on the common law, thus reinforcing his own observation quoted above that, contrary to prevailing usage in England, this civil law and its principles still had much influence on Scottish law, even though it had no authority as such, and therefore entered prominently into Scottish legal education.

A further observation is that, meagre as these notes may be, it

is clear from their perusal that Millar's approach here as elsewhere is pervadingly an historical one. Not only does he begin by passing in review the history of the Pandects in their relation to the Institutes and to the Roman law generally, but in his treatment of particular rules of law reference is frequently made to historical backgrounds and to changes or developments in the Roman law itself in adaptation to changes in the society in which it functioned. In his treatment of " actions " he again, as in the first course, attends to the development of judgeships-with-authority out of voluntary arbitration by respected leaders of the community without authority, and to the origin and development of judicial establishments and procedures in the various kinds of courts in Rome as elsewhere.

Observations like the following are frequently found: " According to the old law the wife was the slave of her husband [etc., etc.]. According to later laws slavery of the wife was abolished," the wife not only ceasing to be property but becoming herself capable of owning property, transmitting it in succession, etc. " After Christianity was established in the Empire the liberty of divorce came to be gradually restrained." " The Romans, after they became an opulent people, had frequent occasion to lend money at interest. During the most flourishing period of the Republic, when the nation was advancing rapidly towards opulence, the people engaged extensively in trade. The greater part of [the people] being enforced slaves, [their owners] had great occasion to borrow in order to increase their stock. At the same time, the profits of trade not being reduced by much competition, the borrower was enabled to pay a considerable premium for the use of money," etc. Then follows a discussion of the introduction of legal regulation of interest-rates, debts, bankruptcy, etc.

Millar was careful in his exposition of the law to point out existing and changing rank-structures in Roman society: slave and free; patricians (senators and their descendants), *equites*, ordinary plebeians, and *libertini* or freedmen. These rank-distinctions he sees as clearly recognised by the laws of the country. The use of the gold ring as a symbol of status is mentioned as a custom recognised in law. The absence, at least in early Roman times, of a nobility based on great landed estates is made note of. So likewise are changes in this social structure with changes in social, economic and political conditions, and corresponding changes in the laws.

If there is one thing that particularly stands out in these lectures

on the Pandects it is Millar's emphasis on the proprietary aspects of marriage and marital relations in Roman society at different times and in a variety of ways. In early Roman times the wife was herself property, as we have already noted. In the course of time the wife was herself conceded the right to own property, to retain property rights in the dowry she brought with her and in other possessions. While the husband had the responsibility of managing his wife's property, he could not effect its alienation, though a difference was made here between her estate itself and the fruits thereof, the land and the crops thereon, land and the timber cut therefrom, for example.

Dowry considerations were a principal consideration in the selection of a mate, this being, of course, an inter-family rather than an inter-individual matter. The matter of the *sponsalia* or engagement, previously referred to, was also guided largely by property considerations. " By degrees, however," Millar informs us, " the inexpediency of supporting such a contract was more and more perceived, and the promise of marriage came to be deprived of all legal effect." And again, " A compatible marriage is not likely to take place where the parties are compelled to marry from a previous promise." The disposal of the dower, in the case of either the husband's or the wife's prior death, was carefully defined in law. " The most important question upon the dissolution of a marriage [presumably either by death or by divorce] relates to the state of the dower: Who has the right to demand the dower after the dissolution of the marriage? " " In the opulent period of Rome," Millar believes, " the views of the people on this subject [marriage] appear to have been extremely mercenary."

Other aspects of the Roman law, such as property rights, and, related to this, the law of succession, are also gone into in considerable detail. Actions, that is courts, their areas of jurisdiction, their procedures, powers of summoning, of the enforcement of their decrees, etc., are treated much more briefly than the rights themselves.

" In these two courses," namely that on the Institutes and that on the Pandects, Craig observes, " he gave every information that could be desired on civil law, whether considered as merely an object of literary curiosity or as the business of modern law, and consequently a most useful commentary on the municipal system of the greater part of Europe." [12]

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[12] *Ibid.*, p. xx.

Scots law

In his twice-weekly lectures on Scots law Millar manifests not only a clear grasp of the essential characteristics and unique features of the municipal law of his country, but also a scholarly grasp of its details and of its sources not only in statutory enactments but also in superior-court decisions in particular causes. He is of course familiar with Stair, Mackenzie and Erskine and with the *Regiam Majestatem*. The *Acts of the Parliaments of Scotland* were prepared and published only after his death by his own former student Thomas Thomson. He recognises clearly the extent to which survivals of the feudal law are still present in the law of his country, especially in land-law, the laws of succession and the law of entail. The predominance of a customary over a statutory element in this body of law, the relative absence of rigid, inflexible rules, the difference between Scottish and English judicial procedures, the use and non-use of juries, etc., in the two countries—all of these receive their due attention.

Some of these are pointed out in his introductory lecture as we see from this excerpt from one set of notes. After noting the distinction between statutory and unwritten or " consuetudinary " law, in Scotland as elsewhere, and after reviewing the principal sources, he turns to the role of customary law in this country, thus:

> " It naturally happens in every country," he is reported as saying, " that many customs are long and conformably observed by the people without the interposition of the legislative authority at all. And so much regard is naturally paid to this that it would be productive of great disorder to make any innovation. . . .
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> " As custom first proceeds from a principle of utility, so regard must always be had to this principle in all subsequent alterations. Thus, though an established custom is found sometimes to be inconvenient, yet if the abrogating the custom might create a greater inconvenience by producing disorder, public utility requires that that custom should be preserved.
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> " In Scotland consuetudinary law has equal effect and authority with statutory law. And where a statute is not followed, or is contradicted by custom, such a statute must yield to that custom, as was found June 25, 1731, Lord Dun against the town of Montrose; but after admitting this point there still remains a difficulty that has not hitherto been settled;

viz., What length of time is necessary for giving a custom this force? This depends in a great measure on the nature of the custom, whether it is more or less calculated for public utility, and whether the overturning it will not be a greater evil than allowing it to remain." [13]

"The Engish think it of more consequence to have a rule —though perhaps an indifferent but fixed and ascertained one —than to have the best possible rule if not perfectly fixed. A decision, therefore, once given, is generally followed invariably and even though opinions of certain celebrated lawyers have almost equally the weight of law. In Scotland, however, there is more attention paid to the intrinsic utility of the law than to former decisions or opinions. And they are more anxious to rectify former mistakes than to establish [a] uniform system. However the English laws have been inordinarily (?) and more accurately fixed and determined than the Scotch which are still fluctuating and unsettled. But the latter will probably come at last to a system of laws more equitable and perfect."

Of the fifty lectures announced in the printed "lecture heads" for the year 1789–90 [14] only one is devoted to introductory preliminaries; four to rights and duties of husband and wife; one each to parent–child, master–servant, guardian–ward, and curator–minor relations. Eight are given to "property," including the introduction of feudalism into Scotland and survival of feudal tenures, the various casualties and some of the forms of conveyancing or transfer of property rights. Then follow two lectures on the various forms of servitude in Scotland, two on "tythes," and one each on pledge and on exclusive privilege. Five deal with promise or contract, six with crime and delinquency, and one with "rights and obligations proceeding from equity or utility." Nine deal with various aspects of personal rights, their transfer, etc. Only six are devoted to "actions," that is to court-jurisdictions and procedures, adjudication, execution of sentences and the like. Space does not permit breaking these topics down into their sub-topics in detail as given in the "lecture heads."

Space also permits but one sample of Millar's treatment of a

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[13] The historians of both ethical and of legal theory will do well to note both the use of this term and the prevalence of this concept of "utility" in Scottish thinking at this time.

[14] Printed Lecture Heads attached to a set of student notes on Millar's Lectures on the Law of Scotland in the David Murray collection, Univ. of Glasgow Library.

particular topic. We have selected "the law of the death-bed" among other things for its very brevity and its attention to small details. We quote:

> "No man by a deed not inter-vivos can dispose of his heritage or those subjects which go to heir, nor burden any of these subjects in prejudice of the heir. —This is chiefly introduced by custom.
>
> "By the law of the death-bed the heir who suffers any loss by a disposition or writing granted on death-bed may obtain a reduction thereof. But this privilege is merely personal in the heir, so that the deed will stand good till it be reduced. —Erskine says that this privilege may be transferred to the *heir's creditor* by adjudication, or even without it. Moveable goods granted on death-bed may even be reduced by the heir if there be not sufficiency of moveables to pay it, when in consequence thereof the heritage may be affected. But all deeds which the deponent was under a previous obligation to grant will be sustained though on death-bed. —This law of death-bed extends to all rights affecting the *ius relictae* or *legitim* in the same manner as heritage. . . .
>
> "The allegation of death-bed is now excluded when the grantor lives sixty days after signing the deed (Act 1696, c. 4), or have been at kirk or market unsupported, or by some equipotent act. But generally, if the person had contracted some disease before signing it, he must live sixty days after, so as to take off this presumption. But if it can be proved that the person was in perfect health before signing the deed, if he should die perhaps suddenly within sixty days thereafter, it ought to be sustained as valid and not reducible. . . ."

Many another discussion might have served our purpose just as well and might have brought out more clearly what was unique in the Scottish practice.

The law of England

Millar's nephew-biographer tells us that in the last few years he added to his offerings a course of lectures on the law of England in a manner already indicated, and offers a few comments on these lectures. A letter recently discovered in the Blair-Adam collection [15]

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[15] Blair-Adam collection of letters addressed to William Adam loaned to Scottish Record Office, Edinburgh, but now returned to the family.

throws some additional light on the matter. In this letter, dated August 4, 1798, and addressed to his former student William Adam, later Lord Chief Commissioner of the Scottish Jury Court and at that time a member of the King's Council at Westminster, he writes among other things as follows:

> "I have undertaken a very arduous task—no less than a course of lectures to give some general sketch of English law. All that I propose is to give a general arrangement, and endeavour to explain so much of the principal articles as will facilitate the study of the law of England to those who, by an academic education, have become acquainted with the civil law and with the views and ways of speaking adopted by the writers on jurisprudence. In short, to reconcile, if that be possible, the one jargon with the other...."

In other words, he hopes to reconcile the language and the arrangement of Coke and Blackstone with those of the civil law. And he proceeds—the reason for this letter—to ask Mr. Adam's counsel on a number of technical points in English law that he wants to clarify in preparing these lectures.

From the date of this letter, this course was not given before 1798–99, and, alternating with the Scots law course, it was accordingly given only once after that. Fortunately we have a remarkably good set of notes, taken in 1800–01, and it is on these that the following observations are based.

A better impression of the general orientation of these lectures, and of Millar's view of the English law, could scarcely be conveyed than by a perusal of these notes on the four orientation lectures in which he develops in greater detail than usual the historical background of the development of English law, both in its substance and in its theoretical formulation and academic teaching, its outstanding characteristics, the principal sources of our knowledge thereof, and the method and general arrangement he intends to follow in these lectures. Millar, we are told, drew more heavily on Blackstone in this course than on the primary sources as he clearly did in the course on Scots law. We can only summarise here the highlights of the first two lectures.

He begins by tracing the English law back to the manners and customs of the ancient Britons, the civilising influence upon them of the Roman occupation of a large part of the island for some three to four centuries, the impact of the Saxon invasion and the assimila-

tion of the Roman-British with Saxon manners, and the very considerable influence of the church upon public life and upon law during the Middle Ages. The impact of the Norman conquest and of feudalism he discusses elsewhere.

Much is made of the development of canon law, based as it was largely on the Roman, and of the introduction and cultivation of both in the English universities. He treats of the bitter rivalry that developed in the thirteenth and following centuries between the law faculties in the universities and the Inns of Court and of Chancery at Westminster, where the municipal common law was cultivated to the all but complete exclusion of the civil or Roman. Because of its direct bearing on public administration, which of course centred at Westminster, law too, in its non-academic cultivation, came more and more to centre there, and so soon gained a marked ascendency over civil and canon law teaching in the universities in their academic isolation. This rivalry, Millar holds, resulted in the all but complete exclusion of municipal law from the English universities and in a similar neglect of " civil " law in the Inns of Court and Chancery. This tended to give English law, as a working system, always a practical, non-theoretical, unsystematic character. English law was therefore, even more than other systems, a casual, circumstantial growth, little influenced by any body of ideas, by speculative lawyers, or by planning efforts of any kind.

This leads him to a rather general characterisation of English law generally, seen no doubt in contrast with Scots law without, however, so stating. The main points may be summarised as follows:

1. English law is remarkable for its " precision and accuracy." " The laws of England enter more minutely into the circumstances of particular cases and are more fixed and determined in their principles than those of other countries. . . ." This system of law was the work of often ignorant practitioners " whose object was to find out expedients for each particular case as it occurred, without looking into futurity," that is, with little attention to principles that would have more or less universal and therefore also future application.

2. " . . . as the English code has not been introduced from experience and observation but from narrow rules, adapted to the times in which they were made, it must follow that the rules themselves will be few and limited in their consequences "—rules which

in their practical application will therefore necessitate many exceptions, a problem that in English law is met by an abundance of so-called " ' fictions of law ' [which are] carried here to a greater degree than perhaps in any other [system] and some of them that are puerile and even ridiculous in the highest degree." These he illustrates at considerable length. These " fictions," necessary to some extent in all systems, have particularly " this bad effect, that they cover [up] the real ground of decisions, and prevent that clearness and accuracy which are so essential to the knowledge of the law."

3. A third characteristic he sees in " the vast multitude of technical phrases and terms of art with which it abounds, and this undoubtedly proceeds from the circumstance before mentioned, that this law took its rise from illiterate practitioners." Without denying the necessity of some such technical terminology, he holds that it should be held to a minimum, and in fact that " in systems of law composed by enlightened people they have been very little used." He agrees with one critic " that the English law is delivered in a Babylonian dialect," the worst consequence of which, besides placing a very heavy burden on the law-student, is " that after employing so much of his time in this dry study, he is apt to suppose he has nothing more to learn."

4. And finally, Millar is very critical of the " arrangement " of English law. Such a lack of logical arrangement he finds characteristic of all " practical " systems of law. " In collecting statutes and decisions according to the order of time [lawyers generally] have lost all regard to natural order; and this prevails more in England than in most other nations." English law's failure to distinguish rights and actions, for example, or property in land and property in moveables, and its arranging statutes and decisions merely in an alphabetical rather than in any logical order, he finds deplorable. " Though Blackstone has done a great deal [to improve this matter], yet much remains still to be done."

Both limitations of space and non-availability at the moment of sufficient notes prevent the author, for the time being at least, from bringing further illustrations here as he attempted to do for the other courses. But enough has probably been presented to provide a fair idea of Millar's approach to the English in its contrasts with the Scottish system of law, and with other systems.

It would be desirable indeed, in bringing these notes on Millar's law-lectures to a close, to comment further on the impact of these

lectures on his students at the time and as they entered public life, many of them at least, at the Bar, on the Bench, in offices of state, in university chairs, or in other scholarly pursuits. But here, too, space permits us to do no more than refer the reader to the author's *Millar* where something is said on this subject—a subject, moreover, that is deserving of further research.[16] The roster of such of his former students cited there—drawing chiefly on David Murray's researches—who later achieved distinction in public life, tells its own remarkable story.

WILLIAM C. LEHMANN.

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[16] See Lehmann, *op. cit.*, Chap 4, esp. footnote pp. 36 *et seq.* Also pp. 149 *et seq.*