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## Some Notes on Mackenzie's *Institutions* and the European Legal Tradition

Sir George Mackenzie (as a Scots lawyer writing on Scots law) was an internationalist in an internationalist era. This must always be taken into account when one tries to understand Mackenzie's thought. The purpose of the present paper is to use the international background to explain some theoretical issues in Mackenzie's *Institutions of the Law of Scotland* and to relate that work to Lord Stair's book of the same title. Stair's *Institutions* were first published in 1681, Mackenzie's in 1684.

### Natural Law in Mackenzie

In the opening chapter of his *Institutions* Mackenzie declares:

The *Law of Nature* comprehends those *Dictats*, which Nature hath taught all living creatures, instances whereof are *Self Defence, Education of Children*: and generally, all those common principles, which are common to Man, and beasts, and this is rather innate instinct, than positive law.

The *Law of Nations*, is peculiar to Man-kind only, dictated by right Reason, and is divided into the *Original* and *primarie Law of Nature*, that flow from the first and purest principles of right Reason; Such as *Reverence to God, respect to our Country, and Parents*. And the *secundarie, and consequential Law of Nature*, consisting of these general conclusions, in which ordinarily all Nations agree, and which they draw by way of necessary consequence, from those first principles. And under this part of the *Law of Nations*, are comprehended, the obligations arising from promises, or contracts, The liberties of Commerce, the ransoming of Prisoners, securities of Ambassadors, and the like<sup>1</sup>.

Mackenzie, following Justinian's *Institutes* 1.2.1,2, but at several removes, divides law into natural law, the law of nations (*ius gentium*) and civil law. Natural law, as in Justinian's *Institutes*, is the law common to all animals, including humans. But, in contrast to the *Institutes*, Mackenzie declares this is innate instinct rather than positive law. Common to the *Institutes* and Mackenzie in this notion of natural law is the absence of any implication that natural law has any specific moral quality.

<sup>1</sup> *Institutions*. 1.1.

In Justinian's *Institutes* 1.2.1, *ius gentium* is positive law which natural reason makes for all mankind and is the same everywhere. It is not easy for us to know what this law is. It is easier to say what it is not: for the Romans it is not international law. In other contexts, *ius gentium* seems to designate that part of Roman law that is available to foreigners as well as to Romans<sup>2</sup>. Then in J.2.1.11, *ius naturale* seems to be equated to *ius gentium*. Mackenzie in his turn gives two express and perhaps one latent meaning to the law of nations. With regard to the last, when he says the obligations arising from promises or contracts are included in the law of nations he may be working with one of the Roman uses of *ius gentium*, namely that part of Roman law which is available to foreigners and citizens alike; and this part of Roman law included most of contracts though not the *stipulatio*. The two express meanings that he gives to the law of nations are firstly the law used by humans, which proceeds from right reason, and this he declares is the primary form of natural law. The second use of the law of nations, his secondary law of nature, has much in common with international law (though Mackenzie also includes contract).

Since Mackenzie does not develop this theme it is hard to be more precise as to his views of the law of nature and the law of nations. But the questions for us are why does he depart from Roman law and why does he draw these particular distinctions? The answer is that he is working within the cultural tradition of 17<sup>th</sup> century European legal scholars. An illustration may be drawn from the elementary work of Johannes Voet, *Elementa Juris secundum ordinem Institutionum Justiniani*, which was first published in 1700. This is particularly similar to Mackenzie. I am, of course, not suggesting that Voet was directly influenced by Mackenzie, only that they both participate in the same legal cultural tradition. Voet says at 1.2:

The law of nature is properly or improperly so called. It is improperly used for *instinct*, that is, what nature taught all animals. To this relates the conjunction of males and females, which we call marriage, the procreation and bringing up of children, and self-defense.

It is properly used for the natural law of men, that is, the law that right reason dictates to those who have true understanding, without great mental activity, so true is it that it is what is always fair and good.

The law of nations is that which applies and is universally observed among all nations or at least the more civilised nations.

<sup>2</sup> See, e.g., J.A.C. THOMAS, *The Institutes of Justinian* (Cape Town, etc., 1975), p.7.

And it is primary or secondary. Primary, which natural reason established among humans and is observed by all or at least by the more civilized. And thus the law of nature is approved by nations. To this relates reverence to God, that we obey our parents, that we love our country.

Secondary, which was introduced by custom and the urge of human needs. And this derives not so much from a simple dictate of right reason but rather from reasoning on account of human benefits or needs. To this is to be related the distinction of kinds of ownership, wars, captivities, enslavements, manumissions and contracts in general, with the exception of *stipulatio* which is part of the civil law, not only with regard to its form but also to its origin.<sup>3</sup>

I am also not suggesting, of course, that Voet and Mackenzie are necessarily saying the same thing, but only that it is undeniable that both are working within the same cultural tradition of reaction to, and partial rejection of, Roman law on the point. The law of nature as the law taught to all animals is being rejected as law. And then the law of nations is being accepted in two senses as the law of nature; the primary sense of the law taught by natural right reason, the secondary sense of international law.

A slightly earlier jurist, J. F. Böckelmann (1633–1681) casts a light on the trend of the arguments of both Mackenzie and Voet. In his *Commentariorum in Digesta Justiniani Libri XIX* he comments on Digest 1.1:

§ 23. *Jus Naturale*, in so far as the term is accepted for a precept of nature, is used with two senses: (1) *Improperly*, and this is nothing else than the instinct of nature. Hence it is said by Justinian, Which nature taught all animals that are born in the heavens, on the land and in the sea . . .

§ 24. *Properly*, *jus naturale* is used either *widely*, so that it even includes the law of nations . . . or *strictly* to mean *what nature teaches to all men and is not invented by human thinking* . . .

§ 25. *Jus gentium* is also used either *widely* or *strictly*. Widely it means that law

<sup>3</sup> *Jus naturale* vel proprie accipitur, vel improprie. Improprie acceptum pro *instinctu*, est, quod natura omnia animalia docuit. Eoque pertinet maris et feminae conjunctio, quam nos matrimonium appellamus, liberorum procreatio, ac educatio, sui defensio.

Proprie pro *jure naturali hominum*, est jus, quod recta ratio iis, qui vere intelligunt, dictat sine discursu mentis; adeoque quod semper aequum ac bonum est.

*Jus gentium* est, quod apud omnes gentes, vel saltem moratiores, obtinet et peraeque custoditur.

Et vel primaevum est, vel secundarium. Primaevum, quod naturalis ratio inter homines constituit, et apud omnes vel saltem moratiores, servatur; adeoque *jus naturale* a gentibus comprobatur. Quo refertur religio erga Deum, ut parentibus pareamus, patriam amemus. Secundarium, quod usu et humanis necessitatibus exigentibus est introductum adeoque non tam ex simplici dictamine rectae rationis, quam potius ex ratiocinatione propter utilitates humanas aut necessitates descendit. Quo reducenda dominiorum distinctio, bella, captivitates, servitutes, manumissiones, et plerique contractus; excepta stipulatione quae non tantum quantum ad formam, sed et quantum ad originem, juris civilis est.

which nations use whether that occurs through the dictate of reason or through common consent ... Indeed it thus often denotes the law of nature ...

§ 26. Used *strictly* it defines "What natural law established (late, c. 9, dist. 1) among all nations ... Include here wars, slavery, *postliminia*, manumissions, the distinctions among ownerships, and almost all of the contracts ...

§ 28. The difference between the law of nature and the law of nations is huge. The former was laid down by God, the latter was established by men. ...

§ 29. What we indeed improperly called *Natural law*, the learned doctors commonly called *primary* natural law. What is called properly Natural law by us is called by them *secondary*, and that to them is the *primary* law of nations. They call the *secondary* law of nations what properly and strictly is the law of nations. This division in a way is tolerable, but is a cause of confusion.<sup>4</sup>

For present purposes we need not investigate the history of this approach to *ius naturale* and *ius gentium*<sup>5</sup>. The underlying reasons for the approach are not hard to find. The concept of natural law in some of its senses is very attractive to theoretically minded jurists, but no use could be made of its definition in Justinian's *Institutes*, 1.2.1. And Justinian, at 2.1.11 does declare that *ius naturale* is the same as *ius gentium*

<sup>4</sup> *Jus Naturale*, quatenus pro praecepto *Naturae* accipitur, dupliciter dicitur: (1) *Improprie*, et nihil aliud est quam instinctus *Naturae*. Hinc dicitur a Justiniano, *Quod Natura omnia animalia docuit, quae Caelo, quae terra, quae mari nascuntur* ...

§ 24. *Proprium* jus naturale accipitur vel *latius*, ut comprehendat etiam jus *Gentium* ... vel *stricte* sic acceptum est, *quod natura omnes homines edocuit, nec humano ingenio excogitatum est* ...

§ 25. *Jus Gentium* etiam accipitur vel *late* vel *stricte*. *Late* significat omne id *ius*, quo gentes utuntur, sive id fit ex rationis dictatu, sive ex consensu communi ... *Quin et ipsum jus naturae saepe sic denotat* ...

§ 26. *Stricte* dictum definitur, *Quod naturalis ratio inter omnes* (sere c.9. dist.1) *Gentes* constituit ... Huc refer *bella, servitudes, postliminia, manumissiones, distinctiones dominiorum* et omnes fere *contractus*, ...

§ 28. Differentia inter jus *Naturale* et *Gentium* permagna est. Illud a Deo constitutum: Hoc ab hominibus positum ...

§ 29. Quod nos vero diximus *Naturale improprium*, id vulgo D. D. *Naturale primaevum* appellatur. Quod nobis proprium *Naturale*, id illis *Naturale secundarium*, idemque ipsis jus *Gentium primum* est. *Secundarium* jus *Gentium* dicunt, quod proprie et *stricte* jus *Gentium* est. Quae quidem divisio quodammodo tolerari potest, sed quorsum confusio isthaec.

<sup>5</sup> A mighty forerunner to both Mackenzie and Voet is HUGO GROTIUS, *De Jure Belli ac Pacis* (1625) at e.g., 1.1.10, 11, 12.3.11.1. For an earlier version one may cite J. B. À COSTA (ca. 1560–1631), *Commentarius*, on J.1.2. Nam jus naturale duobus modis dicitur. *Primo*, quod commune est omnibus animantibus; et hoc sensu accipitur in tripartita hac divisione. *Secundo*, quod ratio naturalis inter omnes homines constituit; et in tripartita hac divisione id proprie appellatur *ius gentium*, quod comparatum cum jure civile naturale appellatur; non quod naturale sit brutis, sed quod natura illud hominum mentibus inseverit. Sic jus gentium dicitur a Justiniano naturale § XI *Inst. de rerum divis.* sic a Jurisconsultis jus gentium, et naturale promiscue usurpatur 1.1. ff. de *acquir. rer. dom.* He makes the tripartite division: *naturale, gentium, civile*. And subsequently he says that *jus naturale* of animals is "metaphorice sive non proprie jus." Though he was French and a professor at Cahors, he was used by the Dutch: thus there is an edition by J. Vande Water, 1714. For a later German example see J. HOPPIUS, *Commentatio succincta ad Institutiones Justinianaeas*, ad J.1.2.

without defining either term, this giving plenty of scope to later jurists to develop both notions. The ambiguity was to have particular importance in the development of the subject of international law.

## The Objects of the Law

In a prominent place in the *Institutions*, 1.2. Mackenzie declares:

Having resolved to follow *Justinians* method, (to the end there may be as little difference found between the Civil Law and ours, as is possible: And that the Reader may not be distracted, by different methods) I do resolve first, to lay down what concerns the Persons of whom the Law treats: *Secundo*, what concerns the things themselves treated of, such as *Rights, Obligations, etc. Tertio*, The *Actions whereby these Rights are pursued*, which answers to the *Civilians objecta juris, viz. Personae, res et Actiones*.

Justinian had declared in J. 1.2.12:

All the law that we observe pertains to persons, to things or to actions<sup>6</sup>.

This threefold division is not further explained, and does not correspond to the Justinianic division into four books. The law pertaining to things, if the division is meaningful, must include the law of property, of obligations and of succession.

This threefold division became common currency among later civilians, also in Mackenzie's own 17<sup>th</sup> century. But these later civilians tend to change its impact on the structure of legal works, and more surprisingly even to misrepresent its impact on the structure of Justinian's *Institutes*. To take two particularly clear examples. First, Antonius Perezius (1583–1672), *Institutiones Imperiales, erotematibus distinctae* is an elementary book for those beginning study in the law. As its title indicates, it consists of questions followed by answers based on the contents of Justinian's *Institutes*. The student's task is to learn the law in Justinian's *Institutes*. Perezius' goal is to make the student's task easier by asking the basic questions and then giving the correct answers. Yet at the beginning, in the proemium he writes:

What is the subject matter of the *Institutes*? The law of persons, of things, and of actions. The law of persons is related in book 1. The law of things, books 2 and 3. The law of actions, book 4<sup>7</sup>.

<sup>6</sup> *Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones.*

<sup>7</sup> *Quae est Institutionum materia? Ius personarum, Rerum ac Actionum. Ius personarum traditur libro 1. Ius rerum, 2. et 3. Actionum, 4.*

This is not quite correct. Book 4 dealt not only with actions but also with delict and quasi-delict which are, surely, on Justinian's scheme, part of the law of things, and criminal law which is a subject apart. Secondly, and more revealing because his treatment is fuller, Dionysius Gothofredus (1549–1622) produced an "Explication of the Arrangement of the Books of the Institutes" in tabular form. This is to be found published in some versions of his great edition of the *Corpus Juris Civilis*. Gothofredus' self-assigned task is to explain the arrangement of the *Institutes*, so his actual departures from the organization of that work are particularly revealing for his perceptions. He accepts the idea of the *Objecta* of the law. The first of these, Persons, he correctly assigns to book 1. Books 2 and 3 he assigns to Things. But he, diverging from Justinian, assigns delict and quasi-delict to book 3. And he puts the whole law of succession into book 2 whereas Justinian treated intestate succession in book 3. Thus, to read Gothofredus is to be left with the impression that Justinian devoted the whole of book 3 to obligations. Gothofredus treats the third object of the law, Actions, in book 4, but then he adds a fourth object, Criminal Law.

Mackenzie also makes the breaks differently from the books of Justinian's Institutes. Book 1 treats of the first object, the law of persons. Books 2 and 3 deal with the second object, the law of things. But Mackenzie devotes book 2 to the law of property and book 3 to obligations followed by succession. Book 4 concerns actions and criminal law.

These deviant versions are all much neater than Justinian's own divisions into books. Whether for Justinian the notion of the three *objecta* of the law was a basic classification cannot easily be determined. What concerns us here is that, in its variations, it had come to be very significant in 17<sup>th</sup> century European legal thinking; and that the Scot, Mackenzie, fits right into this tradition<sup>8</sup>.

Mackenzie makes his purpose, in accepting the three objects of law, plain: it is so that there is as little difference as possible between his

<sup>8</sup> En passant, it may be mentioned that perhaps the high water mark of importance of this classification is to be found in the attempts of Frederick the Great of Prussia to codify the law with the specific aim of making it clearer. The first fruits, which were published at Halle between 1749 and 1751, have the very significant title: *The Project for the Corpus iuris Fredericiani, that is, the Territorial Law of His Majesty Founded in Reason and the Territorial Constitutions, in which Roman Law is Brought into a Natural Order and Right System in Accordance with its Three Objects of law: Das Project des Corpus iuris Fredericiani, d. h. S. M. in der Vernunft und Landes Verfassungen gegründetes Landrecht, worin das Römische Recht in eine natürliche Ordnung und richtiges Systema nach denen dreyen Objectis iuris gebracht.*

account and the civil law. The reasoning behind this is to ensure that the reader is not put off by an approach different from the one he is accustomed to. This point will acquire a greater significance in the last section of this paper.

## The Law of Persons

Mackenzie's treatment of this subject may surprise the modern reader. The title from which the quotation in our preceding section was taken is headed, "Of Jurisdiction, and Judges in General". The title continues:

The Persons treated of in law, are either Civil or Ecclesiastic, the chief of both which in a Legal sense are Judges, with whom we shall begin.

He then discusses jurisdiction, and topics such as the parliament, the convention of three estates, privy council, inferior jurisdictions, clergymen, and so on, until he comes to marriage in title 6 and minors and their tutors and curators in title 7 which is the last title of book 1.

What he is in fact most concerned with is status, and this, as scholars have often noticed, is the subject of book 1 of Justinian's *Institutes*<sup>9</sup>, though Justinian does not deal with public law issues of status. But, again, Mackenzie's treatment is to be found in various continental works. For example, Antoine Loisel in his *Institutes Coutumières* of 1605 devotes book 1 to Persons, and in title 1 he treats, for instance, of the king (§§ 1 onwards), nobles (§ 7 and others), of those who are bourgeois or villeins (for example in § 8) inferior legal jurisdictions (in §§ 19 and 20), majority (for instance, in § 34), bastards (for instance in §§ 40, 41 and 42) and succession by and to them (in §§ 42, 43, 45, 46 and 47), and vassalage (in many §§). Title 2 is then devoted to marriage. A similar approach is to be found, for example for Germany, in Georg Beyer, *Delineatio Juris Germanici* which was first published in 1718<sup>10</sup>.

Thus, it was common for jurists to deal largely with status, including law-making powers or other powers over other people, and jurisdiction, in a first book of an institutional work under the rubric of Persons. The most famous example, dating from long after Mackenzie, is Sir William Blackstone's *Commentaries on the Law of England* (1765–1769) and he,

<sup>9</sup> See, e. g., THOMAS, *Institutes*, p. 13.

<sup>10</sup> See, e. g., A. WATSON, "The Structure of Blackstone's *Commentaries*" *Yale Law Review* (1988), pp. 795 ff., at p. 804, n. 34.



in this regard, was relying heavily on Sir Matthew Hale<sup>11</sup>. Again Mackenzie was very much in the European tradition.

### The Structure of Mackenzie's *Institutions* and Lord Stair

Justinian's *Institutes* had, of course, an enormous impact, particularly in the 17<sup>th</sup> and 18<sup>th</sup> centuries, on the structure of books written on the law of a particular territory. One curious feature in various countries is that sometimes a reappraisal occurred and later writers drew closer to the Justinianian format than their predecessors did. Thus, in England, Blackstone's *Commentaries on the Law of England* (1765–1769) took Justinian more as his model than did Matthew Hale, *Analysis of the Laws of England* (1713) which Blackstone describes as his main source<sup>12</sup>. In France, Guy Coquille, *Institution au droit françois* (1607) shows few direct traces of the influence of Justinian's structure whereas some later works such as Jérôme Mercier, *Remarques nouvelles de droit François sur les institutes de l'empereur Justinien* (1665) do<sup>13</sup>.

For Scotland, it is even plausible to argue that it is the partial departure by a predecessor, Stair, from the structure and approach of Justinian's *Institutes* that led to the appearance of Mackenzie's book which did revert much more to the Roman model. Thus, Lord Stair's *Institutions of the Law of Scotland* (1681), owes a considerable amount to the structure of Justinian but also departs from it to a very great extent<sup>14</sup>. The nature of Stair's structure is much discussed by modern scholars as an enigma. Sir George Mackenzie's work of the same title (1684) is much closer to Justinian.

Though I have found no direct evidence for the history of the writing of Sir George Mackenzie's *Institutions of the Law of Scotland*, I am prepared to claim, with some degree of confidence, that they were written in response to, in emulation of, and with some irritation at, Stair's *Institutions*.

First, Stair's work was first published in 1681, Mackenzie's, with exactly the same title – though Stair has a subtitle – only three years later. The choice of title suggests rivalry. The format of local *Institutes* was

<sup>11</sup> See already, WATSON "Blackstone's *Commentaries*", pp. 803 f.

<sup>12</sup> See e.g. J. CAIRNS, 'Blackstone, an English Institutor: Legal Literature and the Rise of the Nation State', 4 *Oxford Journal of Legal Studies* (1984), pp. 318 ff.; A. WATSON 'Blackstone's *Commentaries*', p. 799.

<sup>13</sup> See e.g. A. WATSON, *The Making of Civil Law* (Cambridge, Mass., 1981), pp. 65 f.

<sup>14</sup> See already, A. WATSON, *Legal Transplants, an Approach to Comparative Law* (Charlottesville, 1974), p. 37.

common in the 17<sup>th</sup> century, but Scotland with Stair was late into the field. It would be rather too much of a coincidence if Scotland could do without any published Institutes until 1681 – and Stair was in manuscript from at least 1662 – yet another appeared without any feeling of competition, in 1684. Should it be the case that Mackenzie was writing before 1681 this basic argument would not be changed: he would be writing in response to Stair's manuscripts, and he published in response to their publication.

Secondly, Mackenzie, who cannot but be aware of Stair's work, never refers to it directly, yet he must have known that others would draw a comparison. The absence of direct citation may not be significant since he cites no other author, yet it appears, as we shall see in a moment, that Mackenzie makes more than one veiled, and hostile, reference in his *Institutions* to Stair. Moreover, elsewhere, in other works of his it would have been very much to the point for Mackenzie to refer to Stair but he never does.

Thirdly, so far as I am aware, Stair's is by far the largest of the local Institutes published in their heyday – the first edition has around 420,000 words – and Mackenzie's is probably the smallest with about 49,000 words<sup>15</sup>. This can scarcely be a coincidence, given the very large number of Institutes that were produced. Justinian's *Institutes* themselves are slightly larger than Mackenzie's with around 53,000 words. Even more significantly, the difference in length corresponds to a difference in approach. Stair gives us a great deal of information that is not relevant, directly or indirectly, to knowing the rules of Scots law in force whereas Mackenzie's aim, as he states in the *Epistle Dedicatory* to the Earl of Middleton is to treat "of nothing save Terms and Principles, leaving out nothing that is controverted . . ."

Mackenzie contrasts his approach with that of others. He has followed the admired method of Euclid's *Elements*, which is "much neglected by all, who have written *Institutions of Law*". Justinian is included in this criticism.

Even more significantly, he claims:

<sup>15</sup> Unless one counts as a local Institute, NATALIS CHAMART, *Institutiones Juris Civilis scripti et non scripti*, which has approximately the length of MACKENZIE's *Institutions* and was published in the same year, 1684. This give in a very abbreviated form the *Institutes* of Justinian – the written civil law – each title being followed by an account of Belgian customary law – the unwritten civil law.

JOHN ERSKINE, in the Advertisement to his *Principles of the Law of Scotland, in the Order of Sir George Mackenzies Institutions of that Law* (1754) reproaches Mackenzie for his brevity.

that if any Man understands fully this *Little Book*; Natural Reason, and Thinking, will easily supply much of what is diffused, through Our many volums of Treatises, and Dicicions; Whereas the studying those, would not in many years give a true Idea of Our Law; and does rather distract than instruct. And I have often observed, that more *Lawyers* are ingorant for not understanding the first Principles, than for not having read many Books; As it is not much ryding, but the ryding in the known road, which brings a Man to his Lodging soon, and securely.

One cannot fail to read into this, I think, criticism of the very different *Institutions* of Stair. Stair's work is very large, contains a great deal that is unnecessary, causes confusion by not setting out clearly the first principles, and results in "much ryding" but not "the ryding in the known road". The difference between the two and the goal that Mackenzie had set himself are immediately apparent from an examination of their first title which is called *Common Principles of Law in Stair*, and designated *OF LAWS in general in Mackenzie*.

Moreover, Mackenzie's emphasis seems rather pointed. It is understanding his *little book*, not reading previous treatises, that will lead with natural reason and thinking to comprehension of the law. And it is more *lawyers*, not other men, who are ignorant for not understanding the first principles.

Fourthly, the sentence about "ryding in the known road" reveals a serious implied criticism of Stair, of the structure of his *Institutions of the Law of Scotland*. The "known road" is the structure of Justinian's *Institutes* which was followed for the greatest part by virtually all institutional writers. Stair in large measure abandoned this structure, Mackenzie in large measure returned to it.

It is not just that Stair's *Institutions* were in two parts – and even the "Form of Process" was a separate production – whereas Justinian's *Institutes* (and Mackenzie's *Institutions*) are in four books or that the ordering of topics is by no means the same. Much more, Stair adopts a classification that is unusual, perhaps original to him, and has been found to be confusing. His treatment of obligations is a prime example with its divisions, for instance, into obediential and conventional. On the basis of obediential obligations, relations between husband and wife, parent and child and the law of tutors and curators are treated as part of the law of obligations and not as law of persons. But liberty and

forms of bondage are left out of this classification to be treated as something *sui generis* in Title II<sup>16</sup>.

Mackenzie's classifications are those well known from Justinian and from other local Institutes which also had to deal with feudal law. His arrangement of topics is basically that of Justinian except that he omits delicts, and, as we have seen, by a clever device treats jurisdictions, immediately after the introduction, as the main item in the law of persons. The device may seem rather forced, and I have found no precise model for Mackenzie's arrangement, but it does make the account of the law that follows both clearer and more practical.

Fifthly, Mackenzie's treatment of *Regiam Majestatem* in his account of sources of law seems significant for his attitude to Stair. Stair (1.1.16) claimed that they "are no part of our Law" but Mackenzie says they are "generally looked upon as part of our Law . . ." This seems dismissive of Stair: Stair is not named, his view is rejected, and the converse opinion is treated as generally accepted and acceptable.

Lastly, we should now bring into account the preceding sections of this paper. Mackenzie's treatment of the law of nature is in line with the contemporary European legal tradition for elementary works, and the approach of Stair is very much more complicated<sup>17</sup>. Mackenzie follows the tradition of dividing law according to Justinian's three *objecta juris*, and Stair does not. Indeed, as we have seen, Mackenzie expressly states that in this he is following the civil law and that his purpose is not to distract the reader by a different method. Mackenzie's treatment of the law of persons is in line with European models based on Justinian. Stair's approach is, as we have seen, again different.

Finally, if this view of the origins of Mackenzie's *Institutions* is correct then it is a trifle ironic that, writing before Scots law was taught in any University, Mackenzie did not live to see Scots law being taught with his book as the basic text and with Professors complaining of the arrangement and complexity of Stair<sup>18</sup>.

<sup>16</sup> Stair explains his treatment of liberty at 1.1.23.

<sup>17</sup> 1.1.4–8.

<sup>18</sup> A. BAYNE (d. 1737), *To the Students of the Municipal Law in the University of Edinburgh* (no date, no place of publication). Bayne was Professor of Scots Law at Edinburgh. National Library of Scotland MS 3412 (notes of John Spottiswood's lectures on Mackenzie's *Institutions*, written in 1717), pp. 478–480; cf. National Library of Scotland MS 3413, pp. 385–387; and the following notes on John Millar's lectures in Scots law – Millar held the Regius Chair of Civil Law at Glasgow, 1761–1801; Glasgow University Library, MS Gen. 347, p. 7; Glasgow University Library MS Murray 83 (no foliation or pagination); Glasgow University Library MS Gen. 181(i), p. 15; Glasgow University Library, MS Gen. 1078, fol. 4. For these references I am indebted to John W. Cairns.