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## James Muirhead, Teacher, Scholar, Book-Collector

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### I. Introduction

James Muirhead, Professor of Civil Law in the University of Edinburgh, died on 8 November 1889 at his home, 2 Drumsheugh Gardens, in the city's western New Town. He had been ill for some months.<sup>1</sup> He had taught from

<sup>1</sup> Death Certificate 685/1/962.

the beginning of the academic year as usual, until, on 24 October, illness forced him to stop.<sup>2</sup> He had shortly before attended the official opening of the Student Union - a development that he had enthusiastically supported - when his appearance had revealed his poor health to all.<sup>3</sup> He had been a popular professor, noted for a dandyish appearance, a love of music, and support for the development of greater corporate student life through such institutions as the Student Representative Council and the Union.<sup>4</sup> Much less laudable to modern eyes was his strong opposition to the admission of women to study in the University and his stance in the famous case of Sophia Jex-Blake, who wished to study medicine.<sup>5</sup> Muirhead's wife followed him to the grave in 1891, leaving the substantial sum of £500 to endow a prize for the class of Civil Law.<sup>6</sup> It was named "The Muirhead Prize in Civil Law" in the professor's honour.

Muirhead had been appointed Professor of Civil Law in the University of Edinburgh in June 1862.<sup>7</sup> He was one of the first new professors of law appointed after the Universities (Scotland) Act of 1858 initiated an important change in the Faculties of Law in Scotland, which had languished somewhat in the recent past. Under the Act Commissioners were appointed to produce regulations to govern and reform the universities.<sup>8</sup> One innovation was the creation of the degree of LL.B., to be taken only after a student had graduated M.A. It was to be a test of academic rather than professional ability.<sup>9</sup> An

<sup>2</sup> Edinburgh University Library, Minutes of the Faculty of Law, Da. 42, vol. 2 (29 Nov. 1889).

<sup>3</sup> *The Student* (New Series), 2 (1889-90), 36.

<sup>4</sup> *The Student* (New Series), 1 (1889), 17-18; 2 (1889-90), 49-50.

<sup>5</sup> M. Todd, *The Life of Sophia Jex-Blake* (London: Macmillan, 1918), pp. 218-397; S. Roberts, *Sophia Jex-Blake: A Woman Pioneer in Nineteenth-Century Medical Reform*, Wellcome Institute Series in the History of Medicine (London and New York: Routledge, 1993), pp. 77-137. The account by Todd is more informative with valuable extracts from Jex-Blake's diary including her impressions of the Edinburgh Professors. Muirhead features a number of times in the account.

<sup>6</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 10, p. 53-54 (12 Oct. 1891); Edinburgh University Library, Minutes of the University Court, Da. 23.5, vol. 4, pp. 321-322.

<sup>7</sup> See Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 2, pp. 183-185 for his official admission by the Senatus on 20 October 1862.

<sup>8</sup> See R. D. Anderson, *Education and Opportunity in Victorian Scotland* (Oxford: Clarendon Press, 1983; reprinted with corrections, Edinburgh: Edinburgh University Press, 1989), pp. 27-69.

<sup>9</sup> Scottish Universities Commission, *General Report of the Commissioners under the*

important component of the degree was Civil Law, the traditional term used for Roman law, the *ius civile*, the province of Muirhead's chair.<sup>10</sup> The chair of Civil Law dated from 1710: Muirhead was the first man of scholarly distinction to occupy it, and he enjoyed a European reputation.

But what makes Muirhead interesting beyond his busy life as a successful professor is his collection of a remarkable law library that reveals much about the intellectual concerns of Scots lawyers of his period. The collection is interesting precisely because it was not that of a bibliophile concerned to acquire rare and valuable antiquarian editions. It did have some older books, but they are always ones that would still be of use to an active scholar, such as the famous Torelli edition of the Florentine *Digest*. Instead, the library was that of an active, working scholar in touch with the latest research as revealed through the specialist scholarly periodicals that had developed over the nineteenth century. The collection is dominated above all by contemporary German scholarship.

After Muirhead's death, Owens College, Manchester bought almost his entire library, and printed the catalogue here reproduced. It is the foundation of the Law Library of the University of Manchester. Edinburgh University Library and the Advocates' Library in Edinburgh appear to have been only very selectively interested in purchasing Muirhead's books. The collection as a whole far surpassed other holdings in Edinburgh in the areas it covered, but the cost of purchasing it in its entirety probably weighed heavily in the decision; the University Library certainly had financial problems in 1890.<sup>11</sup> By January 1890, however, the Advocates' Library had acquired Muirhead's copies of Studemund's *Apographum* and Lenel's *Palingenesia*.<sup>12</sup> In turn, the

*Universities (Scotland) Act, 1858. With an Appendix, containing Ordinances, Minutes, Reports on Special Subjects, and Other Documents* (Edinburgh: H.M.S.O., 1863), pp. xxxv-xxxvi. See D. B. Horn, *A Short History of the University of Edinburgh 1556-1889* (Edinburgh: University Press, 1967), pp. 177-178.

<sup>10</sup> See Ordinance No. 75 in Scottish Universities Commission, *General Report of the Commissioners under the Universities (Scotland) Act, 1858*, pp. 97-98.

<sup>11</sup> Edinburgh University Library, Library Committee Minutes 1877-1905, Da. 3-8, p.177 (12 Nov. 1890).

<sup>12</sup> See the (printed) *Report of the Curators of the [Advocates'] Library* ([Edinburgh], 1890). The purchase is not mentioned in the minutes of the Curators for this period: see National Library of Scotland, Minute Book of the Curators of the Advocates Library 1866 to 1894, FR 124. *Gaii Institutionum Cod. Veron. Apographum ... edid. Gulielm Studemund* (Leipzig, 1874); O. Lenel, *Palingenesia Iuris Civilis*, 2 vols. (Leipzig, 1888-89). Studemund's *Apographum* is now National Library of Scotland, pressmark H.27a.17; Lenel's *Palingenesia* is still in the Advocates' Library, Pressmark C.34.1.

University was keen to acquire his manuscript of the *Digest* of Justinian. The matter first occurs in the minutes of the Library Committee on 6 March 1890, and it was later reported that Owens College would buy the whole of the library.<sup>13</sup> The manuscript, however, proved to be by sale separately and the new Professor of Civil Law, Henry Goudy, proposed to the Senatus on 27 June that it should be acquired. The Senatus received this favourably and remitted the affair to the Library Committee to proceed.<sup>14</sup> The Librarian was able finally to report on 13 October that the manuscript had been acquired for £25, in accordance with the decision made on 30 July following the remit of the Senatus.<sup>15</sup> It can be identified as the twelfth-century manuscript of the *Digestum novum* still in the University Library.<sup>16</sup>

## II.. His Early Life and Education in Edinburgh and Heidelberg

Muirhead was born on 13 November 1830, the eldest of the five sons of Claud Muirhead and Mary Watson, the daughter of an Edinburgh merchant.<sup>17</sup> His father was the proprietor of the *Edinburgh Advertiser* and Muirhead was brought up in the comfortable and privileged atmosphere of 7 Heriot Row, Edinburgh and the family's suburban home of Gogar Park, Midlothian. He completed his schooling at the Edinburgh Academy between 1840 and 1845.<sup>18</sup> He then trained for a commercial career, spending time in a merchant's office in Leith and in his father's newspaper business. He also was sent to Lille to

<sup>13</sup> Edinburgh University Library, Library Committee Minutes 1877-1905, Da. 3-8, pp. 169 (6 Mar. 1890), 170 (21 Mar. 1890).

<sup>14</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 9, p. 408 (27 June 1890).

<sup>15</sup> Edinburgh University Library, Library Committee Minutes 1877-1905, Da. 3-8, p. 173 (30 July 1890), p. 174 (13 Oct. 1890).

<sup>16</sup> Edinburgh University Library, MS 154. See C. R. Borland, *A Descriptive Catalogue of the Western Mediaeval Manuscripts in Edinburgh University Library* (Edinburgh: University Press, 1916), pp. 234-235. Borland describes the MS as probably English: this may be doubted. The University Library has no records of accessions for the relevant period, but this MS, the provenance of which was unknown to Borland, is the only candidate for the MS bought in 1890.

<sup>17</sup> Scottish Record Office, Old Parish Register Index.

<sup>18</sup> *The Edinburgh Academy Register*, ed. by T. Henderson and P. F. Hamilton-Grierson (Edinburgh: Edinburgh Academical Club, 1914), p. 110.

learn French.<sup>19</sup> Deciding against a career in business, Muirhead matriculated as a student in the University of Edinburgh in 1849, and studied arts and law until the spring of 1854.<sup>20</sup> As was common, he did not take a degree. He next moved to the University of Heidelberg, matriculating there on 13 May 1854.<sup>21</sup> At Heidelberg, he passed the summer studying Roman law under C. A. von Vangerow.<sup>22</sup> He returned to Edinburgh to matriculate once again as a law student in the autumn.<sup>23</sup> Muirhead's time in Germany was short, but its influence on him is undoubted.

Muirhead was among a relatively small number of Victorian Scots lawyers who studied in Germany.<sup>24</sup> Though the numbers were few, study in Germany appears to have been particularly attractive to those of a literary and scholarly bent. Such men will have exercised a greater cultural influence than their numbers suggest. In this respect it is worth noting the extent to which Muirhead's colleagues in the Faculty of Law in the University of Edinburgh had also studied in Germany, particularly at the University of Heidelberg. James Lorimer, appointed to the chair of Public Law and the Law of Nature and Nations in 1862, had studied in Berlin and Bonn.<sup>25</sup> Aeneas Mackay, appointed Professor of Constitutional History in Edinburgh in 1874, his successor William Kirkpatrick appointed in 1881, and John Rankine,

<sup>19</sup> See J. Rankine, "Professor Muirhead", *Juridical Review*, 2 (1890), 27-32 at p. 29; *Quasi Cursores. Portraits of the High Officers and Professors of the University of Edinburgh at its Tercentenary Festival Drawn and Etched by William Hole A.R.S.A.* (Edinburgh: University Press, 1884), pp. 179-180.

<sup>20</sup> Edinburgh University Library, Matriculation Roll of the University of Edinburgh, transcribed by Dr Alexander Morgan, typescript, 4 vols., vol. 4, pp. 1267, 1284, 1303, 1317, 1330.

<sup>21</sup> G. Toepke and P. Hintzelmann, *Die Matrikel der Universität Heidelberg*, 7 vols. (Heidelberg: Karl Winter's Universitätsbuchhandlung, 1884-1916; reprinted Nendeln: Kraus, 1976), vol. 6, p. 225 (no. 199).

<sup>22</sup> Rankine, "Professor Muirhead", p. 29. On von Vangerow, see D. Drüll, *Heidelberger Gehlerlexikon 1803-1932* (Berlin: Springer-Verlag, 1986), p. 276.

<sup>23</sup> Edinburgh University Library, Matriculation Roll, p. 1343; Horn, *Short History of the University of Edinburgh*, p. 194 erroneously states that Muirhead had had no part of his education at a Scottish University. He was perhaps influenced by the statement in "Professor Muirhead", *The Student* (New Series), 1 (1889), 17 that Muirhead did not go "through the orthodox University curriculum".

<sup>24</sup> A. Rodger, "Scottish Advocates in the Nineteenth Century: The German Connection", *Law Quarterly Review*, 110 (1994), 563-591.

<sup>25</sup> See J. Lorimer, "The Family Story", unpublished typescript, Edinburgh University Library, Mic. M 1366, pp. 133-141. See Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 2, pp. 156-158 (31 July 1862) for his admission to his chair.

appointed Professor of Scots Law in 1888, had all studied in Heidelberg.<sup>26</sup> The last always referred to von Vangerow as his “revered teacher”.<sup>27</sup> What brought these men to Germany was the tremendous advance in legal studies, especially in Roman law, initiated by the German Historical School in the nineteenth century. The story of the development of legal science in Germany in this era is well known, but some comment on it is necessary because of its significance in the life of Muirhead.

The initial figure of importance in the German Historical School was Gustav Hugo, Professor of Roman Law at Göttingen, but the most prominent individual associated with it was to be Carl von Savigny, who held a chair in Berlin from 1810. The Historical School moved the focus of the study of Roman law back to a concentration on the ancient texts. The discovery of a near complete text of Gaius’s *Institutes* in 1816 reinforced this attitude. In 1820, Friedrich Bluhme published his discovery of the “masses” in the *Digest*, which provided a plausible explanation of how the *Digest* may have been compiled. Later in the century, Theodor Mommsen published his still standard edition of the *Digest* between 1868 and 1870. He also oversaw the publication of a completely new edition of the *Corpus iuris civilis* with the *Institutes* and *Code* edited by Paul Krüger. In 1880, Otto Lenel published his reconstruction of the Praetor’s Edict as *Edictum Perpetuum*, while 1887 saw the appearance of Otto Gradenwitz’s *Interpolationen in den Digesten*. The two volumes of Lenel’s *Palingenesia Iuris Civilis* followed in 1888 and 1889. Relying on these fundamental textual studies and discoveries, there was an outpouring of works on Roman law. It should not be thought that all of this work was purely antiquarian in nature, though some undoubtedly was. One aim of the investigation of the history of Roman law was to isolate law in its purest, most essential form in order to understand its underlying rationality. Such historical studies were considered to reveal a law of universal validity. Indeed, alongside purely antiquarian scholarship developed the *Pandektenwissenschaft*, which, though it may have started from Roman texts, emphasised systematic and logical exposition of doctrine. The *Pandektenrecht* thus created was a Roman law systematised for modern practice and intended for those German lands

<sup>26</sup> Toepke and Hintzelmann, *Matrikel der Universität Heidelberg*, vol. 6, p. 453 (no. 251), p.556 (no. 101). See Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 5, pp. 298-300 (16 Jan. 1875), vol. 7, pp. 299 (18 Dec. 1881), 313-315 (28 Jan. 1882), vol. 9, pp. 155-156 (28 Jan. 1888) for their respective admissions to their chairs.

<sup>27</sup> J. Mackintosh, “The Faculty of Law” in A. Logan Turner (ed.), *History of the University of Edinburgh 1883-1933* (Edinburgh: Oliver and Boyd, 1933), p. 97.

where Roman law still served as the common law. Scots who studied in Germany would also have learned of the debates over codification of law, and become aware of the moves to codify aspects of the law before German unification. They would also have become familiar with the arguments of those who opposed the doctrinal dogmatism of the *Pandektenrecht*, of whom the most famous was Rudolf von Jhering, and the later flowering of a more purely historical approach to law under the influence of the work of Lenel and Gradenwitz. Moreover, the Scots would have been taught a general and legal philosophy which did not conform to the prevailing utilitarianism of Victorian England.<sup>28</sup>

Muirhead's life shows traces of all of these German influences. It is possible to discern in his scholarship in Roman law a shift to placing less emphasis on dogmatic exposition of the law than on reaching an historical understanding of it. This can be traced in such evidence as we have of his classes. He remained an advocate of codification, and saw the German lands as providing a model of what could be achieved in his homeland. Muirhead may only have passed a summer as a student in Germany, but it marked him for the rest of his life.

### III. His Marriage, Early Career, and Appointment to the Chair of Civil Law

On returning from Germany in the autumn of 1854, as well as matriculating once more as a law student in the University of Edinburgh, Muirhead entered the Inner Temple on 31 October 1854.<sup>29</sup> He was admitted to the Faculty of Advocates in Edinburgh on 31 January 1857 and was called to the English bar on 6 June of the same year.<sup>30</sup>

<sup>28</sup> Rodger, "Scottish Advocates in the Nineteenth Century", pp 572-579; F. Wieacker, *A History of Private Law in Europe with Particular reference to Germany*, trans. by Tony Weir (Oxford: Clarendon Press, 1995), pp. 279-362; J. Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 1990), pp. 92-228; M. Bellomo, *The Common Legal Past of Europe 1000-1800*, trans. by L. G. Cochrane (Washington, D.C.: Catholic University of America Press, 1995), pp. 14-25. For early Scottish interest in the German Historical School, see J. W. Cairns, "The Influence of the German Historical School in Early Nineteenth Century Edinburgh", *Syracuse Journal of International Law and Commerce*, 20 (1994), 191-203.

<sup>29</sup> Edinburgh University Library, Matriculation Roll, p. 1343; DNB.

<sup>30</sup> F. J. Grant, *The Faculty of Advocates in Scotland 1532-1943 with Genealogical Notes*

Meanwhile, Muirhead married Jemima Locke Eastlake in London on 14 April 1857.<sup>31</sup> This is a most interesting marriage. Jemima Eastlake was the daughter of George Eastlake of Plymouth, a solicitor and Depute Judge Advocate of the Fleet, and the niece of the painter Sir Charles Locke Eastlake, President of the Royal Academy and Keeper of the National Gallery in London. His wife, Elizabeth Rigby, Lady Eastlake, was a well-known writer on the theory of art who had translated German works on this subject. She was to become noted for her disagreements with Ruskin. Jemima Eastlake's brother, another Charles Locke Eastlake, was to become a well-known writer on design, made famous by his *History of the Gothic Revival* (1872).<sup>32</sup> Before her marriage, Lady Eastlake lived in Edinburgh from 1842 to 1849 and, given her career as a writer, it is likely that she made at least the acquaintance of Claud Muirhead.<sup>33</sup> It is thus possible that it was through her that James Muirhead met his future wife. However this may be, his marriage into a talented family of intellectuals and artists is revealing about Muirhead's own interests and connections.<sup>34</sup> A son and a daughter were born to the marriage, but the son died in infancy.

After his marriage and call to both the English and Scots bars, Muirhead and his wife settled in Edinburgh at 61 Northumberland Street, close to his parental home, and he devoted himself to the bar.<sup>35</sup> At a time when political affiliation was crucial to progress in such a career, he joined the Conservatives and remained a staunch supporter. In 1862, Muirhead published a pamphlet in which he argued for the assimilation of the marriage laws of England, Scotland, and Ireland.<sup>36</sup> Since at least 1800, a number of cases had revealed

(Edinburgh: Scottish Record Society, 1944), p. 157; DNB.

<sup>31</sup> For confirmation of the date, see the birth certificate of their son, Claud James Muirhead, Scottish Record Office, 1 Dec. 1868.

<sup>32</sup> On this family, see *The Dictionary of Art*, ed. by Jane Turner, 34 vols. (New York: Grove, 1996; Basingstoke: Macmillan, 1986), vol. 9, pp. 682-685

<sup>33</sup> M. Lochhead, *Elizabeth Rigby, Lady Eastlake* (London: John Murray, 1961), pp. 35-44, 62-66.

<sup>34</sup> The Muirheads are not mentioned in *Journals and Correspondence of Lady Eastlake*, ed. by Charles Eastlake Smith, 2 vols. (London: John Murray, 1895), which are sickeningly pious, if enlivened by Lady Eastlake's snobbery and arrogance.

<sup>35</sup> The Edinburgh Post Office Directories allow one to trace Muirhead's progress of addresses generally westwards through Edinburgh ultimately to the fashionable, newly built, western new town at Drumsheugh Gardens.

<sup>36</sup> J. Muirhead, *Notes on the Marriage Laws of England, Scotland, and Ireland with Suggestions for their Amendment and Assimilation in a Letter to the Right Honourable the Lord Chancellor* (Edinburgh: William Blackwood, 1862).

problems arising from the differences between the laws on marriage in the three jurisdictions that constituted the United Kingdom.<sup>37</sup> Muirhead's solution was the adoption throughout the United Kingdom of a modified version of the English law.<sup>38</sup> The tract revealed Muirhead's very considerable learning, and his account of the history of the Scots law on marriage was particularly good.<sup>39</sup> While there is no reason to doubt that Muirhead was sincere in his concerns - and the theme of assimilation of the laws of the United Kingdom is one to which we will return - he may also have hoped that the book demonstrated his suitability for a university chair.<sup>40</sup>

On 24 April 1862, A. Campbell Swinton wrote a letter of resignation from the chair of Civil Law at the University of Edinburgh.<sup>41</sup> Campbell Swinton explained that his resignation had been prompted by the recent Ordinance of the Universities Commissioners, which had required the Professor of Civil Law to lecture during the summer session, giving a total of eighty lectures over both the winter and summer sessions.<sup>42</sup> This represented a significant increase in the duties of the chair. Campbell Swinton hoped to gain the revived Chair of Public Law and the Law of Nature and Nations, which only required forty hours of lectures, but was thwarted by the appointment of Lorimer.<sup>43</sup> Before the Universities (Scotland) Act of 1858 came into force, appointments to the chair of Civil Law had been made by the Patrons of the University, the

<sup>37</sup> See J. W. Cairns, "A Note on *The Bride of Lammermoor*: Why Scott did not mention the Dalrymple Legend until 1830", *Scottish Literary Journal*, 20 (1993), 19-36; idem, "The Noose Hidden Under Flowers: Marriage and Law in *Saint Ronan's Well*", *Journal of Legal History*, 16 (1995), 234-255; W. D. H. Sellar, "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* (Dublin: Irish Academic Press, 1995), pp. 59-82; L. Leneman, "English marriages and Scottish Divorces in the Early Nineteenth Century", *Journal of Legal History*, 17 (1996), 225-243.

<sup>38</sup> Muirhead, *Notes on the Marriage Laws*, p. 77.

<sup>39</sup> *Ibid.*, pp. 35-61.

<sup>40</sup> His borrowings from the Advocates' Library indicate that he was working on the study before Campbell Swinton resigned from the Chair of Civil Law: see the entries for February and March 1862 in National Library of Scotland, Advocates' Receipt Books, FR 274, p. 149.

<sup>41</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 2, pp. 143-144 (9 May 1862); National Library of Scotland, Minutes of the Faculty of Advocates, 1861-1894, FR 9, pp. 40-41 (14 May 1862).

<sup>42</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 2, pp. 143-144 (9 May 1862); Ordinance No. 75 in Scottish Universities Commission, *General Report of the Commissioners under the Universities (Scotland) Act, 1858*, pp. 97-98.

<sup>43</sup> Lorimer, "The Family Story", pp. 215-216.

Town Council of Edinburgh, who were required to choose from a leet of two names given them by the Faculty of Advocates. The thirteenth section of the Act had instead vested the Patrons' rights of appointment in seven Curators. Four of these Curators of Patronage were to be nominated by the Town Council and three by the Court of the University. The appointment to replace Campbell Swinton had to follow the new rules. The role of the Faculty of Advocates was preserved.

The Faculty of Advocates held an election to choose the names for the leet on 6 June. There were three candidates: Norman Macpherson, Alexander Smith Kinnear, and Muirhead. At the first ballot, Macpherson gained most votes; Muirhead came last, and his name was for the moment dropped. There was then a run-off between Macpherson and Kinnear, in which the former came first and was put on the leet. There was then a run-off between Muirhead and Kinnear, which the former won, and was put second on the leet. A long discussion ensued, clearly influenced by politics, on a motion as to whether in fact Muirhead or Macpherson should be placed first on the leet. The Vice-Dean of Faculty refused to put this motion.<sup>44</sup> Muirhead was none the less chosen as professor by the Curators of Patronage.

#### IV. Muirhead's Teaching

This was a significant appointment. Campbell Swinton had been appointed to the chair in 1842. His lectures were advertised thus:

General principles of Roman Law treated very much in the order of Justinian's Institutes, with references to the Laws of Modern Nations.

The Students are examined on the contents of the Lectures, and the Institutes of Justinian; and subjects are prescribed for four or five Essays in the course of the Session. Cumin's Manual of Civil Law, and Sandars' Institutes of Justinian, are recommended. Students intended for the Scotch Bar must make themselves acquainted with either Warnkoenig's *Institutiones Juris Romani Privati*, or Mackeldey's *Systema Juris Romani hodie usitati*.<sup>45</sup>

According to James Lorimer, Campbell Swinton's lectures were both well

<sup>44</sup> National Library of Scotland, Minutes of the Faculty of Advocates, 1861-1894, FR 9, pp. 46-47 (6 June 1862).

<sup>45</sup> *The Edinburgh University Calendar. 1861-62* (Edinburgh, 1861), pp. 37-38.

written and well delivered. The substance, however, was allegedly derived from Smith's *Dictionary of Antiquities*.<sup>46</sup> This work contained numerous articles on Roman law written mainly by George Long, lately a fellow of Trinity College Cambridge, who had "never had the advantage of attending a course of lectures on Roman Law".<sup>47</sup> It is difficult to assess the content of the scattered articles as a whole, although Long was evidently able to have access to some of the modern German scholarship on Roman law. A dictionary of antiquities, however, is hardly a major scholarly source for a professor purporting to teach Roman law in a university. Further, the professorial borrowing records of Edinburgh University Library suggest Campbell Swinton had no real interest in the discipline he taught, as in the six years before his resignation he borrowed only a single book on Roman law from the University Library.<sup>48</sup> The impression one gains is of a professor with no deep or independent knowledge of the subject he taught, whose lectures were culled from secondary literature. Lorimer certainly considered that Campbell Swinton's lectures added little or nothing to what he already knew.<sup>49</sup> In fact, there was no real pressure on Campbell Swinton to do other than please his audience. The University offered no taught degree in law; the examinations he gave were periodic quizzes rather than formal assessments for a degree; and most students attended a crammer to acquire the rote knowledge necessary to pass the examination of the Faculty of Advocates in Roman law.<sup>50</sup> (At this period the popular teacher for this was George Lyon, "teacher of law", who lived and taught at 58 Cumberland Street.<sup>51</sup> Lyon also wrote the Latin theses required from intrants.)<sup>52</sup>

Under Muirhead, all was to be different. In his second year of teaching, he announced that in the winter session he would cover the history of Roman law. The general principles of Roman law "bearing more or less upon all its departments" were next "examined with some minuteness", then, "in detail", the laws of property, real rights, and obligations. In the summer session he

<sup>46</sup> Lorimer, "The Family Story", p. 147.

<sup>47</sup> W. Smith, *A Dictionary of Greek and Roman Antiquities* (London, 1842; 2<sup>nd</sup> edn., 1849), p. x.

<sup>48</sup> Edinburgh University Library, Professors' Receipt Books, Da. 2.67, vol. 1, pp. 307-310: *Bulgari ad Digestorum titulum de diversis regulis juris antiqui commentarius, et Placentini ad eum additiones sive exceptiones*. Edidit F. G. C. Beckhaus (Bonn, 1856).

<sup>49</sup> Lorimer, "The Family Story", p. 147.

<sup>50</sup> Lorimer, "The Family Story", p. 147.

<sup>51</sup> See *Post-Office. Edinburgh and Leith Directory 1847-8* (Edinburgh, 1847).

<sup>52</sup> Lorimer, "The Family Story", p. 154

would cover family relationships and succession.<sup>53</sup> The structure within which he treated Roman law was thus that developed by the *Pandektenwissenschaft*. In his third year of teaching, he announced:

During the Winter Term the Professor of Civil Law delivers a course of Lectures on the External History and General Principles of the Law of Rome, as developed in the Institutes of Gaius and Justinian.

During the Summer Term the Lectures are devoted to a more minute exposition of some particular branch of the law, as developed in the Pandects, the Code, and the Novels. In the Summer of 1864 the subject will be the Law of Possession, Property, and Real Rights. In that of 1865 it will probably be the Law of Obligations.<sup>54</sup>

The next year, however, he reverted to the structure found in academic year 1863-1864:

The subject-matter of the course is the External and Internal History and General and Special Doctrines of the Law of Rome, as developed in the Institutes of Gaius and Justinian, supplemented by the other ante-Justinianian and Justinianian texts.

During the Winter Term the External History of the Law will be taken up; next the Doctrines of General Application; and then the Internal History and Special Doctrines (1.) of the Law of Property and Real Rights, and (2.) of the Law of Obligations.

The Lectures of the Summer Term will be devoted to the consideration of the Internal History and Special Doctrines of (1.) the Law of the Family Relationships, and (2.) the Law of Succession.<sup>55</sup>

He retained this basic structure until, from the Session 1876-1877, he began to treat the law according to the structure of Justinian's *Institutes*.<sup>56</sup> This is a significant change. It hints at a growing dissatisfaction with Pandektist dogmatics as the proper mode to approach the teaching of Roman law.

The German example in legal education was ever before Muirhead's eyes as the standard at which to aim. His review of Erwin Grueber's *Lex Aquilia* is instructive in this respect. The work was a translation of and commentary on

<sup>53</sup> *The Edinburgh University Calendar for the Year 1863-64* (Edinburgh, 1863), p. 47.

<sup>54</sup> *The Edinburgh University Calendar for the Year 1864-65* (Edinburgh, 1864), pp. 51-52.

<sup>55</sup> *The Edinburgh University Calendar for the Year 1865-66* (Edinburgh, 1865), pp. 62-63.

<sup>56</sup> *The Edinburgh University Calendar 1876-77* (Edinburgh, 1876), p. 87.

the relevant title of the *Digest*, intended to fill the need for a textbook for teaching a course from the *Digest* in the University of Oxford.<sup>57</sup> Muirhead noted that few books of the same genre had been produced in Germany, “where [the *Digest*] has found its most successful interpreters”, which demonstrated, so he argued, that “oral instruction is the better method of preparing the student intelligently to appreciate the *ipsissima verba* of the great Roman jurists”.<sup>58</sup> This gives us insight into Muirhead’s own approach to teaching. A preference for German practice is what one would expect of a scholar who initially taught Roman law according to the systematic structure developed by the *Pandektenrecht*.

## V. His Recommended Textbooks

The text he initially recommended to his students was R. Gneist’s *Syntagma Institutionum et Regularum Juris Romani*.<sup>59</sup> It includes the texts of Gaius’s and Justinian’s *Institutes* in parallel columns and contains texts of Ulpian’s *Regulae* and Paul’s *Sententiae*, two post-classical compilations derived from classical juristic works. As a teaching text this was a significant choice. It indicates that Muirhead wished his students to be familiar with the historical development of the substantive law from at least the classical period to the reforms of Justinian. Muirhead later simply prescribed the *Institutes* of Gaius and Justinian as textbooks, probably because editions of both became more commonly published, often with a translation, in the United Kingdom.<sup>60</sup> Indeed, in the year he altered the structure of his course to that of the *Institutes*, he recommended as preliminary reading Poste’s edition of Gaius

<sup>57</sup> *The Roman Law of Damage to Property being a Commentary on the title of the Digest ad Legem Aquiliam (IX.2) with an Introduction to the Study of the Corpus Iuris Civilis* by Erwin Grueber, *Dr. Jur. M.A. and Reader in Roman Law in the University of Oxford* (Oxford: Clarendon Press, 1886).

<sup>58</sup> J. Muirhead, Review of *The Lex Aquilia* by Erwin Grueber, *Law Quarterly Review*, 2 (1886), 379-389 at pp. 380-381.

<sup>59</sup> *Institutionum et regularum iuris Romani syntagma exhibens Gai et Iustiniani institutionum synopsis Ulpiani librum singularem regularum Pauli sententiarum delectum tabulas systema institutionum iuris Romani illustrantes praemissis duodecim tabularum fragmentis. Edidit et brevi anotatione instruxit Rudolphus Gneist* (Leipzig, 1858; 2<sup>nd</sup> edn., 1880). *The Edinburgh University Calendar for the Year 1863-64* (Edinburgh, 1863), p. 47; *The Edinburgh University Calendar for the Year 1864-65* (Edinburgh, 1864), p. 52.

<sup>60</sup> See, e.g., *The Edinburgh University Calendar 1876-77* (Edinburgh, 1876), p. 88.

and Sandars' edition of Justinian. Both of these contained a translation.<sup>61</sup> He also expected all his students to possess the *Corpus iuris civilis* and recommended the edition by the Kriegels.<sup>62</sup>

In the Session 1863-1864, Muirhead also recommended the recently published *Studies in Roman Law* of Lord Mackenzie, the *Cursus der Institutionen* of the Pandektist, Puchta, and the *Explication Historique des Instituts* of Ortolan.<sup>63</sup> This selection requires comment. Muirhead was never again to recommend Mackenzie's work. It seems likely that it appeared here because it was recommended for the examination for the degree of LL.B., as will be discussed below. While Mackenzie was aware of the new scholarship of the first half of the nineteenth century, his references to the more contemporary German scholarship are few, and it is probably significant that he often cited works that existed in French translation. For as painstaking a scholar as Muirhead, this would have been insufficient. It is also telling that Mackenzie acknowledged his indebtedness to Long's articles on Roman law in Smith's *Dictionary of Antiquities*. To a more serious scholar this would not inspire confidence. There can, however, be no doubt of the popularity of Mackenzie's straightforward text. Puchta's *Cursus der Institutionen* is a famous Pandektist text emphasising a highly formalist approach to law.<sup>64</sup> Its appearance here is instructive as to Muirhead's legal thinking and intentions for the education of his students in the early 1860s. It was probably around this time that he donated a copy of this work to the Law Students' Library in Queen Street.<sup>65</sup> It does not reappear in reading lists for students, however,

<sup>61</sup> Ibid. E. Poste, *Gaii institutiones juris civilis commentarii quatuor ... Or Elements of Roman Law by Gaius; With a Translation and Commentary* (Oxford, 1871; 2<sup>nd</sup> edn. 1875); T. C. Sandars, *Institutes of Justinian, with English Introduction, Translation and Notes* (London, 1853; numerous subsequent edns.).

<sup>62</sup> (Leipzig, 1846). *The Edinburgh University Calendar for the Year 1863-64* (Edinburgh, 1863), p. 47; *The Edinburgh University Calendar for the Year 1864-65* (Edinburgh, 1864), p. 52.

<sup>63</sup> *The Edinburgh University Calendar for the Year 1863-64* (Edinburgh, 1863), p. 47. Lord Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France, England, and Scotland* (Edinburgh, 1862; seven subsequent editions); G. F. Puchta, *Cursus der Institutionen*, (Leipzig, 1841; numerous subsequent edns.); J. L. E. Ortolan, *Explication Historique des Instituts de Justinien précédé de l'Histoire de la Legislation Romaine et d'une generalisation du Droit Romain*, 7th edn., (Paris, 1863; 8<sup>th</sup> edn., 1870).

<sup>64</sup> See, e.g., Wieacker, *History of Private Law in Europe*, pp. 316-319.

<sup>65</sup> For the donation to the Law Students' Library, see the note in Muirhead's hand on the fly leaf to the 1841 edition of Puchta's *Institutionen* in Edinburgh University Law Library (pressmark \*KG Puc.). Use of the Law Students Library declined significantly during the

although Muirhead recommended the purchase of the new edition in 1881.<sup>66</sup> He also owned copies of Puchta's main works. Ortolan's work was a standard history. In 1876-77, when Muirhead restructured the class, Ortolan's history, by now in an English translation, was recommended as preliminary reading.<sup>67</sup> This seems to reflect a growing focus on the history of Roman law rather than its dogmatic exposition.

In 1877, Krüger and Studemund published a new edition of the *Institutes* of Gaius that was based on the latter's fresh transcription of the Verona manuscript.<sup>68</sup> The next year, Muirhead recommended it to his students as the text of Gaius to be preferred. At the same time, he updated his recommendation for the *Corpus juris civilis* from the edition of the Kriegels to that of Mommsen and Krüger.<sup>69</sup> He did not subsequently repeat this recommendation of Krüger and Studemund's edition, perhaps because the likelihood of his students preferring a German edition to one with an English translation was slight. He also dropped any reference to the *Corpus iuris civilis*, although it remained the topic of specialised questions in the LL.B. examination.<sup>70</sup> In 1880, Muirhead published his own edition of Gaius for the use of his students; it is unsurprising to note that he recommended it as the textbook for the class from then on.<sup>71</sup> At the same time, he dropped the reference to Poste's Gaius and Sandars' Justinian in the preliminary reading, alone preserving the reference to Pritchard and Nasmith's translation of Ortolan.<sup>72</sup> The preliminary reading recommended to the students now became focused on historical introductions. In 1882, Muirhead added to the recommendation of the translation of Ortolan one of Hunter's *Introduction to Roman Law*.<sup>73</sup> In 1884, Ortolan's work was dropped from the recommended

1870s. This suggests that the donation should be dated to the 1860s. See Edinburgh University Library, Senatus Minutes, Da.31.5, vol. 6, pp. 373-374 (26 July 1878).

<sup>66</sup> Edinburgh University Library, Minutes of Curators Meetings, Da. 1.75 (16 Nov. 1881).

<sup>67</sup> *The Edinburgh University Calendar 1876-77* (Edinburgh, 1876), p. 88. J. Ortolan, *History of Roman Law. Translated from Ortolan's Institutes* (London, 1871),

<sup>68</sup> *Gaii institutiones ad codicis Veronensis apographum Studemundianum. Novis curis auctum iterum ed. P. Krüger et G. Studemund* (Berlin, 1877).

<sup>69</sup> *The Edinburgh University Calendar 1878-79* (Edinburgh, 1878), p. 91.

<sup>70</sup> *The Edinburgh University Calendar 1879-80* (Edinburgh, 1879), p. 67.

<sup>71</sup> See below.

<sup>72</sup> *The Edinburgh University Calendar 1880-81* (Edinburgh, 1880), pp. 69-70.

<sup>73</sup> *The Edinburgh University Calendar 1882-83* (Edinburgh, 1882), p. 70. W. A. Hunter, *Introduction to Roman Law* (London, 1880).

reading.<sup>74</sup> The next year, Sheldon Amos's *History and Principles of the Law of Rome* was added to the recommended reading.<sup>75</sup> The following year he replaced his recommendation of Hunter's work with that of his own *Historical Introduction*.<sup>76</sup> It is worth noting that he does not seem to have considered copies of these works of Hunter or Sheldon Amos worth preserving in his personal library.

The books on Roman law that were recommended in 1880 for the collection in the students' Reading Room further exemplify Muirhead's strongly historical approach and the influence of modern German scholarship.<sup>77</sup> The edition of the *Corpus juris civilis* recommended is still that of the Kriegels that he had once recommended to his class, although two years before he had recommended the texts of Mommsen and Krüger.<sup>78</sup> Krüger's and Huschke's editions of Justinian's *Institutes* were, however, also included in the books for the Reading Room.<sup>79</sup> Also listed was Theophilus's *Paraphrase* in the edition of 1860.<sup>80</sup> The ante-Justinianic law was represented by the *Collectio librorum juris antejustiniani in usum scholarum* edited by Krüger, Mommsen, and Studemund,<sup>81</sup> and J. T. Abdy and B. Walker's *The Commentaries of Gaius and Rules of Ulpian* of 1876, although it did not incorporate the revisions deriving from the work of Studemund.<sup>82</sup> (Muirhead's own edition of Gaius was not listed, presumably because the students were expected to have their own individual copy.) Two works of Hunter were included: the *Introduction to Roman Law* that Muirhead recommended as preliminary reading in 1884 and 1885 and the *Historical Exposition of Roman Law in the Order of a Code*. This last embodied a translation of the texts of the *Institutes* of Gaius and Justinian.<sup>83</sup> The more historical aspects of the study of

<sup>74</sup> *The Edinburgh University Calendar 1884-85* (Edinburgh, 1884), pp. 73-74.

<sup>75</sup> *The Edinburgh University Calendar 1885-86* (Edinburgh, 1885), p. 76. S. Amos, *The History and Principles of the Civil Law of Rome: An Aid to the Study of Scientific and Comparative Jurisprudence* (London, 1883).

<sup>76</sup> *The Edinburgh University Calendar 1886-87* (Edinburgh, 1886), p.82. See below.

<sup>77</sup> Edinburgh University Library, Minutes of Curators Meetings, Da. 1.74 (8 Dec. 1880).

<sup>78</sup> *The Edinburgh University Calendar 1878-79* (Edinburgh, 1878), pp. 90-91.

<sup>79</sup> Respectively (Berlin, 1867) and (Leipzig, 1868).

<sup>80</sup> *Theophili paraphrasis Justiniani institutionum secundum versionem Latinam G. O. Reitzii: Accedunt Justiniani Institutiones*, ed. By E. Schrader (Amsterdam, 1860). Reitz's 18<sup>th</sup>-century edition had not yet been superseded by that of Ferrini.

<sup>81</sup> 2 vols. (Berlin, 1878).

<sup>82</sup> (Cambridge, 1876).

<sup>83</sup> W. A. Hunter, *Introduction to Roman Law* (London, 1880); idem, *A Systematic and Historical Exposition of Roman Law in the Order of a Code. Embodying the Institutes of*

Roman law were further represented by Danz's *Lehrbuch der Geschichte des römischen Rechts*.<sup>84</sup> Specific subjects were covered by Brown's *Analysis of Savigny's Treatise on Obligations*, Molitor's *Obligations*, Rivier's *Traité des successions*, and Arnold's *Roman Provincial Administration*.<sup>85</sup> Finally, and most significantly, the Reading Room had Jhering's *Geist des römischen Rechts*.<sup>86</sup> This list further demonstrates Muirhead's move away from the strict formalism of the *Pandektenrecht*. Puchta is no longer included as reading for students; nor are the classic works of Windscheid. This further confirms the historical approach to Roman law, evident from the entries in the *Calendar* for his classes, and his choice of textbooks.

## VI. The Examinations in Civil Law

An examination in Civil law was a pre-requisite for the new degree of LL.B. The content of the first one was described as follows:

In Civil Law the examination will embrace the External History of the Roman Law in the Ante-Justinian and Justinian Periods; and the Principles of the later law of Property, of Real Rights, and of Obligations, including their application in the Jurisprudence of Scotland and England. Books - Warnkönig's *Histoire Externe du Droit Romain*, the Institutes of Gaius and Justinian, and Lord Mackenzie's *Studies in Roman Law*.<sup>87</sup>

The attention to the application of the Roman law in the laws of Scotland and England was not repeated. It may have been intended to make it feasible for those who had studied under Campbell Swinton to sit the examination. It is also possible that it may reflect what Muirhead himself had taught in his own

*Gaius and the Institutes of Justinian ... translated ... by J. Ashton Cross* (London, 1876).

<sup>84</sup> A. H. A. Danz, *Lehrbuch der Geschichte des römischen Rechts*, 2<sup>nd</sup> edn. (Leipzig, 1871).

<sup>85</sup> A. Brown, *An Epitome and Analysis of Savigny's Treatise on Obligations in Roman Law* (London, 1872); J. P. Molitor, *Les Obligations en droit romain*, 2<sup>nd</sup> edn. (Paris, 1874); A. Rivier, *Traité élémentaire des successions à cause de mort en droit romain* (Brussels, 1878); W. T. Arnold, *The Roman System of Provincial Administration to the Accession of Constantine the Great* (London, 1879).

<sup>86</sup> R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 3<sup>rd</sup> edn. (Leipzig, 1873).

<sup>87</sup> *Edinburgh University Calendar for the Year 1863-64* (1863), p. 134.

first year, as the *University Calendar* for 1862-1863 had repeated what Campbell Swinton had previously taught.<sup>88</sup> Muirhead may have considered himself bound to fulfil the expectations thus raised. Suffice it to say that the next year the syllabus for the examination was described thus:

In Civil Law the Examination will embrace the External History of the Roman Law down to the time of Justinian, as described in any of the Standard modern text-books; the General Principles of the Law as set forth in the Institutes of Gaius and Justinian; the Doctrines of the Law of Real and Consensual Obligations, as explained in Molitor's *Traité des Obligations*; and so much of the Doctrines of the Law of Legacies and Mortis Causa Trusts as is set forth in Books xxx-xxxii. of the Pandects.<sup>89</sup>

Indeed, the Civil Law exam was never again to cover the application of the principles of Roman law to the modern law of Scotland and England. Coverage always included the external history of the law (including to a certain extent the subsequent history of its sources),<sup>90</sup> the principles of the law as laid down in Gaius and Justinian, and some areas in more specialised detail. As regards the last, Muirhead's practice varied in a complex way. For the first few years of his teaching there was some variation in the area covered in more specialised detail in the examination. From 1871, Muirhead settled on examining in detail the doctrine of servitudes as found in the seventh and eighth books of the *Digest*. He retained this until 1877, when, until 1882, he fixed on the sixth and forty-fifth books of the *Digest* for examination in special detail. Thereafter, his practice was to prescribe specific titles of the *Digest* as subject to examination in detail. These were varied from year to year.<sup>91</sup> The style of the examination became progressively more elaborate over

<sup>88</sup> *Edinburgh University Calendar. 1862-63* (Edinburgh, 1862), p. 44: "[The Lectures hitherto delivered in this Class have comprised the general principles of Roman Law treated very much in the order of Justinian's Institutes. The Books specially recommended were Cumin's Manual of Civil Law, and Sandars' Institutes of Justinian. Students intended for the Scotch Bar must make themselves acquainted with either Warnkoenig's *Institutiones Juris Romani Privati*, or Mackeledey's *Systema Juris Romani hodie usitati*.]"

<sup>89</sup> *The Edinburgh University Calendar for the Year 1864-65* (Edinburgh, 1864), p. 155.

<sup>90</sup> See, e.g., "Before the discovery of the Verona MS. in 1816 how much was known of the Institutes of Gaius, and from what sources had that much been derived?" (question 5, *The Edinburgh University Calendar 1870-71* (Edinburgh, 1870), pp. 238-239); or "What do you know about the history of (1) the Institutes of Gaius; (2) the Vatican fragments; (3) the Paraphrase of Theophilus; and (4) the Basilica?" (question 4, *The Edinburgh University Calendar 1876-77* (Edinburgh, 1876), p. 268.

<sup>91</sup> *The Edinburgh University Calendar 1871-72* (Edinburgh, 1871), p. 155; *The Edinburgh University Calendar 1877-78* (Edinburgh, 1877), p. 157; *The Edinburgh University*

his tenure of the chair, as different requirements were made of students for the undergraduate degree of B.L. (introduced in 1874) and of those who wished to be candidates for various prizes and scholarships.

## VII. His Historical Approach to Civil Law in his Classes

A noted exponent of the Pandektenrecht may have taught Muirhead in Heidelberg, but he himself favoured a more strictly historical rather than dogmatic approach to Roman law – a tendency that may have become more marked as the years passed. Indeed, Muirhead's colleague, Professor Rankine, who had also been taught by von Vangerow, explicitly distinguished them in this respect. Von Vangerow "was at his best when, treating of some controverted passage, he had cited an imposing array of authorities, and convinced his class that their views were unimpeachable, and then precluded a still more imposing *catena* and a sounder hypothesis with the words, 'Aber, meine Herren'". Muirhead, in contrast, kindled enthusiasm in his class not "over a barren logomachy, but when the gradual development of some important institute was traced through long eras of Roman history".<sup>92</sup> He was remembered as sympathising with the Historical School, and as "introducing its ideas and methods into his teaching".<sup>93</sup> He wrote himself:

For the man who reads Roman law as a professional training, rather than in the expectation of having to deal with it as authoritative positive law, the study of the very words of the great jurists of the first two centuries and a half of the empire is likely to prove more profitable than the most careful perusal of the most perfect systematic treatise of a Savigny, a Windscheid, or a Brinz. Be the doctrine there expounded ever so true, precise, and complete a reproduction of that contained in the Roman texts, yet it is doctrine only. It can teach little or nothing of the surpassing art of the Roman jurists, - the apparently instinctive skill with which they dissected a case, exposed its points, and discovered and applied the rule that was to determine

*Calendar 1882-3* (Edinburgh, 1882), p. 120. In this year, D.6.1.; 41.1 and 2; and 45.1 were specified. In 1884 and 1885 D.6.1 and 9.2 were the subject of the examination: *The Edinburgh University Calendar 1884-5* (Edinburgh, 1884), p. 129; *The Edinburgh University Calendar 1885-6* (Edinburgh, 1885), p. 133. This was the only instance of such a continuity of subject.

<sup>92</sup> Rankine, "Professor Muirhead", p. 29.

<sup>93</sup> Mackintosh, "Faculty of Law", in Logan Turner (ed.), *University of Edinburgh*, pp. 92-93.

the question to which they gave rise.<sup>94</sup>

Muirhead clearly believed Roman law no longer to be “authoritative positive law” in Scotland. What was important was its role in professional training. Here again the contrast was with Germany:

Over a great part of the Empire the Justinianian texts are still formally authoritative; and in the Supreme Court at Leipzig, when an appeal is under consideration from Bavaria say, or Wurtemberg, or one of the Thuringian duchies, one may hear the pleaders quoting the words of Paul, Ulpian, or Papinian as freely as with us they would found on a judgment of the House of Lords, and see the books of the Corpus Iuris passing from hand to hand on the bench as if they were so many volumes of the Statutes of the Realm.<sup>95</sup>

Any interest Muirhead may have had in legal doctrine evidently focused more on modern Scots law than on the German *Pandektenrecht*. He presumably would have agreed with his pupil Goudy that:

No doubt in the Scotch Reports of the present century citations of Justinian’s texts and of the Civilians will be found to be comparatively rare, but that is due mainly to the fact that a wealth of decided cases has accumulated, and that, in matters of commercial law, the well-furnished storehouses of the English Reports have been largely resorted to.<sup>96</sup>

His course was praised thus in 1889: “He is not content to give a catalogue of the facts; every law is traced to its origin in reason, and described in its historical development. He shows us, not a soulless chaos of details, but the growth of a living organism.”<sup>97</sup>

The texts of Ante-Justinianian law were thus always of great interest to Muirhead. His library contained the fundamental works on the reconstruction and study of the *Twelve Tables*, such as those by Dirksen, Schoell, and Voigt.<sup>98</sup> (It is worth noting that Muirhead considered Voigt’s reconstruction of

<sup>94</sup> Muirhead, Review of Grueber, p. 379.

<sup>95</sup> Ibid.

<sup>96</sup> H. Goudy, *An Inaugural Lecture on the Fate of the Roman Law North and South of the Tweed* (London, 1894), p. 27.

<sup>97</sup> “Professor Muirhead”, *The Student* (New Series), 1 (1889), 17-18 at p. 18.

<sup>98</sup> H. E. Dirksen, *Uebersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf-Tafel-Fragmente* (Leipzig, 1824); *Legis XII. Tabularum Reliquiae*, ed. by R. Schoell (Berlin, 1866); *Die XII. Tafeln. Geschichte und System des Civil- und Criminal-Rechtes, wie –Processes der XII. Tafeln nebst deren Fragmenten von M. Voigt*, 2 vols. (Leipzig,

the Twelve Tables as overly speculative and preferred the “much soberer one of Schoell”).<sup>99</sup> He acquired the texts of the *Digest* edited by Mommsen, and of the *Institutes* and *Codex* edited by Krüger as they appeared in various editions, and, at his death, possessed the first part of Schoell’s edition of the *Novels*.<sup>100</sup> (It is a tempting speculation that Muirhead’s pupil Henry Goudy studied at Königsberg under his influence because of the presence there of Krüger.)<sup>101</sup> He purchased Lenel’s reconstruction of the Edict, and described it, only three years after its publication, as Lenel’s “great book”.<sup>102</sup> In the very year Gradenwitz’s study of interpolations in the *Digest* was published, Muirhead can be found borrowing it from the University Library.<sup>103</sup> He also acquired it for his personal library. Shortly before his death he bought the copy of Lenel’s *Palingenesia* now in the Advocates’ Library.<sup>104</sup> He not only purchased these works; he read them carefully. This is easily demonstrated. He can be found writing a relevant cross-reference to a paper in the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* in pencil on the flyleaf of the University’s copy of Lenel’s *Edictum Perpetuum*.<sup>105</sup> He also made occasional pencil marks in the margin of the University’s copy of this work.<sup>106</sup>

Moreover, to the very end of his life, as his library demonstrates, he kept abreast of new developments in scholarship in Roman legal history. His interest in the innovatory work of Gradenwitz and Lenel has already been noted. His periodical collection is telling. Some examples will demonstrate his recognition of the importance of law journals in the communication of the

1883).

<sup>99</sup> See Muirhead, Review of Grueber, p. 382.

<sup>100</sup> He owned Mommsen’s *editio maior* of the *Digest* (Berlin, 1870), Krüger’s edition of the *Codex* of 1877; and various sets of the Krüger/Mommsen texts including the *editio altera* of 1877-80. Of Schoell’s work, he owned *Fasciculus X. Novellae I. – XXII* (Berlin, 1880).

<sup>101</sup> J. Mackintosh, “Henry Goudy”, *Juridical Review*, 34 (1922), 53-57 at p. 54.

<sup>102</sup> J. Muirhead, *Historical Introduction to the Private Law of Rome* (Edinburgh: Adam and Charles Black, 1886), p. 253 note 1. See Rodger, “Scottish Advocates in the Nineteenth Century”, p. 573.

<sup>103</sup> Edinburgh University Library, Professors’ Receipt Books, Da. 2.69, p. 212. He borrowed it on 24 July 1887 and returned it on 30 Jan. 1888.

<sup>104</sup> Advocates’ Library, pressmark C.34.1.

<sup>105</sup> O. Lenel, *Das Edictum Perpetuum: ein Versuch zu dessen Wiederherstellung. Mit dem für die Savigny-Stiftung ausgeschriebenen Preise gekrönt* (Leipzig, 1883) (Edinburgh University Law Library, pressmark \*KG Len). The reference was to Brinz, “Gutachten für die königliche Akademie in München”, *Zeitschrift der Saigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 4 (1883), 164-76.

<sup>106</sup> See, e.g., Lenel, *Edictum Perpetuum*, pp. 20, 72, 127, 222, 225,

most recent scholarship. He acquired a complete run of Hugo's *Civilistisches Magazin* and Savigny, Eichhorn and Göschen's *Zeitschrift für geschichtliche Rechtswissenschaft*. He subscribed to the *Zeitschrift für Rechtsgeschichte* and then to its successor the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. He took the *Bulletino dell' Instituto di Diritto Romano* published in Rome and Jhering's *Jahrbucher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. He ensured that the University Library subscribed to *Studi e documenti di storia e diritto*.<sup>107</sup> These journals would have been invaluable not only for the original scholarship they contained, but also for their reviews of books and information about new publications – a matter of particular concern to such a notable book collector. Thus, in 1880, the *Kritische Vierteljahrschrift für Gesetzgebung und Rechtswissenschaft*, to which Muirhead subscribed, contained a review by Bluntschli of the *Syrisch-Römisches Rechtsbuch* edited by K. G. Bruns and E. Sachau, and published in that year in Leipzig.<sup>108</sup> On 2 December 1880, Muirhead borrowed this work from the University Library, which probably had bought it on his suggestion.<sup>109</sup> (Indeed, there can be little doubt that Muirhead was behind the collection of modern German legal scholarship in Roman law built up by the University in this period.)

### VIII. Muirhead's Publications

Given Muirhead's concern with the ante-Justinianian law, it is no surprise that in 1880 he published *The Institutes of Gaius and Rules of Ulpian. The Former from Studemund's Apograph of the Verona codex. With Translation and Notes, Critical and Explanatory, and Copious Alphabetical Digest*.<sup>110</sup> To understand the significance of this work it is necessary to explore the history

<sup>107</sup> Various parts of *Studi e documenti di storia e diritto* were sent to Muirhead's retiring room, which he returned on 26 Nov. 1887: Edinburgh University Library, Professors' Receipt Books, Da. 2.69, p. 212. On 21 Dec. 1887, at a meeting at which Muirhead was present, the Library Committee agreed to purchase the periodical: Edinburgh University Library, Library Committee Minutes 1877-1965, Da. 3-8, p. 157. Presumably some parts of the journal had been obtained and sent to Muirhead for assessment before a decision to subscribe had been made.

<sup>108</sup> *Kritische Vierteljahrschrift für Gesetzgebung und Rechtswissenschaft*, N.F., 3 (1880), 548.

<sup>109</sup> Edinburgh University Library, Professors' Receipt Books, Da. 2.67, vol. 3, p. 211.

<sup>110</sup> (Edinburgh: T. & T. Clark, 1880).

of the publication of Gaius's *Institutes* in the nineteenth century. The discovery by B. G. Niebuhr of the palimpsest manuscript of Gaius in 1816 resulted in the publication in 1820 of its text, transcribed by J. F. L. Goeschen, with the assistance of A. Bethmann-Hollweg, on behalf of the Prussian Academy of Sciences.<sup>111</sup> The difficulty of reading the manuscript had been considerable, some pages causing great problems for Goeschen. In 1822, Bluhme had visited Verona and took the opportunity thus afforded to improve on the pages that had caused most difficulty. Unfortunately, the powerful chemicals Bluhme used to help decipher the text rendered these pages illegible. In 1866, E. Böcking published what was described as an apograph of the Verona manuscript of Gaius. In fact, it was produced from the copies made by Goeschen, Bethmann-Hollweg, and Bluhme, which were in the Royal Library at Berlin.<sup>112</sup> Acting on a Commission from the Prussian Academy of Sciences, G. Studemund started work in 1866 on a completely new transcription of the Verona Codex. This was published in 1874. The aim was to produce a version of the text as close as possible to what was found in the manuscript without any editorial revision or intervention. Studemund carefully indicated those instances where the reading was so clear as to be certain and those where he believed he had accurately deciphered the text but might be mistaken. Asterisks indicated letters that could be counted but not deciphered. He carefully distinguished sections that were illegible and blanks in the manuscript. A special font of type was cast for the printing in order to reproduce the manuscript as closely as possible.<sup>113</sup>

Muirhead bought the *Apographum* and started to annotate his copy of the *Institutes* of Gaius. The alterations became so great, and, he judged, so important, that he decided to publish for the benefit of his students a new edition and translation based on Studemund's *Apographum*. This task required Muirhead to assess the transcription of Studemund and exercise his critical skills and judgement in restoring the text where necessary. Of course, the earlier literature and editions helped in this task, and as he prepared his own

<sup>111</sup> *Gaii institutionum commentarii IV. Accedit fragmentum de Jure Fiscis Veteris Jurisconsulti* (Berlin, 1820)

<sup>112</sup> *Gaii institutiones ad codicis Veronensis apographum. Ad Goescheni Holwegi Bluhmii Schedas Compositum. Publicavit E. Böcking* (Leipzig, 1866).

<sup>113</sup> *Gaii Institutionum Cod. Veron. Apographum ... edid. Gulielmus Studemund* (Leipzig, 1874). See Muirhead, *Law of Rome*, pp. 329-331; *Institutes of Gaius* (ed. Muirhead), pp. ix-xi. Studemund and Krüger made further inspections of the Verona MS in 1878 and 1883 which allowed them to decipher more of the text and disprove definitively some of the proposed reconstructions.

edition, texts edited by Krüger and Studemund, Huschke, and Polenaar appeared, both delaying the production of his own and assisting it.<sup>114</sup> Muirhead's edition, however, indicates his ability and critical skills, and is a notable achievement. It received a favourable welcome in the *Journal of Jurisprudence*, and was re-issued in 1895.<sup>115</sup> His outstanding personal library, of course, provided much of the basis on which the work was carried out.

The same focus on the history of Roman law as the key to understanding it features in the entry on Roman law that Muirhead prepared for the ninth edition of the *Encyclopaedia Britannica* (1886). This proved too long, and, while a condensed version appeared in the *Encyclopaedia*, Muirhead's original text was published as the *Historical Introduction to the Private Law of Rome* that we noted him recommending to his students.<sup>116</sup> In this work, Muirhead divided Roman legal history into five major parts: "The Regal Period"; "The Jus Civile" (from the establishment of the Republic to the conquest of central and southern Italy); "The Jus Gentium and Jus Honorarium" (the second half of the Republic); "The Jus Naturale and Maturity of Roman Jurisprudence" (the period of the Principate, that is the Empire until Diocletian); and "The Period of Codification" (the Empire from Diocletian to Justinian). Within each part he discusses the political, historical, and social influences on the law in the period, the general characteristics of the law, and the substantive changes in the law. More than half the book is devoted to developments prior to the Empire, as Muirhead endeavours to explain what gave Roman law its particular characteristics. It concludes with a discussion of the fate of the *Corpus iuris civilis* in the east and the west and a discussion of the principal manuscripts of its component parts. The picture Muirhead gives is one of the

<sup>114</sup> *Institutes of Gaius* (ed. Muirhead), pp. v-vi, xi-xii; Muirhead, *Law of Rome*, p. 330 note 6. He owned copies of all of these. As noted, his copy of the *Apographum* of Studemund was bought by the Advocates' Library and is now National Library of Scotland, pressmark H.27a.17. The Owens College Catalogue accidentally prints the first edition of the text established by Krüger and Studemund as appearing in 1887 rather than 1877. Polenaar's text is under the heading *Syntagma* and Huschke's under *Antejustinianum Jus* in the Catalogue.

<sup>115</sup> *Journal of Jurisprudence*, 24 (1880), 94-97. An edition of 1904 is noted in *A Legal Bibliography of the British Commonwealth of Nations. Volume 5 Scottish Law to 1956 Together with a List of Roman Law Books in the English Language*, 2<sup>nd</sup> edn., by L. F. Maxwell and W. H. Maxwell (London: Sweet and Maxwell, 1957), p. 139. This is probably a bibliographical ghost created by an error in *Catalogue of the Printed Books in the Library of the University of Edinburgh*, 3 vols. (Edinburgh: University Press, 1918-1923), vol. 2, p. 5, which probably mistakes this for the 1904 edition of the text and translation by Poste.

<sup>116</sup> (Edinburgh: Adam and Charles Black, 1886).

formalism of the *jus civile* replaced by the flexibility of the *jus honorarium* under the influences of the *jus gentium* and *jus naturale*. His stress on the significance of the *jus naturale* evidently derived from his reading of Voigt's study.<sup>117</sup> The period of the Severan Emperors was the period of maturity of the law. The era to the time of Justinian and his compilation was one of simplification of forms and increasing Christian influence. The whole reflects Muirhead's reported belief that what was important was "to trace the process of evolution, whereby that law came to be what it was".<sup>118</sup> He successfully used concepts such as *jus civile*, *jus gentium*, and *jus naturale* to divide the history of Roman law into periods that explain the changes that took place in Roman law in the context of the development of Roman society and politics. This was what was found most valuable and successful in the work.<sup>119</sup>

This book was a success. A second edition appeared in 1899 revised by Henry Goudy, a pupil of Muirhead's who had studied at Königsberg, and who had succeeded him in the Edinburgh chair of Civil Law before being translated to the regius chair of Civil Law in Oxford.<sup>120</sup> It reached a third edition in 1916 by Alexander Grant, a former Fellow of All Souls and Lecturer in Roman Law and Jurisprudence in Manchester.<sup>121</sup> Both left Muirhead's text untouched, but added new references and notes to take account of subsequent scholarship. It was only replaced as the standard text in the English language on its topic when H. F. Jolowicz published his *Historical Introduction to the Study of Roman Law* in 1932.<sup>122</sup> To take a few examples, the influence of Muirhead's *Historical Introduction* may be traced in Moyle's *Contract of Sale in the Civil Law*, and Sherman's *Roman Law in the Modern World*, where both deal with points of the external history of Roman law.<sup>123</sup> The work was regarded as sufficiently valuable to be worth translating into other languages. In 1888, it

<sup>117</sup> See pp. 298-301; M. Voigt, *Das jus naturale, aequum et bonum, und jus gentium der Römer*, 4 vols. (Leipzig, 1856-75). Muirhead owned a copy.

<sup>118</sup> Rankine, "Professor Muirhead", p. 30

<sup>119</sup> G. Carle, "Professor Muirhead", *Juridical Review*, 2 (1890), 32-36 at p. 35.

<sup>120</sup> *Historical Introduction to the Private Law of Rome, by the late James Muirhead, LL.D. (Glasg.) Professor of Roman Law in the University of Edinburgh. Second edition revised and edited by Henry Goudy, LL.D. Regius Professor of Civil Law, Oxford* (London: Adam and Charles Black, 1899).

<sup>121</sup> (London: A. & C. Black, 1916).

<sup>122</sup> (Cambridge: University Press, 1932).

<sup>123</sup> J. B. Moyle, *The Contract of Sale in the Civil Law with References to the Laws of England, Scotland and France* (Oxford, 1892); C. P. Sherman, *Roman Law in the Modern World*, 2<sup>nd</sup> edn., 3 vols. (New Haven, 1922).

appeared in Italian as *Storia del diritto romano dalle origini a Giustiniano*.<sup>124</sup> It served in this guise as a textbook in some of the Italian universities.<sup>125</sup> The following year it appeared in a French translation as *Introduction historique au droit privé de Rome*.<sup>126</sup> The work also brought Muirhead real recognition as a scholar. The University of Glasgow had already awarded him the honorary degree of LL.D. in 1885.<sup>127</sup> The Juridical Society of Berlin now elected him an honorary member in 1888, as did the Institute of Roman Law in Rome.<sup>128</sup> A more doubtful recognition was the flagrant plagiarism of Muirhead's *Historical Introduction* by Hannis Taylor in his *Science of Jurisprudence* published in 1908.<sup>129</sup>

## IX. Muirhead and German Scholarship

It would be perfectly possible to trace in detail the particular influences on Muirhead in the writing of his history of Roman law. It is sufficient here to point out that what dominated his thinking was recent German scholarship. The studies he cited in both his *Gaius* and his *Historical Introduction* demonstrate this clearly. German works and periodicals dominated his library. Not that Muirhead was completely blinded by the dazzling quality of contemporary German legal science. In his review of Erwin Grueber's *Lex Aquilia*, for example, he criticised the author for citing only modern German legal scholarship, which, Muirhead claimed, had paid little detailed attention to the *Lex Aquilia*. He suggested that it would have been much more useful to refer to "the systematic expositions of Suarez de Mendoza ... and Gerhard

<sup>124</sup> *Storia del diritto romano dalle origini a Giustiniano di Giacomo Muirhead Professore nell'Università di Edinburgo. Traduzione dall'Inglese con note del Dott. Luigi Gaddi con prefazione di Pietro Cogliolo Professore nell'Università di Modena* (Milan: Dott. Leonardo Vallardi, Edit., 1888).

<sup>125</sup> Carle, "Professor Muirhead", p. 33.

<sup>126</sup> *Introduction historique au droit privé de Rome par James Muirhead, LL.D. (Glasc.) Professeur de Droit Romain à l'Université d'Edimbourg. Traduit et annoté avec l'autorisation de l'auteur par G. Bourcart agrégé près la Faculté de Droit de Nancy* (Paris: A. Durand et Pedone-Lauriel, Éditeurs and G. Pedone-Lauriel, Successeur, 1889).

<sup>127</sup> *A Roll of the Graduates of the University of Glasgow From 31<sup>st</sup> December, 1727 to 31<sup>st</sup> December, 1897*, ed. by W. Innes Addison (Glasgow, 1898), p. 459.

<sup>128</sup> Rankine, "Professor Muirhead", pp. 31-32.

<sup>129</sup> See H. Goudy, "Plagiarism – A Fine Art", *Juridical Review*, 20 (1908-9), 302-315 discussing H. Taylor, *The Science of Legislation* (New York: Macmillan, 1908).

Noodt”.<sup>130</sup> Muirhead none the less viewed the world of legal scholarship as dominated by modern German *Wissenschaft*. In this respect it is worth noting J. B. Moyle’s review of the *Historical Introduction in the Law Quarterly Review*. He specially singled out Muirhead’s familiarity with modern European scholarship for praise:

Every page ... is written with reference to the latest continental contributions to the subject, and upon many disputed matters English readers are for the first time introduced to the views of writers more recent than Savigny and Sir Henry Maine, and to the results of a mass of monographical literature not otherwise easily accessible. How unsure is much of the ground, how countless the volumes of French, Italian and German, and how diverse the views of their authors, is known to not a few even in this country: and Professor Muirhead deserves congratulation upon the unusual judgment with which he chooses the good and rejects the bad from works so learned and yet in parts so fanciful as those (e.g.) of Voigt, of Kuntze, and (in a less degree) of Ihering.<sup>131</sup>

This is high testimony to Muirhead’s scholarship. The review in the *Journal of Jurisprudence* also singled out Muirhead’s familiarity with the continental literature for praise.<sup>132</sup> This praise also points to the excellence of his personal library. Since he was not a great borrower from either the University or Advocates’ Libraries (although we cannot tell what he may have consulted in either), there can be little doubt that it was on his own collections that he mainly relied in his writing.

Lest it should be thought that this focus on German scholarship was unique to Muirhead, it must be noted that his colleagues in the Faculty of Law would also have recognised the pre-eminence of German *Rechtswissenschaft* in this period. This is too large a topic to do more than touch on here. But it is worth noting that in 1888 the Faculty of Law of the University of Edinburgh sent an address to Rudolf von Gneist on the occasion of the fiftieth anniversary of the award of his doctorate.<sup>133</sup> (Gneist’s death was later noted in the *Scots Law*

<sup>130</sup> Muirhead, Review of Grueber, p. 381. In Muirhead’s library we can note G. Noodt, *Probabilium Juris Civilis Libri IV. et ad Legem Aquiliam Liber Singularis* (Leiden, 1691) and *Thesaurus Juris Civilis et Canonici Novus ex Collectione et Museo G. Meerman*, 7 vols and Supplementum (The Hague, 1751) which contained the treatise of Suarez de Mendoza.

<sup>131</sup> J. B. M[oyle], Review of *A Historical Introduction to the Private Law of Rome* by James Muirhead, *Law Quarterly Review*, 3 (1887), 74-77 at p. 74.

<sup>132</sup> Review of *Historical Introduction to the Private Law of Rome* by James Muirhead, *Journal of Jurisprudence*, 31 (1887), 37-44 at p. 37.

<sup>133</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 9, pp. 224-225 (24 Nov. 1888).

*Times*).<sup>134</sup> We have noted already that at one time Muirhead taught using Gneist's *Syntagma*. Gneist, however, was best known for his work on constitutional law, especially in England.<sup>135</sup> For some years, Aeneas Mackay, the Professor of Constitutional Law and History, had recommended works of Gneist to his class.<sup>136</sup> The same author published a history of the English constitution in 1882, which was later translated into English.<sup>137</sup> In 1884, Muirhead's colleague, Professor Kirkpatrick, added the German edition to the list of works recommended to his students.<sup>138</sup> Professor Lorimer also prescribed German textbooks for his students. For example, in legal philosophy he recommended works of Trendlenburg, Röder, and Krause; in public international law a work of Bluntschli; and in private international law works of Bar and Savigny.<sup>139</sup> When the Faculty of Law came to consider candidates for honorary doctorates in connection with the University of Edinburgh's tercentenary celebrations, the names of twenty-one candidates "of first-rate eminence" included the Roman lawyers Mommsen, Windscheid, and Jhering.<sup>140</sup> Krüger was included among the scholars of Roman law as one of the six "slightly inferior" candidates. James Bryce of Oxford was the only other man named as of eminence in Roman law.<sup>141</sup> Further German legal scholars on the list were Gneist, von Bar, the international lawyer,

<sup>134</sup> *Scots Law Times (News)* 3 (1895), 69.

<sup>135</sup> On Gneist, see *Handwörterbuch zur deutschen Rechtsgeschichte*, ed. by A. Erler and E. Kaufmann (Berlin: Erich Schmidt Verlag, 1971- ), vol. 1, cols. 1719-1722.

<sup>136</sup> (Berlin, 2<sup>nd</sup> edn., 1861). See, e.g., *The Edinburgh University Calendar 1877-78* (Edinburgh, 1877), p. 94.

<sup>137</sup> R. von Gneist, *Englische Verfassungsgeschichte* (Berlin, 1882); R. von Gneist, *The History of the English Constitution*, trans. by P. A. Ashworth (London, 1886).

<sup>138</sup> *Edinburgh University Calendar 1883-84* (Edinburgh, 1883), p. 77.

<sup>139</sup> F. A. Trendlenburg, *Naturrecht auf dem Grunde der Ethik*, 2<sup>nd</sup> ed. (Leipzig, 1868); K. D. A. Röder, *Grundzüge des Naturrechts oder der Rechtsphilosophie*, 2<sup>nd</sup> edn., 2 vols. (Leipzig and Heidelberg, 1860); K. C. F. Krause, *Das System der Rechtsphilosophie*, ed. K. D. A. Röder (Leipzig, 1874); J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten las Rechtsbuch dargestellt*, 2<sup>nd</sup> edn. (Nördlingen, 1872); L. Bar, *Das Internationale Privat- und Statrecht* (Hanover, 1862); F. C. von Savigny, *System des heutigen Römischen Rechts*, 9 vols. (Berlin, 1840), vol. 8. See, e.g., *The Edinburgh University Calendar 1873-74* (Edinburgh, 1873), p. 87; *The Edinburgh University Calendar 1874-75* (Edinburgh, 1874), p. 90.

<sup>140</sup> Edinburgh University Library, Minutes of the Faculty of Law, vol. 2, 7 Dec. 1883 and 24 Jan. 1884.

<sup>141</sup> The Belgian Romanist Alphonse Rivier had originally been on the list but then struck out having been categorised (along with Karl Olivecrona) as of the third rank in eminence. On a curious episode arising out of these recommendations, see Rodger, "Scottish Advocates in the Nineteenth Century", pp. 590-591.

Goldschmidt, the mercantile lawyer, and Maurer, the scholar of Scandinavian law.<sup>142</sup> A German political economist was also named. Thus, although there was a concern to balance the nationalities it is obvious where excellence in law was thought to lie, as one third of the men the Faculty thought worthy of the honorary degree of LL.D. were German scholars.

## X. Muirhead and Codification

Muirhead's scholarly concerns were far from purely antiquarian. We have already noted his concern with the need for assimilation of the marriage law of the United Kingdom. His study of the relevant laws discloses his belief that historical research helped to reveal the principles underlying the law that could be used in framing appropriate legislation. He identified a major problem for English law in the formal requirements for a valid celebration of a marriage made by Lord Hardwicke's Act. These had departed from the proper principles of legislation in this area. England was only now returning to the true principles of legislation:

The sketch I have endeavoured to present in the foregoing paper of the history and present position of the marriage laws of the three divisions of the kingdom shows, I think, not only what a signal difference there is between them, but that, proceeding from the same original, they have more and more diverged with every new step of fragmentary legislation. The law of England has over and over again been operated upon; so has that of Ireland. Scotland alone has had hers left untouched. Hitherto she has certainly been the gainer. While England has had to pass through the purgation of a hundred years before arriving at the true principle of legislation on such a subject, and Ireland is still in search of it, Scotland has been content to abide by the old landmarks, and to regard marriage, not as an invention for the creation of inheritors of lands or title, but as an institution of nature's ordinance, meant to secure her good name to woman, and the paternal offices to her children.<sup>143</sup>

Recognition of this provided the foundation on which legislation to assimilate the laws could proceed.

Codification of the laws of the United Kingdom was inevitably attractive

<sup>142</sup> The first was judged to be of "slightly inferior" and the second and third of "first-rate eminence". Edinburgh University Library, Minutes of the Faculty of Law, Da. 42, vol. 2, 7 Dec. 1883 and 24 Jan. 1884.

<sup>143</sup> Muirhead, *Notes on the Marriage Laws*, p. 66.

to one of such views. It is therefore unsurprising to find Muirhead addressing the Edinburgh Chamber of Commerce in 1864 on codification of mercantile law. This was a topic on which there had been considerable debate in Britain since the middle years of the century.<sup>144</sup> For Scots lawyers, the question of codification also raised the issue of assimilation of the laws of Scotland and England.<sup>145</sup> Muirhead was an enthusiastic proponent of a general codification of the laws of the United Kingdom. He argued that this would require a general assimilation of the laws. He did not think the time was yet ripe for this, because of the prejudices of both the Scots and English in favour of certain aspects of their own laws. He added: “Let us hope that other twenty years of more extended intercourse with our fellow-subjects south of the Tweed will all but remove it, and convince them and us that, with our common interests, we should fare not worse but better for a common law.”<sup>146</sup> If a general codification (and assimilation) of the laws of the United Kingdom was not yet feasible, Muirhead saw no reason for desisting from partial codification.<sup>147</sup> Here the example to which he looked was contemporary Germany. He wrote before the creation of the new Empire under Prussia. He was none the less able to point out that the German confederation had succeeded in producing, first, a code of law on bills of exchange (the *Wechsel-Ordnung* of 1848) and then a general codification of mercantile law (the *Allgemeines Handelsgesetzbuch* of 1861). “Now, if codification of the mercantile law be possible in Germany, which, like our own country, is not yet ripe for *general* codification of its private law, why should it not be so with us?” he asked the Chamber of Commerce. He added:

The mercantile laws of England and Scotland are both of comparatively modern growth; neither contains anything that it would shock the affections of the people to see amended; the differences between them are insignificant, and with the assistance and under the guidance of calm, unprejudiced, rationally-minded merchants and jurists, might without much difficulty be reconciled and adjusted.<sup>148</sup>

Muirhead praised the advantages brought about by the Mercantile Law

<sup>144</sup> A. Rodger, “The Codification of Commercial Law in Victorian Britain”, *Law Quarterly Review*, 109 (1992), 570-590.

<sup>145</sup> *Ibid.*, pp. 573-578.

<sup>146</sup> J. Muirhead, *Codification of the Mercantile Law: An Address read before the Edinburgh Chamber of Commerce, 25<sup>th</sup> January 1864* (Edinburgh, 1864), pp. 12-13.

<sup>147</sup> *Ibid.*, p. 15.

<sup>148</sup> *Ibid.*, p. 17.

Amendment Act of 1856, though he regretted that the reforms had not gone further.<sup>149</sup> The proposals in his pamphlet must have contributed to the climate in favour of reform that later resulted in the Bills of Exchange Act of 1882, the Partnership Act of 1890, and the Sale of Goods Act of 1893.

In his attitude to law reform and assimilation of the laws of the United Kingdom, one can readily identify the influence on Muirhead of German scholarship and experience. What was important was to identify the principles that ought to underlie legislation in a particular area and then legislate on their basis. German experience demonstrated that assimilation of the laws was both necessary and possible when based on true legislative principles. Law was a scientific matter to be advanced in a rational way on correct principles. Historical study could both reveal these principles and how muddled development had lost sight of them. In this respect the work of Puchta was as important for Muirhead as that of Mommsen and Lenel. His teacher at Heidelberg, von Vangerow, was, after all, a noted exponent of the *Pandektenwissenschaft*. In this connection it is worth noting that, in November 1882, Muirhead proposed that the Library should subscribe to the *Zeitschrift für Vergleichende Rechtswissenschaft*. The question of the subscription was postponed. In March 1883, the minute book of the Curators of the Library has an entry in Muirhead's own hand repeating the name of the periodical, but underlining the word "*Vergleichende*" with the comment: "Comparative Jurisprudence is becoming of much importance." (He also underlined "Comparative".) This time he succeeded in persuading the committee of the need to purchase this journal.<sup>150</sup> His anxiety to secure the subscription is attributable to a belief that comparative legal science was vital to the progressive development of the law. In October 1883, he borrowed the first three volumes.<sup>151</sup>

## XI. Muirhead and the University of Edinburgh

The University of Edinburgh provided the setting for Muirhead's work as a scholar and teacher of Roman law. He participated fully in its corporate life.

<sup>149</sup> Ibid., pp. 17-18.

<sup>150</sup> Edinburgh University Library, Minutes of Curators Meetings, Da.1.75 (15 Nov. 1882 and 21 Mar. 1883).

<sup>151</sup> Edinburgh University Library, Professors' Receipt Books, Da. 2.69, p. 211.

To explore this adequately would take us into areas far from the central focus of this study, but it is useful to make some remarks on it.<sup>152</sup> Muirhead joined a Faculty and University that were in a relatively healthy state. No doubt there was as much mediocrity as there always is in such bodies, but the Faculty of Law had a respectable number of reasonably distinguished professors during his time. Muirhead's tenure of the chair in Civil Law also saw a sizeable increase in the number of law students. There were 202 law students in 1861-62; the year before Muirhead's death there were 492.<sup>153</sup> Only a minority of these students, however, attended his classes. This was because a pass in Civil Law was necessary only for graduation in law or admission as an advocate. Most law students, however, simply wished to attend the classes necessary to qualify as a law agent or writer without taking a degree. Thus, while in 1871-72 the Scots Law class attracted 169 students, that of Civil Law attracted only thirty; in 1876-77, 123 attended Scots Law and fifty-four Civil Law.<sup>154</sup>

Shortly after appointment to the chair of Civil Law, Muirhead was elected Dean of the Faculty of Law.<sup>155</sup> He served as such until 1869.<sup>156</sup> He thus held office during the important early years when the Faculty worked out the practice for teaching and examination for the degree of LL.B. within the framework established by the Ordinances of the Universities Commissioners. He served again briefly as Dean in the early 1880s: this latter period was clearly that of a caretaker Dean, serving until a more permanent officeholder could be elected.<sup>157</sup> These duties will have involved a certain effort on Muirhead's part, but the university records suggest that they were not especially onerous. There are two possible reasons for his resignation from the office of Dean in February 1869. He may have desired not to hold an office in

<sup>152</sup> For a general account of this period, see Horn, *Short History of the University of Edinburgh*, pp. 170-210.

<sup>153</sup> *Ibid.*, p. 180.

<sup>154</sup> *Report of the Royal Commissioners appointed to inquire into the Universities of Scotland, with Evidence and Appendix. Volume IV. Returns and Documents* (Edinburgh, 1878), p. 338.

<sup>155</sup> Edinburgh University Library, Minutes of the Faculty of Law, Da. 42, vol. 1 (7 Nov. 1862).

<sup>156</sup> *Ibid.* (14 Feb. 1869). The minutes of the Faculty are written in his hand until this date. He had already tendered his resignation in 1865. The resignation does not seem to have been accepted, and alternative arrangements were made to cover his potential absence: *ibid.* (1 Apr. 1865).

<sup>157</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 7, p. 403 (23 Oct. 1882). He had taken up the duties in 1881 on the resignation of Professor Mackay.

the University other than his chair, so he could more easily oppose the admission of women to study medicine. It was in March 1869 that the Senatus resolved to admit Sophia Jex-Blake. As noted, Muirhead opposed this energetically.<sup>158</sup> Alternatively, his resignation may have been connected with the death of his son Claud, who had been born on 1 December 1868 but died within the year.<sup>159</sup> As well as the regular formal business of managing the Faculty and participation in the Senatus, as a member of the Faculty of Law, Muirhead was regularly involved in providing the Senatus with legal advice on difficult points. He also served on the University's Library Committee in the 1880s.<sup>160</sup> Among more miscellaneous duties, we may note that, with Lorimer, he attended the celebration of the quatercentenary of the University of Munich on behalf of the University.<sup>161</sup> He also played a prominent part in the campaign to elect Lord Inglis as Chancellor in 1868.<sup>162</sup>

For one whose teaching was initially set at eighty hours a year, and whose administrative duties were slight, Muirhead's scholarly production might seem thin in comparison with that of his great German contemporaries. The reason for this is not far to seek. Ordinance No. 23 of the Universities Commissioners of 1858 had attached a salary of £250 to the chair of Civil Law.<sup>163</sup> The professor was expected to receive a fee income of around £125 annually.<sup>164</sup> The fees were set at five guineas (£5/5/-).<sup>165</sup> In fact, by the mid-1870s Muirhead had a fee income of over £200 *per annum*, so that most years his income from his chair was approaching £500.<sup>166</sup> This was still well short of

<sup>158</sup> See, e.g., Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 4, pp. 27-28 (10 Apr. 1869).

<sup>159</sup> Certificate 685/2/1023.

<sup>160</sup> See Edinburgh University Library, Library Committee Minutes 1877-1965, Da. 3-8, pp. 150-163.

<sup>161</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 5, p. 24 (15 July 1872).

<sup>162</sup> See J. Muirhead to Professor Struthers, 8 August, 1868, Edinburgh University Library, MS Gen 566/6.

<sup>163</sup> *The Universities (Scotland) Act, 1858 together with Ordinances of Commissioners under said Act With relative Notes of Alterations thereon authorised by Orders in Council of various dates*, ed. by A. E. Clapperton (Glasgow: James MacLehose and Sons, 1916), p. 104.

<sup>164</sup> *Ibid.*, p. 110.

<sup>165</sup> *Report of the Royal Commissioners Volume IV. Returns and Documents* (Edinburgh, 1878), p. 369.

<sup>166</sup> *Ibid.*, p. 363:

1871-72: £157/10/-

1872-73: £168

1873-74: £236/5/-

the £600 *per annum* that the Commissioners appointed in 1876 thought should be a minimum.<sup>167</sup> The law professors accordingly treated their chairs as part-time occupations and, unless they were of independent means, continued to practice at the bar. Indeed, the Minutes of the Faculty of Law reveal that it was common to hold the Faculty Meetings in the Advocates' Library. Muirhead's career as an advocate led to his appointment by the Conservatives as an advocate depute in 1874.<sup>168</sup> It was no doubt in connection with these duties as a public prosecutor that we find Muirhead borrowing three books on poisons and a medical periodical from the University Library on 1 May 1878.<sup>169</sup> Presumably the three books on coal mining he borrowed from the Advocates' Library in 1876 are also a reflection of his legal practice.<sup>170</sup> In 1880, he was appointed Sheriff of Chancery, while he was appointed Sheriff Principal of Stirling, Dumbarton and Clackmannan in 1885.<sup>171</sup> This last office, which he held until his death, involved a mixture of administrative and judicial duties. The need to gain extra income makes his scholarly work remarkable rather than anything else. The part-time tenure of the law chairs in Scotland, in comparison with Germany, was an object of contemporary criticism by individuals such as J. P. Coldstream. Critics argued that until there were more law professors, and professors who devoted all their energies to their chairs, little further progress could be made in developing university education in law.<sup>172</sup>

## XII. Conclusion

Henry Goudy reflected thus nearly twenty years after the death of his old

1874-75: £228/18/-

1875-76: £231

1876-77: £274/1/-.

<sup>167</sup> *Report of the Royal Commissioners Appointed to inquire into the Universities of Scotland, with Evidence and Appendix. Volume I. Report with Index of Evidence* (Edinburgh, 1878), p. 97.

<sup>168</sup> See Obituary, *Journal of Jurisprudence*, 33 (1889), 639-641 at p. 640.

<sup>169</sup> Edinburgh University Library, Professors' Receipt Books, Da. 2.68, p. 301.

<sup>170</sup> National Library of Scotland, Advocates' Receipt Books, FR 277, p. 894.

<sup>171</sup> See Obituary, *Journal of Jurisprudence*, 33 (1889), 639-641 at p. 640.

<sup>172</sup> J. P. Coldstream, *The University System of Germany* (Edinburgh: James Thin, 1888), pp. 8-10, 22-23. See also W. Galbraith Miller, *The Faculty of Law in the University of Glasgow* (Glasgow: John Smith, 1889).

teacher: “Professor Muirhead devoted himself with unremitting toil to the study and exposition of Roman law, and did more probably than anyone last century to raise the standard of legal scholarship in this country.”<sup>173</sup> His library was central to this endeavour. The content of Muirhead’s library speaks for itself. The collection indicates what a serious working scholar of Roman law would require either to own or have access to in the period immediately prior to 1900. Muirhead died too soon for his collection to contain some of the important works that opened up new fields of historical research in the 1890s, such as that of Ludwig Mitteis on the relationship between Roman law and Vulgar law in the Eastern Empire. (The latter’s *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* was only published in 1891.)<sup>174</sup> None the less, his library is a very fair reflection of what was important in Roman law scholarship before 1900, and still would serve as a useful guide to the older literature.

In the absence of studies of comparable contemporary private libraries, it is impossible to be certain whether or not Muirhead’s library had counterparts in Scotland or south of the Tweed. It may well have been a uniquely fine collection; it certainly represented a huge investment of time as well as money by the professor. Building up such a library indicates the intensity of Muirhead’s interest in his discipline, just as his publications indicate the high level and purity of his scholarship. To the end of his life he collected for his library and remained engaged with his subject. In so far as the restructuring of his classes in 1876 marks a shift towards a more historical orientation in his teaching, it must have been stimulated by the new recension of Gaius by Studemund and by the continuing work of Mommsen and Krüger on the *Digest* and the *Institutes*. Muirhead was active in an era of exciting development in Roman law. One can well imagine that he was eager to acquire and read the works of Gradenwitz and Lenel as soon as they appeared. The love of his subject marked by the library was recognised by his colleagues in the formal minute of the Senatus recording his death:

As a lecturer of pre-eminent ability, an enthusiastic Student of Roman Law, an accomplished scholar, and an author of European reputation, the late Professor was held in the highest esteem throughout his whole career, while his wide practical experience as an Advocate and a Judge, and his wise and

<sup>173</sup> Goudy, “Plagiarism – A Fine Art”, p. 315.

<sup>174</sup> See Wieacker, *History of Private Law in Europe*, p. 333. Muirhead did own L. Mitteis, *Die Individualisierung der Obligation* (Vienna, 1886).

ready counsel rendered him an invaluable member of the Senatus.<sup>175</sup>

(The author gratefully acknowledges his debts, first, to Mr Angus Stewart, Q.C., Keeper of the Advocates' Library, for permission to consult and cite the records of the Faculty of Advocates; secondly, to the Librarian of the University of Edinburgh, for permission to cite and quote from archival and manuscript material in the Library's care. He also acknowledges the benefit he has received from the comments of Mr Donald Jardine. A version of this account was delivered as a paper entitled "Puchta comes to Queen Street: James Muirhead and German Scholarship in Roman Law" to the Edinburgh Law Faculty Legal History Discussion Group on 10 December, 1997. The author greatly benefited from the discussion on that occasion.)

<sup>175</sup> Edinburgh University Library, Senatus Minutes, Da. 31.5, vol. 9, pp. 319-320 (30 Nov. 1889). See also Edinburgh University Library, Minutes of the Faculty of Law, Da. 42 (29 Nov. 1889).