Principles of Equity

OLD STUDIES IN SCOTS LAW

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1. George Joseph Bell, *Principles of the Law of Scotland* (4th edn, 1839) [2010]
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3. William Forbes, *The Institutes of the Law of Scotland* (1722 and 1730) [2012]
4. Lord Kames, *Principles of Equity* (3rd edn, 1778) [2013]

OLD STUDIES IN SCOTS LAW

VOLUME 4

Principles of Equity

Third Edition

LORD KAMES

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INTRODUCTION

"Law in particular becomes then only a rational study, when it is traced historically, from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society. And yet the study is seldom conducted in this manner … Such neglect of the history of law is the more unaccountable, that in place of a dry, intricate and crabbed science, law treated historically becomes an entertaining study; entertaining not only to those whose profession it is, but to every person who hath any thirst for knowledge." [1]

AUTHOR AND WORK

Prefatory remarks for the reprint of an historical text are made easier when the author reprinted gives so eloquent a justification for the study of legal history. Henry Home,[2] Lord Kames,[3] was a colourful figure who lived in exceptional times. An active writer and practitioner across different disciplines, Kames, like a number of his contemporaries, was the embodiment of interdisciplinary study. The character of the man no doubt contributed to a restlessness of intellectual focus; yet a backdrop of Enlightenment ideas must also be reckoned with. Living in the period that has come to be known as the "Scottish Enlightenment"[4] Kames was exposed to, and cultivated, the flowering of disparate fields of knowledge during an age of profound change in Scotland.[5]

The present reprint of the *Principles of Equity*[6] provides an opportunity to reflect on the nature of legal reasoning and authority according to Kames,

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[1] Lord Kames, *Historical Law-Tracts* (1758) v–vi. The passage quoted survives into the third edition, the last Kames prepared himself, with some alterations of punctuation and style: Lord Kames, *Historical Law-Tracts*, 3rd edn (1776) iii–iv.

[2] Pronounced "Hume", "Home" being a variant spelling of the same name.

[3] Hereafter "Kames".

[4] The use of "Scottish" can be said to detract from the international character of the Enlightenment generally, as well as representing a label that overshadows and displaces the substantive development and parameters of the epoch. In this prefatory piece the term is retained as a convenient label, though the reader seeking more guidance, in a legal context, should consult K Haakonssen, "Natural jurisprudence in the Scottish Enlightenment: summary of an interpretation", in N MacCormick and Z Bankowski (eds), *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy* (1989).

[5] From a massive literature an accessible starting-point can be found in A Broadie, "The rise (and fall?) of the Scottish Enlightenment", in T M Devine and J Wormald (eds), *The Oxford Handbook of Modern Scottish History* (2012) and the references cited therein.

[6] Hereafter "*Principles of Equity*". All references are to the 3rd edition, reprinted here, unless otherwise stated.

whose philosophical bent is deeply embedded in the plan and content of the work. For the Scottish lawyer the *Principles* is an intriguing text with a fairly solid claim to "institutional" status, even if it is unlike other "institutional" works in terms of structure and content. The text, however, cannot be understood as a mere statement of the law in Scotland; rather, the *Principles* is a sophisticated amalgam of thinking about "equity" both in a system-neutral fashion and also as applied in Scotland and England. The methodology adopted is novel. Kames takes an empirical, or scientific, approach and fuses it with an historical method to illustrate the progress of equity in Scotland and beyond. The author's design was, therefore, a formidable one.

Kames' life is both an important contextual influence for his works and also entertainingly controversial. Despite a daunting corpus, if not canon, of works, Kames was no monk of the groves of Academe. As an advocate and judge in Enlightenment Scotland, he was a member, indeed a leader, of many of the intellectual elites of Edinburgh, and had a hand in the development of a stellar cast of thinkers even if, by the end, most had tired of his somewhat overbearing advice.

EARLY LIFE AND EDUCATION

The importance of the man, and the diversity of his interests, mean that there are a number of essays[7] and books[8] devoted to the life and work of Kames.[9]

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[7] See for example: D M Walker, *The Scottish Jurists* (1985) ch 14; D Lieberman, *The Province of Legislation Determined: Legal theory in eighteenth-century Britain* (1989) chs 7 and 8; M Lobban, "The ambition of Lord Kames' equity", in A Lewis and M Lobban (eds), *Law and History: Current Legal Issues 2003* (2004) 97; A Rahmatian, "Lord Kames and his *Principles of Equity*", in Lord Kames, *Principles of Equity*, 3rd edn (2011 reprint). A number of older accounts remain of value, notably: J Ramsay of Ochtertyre, *Scotland and Scotsmen in the Eighteenth Century* (A Allardyce (ed) 1888) vol 1, ch 3; W Forbes Gray, *Some Old Scots Judges: Anecdotes and Impressions* (1915, repr 2005) ch 1.

[8] H W Randall, *The Critical Theory of Lord Kames* (1944); A E McGuinness, *Henry Home, Lord Kames* (1970); W C Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and in the History of Ideas* (1971); I S Ross, *Lord Kames and the Scotland of his Day* (1972). A much earlier account is A F Tytler, *Memoirs of the Life and Writings of the Honourable Henry Home of Kames* (1807) 2 vols; 2nd edn (1814) 3 vols. A supplementary volume appeared in 1809: A F Tytler, *Supplement to the Life and Writings of the Honourable Henry Home of Kames* (1809). Tytler's biography is substantial and rich, especially with regard to primary source material, but it is also partial. Ross 371 n 2 notes that Tytler was "very likely" Kames' secretary for a time. Furthermore, Kames seems to have attempted to cultivate and influence Tytler, and Boswell, as potential biographers: see I S Lustig and F A Pottle (eds), *Boswell: The Applause of the Jury 1782–1785* (1981) 40.

[9] James Boswell toyed with producing a biography of Kames, but it never appeared: see C Rogers (ed), *Boswelliana: the Commonplace Book of James Boswell* (1874) 102; F Brady, *James Boswell: the Later Years 1769–1795* (1984) 125, 233–34. Boswell's phantom work might be what Tytler was referring to when he explained that he waited 20 years to produce his work "while there appeared any probability of its falling into abler hands": Tytler, *Memoirs*, 2nd edn (n 8) vol 1, vi.

The present essay can do no more than provide a snapshot of Kames' life, and readers are referred to the works cited for more detailed accounts.

Henry Home, the future Lord Kames, was born at Kames, near Duns, in the Scottish border county of Berwickshire sometime in 1696, the exact date being lost to history,[10] into a respectable family[11] which had fallen on hard times.[12] Forbes Gray captures the effect on Kames' education: "Considering his family and station, Home received a wretched education."[13] Privately educated by two tutors,[14] Kames received no formal university education, whether in Scotland or on the Continent.[15] Ramsay notes Kames' complaint that these early difficulties meant that he had to "submit to the drudgery of mind and body … for years before and after coming to the bar".[16] The "drudgery" before the bar refers to a period spent as an assistant in the offices of a Writer to the Signet after leaving home for Edinburgh.[17] A potential counterbalance might have been the Civil Law lectures, delivered by James Craig,[18] which the young Kames attended, apparently as a result of an epiphany brought on by running an errand to the then Lord President,[19] Sir Hew Dalrymple. Unfortunately, Kames appears not to have found the lectures stimulating.[20]

Kames' plans changed in the aftermath of the visit to the Lord President. Instead of following a career as a solicitor he resolved to become an advocate. This seems to have had the concomitant effect of broadening the intellectual

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[10] Lehmann, *Henry Home* (n 8) 4 n 2 suggests it was likely to have been early in 1696.

[11] On Kames' distinguished kin see Ross, *Lord Kames* (n 8) 3–5.

[12] The debts of the estate inherited by Kames must have been substantial as it was not until 1752 (the year he was raised to the Bench) that he succeeded in settling them: Ross, *Lord Kames* (n 8) 5.

[13] Forbes Gray, *Old Scots Judges* (n 7) 4.

[14] The first tutor, a John Wingate, is said to have been a stern taskmaster. Tytler, *Memoirs*, 2nd edn (n 8) vol 1, 3–5 gives an account of Kames exacting revenge in later life: when asked to examine his former tutor's title deeds, Kames is said to have put the unfortunate tutor through the wringer before declaring the deeds sound.

[15] Lehmann, *Henry Home* (n 8) 7–12; Ross, *Lord Kames* (n 8) 5–6. Many of Kames' contemporaries would have studied abroad, although the practice was dying out by the middle of the eighteenth century: see J W Cairns, "The Scottish legal mind in the eighteenth century: themes of humanism and enlightenment in the admission of advocates", in N MacCormick and P Birks (eds), *The Legal Mind: Essays for Tony Honoré* (1986) 263.

[16] Ramsay, *Scotland and Scotsmen* (n 7) vol I, 182–83.

[17] Lehmann, *Henry Home* (n 8) 8–9; Ross, *Lord Kames* (n 8) 12–15. Once again the literature does not record entirely accurate dates here: it seems to have been a period of around two years from 1712 or so.

[18] Craig was the first holder of the Chair of Civil Law at the University of Edinburgh, having been appointed in 1710. From its inauguration to 1717 there was no endowment attached to the Chair, and Craig was expected to earn his living from fees: see J W Cairns, "The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 EdinLR 300, 347.

[19] Tytler, *Memoirs*, 2nd edn (n 8) vol 1, 12–14; Lehmann, *Henry Home* (n 8) 9; Ross, *Lord Kames* (n 8) 19–20.

[20] Kames described Craig, to Boswell, as a "very dull man", and himself, at the time of the lectures, as a "mechanical Student and got law by rote". See Ross, *Lord Kames* (n 8) 14.

pursuits of the young man, a development that significantly influenced his later life.

BAR AND BENCH

Bar

On 19 January 1723 the young Kames was publicly examined on book 2, title 21 of Justinian's *Institutes* (*De ademptione legatorum*) and found to be qualified for admission to the bar.[21] Within two years he had been appointed, by virtue of a Faculty vote, as a "private Examinator"[22] of potential intrants. In subsequent years Kames was to alternate between the role of private and public examinator.[23]

The first evidence of Kames' involvement in the production of legal writing is his appointment to a committee, alongside the future Lord Bankton, to review Alexander Bruce's *Dictionary of Decisions* prior to its projected publication in 1728.[24] Bruce, it turned out, had not collected decisions beyond January 1717,[25] and it fell to Kames to organise some of Bruce's decisions, alongside those he had collected himself, for publication as *Remarkable Decisions of the Court of Session 1716–1728*.[26] In the preface Kames suggests that the collection began life as preparatory materials for a new edition of Stair's *Institutions of the Law of Scotland*.[27] If that is correct, it is disappointing that what could have been one of the most interesting editions of Stair was never to appear.[28]

One reason for the lack of progress on Stair may have been the publication, in 1732, of Kames' first book, *Essays upon Several Subjects in Law*. The preface is characteristically playful:[29]

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[21] J M Pinkerton (ed), *The Minute Book of the Faculty of Advocates 1713–1750* (Stair Society vol 32, 1980) 59.

[22] Pinkerton (ed) *Minute Book* (n 21) 84.

[23] Pinkerton (ed) *Minute Book* (n 21) 104, 115, 120, 151, 162, 180, 188, 200, 203, 209, 239; A Stewart (ed), *The Minute Book of the Faculty of Advocates 1751–1783* (Stair Society vol 46, 1999) 9.

[24] Pinkerton (ed), *Minute Book* (n 21) 112.

[25] Pinkerton (ed) *Minute Book* (n 21) 66. The published fruits of Bruce's collecting are his own *Decisions of the Lords of Council and Session* (1720), which covers the period November 1714 to July 1715; and decisions from June 1716 to January 1717 which are included in the third volume of the Faculty Collection: see generally J S Leadbetter, "The printed law reports, 1540–1935", in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936).

[26] H Home, *Remarkable Decisions of the Court of Session 1716–1728* (1728).

[27] Home, *Remarkable Decisions*, iii.

[28] It may be that Kames' subsequent observations on the institutional system explain why the project was aborted: see n 154. Blackie notes that it was Kames who subjected Stair's *Institutions* to the most sustained critical analysis by "the light of reason": see J W G Blackie, "Stair's later reputation as a jurist", in D M Walker (ed), *Stair Tercentenary Studies* (Stair Society vol 33, 1981) 207, 224–25.

[29] H Home, *Essays upon Several Subjects in Law* (1732) ii.

> The following little Pieces, Fruits of some Leisure Hours, are exposed with the same Indifference they were conceived. If they prove useful, the End is gain'd: if not, there's no great Harm done. No Man will grudge the Author the Satisfaction of a laudable Attempt: He shall grudge no Man the Privilege of Reading or Neglecting, of Approving or Condemning.

In one respect the publication was well timed. James Craig, Kames' former teacher, died in 1732 leaving vacant the Civil Law Chair at Edinburgh University. Kames, who may have felt that his book justified his appointment to the Chair,[30] was nominated for the position.[31] In the event, however, the Faculty of Advocates forwarded the names of Thomas Dundas and John Erskine for the City's decision, and Dundas was appointed.[32]

By now Kames was beginning to secure more senior appointments within the Faculty hierarchy. In 1737 he was appointed as senior curator of the library, perhaps reflecting his eclectic intellectual tastes.[33] A year later, his experience with reporting cases led to his being called upon to assist Thomas Ruddiman[34] with a plan to print Fountainhall's Decisions.[35] In 1747 he was appointed to a Faculty committee to consider the effects of the abolition of heritable jurisdictions.[36] The fact that Kames withdrew[37] to the countryside to write for the duration of the 1745 Rebellion did him no harm in securing such an appointment.[38]

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[30] Ross, *Lord Kames* (n 8) 36.

[31] "Harry Hume, better known as Lord Kames, was supported by Patrick Grant of Elchies in the belief that the appointment should be well supplied was [*sic*] of some importance to our country as well as to the Court. Though Drummore believed Lord Milton favoured Hume when the Faculty of Advocates drew up its leet, there was no mention in the record of either [Kames and another] of those candidates." See *Papers of Professor D B Horn*, Edinburgh University Library, GB 237 Coll-26; Gen.1824, "Chair of Law", p 12 of the typed transcription.

[32] The votes were cast as follows: 119 for Dundas, 82 for Erskine, and 55 for David Graeme: Pinkerton (ed), *Minute Book* (n 21) 137.

[33] Pinkerton (ed), *Minute Book* (n 21) 162.

[34] The well-known linguist, publisher, and then Keeper of the Advocates Library: see A P Woolrich, "Ruddiman, Thomas (1674–1757)", *Oxford Dictionary of National Biography* (2004); J St Clair and R Craik, *The Advocates Library* (1989) 33–34.

[35] Pinkerton (ed), *Minute Book* (n 21) 168. In fact, no part of Fountainhall was to appear for another 22 years, and that which did appear was somewhat diminished: Stewart (ed), *Minute Book* (n 23) 74 n 115.

[36] Pinkerton (ed), *Minute Book* (n 21) 213, 220.

[37] In later life Kames' wife told Boswell that they had gone to England, but Kames himself contradicted her account, though he did suggest that they had left home for some time so he would not have to testify against his friends with Jacobite sympathies: Lustig and Pottle (eds), *Applause of the Jury* (n 8) 26.

[38] E C Mossner, *The Life of David Hume*, 2nd edn (1980) 180. In later years Kames' connections with Jacobites, and Episcopalians, resulted in an accusation that he was a Jacobite himself, an accusation that almost cost him his place on the Bench: Ross, *Lord Kames* (n 8) 114–15. See generally H Trevor-Roper, *The Crisis of the Seventeenth Century: Religion, the Reformation and Social Change* (1967) ch 4.

By the late 1740s Kames was well established as a senior member of the bar. For example, the Faculty *Minute Book* records him suggesting the erection of a statue of the recently deceased Lord President Forbes, and of being one of a party of leading lights sent to congratulate the newly-appointed Lord President, Dundas of Arniston.[39] By the close of the decade Kames had been appointed a member of a committee to review qualifications for the bar,[40] and more prestigiously, a member of the Dean's Council[41] – a position that he would retain until raised to the Bench.

Bench

In 1752 Kames was made a Senator of the College of Justice in place of Patrick Campbell, Lord Monzie;[42] his appointment as a Lord Commissioner of Justiciary followed in 1763,[43] replacing Sir George Elliot of Minto who had been made Lord Justice-Clerk.[44] Kames' initial promotion to the Bench was achieved through the patronage of Archibald Campbell, third Duke of Argyll, as a result of a shared interest in science, manufacturing and agriculture.[45] Kames continued to develop his interests across a variety of fields, including his predilection for the latest gossip in an intimately connected society, apparently without detriment to his duties as judge.[46] In addition, he discharged civic duties as patron of a surfeit of organisations, taking an active role in matters of patronage,[47] and maintaining a steady[48] publication rate.

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[39] Pinkerton (ed), *Minute Book* (n 21) 217, 223; see also Stewart (ed), *Minute Book* (n 23) 5.

[40] Pinkerton (ed), *Minute Book* (n 21) 232.

[41] Pinkerton (ed) *Minute Book* (n 21) 231.

[42] G Brunton and D Haig, *An Historical Account of the Senators of the College of Justice from its Institution in 1532* (1832) xxvii. It seems that Kames' appointment was expected, as Hume was able to predict in a letter of 1751 that "his Friends wish to see him on the Bench, and on the first Vacancy we shall probably have that satisfaction": D Hume, *The Letters of David Hume* (J Y T Greig (ed) 1932) vol 1, 162. However, Andrew McDouall, later Lord Bankton, had also been seeking the vacancy that Kames filled: A R C Simpson, "Learning, honour and patronage: the career of Andrew McDouall, Lord Bankton 1746–61", in H L MacQueen (ed), *Miscellany VI* (Stair Society vol 54, 2009) 133–35.

[43] Kames had been overlooked for the previous vacancy despite his entreaties to his patron, the 3rd Duke of Argyll: Ross, *Lord Kames* (n 8) 295.

[44] Ross, *Lord Kames* (n 8) 296 reproduces Kames' letter of solicitation to the then "Prime Minister", the Earl of Bute.

[45] R Emerson, *Academic Patronage in the Scottish Enlightenment: Glasgow, Edinburgh and St Andrews Universities* (2008) 121.

[46] H G Graham, *The Social Life of Scotland in the Eighteenth Century* (1950) 115–16.

[47] Thomas Reid's appointment, in place of Adam Smith, at Glasgow University was initiated by Lords Kames and Deskford (James Ogilvie, 6th Earl of Findlater and 3th Earl of Seafield): A Smith, *The Correspondence of Adam Smith* (E C Mossner and I S Ross (eds) 1987) vol 1, 99–100. Unlike some of Kames' protégés, Reid corresponded with Kames, especially with regard to the laws of motion, until Kames' death: T Reid, *The Correspondence of Thomas Reid* (P Wood (ed) 2002) 158.

[48] James Burnett, Lord Monboddo (1714–99) might have described it as excessive: "you [Kames] write a great deal faster than I [Monboddo] am able to read": Ramsay, *Scotland and Scotsmen* (n 7) vol I, 356 n 2.

Assessments of Kames' tenure as a judge have been mixed. Most commentators – contemporary[49] and later – acknowledged his skill and labour in discharging his duties as a member of the "Haill Fifteen", though as he became more enamoured with his other interests the discharge of his judicial duties appears to have suffered.[50]

Evaluations of Kames' performance as a criminal judge have been less flattering and are often highly critical of his propensities as a "hanging judge".[51] A further charge is that the manifestations of Kames' character in criminal trials were not appropriate, especially as most of these trials would have been capital. Examples of the gulf between Kames' behaviour and today's paradigmatic understanding of appropriate judicial conduct are legion. Perhaps the best known relates to the trial of Matthew Hay, with whom Kames had previously been in the habit of playing chess. Hay was charged with the murder of his tenants, and causing severe injury to their children, by poisoning.[52] The apparent motive for the crime was Hay's impregnation of one of the injured children.[53] The jury duly convicted. What happened at the moment of the verdict has been disputed. Popular tradition had it that Kames reacted by exclaiming: "That's checkmate to you, Matthew!"[54] Some sources attribute the remark to Kames,[55] on the authority of Lord Hermand;[56] other sources attribute the remark to Lord Braxfield.[57] Hill Burton suggests that Kames made the remark, but that it was rendered upon the revelations of the expert witness – concerning the presence of poison – and jocularly directed

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[49] E.g. A Forbes (ed), *Curiosities of a Scots Charter Chest 1600–1800* (1897, repr 2007) 304, quoting Sir Alexander Dick (1704–85), the distinguished physician and rhubarb charmer. Some praise was barbed, such as that of Lord Elchies, one of whose reports noted that Lord Kames had dissented: "a circumstance which greatly confirms the authority of the decision, for it shews that when the Court pronounced the decision, they were in possession of every argument against it, which that learned and ingenious judge (who appears to have been more attached to his opinions in proportion as they were peculiar to himself) could furnish": Lord Cooper, *The Register of Brieves* (Stair Society vol 10, 1946) 119.

[50] Ramsay, *Scotland and Scotsmen* (n 7) vol I, 187.

[51] See Kames' alleged remark to Lord Pitfour: "Ay, Pitfour, here is our *hanging* Court [the High Court of Justiciary] of which you are a most unworthy member; for if you got your will, nobody would ever be hanged. You would have been a rare judge to the Empress Elizabeth of Russia." See: J Fergusson and R M Fergusson (eds), *Records of the Clan and Name of Fergusson, Ferguson, and Fergus* (1895) 252; J Ferguson, "An old Scots judge" (1914) 26 JR 283, 293. Empress Elizabeth of Russia (1709–62) prohibited capital punishment during her reign. For a kinder view of Kames, see Tytler, *Memoirs*, 2nd edn (n 8) vol II, 2.

[52] The eminent chemist Joseph Black (1728–99), Professor of Medicine and Chemistry at Edinburgh University, appeared as an expert witness in the case and attested to the presence of arsenic: J Hill Burton, *Narratives from Criminal Trials in Scotland* (1852) vol II, 64.

[53] Ross, *Lord Kames* (n 8) 308.

[54] Ross, *Lord Kames* (n 8) 311.

[55] A W Renton, "Sketches from the Parliament House" (1892) 4 Green Bag 62, 64.

[56] J Fergusson, "Lord Hermand: a bibliographic sketch", in F P Walton (ed), *Lord Hermand's Consistorial Decisions* (Stair Society vol 6, 1940) 13.

[57] "Lord Cockburn and the Edinburgh Review" (1856–7) 2 Law Mag & L Rev 371, 379.

at the accused's counsel (the future Lord Hermand) and not the accused himself.[58] What truly happened cannot now be discerned in the absence of new source material; yet the evidence seems to point towards some form of intervention from Kames. The probable incident at the trial of Matthew Hay, whatever its exact character, typifies the criticisms made of Kames' conduct in criminal trials.[59]

The characterisation as a hanging judge also appears accurate.[60] A contemporary newspaper report gives something of the flavour.[61] A mother and son were found guilty of murdering a man, who was husband and father to them respectively, ten years before the trial at the Circuit Court in Aberdeen. Upon returning a verdict of guilty the jury, clearly of the view that the mother had orchestrated the crime, "by a plurality of voices recommended him [the son] earnestly to the mercy of the Court". The sentence of the court was that the mother be hanged, her body be "dissected and anatomized". The son was to be hanged too, and thereafter "his body to be hung in chains on the Gallowshill".[62] If this was the mercy of the eighteenth century, then its essence has been lost to time. On the other hand, Kames was hardly alone in taking a robust view of criminal justice at this time.

Another cause for censure related to personal conduct whilst on circuit. An anonymous pamphlet from 1780, *Letter to Robert Macqueen, Lord Braxfield*, railed against what the author considered as undesirable traits of members of the High Court of Justiciary. At least two of the complaints were directed at Kames personally: that Kames quibbled about bills so as to make money from his circuit allowance, and that Kames left a circuit early.[63]

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[58] Hill Burton, *Criminal Trials* (n 52) vol II, 64–65 n (apparently based upon an account received "from the son of a person who was officially present at the trial").

[59] For other tales see G A Morton and D M Malloch, *Law and Laughter* (1913) 165–67, including one occasion upon which Kames is said to have remarked that a lady, accused of murdering a child, was "a weel farred bitch".

[60] See for example J Maidment (ed), *The Court of Session Garland* (1888) 69, recounting Kames' alleged remark, after hanging two convicts, that he "had killed two birds that day". Furthermore, Boswell composed a "Song in Character of Lord Kames", reproduced in McGuinness, *Henry Home* (n 8) 20–21, which includes the following stanzas, one of which has a pun on the *Principles*: "And if a woman is of age/To hang her I'm extremely keen/ For 'tis a *Principle* with me/To [hang] all women past fifteen"; "Of all the Judges in the land/I surely must be held the Chief;/For none so *cleverly* can hang/A bloody Murderer or Thief". Compare, however, what appears as conduct contrary to the interests of the Crown mentioned in W Wimsatt and F A Pottle (eds), *Boswell for the Defence 1769–1774* (1960) 249 ff.

[61] *The Whitehall Evening Post; or London Intelligencer*, No 3196, 13–16 September 1766, 4.

[62] As it turned out, the King granted both a pardon, apparently partly on account of Kames having left the Bench to get some fresh air: W Roughead, *Twelve Scots Trials* (1913) 136 ff.

[63] *A letter to Robert Macqueen Lord Braxfield, on his promotion to be one of the judges of the High Court of Justiciary* (1780) 21–30, 33–39. It may be that the author of the pamphlet was more outraged by the fact that this thriftiness might have had a concomitant effect on the claret available to counsel. Ramsay, *Scotland and Scotsmen* (n 7) vol I, 213 n 1 reports:

For his part, Kames saw nothing wrong with either of these arrangements and vehemently disagreed with James Boswell, the possible author of the pamphlet, that there was anything inappropriate about his actions.[64] Both the supposed incidents and their written censure caused murmurings in Parliament House.

OLD AGE AND DEATH

By the time of the publication, in 1780, of the *Letter to Robert Macqueen, Lord Braxfield*, Kames was an old man whose life was drawing to an end. In his final year Kames received a number of visits from Boswell, his supposed biographer. Although Boswell's line of questioning had an exuberant prurience about it – the more so when one recalls Boswell's affair with Kames' daughter[65] – his notes of the meetings are of interest. So for example, following a general discussion of publishing and literary tastes, Kames is recorded as having remarked: "There is another kind of books which do not sell at all: the commentators on Civil Law, of which I have a great number purchased by my father-in-law while he studied in Holland. Nobody reads them now."[66] Around the "high noon" of Civilian influence in Scots law,[67] it is striking for a judge, and one so well read and intimately connected to publishing trends, to express himself so starkly. When pressed further by Boswell Kames posits that points of law that could usefully be addressed by Civilian scholarship had now all been settled; an advocate who cited Civil Law would "be laughed at". Yet written pleadings had become longer "because there are more points to settle. At first there is a very gross view of a subject. Refinement sees with a more piercing eye, and a variety of questions appear".[68] Kames' phraseology here betrays his historical view of legal evolution through time, a perspective shared by other Scottish jurists,[69] and characteristic of his approach to equity in Scotland.

"At the circuit table in Jedburgh, his lordship asked Mr Henry Erskine where he supposed D'Estaing and the French fleet in the West Indies to be. 'Confined to *port*, my lord, as we are at present.' 'Oh you sly rogue,' replied Kames; 'but for all that, not one drop of claret shall you have.'"

64 Lustig and Pottle (eds), *Applause of the Jury* (n 8) 31–32.

65 Boswell had an affair with Kames' daughter, and arguably therefore had a (minor) hand in her ruin: D Daiches, *James Boswell and his World* (1976) 33. Whether this was known to Kames, or his wife, is unclear: Brady, *Boswell* (n 9) 233; R Craik, *James Boswell 1740–1795: The Scottish Perspective* (1994) 37–38.

66 Lustig and Pottle (eds), *Applause of the Jury* (n 8) 20.

67 See G McLeod, "The Romanization of private law" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 220. See also J Dove Wilson, "Historical Development of Scots Law" 8 JR 217, 225 (1896).

68 Lustig and Pottle (eds), *Applause of the Jury* (n 8) 20–21.

69 See P Stein, *Legal Evolution: the Story of an Idea* (1980). Although open to criticism, these ideas still form points of departure for discussion today: see N Luhmann, *Law as a Social System* (2004) 230.

Kames' long life came to an end on 27 December 1782. He was 86. It may be that his death was linked to the portentously bad weather of that year[70] – he had previously recovered from a number of ostensibly terminal "fevers".[71] Shortly before his death Kames had taken his leave of his brethren in the Court of Session, apparently aware of the onset of mortality. Another piece of legal Apocrypha is associated with this event. On the one hand, Boswell's account is of a sedately decorous, almost touchingly poignant, scene with Kames "like a ghost, shaking hands with Lord Kennet in the chair, and Lords Alva and Eskgrove patting him kindly on the back as if for the last time".[72] The alternative version of events is more amusing, if less likely: upon taking leave of his chair Kames is said to have remarked with apparent cheer and warmth "Fare ye a' well, ye bitches!"[73] Like the checkmate controversy, this tale is contested;[74] what is not contested is Kames' fondness, apparently as a term of endearment, of the word "bitch". So well known indeed was Kames' use of the word that it is frequently referenced in literary work associated with Scottish lawyers. The doggerel *Court of Session Garland*, mainly the work of Boswell, has Lord Kames uttering (fictitiously) the immortal line "Tis equity you bitch".[75] Walter Scott's *Redgauntlet* leaves little to the imagination in the following exchange:[76]

> "What's the matter with the auld bitch next?" said an acute metaphysical judge, aside to his brethren. "This is a daft cause, Bladderskate [a judge] …What say ye till't, ye bitch?"
>
> "Nothing, my lord," answered Bladderskate, much too formal to admire the levities in which his philosophical brother sometimes indulged – "I say nothing, but pray to Heaven to keep our own wits".
>
> "Amen, amen," answered his learned brother; "for some of us have but few to spare".

That Scott is parodying Kames can be seen not only from the reference to metaphysics, and the notorious sobriquet;[77] the flash of somewhat barbed humour is also typical Kames.

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[70] As described in Ramsay, *Scotland and Scotsmen* (n 7) vol II, 255–56.

[71] According to Hume, Kames had "an iron mind in an iron body": Ross, *Lord Kames* (n 8) 349.

[72] Lustig and Pottle (eds), *Applause of the Jury* (n 8) 43.

[73] Ross, *Lord Kames* (n 8) 370.

[74] Lehmann, *Henry Home* (n 8) 135.

[75] Maidment (ed), *Court of Session Garland* (n 60) 65.

[76] W Scott, *Redgauntlet* (G A M Wood and D Hewitt (eds), 1824, repr Edinburgh edition 1997) 135–36. Different editions of the text have slightly different wordings of this exchange. At 486, note to 135.41–2, Scott himself noted the identity of his "acute metaphysical judge": "Tradition ascribes this whimsical style of language to the ingenious and philosophical Lord Kaimes."

[77] One last fictional reference to the infamous sobriquet occurs in what is perhaps one of the oddest pieces to have appeared in the pages of a law journal: W Duke, "Wigs on the green" (1926) 38 JR 163, 173–75.

This sharp tongue, and apparent lack of concern about who would catch it, is illustrated by an exchange between Kames and the second Lord President Dundas,[78] recorded by Ramsay:[79]

> One day the late Lord President Dundas said to him [Kames], after he had delivered a metaphysical opinion, "Lord Kames, I do not understand a word of what you have been saying all this while; it is too deep for me". Some time after, on Lord Kames rising from his seat, the President asked him where he was going. "– *backwards*, my lord; do you understand *that*?"

Another observer recalls a dialogue between Boswell and Kames thus:[80]

> Boswell was one day complaining that he was sometimes dull. "Yes, yes" cried Lord Kames, "aliquando dormitat Homerus" [Homer sometimes nods]. Boswell being too much elated with this, my lord added, "Indeed, sir, it is the only chance you had of resembling Homer".

A further anecdote, though somewhat lacking in evidence, relates to an exchange between Kames and a leading counsel, Henry Erskine. Erskine: "Tickle, my client, the defendant, my Lord;" Kames: "Tickle him yourself Harry; you are as able to do it as I am."[81] The use of the word "defendant" here is suspect. On another occasion Lords Kames and Monboddo are said to have been engaged in the twisted choreography that seems to attach to great men going through a door, each attempting to usher the other in first. It is said that Kames, becoming exasperated, said to his colleague "Gang in, man, and show us your tail",[82] a reference to Monboddo's theory that in earlier ages men had tails. In light of the advances of evolutionary theory it is less clear, today, who is the butt of that joke.

The legal biography of Kames is thus a rich one. So too is Kames' legal bibliography: in addition to the *Principles*, Kames was the author of eight law books and collections of case reports: *Remarkable Decisions of the Court of Session, from 1716 to 1728* (1728);[83] *Essays upon Several Subjects in Law* (1732); *Decisions of the Court of Session, from Its first Institution to the present Time. Abridged and digested under proper heads, In Form of a Dictionary*

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[78] Robert Dundas of Arniston (1713–87), son of the first Lord President Dundas: Robert Dundas, Lord Arniston (1685–1753). Kames sat on the Bench with both the Lords President Dundas.

[79] Ramsay, *Scotland and Scotsmen* (n 7) vol I, 186.

[80] Rogers (ed), *Boswelliana* (n 9) 308. For another encounter, see Ramsay, *Scotland and Scotsmen* (n 7) vol I, 218 n 2.

[81] M Brown, *Wit and Humour of Bench and Bar* (1899) 266. Another source has "the defendant" as a lady, thereby putting a somewhat different complexion on the incident: A Polson and J Grant, *Law and Lawyers; or Sketches and Illustrations of Legal History and Biography* (1840, repr 1982) vol 2, 360.

[82] J Paterson, *Curiosities of Law and Lawyers*, new edn (J Croake ed, 1896) 535.

[83] A "second" edition appeared in 1790, but the text is the same.

(1741–1774);[84] *Statute Law of Scotland abridged, with Historical Notes* (1757);[85] *Historical Law-Tracts* (1758);[86] *Remarkable Decisions of the Court of Session, from 1730–1752* (1766); *Elucidations respecting the Common and Statute Law of Scotland* (1777);[87] and *Select Decisions of the Court of Session, from 1752–1768* (1780).[88] Ramsay suggested of Kames that "had he devoted his thoughts chiefly to speculations on the law of Scotland, he would have been not only one of the greatest and most enlightened judges of his time, but would have stood at the head of the classical and philosophical writers upon the jurisprudence of his native country".[89] But Kames had a different plan in mind, which involved following his curiosity wherever it might take him. Arguably, this affected the discharge of his judicial functions and damaged his reputation as a lawyer; equally, however, by following a diverse intellectual trajectory he was able to produce writings of originality and insight which are still of value today.

INTELLECTUAL INTERESTS

His training as a lawyer probably influenced Kames' approach to the many different disciplines to which he was drawn. If that is correct, this account of his intellectual interests cannot be seen as entirely independent of the trajectory of his legal career. Kames penned a prodigious number of books across many fields, some in multiple editions; a frank assessment would be that he did not achieve distinction in each field. Only a short précis of Kames' broader intellectual pursuits is possible here, with the purpose of developing a general intellectual background in which his legal writings can be situated.

Agriculture[90]

We have already seen that Kames was involved with agricultural matters, an interest that seems to have assisted his ascent to the Bench.[91] This interest was not borne of affectation, however, as a touching anecdote confirms: "Lord Kames and Lord Dunsinane, the moment they arrived at their homes,

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[84] The original two volumes, published in 1741, were supplemented by further volumes in 1757, 1764, and 1774.

[85] Further editions appeared in 1769 and 1778.

[86] Further editions appeared in 1761, 1776, and a posthumous edition in 1792. There was also a French edition: *Essais Historiques sur Les Loix* (1766).

[87] A posthumous "second" edition appeared in 1800.

[88] A posthumous "second" edition appeared in 1799.

[89] Ramsay, *Scotland and Scotsmen* (n 7) vol I, 197.

[90] See generally M-H Thévenot, "Un magistrat aux champs: Henry Home of Kames (1696–1782)" (1982) 35 Études Anglaises 13.

[91] See n 45 and text above.

although it was dark, were out with lanterns in their hands to see how the trees had grown since last they saw them".[92] If this conjures an image of eccentric amateurism, that would be misleading. For Kames, agriculture was to be treated as a nascent science in order to maximise its contribution to Scotland's prosperity.[93] In addition to essays on the subject[94] Kames published a book in 1776 whose full title discloses its scientific intent: *The Gentleman Farmer. Being An Attempt to improve Agriculture, By subjecting it to the Test of Rational Principles*.[95] Indeed, although the introductory "Epistle to Sir John Pringle"[96] talks of agriculture as "the chief of arts … combining deep philosophy with useful practice",[97] the substance of the approach advocated would, today, be described as scientific relying as it does upon synthesising observed results from practical experience.[98] Such an approach is consistent with "Enlightenment" thinking in Scotland at a time when the importance of an empirical, or scientific, methodology for all disciplines became a central mode of thought.

Kames was not solely concerned with agriculture's contribution to economic development, important though that was. Improvement was a disciplinary macro-programme that blended political, economic and sociological concerns, and good agricultural technique was an important component of the broader programme.[99] Unproductive land was to be transformed in order to meet the most basic need of an increasing population, and indeed as a means of improving the lives of tenants.[100] His published support for the welfare of tenants is reinforced by evidence that Kames treated his own tenants well.[101] The outstanding attribute of the *Gentleman Farmer* is practicality, a feature that deserves emphasis in the light of the criticisms levelled at Kames' legal writings as shrouded in a fog of metaphysics.

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[92] H G Graham, *The Social Life of Scotland in the Eighteenth Century* (1950) 59.

[93] See e.g. Lord Kames, *Progress of Flax-Husbandry in Scotland* (1766).

[94] See in particular "Observations upon the foregoing paper concerning shallow ploughing", in Philosophical Society of Edinburgh, *Essays and Observations, Physical and Literary* (1771) vol 3.

[95] Further editions of the work appeared in 1779, 1788, 1798, 1802, and 1815.

[96] Sir John Pringle (1707–82), a Scottish physician, was the President of the Royal Society. Pringle was also physician-in-ordinary to the King, and Ross states that Kames asked Pringle to present a copy of *The Gentleman Farmer* to George III: Ross, *Lord Kames* (n 8) 363.

[97] Lord Kames, *The Gentleman Farmer* (1776) v. This was a common turn of phrase at the time: see e.g. A Hunter, *Georgical Essays* (1769) 1 ("Agriculture is the oldest, as well as the most useful, of the arts").

[98] Note also the (claimed) endorsement from the eminent chemist, Joseph Black, mentioned in *The Gentleman Farmer* (n 97) xiii.

[99] See C A Whatley, *Scottish Society 1707–1830: Beyond Jacobitism, towards industrialisation* (2000) 121–22.

[100] Kames, *The Gentleman Farmer* (n 97) x–xi.

[101] Ramsay, *Scotland and Scotsmen* (n 7) vol I, 215–16

The *Gentleman Farmer* was highly thought of[102] – so much so that copies made their way, like other works by Kames,[103] to the libraries of the New World: not least the library of the United States' first President, George Washington.[104]

Literature

An active participant in the fine arts, Kames was more immersed in cultural pursuits than many, though not all, of his judicial brethren. It was not in Kames' nature merely to attend performances and patronise the arts, and in due course he produced a book entitled *The Elements of Criticism*. Intriguingly, there were contemporary suggestions that Kames was not the author,[105] although today the authorship is not in dispute. The purpose of the *Elements of Criticism* is overtly one of "education", designed to develop and hone the critical faculties of those coming to the arts. In his dedication to the King, Kames notes that, by providing appropriate education through the *Elements* and other sources, the people might be fulfilled individually, thereby effecting a broader improvement to society, even to the extent of making people more law-abiding.[106]

Literary commentators read more into the *Elements of Criticism* than Kames' simple assertion of an educational purpose. Ross connects the work with Kames' intellectual heritage,[107] drawing an analogy with the structure of Stair's *Institutions of the Law of Scotland*[108] and seeing Shaftesbury, Hutcheson, and Gerard as important influences.[109] Such philosophical precursors position the text within a tradition where the natural attributes of individuals generate their understanding of criticism,[110] in a manner related to Kames' natural law

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[102] W Smellie, *Literary and Characteristical Lives* (A Smellie ed, 1800) 133. Smellie was the premier printer of learned works in Enlightenment Edinburgh and would be well placed to assess the popularity of published works. For his connections with Kames, see S W Brown, "Smellie, William (1740–1795)", *Oxford Dictionary of National Biography* (2004). *The Oeconomist, Or, Englishman's Magazine* vol 1, issue 4 (March 1798) 85 placed *The Gentleman Farmer* at the head of a list of texts that societies of farmers ought to purchase.

[103] As to which see pp xxxix ff below.

[104] N Wilson, "The Scottish bar: the evolution of the Faculty of Advocates in its historical social setting" (1967–8) 28 Louisiana L Rev 235, 252.

[105] See the letter to the editor from "Biographicus" in *The Bee* vol 5, issue 43 (1791) 246–48. For the possible identity of "Biographicus", see G Watson (ed), *The New Cambridge Bibliography of English Literature Volume 2 1660–1800* (1971) 1238.

[106] Lord Kames, *Elements of Criticism* (1762) iv–vi. See further B I Manolescu, "Traditions of rhetoric, criticism, and argument in Kames' *Elements of Criticism*" (2003) 22 Rhetoric Review 225, 237.

[107] I S Ross, "Scots law and Scots criticism: the case of Lord Kames" (1966) 45 Philological Quarterly 614, 621–23.

[108] The importance of Sir George Mackenzie, as literary aesthete and practical lawyer, is also posited by Ross (n 107) 618–19, 622.

[109] Ross (n 107) 620–21; V M Bevilacqua, "Lord Kames' theory of rhetoric" (1963) 30 Speech Monographs 309, 310–14.

[110] See A Horn, "Kames and the anthropological approach to criticism" (1965) 44 Philological Quarterly 211.

thinking. The development of fixed and observable laws in the natural world, as observed by Newton, was becoming influential beyond natural philosophy, or science.[111] Furthermore, Randall suggests that the text adopts an approach based on Newtonian moralism, taking a number of discrete philosophical concepts and moulding them into unified critical theory.[112]

Of all Kames' published works *Elements of Criticism* was arguably the most successful. Despite a mixed critical reception, ranging from hostile dismissal by Voltaire[113] and Smith,[114] ambivalent acknowledgement from Johnson[115] and Hume,[116] to enthusiastic approbation,[117] the work went to multiple editions, domestic and international.[118] The study of aesthetics, in Germany especially[119] and including by Kant,[120] seems to owe much to *Elements of Criticism*, while for many years Kames' work was considered integral to the canon underlying education in the American universities.[121]

Metaphysics/Philosophy

Kames' reputation as a jurist was complicated, and often diminished,[122] by a long-standing interest in metaphysics. In well-known remarks to Adam Smith about Kames' approach to law and philosophy, David Hume said:

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111 Bevilacqua (n 109) 310–11.

112 Randall, *Critical Theory of Lord Kames* (n 8). McGuinness, *Henry Home* (n 8) gives a similar analysis.

113 Ross, *Lord Kames* (n 8) 285–87.

114 Boswell recounts the following conversation: "[Adam] Smith said *The Elements of Criticism* was Lord Kames' worst work. 'They are all bad,' said he. 'But it is the worst.'" See J W Reed and F A Pottle (eds), *Boswell: Laird of Auchinleck 1778–1782* (1977) 385. The intellectual relationship between Smith and Kames is in need of further study, especially given that Kames' protégés often cooled in their view of their patron to leave a record of inconsistent sentiments: Ross, *Lord Kames* (n 8) 75–97.

115 J Boswell, *The Life of Johnson* (1791) vol 1, 212, 319; Kames' writings on law are praised at 384. Boswell also records (301) that when he advanced Lord Kames as an antidote to Johnson's anti-Scottish sentiment Johnson replied "You *have* Lord Kames. Keep him; ha, ha, ha! We don't envy you him".

116 Hume, *Letters of Hume* (n 42) vol 2, 289–90.

117 A Erskine, *Letters Between the Honourable Andrew Erskine, and James Boswell Esq* (1763) 151.

118 See Ross, *Lord Kames* (n 8) 380, who notes around 40 editions, published between 1762 and 1969.

119 L R Shaw, "Henry Home of Kames: precursor of Herder" (1960) 35 Germanic Review 16; N Saul, "Novalis's 'Geistige Gegenwart' and his essay 'Die Christenheit oder Europa'" (1982) 77 Modern Language Review 361.

120 P Guyer, "The psychology of Kant's aesthetics" (2008) 39 Studies in History and Philosophy of Science 483 esp 485–87.

121 A Hook, *From Goosecreek to Gandercleugh: Studies in Scottish-American Literary and Cultural History* (1999) 216.

122 Though not always: see G Stuart and W Thompson, "Review of James Grant's *Essays on the Origins of Society*" (1785) 1 Political Herald and Review 213–14. One of the authors, Gilbert Stuart, adopted Kames' methodology: see W Zachs, "Stuart, Gilbert (1743–86)", in *Oxford Dictionary of National Biography* (2004).

"I am afraid of Lord Kaims's Law Tracts. A man might as well make a fine Sauce by a Mixture of Wormwood & Aloes as an agreeable Composition by joining Metaphysics & Scotch Law."[123] Once again the constraints of a general prefatory treatment loom large, and all that can be set out here is a gloss of how Kames' philosophical writings contribute to the intellectual framework within which his legal writings are situated.

Hard distinctions between branches of knowledge were not acknowledged by Kames, and while few writing then, or indeed now, would see their work as existing in an intellectual vacuum, Kames seems to have taken a particularly expansive approach to the form, organisation and substance of knowledge in order to draw epistemological lessons. Deploying moral philosophy to inform the constitutive elements of the law (and equity), and to augment its study, was an attractive approach for Kames. Changes to the successive editions of the *Principles of Equity* can be used, albeit crudely, to demonstrate this approach: perhaps most obviously when, in the second edition, Kames inserted a preliminary discourse dealing with principles of morality.[124]

By taking philosophical, or metaphysical, precepts to underpin his writings Kames attempts to fashion a canon that is, ontologically, internally consistent and mutually supporting, and is reinforced by adopting an almost empirical method. It is a hugely ambitious project and one that did not wholly succeed: for Kames' project is not today – if it ever was – viewed as a unified system of seamlessly interwoven logic. And if philosophy was thought to be bad for his law,[125] it was not philosophy of the first rank,[126] although more recently[127] there has been a tendency to view Kames' philosophical work more sympathetically and to emphasise his influence on others.[128] It may be that

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[123] Smith, *Correspondence of Adam Smith* (n 47) 34. Note, however, as few do when citing this remark, that Hume went on to say: "However, the Book, I believe has Merit; tho' few People will take the Pains of diving into it."

[124] Lord Kames, *Principles of Equity*, 2nd edn (1767) vi. The preliminary discourse was omitted from the third edition, reprinted here, on the ground that its inclusion raised the cost of the book, and by then it had been included in Lord Kames, *Sketches of the History of Man* (1774) vol 2, 242 ff.

[125] See p xxxv below. Note also Lord President Dundas of Arniston's comments in a letter to Lord Hardwicke, transcribed in Simpson (n 42) 169: "its true Mr Hume [Kames] hath been a long practitioner but I do think a very odd and not very lucky one, he generally gives up the solid part of his Clients [*sic*] cause and takes himself to some strange conceits of his own by which we have been often obliged to do his Clients justice by neglecting his conceits, and taking up with what we thought more solid, he is quite drowned in metaphysicks and I am affraid would make a very whimsical and troublesome judge…". I am grateful to Dr Simpson for alerting me to this letter and its contents.

[126] Some assessments have been brutal: see e.g. Mossner, *Life of Hume* (n 38) 294–95.

[127] See e.g. A Broadie, *A History of Scottish Philosophy* (2009) 273 ff, 368; N Phillipson, *Adam Smith: An Enlightened Life* (2010) 86.

[128] Kames acted as mentor and confidante to many of the leading figures of the Scottish Enlightenment, including Smith, Reid, Millar, and Hume, though in almost all cases the relationship between master and pupil cooled somewhat with the passage of time: see Ross,

further research will identify yet deeper influence and greater glory; but it is well to acknowledge that many of his works were viewed with ambivalence from the very beginning.

Other fields of knowledge

Space prevents the discussion of other fields of knowledge in which Kames engaged, such as education,[129] religion,[130] evolution, and historical method.[131] Lieberman's summary is apposite:[132]

> [Kames] assembled a massive, if rather prolix, corpus of over twenty volumes that could serve as an index to nearly all of the intellectual pursuits of the Scottish Enlightenment, encompassing such topics as morals, religion, law, government, natural philosophy, political economy, education, aesthetics, and of course history.

PRINCIPLES OF EQUITY

Introduction

As one might perhaps expect, given his reputation for immodesty,[133] Kames held the *Principles* in high estimation compared to other legal texts. According to Lord Braxfield, "Kames thinks nothing of any law book but [his own] *Principles of Equity*".[134] Not all Scottish lawyers have shared this view. In order to assess the reception of the work it is first necessary to consider the text on its own terms and in its own context. Thereafter it will be possible to

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Lord Kames (n 8) 75–97; Mossner, *Life of Hume* (n 38) 411–12; Phillipson, *Adam Smith* (n 127) 85–88; Rahmatian (n 7) V–VI; N MacCormick, "On Public Law and the Law of Nature and Nations" (2007) 11 Edin LR 149, 152. According to the somewhat partial Tytler, *Life of Kames*, 1st edn (n 8) vol 1, 159–60, Smith, when at the height of his fame, said that: "We must every one of us acknowledge Kames for our master."

129 See e.g. R P Hanley, "Educational theory and the social vision of the Scottish Enlightenment" (2011) 37 Oxford Review of Education 587, 594–97.

130 Kames and his kinsman, David Hume, were pursued by Church of Scotland hardliners for their published views on religion. See generally R B Sher, *Church and University in the Scottish Enlightenment: the Moderate Literati of Edinburgh* (1985); W L Mathieson, *The Awakening of Scotland: A History from 1747–1797* (1910) 222–23; Mossner, *Life of Hume* (n 38) ch 25.

131 On which, see Stein, *Legal Evolution* (n 69); Lieberman, *Province of Legislation* (n 7); P Stein, "Legal history: the British perspective" (1994) 62 Tidschrift voor Rechtsgeschiedenis 71; J W Cairns, "Attitudes to codification and the Scottish science of legislation, 1600–1830" (2007) 22 Tulane European and Civil Law Forum 1.

132 Lieberman, *Province of Legislation* (n 7) 146; D Lieberman, "The legal needs of a commercial society: the jurisprudence of Lord Kames", in I Hont and M Ignatieff (eds), *Wealth and Virtue. The Shaping of Political Economy in the Scottish Enlightenment* (1983) ch 8.

133 The most famous remark in this connection is probably that attributed to David Hume by Adam Smith in conversation with Boswell and reproduced in Reed and Pottle (eds), *Laird of Auchinleck* (n 114) 385: "When one says of another man he is the most arrogant man in the world, it is meant only to say that he is very arrogant. But when one says it of Lord Kames, it is an absolute truth." See also Hume, *Letters of Hume* (n 42) vol 1, 436.

134 Reed and Pottle (eds), *Laird of Auchinleck* (n 114) 239 n 3. See also ibid 184.

give meaning to how subsequent lawyers' understanding of the text informed the conventions of use that formed around it.

Publication and content

The *Principles of Equity* was first published in 1760, appearing without the author's name. A second edition followed in 1767, no longer anonymous, and dedicated to Lord Mansfield. The final edition prepared by Kames' hand was the third edition of 1778.[135] It is the third edition which is reproduced here: the two volumes of the original have been combined but without disturbing the pagination.

In each edition the *Principles* is arranged in three "books", preceded by a wide-ranging introduction. An organisational division is drawn to reflect the important roles assigned to the principles of justice and utility. Thus, the first two books are more abstract than the third, concentrating upon the exercise by courts of equity of powers derived from justice and utility. The third book is more practical in nature; it is here that Kames shows how the powers and concepts developed in the first two books are applied to specific situations.

Differences between editions

A table of contents for all three editions of *Principles of Equity* is given in an appendix to this Introduction. Although each edition shares the same tripartite structure, there are differences in respect of the first two books. Thus in the first edition, Book I, "Powers of a Court of Equity derived from the Principle of Justice",[136] is divided into three parts: "Powers of a Court of Equity to supply what is defective in Common Law with respect to pecuniary Interest"; "Powers of a Court of Equity to correct the Injustice of Common law with respect to pecuniary Interest"; and "Powers of a Court of Equity to remedy the Imperfection of Common Law with respect to Matters of Justice that are not pecuniary". In subsequent editions, the first two of these parts are combined to form a new Part I: "Powers of a court of equity to remedy the imperfections of common law with respect to pecuniary interest, by supplying what is defective, and correcting what is wrong." This results in a different scheme of chapters in Book I, including new chapters relating to "protecting the weak of mind",[137] and powers of a court of equity

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[135] A 4th and then a 5th edition appeared after Kames' death, respectively in 1800 and 1825. The 3rd edition has been reprinted a number of times.

[136] In the table of contents of the 1st edition, Book I is entitled "Powers of a Court of Equity founded on the Principle of Justice". However, the actual heading found in the text uses the words "derived from" in place of "founded on", as do the table of contents and text in the 2nd and 3rd editions.

[137] 2nd edn, Book I, part I, chapter II: "Powers of a court of equity to remedy what is imperfect in common law with respect to protecting the weak of mind from harming themselves by unequal bargains and irrational deeds."

"to inflict punishment, and to mitigate it".[138] In the third edition these are joined by a further chapter, on the powers of a court of equity "with respect to a process".[139]

Book II also changes between editions. The second edition adds a chapter: "Acts and covenants, in themselves innocent, prohibited in equity, because of their tendency to hurt society."[140] In the third, there are further changes. What constituted the substance of chapter III[141] in the second edition becomes chapter I of the third, renamed as "Acts in themselves reprobated in equity as having a tendency to corrupt morals". Chapter II remains the same, though with a partially altered title. Chapter III is a new and ambitious one: the "regulations of commerce, and of other public concerns, rectified where wrong".[142]

Kames' alterations were not simply cosmetic. Sometimes new material was added, presumably because it was considered important; in other cases material was removed or restructured. Alterations were sometimes needed to take account of new developments in the law. Another reason for change was to assist the reader, the previous structure having tended "to darken rather than enlighten the subject".[143]

The historical and the scientific methods

A major contribution of the *Principles* for Scottish legal thought was to emphasise the contribution that historical awareness, if not historical method, could make to an understanding of the modern law.[144] Thus, in reading Kames it is important to be conscious of the formative role of historical influences upon his legal theory.[145] This emphasis on history was supplemented by the view that law was a scientific endeavour.[146] Kames was

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138 2nd edn, Book I, part I, chapter VIII.

139 3rd edn, Book I, part I, chapter VII.

140 2nd edn, Book II, chapter II.

141 2nd edn, Book II, chapter III: "Certain claims in themselves just, and therefore authorized by common law, rendered ineffectual by equity because of their bad tendency."

142 3rd edn, Book II, chapter III.

143 *Principles of Equity* I, xiii.

144 See also Kames, *Historical Law-Tracts* (n 1) vol 1, v ff. Previous institutional writings were not the product of so deep an historical view: C Innes, *Lectures on Scotch Legal Antiquities* (1872) 6–7; D N MacCormick, "The rational discipline of law" 1981 JR 146, 157; R B Ferguson, "Sources of law (formal)", in T B Smith (ed), *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 22 (1987) para 411. Elsewhere in his writings (but not in the *Principles*) Kames cites Montesquieu, whose *De l'esprit des lois* was first published in 1748 and uses the historical method. But it is not at all clear that Kames was following Montesquieu – see Lehmann, *Henry Home* (n 8) 292 ff – and it may be that their relationship was like that of Leibnitz and Newton, minus the rancour.

145 Lobban (n 7) 98. Walter Ross praised this historical approach: see his *Lectures on the History and Practice of the Law of Scotland* (1792) vol 2, 15.

146 Ross also adopted this sceptical approach: Ross, *Lectures* (n 145) vol 1, xxi.

one of the first writers to insist on taxonomical structure[147] as an important organising methodology for the understanding of substantive law.[148] In this he was an early proponent of what might today be thought of as "law and society": to operate a rational scientific methodology within an interstitial disciplinary approach held the promise of legal progress:[149]

> Were law taught as a rational science, its principles unfolded, and its connection with manners and politics, it would prove an enticing study to every person who has an appetite for knowledge. We might hope to see our lawyers soaring above their predecessors; and giving splendor to their country, by purifying and improving its laws.

"Institutional" status

The *Principles* is immediately distinguished from other works in the Scottish legal canon by being devoted entirely to the concept of equity, and is not therefore by structure or content an "institutional" writing. But "institutional" can also be used to refer to a work of intrinsic authority,[150] and in this latter sense commentators have been less clear where the *Principles* stands.[151] It is the judiciary that has been most favourably disposed to the work, though by no means unanimous in its praise, with Lord Dunedin, for example, describing Kames as "an authority, though a rather wild one".[152]

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147 *Principles of Equity* I, xiii: "In an institute of law or of any science, the analyzing it into its constituent parts, and the arranging every article properly, is of supreme importance. One would not conceive, without experience, how greatly accurate distribution contributes to clear conception."

148 For an intricate examination of Kames' property law see A Rahmatian, "The property theory of Lord Kames (Henry Home)" (2006) 2 International Journal of Law in Context 177.

149 Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777) xiii. See also Lord President Dundas' advice to aspirant advocates, reproduced in Pinkerton (ed), *Minute Book* (n 21) 225.

150 J Cairns, "Institutional writings in Scotland reconsidered" (1983) 4 J of Legal History 76; A C Black, "The institutional writers 1600–1826", in McKechnie (ed), *Sources and Literature of Scots Law* (n 25) 59–61 (who does not admit Kames to the club); G C H Paton, "Comparison between the Institutions and the other institutional writings", in Walker (ed), *Stair Tercentenary Studies* (n 28) 201 ff.

151 For a range of views, see: T B Smith, "English influences on the law of Scotland" (1954) 3 Am J Comp Law 522, 522; T B Smith, *British Justice: The Scottish Contribution* (1961) 14–15; T B Smith, "Authors and authority" (1972–73) 12 Journal of the Society of Public Teachers of Law (ns) 3, 8; Cairns (n 150) 101; D M Walker, *Scottish Private Law,* 4th edn (1988) vol 1, 26; N R Whitty, "The Civilian tradition and debates on Scots law" 1996 Tydskrif vir die Suid-Akrikaanse Reg 227, 235 n 44; N R Whitty, "Borrowing from English equity and minority shareholders' actions", in E Reid and D Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 100, 105.

152 UK Parliament, *Gordon Peerage: Speeches delivered by counsel before the Committee for Privileges and Judgments* (1929) 8. Compare *Cassels v Lamb* (1885) 12 R 722, 755 per Lord Rutherfurd Clark ("I have always conceived that Lord Kames was a great lawyer, and that his

Kames himself was ambivalent about previous institutional writings, and indeed legal education more broadly.[153] In one place he remarked:[154]

> [I]n none of our law-books is there the slightest attempt to separate the chaff from the wheat.[155] Lord Stair, our capital writer on law, was an eminent philosopher; but as he was not educated to the profession of law, his Institutes consist chiefly of the decisions of the Court of Session; which with him are all of equal authority, though not always concordant: nor are works of our later writers much more systematic. Such a mode of writing is infectious: Our law-students, trained to rely upon authority, seldom think of questioning what they read: they husband their reasoning faculty as if it would rust by exercise.

It was not only Stair who was singled out for criticism. Mackenzie's work was lambasted for following the classic Justinianic scheme of Roman law despite the fact that there was "not the slightest foundation in our law for such a division".[156] The pugnacity of these comments disguises a serious point:[157] greater emphasis should be placed upon the normative foundations of law; the enunciation of law is important, but so too is the manner in which one thinks about law as a system, and the historical grounding of that system.[158] For Kames, a system of law should be viewed scientifically, having regard to premises and consequences. Therefore the principles underlying and shaping law deserve attention, and in that respect the role of reasoning is important. Thus, it is not that Kames discarded a formal structure for a theory of law, such as that represented by the received institutional scheme; rather, he wished to have a differently constituted scheme which was dynamic and responsive to change – a classically Enlightenment desire for improvement applied to law,

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authority stood very high"); *Kennedy v Stewart* (1889) 16 R 421, 430 per Lord President Inglis ("The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland").

153 Lehmann, *Henry Home* (n 8) 196–97.

154 Kames, *Elucidations* (n 149) vii–viii. Blackie (n 28) 224–25 notes that Kames appears to have waited until later in life before feeling able to criticise Stair so stridently.

155 Given his agricultural interests it is probably unsurprising that the grain (or corn) and chaff image was one of which Kames was fond: Lord Kames, *Sketches of the History of Man* (1774) vol 2, 149, 237, 462; Lord Kames, *Loose Hints upon Education, Chiefly Concerning the Culture of the Heart* (1781) 197.

156 Kames, *Elucidations* (n 149) x. With respect to Roman law, Kames did not hold back from describing the *Corpus Iuris Civilis* as "remarkable even among law-books for defective arrangement": *Principles of Equity* I, xiv.

157 Kames' views here have repercussions for the appropriate way to conduct legal education: see Cairns (n 131) 47 ff.

158 For praise for this concern about history, see: Innes, *Scotch Legal Antiquities* (n 144) 10–11; P Stein, "Legal thought in eighteenth-century Scotland" 1957 JR 1, 10. Cairns argues that this historical approach provided an entry point for influence from the German Historical School in the following century: J W Cairns, "The influence of the German Historical School in early nineteenth century Edinburgh" (1994) 20 Syracuse Journal of International Law and Commerce 191, 194.

as part of a perceived general progress of all knowledge. That scheme would include authority from the past, but such authority would be supplemented by, and be ultimately subservient to, law as "a rational science, its principles unfolded, and its connection with manners and politics"[159] discerned from and governed by reason. Indeed, as evidence that Kames saw potential for a revised institutional scheme one need look no further than the following passage from his *Select Decisions*:[160]

> The law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government. And as these are seldom stationary, law ought to accompany them in their changes. An institute of law accordingly, however perfect originally, cannot long continue so: A century, or perhaps a shorter time, will introduce innovations … Such collections [of reported cases], it is true, are multiplying daily; and it is irksome to think, that the study of law must become more and more laborious, from the necessity of perusing collections without end. This inconvenience, however, seems not incapable of a remedy. What greater service to his country can a Lawyer in high estimation perform, than to bring their substance into a new institute, leaving nothing to the student but to consult the originals when he is not satisfied with his author. This indeed may require a new institute every century or two. But if law-proceedings be carried on, as at present, with accuracy and disinterestedness, our law will move with a swift pace toward perfection and render new institutes less and less necessary.

So, Kames was not implacably opposed to the idea of "institutional" works dealing with the law;[161] rather, he was concerned that there should be new institutional works that should reflect changes in society.[162] Conscious of the rapidly changing Scotland of his time,[163] Kames was concerned that law should reflect changes in governance and socio-economic circumstances.[164] That concern coheres logically and methodologically with a preoccupation with looking at law as part of a broader historical narrative or continuum of organic development.[165] Such an outlook is consistent with Kames'

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[159] Kames, *Elucidations* (n 149) xiii.

[160] Lord Kames, *Select Decisions of the Court of Session 1752–1768* (1780) iii–iv.

[161] Indeed, his *Remarkable Decisions* were originally collected with a view to preparing a new edition of Stair's *Institutions*: H Home, *Remarkable Decisions* (n 26) iii. Furthermore, Lobban (n 7) 98 plausibly suggests that Kames may have felt that a new institutional treatment of Scottish law was not required.

[162] Stein (n 158) 10.

[163] Lehmann, *Henry Home* (n 8) 197–98.

[164] D Carpi (ed), *The Concept of Equity: An Interdisciplinary Assessment* (2007) 11 writes that: "Interest in equity as a principle of justice is enhanced in periods of rapid transition, of more intense socio-economic change and, in a certain sense, of crisis."

[165] Kames' influence on Millar in this regard is obvious: J Millar, *An Historical View of the English Government: From the Settlement of the Saxons in Britain to the Revolution in 1688* (1803, repr 2006) 795. At other times Millar departed from Kames' views: see e.g. J W Cairns, "John Millar's lectures on Scots criminal law" (1988) 8 OJLS 364, 379.

discussion of the structural sources of Scots law – bemoaning an antiquated institutional scheme while at the same time identifying equity as a means of developing a legal framework to accommodate societal change.[166]

Therefore the essential value of equity, for Kames, lay in its dynamism – that is, as a means of ensuring a legal system kept pace with changing conditions. Equity represented the institutional tool by which legal correlativity to changes in societal attitudes was achieved. In a sense, this was a quasi-legislative understanding, and it is one of the features of the work that has attracted the greatest attention.[167] In this way the judges were to be entrusted with the future development of the law. This was a consistent theme with Kames, and he had suggested as much before.[168] Since he considered that humanity was moving forwards in its civilisation, he saw equity in the image of a plant being tended to maturity and perfection.[169] If equity was the plant, then the soil from which it drew nourishment was the progress of societal attitudes and ethics, which were to be reflected in the progress of the law. The key was the idea of an organically evolving system.[170]

Equity and common law

In accordance with his historical compass, Kames described the development of the common (positive) law which, he said, moved from limited protections to greater breadth as the success of governance by rule of law became apparent.[171] Yet, this jurisdictional expansion would reach a natural limit of competence, beyond which it could not proceed while maintaining its integrity. Cases which could not be dealt with by evolution within the

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166 Stein (n 158) 11.

167 See N Phillipson, *Scottish Whigs and the Reform of the Court of Session 1785–1830* (Stair Society vol 37, 1990) 181–83; Lobban (n 7) 99–100; Lieberman, *Province of Legislation* (n 7) ch 8. Phillipson notes a complex political dynamic behind this development, and Cairns points out that there was a more general change in attitudes to the relative merits of legislation and custom or case law during this period: J W Cairns, "Ethics and the Science of Legislation: Legislators, Philosophers, and Courts in Eighteenth-Century Scotland", in B S Byrd et al (eds), *Annual Review of Law and Ethics 2000: The Origin and Development of the Moral Sciences in the Seventeenth and Eighteenth Century* (2001) 161–62; Cairns (n 131).

168 Lord Kames, *The Decisions of the Court of Session from its first Institution to the present Time. Abridged, and Digested under proper Heads, In Form of a Dictionary* (1741) vol I, iii. This collection of decisions was an important development in making reported cases more accessible: see K Reid, "A note on law reporting", in Reid and Zimmermann (eds), *History of Private Law* (n 67) vol 1, lv.

169 *Principles of Equity* I, 1.

170 For a modern echo, see Lord Macmillan, "Law and ethics" (1933) 49 SLR 61. As Lord Macmillan identified with prescience, the trend towards the use of law as a social tool makes Kames' work pertinent at least from a methodological perspective.

171 *Principles of Equity* I, 2–4.

positive common law were the preserve of the King and his council,[172] though the increased complexity of the internal relations of the body politic and its constituents meant that these cases increased in number and complexity.[173] In England the pressing business of state meant that the Court of Chancery came into being to handle the King's conscience; whereas in Scotland the comparatively smaller involvement in international affairs meant there was no need for such a move.[174] Accordingly, the jurisdictional schism in England necessitated the erection of the respective names of "common law" and "equity", which formed a relationship of mutually symbiotic definition, the former being the domain of the ordinary branch of law dealt with by the courts, the latter being governed "*less* by precise rules, than by *secundum æquum et bonum*, or according to what the judge in conscience thinks is right".[175]

In setting out a system for delimiting the extent of equity and common law Kames emphasised that in many countries there was no satisfactory delimitation of these constituent parts of the juridical whole. Yet such boundary disputes could be rectified by careful definitional co-operation between judges of the two "internal jurisdictions" in legal systems characterised by separate equity jurisdictions – an idea which is at once intuitively pleasing, and historically dubious.[176] In many ways the definition of equity starts from the implicit assertion of a negative:[177]

> Thus equity, in its proper sense, comprehends every matter of law that by the common law is left without remedy; and supposing the boundaries of the common law to be ascertained, there can no longer remain any difficulty about the powers of a court of equity. But as these boundaries are not ascertained by any natural rule, the jurisdiction of common law must depend in a great measure upon accident and arbitrary practice; and accordingly the boundaries of common law and equity, vary in different countries, and at different times in the same country.

Once more we can see the importance of history: each country will have had a different formative experience of common or positive law, and hence a

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[172] Kames, *Principles of Equity* I, 5 gives the following, apparently non-exhaustive, examples: "actions for proving the tenor or contents of a lost writ; extraordinary removings against tenants possessing by lease; the causes of pupils, orphans, and foreigners; complaints against judges and officers of law, and the more atrocious crimes, termed, *Pleas of the crown*".

[173] Kames, *Principles of Equity* I, 4.

[174] Kames, *Principles of Equity* I, 5–6. For an illustration of the early history of the role of the King and Chancellor in Scotland, see D M Walker, *Equity in Scots Law* (PhD Thesis, University of Edinburgh, 1952) 176 ff.

[175] *Principles of Equity* I, 6, citing Francis Bacon, *The Advancement of Learning* (J Devey (ed) 1605, repr 1901) 8.3.32.

[176] For the English experience, see J Getzler, "Patterns of fusion", in P Birks (ed), *The Classification of Obligations* (1997) 175 ff.

[177] *Principles of Equity* I, 6–7.

different manifestation of equity. And as part of that historical development there is an increasing incorporation of morals into law via equity, so that matters that would previously have been binding in conscience only are given legal force through equity.[178] Equity is the juridical embodiment of the society's progress in its moral self-awareness. Yet, while the effect of equity's institutional role may have been to form a conduit for the application of ethics, this was not the intent or at least the operational function of equity; that is to say, equity was not to be an exercise in arbitrary enforcement of judicial world views.[179] On the contrary, Kames suggests that equity achieved its purpose by virtue of its systemic character, and systems for Kames involved scientific methods of causes, effects, functions and the like. The system of equity, and the rules which framed and defined the system, were themselves constructed by the living experience of society and its courts.[180]

Equity and utility

The obvious problem with Kames' approach is one of extent; for how does one decide which benevolent duties should be assimilated to law through equity? To this question he has an answer:[181]

> It appears now clearly, that a court of equity commences at the limits of the common law, and enforces benevolence in certain circumstances where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its gradual refinements, enforces every natural duty that is not provided for at common law.

As is clear from this passage, Kames can be viewed as a natural lawyer at least to some degree, and indeed it has been said that "it would be too much to expect Kames to be able to break completely with the natural law school of legal thinking".[182] His account of the court's jurisdiction, however, can be criticised as too wide, since there are many obligations which are not the province of courts of law.[183] Indeed in a later passage Kames accepts that many "natural duties" are beyond the aid of a court of equity.[184] The rationalisation

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178 *Principles of Equity* I, 8.

179 This is a point which Kames makes clear by quoting Bacon, *Learning* (n 175) 8.3.38: "These courts of jurisdiction should not be committed to a single person, but consist of several; and let not their verdict be given in silence, but let the judges produce the reasons of their sentence openly and in full audience of the court; so that what is free in power may yet be limited by regard to fame and reputation."

180 *Principles of Equity* I, 9–10.

181 *Principles of Equity* I, 12.

182 Lehmann, *Henry Home* (n 8) 204.

183 Ferguson (n 144) para 415.

184 *Principles of Equity* I, 23.

given for the enforcement of some natural duties and the exclusion of others is the idea of utility; for, sometimes, providing a remedy for natural duties causes more harm to society than otherwise.[185]

With the broad macro-definition of equity in place Kames is able to elaborate on what he considers the role of a court of equity to be. For example, such a court is important in rectifying the objective wording of a document to fit the subjective will that underlay its creation.[186] Indeed, this is a minor reflection of the greater remedial and augmentative role of equity with regard to the common law:[187]

> A court of equity, by long and various practice, finding its own strength and utility, and impelled by the principle of justice, boldly undertakes a matter still more arduous, and that is to correct or mitigate the rigour, and what even in a proper sense may be termed the *injustice* of common law. It is not in human foresight to establish any general rule, that, however salutary in the main, may not be oppressive and unjust in its application to some singular cases. Every work of man must partake of the imperfection of its author; sometimes falling short of its purpose, and sometimes going beyond it. If with respect to the former a court of equity be useful, it may be pronounced necessary with respect to the latter; for, in society, it is certainly a greater object to prevent legal oppression, which alarms every individual, than to supply legal defects, scarce regarded by those immediately concerned.

This passage, heavily influenced by Bacon,[188] is one of the enduring explanations for equity that has come down to the present day. For Kames, the normative justification is to prevent injustice being exacted in the name of formal justice. And an equity jurisdiction derives its force from public utility, for the rigour of strict law can be opposed to an overarching public interest.[189] The two great principles upon which equity feeds are thus justice and utility.[190]

The legal authority reposed in the court of equity to achieve this object is its magisterial power, and in this sense it closely resembles the powers of the praetor of Roman law, which, it is said, were assumed and not given. In a Scottish context this would be the inherent power of the Court of Session.[191] Conscious of traditional objections, Kames is at pains to point

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[185] *Principles of Equity* I, 23–24. See also ibid 33–34, where the reason given for selective enforcement is that the development of society is not such as to allow all natural laws to be so enforced; or, that some matters are so trifling as to be "below the dignity of the law".

[186] *Principles of Equity* I, 13.

[187] *Principles of Equity* I, 15–16.

[188] Bacon, *Learning* (n 175) 8.3.35: "In like manner, the courts of equity should have power as well to abate the rigour of the law as to supply its defects; for if a remedy be afforded to a person neglected by the law, much more to him who is hurt by the law."

[189] *Principles of Equity* I, 18–19.

[190] *Principles of Equity* I, 39–40.

[191] *Principles of Equity* I, 19.

out that equity must function as a system informed by principles, and not capricious judicial whim (in the absence of angels for judges).[192] In recognising this, Kames also recognises the criticism of equity as based upon philosophical circularity: when the rules of equity settle into a system of law, which invariably will ossify, there cannot be infinite tangential systems to provide relief from equity. Kames' common-sense response is that a reasonably flexible system of equity to mitigate the rigour of the common law is as good a substantive institutional safeguard as can be erected.[193] This reflects a balancing act between the desire for a known and clearly stated system of laws resting on principle, and the desire to achieve substantive justice in individual cases, though Kames ultimately accords primacy to certainty in order to prevent judicial caprice.[194] This is an admission that establishing the borders of any equity jurisdiction with finality may be beyond the legal community. For Kames, equity, and common law for that matter, are functional tools to reflect society's values for its better governance through the rule of law. If there is an ongoing tension between, on the one hand, a form of law which is imbued with less formality but the flexibility to accommodate change, and on the other hand, the attempted imposition of rules to provide some systemic rationalisation and control of that flexible system, then that tension may well be an acceptable price.

The position in Scotland

As for Scotland, Kames says this:[195]

> In England, where the courts of equity and common law are distinct, the boundary betwixt equity and common law, where the legislature doth not interpose, will remain always the same.[196] But in Scotland, and other countries where equity and common law are united in one court, the boundary varies imperceptibly. For what originally is a rule in equity, loses its character when, gathering strength by practice, it is considered as common law. Thus the *actio negotiorum gestorum*, retention, salvage, &c. are in Scotland scarce now considered as depending on principles of equity. But by the cultivation of society, and practice of law, nicer and nicer cases in equity being daily evolved, our notions of equity are preserved alive; and the additions made to that fund, supply what is withdrawn from it and transferred to common law.

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192 *Principles of Equity* I, 20.
193 *Principles of Equity* I, 21.
194 *Principles of Equity* I, 21–22, citing Bacon, *Learning* (n 175) 8.3.46.
195 *Principles of Equity* I, 26–27.
196 This, of course, was written long before the Judicature Act 1873, and indeed the modern discussions of "fusion".

Hence, law and equity are, in Scotland, a single jurisdiction, handled by a single court:[197] the Court of Session, as successor to the Privy Council.[198] Furthermore, in the continued theme of historical movement and usage, Kames explains that legal instruments which may at first have been admitted as equitable doctrines are subsequently embedded into the common law once their usage is established. Unfortunately, how to discern the moment at which a doctrine crosses from the equitable reservoir of creativity into the body of the common law is not revealed, though it seems connected to usage and the development of rules regulating the instrument, or perhaps even the passage of time.

The *Principles* was not intended as a standard book on Scots law, and its somewhat general and philosophical stance has led to criticism. For example:[199]

> As a rule, however, Kames was regarded as too little influenced by "law-notions", and too ready to be guided by what seemed to him to be the equity of the case … In his legal writings Kames is generally thought to have failed to distinguish clearly between law as it actually was, and as he thought it to be.

No doubt this narrative fitted neatly with contemporary criticisms that Kames was too metaphysical,[200] and, especially in later periods, reflected the growing strength of a positivist view of law. As noted above,[201] while the *Principles* is not an "Institute" of the law of Scotland,[202] that does not mean that the work is not "institutional" in the sense of carrying formal legal authority.[203] Kames' aim was both broader and deeper than stating existing rules. The problem for subsequent lawyers is that the text fails to distinguish fully between the existing and the aspirational.[204]

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[197] Kames deals at some length with the question of whether it is better to have a unified system of law and equity, or have it dealt with in separate courts: *Principles of Equity* I, 27–30. See also his well-known correspondence on the matter with Lord Hardwicke: Tytler, *Life of Kames,* 1st edn (n 8) vol 1, 237 ff.

[198] *Principles of Equity* I, 30–31.

[199] F P Walton, "Humours of Hailes" (1894) 6 JR 223, 231–32.

[200] See p xxxv below.

[201] See pp xxiv–xxvii above.

[202] Lobban (n 7) 98.

[203] What exactly is meant by the classification "institutional writer", or more accurately "institutional work" (for not all of a writer's works need be institutional) can be unclear; furthermore, such clarity as there is seems to be fading with the passage of time. See generally: Cairns (n 150); T B Smith, *A Short Commentary on the Law of Scotland* (1962) 32–33; E Marshall, *General Principles of Scots Law*, 7th edn (1999) paras 3.40–3.47; D M Walker, *The Scottish Legal System*, 8th edn (2001) 475–77; W M Gloag and R C Henderson, *The Law of Scotland*, 13th edn, by H L MacQueen et al (2012) para 1.51; R M White, I D Willock and H L MacQueen, *The Scottish Legal System*, 5th edn (2013) para 5.22.

[204] See Walton (n 199) 231–32; P Stein, "Actio de effusis vel dejectis and the concept of quasi-delict in Scots law" (1955) 4 ICLQ 356, 360.

An underestimated achievement of the *Principles* is how it met one of its purposes as conceived by Kames[205] – that a lay person could, and perhaps to some extent still can, pick it up and glimpse the philosophical and historical narrative of equity as a concept in Scotland and beyond. One of the text's most enduring contributions is as a rhetorical discussion of fundamental principles, with illustrations of instances of the law. In a sense, its strongest feature is the way it facilitates the process of thinking. As a conventionally authoritative source of Scottish law, however, the work has proved less successful.[206]

USE AND INFLUENCE

In Scotland

Having considered the influences and principles that influenced Kames while writing the *Principles*, and having looked at the text itself, we can consider the narrower question of the way in which the *Principles* has been used as an authority by subsequent lawyers in Scotland.[207]

George Joseph Bell, the only "institutional" writer of the nineteenth century in civil law, cited Kames but usually as an occasion to express disagreement. In his *Commentaries* Bell was highly critical of Kames' alleged inaccuracies,[208] and thought that a particular power claimed for a court of equity was "exceedingly doubtful as a general proposition".[209] In his inaugural lecture at Edinburgh University Bell was recorded as having said that "Kames injudiciously separates law and equity and attempts to establish an opposition between them quite out of place with reference to Scotland where they go hand in hand".[210] Bell also took Kames to task on the inaccuracy of his law reporting.

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[205] *Principles of Equity* I, 39: "I dedicate my work to every lover of science; having endeavoured to explain the subject in a manner that requires in the reader no particular knowledge of municipal law."

[206] This is broadly the same conclusion as reached by Lobban (n 7) 120–21.

[207] See generally Rahmatian (n 7), and specifically at XIV and the modern cases cited therein.

[208] G J Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, 7th edn, by J McLaren (1870) I, 708 and II, 186.

[209] Bell, *Commentaries* (n 208) I, 766 n 2, and see also II, 404 n 1. The power related to the Court of Session augmenting a statute that provided a preference to creditors doing diligence against "real property". Kames suggested that the Court had extended this to moveables, the statute being silent, and that it was entitled to do this as a "court of equity". Bell's doubts have force, though one should remember that the Court of Session's view of its powers in 1751 (the year of the impugned decision) would be different from the prevailing orthodoxy of Bell's day.

[210] *Notes on The Law of Scotland From the Lectures of Mr Bell. Edinburgh College. 1822–23* (Edinburgh University Library). The lecture in question was given on 12 November 1822. The identity of the student note-taker is not disclosed.

On the other hand, an "unofficial" institutional writer, Baron David Hume, seems to have entertained a higher opinion of Kames' talents. Not only did he consider some of his writings (though not *Principles of Equity*) to be "the best series of Law Essays in our language",[211] he also borrowed heavily from Kames' approach to what we now know as unjustified enrichment.[212] Yet Hume the teacher was careful to warn his students that, while Kames' remarkable mind was of value to more experienced lawyers, the younger lawyer should be alert to the fact that he was not always accurate in stating the law of his time.[213] When Hume invoked Kames in his criminal writing it was to exclaim that his was "a name which will long be followed with the grateful remembrance of the Scottish bar".[214] The fact that Hume was capable of being critical of Kames if a specific instance required it – such as when he describes some of Kames' views on prescription as "peculiar notions"[215] – strengthens, rather than diminishes, the weight to be accorded to his overall assessment.

Writers of less formal authority have also been ambivalent with respect to Kames and his writings. Although clearly an admirer of Kames' critical approach to legal education and use of an historical method,[216] Walter Ross was careful to issue a balanced warning to students which anticipated, and may even have been copied by, Hume:[217]

> In his Lordship's works are to be found strength and variety of expression, a luxuriant fancy, a mind rich in learning, endowed with a degree of ingenuity, which falls to the lot of very few men. It is that wonderful ingenuity to which, as often as his Lordship did go wrong, the error is to be imputed. A thought, a hint, an expression, a single inference, seems more than once to have given him a hypothesis, or the subject of a Tract, or an article of Elucidation; and the idea once conceived, his mode of supporting it is so ingenious, and so plausible, that, if the reader inquire no farther, he must, for the most part, remain convinced; and yet, we are sorry to say it, he will also very often remain in error. Although, by trusting his own strength of reasoning, in place of deliberate inquiry, Lord Kaims has often gone wrong, yet, upon the whole, it would be the heighth [*sic*] of ingratitude not to acknowledge, that I have been more indebted to him for assistance and materials, than to all the other writers on our law.

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[211] Baron David Hume, *Lectures 1786–1822*, ed G C H Paton, vol I (Stair Society vol 5, 1939) 358.

[212] Baron David Hume, *Lectures 1786–1822*, ed G C H Paton, vol III (Stair Society vol 15, 1952) 179.

[213] Hume, *Lectures* vol I (n 211) 15.

[214] D Hume, *Commentaries on the Law of Scotland respecting Trial for Crimes* (1800) i, 191–92. In the 2nd edition of 1819 (ii, 119) Hume alters the wording slightly to "a name well entitled to the grateful remembrance of the Scottish bar".

[215] Baron David Hume, *Lectures 1786–1822*, ed G C H Paton, vol IV (Stair Society vol 17, 1955) 542.

[216] See notes 145 and 146.

[217] Ross, *Lectures* (n 145) vol 2, 16.

On the other hand, J S More advised any student who "desires to be acquainted with the rules of our law to peruse carefully … the works of Sir George Mackenzie, and also of Lord Kames".[218]

In addition to general observations on the authority of Kames, a number of writers have cited the *Principles* with apparent approval.[219]

This selection of views, it need hardly be said, is not a comprehensive appraisal of Kames' influence on jurists in Scotland: that is a task for a critical edition of the *Principles*, not an introductory preface. What this selection does illustrate, however, is the variety of opinion that has been entertained about Kames himself, and the *Principles* more particularly.

Those on the Bench took a similarly mixed view of Kames' writings. Over the years the criticisms of judges have followed familiar themes, emphasising a tendency towards inaccuracy[220] and flights of metaphysical fancy.[221] One judge described his *Remarkable Decisions* as "characterised with all the peculiarities which render the *Remarkable Decisions* more specimens of speculation than accurate reports".[222] Yet in other cases Kames was described as "ingenious",[223]

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[218] J S More, *Lectures on the Law of Scotland*, ed J McLaren (1864) vol 1, 14. Craig's *Jus Feudale*, and Balfour's *Practicks* were also mentioned.

[219] See e.g. P Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, 2nd edn (1876) vol 1, 269–70 cf 521–22, 532, 804–05; W G Miller, *Lectures on the Philosophy of Law* (1884) viii. For Kames' mixed legacy on the law of unjustified enrichment, see N R Whitty, "*Transco plc v Glasgow City Council*: developing enrichment law after *Shilliday*" (2006) 10 EdinLR 113, 123. And on the possible influence of Kames' enrichment ideas in England, see H L MacQueen and W D H Sellar, "Unjust enrichment in Scots law", in E J H Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 2nd edn (1999) 298–99, 314–16; D J Ibbetson, "Common Law evolution: the influence of mixed legal systems", in MacQueen (ed), *Miscellany VI* (n 42) 274.

[220] *Fogo v Fogo* (1842) 4 D 1063 at 1080 per Lord Justice-Clerk Hope cf 1030–31 per Lord Cuninghame; *Monteith v Robb* (1844) 6 D 934 at 940 per Lord Justice-Clerk Hope; *Miller v Milne's Trs* (1859) 31 Scottish Jurist 209 at 213; *Parker v Lord Advocate* (1902) 4 F 698 at 709 per Lord President Balfour.

[221] *Gillespie v Dods* (1857) 19 D 475 at 480 per Lord Cowan. See also Henry Erskine's written evidence for an English court: "but with great deference to that learned writer [Kames], who very frequently indulged himself in speculations as to what the law of Scotland ought to be rather than in discussing what it really was": *Depositions of Witnesses, and other Evidence, in the Cause of Dalrymple v Dalrymple* (1809) 2 Hag Con (App) 1, 31, 161 ER 802, 816. In the decision itself, Kames was the subject of scornful comments at the hands of Lord Stowell: *Dalrymple v Dalrymple* (1811) 2 Hag Con 55 at 91–92, 161 ER 665 at 678. Fraser, *Treatise on Husband and Wife* (n 219) 269 mounts a partial defence of Kames in response to Lord Stowell's comments.

[222] *Fogo v Fogo* (1842) 4 D 1063 at 1084 per Lord Justice-Clerk Hope.

[223] *Young v Leith* (1847) 9 D 932 at 967 per Lord Medwyn, 987 per Lord Cunninghame; *Baillie v Fletcher* 1915 SC 677 at 696 per Lord Dundas. A description of "Lord Kaimes, to whom the law of Scotland is, above all others, indebted for many most accurate disquisitions into its origin, nature and principles" by counsel in *Ogilvie v Wingate* (1792) 6 Bro 498, 505, 2 ER 1225, 1230 is perhaps unreliable given their interest in the House of Lords recognising his authority.

and the *Principles* as "remarkable".[224] Another judge remarked: "I think that reasoning of Lord Kames is not only ingenious, but sound, an observation not applicable to all the lucubrations of that eminent jurist."[225] The ambivalent status of the *Principles* could lead to a certain defensiveness in relying on it:[226]

> Again, I am charged with having cited, in support of my opinion, a passage, which, it is said, has become one of the curiosities of our legal literature. It is taken from the writings of Lord Kames. I always conceived that Lord Kames was a great lawyer, and that his authority stood very high. He was sometimes quaint in his expression, and in this instance his metaphor is perhaps not happy. But his meaning is clear, and I am glad that my views have his sanction, though the form in which it is expressed may seem to be curious. There is nothing curious but the expression.

A possible explanation for the inaccurate law reporting comes from Kames himself. Not only did he complain privately to Boswell that he did not "like to recollect" the time he had spent on preparing reports,[227] but he made a quite remarkable public *apologia* in print in this connection: "Life is short, at any rate uncertain, and man is not made for tedious undertakings."[228] But if such honesty is to the credit of Kames' character, it does little to augment his authority as a law reporter.

It would, however, be unfair to suggest that all inaccuracies in his reporting came from slovenly indifference. A more principled explanation flows from Kames' tendency to speculate, and to evaluate authorities on what he took to be their worth. "As my intention", he wrote in the *Elucidations*, "is only to give examples of reasoning, free from the shackles of authority, I pretend not to say what our law actually is, but what it ought to be".[229] This rather glib statement has worried lawyers, particularly Scottish

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[224] *Nicol's Trs v Hill* (1889) 16 R 416 at 419 per Lord President Inglis. See also *Crichton v Grierson* (1828) 3 Bligh NS 424 at 431–32, 4 ER 1390 at 1393 per the Lord Chancellor (Lyndhurst) (a "valuable work").

[225] *Campbell's Exx v Clinton's Trs* (1866) 4 M 858 at 865 per Lord Curriehill, referring to *Historical Law-Tracts*.

[226] *Cassels v Lamb* (1885) 12 R 722 at 755 per Lord Rutherfurd Clark. The opinion Lord Rutherfurd Clark was defending was to be overruled in this case, with Lord Fraser remarking, at 759, that Kames' views on the matter at hand were "singular".

[227] Lustig and Pottle (eds), *Applause of the Jury* (n 8) 18.

[228] Kames, *Dictionary* (n 168) vol I, iv. This is borne out by an exchange of letters between Boswell and Kames: Boswell had investigated the papers of a case and found them to be quite different from the entry in the *Dictionary*. Boswell (politely) chastised Kames on the basis that this was inappropriate for a work that was relied upon as a formal authority, to which the reply from Kames was rather high-handed dismissal and the suggestion that Boswell should consider the report as the authority and stop "peeping" behind it: Wimsatt and Pottle (eds), *Boswell for the Defence* (n 60) 25.

[229] Kames, *Elucidations* (n 149) xiii.

lawyers, and that worry is reflected in attitudes to Kames' legal writing and reporting.

A partial explanation for this approach can be found in Kames' more comprehensive discussion of precedent in his *Dictionary of Decisions*:[230]

> As to cases, which ought to be determined from principles universally agreed upon, I acknowledge that decisions ought there to have no authority. If the deduction upon which the decision is founded be fair, the decision is just; but then reason is the authority, not the decision. If the decision be founded upon wrong principles, or, concludes falsly from true principles, it can signify nothing: And in these matters every man must judge for himself.

This account of the doctrine of precedent – or rather, of the absence of such a doctrine – allows a more nuanced view of Kames' legal method. Cases are to be assessed and weighed by the light of reason in order to discern their intrinsic worth, and it is intrinsic worth that demonstrates the authority of the decision. To engage with authorities is to undertake an almost discourse-based, or rhetorical, reasoning process that takes account of broader intellectual disciplines in order to reach a rational conclusion on the merits of a rule.

By virtue, therefore, of his discursive approach to authorities, Kames can be placed within familiar debates on the binding nature of precedent and immutable laws. Discomfort with Kames' approach is certainly understandable and, if one reasons as a formalist or positivist, entirely justified. That Kames' views have had a mixed reception reflects a number of factors. Legal reasoning and theory move through different fashions and epochs, and individual tastes in both the academy and in practice are also in a state of dynamic equilibrium. Formalism itself exists as a spectrum. While many adopt a version of formalism, others are drawn to engage with Kames' ideas and speculations, often, though not necessarily, in the spirit of the man himself. In the absence of a universally accepted legal ontology neither approach is "wrong", and a legal pluralist would reject both polarities. With Kames beauty is in the eye of the juridical beholder.

What seems beyond dispute is that Kames' writings do have *an* enduring value insofar as even those who disagree with him engage with his works. If, to some, those works seem speculative and unreliable, they are also sufficiently comprehensible and logically grounded to attract interest and discussion. That readers today can engage with Kames is a testament to the spirit of his writing and his age; and the fact that the process occurs at all would surely be to his taste.

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[230] Kames, *Dictionary* (n 168) vol I, ii.

In England

The *Principles*, it seems, had little influence on English law. Blackstone disavowed Kames' ideas on equity:[231]

> In short, if a court of equity in England did really act, as a very ingenious writer in the other part of the island supposes it (from theory) to do, it would rise above law, either common or statute, and be a most arbitrary legislator in every particular case.[232] No wonder he is so often mistaken. Grotius, or Pufendorf, or any of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law.

Beyond that negative reception – perhaps indeed because of it – there is no obvious evidence of an overt influence upon English law or lawyers.[233] Although Kames was the first person to write at length in English about equitable jurisdictions in the United Kingdom, it seems that English lawyers were satisfied that their system, and the underlying materials supporting it, were sufficiently sophisticated. Indeed, most English lawyers only know of Kames as the recipient of the famous correspondence from Lord Hardwicke,[234] and they concentrate on Hardwicke's views without looking at the work, the *Principles*, that prompted the exchange. The *Principles,* therefore, seems to have been largely passed over by English writers,[235] perhaps because they disagreed with its content,[236] but more probably because they regarded it as superfluous to their requirements.

Judicial recognition has been no better. The few cases in which the *Principles* are cited tend to relate to international private law, often with a

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[231] W Blackstone, *Commentaries on the laws of England* (1765–69) vol 3, 433. The attack is somewhat depersonalised by Blackstone in the eighth edition of 1778, when the passage is altered to "as many ingenious writers have supposed". It seems worth pointing out that Blackstone was a common lawyer, and his understanding of equity was basic and imperfect: see W Holdsworth, *A History of English Law* (1938, repr 1966) vol XII, 588 ff.

[232] Blackstone seems to underplay Kames' recognition that safeguards were necessary, or at least to think that Kames' safeguards were insufficient or contradicted by other comments: see n 192.

[233] Lobban (n 7) 121. Other works by Kames were cited by distinguished English thinkers such as Malthus (*An Essay on the Principle of Population,* 6th edn (1826) 62) and Bentham (*The Works of Jeremy Bentham*, ed J Bowring (1843) vol 1, 115, 263–64 n 15).

[234] See P C Yorke, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great* Britain (1913) vol 2, 550 ff.

[235] With some exceptions: see Lieberman, *Province of Legislation* (n 7) 145.

[236] A pugnacious example was John Park (1793–1833), the first Professor of English Law and Jurisprudence at Kings College London, who criticised Kames' "very indigested ideas" which turned "upon the obstinate fallacy of common law and equity being two things inherently different". See J J Park, *What are Courts of Equity? A Lecture Delivered at Kings College, London April 6, 1832* (1832) 14.

Scottish dimension.[237] The only other case of significance is *Regal (Hastings) Ltd v Gulliver* when the Scottish law lord, Lord Macmillan, cited the *Principles* in support of the rule against a trustee making a profit.[238]

In the United States

Like other Scottish jurists such as Erskine and, later, Bell, Kames was much better known in the newly-formed United States of America than in England, no doubt because the legal system there was hungry for authorities and simultaneously aware of an opportunity to take a more critical approach to its law.[239] Furthermore, Kames' political orientation, as well as his membership of the influential group of writers constituting the Scottish Enlightenment,[240] would have made him attractive ideologically,[241] and there is clear evidence that distinguished American jurists and politicians used his works.[242] While

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[237] *Hunter v Potts* (1791) 4 TR 182 at 184 n (b), 100 ER 962 at 963 n (b); *Hog v Hog* (1792) 2 Coop T Cott 497 at 506, 47 ER 1269 at 1271; *Hog v Hog* (1804) 2 Coop T Cott 449 at 469–70, 47 ER 1243 at 1252–53; *Doe v Vardill* (1840) West 500 at 506, 9 ER 578 at 580; *De Mattos v Gibson* (1860) 1 J & H 79 at 81, 70 ER 669 at 671. See also *Macfarlane v Norris* (1862) 2 B & S 783 at 790–91, 121 ER 1263 at 1266 (calculation of damages).

[238] [1967] 2 AC 134 at 153 per Lord Macmillan (the case was actually decided in 1942). All citations of Kames that I have been able to trace in Commonwealth jurisdictions have been mediated through Lord Macmillan's speech in *Regal*. See *Scott v Scott* (1964) 109 CLR 649 at 659 per McTiernan, Taylor and Owen JJ; *Robb v Sojourner* [2007] NZCA 493, [2008] 1 NZLR 751 at para 126 per William Young P; *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASCA 17 at para 383 per Murphy JA.

[239] See generally R H Helmholz, "Scots law in the New World: its place in the formative era of American law", in H L MacQueen (ed), *Miscellany V* (Stair Society vol 52, 2006). The story of the influence of Scottish law in America is one that has yet to be told, but there are some studies that offer tantalising hints about the extent of that influence, especially in the late-eighteenth and early-nineteenth century: in addition to Helmholz 174–75 see e.g. C P Rogers III, "Scots law in post-revolutionary and nineteenth-century America: the neglected jurisprudence" (1990) 8 Law and History Review 205; J Mikhail, "Scottish common sense and nineteenth-century American law: a critical appraisal" (2008) 26 Law and History Review 167; W Ewald, "James Wilson and the Scottish Enlightenment" (2009–10) 12 U Pa J Const L 1053; J E Pfander and D D Birk, "Article III and the Scottish judiciary" (2010–11) 124 Harv L Rev 1613. On broader philosophical connections see: R B Sher and F Smitten (eds), *Scotland and America in the Age of Enlightenment* (1990); S Fleischacker, "The impact on America: Scottish philosophy and the American founding", in A Broadie (ed), *The Cambridge Companion to the Scottish Enlightenment* (2003); T Devine, *Scotland's Empire and the Shaping of the Americas 1700–1815* (2004).

[240] A Hook, *Scotland and America: A Study of Cultural Relations 1750–1835,* 2nd edn (2008) 75–76, 80–81. Interestingly, for all the success of Kames' works none was on the list compiled for acquisition at the founding of the Library of Congress, even though other Scottish works were included: Hook 42.

[241] W C Lehmann, *Scottish and Scotch-Irish Contributions to Early American Life and Culture* (1978) 160; it is also explained that Jefferson took a dim view of Blackstone for similar reasons.

[242] Rahmatian (n 7) II n 5; Lehmann, *Early American Life and Culture* (n 241) 159 ff; Helmholz (n 239) 173–75.

further research on this topic is needed, a selection of prominent figures can be highlighted here.

One influential American whom Kames impressed was Benjamin Franklin. As well as corresponding with Kames, Franklin met and stayed with him.[243] In 1761 Franklin informed Kames that he had sent a copy of *Principles of Equity* to a judge in the Supreme Court of Pennsylvania, noting that state's lack of separate equity courts, and reported that, although initially lukewarm, the judge appeared to have been impressed upon a full reading.[244] Franklin himself wrote in glowing terms about the preliminary discourse in the second edition of the *Principles* although he was silent as regards the rest of the text.[245]

Thomas Jefferson was also influenced by Kames' works[246] – to the point that Kames has been described variously as a "master and guide",[247] or as an "intellectual hero"[248] for the future President – and in his commonplace book he made considerable use of the *Principles*[249] and of the *Historical Law-Tracts*.[250] Jefferson was sufficiently impressed by the *Principles* to recommend it to young lawyers, on the basis that Kames "has given us the first digest of the principles of that branch of our jurisprudence, more valuable for the arrangement of the matter, than for it's [*sic*] exact conformity with the English decisions".[251] However, Jefferson could also be critical, in particular agreeing with the charge that Kames was often too metaphysical:[252]

> Your objection to Lord Kaims, that he is too metaphysical, is just, and it is the chief objection to which his writings are liable. It is to be observed also that though he has given us what should be the system of equity, yet it is not the one that is actually established, at least not in all parts. The English chancellors have gone on from one thing to another without any comprehensive or systematic view of the whole field of equity, and therefore they have sometimes run into inconsistencies and contradictions.

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243 See e.g. Hook, *Cultural Relations* (n 240) 19–22; Lord Mackenzie-Stuart, "Benjamin Franklin in Scotland" (1991) 6 Denning LJ 119.

244 B Franklin, *The Complete Works of Benjamin Franklin*, ed J Bigelow (1887) vol 3, 154–55.

245 B Franklin, *The Complete Works* (n 244) vol 4, 9.

246 U M von Eckardt, *The Pursuit of Happiness in the Democratic Creed* (1959) 104; Lehmann, *Early American Life and Culture* (n 241) 159, 165–66; T F Kuper, "Thomas Jefferson the lawyer" (1943) 3 Lawyers Guild Review 30, 31; E Dumbauld, "Thomas Jefferson's Equity Commonplace Book" (1991) Washington & Lee L Rev 1257, 1260; L M Keller, "The American rejection of economic rights as human rights and the Declaration of Independence: does the pursuit of happiness require basic economic rights?" (2003) 19 N Y L Sch J Hum Rts 557.

247 T Jefferson, *Commonplace Book of Thomas Jefferson*, ed G Chinard (1926) 19.

248 G Wills, *Inventing America: Jefferson's Declaration of Independence* (1978) 201.

249 Jefferson owned all three editions of *Principles of Equity*: see Wills, *Inventing America* (n 248) 201.

250 Jefferson, *Commonplace Book* (n 247) 16–17. Bentham was also an admirer of the work: J Bentham, *A Fragment on Government*, 2nd enlarged edn (1823) 16.

251 Cited in Dumbauld (n 246) 1260.

252 Jefferson, *Commonplace Book* (n 247) 17.

It seems that Kames had the potential to be influential among Virginian lawyers more generally, probably as a result of the programme of study initiated by Jefferson's teacher, George Wythe. Jefferson was instrumental in the appointment of Wythe to a professorship of law at the College of William and Mary.[253] Present in Wythe's first class was John Marshall, the future and celebrated Chief Justice of the United States Supreme Court.[254] According to Lord Macmillan, Marshall owned a copy of the *Principles of Equity*.[255] Slightly later, this time at the University of Transylvania in Kentucky, legal instruction following the Wythe programme saw the *Principles* being used as a text for students.[256] A judge was prescribing Kames' works to law students in New Hampshire in the 1770s.[257] Further research would doubtless reveal similar stories in other states, and prominent lay Americans could also be cited.[258]

Writers too made use of the *Principles*,[259] and other works by Kames.[260] One of the earliest treatises to discuss the *Principles* was Zephaniah Swift's *A System of the Laws of the State of Connecticut* (1796), where the author considered Kames' conceptualisation of equity at a systemic level and compared it with Blackstone's (which he preferred).[261] Another writer to engage with the *Principles* was James Wilson. Born and educated in Scotland, Wilson was later to sit as one of the first Associate Justices of the United States Supreme Court. He was also the first professor of law at the University of Pennsylvania,[262] and in lectures given around 1790 he exhorted his students to read Kames' works alongside those of Bacon and Bolingbroke.[263] The influence of the *Principles* on his view of equity is clear.[264]

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253 P D Carrington, "Teaching law and virtue at Transylvania University: the George Wythe tradition in the antebellum years" (1989–90) 41 Mercer Law Rev 673, 673.

254 Carrington (n 253) 675.

255 Lord Macmillan, "Address to the American Bar Association" (1930) 42 JR 312, 315.

256 Carrington (n 253) 679.

257 S E Baldwin, "The study of elementary law – a necessary stage in legal education" (1903–04) 16 Yale L J 1, 3; J Parrish, "Law books and legal publishing in America: 1760–1840" (1979) Law Lib J 355, 357; Pfander and Birk (n 239) 1641.

258 Lehmann, *Early American Life and Culture* (n 241) 159–60, 166–67 notes, in addition to Jefferson and Franklin, the potential influence on John Adams and James Madison of Kames' broader corpus of works. Madison was against what he took, wrongly, to be Kames' advocacy of a binary court system to administer law and equity separately: see J Madison, *The Writings of James Madison*, ed G Hunt (1901) vol 2, 170–71. John Adams' *A Collection of State Papers* (1782) 90 also refers to Kames.

259 Helmholz (n 239) 175.

260 Parrish (n 257) 357; N Chipman, *Principles of Government: A Treatise on Free Institutions including the Constitution of the United States* (1833, repr 2000) 20; Chipman was Chief Justice of Vermont.

261 Z Swift, *A System of the Laws of the State of Connecticut* (1796) vol 2, 421.

262 J Wilson, *The Works of the Honourable James Wilson LLD*, ed B Wilson (1804) vol 1, iii. See Ewald (n 239).

263 Wilson, *Works* (n 262) vol 1, 44.

264 Wilson, *Works* (n 262) vol 1, 44, vol 2, 271–74.

In the nineteenth century the *Principles* continued to be treated as an important work, especially in respect of international private law,[265] the nature of equity jurisdiction, and the calculation of damages. That equity lawyers should use the *Principles* is unsurprising. In the course of a general discussion of equity concepts in England, John Norton Pomeroy engaged with Kames' conceptualisation of equity as commencing at the limits of the common law and as folding natural obligations into that law.[266] It seems, however, that Pomeroy preferred the Blackstonian view of a limited equity, dismissing Kames among a number of "old writers and judges of great ability and high authority, many of which are entirely incorrect and misleading" insofar as they apparently supported unbridled discretion in the conscience of the Chancellor.[267] On the other hand, Joseph Story seems to have been more sympathetic to Kames' view, partly because he perceived Kames' work to have received the approbation of Hardwicke.[268]

In the courts the *Principles* was cited with quite remarkable frequency[269] – perhaps more so than in Scotland, and certainly far more than in England

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[265] In the first edition of his *Commentaries on the Conflict of Laws* (1834), Joseph Story cites Kames frequently: see 104, 235, 241, 295, 301, 313, 314, 317, 323, 324, 328, 332, 334, 347, 361, 371, 395, 402, 404, 416, 419, 420, 421, 484, 495, 501, 503, and 518. And see F K Juenger, "A page of history" (1983–4) 35 Mercer L Rev 419, 439, 442; F K Juenger, "Two European Conflicts Conventions" (1998) 28 Victoria University of Wellington L Rev 527, 528.

[266] J N Pomeroy, *A Treatise on Equity Jurisprudence* (1881–3) vol 1, 38–39 n 1.

[267] Pomeroy, *Equity* (n 266) vol 1, 37. As we have seen, this rather misrepresents Kames' position.

[268] J Story, *Commentaries on Equity Jurisprudence* (1836) 18 n 2. See Yorke, *Life of Hardwicke* (n 234) vol 2, 421. In passing we may note that Story's justification is suspect at best: Hardwicke and Kames' famous exchange of letters proceeded on the basis of a fundamental disagreement about the desirability of a separate system of equity jurisprudence. See also *Wilkes v Rogers* (1810) 6 Johns 566 per the Chancellor (Livingston) who thought Kames' equity overly broad.

[269] In addition to the cases mentioned in the following footnotes, the *Principles of Equity* was cited in other cases including the following: *Holingsworth v Ogle* (1788) 1 US (1 Dall) 257; *Morgan's Exrs v Biddle* (1791) 1 Yeates 3; *Clayton v The Harmony* (1800) 1 Pet Adm 70; *Alexander v Morris* (1801) 3 Call 89; *Nash v Tupper* (1803) 1 Cai R 402; *Ludlow v Dale* (1805) 2 Cai Cas 348; *Post v Neafie* (1805) 3 Cai R 22; *Ludlow v Simond* (1805) 2 Cai Cas 1; *State v Evans* (1806) 1 Tenn 211; *Camfranque v Burnell* (1806) 4 F Cas 1130; *Conframp v Bunel* (1806) 6 F Cas 275; *Jackson v Jackson* (1806) 1 Johns 424; *Clayton v The Harmony* (1807) 5 F Cas 994; *Estill v Blakemore* (1808) 8 F Cas 798; *Riley v Riley* (1808) 3 Day 74; *Smith v Elder* (1808) 3 Johns 105; *Desebats v Berquier* (1808) 1 Binn 336; *Cheriot v Foussat* (1811) 3 Binn 220; *Clark's Exrs v Cochran* (1814) 3 Mart (os) 353; *Duplantier v Pigman* (1814) 3 Mart (os) 236; *Milne v Moreton* (1814) 6 Binn 353; *Cheesbrough v Millard* (1815) 1 Johns Ch 409; *King v Baldwin* (1819) 17 Johns 384; *Pannell v McMechen* (1819) 4 H & J 474; *Merritt v Brinkerhoff* (1820) 17 Johns 306; *Matthews v Zane* (1822) 20 US (7 Wheaton) 164; *Holmes v Rensen* (1822) 20 Johns 229; *Carr v Jeannerett* (1822) 2 McCord 66; *Hunt v Rousmanier's Administrators* (1823) 21 US (8 Wheaton) 174; *Daniel v McRae* (1823) 2 Hakws 590; *Jones's Administrator v Hook's Administrator* (1824) 2 Rand 303; *Dawes v Head* (1825) 3 Pick 128; *Peek v Wakely* (1825) 1 McCord Eq 43; *Pannell v Farmers Bank of Maryland* (1826) 7 H & J 202; *Bussy v McKie* (1827) 2 McCord Eq 23; *Bradford v Felder* (1827) 2 McCord Eq 168; *Thatcher v Walden* (1827) 5 Mart (ns) 495; *Simmons v Drury* (1829) G & J 32; *Robinson v Rapelye* (1829) 2 Stew 86; *Union Bank of Georgetown v Smith* (1830) 24 F Cas 566; *Quick v Stuyvesant* (1830) 2 Paige Ch 84; *Maberry*

– and it clearly enjoyed the respect of judges. So for example in 1803 Justice Livingston of New York, later an Associate Justice of the United States Supreme Court, pronounced the *Principles* "a work of which no professional gentleman should be ignorant".[270] Another judge described Kames himself as "a lawyer of distinguished learning",[271] while Justice Story suggested that the *Principles* was written with "great precision", and that the opinions stated there should carry "great weight".[272] Among the topics in respect of which the *Principles* was cited were the nature of equity,[273] international private law,[274] the calculation of damages,[275] the trustee no-profit rule,[276] and the rights of the *bona fide* possessor and enrichment law.[277]

Of the subjects just mentioned it was international private law that was easily the most important, at least in terms of weight of citation. Furthermore, the vast majority of those citations occurred in the early nineteenth century.[278] Lawyers in a country which was new and formed of distinct states were no doubt attracted by a treatise which explained conflicts of law in a manner

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v Shisler (1834) 1 Harr 349; *English v Lane* (1835) 1 Port 328; *Layson v Rowan* (1844) 7 Rob (LA) 1; *Norris v Showerman* (1845) 2 Doug 16; *Aspden v Nixon* (1846) 45 US (4 How) 467; *Monroe v Douglas* (1846) 4 Sand Ch 126; *Macfarland v McKnight* (1846) 6 B Mon 500; *Lenx v Jansen* (1859) 18 How Pr 265; *Forbes v Scannell* (1859) 13 Cal 242; *Eastman v Amoskeag Manufacturing Co* (1862) 44 N H 143; *Parsons v Moses* (1864) 16 Iowa 440; *Mack v Patchin* (1870) 3 Hand 167; *Hill v Morehead* (1882) 20 W Va 429; *Wisconsin v Pelican Insurance Co* (1888) 127 US 265; *Hollmann v Conlon* (1898) 45 S W 275.

270 *Hitchcock v Aiken* (1803) 1 Cai R 460, 3 Johns Cas 595 per Livingston J.

271 *Morris v Eves* (1822) 11 Mart (os) 730 per Porter J.

272 *Le Roy v Crowninshield* (1820) 15 F Cas 362 at 365–66.

273 See *Spoon-Shacket Co v Oakland County* (1959) 356 Mich 151 at 159 per Black J.

274 See e.g. *Ludlow & Ludlow v Dale* (1799) 1 Johns Cas 16 per Kent J; *Goix v Low* (1800) 1 Johns Cas 341 per Kent J; *Williamson's Administrators v Smart* (1801) Cam & Nor 146 at 149 per Taylor J; *Simpson v Hart* (1814) 1 Johns Ch 91; *Hart v Ten Eyck* (1816) 2 Johns Ch 62 per the Chancellor (Kent); *Decouche v Savetier* (1817) 3 Johns Ch 190 per the Chancellor (Kent); *Harvey v Richards* (1818) 11 F Cas 746 at 755 per Circuit Justice Story; *Le Roy v Crowninshield* (1820) 15 F Cas 362 at 365–66 per Circuit Justice Story; *Van Buskirk v Hartford Fire Insurance Co* (1842) Conn 583 per Storrs J; *Townsend v Jenison* (1850) 50 US (9 How) 407 at 414, 417–18 per Justice Wayne; *Great Western Railway Co of Canada v Miller* (1869) 19 Mich 305; *Barker v State of Ohio* (1980) 62 Ohio St 2d 35 at 39 per Herbert J; *State ex rel Amburgey v Russell* (2000) 139 Ohio App 3d 857 at 861.

275 See e.g. *Talbott v Heirs of Bedford* (1814) 5 Am LJ 330 at 332. An opinion of the Attorney-General also cited *Principles of Equity*: C Cushing, *Damages Under the Florida Treaty* (1854) 6 Op Att'y Gen 530 at 532.

276 *Rogers v Rogers* (1825) Hopk Ch 515 at 525 per the Chancellor (Sandford).

277 *Snell v Fausatt* (1805) 22 F Cas 714; *Whitledge v Wait's Heir* (1804) Snead (KY) 335; *Townsend v Shipp's Heirs* (1813) 3 Tenn 294; *Bristoe v Evans* (1815) 2 Tenn 341 at 346, 348; *Green v Biddle* (1823) 21 US 1 at 80–81 per Washington J; *President and Directors of Branch Bank at Columbia v Black* (1827) 2 McCord Eq 344; *Matthews v Davis* (1845) 25 Tenn 324; *Indra v Wiggins* (1947) 238 Iowa 728 at 740 per Bliss CJ.

278 On developments in the equity jurisprudence of the Supreme Court, see generally J R Kruger, "Supreme Court equity, 1789–1825, and the history of American judging" (1997–8) 24 Hous L Rev 1425.

accessible to a common lawyer. The *Principles* was pioneering in the sense that it provided what may have been the only account of conflicts of law in English. There was Civilian literature, but Common Law sources were lacking.[279] That a jurist from the smaller legal system within a political union would write on this subject was also unsurprising. When, however, Story published his *Commentaries on the Conflict of Laws*, in 1834,[280] the *Principles* would have been largely superseded, and this is probably the explanation for the virtual cessation in its use by the mid-nineteenth century.

CONCLUSION

While inevitably indebted to intellectual precursors, Kames was also a radical and a creative thinker. From an early stage in his life it is possible to trace a number of strands of his thought. Deeply concerned with historical influences upon society, Kames analysed the development of the law through a prism of evolutionary progress that was, supposedly, scientific. By applying an historical analysis he was able, sometimes without express differentiation, to postulate what the law had been, what it then was, and what it could be. Accordingly, that which was speculative was sufficiently tethered to underlying legal precepts as to be capable of being sensibly understood, even if it did not always command assent.

The variable regard with which he has come to be held would not have troubled Kames, and might even have pleased an author who valued critical debate even above his (considerable) faith in his own powers. Thinking and writing about law was, for Kames, an exercise not only in receiving wisdom but in criticism. By examining critically the taxonomies and axioms handed down by the lawyers of old Kames broke new ground. The process thus set in train altered approaches to legal education and, to a lesser extent, the way in which, in some areas at least, practising lawyers viewed the law.

The *Principles* embraces a critical approach that seeks to develop new ways of thinking. For a Scottish lawyer familiar with the "institutional" treatments of Stair, Erskine, and Bell, this can be disconcerting.[281] The structure of the text is unexpected and it is written in an almost rhetorical style. This was

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[279] See the articles by Juenger at n 265.

[280] J Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments* (1834).

[281] A comment made in respect of the *Elements of Criticism* is pertinent here: "If Kames' book called for interpretation and elucidation in its own time, it requires even more explanation now. Not only did he force the reader, by a very forbidding scheme of presentation, to carry with him to the end of the argument the principles and proofs laid down at the beginning; he also expected a knowledge of contemporary philosophy, and he did not see fit to outline for his reader every one of the many literary and philosophical controversies of that day." See Randall, *Critical Theory of Lord Kames* (n 8) v.

deliberate. As has been observed of another of Kames' works: "[he] found it more to his temperament to hold a point of view which had room for contradictions than to follow a single coherent philosophy to its extreme and unrealistic conclusions".[282]

Lawyers in the past, and especially in the era of high formalism, have not always found Kames' approach to their taste. Today, however, when even Stair, Erskine, and Bell are too remote in time to be a reliable guide to the law, and are valued for their ideas as much as for their authority, the gap with Kames has narrowed.[283] Viewed from the twenty-first century, the *Principles* appears as the work of an Enlightenment lawyer attempting to rationalise the law to reflect a changing world. And its enduring relevance is its exemplification of a critical method that adopts an interdisciplinary focus. Such an approach is more in vogue today than at any time in the past.

One contemporary's verdict on the *Elements of Criticism* applies equally to the *Principles of Equity*: "My Lord Kames is not content if you show him a fine room, perfectly elegant; he wants always to scratch behind the panelling and analyse the plaster of the walls."[284] Kames' concern was as much with the concept of law as with its manifested rules, and today's lawyer reading the *Principles* will find deeply contextualised ideas set inside a critical method that addresses the very nature of the legal system. Looking, with Lord Kames, at the plaster behind Scots law's walls is both enlightening and enjoyable.

DANIEL J CARR*

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[282] G McKenzie, "Lord Kames and the mechanist tradition" (1943) 14 University of California Publications in English 93, cited in Randall, *Critical Theory of Lord Kames* (n 8) 98.

[283] As Kames himself predicted: see n 160.

[284] F A Pottle (ed), *Boswell in Holland 1763–1764* (1952) 85.

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APPENDIX

CONTENTS OF THE THREE EDITIONS OF *PRINCIPLES OF EQUITY*

FIRST EDITION (1760)

Book I: Powers of a Court of Equity founded on the Principle of Justice[285]

Part I: Powers of a Court of Equity to supply what is defective in Common Law with respect to pecuniary Interest

Chapter I. Defects in Common Law with respect to the protecting Individuals from Harm

Chapter II. Defects in Common Law with respect to enforcing the natural Duty of Benevolence

Chapter III. Defects in Common Law with respect to Rights founded on Will

Chapter IV. Defects in Common Law with respect to Statutes

Chapter V. Defects in Common Law with respect to Execution

Part II: Powers of a Court of Equity to correct the Injustice of Common Law with respect to pecuniary Interest

Chapter I. Injustice of Common Law with respect to Rights founded on Will

Chapter II. Injustice of Common Law with respect to Statutes

Chapter III. Injustice of Common Law with respect to Actions at Law

Chapter IV. Injustice of Common Law in making Debts effectual

Part III: Powers of a Court of Equity to remedy the Imperfection of Common Law with respect to Matters of Justice that are not pecuniary

Book II: Powers of a Court of Equity founded on the Principle of Utility

Chapter I. Acts *contra bonos mores* repressed

Chapter II. Certain Claims in themselves just, and therefore authorized by Common Law, rendered ineffectual by Equity because of their bad Tendency.

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[285] See n 136 above.

THIRD EDITION (1778)

Book I: Powers of a court of equity derived from the principle of justice

NOTE ON ORGANISATION AND CITATION

In this reprint of the third edition of Kames' *Principles of Equity* the two volumes of the original are reproduced as a single volume. After a dedicatory letter to Lord Mansfield, two prefaces, and a table of contents to both volumes, the work begins with the 429 pages of volume 1 before restarting at page 1 for volume 2. A combined index to both volumes can be found at page 379 of volume 2.

The double system of pagination makes it necessary to distinguish between the two volumes in citing the work: so for example Lord Kames, *Principles of Equity* (3rd edn 1778, repr 2013) II, 193.