# HISTORICAL LAW-TRACTS

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

Knud Haakonssen
*General Editor*

Henry Home, Lord Kames

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

# *Historical Law-Tracts*

## *The Fourth Edition with Additions and Corrections*

Henry Home, Lord Kames

Edited and with an Introduction by
James A. Harris

*Major Works of Henry Home, Lord Kames*

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# INTRODUCTION

When he published *Historical Law-Tracts* in 1758, Henry Home was 62.[1] He had been elevated to the Court of Session, and had assumed the title Lord Kames, six years previously, in February 1752. Since its creation in 1532 the Court of Session had been the supreme civil court in Scotland. As Kames explains in the tract "Of Courts," it "hath an original jurisdiction in matters of property, and in every thing that comes under the notion of pecuniary interest" (226).[2] Elevation to the Court was the culmination of a legal career that had begun when Kames was called to the bar in 1723.

1. The best biography remains Ian Simpson Ross, *Lord Kames and the Scotland of His Day* (Oxford: Clarendon Press, 1972). The most comprehensive study of Kames's thought is now Andreas Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh: Edinburgh University Press, 2015). But see also: William C. Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment* (The Hague: Martinus Nijhoff, 1971); David Lieberman, "The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames," in Istvan Hont and Michael Ignatieff (eds.), *Wealth and Virtue: The Shaping of the Political Economy of the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983), pp. 203–34; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), pp. 144–75; Michael Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900* (Dordrecht: Springer, 2007), pp. 114–21; David M. Walker, *The Scottish Jurists* (Edinburgh: W. Green, 1985), pp. 220–47. For an account of the development of Scots law up to 1832, see John Cairns, "Historical Introduction," in Kenneth Read and Reinhard Zimmermann (eds.), *A History of Private Law in Scotland* (Oxford: Oxford University Press, 2000), vol. i, pp. 14–184. Cairns's chapter sketches the context for many of the issues explored by Kames in *Historical Law-Tracts*. See also John Cairns, "Attitudes to Codification and the Scottish Science of Legislation, 1600–1832," *Tulane European and Civil Law Forum* 22 (2007): 1–78.

2. Kames predicts, though, that in time it will be accepted "[t]hat it is the province of this court, to redress all wrongs for which no other remedy is provided" (pp. 228–29). For the place of the Court of Session in eighteenth-century Scottish political culture, see N. T. Phillipson, *The Scottish Whigs and the Reform of the Court of Session 1785–1830* (Edinburgh: Stair Society, 1990), pp. 1–41.

One thing that had helped to advance that career was the remarkable energy Kames devoted to a series of books intended to give order to two centuries of the Court's decisions. The first of these was *Remarkable Decisions of the Court of Session, from 1716 to 1728* (1728), intended as a supplement to Stair's *Institutions of the Law of Scotland* (1681), and preoccupied, like the *Institutions,* with uncovering the fundamental principles of law in Scotland. Stair's question had been "Whether law may or should be handled as a rational discipline, having principles from whence its conclusions may be deduced?"[3] Kames had no doubt that the answer was that it may and should—in other words, that those lawyers were mistaken who, as Stair had put it, "esteem[ed] law, especially the positive and proper laws of any nation, incapable of such a deduction, as being dependent upon the will and pleasure of lawgivers."[4] Kames went on to produce a huge two-volume work entitled *The Decisions of the Court of Session from Its Institution to the Present Time, Abridged and Digested under Proper Heads, in Form of a Dictionary* (1741). This was a further attempt to show that the opinions of the judges on the Court were "founded . . . for the most part, upon solid principles"—to show, in other words, that it was not a fatal flaw in Scottish law that it had so little foundation in statute.[5] Late in life Kames told Boswell that he didn't like to remember how much time this dictionary took to complete. However, he had the energy to press on to a consideration of Scottish statute law, *Statute Law of Scotland Abridged, with Historical Notes* (1757). In the years before *Historical Law-Tracts* he also wrote two more miscellaneous books: *Essays upon Several Subjects in Law* (1732) and *Essays on Several Subjects concerning British Antiquities* (1747).

Kames was a man of extraordinary energy and intellectual range. He was interested in philosophy as well as law, because he wanted to expose law's philosophical foundations, but also because he found metaphysical and moral questions fascinating in their own right. He had the confidence to engage in correspondence with Samuel Clarke about *a priori* arguments for

3. James, Viscount of Stair, *The Institutions of the Law of Scotland,* ed. David M. Walker (Edinburgh and Glasgow: The University Presses of Edinburgh and Glasgow, 1981), p. 89.

4. Stair, *Institutions,* ed. Walker, p. 89.

5. Kames, *The Decisions of the Court of Session,* 2nd ed., vol. i, p. vii.

the existence of God and with Joseph Butler about various issues raised in his *Sermons Preached at the Rolls Chapel.* Kames was part of the active intellectual community based in the Scottish Borders in the 1730s, a community that included the young David Hume, for a time so close a friend that the pair are said by some to have laid plans to start a new Edinburgh-based journal.[6] Kames's conversations with Hume, and his inability to accept the younger man's scepticism, gave rise to his first non-legal work, *Essays on the Principles of Morality and Natural Religion* (1751). In this book Kames gave systematic expression to a belief that underlies all of his writing on law: that there is such a thing as natural law, prior to and independent of all positive law, and revealed to us, not by reason or by divine will, but rather by human sentiment. The true ground of our knowledge of the primary laws of nature, Kames argued, was human nature. The laws of nature could be defined as "*Rules of our conduct founded on natural principles approved by the moral sense, and enforced by natural rewards and punishments.*"[7] One of these natural principles was a "principle of justice," consisting of two branches, "one to abstain from harming others, and one to perform our positive engagements."[8] Another was benevolence. Kames gave particular emphasis to the naturalness of principles of justice conceived of as grounded in an innate sense of duty distinct from the sense of benevolence, and in this he meant himself to be understood as correcting Francis Hutcheson. But of course the language of a moral sense was Hutcheson's language, and it is probably right to see Kames's moral philosophy as, at bottom, Hutchesonian in inspiration.[9] What differentiated Kames from Hutcheson, and from Hume for that matter, was his interest in how universal principles of human nature found different particular expressions in different times and places.

This was an interest Kames shared with Montesquieu, and it is usual to group Kames with those Scots whose intellectual life was fundamentally

6. See, e.g., Ross, *Lord Kames and the Scotland of His Day,* pp. 81–82.

7. Kames, *Essays on the Principles of Morality and Natural Religion,* ed. Mary Catherine Moran (Indianapolis: Liberty Fund, 2005), p. 56.

8. Kames, *Essays on the Principles of Morality and Natural Religion,* ed. Moran, p. 56.

9. See David Fate Norton, *David Hume: Common-Sense Moralist, Sceptical Metaphysician* (Princeton: Princeton University Press, 1982), pp. 174–89.

altered by the publication of Montesquieu's *De l'Esprit des Lois* in the late autumn of 1748. In his *Life of Adam Smith* (1794), Dugald Stewart described Kames in the *Historical Law-Tracts* as having "given some excellent specimens" of Montesquieu's consideration of laws "as originating chiefly from the circumstances of society." He provided further instances of the attempt "to account, from the changes in the condition of mankind, which take place in the different stages of their progress, for the corresponding alterations which their institutions undergo."[10] John Craig, in his 1806 "Life of John Millar," likewise claimed that in his history of property law, Kames had followed Montesquieu's way of deploying a comparative study of law in relation to human nature in order to "deduce the causes of those differences in laws, customs, and institutions, which, previously, had been remarked merely as isolated and uninstructive facts."[11] Kames, though, had already made a historical turn in his thinking about law in *Essays upon Several Subjects in Law* and *Essays on Several Subjects Concerning British Antiquities,* both published before *De l'Esprit des Lois.* Furthermore, he could be seen as rather self-consciously refusing to acknowledge any significance for Montesquieu in the writing of *Historical Law-Tracts.* By 1758 the intellectual life of Scotland was more or less saturated by Montesquieu.[12] When John Dalrymple published *An Essay towards a General History of Feudal Property* in 1757, he made no bones about the influence upon

10. Dugald Stewart, "An Account of the Life and Writings of Adam Smith, LL.D.," in Adam Smith, *Essays on Philosophical Subjects,* ed. W. P. D. W. Wightman, J. C. Bryce, and I. S. Ross (Oxford: Clarendon Press, 1980), pp. 294–95.

11. [John Craig], "Account of the Life and Writings of John Millar, Esq.," in John Millar, *The Origin of the Distinction of Ranks,* ed. Aaron Garrett (Indianapolis: Liberty Fund, 2006), p. 20.

12. An edition of *De l'Esprit des Loix* had been published in Edinburgh in 1750, along with a special translation of the two chapters which bore most closely on the question of the constitution of England and the character and manners that it was likely to produce. In 1756 Nugent's translation was published in a new edition in Aberdeen. Editions of the *Considérations sur les Causes de la Grandeur des Romains et de leur Décadence* were published in Edinburgh in 1751 and in Glasgow in 1752. A fourth version of the Glasgow edition came out in 1758. A translation of *Lettres Persanes* appeared in Glasgow in 1751. For a general account of Montesquieu's influence in eighteenth-century Scotland, see James Moore, "Montesquieu and the Scottish Enlightenment," in Rebecca E. Kingston (ed.), *Montesquieu and His Legacy* (Albany: State University of New York Press, 2009), pp. 179–95.

his book of "the greatest genius of our age." Montesquieu was quoted on the title page, and if Kames "directed" Dalrymple's thoughts in the *Essay,* as Dalrymple wrote in the dedication to him, those thoughts were later revised by Montesquieu himself. In the Preface, Montesquieu is said to have been one of the first to have "suggested . . . that it was possible to unite philosophy and history with jurisprudence, and to write even upon a subject of law like to a scholar and a gentleman."[13] Books 30 and 31 of *De l'Esprit des Lois* are then cited repeatedly in Dalrymple's "History of the Introduction of the Feudal System into Great Britain." In *Historical Law-Tracts,* by contrast, there is not a single mention of Montesquieu or of *De l'Esprit des Lois.* In the Preface, the authority cited "in order to recommend the history of law" is, of all people, Bolingbroke—an author, as Kames himself says, "in whose voluminous writings not many things deserve to be copied" (viii).

Kames certainly read Montesquieu and admired him greatly. In his magnum opus *Sketches of the History of Man,* published in 1774, Kames describes the author of *De l'Esprit des Lois* as "the greatest genius of the present age."[14] The remark is made in the context of a discussion of manners and their causes. This is significant because on this topic Kames disagrees with Montesquieu profoundly, and at great length. Like Hume, Kames found the case made for the influence of climate made in Book 14 of *De l'Esprit des Lois* quite unpersuasive. Montesquieu may have been, as Kames says elsewhere in the *Sketches,* "a judicious writer, to whom every one listens with delight,"[15] but this did not mean that everyone, least of all Kames himself, agreed with everything that Montesquieu said. The majority of the references made to Montesquieu in *Sketches of the History of Man* are critical in tone. So the greatness of Montesquieu's genius was not, for Kames, a matter of his always having been right.

In one important respect, even so, the agenda of *Historical Law-Tracts* is notably similar to that of Montesquieu. In its treatment of criminal law,

13. John Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain,* 2nd ed. (London: 1758), p. ix.

14. Kames, *Sketches of the History of Man,* ed. James A. Harris (Indianapolis: Liberty Fund, 2007), p. 163 fn.

15. Kames, *Sketches of the History of Man,* ed. Harris, p. 511.

*De l'Esprit des Lois,* before it is anything else, is a plea for moderation and the relaxation of senselessly severe regimes of punishment. The rigor of punishments is argued to vary in direct proportion to the liberty allowed by a state's form of government. "Severity in penalties suits despotic government, whose principle is terror," Montesquieu observes, "better than monarchies and republics, which have honor and virtue for their spring."[16] Even in a despotism, however, it is possible for penalties to be too severe, as is shown by the case of Japan, where punishments are so excessive that, as Montesquieu puts it, "one is often obliged to prefer impunity."[17] In a despotism there is only one judge, the despot himself. It is a mark of the freedom of a republic, in Rome and, Montesquieu adds, "in many other cities," that citizens are permitted to accuse one another, for it is in the spirit of a republic, "where each citizen should have boundless zeal for public good, where it is assumed that each citizen has all the rights of the homeland in his hands."[18] Between these two extremes lies what is appropriate in a monarchy, where citizens cannot be supposed to have that kind of zeal for the public good and where it is a danger that prosecutions might be attempted merely in order to please the prince. "At present we have an admirable law," Montesquieu writes; "it wants the prince, who is established in order to see the execution of laws, to appoint an officer in each tribunal who will pursue all crimes in his name."[19] In the tract "Criminal Law" Kames makes the same case for the need for a public prosecutor "[i]n modern governments" (60). This is a necessary restraint on the passion of private resentment, which is the origin of all criminal law, but which is admitted as the guiding principle of punishment only among savages. The public prosecutor, who should have no personal stake in any legal process, can be supposed to have only the public good in view in his determinations of appropriate punishment. It may well have been the case for the distinction of punishment from revenge that prompted Bentham to declare that

16. Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws,* ed. and trans. Anne M. Cohler, Basia C. Miller, and Harold S. Stone (Cambridge: Cambridge University Press, 1989), p. 82 (VI.9).

17. Montesquieu, *The Spirit of the Laws,* p. 88 (VI.13).

18. Montesquieu, *The Spirit of the Laws,* p. 81 (VI.8).

19. Montesquieu, *The Spirit of the Laws,* p. 81 (VI.8).

"A very ingenious and instructive view of the progress of nations, from the least perfect states of political union to that highly perfect state of it in which we live, may be found in Lord Kaims's *Historical Law Tracts*."[20] The point here, though, is not that Montesquieu should be supposed to have been an influence on Kames. Rather, both were part of a larger, pan-European, movement for the reform and modernization of criminal law.[21]

In *Historical Law-Tracts* Kames gives full expression to a long-standing antipathy to the feudal system. In the aftermath of the Jacobite rebellion of 1745 one key feudal form, the "regality," or hereditary jurisdiction, was completely and finally abolished. In Tract VI Kames described the process whereby the regalities had in fact already, and naturally, ceded power as regards both civil and criminal matters to centralized and professional courts. This meant that, in truth, the Hereditable Jurisdictions Act of 1746 was "no harsh measure" (222). It is worth remembering that in a letter to Montesquieu of April 1749, Hume pointed to this act as proof of the truth of Montesquieu's "novel and striking" remark that "In order to favour liberty, the English have removed all the intermediate powers that formed their monarchy. They are quite right to preserve that liberty; if they were to lose it, they would be one of the most enslaved peoples on earth."[22] "The consequences that you predict would certainly take place," Hume wrote, "if there were a revolution in our government"—if, in other words, Britain's monarchy were to take a despotic turn.[23] Adam Ferguson shared Hume's concern about the dangers inherent in the stripping away in Britain of the intermediate powers that, on Montesquieu's analysis of monarchy, provided the surest protection of the individual from the power of the crown.[24] So did Dalrymple. Kames did not. He can have had no sympathy for the implicit case made by Montesquieu in Books 29, 31, and 32 of *De l'Esprit des Lois* for the need, even in a modern monarchy, for the preser-

20. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government,* ed. J. H. Burns and H. L. A. Hart (Oxford: Clarendon Press, 1977), p. 430.

21. Lieberman, "Legal Needs of a Commercial Society," p. 215.

22. Montesquieu, *The Spirit of the Laws,* pp. 18–19 (II.4).

23. J. Y. T. Greig (ed.), *The Letters of David Hume,* 2 vols. (Oxford: Clarendon Press, 1932), vol. i, p. 134.

24. See Iain McDaniel, *Adam Ferguson in the Scottish Enlightenment: The Roman Past and Europe's Future* (Cambridge, Mass.: Harvard University Press, 2013).

vation of a traditional, which is to say feudal, balance of power between the king and the other powers of the state. Kames might have agreed, instead, with Smith's assertions in his lectures on jurisprudence that, under feudalism, "the nobility are the greatest opposers and oppressors of liberty that we can imagine," and that "[t]hey hurt the liberty of the people even more than an absolute monarch."[25]

Wherever he saw the continuing presence of the spirit of feudalism in Scottish law, Kames saw something to be reformed. The feudal system, he writes in the tract on property, "was a violent and unnatural system, which could not be long supported in contradiction to love of independence and property, the most steady and industrious of all human appetites" (141). But the spirit of feudalism had penetrated deep into Scottish property law, in ways that were often only apparent to the judge whose business it was to decide hard cases concerning land and the various kinds of rights pertaining to it. Through the process of the normalization of the ownership and inheritance of land, the substance of feudal law might have been reduced to nothing. Yet the forms remained in place. For example, a purchaser of land, as Kames puts it in the tract on "Securities upon land for payment of debt," "contrary to the nature of the transaction, was metamorphosed into a vassal," and so was subjected to a variety of duties and fees (170). "When the substantial part of the Feudal law has thus vanished," Kames observes, "it is dismal to lie still under the oppression of its forms, which occasion great trouble and expence in the transmission of land-property" (171). In several tracts Kames mounted a sustained attack on ways in which the continuing influence of feudal forms upon the law of inheritance in Scotland made it difficult, sometimes to the point of impossibility, for creditors to extract repayment of loans from the heirs of debtors. The spirit of feudalism was incompatible with an owner of land using that land as a means of raising loans, and thus the preservation of feudal legal forms was incompatible with one of the driving forces of a commercial society. It made borrowing more risky than it needed to be, and more expensive. There was reason to hope, now that the benefits of easy borrowing and low

25. Adam Smith, *Lectures on Jurisprudence,* ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Clarendon Press, 1978), p. 264.

interest rates were obvious, that the dead hand of feudal forms would be felt less and less in legal disputes between debtors and creditors, and in the decisions of the Court of Session in particular. And yet, astonishingly, the great landowners had managed to arrest this natural process, with the passing in 1685 of a statute enshrining in law the right of entail.

Montesquieu's view was that entails and other forms of "substitution" were appropriate to a monarchy but not to a republic. They were a means of keeping property in families, and were thus a means of reinforcing the "dignity" of noble and his fief, on which, in turn, the dignity of the monarch depended. In a republic, by contrast, all possible measures should be taken to restore fortunes to equality by the division of inheritances. Substitutions, he noted, "hamper commerce."[26] This was also Kames's principal objection to entails. The very idea of an owner of land determining the line of succession for generations to come had its origin in the rights of a feudal superior. It had no basis, Kames insisted, in common law. It was a perversion of the perfectly natural sentiment of ownership, in the form of an attempt to maintain ownership forever, even after the death of the immediate heir. "No moderate man can desire more than to have the free disposal of his goods during his life," Kames argued, "and to name the persons who shall enjoy them after his death" (154–55). No one in ancient Greece or Rome had imagined the rights of property to extend any further. It is interesting to contrast Kames's unequivocal opposition to entails with the position developed by Dalrymple in his pamphlet *Considerations upon the Policy of Entails* (1764). Having argued against statutory abolition of entails in his earlier book on feudal property, Dalrymple now made a positive case for their preservation, and did so in language that was redolent of Montesquieu's description of moderate monarchy. "[T]hat state of despotism is, of all others, the most irretrievable," he intoned, "where the antient families of a country, being divested of their estates, there is no rank in the State, except that of Prince and Tenant; terms which will soon be converted, if not in name, yet in effect, into those of Master and Slave."[27] It is tempting to suggest that, in the disagreement between Kames and

26. Montesquieu, *The Spirit of the Laws,* pp. 54–55 (V.8–9).

27. John Dalrymple, *Considerations upon the Policy of Entails in Great Britain* (Edinburgh: 1764), p. 62.

Dalrymple about entails, we see a disagreement as to whether, in Montesquieu's terms, Britain was fundamentally a republic or a monarchy. In truth, though, and needless to say, Kames was no republican. His criticism of feudal legal forms was grounded, rather, in a sober pragmatism about what Scotland needed to do to have a chance of improving itself and competing with England on more or less equal commercial terms.

"I am afraid of Kames' *Law Tracts,*" Hume wrote to Adam Smith in April 1759. "A man might as well think of making a fine sauce by a mixture of wormwood and aloes, as an agreeable composition by joining metaphysics and Scottish law."[28] Despite the book's merits, Hume continued, few people would take the trouble to read it. Hume seems to have been wrong about that. *Historical Law-Tracts* went through four editions (new and corrected editions were issued in 1761, in 1776, and, posthumously, in 1792), and the tracts on criminal law and property were translated into French in 1766.[29] William Robertson reviewed it in glowing terms in *The Critical Review.* Kames, according to Robertson, showed that it was possible to write on law in a more rational and instructive manner than had usually been managed hitherto. "[T]hough researches of this kind be, necessarily, intricate and profound," Robertson added, "our author writes with remarkable perspicuity, and in a vigorous and manly stile. A subject seemingly dry and abstruse becomes, in his hands, not only instructive but amusing."[30] *Historical Law-Tracts* was well received also by *The Monthly Review,* where, like Robertson, the reviewer gave particular attention to the tract on the history of the criminal law, "a subject of general import, and of the highest concern to every member of a free state; as the preservation of Liberty depends chiefly on the perfection of the laws in criminal cases." Despite the amount of technical discussion of Scottish law, the reviewer judges that

28. Greig (ed.), *The Letters of David Hume,* vol. i, p. 304.

29. *Essais Historiques sur les Loix, Traduits de l'Anglois, par Mr. Bouchand* (Paris: 1766). "L'immortel Montesquieu nous a donné l'esprit des Loix," the translator writes in the Introduction. "Voici un Auteur Ecossois, dont nous ignorons le nom, qui a tenté d'en equisser l'histoire. Son objet est de remonter à l'origine des Loix, sur les points de Jurisprudence les plus importans, & de tracer les changemens progressifs de ces Loix, dans les différens âges du monde & les différentes nations" (pp. v–vi).

30. William Robertson, review of *Historical Law-Tracts, The Critical Review* 7 (April 1759): 356–67, p. 358.

in the book taken as a whole "the Author discovers a thorough knowledge of human nature, and a very intimate and extensive acquaintance with History and Jurisprudence."[31] Bentham's approval of Kames's jurisprudence has been noted above. On the basis of his achievement in the *Law-Tracts,* Kames was invited to become a member of a "Society of Citizens" to be based in Berne with the aim of improving moral science and the science of legislation.[32] *Historical Law-Tracts* was also read with interest in revolutionary America.[33] John Adams endorsed Kames's critique of feudalism, and Thomas Jefferson ranked Kames with Blackstone as a legal authority. In the lectures he gave in the College of Philadelphia in the 1790s, James Wilson recommended his own program for the study of law in the following terms:

> It comes to you supported with all the countenance of and authority of Bacon, Bolingbroke, Kaims—two of them [i.e., Bacon and Kames] consummate in the practice, as well as in the knowledge of the law—all of them eminent judges of men, of business, and of literature; and all distinguished by the accomplishment of an active, as well as those of a contemplative life.[34]

There is recognition here of Kames's achievement in turning himself into a notably well-rounded man of law, expert not only in the law itself but also in much else pertinent to understanding law's function in a free society.

31. [Anon.], review of *Historical Law-Tracts, The Monthly Review* 21 (July 1759): 302–11, pp. 304, 303. *The Monthly Review,* however, lamented that, while Kames had adopted an "enlarged and liberal method of prosecuting legal investigations," "his doctrines are generally fallacious; and while he gives too great a scope to conjecture and to fancy, he is destitute of erudition, and discovers a propensity to adopt as his own the inventions of other men" ([Anon.], review of *A Collection of Curious Discourses Written by Eminent Antiquaries, The Monthly Review* 47 (July 1772): 361–65, p. 362). I am grateful to Silvia Sebastiani for drawing these reviews to my attention.

32. See Ross, *Lord Kames and the Scotland of His Day,* pp. 216–17.

33. For a general account of Kames's influence in America, see Rahmatian, *Lord Kames,* pp. 316–33.

34. Quoted in Rahmatian, *Lord Kames,* p. 329.

# EDITORIAL PRINCIPLES

## Text

This edition of *Historical Law-Tracts* is based on the edition published ten years after Kames's death:

*Historical Law-Tracts.* The Fourth Edition. With Additions and Corrections. Edinburgh: Printed for T. Cadell, in the Strand, London; and Bell & Bradfute, and W. Creech, Edinburgh. 1792.

This edition incorporates Kames's final alterations. It also incorporates the page numbers of the 1792 addition, inserted within angle brackets in the main body of the text.

Earlier editions are as follows:

*Historical Law-Tracts.* 2 vols. Edinburgh: Printed for A. Millar, at Buchanan's Head in the Strand; and A. Kincaid, and J. Bell, Edinburgh. 1758.

*Historical Law-Tracts.* The Second Edition. Edinburgh: Printed by A. Kincaid, His Majesty's Printer, for A. Millar in the Strand, London; and A. Kinkaid and J. Bell, Edinburgh. 1761.

*Historical Law-Tracts.* The Third Edition. With Additions and Corrections. Edinburgh: Printed for T. Cadell, in the Strand, London; and J. Bell and W. Creech, Edinburgh. 1776.

Major differences between the 1792 and earlier editions are indicated in footnotes to the text. The 1758 and 1761 editions are mostly identical, as are the 1776 and 1792 editions.

None of these four editions has the author's name on its title page. The table of contents was added in 1776. In 1758 and 1761, the title of every tract apart from Tract XIV begins with "History of . . . ." Thus in these

two editions, Tract I is "History of Criminal Law," Tract II is "History of Promises and Covenants," and so on.

## Annotation

Full references to all works cited by Kames are provided in the bibliography. Most of Kames's footnote references (shorter ones indicated by symbols: *, †, ‡, etc.; longer ones indicated by Arabic numerals within parentheses) are easy enough to make sense of. Where this is not the case, sufficient information (inserted within double square brackets) has been added to enable the reader to identify the passage that Kames refers to. A small number of footnotes (indicated by Arabic numerals) have been added to explain legal and historical matters likely not to be readily comprehensible to the nonspecialist.

Kames frequently cites Scottish and English, and British, statute law. He also regularly cites decisions of the Court of Session, and a variety of bodies of ancient British and continental European law. These citations can be pursued using the following reference works:

## *Statute Law of Scotland*

For the period beginning with the accession of James I in 1406 Kames would have used:

Glendook, Sir Thomas Murray of. *Laws and Acts of Parliament made by King James the First, [. . .], King Charles the Second who now presently reigns, Kings and Queens of Scotland.* Edinburgh, 1681.

The standard reference work is now:

*The Acts of the Parliament of Scotland, A.D. MCXXIV–MDCCVII.* Ed. Cosmo Innes and Thomas Thomson. 12 vols. London, 1814–52.

A complete list of acts of the Scottish Parliament to 1707, including a chronological table of statutes from 1424 to 1707, is provided by the database Records of the Parliaments of Scotland to 1707: http://www.rps.ac.uk