

PRINCIPLES OF EQUITY

NATURAL LAW AND  
ENLIGHTENMENT CLASSICS

Knud Haakonssen,  
*General Editor*



Henry Home, Lord Kames



NATURAL LAW AND  
ENLIGHTENMENT CLASSICS

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*Principles  
of Equity*

Henry Home, Lord Kames

*The Third Edition*

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Edited and with an Introduction by  
Michael Lobban

*Major Works of Henry Home, Lord Kames*

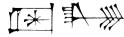
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## EDITOR'S INTRODUCTION

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Henry Home was born in 1696 at Kames in the Scottish borders, the son of an indebted laird. Having been educated at home by private tutors, he was sent at the age of sixteen to train for the lower branch of the Scottish legal profession by studying in the chambers of a writer to the signet (attorney). Attracted by the riches promised by the bar, within two years he resolved to become an advocate (counsel) and began to study both Roman law and the classics. He attended James Craig's private College of Civil Law in Edinburgh, where he composed for himself a collection that identified errors made by civilian writers. He continued to study hard after his admission to the Faculty of Advocates in 1723, and nine years later he applied unsuccessfully to fill the vacant professorship of Roman law in Edinburgh. By now, he had obtained a good and lucrative legal practice, particularly in commercial matters. Coming from a family which had both Jacobite and Hanoverian connections, Kames had been a zealous Jacobite when a young man. Although by the 1730s he had become "quite disentangled from Jacobitism"<sup>1</sup> and was appointed an Advocate Depute (or crown prosecutor) in 1737, his early Jacobite connections may have contributed to his slow advancement to the bench. It was not until 1752 that he was appointed to Scotland's highest civil court, the Court of Session, whereupon he took the title of Lord Kames, after the modest family estate which he had inherited in 1741. His later wealth derived not from that estate, but from his wife Agatha Drummond's inheritance of her family's estate at Blair Drummond in Stirlingshire in 1766. In 1763, Kames secured an additional appointment to the High Court of Justiciary, dealing with criminal cases, and remained active on that court until his death in 1782.

1. Geoffrey Scott and Frederick A. Pottle, *Private Papers of James Boswell from Malahide Castle* (privately printed, 1932), vol. 15, p. 270.

Kames is well known as one of the leading figures of the Scottish Enlightenment. He was a friend (as well as a cousin) of David Hume and a mentor and patron to Adam Smith, John Millar, and Thomas Reid. His interests were broad and he wrote influential works in a number of fields. His *Principles of Morality and Natural Religion* (1751) was a work of moral philosophy, which helped establish the Scottish Common Sense philosophy developed more fully by Reid. His *Historical Law-Tracts* (1758) and *Sketches of the History of Man* (1774) were works of historical sociology, which discussed the well-known 'four-stage theory' of social development. His *Elements of Criticism* (1762) was an important work on aesthetics. Late in life, he even wrote a work on husbandry, *The Gentleman Farmer* (1776). Besides such works on history, philosophy, and aesthetics, Kames also produced a number of works on legal topics. These included his *Essays upon Several Subjects in Law* (1732), *Statute Law of Scotland, abridged with historical notes* (1757), and *Elucidations Respecting the Common and Statute Law of Scotland* (1777). But the most important of his law works was his *Principles of Equity*, first published in 1760. Kames continued to work on it in later life, producing a second edition in 1767 and a third in 1778.

The book brought together his philosophical interests and his knowledge of the detailed doctrines of Scots law. This knowledge derived not only from his experience as an advocate and judge, but also from his work as a reporter, for he was particularly influential in the development of systematic law reporting in Scotland. Decisions of the Court of Session had long been collected privately and circulated in manuscript, but it was not until the 1680s that any collection was put into print.<sup>2</sup> In the early eighteenth century, the Faculty of Advocates appointed a number of individuals to develop an official collection of decisions, and some of their work found its way into print. At the same time, unofficial collections which would contribute to the systematization of reporting were made by other lawyers,

2. The first to appear was Sir James Dalrymple of Stair, *The Decisions of the Lords of Council & Session in the Most Important Cases Debate before Them, with the Acts of Sederunt . . . from June 1661 to July 1681* (Edinburgh: Andrew Anderson, 1683), with a second volume following in 1687. On the history of law reports in Scotland, see David M. Walker, *A Legal History of Scotland*, vol. V: *The Eighteenth Century* (Edinburgh: T. & T. Clark, 1998), pp. 5–17.

including the young Henry Home. In 1728, he published a collection of *Remarkable Decisions of the Court of Session from 1716 to 1728*, in which he sought to illustrate new points of law which had developed since the publication of Lord Stair's *Institutions*. In 1766, he published a further set of *Remarkable Decisions*, covering the years 1730 to 1752; and shortly before his death, another collection of *Select Decisions* appeared. More influential still was his work in assembling a dictionary of decisions, the first volume of which was published in 1741.<sup>3</sup> In it, he gathered together and abridged material from eight printed and seventeen manuscript collections, arranging it in a way to illustrate particular principles. Kames's two volumes were supplemented by two further volumes by Alexander Fraser Tytler published in 1770 and 1797. Together, these works laid the foundation for William Maxwell Morison's definitive thirty-eight-volume *Dictionary*.

By the time *Principles of Equity* was published, Kames had been on the bench for eight years. As a judge, he acquired the reputation of wanting to get through business as quickly as possible, to leave time for his other pursuits. He was not always popular, since he could be blunt or coarse, having a "fretfulness and liveliness in his expressions as an Ordinary, which did not suit with the gravity and dignity of a judge."<sup>4</sup> At the same time, if the nature of the case was such as to encourage metaphysical speculation, he could engage in subtle and abstract reasoning which might go over the heads of the audience. Kames was also sometimes unpopular with his colleagues for seeking to make innovations both in substantive law and procedure, in line with his view that law was mutable and susceptible to improvement with the progress of society. The tension is well captured in Boswell's ditty:

Alemoor the judgement as illegal blames,  
'Tis equity, you bitch, replies my lord Kames.<sup>5</sup>

3. *Decisions of the Court of Session, from its first institution to the present time. Abridged and digested under heads in the form of a dictionary*, 2 vols. (Edinburgh: Richard Watkins, Alexander Kincaid and Robert Fleming, 1741).

4. John Ramsay of Ochtertyr, quoted by Ian Simpson Ross, *Lord Kames and the Scotland of His Day* (Oxford: Clarendon Press, 1972), p. 132.

5. James Boswell, *The Court of Session Garland*, quoted in Ross, *Lord Kames*, p. 222. Boswell's other judge is Andrew Pringle, Lord Alemoor, a judge of the Court of Session and High Court of Justiciary from 1759 to 1769.

## Kames on Legal Development

Kames's legal and philosophical thought developed together. His view of law was informed by his ideas on the nature of human development and the influence of the moral sense. In turn, some of these ideas were developed in his elaboration of legal doctrines, both in his reports and in his treatises. For instance, in his first work, *Essays upon Several Subjects in Law*, he explained that an examination of human nature could show that rules of prescription were not merely the creature of positive law, but derived from natural feelings. Mankind, he argued, had an affection for property, which "leads us to bestow Care in preserving, Labour and Industry in improving what we thus consider as our own." This affection was "as much founded in Nature as that we bear to our Children, or any Affection whatever." Rules of prescription, according to which rights to land could be lost and gained over time, thus derived from the fact that the feelings of affection one had for one's property faded the more one was separated from it. Anyone who consulted "his own Heart about it" would find confirmation of this basis for prescriptive rights.<sup>6</sup>

Kames's theory of the moral sense, and its relation to law, was first set out in his *Principles of Morality and Natural Religion*. It was later restated in the preliminary discourse to the second edition of *Principles of Equity* and then included in the *Sketches*. According to his theory, the principles of morality—or the law of nature—were not to be found in abstract reason but in the facts of human nature. This nature "is made up of appetites and passions, which move us to action, and of the moral sense, by which these appetites and passions are governed."<sup>7</sup> Unlike animals, man was endued with a conscience "to check and control his principles of action, and to instruct him which of them he may indulge, and which of them he ought to restrain."<sup>8</sup>

6. "Observations upon Prescription," in *Essays upon Several Subjects in Law* (Edinburgh: R. Fleming & Co, 1732), pp. 101–3.

7. Henry Home, Lord Kames, *Essays on the Principles of Morality and Natural Religion* (3rd edition, Edinburgh: John Bell; London: John Murray, 1779; edited by Mary Catherine Moran, Indianapolis: Liberty Fund, 2005), p. 40.

8. *Ibid.*, p. 41.

While Kames's view of the moral sense built on the work of Shaftesbury and Hutcheson, he considered that these writers had not fully explored the nature of duties and justice in a way that would provide principles to guide human actions. In Kames's view, the moral sense taught a distinction between duty and benevolence. The moral sense dictated—as a matter of fact confirmed by everyone's experience—that actions directed at harming others were wrong and that people were consequently under a duty not to perform them. Equally, it taught that people were under a duty to be grateful to their benefactors and to perform their engagements. These "primary virtues" were essential to society: since society could not subsist without them, they "are objects of the foregoing peculiar sense, to take away all shadow of liberty, and to put us under a necessity of performance." Kames argued, against Hume, that the sense of justice which taught these duties was naturally universal, not artificial as argued by his kinsman. Anyone who harmed another or invaded his property, or who failed to keep his positive promises, experienced remorse and felt that he merited punishment for breaching a duty. By contrast, the virtues of benevolence or generosity, which were not "so necessary to the support of society," were regarded by the moral sense as "secondary." They were a matter of choice rather than compulsion, and were "left upon the general footing of approbatory pleasure."<sup>9</sup> Against Shaftesbury, he argued that there was no principle of universal benevolence. While the principles of justice were enforced by effective natural sanctions, universal benevolence could not be made into a strict duty, since the limited abilities and capacities of man were unsuited to it. However, Kames also argued that benevolence could become a duty in certain circumstances. The stronger the connection between two parties, the greater was the impulse to benevolence. Where the connection was a close one—as between parent and child—benevolence could become a duty, since neglecting to act would be "attended with remorse and self-condemnation."<sup>10</sup> But the more distant the connection, the weaker the sense of duty.

Kames also argued that the moral sense developed with the progress

9. *Ibid.*, pp. 33, 35–36.

10. *Ibid.*, p. 57.

of society. The law of nature was not stationary, but “must vary with the nature of man, and consequently refine gradually as human nature refines.”<sup>11</sup> The four-stage theory of human development played a prominent role in Kames’s views of both social and legal development.<sup>12</sup> He argued that in his original state, man was ruled more by his appetites and passions than by general principles which could be derived from the moral sense. Hunter-gatherer societies had only the most limited notion of property—that a man who caught prey could use it—and no notion of contracting. But since man was not designed to be an animal of prey, this precarious life was not suitable to his nature, and he progressed naturally to the pastoral, agricultural, and finally commercial stages of society, where the respect for property and fidelity to promises which were part of the moral sense could become more cultivated. At the same time, as societies progressed, the legal concepts of property and contract became ever more refined.

With this social and moral advance, the number of duties enforced by law increased, as the boundary between duty and benevolence changed. Municipal law, he noted, was concerned only with whether a man transgressed the regulations necessary for the preservation of society; it was not concerned with whether or not he was virtuous. One reason for this was that municipal law had to be reducible to precise and clear rules, which could be applied in general. Only matters which could be reduced to rules could be regarded as duties which were enforced as a matter of justice. The duty to be benevolent could not usually be reduced to a rule, since the degree of benevolence called for depended too much on particular circumstances. Nonetheless, Kames argued, in some cases, the “duty of benevolence arising from certain peculiar connections among individuals” could be made into a precise rule. In such cases, “benevolence is also taken under the authority of the legislature, and enforced by rules passing commonly under the name of the law of equity.”<sup>13</sup>

In the *Principles of Equity*, Kames aimed to explain how equity worked over time to convert what were duties of benevolence into duties of justice.

11. *Ibid.*, p. 65.

12. See his exposition in *Historical Law-Tracts*, 2 vols. (Edinburgh: Millar, Kincaid and Bell, 1758), vol. 1, pp. 77–79 (note).

13. *Essays on the Principles of Morality and Natural Religion* (Liberty Fund ed.), p. 61.

In it, he argued that as societies progressed, benevolence became “a matter of conscience in a thousand instances, formerly disregarded.”<sup>14</sup> This was something to which a court of common law, which dealt with the ordinary duties of justice, was blind. However, a court of equity was able to recognize this development, and to intervene in “remarkable cases” when it perceived from the circumstances that the duty was “palpable.” The court of equity thus worked to help convert the duty of benevolence which had refined over time into a duty of justice. It “commences at the limits of the common law, and enforces benevolence 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.”<sup>15</sup> Over time, as case law developed, judges in equity became more acute at making distinctions and developed these duties in a more systematic way. Once a rule in equity had become fully established in practice, it became part of the fixed rules of common law. This meant that the borderline between common law and equity was flexible: the task of a court of equity was to recognize, refine, and incorporate new rules recognized by the moral sense.

### The Nature of Equity

The *Principles of Equity* was the fullest elaboration of Kames's theory of legal development. Yet it was not really a book of legal philosophy, but a practical work, aimed at an informed legal audience. Although a book primarily about Scottish law, it was written for a legal audience throughout Great Britain. In the preface to the *Historical Law-Tracts*, he stated that it was unfortunate that the different parts of the kingdom were ruled by different laws. “A regular institute of the common law of this island, deducing historically the changes which that law hath undergone in the two nations, would be a valuable present to the public,” he noted, “because it would make the study of both laws a task easy and agreeable.”<sup>16</sup> He added that one man could not do it alone, but that such a work would both help

14. *Principles of Equity*, below, p. 21.

15. *Ibid.*, below, p. 23.

16. *Historical Law-Tracts*, vol. 1, p. xiv.

bring about a more effective union and improve Scots law. The *Principles of Equity* was in many ways his contribution to this project, for in it he aimed to treat one aspect of the law and set out a general treatise which drew on the case law of both countries.

The very project of writing a treatise on equity which would address legal audiences on both sides of the border was highly ambitious, since it raised questions about what was meant by *equity*. The classical definition was to be found in Aristotle's *Nicomachean Ethics*,<sup>17</sup> according to which it was sometimes necessary for the rules of law to be adapted or modified in particular cases where a strict adherence to a rule would lead to injustice. Yet neither English nor Scots lawyers argued that equity could be used simply to set aside unjust laws. In the words of Kames's contemporary Lord Bankton, the Court of Session had no equitable power to give relief "where the prescription of the law is clear, and yet happens to fall very hard in any particular case."<sup>18</sup> In such cases, it was for the legislature to intervene.

English writers generally saw equity in jurisdictional terms. It was associated with the Court of Chancery,<sup>19</sup> which had an equitable jurisdiction wholly denied to courts of common law. Although there had been a famous clash between the courts of common law and the Chancery in 1616,<sup>20</sup> writers on equity accepted Christopher St. German's sixteenth-century view that the Lord Chancellor's jurisdiction in equity did not stand in opposition to the common law and that his conscience should be guided by the law. The role of the Chancery was to provide a remedy where the common law courts could not do so, due to the nature of their procedure. In England, the procedure used in the common law courts was wholly

17. Aristotle, *The Nicomachean Ethics*, trans. D. Ross, rev. L. Brown (Oxford: Oxford University Press, 2009), pp. 98–99 (1137a–1138a).

18. Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights*, 3 vols. (Edinburgh: Fleming for Kincaid & Donaldson, 1751–53), vol. 3, p. 94.

19. The court of Exchequer had a jurisdiction over both common law and equitable matter, but the two sides of the court were distinct and operated with different procedures. See W. H. Bryson, *The Equity Side of the Exchequer* (Cambridge: Cambridge University Press, 1975), and H. Horwitz, *Exchequer Equity Records and Proceedings, 1649–1841* (London: Public Record Office, 2001).

20. On this, see especially J. H. Baker, "The Common Lawyers and the Chancery: 1616," in his *The Legal Profession and the Common Law: Historical Essays* (London: Hambledon Press, 1986), pp. 205–29.

different from that used in the Chancery. Common law procedure was an adversarial one, in which parties set out their disputes in pretrial pleadings which refined the matter to a single point. A jury would then find for one party or the other on the question put to them and award damages. By contrast, the procedure used in the Chancery was more inquisitorial. Cases were commenced with a bill explaining the plaintiff's claim and demanding an answer from the defendant. It was this procedure which gave the court its jurisdiction over matters of trust, fraud, and confidence. For the Chancery's procedure allowed it to probe the consciences—or knowledge—of the parties in a way not possible at common law. It also offered a more flexible and discretionary set of remedies. By the eighteenth century, the equitable jurisdiction of the Court of Chancery had become increasingly settled, with the court following rules and precedents which had created a body of doctrine over time.

By contrast, the Scottish Court of Session had both a “common law” and an “equitable” jurisdiction. Since this court used an inquisitorial procedure taken from the Romano-Canonical tradition, there was no need for a separate court to explore the parties' consciences and administer equity. At the same time, in Scotland, only the Court of Session had a jurisdiction over equity: inferior courts were limited to matters of common law. What, then, was this “equity” which the highest court applied? Scottish writers spoke of it as “the *nobile officium* of the judges,” a power which was “inherent in the supreme judicatory of every state.”<sup>21</sup> According to John Erskine, this power allowed the court “to proceed by the rules of conscience, in abating the rigour of the law, and in giving aid, in the actions brought before them, to those who can have no remedy in a court of law.” The notion of the *nobile officium* derived from civilian teaching dating back to Bartolus of Sassoferrato (1313–57), who distinguished between the “mercenary office” (*officium mercenarium*) of a judge, by which was meant his ordinary power, and his “noble office” (*officium nobile*), which connoted his extraordinary power. When exercising the former power, the judge strictly followed the forms of the law.

21. John Erskine, *An Institute of the Law of Scotland*, 2 vols. (Edinburgh: John Bell, 1773), vol. I, p. 44 (book I, tit. iii, sect. 22).

When exercising the latter, he acted on his own initiative and by his own authority.<sup>22</sup>

In the late seventeenth century, Sir George Mackenzie associated this power with “Arbitrary Actions wherein the Judge is tied to no particular Law.” It operated “in opposition to that *officium ordinarium & mercenarium*; wherein he is obliged to follow the *will of the Contractors* precisely, & *hoc officium mercenarium Judex nunquam impertit nisi rogatus.*”<sup>23</sup> This discretionary power allowed the court to provide remedies which parties could not demand of right, but where the court’s intervention was needed to prevent injustice. For instance, it was used by the Court of Session to allow creditors to attach a debtor’s property to secure a debt not yet due, if the creditor was in danger of losing his money by the threatened flight of the debtor. It also allowed the court to set aside fixed procedural rules which operated at common law.<sup>24</sup> In the seventeenth century, the *nobile officium* was associated with the court’s relaxation of its rules of procedure which required parties to obtain a decision on points of law raised by the alleged facts, before going to proof on those facts. In place of this procedure, the court used its discretion to allow mixed questions of fact and law to proceed, so that the court would pronounce the law subsequently on the basis of facts which had emerged in further investigation. This procedure allowed the court in effect to adapt the law to the particular circumstances of individual cases.<sup>25</sup>

22. See the discussion in J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford: Hart, 2007), p. 486.

23. Sir George Mackenzie, *The Institutions of the Laws of Scotland* (Edinburgh: John Reid, 1684), pp. 343–45 (part 4, tit. 1). [And the judge never exercises this mercenary office unless asked.]

24. For example, it might deviate from the standard rules of evidence. As Erskine put it, “they frequently ordain *ex officio* a party to be examined, though his adversary, who declines referring the matter in issue to his oath, has no title to insist for such examination.” Erskine, *Institute*, vol. 1, p. 44 (book I, tit. iii, sect. 22). In his *Dictionary of Decisions*, Kames illustrated the exercise of the *nobile officium* by reporting a case where the judges, having pronounced an act before answer, admitted witnesses, otherwise exceptionable, to obtain as much evidence as possible of fraud, “reserving to themselves, at advising, what it should operate.” Kames, *Dictionary*, vol. 1, p. 498 (citing *Scot contra Fowler*, 3 Dec. 1687, from Fountainhall, 487).

25. See Ford, *Law and Opinion*, p. 490. The normal procedure was for litigants to have questions of law settled on the supposition that the facts alleged by the pursuer

The court also had the power by its *nobile officium* to introduce new rules to overcome imperfections in the law. There was some debate over how far this extended. Lord Bankton illustrated the power by referring to “a memorable instance” in 1725 when the Court of Session made an act of sederunt<sup>26</sup> to order the brewers of Edinburgh, who had entered a resolution to give up their trade, to give a security that they would continue to brew beer, on pain of imprisonment.<sup>27</sup> Some critics found this legislative power of the court to be alarming. James Boswell wrote a *Letter to the People of Scotland* in 1785, in which he described the *nobile officium* of the court as an “undefined arbitrary jurisdiction.”<sup>28</sup> He referred his readers to Gilbert Stuart, who had said that through its exercise, “the judicial powers usurp upon the legislative.” “It is in a wild hostility with our constitution,” Stuart added. “It is a Turkish jurisdiction in a country of liberty.”<sup>29</sup> Another writer attacked the Court of Session’s use of its *nobile officium* to make acts of sederunt which repealed or dispensed with statutes, or imposed taxes.<sup>30</sup> Yet if some pamphleteers found this power dubious, particularly when it was seen to usurp the role of legislation, most legal writers regarded it as a necessary means to allow new remedies to emerge to

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were true. The decision—or “acts of litiscontestation”—was followed by the proof. However, the court also allowed a procedure known as “acts before answer” in cases where law and fact were mixed, allowing the facts to be settled before the law was ruled on. Swinton claimed that by the late eighteenth century acts before answer “have now come in fashion to be pronounced almost in every case”: John, Lord Swinton, *Considerations concerning a proposal for dividing the court of session into classes or chambers; and for limiting litigation in small causes; and for the revival of jury-trial in certain civil actions* (Edinburgh: Peter Hill, 1789), p. 83.

26. See glossary, “act of sederunt.”

27. Bankton, *Institute*, vol. 2, pp. 517–18. He noted that the act of sederunt “had the desired effect.” The episode was mentioned by Kames in *Equity*, 3rd ed., vol. 2, p. 93. For the act of sederunt, see *AS*, 280.

28. James Boswell, *A Letter to the People of Scotland, on the alarming attempt to infringe upon the articles of union, and introduce a most pernicious innovation, by diminishing the number of the lords of session* (London: Charles Dilly, 1785), p. 5.

29. Gilbert Stuart, *The History of Scotland, from the establishment of the Reformation, till the death of Queen Mary, to which are annexed, Observations concerning the public law and the constitution of Scotland*, 2nd ed., 2 vols. (London: J. Murray, 1784), vol. 2, pp. 102, 104.

30. John Martin, *An Inquiry into the State of the Legal and Judicial Polity of Scotland* (London: J. Johnson, 1792).

deal with imperfections in the common law, in areas which attracted little legislative attention.<sup>31</sup>

Kames explained his own understanding of the *nobile officium* in the *Historical Law-Tracts*. He associated it with a power to redress wrongs of all kinds. It worked in a way to uncover principles for unsettled subjects on which men were apt to disagree and judge by sentiment. As he put it,

Matters of law are ripened in the best manner, by warmth of debate at the bar, and coolness of judgment on the bench; and after many successful experiments of a bold interposition for the publick good, the court of session will clearly perceive the utility, of extending their jurisdiction to every sort of wrong, where the persons injured have no other means of obtaining redress.<sup>32</sup>

This meant that “all extraordinary actions, not founded on common law, but invented to redress any defect or wrong in the common law, are appropriated to the court of session,” exercising a jurisdiction denied to inferior courts.<sup>33</sup>

Kames himself explored this power of equity in his reports. For instance, in his report of the case of *Charles M'Kinnon contra Sir James M'Donald* in his *Select Decisions of the Court of Session from the Year 1752 to the Year 1758*, he commented on how a new rule regarding which heir could take charge of a deceased person's estate had emerged “in the famous case of Sir George M'Kenzie's entail.” The new rule developed by the judges, he commented, “was a new exertion of the *nobile officium* in order to remedy many hardships, and even injustice that must arise in this case, from the aforesaid rule of succession established at common law.” Kames proceeded to explain to readers the reason for the rule, and to make a commentary on what he felt were the consequences of the rule.<sup>34</sup> In his

31. Bankton (*Institute*, vol. 2, p. 517), for instance, gave as an example “the case of adjudications in implement, introduced by authority of the court of session, to complete a party's right to lands.” For such adjudications, see glossary, “adjudication in implement.”

32. *Historical Law-Tracts*, vol. 1, p. 324.

33. *Historical Law-Tracts*, vol. 1, p. 329.

34. *Select decisions of the Court of Session, from the Year 1752 to the Year 1768. Collected by the Honourable Henry Home of Kames*, 2nd ed. (Edinburgh: Bell and Bradfute, 1799), 298–304. The case was also discussed in the *Principles of Equity*, below, p. 303.