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The Influence of Lord Kames (Henry Home) on some of the Founders of the United States

CONTENTS: 1. Introduction: Lord Kames and his Position in the Scottish Enlightenment - 2. Kames's Views on the Political Situation of the American Colonies - 3. What are the Reasons for Kames's Relevance to some of the Founders of the United States? - 4. Benjamin Franklin - 5. John Adams - 6. Thomas Jefferson - 7. James Wilson - 8. Conclusion - Bibliography

ABSTRACT: The jurist, judge, philosopher and legal historian Henry Home, Lord Kames (1696-1782) was one of the principal representatives of the Scottish Enlightenment. He also shaped considerably the thinking of some of the founders of the United States, Benjamin Franklin, John Adams, Thomas Jefferson and James Wilson. Franklin exchanged ideas with Kames about art and American affairs. For Adams, Kames was an authority on law and legal history, with a singularly critical stance towards the traditional feudal system. For Jefferson, Kames was an authoritative writer on law and a principal influence in the shaping of Jefferson's own moral philosophy. Wilson made Kames a role model for young lawyers in a new American spirit. Kames's thought has influenced these four founders of the United States more substantively than has commonly been assumed.

KEYWORDS: Lord Kames, Founders of the United States, Scottish Enlightenment

1. Introduction: Lord Kames and his Position in the Scottish Enlightenment

The jurist, judge, philosopher and legal historian Henry Home (1696-1782) who took the title Lord Kames when he was raised to the Bench of the Scottish Court of Session in February 1752¹ was one of the principal figures, and one of the principal makers, of the Scottish Enlightenment. It would be an exaggeration if one inferred from Adam Smith's generous statement "We must every one of us acknowledge Kames for our master"² that Kames were indeed the Father of the Scottish Enlightenment. If such an epithet is of any relevance, then it needs to be reserved for Francis Hutcheson³. But Kames was certainly a master for his *élèves* for some time, among these particularly Adam Smith, Thomas Reid and John Millar, and, to a limited extent, David Hume⁴. The fact that he was surpassed by his most famous pupils – in theory the greatest compliment for a teacher, although Kames may not have appreciated it in this way⁵ – should not lead to the conclusion that he was only a minor character and a stock figure in the tableau of the Scottish Enlightenment. The

¹ I. S. Ross, *Lord Kames and the Scotland of his Day*, Oxford 1972, pp. 117-118.

² Quoted in I. S. Ross, *Lord Kames*, cit., p. 97.

³ T. D. Campbell, "Francis Hutcheson: "Father" of the Scottish Enlightenment", in Campbell, Roy H. and Skinner, Andrew, S. (eds.), *The Origins and Nature of the Scottish Enlightenment*, Edinburgh 1982, p. 167.

⁴ I. S. Ross, *Lord Kames*, cit., p. 75-97.

⁵ James Boswell records that Hume said to him about Kames: "He is very fond of young people, of instructing them and dictating to them, but when ever they come up and have a mind of their own he quarrels with them". Quoted in I. S. Ross, *Lord Kames*, cit., p. 349.

blend of philosophy, law, legal history, sociology, anthropology and aesthetics in Kames's works is still of great interest today, and not only to the intellectual historian. Kames's work reaches from legal history especially in the *Historical Law-Tracts* (1758) and from applied legal theory in the *Principles of Equity* (1760), via moral philosophy in the *Essays on the Principles of Morality and Natural Religion* (1751), to a philosophical history and anthropology in the *Sketches of the History of Man* (1774), and to aesthetics and philosophy of art in the *Elements of Criticism* (1762). Adaptations of the last work served as textbooks in rhetoric in America well into the latter part of the nineteenth century, including in form of a "purged edition"⁶. These and several other works on law, legal history, education and agriculture made Kames one of the most prominent writers and intellectuals in the eighteenth century, and his works were read, discussed, and partly translated in France and in the German countries.

One will therefore not be surprised to discover that Kames's books were widely read and made an impact among the educated élite in America during the colonial period and during the first years after independence. As Kames was an important intellectual figure for colonial America, he also became a highly relevant author to some of the founders of the United States. Kames's biographers have always known that⁷, but there is as yet no research which has tried to examine in detail as to who among the founders was influenced by Kames in which way and by which of his works.

This article discusses Kames's influence on Benjamin Franklin, John Adams (later the second President of the United States), Thomas Jefferson (the principal draftsman of the Declaration of Independence and later the third President of the United States), and James Wilson (one of the first judges of the US Supreme Court). Kames's influence can obviously not be confined to these four individuals, but apart from the need to reduce the scope of enquiry to manageable proportions, these four personalities unquestionably had a central role in the making of the United States, also its intellectual framework. Furthermore, it seems that these four founders of the United States in particular read Kames's works extensively. Each of these men had an interest in different works by Kames, and, with the exception of Franklin, all were influenced by Kames in their formative years. Kames was a very prominent senior intellectual figure for them, 39 years older than Adams, 47 years older than Jefferson. The compact compendium of contemporary thought which much of Kames's work constituted was not only available during the right time, it was also intellectually more accessible than the more excellent works of those we regard as the greatest representatives of the Scottish Enlightenment today. David Hume made comparatively little impact with his philosophy, but his historical works enjoyed a wide reception in North America during Hume's lifetime. Adam Smith whose *Wealth of*

⁶ Henry Home of Kames, *Elements of Criticism*; revised, with omissions, additions, and a new analysis; edited by Rev. James R. Boyd, New York: A. S. Barnes & Burr, 1861, at pp. 3-4: "There seems to be no other work, even at this date, that is fitted to supply its place, and yet [it is not] ... free from some grave objections, that have served, in many instances, to prevent its adoption as a text-book, especially in female seminaries. ... Frequent omissions have been made ... where the matter was ... objectionable on account of its indelicacy".

⁷ W. C. Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and the History of Ideas*, The Hague 1971, pp. 217-219, I. S. Ross, *Lord Kames*, cit., pp. 218-219.

Nations appeared in 1776 arrived late for making a deep impression in the early years of the United States, although the American founders seemed to be among the first who read the *Wealth of Nations*⁸.

In this context the question becomes important: what does “influence” or “relevance” really mean in the context of intellectual history? Ideas characteristic of a period cannot necessarily be pinpointed to one single author, and even so, it may not have been that author who was influential, but another, often a writer of a pamphlet as a popularizing intermediary. For example, the reference to “unalienable rights” in the Declaration of Independence owes more to Rousseau than to Hutcheson (as has however been claimed⁹), but presumably most to John Cartwright’s pamphlet *American Independence* which appeared in 1774¹⁰, and similar publications which fuelled the discourse of the time and guaranteed an immediacy which texts of political theory would rarely muster. The case for the contribution of the Scottish Enlightenment to the thinking and political theories in early America has particularly been made in relation to the American Declaration of Independence in historical scholarship during the 1980s¹¹. Kames is occasionally mentioned in this discussion, but does not feature prominently. Not only is that an unusually narrow specialisation; the importance of Kames to Scottish Enlightenment thought also has been, and still tends to be, overlooked by scholars. His relevance, or even influence, is noteworthy.

First, the article deals with Kames’s views on colonial America (under 2.). That is followed by an explanation why Kames was relevant to some of the founders (under 3.). The next parts will deal with Kames’s relevance to Benjamin Franklin (under 4.), John Adams (5.), Thomas Jefferson (6.), and James Wilson (7.) individually.

2. Kames’s Views on the Political Situation of the American Colonies

Lord Kames had a keen interest in the American colonies, as many other representatives of the Scottish Enlightenment, like Hume¹² (who was in favour of

⁸ S. Fleischacker, “Adam Smith’s Reception among the American Founders, 1776-1790”, 59(4) *The William and Mary Quarterly. Third Series* (2002), pp. 897-924, at p. 897.

⁹ By G. Wills, *Inventing America. Jefferson’s Declaration of Independence*, Garden City, New York 1978, p. 231.

¹⁰ J. Cartwright, *American Independence. The Interest and Glory of Great Britain*, London 1774.

¹¹ Starting with G. Wills, *Inventing America*, cit., although this was preceded by a long historiography in this area, see D. W. Howe, “Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution”, 31(3) *Comparative Studies in Society and History* (1989), pp. 572-587, at p. 572.

¹² As one can see especially from Hume’s letters, see e.g. D. Hume, letter to the Earl of Hertford, 27 February 1766, *The Letters of David Hume*, ed. J. Y. T. Greig, II, Oxford 1932, pp. 18-23, reporting from a Parliamentary debate in London about the American Colonies; letter to William Strahan, 1 March 1774, *Letters*, II, cit., pp. 287-288, on Franklin’s role in relation to the Hutchinson letters; letter to Adam Smith, 8 February 1776, *Letters*, II, cit., p. 308, with the memorable comment: “By all Accounts, your Book [*Wealth of Nations*] has been printed long ago; yet it has never yet been so much as advertised. ... If you wait till the fate of America be decided, you may wait long. ... The Duke of Bucleugh [*recte* Buccleugh, for whom Smith was travelling tutor to France from 1764] tells me, that you are very zealous in American Affairs. My Notion is, that the Matter is not so important as is commonly imagin’d”.

American independence, but against a republican government¹³) and Adam Smith¹⁴. To some extent the development and conflicts of colonial America may have been a living laboratory for Kames's political and social theories on the evolution of the society and the State in its various forms. Kames put forward these theories rather late, in 1774 in his *Sketches of the History of Man*¹⁵ with a variable degree of originality and stringency, although he seemed to have worked on the *Sketches* for over twenty years¹⁶. Because of this late date of publication the *Sketches* could not have had a substantial impact on the discussions about the relationship between Britain and its American colonies, but they were relevant and were received with great interest in America around the time of independence. A shortened version of the *Sketches*, containing only six sketches, appeared in Philadelphia in 1776. This edition was also read by John Adams¹⁷.

In book two of the *Sketches* ("progress of man in society") there are several passages on politics and on economics and taxation, which deal with the American colonies. Kames was sceptical about American independence; in particular, he doubted the success of a federal union, and instead he foresaw a conglomerate of independent smaller American (republican) states in conflict. This prediction was obviously false, but the context in which Kames made this point is still interesting to note. The American colonies are an example within a theory about the progress of states "from small to great, and from great to small" in connection with the basic forms of government. Small states are more suitable to having a republican government, Kames postulates, while large states are more appropriately monarchies; however, great monarchies become weak because of luxury, riches and the ensuing corruption of morals. Hence "a part of a great state will be converted into many small states" which will choose a republican government¹⁸. Kames's philosophical-deterministic conception of the development of states in relation to their form of government is obviously indebted to Montesquieu: In chapters 16 and 17 of the eighth book of *De l'esprit des lois* Montesquieu discusses that "it is natural to a republic to have only a small territory", while "a monarchical state ought to be of a moderate bigness"¹⁹. Kames's argument also had predecessors in Jean Bodin²⁰ and Machiavelli's

¹³ J. G. A. Pocock, *Virtue, Commerce, and History. Essays on Political Thought and History, Chiefly in the Eighteenth Century*, Cambridge 1985, pp. 133, 135, 138, Livingston (1990: 133, 143).

¹⁴ See A. Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations*, eds Roy H. Campbell, Andrew S. Skinner (The Glasgow Edition of the Works and Correspondence of Adam Smith, II), Oxford 1976, book 4, chapter 7, pp. 591-631, especially on the monopoly of the colony trade and on taxation, and A. S. Skinner, "Adam Smith and America: The Political Economy of Conflict", in Richard B. Sher & Jeffrey R. Smitten (eds.), *Scotland and America in the Age of the Enlightenment*, Edinburgh 1990, pp. 148-162, at p. 148.

¹⁵ See also I. S. Ross, Lord Kames, cit., pp. 340-341, for some of Kames's comments on the American Colonies in the *Sketches*.

¹⁶ W. C. Lehmann, *Henry Home, Lord Kames*, cit., pp. 59, 149.

¹⁷ See discussion below under 5.

¹⁸ H. Home, Lord Kames, *Sketches of the History of Man*, Books 1-3, ed. James A. Harris, Indianapolis 2007, book 2, sketches 3 and 4, pp. 376, 387, 390.

¹⁹ Ch. de Montesquieu, *The Spirit of Laws*, ed. David Wallace Carrithers, Berkeley 1977, book 8, chapters 16 and 17, pp. 176-178.

²⁰ J. Bodin, *Six Books of the Commonwealth*, M. J. Tooley (ed.), Oxford 1955, book 4, chapter 1, book 6,

*Discorsi*²¹. Kames's deterministic idea of the development of the American colonies was, however, contrary to the true historical events²².

3. What are the Reasons for Kames's Relevance to some of the Founders of the United States?

There have been several reasons why Kames became a highly relevant author to some of the founders of the United States. The prolific nature of Kames's writing in an astonishingly great number of areas (though not always with equally high quality) played a significant role for his reception in North America. In some ways he was providing fairly orderly and portable "codifications" of large areas of knowledge of his time – law, moral philosophy, legal and social history, property and economic theory, education, aesthetic, rhetoric and letters, and agriculture. That was of much use in the intellectual outpost of civilization which colonial America then was. The Enlightenment man and *uomo universale* Kames served as a transmitter, and to some extent populariser, of eighteenth-century thought. Furthermore, he was not English, but Scottish, and that not only chimed with the Scottish and Protestant-Calvinist roots of many of the American settlers²³; it also made Kames an unsuspecting, and potentially even sympathetic, author during the growing political and economic tensions with England-dominated Britain which would lead to American independence in 1776. The fact that Kames was a figurehead of the Scottish Enlightenment and, as a Scottish judge, a member of the Scottish establishment, gave his books an increased authority, and that by no means applied to his legal works only.

All that made Kames attractive to several founders of the United States as well. Those founders who studied Kames were not collectively influenced by him, but individually, and also each of them by different works. Kames reached them during their individual training in their formative period, well before they entered the political arena. As Kames's works covered an unusually large variety of areas, each reader would pick out these works which served his interests most. Thomas Jefferson was here probably the reader with the broadest interest.

One notices a shift of emphasis away from Kames towards the end of the eighteenth century when one looks at the next generation in the early years of the United States. In moral philosophy, for example, Thomas Jefferson and John Adams read Kames, while Adams's son, John Quincy Adams, worked instead through Thomas Reid, the principal founder of Common Sense philosophy. The assigned

chapter 4, pp. 111, 119-122, 199-200.

²¹ N. Machiavelli, "The Discourses", in Peter Bondanella and Mark Musa (eds.), *The Portable Machiavelli*, New York 1979, book 1, chapter 2, book 2, chapter 4, book 3, chapter 9, pp. 175, 301, 381.

²² See also A. Hamilton, in *The Federalist No. 9* (November 21, 1787), A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, Garry Wills (ed.), New York 2003, pp. 44, 46-47, and J. Madison, in *The Federalist No. 14* (November 30, 1787), Hamilton, Madison, Jay, *The Federalist Papers*, cit., p. 74. Both contradict Montesquieu's thesis. See also below briefly under "John Adams".

²³ See D. W. Howe, *Scottish Enlightenment*, cit., p. 576, for the Scottish Enlightenment thinkers in general: "a self-conscious band of programmatic intellectuals indebted to a provincial Calvinist heritage they were trying to escape and seeking to enlist private wealth on the side of their country's public good".

reading for John Quincy Adams at Harvard was not Kames, but Thomas Reid²⁴ who was the more accomplished, more organized, more systematic philosopher than his predecessor Kames. In contrast to Reid, Kames was not an academic philosopher. However, Reid was perhaps perceived as the more boring of the two. John Quincy Adams noted in his diary: “3D. – Reading, Reid on the Mind. This author in some places pleases me very much; but in others he is disagreeable especially when he attempts to be humorous”²⁵. Kames did not seem to have featured at all in John Quincy Adams’s reading, nor did Hume, except for his *History of England*²⁶. Adam Smith appears, both his *Theory of Moral Sentiments*²⁷, and his *Wealth of Nations* – more precisely, there is a diary entry that John Quincy Adams had borrowed the second volume of the *Wealth of Nations*²⁸ (which deals mainly with the British colonies, state finances and state expenses for defence and justice as well as education of the public, and with taxes), but whether he worked through it is not certain. Generally, however, the next generation understandably settled for authors who would eclipse Kames intellectually, above all Hume and Smith, once these thinkers were established.

The founders of the United States did not share their common interest for Kames among each other. This does not come as a surprise. When the founders became politically active, they were not exactly a “band of brothers”, but formed alliances of convenience and otherwise often had tense relationships, to say the least. Adams’s comment about Benjamin Franklin as ambassador in Paris is well-known:

But you will form but an imperfect Idea after all of the Difficulties we have had to encounter, without taking into Consideration another Character equally selfish and interested, equally vain and ambitious, more jealous and envious, and more false and deceitful, I mean Dr. Franklin. ... His whole life has been one continued Insult to good Manners and to Decency. ... I can have no Dependence on his Word. I never know when he speaks the Truth, and when not²⁹.

One cannot expect much of an intellectual exchange under such circumstances, even if both parties were predisposed to it in principle. When relationships improved in later years, as between Adams and Jefferson, Kames was apparently no longer a subject of discussion. He does not appear in the correspondence between Adams and

²⁴ John Quincy Adams, *Diaries*, II: March 1786-December 1788, ed. Robert J. Taylor et al., Cambridge, MA and London 1981, July 13th, 1786, p. 64: “We finished with Locke this morning, and were told to begin next Quarter, in Reid”.

²⁵ John Quincy Adams, *Diaries*, II, cit., November 3rd, 1786, p. 121.

²⁶ John Quincy Adams, *Diaries*, II: November 1779-March 1786, ed. Robert J. Taylor et al., Cambridge, MA and London 1981, January 27th, 1782, p. 103.

²⁷ John Quincy Adams, *Diaries*, II, cit., November 17th, 1786, p. 127.

²⁸ John Quincy Adams, *Diaries*, II., cit., March 22nd, 1782, p. 115.

²⁹ Letter from John Adams to James Warren, April 13th, 1783, in H. C. Lodge, W. Warren, C. F. Worthington (1925), *Warren-Adams Letters. Being chiefly a correspondence among John Adams, Samuel Adams, and James Warren*, II, 1778-1814, Boston 1925 (The Massachusetts Historical Society: Collections, LXXIII) *Warren-Adams Letters*, p. 209. Also at: Massachusetts Historical Society, Microfilm Reel P-164, Warren-Adams Papers. Adams’s spelling is retained. Earlier, in a letter to James Warren of September 30th, 1775, Adams would say: “Dr. Franklin needs nothing to be said _ There is no abler or better American, that I know of -”, Massachusetts Historical Society, Microfilm Reel P-164, Warren-Adams Papers.

Jefferson, although both knew him well and had several of his works in their libraries – Jefferson almost all.

But not all founders were influenced by Kames. James Madison, for example, will not be considered here because he did not seem to have mentioned Kames (but Madison apparently owned a copy of Kames's *Historical Law-Tracts*³⁰). As a contrasting example, William Bradford wrote to Madison on 1 March 1773³¹ about Lord Kames's aesthetic rule that during each act of a theatre play the unities of place and time ought to be strictly observed, which Kames put forward in his *Elements of Criticism*³². Such references will not be followed up in the further discussion. Save for some exceptions, letters by persons addressed to the founders have not been considered either. That applies to letters addressed to founders who are dealt with here because Kames was relevant to them³³, as well as to those to whom he was apparently not, like Madison.

4. Benjamin Franklin

Personal Matters

Benjamin Franklin had a rather close personal relationship with Lord Kames, even a friendship, as it becomes clear from the sources³⁴. However, it seems that Kames influenced Franklin little substantively on the issues of social theory, legal history, law, constitutional matters and the position of colonial America in relation to England, or the question of possible independence from Britain, although the latter two matters were a subject of discussion between them³⁵. Franklin visited Kames in Scotland in 1759 in his role as the London Agent of the Province of Pennsylvania, and a second time, having travelled from Dublin, in 1771³⁶. Otherwise they remained in contact by

³⁰ S. Fleischacker, *Adam Smith's Reception*, cit., p. 899.

³¹ Letter from William Bradford to James Madison, 1 March 1773, J. Madison, *The Papers of James Madison*, I, eds. William T. Hutchinson and William M. E. Rachal, Chicago and London 1962, p. 81.

³² H. Home, Lord Kames, *Elements of Criticism*, Vols. I-III, ed. Robert Voitle, Hildesheim, New York, 1970 [1762], III, p. 291.

³³ E.g. letter from John Daly Burk to Thomas Jefferson, Amelia County, before 19 June 1801, Th. Jefferson, *The Papers of Thomas Jefferson*, Vols. XI, XII, XVI, XX, XXII, XXIV, XXVIII, XXX, XXXII, XXXIV, XXVII, XXXVIII, eds. Julian P. Boyd, Charles T. Cullen, John Catanzariti, Barbara B. Oberg, Princeton, NJ: Princeton University Press/Princeton and Oxford 1955, 1961, 1982, 1990, 2000, 2003, 2005, 2007, 2010, 2011, XXXIV (2007), p. 385, discussing that the vastness of the landscape of America, its relatively recent discovery, the manners of the Indians and the public spirit and struggle of the people during the revolution “give the poet all the advantages [for writing an epic poem] which Kaim's [sic] & Blair contemplated in an high antiquity”.

³⁴ E.g. Franklin's letter to Lord Kames, Coventry, Sept. 27, 1760, B. Franklin, *The Papers of Benjamin Franklin*, eds Leonard W. Labaree, William B. Willcox, Ellen R. Cohn, vols. VI, VIII, IX, X, XI, XII, XIV, XV, XVI, XVIII, XXI, XXXIX, New Haven and London 1963, 1965, 1966, 1967, 1968, 1970, 1972, 1974, 1978, 2008, IX, p. 231: “... we are disappointed in our Hopes of spending some more happy Days at Kaims, with you and your amiable Family”. Franklin's letter to Lord Kames, Portsmouth, Aug. 17, 1762, addresses Kames as “My dear Lord”, B. Franklin, *Papers*, cit., X, p. 147. Franklin's letter to Lord Kames, London, Feb. 25, 1767, addresses Kames as “My dear Friend”, B. Franklin, *Papers*, cit., XIV, p. 64. Franklin's letter to Mary Hewson, Passy, Jan. 27, 1783, B. Franklin, *Papers*, cit., XXXIX, p. 67, bemoaning Kames's death.

³⁵ E.g. Franklin's letter to Lord Kames, London, Jan. 3, 1760, B. Franklin, *Papers*, cit., IX, pp. 6-7.

³⁶ Franklin's letter to William Strahan, Edinburgh, Nov. 17, 1771, B. Franklin, *Papers*, cit., XVIII, p.

way of correspondence, however, most of Kames's letters to Franklin apparently no longer exist³⁷. Franklin wrote very little about his trips to Scotland. The only sources are notes and a few letters³⁸; in his unfinished *Autobiography* he mentions almost not at all his travels to Scotland³⁹ (including his honorary doctorate in law conferred by the University of St. Andrews in 1759⁴⁰). In particular, Kames does not appear anywhere in his *Autobiography*, but in October 1759 on his way back to England Franklin stayed with Kames whom he befriended⁴¹.

Virtually all sources referring to Kames are Franklin's letters to Kames. However, they contain little relevant material for the intellectual historian. They are about relating everyday information, the exchange of pleasantries and expression of gratitude for the hospitality enjoyed in Scotland⁴², about reports of his travels and other activities⁴³, about devices Franklin invented, in Kames's case notably the "Pennsylvanian Fireplace"⁴⁴ and Kames's complaint about his smoky fireplace in his house in Edinburgh ("I apply to you for a remedy as to an universal Smoke Doctor"⁴⁵), about the sending of some of Franklin's writings to Kames⁴⁶, and the

250. J. B. Nolan, *Benjamin Franklin in Scotland and Ireland 1759 and 1771*, Philadelphia 1938, pp. 14, 169-170; E. Wright, *Franklin of Philadelphia*, Cambridge, MA and London, p. 125; M. Atyah, "Benjamin Franklin and the Edinburgh Enlightenment", 150(6) *Proceedings of the American Philosophical Society*, (2006), pp. 591-606, at pp. 599-606, for some background information on Franklin's visit to Edinburgh.

³⁷ I. S. Ross, *Lord Kames*, cit., pp. 197, 200. There is one more substantial letter by Kames to Franklin (the "Smoke Doctor" letter), dated Feb. 18, 1768 (*American Philosophical Society*, Mss. B. F85, inventory 01, collection II, 113) and B. Franklin, *Papers*, cit., XV, pp. 50-51, see also B. Franklin, *Papers*, cit., IX, p. 5, note 4. On Franklin's fireplace device, see also Franklin's letter to James Bowdoin, London, Dec. 2, 1758, B. Franklin, *Papers*, cit., VIII, p. 194.

³⁸ J. B. Nolan, *Benjamin Franklin*, cit., pp. 4-5.

³⁹ A few passing comments in B. Franklin, *The Autobiography of Benjamin Franklin*, ed. Leonard W. Labaree *et al.*, 2nd ed., New Haven and London 2003, p. 119, and in Franklin's outline, B. Franklin, *The Autobiography*, cit., p. 270.

⁴⁰ J. B. Nolan, *Benjamin Franklin*, cit., pp. 15, 77-78. According to University Minutes of St. Andrews University (quoted in J. B. Nolan, *Benjamin Franklin*, cit., p. 15): "Conferred the Degree of Doctor in Laws on Mr. Benjamin Franklin famous for his writings on Electricity and appoint his diploma to be given him gratis, the Clerk and Arch Beadle's dues to be paid by the Library Questar".

⁴¹ B. Franklin, *Papers*, cit., VIII, p. 431, editorial note.

⁴² E.g. Franklin's letter to Lord Kames, London, Jan. 3, 1760, B. Franklin, *Papers*, cit., IX, pp. 6, 8-9; Franklin's letter to Lord Kames, London, May 3, 1760, B. Franklin, *Papers*, cit., IX, p. 103; Franklin's letter to Lord Kames, London, Sept. 27, 1760, B. Franklin, *Papers*, cit., IX, p. 231; Franklin's letter to Lord Kames, London, Oct. 21, 1761, B. Franklin, *Papers*, cit., IX, pp. 375-376: "Your invitation to make another Jaunt to Scotland, and Offer to meet us halfway *en famille*, was extremely obliging. Certainly I never spent my Time any where more agreeably, nor have I been in any Place, when the Inhabitants and their Conversation left such lasting pleasing Impressions on my Mind, accompanied with the strongest Inclination once more to visit that hospitable friendly and sensible People"; Franklin's letter to Lord Kames, Portsmouth, Aug. 17, 1762, B. Franklin, *Papers*, cit., X, p. 148, to give some examples.

⁴³ Franklin's letter to Lord Kames, London, June 2, 1765, B. Franklin, *Papers*, cit., XII, p. 158, on his passage to America in 1762 and his activities after his return.

⁴⁴ Franklin's letter to Lord Kames, London, Jan. 3, 1760, B. Franklin, *Papers*, cit., IX, p. 5. Franklin's letter to Lord Kames, London, Jan. 27, 1762, B. Franklin, *Papers*, cit., X, p. 28.

⁴⁵ Lord Kames's letter to Franklin, Edinburgh, Feb. 18, 1768, B. Franklin, *Papers*, cit., XV, pp. 50-51,

announcement of some of Franklin's planned works⁴⁷. At least one of Franklin's writings must have impressed Kames particularly, the "Parable against Persecution"⁴⁸, Franklin's parable of religious tolerance imitating the style of the King James Bible, which Kames printed first in his *Introduction to the Art of Thinking*, without acknowledging Franklin's authorship⁴⁹, and a second time in his *Sketches*, here stating Franklin as the author: "The following parable against persecution was communicated to me by Dr. Franklin of Philadelphia, a man who makes a figure in the learned world". Kames then reprints Franklin's "Parable", and comments, much in the spirit of the Enlightenment idea of religious tolerance: "The historical style of the Old Testament is finely imitated; and the moral must strike every one who is not sunk in stupidity and superstition. Were it really a chapter of Genesis, one is apt to think, that persecution could never have shown a bare face among Jews or Christians. But alas! that is a vain thought"⁵⁰.

Discussion of Kames's Works

In a few letters, however, Franklin discussed some of Kames's works he obtained from Kames himself. One of these is Kames's perhaps most important work on law, the *Principles of Equity*. This work has on occasion been regarded as an authoritative source of Scots law. In the opinion of some even today, it has earned Kames the status of an Institutional Writer of Scots law, although this view is not prevalent⁵¹. In a

and Franklin's reply letter to Lord Kames, London, Feb. 28, 1768, B. Franklin, *Papers*, cit., XV, pp. 60-62.

⁴⁶ Notably (1) the "Observations concerning the Increase of Mankind, Peopling of Countries", Franklin's letter to Lord Kames, London, Jan. 3, 1760, B. Franklin, *Papers*, cit., IX, p. 5; presumably also (2) the "Humorous Reasons for Restoring Canada", Franklin's letter to Lord Kames, London, Jan. 3, 1760, B. Franklin, *Papers*, cit., IX, pp. 5-6, where Franklin says that he sends Kames "some little sketches that have been printed in the Grand Magazine; which I should hardly own, did I not flatter myself that your friendly Partiality would make them at least tolerable"; (3) "The Interest of Great Britain Considered", Franklin's letter to Lord Kames, London, May 3, 1760, B. Franklin, *Papers*, cit., IX, p. 103; and (4) the "Parable against Persecution", Franklin's letter to Lord Kames, London, May 3, 1760, B. Franklin, *Papers*, cit., IX, p. 104, which Franklin only sent to Kames in September 1760. Franklin's letter to Lord Kames, London, Sept. 27, 1760, B. Franklin, *Papers*, cit., IX, p. 232.

⁴⁷ Especially *The Art of Virtue*, Franklin's letter to Lord Kames, London, May 3, 1760, B. Franklin, *Papers*, cit., IX, p. 104, but Franklin never completed or published the work. See also Franklin's letter to Lord Kames, London, Jan. 27, 1762, B. Franklin, *Papers*, cit., X, p. 28.

⁴⁸ On the editorial history of Franklin's well-known hoax and the possible Middle Eastern pedigree (Salomon Ibn Verga's *Historia Judaica* and *Bostān* by the Persian poet Sa'di) of this Parable, see B. Franklin, *Papers*, cit., VI, pp. 114-121, editors' note; for the text, *ibid.*, at 122-124. Franklin was initially reluctant to publish his "Parable", Franklin's letter to William Strahan, Philadelphia, Sept. 24, 1764, B. Franklin, *Papers*, XI, cit., p. 354: "I was always unwilling to give a Copy of the Chapter [i.e. the "Parable"], for fear it should be printed, and by that means I should be depriv'd of the Pleasure I often had in amusing People with it [i.e. by pretending it was really from the Old Testament]. I could not, however refuse it to two of the best Men in the World, Lord Kaims [sic] and Mr. Small ..."

⁴⁹ H. Home, Lord Kames, *Introduction to the Art of Thinking*, with a New Introduction by John V. Price, London 1993 [1775], pp. 246-248. Kames's printed version of the parable has a few slight differences and omits the last two sentences of the original, see B. Franklin, *Papers*, cit., VI, pp. 123-124.

⁵⁰ Kames, *Sketches*, cit., book 3, sketch 3, pp. 898-899. See also I. S. Ross, *Lord Kames*, cit., pp. 199-200.

⁵¹ On the assessment of the *Principles of Equity* and of Kames as an Institutional Writer by academics

letter of May 3, 1760, Franklin wrote to Kames about this work which appeared earlier that year:

I am now reading, with great Pleasure and Improvement, your excellent Work, the Principles of Equity. It will be of greatest advantage to the Judges in our Colonies, not only in those which have Courts of Chancery, but also in those which having no such Courts are obliged to mix Equity with the Common Law. It will be of the more Service to the Colony Judges, as few of them have been bred to the Law⁵².

Franklin then said that he had sent the book to one of the judges of the Supreme Court (probably William Coleman⁵³) in Pennsylvania, “where, as there is no Court of Chancery, equity is often mix’d with the Common Law in their Judgments”, as Franklin specified in a second, later letter to Kames⁵⁴. In that second letter Franklin also reported that this judge had replied in two letters, in the first the judge “seem’d to think something wanting” in the *Principles of Equity*, while in the second he questioned his own initial judgment. We do not obtain more detailed information about Franklin’s views on the *Principles of Equity*⁵⁵, but it is interesting to note that the issue of mixed or separate equity/common law courts concerned James Wilson as well, and also with reference to Kames’s *Principles of Equity*. Kames himself deals with the issue as follows: the boundary between the areas of equity and the common law always varies at different times and in different countries. For the purpose of the “science of jurisprudence” it is of great importance to be able to ascertain the boundary between equity and the common law, but in legal practice this can lead to hardship, as procedural mistakes about the jurisdiction of the courts inevitably happen. One cannot predict whether a plea will be put in equity or at common law. So a united jurisdiction is to be preferred, “so far at least, as that the court before which a claim is regularly brought, should be empowered to judge of every defence that is laid against it”⁵⁶.

Other works Franklin referred to in his letters were perhaps of greater personal interest to him: Kames’s *Introduction to the Art of Thinking*, which appeared for the first

and by the Scottish courts, see A. Rahmatian, “Introduction: Lord Kames and his Principles of Equity” in Home, Henry, Lord Kames (2011 [1778]), *Principles of Equity*, Volumes 1 and 2, Clark, New Jersey 2011 [1778], pp. I-LIX, at pp. XI-XV.

⁵² Franklin’s letter to Lord Kames, London, May 3, 1760, B. Franklin, *Papers*, cit., IX, pp. 103-104.

⁵³ B. Franklin, *Papers*, cit., IX, p. 104, note 6, editors’ note.

⁵⁴ Franklin’s letter to Lord Kames, London, Oct. 21, 1761, B. Franklin, *Papers*, cit., IX, p. 376.

⁵⁵ Franklin commented on the second edition of the *Principles of Equity* (1767) in his letter to Lord Kames, London, Feb. 25, 1767, B. Franklin, *Papers*, cit., XIV, p. 70: “I borrow’d at Millar’s the new Edition of your Principles of Equity and have read with great Pleasure the preliminary Discourse. I have never before met with any thing so satisfactory on the Subject”. Kames removed this “preliminary discourse on the principles of morality” in the third edition (1778) and published it in extended form in his *Sketches of the History of Man*, especially in book 3, sketch 2, Kames, *Sketches*, cit., pp. 701-789, and H. Home, Lord Kames, *Principles of Equity*, Volumes 1 and 2, with a New Introduction by Andreas Rahmatian, Clark, New Jersey 2011 [1778], “Preface to the Present [Third] Edition”, p. xii.

⁵⁶ Kames, *Principles of Equity*, cit., pp. 7, 29-30.

time in 1761⁵⁷, the *Sketches of the History of Man* (1774)⁵⁸, and the *Elements of Criticism*, published in 1762⁵⁹. After having read the *Elements of Criticism*, Franklin commented, “your excellent work ... in which I found great Entertainment, much to admire, and nothing to reprove”. But: “I only wish’d you had examin’d more fully the Subject of Music...”⁶⁰. What follows is a lengthy and interesting discussion about the aesthetics of music which can only be outlined here very briefly. Music is indeed not a strong point in the *Elements of Criticism*⁶¹. It is also characteristic of Kames that he places great emphasis on the examination of the external senses, seeing, hearing etc., but it is then only the visual sense which is discussed at length⁶², while the aural sense obtains scant recognition. One can also observe that in Thomas Reid’s Common Sense philosophy.⁶³ Music and the aural sense seemed not to have concerned the Scottish philosophers much. Franklin agrees with Kames that “Melody and harmony are separately agreeable and in union delightful”⁶⁴, but adds that the pleasure musicians derive from the contemporary music of the time is not the natural pleasure from harmony and melody, but the pleasure in the skill of mastering the instruments and performance (“... of the same kind with the Pleasure we feel on seeing the surprising Feats of Tumblers and Rope Dancers, who execute difficult Things”). Franklin then elaborates on the “Scotch Tunes” which in his opinion are compositions uniting melody and harmony: their melody is their harmony. The notes are in concord with the preceding notes, because of the harp accompanying the voice, as was the way in which these songs were originally composed. This requires natural simplicity, in contrast to elaborate ornamentation and the need of “the artificial Harmony of a Bass and other accompanying Parts”⁶⁵ (Franklin means here the *basso continuo* of Baroque

⁵⁷ Franklin’s letter to Lord Kames, London, Oct. 21, 1761, B. Franklin, *Papers*, cit., IX, p. 375: “... [In the *Introduction to the Art of Thinking*] you sow thick in the young Mind, the Seeds of Good Sense concerning moral Conduct ... Permit me to say, that I think I never saw more solid useful Matter contain’d in so small a Compass, and yet the Method and Expression so clear, that the Brevity occasions no Obscurity”.

⁵⁸ Franklin’s letter to Lord Kames, London, March 14, 1775, B. Franklin, *Papers*, cit., XXI, p. 523: “I congratulate you cordially on the Success of your last work. It does you great Honour. I hear it every where well spoken of ...”

⁵⁹ Franklin’s letter to Lord Kames, London, Jan. 27, 1762, B. Franklin, *Papers*, cit., X, p. 27, awaiting the publication of the *Elements of Criticism*; Franklin’s letter to Lord Kames, Portsmouth, Aug. 17, 1762, B. Franklin, *Papers*, cit., X, pp. 147-148, planning to read the *Elements of Criticism* on his passage to America.

⁶⁰ Franklin’s letter to Lord Kames, London, June 2, 1765, B. Franklin, *Papers*, cit., XII, p. 162. On Franklin’s invention of the glass harmonica, see E. Wright, *Franklin*, cit., pp. 127-128.

⁶¹ Kames, *Elements of Criticism*, op. cit., I, pp. 166-170. Reference is here made to the facsimile edition of the first edition of 1762 which is the edition Franklin read and commented upon; the differences between the first edition and the later editions Kames published during his lifetime are considerable.

⁶² H. Home, Lord Kames, *Essays on the Principles of Morality and Natural Religion*, ed. Mary Catherine Moran, Indianapolis 2005, part 2, essays 2 and 3, pp. 149, 165.

⁶³ Th. Reid, “An Enquiry into the Human Mind”, in Th. Reid, *The Works of Thomas Reid*, Vols. I and II, ed. William Hamilton, Edinburgh/London 1863, pp. 104-201; the visual sense is discussed in by far the longest chapter, *ibid.*, pp. 132-201.

⁶⁴ Kames, *Elements of Criticism*, cit., I, p. 166.

⁶⁵ Franklin’s letter to Lord Kames, London, June 2, 1765, B. Franklin, *Papers*, cit., XII, pp. 162-164.

music which was already fading around 1765). It would be worth exploring elsewhere whether Franklin's statement can be seen as a precursor of the early Romantic movement in music as from the 1770s⁶⁶.

Political Affairs

Remarkably little can be found on political affairs in the exchanges between Franklin and Kames. As has already been said, Kames was skeptical about possible independence of America, but had a sympathetic interest in American affairs. That may have cemented the friendship between Kames and Franklin who saw himself still as a moderate colonial subject of the British Crown at the time of his meetings with Kames⁶⁷: "No one can rejoice more sincerely than I do on the Reduction of Canada; and this, not merely as I am a Colonist, but as I am a Briton"⁶⁸. We can only speculate why there is not more material in Franklin's letters to Kames on the question of the relationship of colonial America to Britain: the principal existing letter of February 25, 1767⁶⁹ on this issue went astray, and Kames initially never received it; Franklin then sent a duplicate letter, probably made from a copy (that is still in existence) and sent that letter to Kames two years later (dated February 21, 1769⁷⁰). Tytler, Kames's first biographer who reprinted Franklin's letter in his biography of Kames (1814), claimed that the letter "was in all probability intercepted"⁷¹. In that letter Franklin stated, among other things:

I am fully persuaded with you, that a consolidating Union, by a fair and equal Representation of all the Parts of this Empire in Parliament, is the only firm Basis on which its political Grandeur and Stability can be founded. Ireland once wish'd it, but now rejects it. The Time has been when the Colonies might have been pleas'd with it; they are now indifferent about it; and, if 'tis much longer delay'd, they too will refuse it. ...

It is a common but mistaken Notion here, that the Colonies were planted at the Expense of Parliament, and that therefore the Parliament has a Right to tax them, &c. The Truth is, they were planted at the Expence of private Adventurers, who went over there to settle with Leave of the King given by Charter. ...

Scotland and Ireland are differently circumstanc'd. Confin'd by the Sea, they can scarcely increase in Numbers, Wealth and Strength so as to overbalance England. But America, an immense Territory, favour'd by Nature ... must become a great Country, populous and mighty; and will in a less time than is generally conceiv'd be able to shake off any Shackles that may be impos'd on her, and perhaps place them on the Imposers⁷².

⁶⁶ One may also examine whether, for example, Joseph Haydn's then popular folksong arrangements of Scottish songs he (and his assistant Sigismund Neukomm) made for George Thomson between 1792 and 1804 (Hob. XXXIa) follow this aesthetic ideal that Franklin postulated.

⁶⁷ E. Wright, *Franklin*, cit., pp. 122-123, 209-210.

⁶⁸ Franklin's letter to Lord Kames, London, Jan. 3, 1760, B. Franklin, *Papers*, cit., IX, pp. 6-7.

⁶⁹ Franklin's letter to Lord Kames, London, Feb. 25, 1767, B. Franklin, *Papers*, cit., XIV, p. 64.

⁷⁰ Franklin's letter to Lord Kames, London, Feb. 21, 1769, B. Franklin, *Papers*, cit., XVI, p. 48.

⁷¹ See on this matter (and the problem of dating the lost original letter) the editorial note to Franklin's letter to Lord Kames, London, Feb. 25, 1767, B. Franklin, *Papers*, cit., XIV, pp. 62-63.

⁷² Franklin's letter to Lord Kames, London, Feb. 25, 1767, Franklin, *Papers*, cit., XIV, pp. 65, 67-68, 69-70. See also discussion of Franklin's political views at that time in G. Stourzh, *Benjamin Franklin and American Foreign Policy*, Chicago 1954, pp. 96-100.

Although Kames did not mention Franklin by name, this information and Franklin's interpretation clearly had an impact on Kames's discussion of the American colonies within the chapter on the progress of States ("from small to great, and from great to small") in his *Sketches of the History of Man* (1774)⁷³.

Franklin and Kames also engaged in a conversation about the economic and financial situation in the American colonies after the Currency Act 1764 and the subsequent depreciation of paper money. (Kames's writings on commerce and money will be discussed in the section on John Adams below, since they feature in Adams's letters as well.) In his letter to Kames in 1769⁷⁴, Franklin probably also sent Kames his "Positions to be Examined"⁷⁵, but that is not entirely clear, because the relevant letter never reached Kames⁷⁶. In these "Positions to be Examined" Franklin deals with economic concepts from the mercantilists' and physiocrats' perspective, and in particular puts forward a labour theory of value⁷⁷. Kames would discuss some of these issues in his *Sketches of the History of Man* in 1774 (Book 1, sketch 3). Through his communications Franklin seems to have furnished Kames with material as a basis or evidence for Kames's economic theories. However, Franklin cannot strictly be seen as a predecessor of Kames in this regard; Hume's essays on money and interest undoubtedly had a more profound influence on Kames.

Both Franklin and Kames may not have regarded it advisable to discuss in their letters politically sensitive matters too extensively and may have preferred personal communication when this was possible: Franklin's repeated statements about his fond memories of his time with Kames may well have referred to discussions about political issues, too; after all, he kept providing Kames with his own pamphlets on American and British affairs⁷⁸. Obviously, some relevant letters are no longer extant; especially almost all of Kames's letters to Franklin are not.

It is not surprising that Franklin did not go beyond general complementary comments about Kames's central legal work, the *Principles of Equity*⁷⁹. Law was not his field, in contrast to John Adams and Thomas Jefferson.

5. John Adams

Adams's readings of Kames: Legal History and Feudalism

Unlike Benjamin Franklin, John Adams did not have any personal contact with Lord Kames which might have initiated his interest in Kames's works. Kames appears

⁷³ Kames, *Sketches*, cit., book 2, sketch 4, p. 395.

⁷⁴ Franklin's letter to Lord Kames, London, Jan. 1, 1769, B. Franklin, *Papers*, cit., XVI, p. 2.

⁷⁵ B. Franklin, *Papers*, cit., XVI, p. 107.

⁷⁶ Kames's letter to Franklin, Edinburgh, Jan. 21, 1769, B. Franklin, *Papers*, cit., XVI, p. 26. There were more exchanges of letters, some of which no longer appear to be extant.

⁷⁷ Especially points 5, 6 and 9, B. Franklin, *Papers*, cit., XVI, p. 108.

⁷⁸ E.g. Franklin's letter to Lord Kames, London, May 3, 1760, B. Franklin, *Papers*, cit., IX, p. 103, enclosing "The Interest of Great Britain Considered".

⁷⁹ Franklin procured the purchase of the *Principles of Equity* and the *Historical Law Tracts* for the Library Company of Philadelphia, Franklin's letter to Joseph Morris, London, Feb. 20, 1761, B. Franklin, *Papers*, cit., IX, p. 277.

to have left Scotland rarely and only in his youth⁸⁰, and John Adams never went to Scotland⁸¹. Yet, both of Kames's main biographers claim that Kames had given (or sent) a copy of his *Historical Law-Tracts*⁸² to John Adams⁸³. That is highly improbable. John Adams was 39 years Kames's junior, and that Kames would have sent a copy of his book to an obscure young New Englander before 1765 (this is the year when Kames appears in Adams's diary for the first time⁸⁴) is virtually inconceivable, unless Adams had sent a letter to Kames in this regard, of which (as far as I know) there is no indication. Even so, if Kames had really sent a copy of his book at Adams's request, that copy would surely have had a dedication by Kames or a note on the title page by Adams. I inspected John Adams's copy of the *Historical Law Tracts* in Boston Public Library which houses the John Adams library⁸⁵, and while the time of the edition would fit (second edition 1761) and the first (half-title) page is signed with "John Adams 1761" (so it seems he obtained the book soon after it appeared), there is only the addition on the title page "Henry Home, Lord Kaime" [sic] in handwriting in ink (the second edition still did not name Henry Home or Lord Kames as the author⁸⁶). But there is no dedication or note, nor is there any indication in Adams's diary about a correspondence with Kames. The same applies to the second book by Kames which became important for Adams, the *Essays upon Several Subjects Concerning British Antiquities* (first edition 1747)⁸⁷. Adams owned the third edition of 1763⁸⁸, and the title page is signed in black ink "John Adams"; also this edition does not state Kames as the author on the title page, only the "Introduction", dated 10th Nov. 1746, is signed with "Henry Home". Again, there is no dedication or comment which would indicate a more direct connection with Kames. There is no reason to assume a direct contact, if only by letters, between Adams and Kames.

What attracted Adams to Kames was primarily the scholarly treatment of the law, especially the discussion of the legal framework of feudalism in its historical

⁸⁰ In particular, Kames could not afford to go on a Grand Tour to Europe which was common for wealthier young men at his time. See W. C. Lehmann, *Henry Home, Lord Kames*, cit., pp. 7, 13.

⁸¹ Since Kames and Adams seemed to have had a similar temperament in many respects, any meeting, whether amicable or ill-tempered, would probably have left traces in the sources, but there are no indications.

⁸² Kames (Henry Home), *Historical Law-Tracts*, first edition 1758. In this article, reference is made to H. Home, Lord Kames, *Historical Law-Tracts*, 2nd ed., Birmingham, AL 1988, a facsimile reprint of the second edition of 1761, the same edition which Adams owned.

⁸³ W. C. Lehmann, *Henry Home, Lord Kames*, cit., p. 217, Ross (1972: 218). The same is also claimed by Fleischacker (2002: 899), probably following these two authors.

⁸⁴ J. Adams, *Diary and Autobiography of John Adams*, I: Diary 1755-1770, ed. L. H. Butterfield, Cambridge, MA 1962, January 24th, 1765, p. 251.

⁸⁵ Boston Public Library, John Adams Library, call no. Adams 262.16.

⁸⁶ As was common practice, also with regard to Kames's works, see R. B. Sher, *The Enlightenment and the Book: Scottish Authors and their Publishers in Eighteenth-Century Britain, Ireland, and America*, Chicago and London 2006, p. 153.

⁸⁷ Kames (until the third edition still: Henry Home), *Essays upon Several Subjects Concerning British Antiquities*, first edition 1747. In this article, reference is made to a facsimile reprint in 1993 of the second edition of 1749: H. Home, Lord Kames, *Essays upon Several Subjects Concerning British Antiquities*, London 1988 [1749].

⁸⁸ Boston Public Library, John Adams Library, call no. Adams 262.16.

development and its constitutional and political implications. On 22 August 1756 Adams noted in his Diary that he “completed a Contract with Mr Putnam, to study Law under his Inspection for two years”⁸⁹. Being apprenticed by a licenced lawyer was the only realistic route to become a lawyer in colonial America, as there were no law schools then and studying in Europe was unaffordable for most. A large part of the initial training was reading law treatises and being then examined by the master⁹⁰. Adams was determined to study law seriously, also with the interest of the scholar, not that of a practitioner only, and he carried on in this way after he had finished his apprenticeship two years later. He wrote on October, 5th 1758: “Few of my Contemporary Beginners, in the Study of the Law, have the Resolution, to aim at much knowledge in the Civil Law. Let me therefore distinguish my self from them, by the Study of the Civil Law, in its native languages, those of Greece and Rome”⁹¹. This learned approach to law would very much have met with Kames’s approval. It is likely that Kames’s insistence on the study of historical sources and mastery of Roman law “ad fontes” in the original language⁹² would later appeal to Adams as well as Kames’s distinctive philosophical, socio-historical and anthropological style. One of the books Adams studied in 1758 was “*A Treatise of Tenures*” by Baron Jeffrey Gilbert (1674-1726), which appeared posthumously⁹³: “... I am resolved to translate Justinian and his Commentators Notes by day light and read Gilberts Tenures by night till I am master of both ...”⁹⁴. Apparently he did not find it easy to work though the book but he tenaciously carried on⁹⁵. This theoretical legal and historical knowledge of the feudal framework would assist Adams greatly when he started thinking about the political and social implications of the colonial status of America particularly in relation to the controversies that surrounded the passing of the Stamp Act 1765⁹⁶.

Kames was a good author to consult if one wished to go beyond the technical law and explore the historical and sociological context in which it operated. Adams’s deeper interest in Kames seems to have originated from the “Sodalitas” meetings. Sodalitas was the name of “A Clubb of Friends”, consisting of three people, which was formed in January 1765 and which was “a private Association, for the study of Law and oratory”, as Adams noted in his diary⁹⁷. The members decided to read and discuss “The Feudal Law” and Cicero, and they also “suffered our Conversation to

⁸⁹ J. Adams, *Diary*, cit., August 22nd, 1756 (1962: 42).

⁹⁰ J. Ferling, *John Adams. A Life*, Oxford/New York 2010, pp. 20-21.

⁹¹ J. Adams, *Diary*, cit., October 5th, 1758, pp. 44-45.

⁹² Kames, *Historical Law-Tracts*, cit., “Preface”, pp. vi-viii, Kames, *Elucidations Respecting the Common and Statute Law of Scotland*, Introduction by John Valdimir Price, London 1993 [1777], “Preface”, pp. viii-x, I. S. Ross, *Lord Kames*, cit., pp. 21-23, W. C. Lehmann, *Henry Home, Lord Kames*, cit., p. 9.

⁹³ Lord Chief Baron Gilbert, *A Treatise of Tenures, in Two Parts*, London, 1738. This edition is the one Adams used and annotated (John Adams Library, Call no. Adams 253.15).

⁹⁴ J. Adams, *Diary*, cit., October 5th, 1758, p. 45.

⁹⁵ J. Adams, *Diary*, cit., October 9th, 10th, 1758: “Read in Gilbert. I read him slowly, but I gain Ideas and Knowledge as I go along, which I don’t always, when I read”, October 12th, 13th, 16th: “Read a few pages in Gilbert. I proceed very slowly”, October 17th, pp. 47-48, 50-51.

⁹⁶ M. I. Urofsky and P. Finkelman, *A March of Liberty: A Constitutional History of the United States, I: From the Founding Fathers to 1890*, New York, Oxford 2002, p. 49, J. Ferling, *John Adams*, cit., pp. 37-43.

⁹⁷ J. Adams, *Diary*, cit., January 24th, 1765, p. 251.

ramble... upon Ld. Kaims [sic], Mr Blackstone &c.”⁹⁸. On Thursday 24th January 1765, Adams noted:

We read the 3 first Titles of the feudal Law, and We read Gothofreds Notes and the We looked into Strykius for the Explanation of many hard words ... This Strykius wrote an Examen Juris feudalis ... His account of the original of the Consuetudines Feudorum is, that they were collected and written by Gerardus Niger, and Obertus, the Consulls of Milan. ... The Law of Inheritances in England originates in the feudal Law. Gilberts Tenures originate there. Robinsons [*recte*: Robertson's] History of Scotland gives the clearest account of the Feudal system they say. Ld. Kaims [sic] has given us the Introduction of the Feudal Law in to Scotland. – Q. What say the Law Tracts and Dalrymple on this subject?⁹⁹.

This passage gives interesting insights. Adams and his colleagues embarked on a serious study of the history and the doctrinal law of the feudal systems in England and Scotland. The reference to the “Feudal Law” is to a textbook or treatise, possibly a later print of Cujas’s edition of the *Libri Feudorum* in 1566¹⁰⁰. Thomas Craig’s *Jus Feudale* (first published in print in 1655)¹⁰¹, the influential treatise on feudalism in Scotland, can be ruled out, otherwise the contrasting comment on Robertson and Kames later as the Scottish authors would make no sense¹⁰². “Strykius” refers to the jurist Samuel Stryk (1640-1710), one of the principal representatives of the *usus modernus pandectarum* on the European continent¹⁰³. The comment about the *Consuetudines Feudorum* collected by Gerardus Niger and Obertus de Orto¹⁰⁴ reappears elsewhere: in Adams’s copy of Kames’s *Historical Law-Tracts* (1761 edition). Adams made the following marginal note in the Preface¹⁰⁵: “Vide. The Consuetudines Feudorum, collected by Gerardus Niger & Obertus, and printed at the End of

⁹⁸ J. Adams, *Diary*, cit., January 24th, 1765, p. 251, although the meeting Adams discusses must have taken place earlier (probably a week earlier, so the 17th) because the next diary entry bears the same date.

⁹⁹ J. Adams, *Diary*, cit., January 24th, 1765, pp. 252-253.

¹⁰⁰ John Adams owned a copy of Cujas, dated 1658 (John Adams Library, call no. Adams 101.1 v.10 Folio), though it is uncertain whether this was the copy he may have owned and used in 1765. Some of the “hard words” (The Valvasors, Guardiae etc.) Adams mentions indeed appear in the “3 first titles”. Kames also referred to Cujas in his *Historical Law-Tracts* which Adams drew upon, Kames, *Historical Law-Tracts*, cit., tract 5, “History of the Privilege of Hairs-Apparent”, p. 173.

¹⁰¹ Th. Craig, *The Jus Feudale*, ed. and trans. James A. Clyde, Edinburgh and London 1934, p. xvi; Craig’s outline of the history of the feudal law in Title 4, Th. Craig, *Jus Feudale*, cit., p. 49. See also J. W. Cairns and G. Mcleod, “Thomas Craig, Sir Martin Wright, and Sir William Blackstone: The English Discovery of Feudalism”, 21(3) *The Journal of Legal History* (2000), p. 54, about Craig’s possible influence on English feudal law, and G. Gretton, “The Feudal System”, in Kenneth G. C. Reid, *The Law of Property in Scotland*, Edinburgh 1996, pp. 51-100, at p. 55.

¹⁰² The book chapters Adams mentions do not match either: J. Adams, *Diary*, cit., January 31st, February 21st, 1765, pp. 253-254.

¹⁰³ F. Wieacker, *A History of Private Law in Europe*, trans. Tony Weir, Oxford 2003, p. 160.

¹⁰⁴ J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English historical Thought in the Seventeenth Century*, Cambridge 1987, p. 84.

¹⁰⁵ Kames, *Historical Law-Tracts*, cit., “Preface”, p. vii, line 11, which Adams underlined: “The feudal customs ought to be the study of every man who proposes to reap instruction from the history of modern European nations”. The marginal note is beside this passage.

Gothofreds Corpus Iuris”. Gothofred is the French lawyer Dioysius Gothofredus (Denis Godfrey) (1549-1622) who produced a well-known annotated edition of the *Corpus Iuris Civilis*¹⁰⁶. Adams’s marginal note in the copy of Kames’s *Historical Law-Tracts* and the corresponding comment in the diary indicate that he seems to have bought the book in 1761 (as indicated by the signature on the half-title page) but only started working through it properly on the occasion of the Sodality reading group in January 1765. Furthermore, the diary entry of 24th January refers to Gilbert’s *Treatise of Tenures* which Adams had studied in 1758. It is, as a text on English law, contrasted with three texts by Scottish authors: Robertson’s *History of Scotland*¹⁰⁷, Kames’s *Historical Law-Tracts*, and “Dalrymple”, that is Dalrymple’s *Essay towards a General History of Feudal Property*¹⁰⁸.

The annotation in the *Historical Law-Tracts* apparently also served as a bookmark. In one of the next sessions¹⁰⁹, Adams “quoted to my Brothers, the Preface to the Historical Law Tracts, “The feudal Customs ought to be the study of every man ...”¹¹⁰. He then added, “I quoted also the sentiments of Rosseau [sic], which are very inimical to the Feudal System”¹¹¹. But Rousseau’s arguments were felt to be too “shallow”; the real problem with the feudal system is a different one: “I think that the Absurdity and Iniquity lies in this, that Nations at Peace and in Plenty who live by Commerce and Industry, have adopted such a system”, Adams cites himself, and continues¹¹². “I might have quoted Ld. Kaimes’s [sic] British Antiquities, who says...”¹¹³.

We encounter the same line of argument in Adams’s *Dissertation on Canon and Feudal Law* (1765), an attack on the tradition of dependency on Church and State as being two systems of tyranny (that is: the canon and the feudal law) “since the promulgation of Christianity”¹¹⁴. Only at the end, the Stamp Act, the biggest controversy at that time, is discussed briefly¹¹⁵. But the piece was not conceived with the Stamp Act 1765 in mind¹¹⁶, it grew directly out of the Sodality meetings; a fragmentary draft of the

¹⁰⁶ F. Wieacker, *History*, cit., p. 124, also generally on French humanist “elegant” jurisprudence in the second half of the sixteenth century.

¹⁰⁷ William Robertson, *The History of Scotland during the Reigns of Queen Mary and of King James VI*, London, 1759. Robertson’s *History of America* appeared only in 1777.

¹⁰⁸ Sir John Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain*, London, 1757. Dalrymple (1726-1810) dedicated his work to Kames, see I. S. Ross, *Lord Kames*, cit., p. 204. On Dalrymple, see also P. Stein, *Legal Evolution. The Story of an Idea*, Cambridge 1980, pp. 23-25.

¹⁰⁹ J. Adams, *Diary*, cit., February 21st, 1765, p. 254.

¹¹⁰ Passage from Kames, *Historical Law-Tracts*, “Preface”, cit., p. vii, lines 11-22.

¹¹¹ Adams then quotes a passage from J.-J. Rousseau’s *Social Contract*, ed. and trans. Maurice Cranston, London 1968, book 3, chapter 15, p. 141: “The idea of representation is a modern one. It comes to us from feudal government, from that iniquitous and absurd system under which the human race is degraded and which dishonors the name of man” (modern translation).

¹¹² J. Adams, *Diary*, cit., February 21st, 1765, p. 254.

¹¹³ Adams then quotes a passage from Kames (until the third edition still: Henry Home), *Essays upon Several Subjects Concerning British Antiquities*, cit., pp. 1-2.

¹¹⁴ J. Adams, *Papers of John Adams, I: September 1755-October 1773*, ed. Robert J. Taylor, Cambridge, MA 1977, p. 112.

¹¹⁵ J. Adams, *Papers*, cit., p. 128.

¹¹⁶ J. Ferling, *John Adams*, cit., p. 47.

Dissertation has survived¹¹⁷. The *Dissertation* is generally a piece promulgating liberty against (British) tyranny and the creation of a freer system than that under the colonial power: “the great ... have ... laboured ... in all ages, to wrest from the populace, as they are contemptuously called, the knowledge of their rights and wrongs ... I say RIGHTS, for such they have, antecedent to all earthly government, –*Rights*, that cannot be repealed or restrained by human laws”¹¹⁸. A main hindrance to the realisation of these rights is the feudal system with its “base services and servile dependencies”¹¹⁹. Here Adams refers to Kames: “Lord Kaim’s [sic], a Scottish writer of great reputation, whose authority in this case [i.e. the feudal law] ought to have the more weight as countrymen have not the most worthy ideas of liberty”. Then he quotes from Kames’s *British Antiquities*, in which Kames characterises the feudal system as “a Constitution so contradictory to all the Principles which govern Mankind”¹²⁰. Again, Kames’s statement is combined with a strongly critical quote about feudalism from Rousseau’s *Social Contract*¹²¹. The discussion in the *Dissertation* reflects entirely the flow of the debate in the Sodality meetings, as Adams has related it in his diary.

It was especially Kames’s opposition to the feudal system as “unnatural a Constitution” which made his works so attractive to John Adams and his friends. Not only was the feudal system imposing bondage, dependence, inequality, not only did it become the symbol of the mother country Britain which increasingly had been perceived as oppressive, it also hindered the free exchange of goods, free trade and the increase of wealth, an idea which emerged with early capitalism: “Nations at Peace and in Plenty who live by Commerce and Industry”, as Adams put it in his diary¹²². Capitalism was indeed a liberating force, since theoretically not rank and birth were relevant, but what and how competitively one can produce, sell and trade, and that gives everyone a chance in principle, irrespective of one’s class and background. That was also very much Kames’s view – the thinkers of the 1760s cannot be expected to have foreseen the unpleasant effects of capitalism.

Kames was openly hostile to feudalism. For a man of his time and his rank, this was an extraordinarily revolutionary and almost seditious attitude. It shows Kames as a free spirit and independent thinker; he is not, as a common deficient assessment among scholars would have it¹²³, the somewhat pedestrian busybody of the Scottish Enlightenment who otherwise represents religious and social conservatism and whose main role was acting as a patron of the intellectually far superior David Hume and Adam Smith. Kames’s criticism of the feudal system appears in several places of his work. In the *Essays upon Several subjects concerning British Antiquities* (1747), which Adams

¹¹⁷ J. Adams, *Diary*, cit., February 1765, p. 255: “This Sodality has given rise to the following Speculation of my own ...”.

¹¹⁸ J. Adams, *Papers*, cit., pp. 111-112.

¹¹⁹ J. Adams, *Papers*, cit., p. 117.

¹²⁰ Kames, *British Antiquities*, cit., pp. 1-2.

¹²¹ J. Adams, *Papers*, cit., p. 117. The quote from Rousseau is the same as in his diary, J.-J. Rousseau, *Social Contract*, cit., book 3, chapter 15, p. 141.

¹²² J. Adams, *Diary*, cit., February 21st, 1765, p. 254.

¹²³ E.g. R. Olson, “The Human Sciences”, in Roy Porter (ed.), *The Cambridge History of Science, IV: Eighteenth-Century Science*, Cambridge 2003, pp. 436-462, at p. 449, similar N. Phillipson, *Adam Smith. An Enlightened Life*, London 2010, pp. 86-87.

refers to, Kames calls the feudal system “a Constitution so contradictory to all the Principles which govern mankind” that this system, one would think, could only have been brought about by “Violence”, “Conquest from without, or military Force from within”¹²⁴. He also engages in a lengthy historical discussion to show that the feudal law was indeed a system imposed by violence, since it “was brought into England by a Conqueror, at least one who treated his new Subjects as a conquered people”¹²⁵. The polemic overtone is palpable: “property was in a continual Flux by Forfeitures”, feudal law was extended, but, because of that, “there was no secure Manner of transferring Land Property but by Charter and Sasine”¹²⁶. The introduction of feudalism, Kames says, was a “most politic” measure, because it created a constitution that, better than any other, firmly unites a people with their sovereign and “gives the Sovereign such an immediate Hold of the Person and Property of his Subjects”¹²⁷. And most importantly: “It was one Effect of the Feudal Law to withdraw Land from Commerce”. The superior could not sell, because he needed the profits to provide for the vassal, and the vassal could not sell because he was not owner: “This was an unnatural Constitution, which could not subsist long in peaceable Times”¹²⁸.

In Tract 3 (History of Property) of the *Historical Law-Tracts* that John Adams also referred to, Kames went further: “The feudal law lost ground universally in times of peace. It was a violent and unnatural system, which could not long be supported in contradiction to love of independency and property, the most steady and industrious of all the human appetites”¹²⁹. It is obvious that such words were welcomed by those in colonial America who wanted to break free from Britain to pursue their own (economic) interests. Kames’s quote here is in the context of an attack against the entail and part of a discussion about the starting deterioration of the strict feudal system in England with the statute *Quia Emptores* of 1290¹³⁰. That statute *Quia Emptores* is an example of living legal history: it introduced substitution of vassals instead of subinfeudation and so permitted genuine alienation of land¹³¹, and it is still the ultimate legal basis for every freehold transaction of land in England and Wales

¹²⁴ Kames (Home), *British Antiquities*, cit., pp. 1-2. The capitalisation here and in the following is in the original.

¹²⁵ Kames (Home), *British Antiquities*, cit., p. 17. More differentiated e.g. in F. Pollock and F. W. Maitland, *The History of English Law before the time of Edward I*, 2nd ed., I, Cambridge 1898, p. 43, F. L. Ganshof, *Feudalism*, 3rd ed. trans. Philip Grierson, London 1964, p. 159. On the development of the distinct features of English feudalism out of the Norman feudal system after the Norman Conquest, see e.g. D. C. Douglas, “The Norman Conquest and English Feudalism”, 9(2) *The Economic History Review* (1939), pp. 128-143, at p. 128.

¹²⁶ Kames (Home), *British Antiquities*, cit., pp. 22-24.

¹²⁷ Kames (Home), *British Antiquities*, cit., pp. 24-25.

¹²⁸ Kames (Home), *British Antiquities*, cit., p. 28.

¹²⁹ Kames, *Historical Law-Tracts*, “History of Property”, cit., p. 129.

¹³⁰ Kames, *Historical Law-Tracts*, “History of Property”, cit., p. 130.

¹³¹ 1290 Chapter 1 18 Edw. 1: (translation) “... That from henceforth it shall be lawful to every Freeman to sell at his own pleasure his Lands and Tenements, or part of them; so that the Feoffee shall hold the same Lands or Tenements of the Chief Lord of the same Fee, by such Service and Customs as his Feoffor held before”. See also Pollock and Maitland, *History of English Law*, I, cit., p. 337.

today¹³². The aspect of alienation of property – or its prevention by feudalism – was an important point for Adams. At page 96, second line from above, in the tract on property, Adams wrote in his copy of the *Historical Law-Tracts* a note in the margin: “alienation”¹³³; the respective paragraph deals with the development of alienability of moveable property and, later, land, and Adams drew a hand pointing against the opening line of a paragraph that takes up the subject of alienation again at page 103¹³⁴.

In the conclusion to Tract 5 (History of the Feudal Privilege of an Heir-apparent), also marked by Adams in his copy, Kames becomes even more outspoken about feudalism¹³⁵:

The feudal law was a violent system, repugnant to natural principles. It was submitted to in barbarous times, when the exercise of arms was the only science, and the only commerce. It is repugnant to all the arts of peace, and when mankind came to affect security more than danger, nothing could make it tolerable but long usage and inveterate habit.

Kames’s next two texts played no formative role in Adams’s life, but are illustrative of Kames’s attempts at undermining the feudal system. In Article 11 of the *Elucidations respecting the Common and Statute Law of Scotland* (1777), Kames’s last work on law, Kames discusses the concepts of *dominium directum* and *dominium utile*. As is known, the Glossators romanised the feudal system through the notion of a *dominium directum* and *dominium utile* by developing further certain concepts of the post-classical *emphyteusis*¹³⁶ (classical Roman law was incompatible with such a notional division of ownership¹³⁷). In the *Elucidations* Kames argues that the superior’s right in the land (*dominium directum*) is unlimited, while the vassal’s real right (*dominium utile*) is “in effect” a burden on the superior’s land and an usufruct. As it is a mere burden on the superiority, the simple renunciation by the vassal would suffice to divest him of his *dominium utile*, because a mere burden can be extinguished by simple renunciation only¹³⁸. Contemporaries or near contemporaries of Kames¹³⁹ as well as modern scholars have identified this suggestion as incorrect¹⁴⁰. In fact, the superiority was a burden on the *dominium utile*, an interpretation which conforms to the reality in the nineteenth and twentieth centuries. This interpretation is also mirrored in the provision of the Scottish Abolition of Feudal Tenure Act 2000 that the *dominium directum* be abolished and the *dominium utile*

¹³² K. Gray and S. F. Gray, *Elements of Land Law*, 5th ed., Oxford 2009, p. 66.

¹³³ Beside the line starting with: “It is extreme probable ...”, Kames, *Historical Law-Tracts*, “History of Property”, cit., p. 96.

¹³⁴ Kames, *Historical Law-Tracts*, “History of Property”, cit., p. 103, starting with: “It is remarked above...”

¹³⁵ Kames, *Historical Law-Tracts*, “History of the Feudal Privilege of an Heir-apparent”, cit., p. 186.

¹³⁶ M. Kaser, *Das römische Privatrecht II. Die nachklassischen Entwicklungen*, 2nd ed., München 1975, pp. 308-312, R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, p. 359.

¹³⁷ B. Nicholas, *An Introduction to Roman Law*, Oxford 1975, p. 157.

¹³⁸ Kames, *Elucidations*, cit., Art. 11, pp. 76-77.

¹³⁹ W. Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence*, 2nd ed., II, Edinburgh 1822, pp. 222-223, quoted in G. Gretton, “Feudal System”, cit., para. 51, note 4, p. 62.

¹⁴⁰ G. Gretton, “Feudal System”, cit., para. 51, p. 61.

be extended to full ownership¹⁴¹. Kames's opinion would have stood against that solution on technical grounds, but his view is not without foundation; Cujacius (Cujas), whom Kames seems to have followed generally¹⁴², took the same view, and it also reflects more the historical development of the feudal system¹⁴³. What Kames effectively does with the argument of the renunciation of the vassal's "burden", hidden in legal technicalities, is supporting argumentatively the dismantling of the feudal system. Historically the feudal bond could be destroyed by the vassal renouncing his faith: *diffidatio* (the original meaning of the word "defiance"), a renunciation of fealty. In political terms that was usually a rebellion of the vassal against the lord, often coupled with an attempt at retaining the fief as full *dominium* (*allodium*)¹⁴⁴. What Kames had in mind, however, was only the proprietary aspect of the feudal system which he, as a reformer, saw as an obsolete framework full of cumbersome and meaningless formalities. Kames's argument is a good example of his attack against feudalism, here using the niceties of technical law¹⁴⁵.

The second important piece of a later period was one chapter in the appendix to the *Sketches of the History of Man* (1774), in which Kames discusses, and criticizes fiercely, the institution of the entail in the Scottish feudal system¹⁴⁶. The entail, that is, an estate in land which endures as long as the original "tenant in tail" or any of his lineal tenants remain alive¹⁴⁷, is described by Kames as "a most irrational power" that is "productive of much mischief"¹⁴⁸. The entail subverts liberty and independence, it prevents the improvement of the land, especially in a "bare country like Scotland", and it has a morally corrupting effect, for "a young man, bred up from infancy in the certainty of inheriting an opulent fortune" does not subject himself to the effort of education but "abandons himself to pleasure, and indulges his passions without control"¹⁴⁹. The sums the entails permit are often too small, particularly as there is usually a depreciation in value of the money, and this depreciation in general stands against any improvement of the land. Hence, commerce and agriculture suffer, and the population shrinks. But "unless men be usefully employed, population is of no real advantage to a state". As the children of landowners are used to luxury and "too

¹⁴¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 (in force as of 28 November 2004), s. 2 (1) and (2); K. C. G. Reid, *The Abolition of Feudal Tenure in Scotland*, Edinburgh and London, 2003, p. 8.

¹⁴² Compare Kames, *Historical Law-Tracts*, "History of the Feudal Privilege of an Heir-apparent", cit., p. 173.

¹⁴³ F. L. Ganshof, *Feudalism*, pp. 69, 72, 75.

¹⁴⁴ F. L. Ganshof, *Feudalism*, pp. 98, 128.

¹⁴⁵ More details in A. Rahmatian, "The property theory of Lord Kames (Henry Home)", 2(2) *International Journal of Law in Context* (2006), pp. 198-200.

¹⁴⁶ Kames, *Sketches*, cit., book 3, appendix, sketch 1, p. 907, and *ibid.*, at p. 909: "The purpose of the present essay, is to set before our legislature, coolly and impartially, the destructive effects of a Scotch entail".

¹⁴⁷ K. Gray and S. F. Gray, *Land Law*, cit., p. 60. Effectively that means, land must pass on death to the property holder's heirs by operation of law and cannot be alienated or mortgaged.

¹⁴⁸ Kames, *Sketches*, cit., book 3, appendix, sketch 1, p. 908.

¹⁴⁹ Kames, *Sketches*, cit., book 3, appendix, sketch 1, pp. 909, 910.

proud for business”, improvement within the entail system cannot be expected.¹⁵⁰ Furthermore,

Arts and sciences can never flourish in a country, where all the land is engrossed by a few. Science will never be cultivated by the dispirited tenant, who can scarce procure bread; and still less, if possible by the insolent landlord, who is too self-sufficient for instruction. There will be no encouragement for arts: great and opulent proprietors, fostering ambitious views, will cling to the seat of government, which is far removed from Scotland ... In such circumstances, will our constitution be in no danger from the ambitious views of men elevated above others by their vast possessions? Is it unlikely, that such men, taking advantage of public discord, will become an united body of ambitious oppressors, overawing their sovereign as well as their fellow-subjects?¹⁵¹

It is obvious that Kames’s opinion struck a chord with the Puritan world view and work ethics of the population in New England¹⁵², and with the debates about the form of government and the political representation in colonial America in the eighteenth century¹⁵³. Kames was, however, indifferent as to whether a monarchy or republic is to be preferred – he thought a monarchy is more suitable for large states and a republic for small ones (he had in mind historical examples of city-states)¹⁵⁴. In any event, he rejected democracy as “the worst form of government” after despotism, and as “rash, violent, and fluctuating ... where the mob rules”¹⁵⁵, which was a common view among the leading representatives of the Enlightenment at the time¹⁵⁶.

One needs to imagine the time and circumstances in which Kames’s comments about feudalism were made. Both the British Crown and the House of Lords, as well as the system of landholding (untechnically: “landownership”) rested on the principles of the feudal system. Vestiges of that can still be observed in features of the British

¹⁵⁰ Kames, *Sketches*, cit., book 3, appendix, sketch 1, pp. 911-912.

¹⁵¹ Kames, *Sketches*, cit., book 3, appendix, sketch 1, pp. 913-914.

¹⁵² E.g. R. C. Simmons, *The American Colonies. From Settlement to Independence*, London 1976, pp. 117-119, 230-239; J. Adams, *Thoughts on Government* (1776), here cited from Massachusetts Historical Society, *Early American Imprints*. First Series, Microfiche, Evans no. 14639 (1 microfiche), pp. 23 and 25: “... the happiness of the people might be greatly promoted by [sumptuary laws] ... That elevation of sentiment inspired by such a government [a republican government as sketched out by Adams before], makes the common people brave and enterprising. That ambition which is inspired by it makes them sober, industrious, and frugal”. See alternatively for the same source, J. Adams, *Papers*, cit., IV (1979), pp. 91-92. On the parallels between the societies in Scotland and colonial America, see also D. W. Howe, *Scottish Enlightenment*, cit, pp. 581-582.

¹⁵³ E.g. Th. Paine, *Rights of Man, Common Sense and Other Political Writings*, ed. Mark Philip, Oxford 2008, pp. 15, 22, 26-27, to which Adams replied in his *Thoughts on Government*. See also R. C. Simmons, *American Colonies*, cit., pp. 260-267, 353-355, and for around the time of the Declaration of Independence 1776, see P. Maier, *American Scripture. Making the Declaration of Independence*, New York 1997, pp. 18-24, 28-36.

¹⁵⁴ Kames, *Sketches*, cit., book 2, sketch 3, pp. 376, 385.

¹⁵⁵ Kames, *Sketches*, cit., book 2, sketch 3, pp. 375, 376.

¹⁵⁶ This is not too far from Adams’s views either, see John Adams, letter to Thomas Jefferson, July 13th 1813, L. J. Cappon, *The Adams-Jefferson Letters. The Complete Correspondence between Thomas Jefferson and Abigail and John Adams*, Chapel Hill and London 1987, p. 355, J. Ferling, *John Adams*, cit., pp. 289, 452.

system of government or the “state”¹⁵⁷, and in England and Wales also with regard to landownership¹⁵⁸. Only in Scotland the feudal system of land holding (“heritable property” in Scots law¹⁵⁹) has been abolished, though as late as 2004, and only with regard to land, not in relation to the (originally feudal) prerogatives of the Crown¹⁶⁰. In the eighteenth century any polemic assault on the feudal system, in this case by a Scottish judge, questioned the constitutional framework of the British state as a whole¹⁶¹. This had a subversive tendency, even if Kames’s (ostensible) concern was capitalist prosperity and the free alienation of property, especially land. This was what feudalism and the entail prevented, so that commerce and the increase of wealth were inhibited.

Kames’s Writings on Commerce and Money

Kames’s writings on commerce and money feature in John Adams’s letters. Whether Adams read Kames’s *Sketches* in full when they were published in 1774, is not certain, but he definitely read the abridged edition which appeared in Philadelphia in 1776¹⁶² and comprised six sketches, (i) on the Diversity of Men and of Languages, (ii) on Food and Population, (iii) on Property, (iv) on the Origin and Progress of Commerce, (v) on the Origin and Progress of the Arts, and (vi) on the Progress of the Female Sex¹⁶³. The choice of the individual Sketches and their publication were apparently regarded as being relevant to the current debates in America in 1776, because the final page of the Philadelphia edition of the *Sketches* carries an advertisement for a pamphlet (by John Cartwright (1740-1824)¹⁶⁴, but the advert does not state an author) entitled “American Independence the Interest and Glory of Great Britain; containing Arguments which prove, that not only in Taxation, but in Trade, Manufacturing, and Government, the Colonies are entitled to an entire Independency on the British Legislature,...”, areas touched upon by Kames’s *Six Sketches*.¹⁶⁵ On April 6th, 1777, John Adams wrote to his wife Abigail¹⁶⁶:

¹⁵⁷ M. Loughlin, “The State, the Crown and the Law”, in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown*, Oxford 1999, pp. 33-76, at pp. 43-44, discussing the problems of the idea of a “state” in English law.

¹⁵⁸ K. Gray and S. F. Gray, *Land Law*, cit., pp. 56-58, 62-63.

¹⁵⁹ K. G. C. Reid, *The Law of Property in Scotland*, Edinburgh and London 1996, pp. 17-19.

¹⁶⁰ K. Reid, *Abolition of Feudal Tenure*, cit., pp. 7-8, 12.

¹⁶¹ On the legacy of feudalism in the English and later British constitutional system from the Norman conquest onwards, see e.g. D. C. Douglas, *Norman Conquest*, cit., p. 129.

¹⁶² Kames, *Six Sketches on [sic] the History of Man* (1776), here taken from Massachusetts Historical Society, Early American Imprints. First Series, Microfiche, Evans no. 14801 (3 microfiche).

¹⁶³ In the full Scottish edition of the *Sketches of the History of Man* of 1774, the equivalent is book 1, Preliminary Discourse, Sketches 1, 2, 3, 4 and 6 (see Kames, *Sketches*, cit., pp. 13, 53, 68, 74, 91, 259). The original first edition of 1774 differs in some minor details from the third edition of 1788 (as reissued in 2007) which has been referred to here.

¹⁶⁴ J. Cartwright, *American Independence*, cit., p. i. Cartwright’s pamphlet appeared for the first time in 1774.

¹⁶⁵ Kames, *Six Sketches on the History of Man* (1776) Massachusetts Historical Society, Early American Imprints. First Series, Microfiche, Evans no. 14801, p. 265.

¹⁶⁶ Letter from John Adams to Abigail Adams, April 6th, 1777, *Adams Family Correspondence* (1963) II: June 1776-March 1778, ed. L. H. Butterfield, Cambridge, MA 1963, p. 201. The original spelling has

The Act [Massachusetts Act fixing the prices of wages and commodities¹⁶⁷], my dear, that you were so fond of will do no good. Legislation cannot effect Impossibilities. I detest all Embargoes, and all other Restraints upon Trade. ... The Paper emitted by the states jointly and separately is too much, it is more than enough to purchase every Commodity and every species of Labour that is wanted, and this Excess of Quantity is the true Cause of the Artificial Scarcity of Things, but the Price of this will be in Proportion to the Demand, in spite of all Regulations. – To save my self the Trouble of thinking I will transcribe for your amusement a few observations of Lord Kaims [sic], on the subject of Money, scarcity, Plenty, and Demand. Read them, compare them with the Increase of Money in America, the Decrease of Goods and Labour, and the Increase of Demand for both, and then judge whether the Regulations and Embargoes can do any good.

Adams then copied most of Kames's *Sketch IV* ("Origin and Progress of Commerce") of the abridged Philadelphia Edition of the *Sketches*¹⁶⁸. Abigail Adams referred to the same subject in a letter to her husband on June 23rd, 1777¹⁶⁹:

... money is lookd upon of very little value, and you can scarcely purchase any article now but by Barter ... Gold dear Gold would soon lessen the Evils. I was offerd an article the other day for two dollars in silver for which they askd me six in paper.

I have no more to purchase with than if every dollor was a silver one. Every paper dollor cost a silver one, why then cannot it be equaely valuable? You will refer me to Lord Kames I know, who solves the matter. I hope in favour you will not Emit any more paper, till what we have at least becomes more valuable.

What John and Abigail Adams refer to is Kames's discussion in the *Sketches* of barter, money (a version of the quantity theory of money), and an early market model of price development triggered by supply and demand. Kames in his sketch on commerce first discusses barter as the first form of trade, a (controversial¹⁷⁰) narrative nowadays better known from Adam Smith's *Wealth of Nations*¹⁷¹, which appeared in 1776, two years after the *Sketches*. As pure barter is inefficient, money has been introduced, first as gold and silver in bullion, later as coinage¹⁷². The price of commodities, represented by the money exchanged¹⁷³, depends on the demand for a

been retained.

¹⁶⁷ An Act to prevent Monopoly and Oppression, passed 25 Jan. 1777 (Mass., *Province Laws*, 5:583–589). See B. P. McAllister, "Price Control by Law in the United States. A Survey", 4 *Law and Contemporary Problems* (1937), pp. 273-300, at pp. 274-275. On paper money and the shortage of money supply, see R. C. Simmons, *American Colonies*, cit., pp. 203-204, 261-262.

¹⁶⁸ Kames, *Six Sketches on the History of Man* (1776), Massachusetts Historical Society, Early American Imprints. First Series, Microfiche, Evans no. 14801, sketch 4, pp. 78-99. Adams copied over 4,000 words up to p. 96.

¹⁶⁹ Letter from Abigail Adams to John Adams, June 23rd, 1777, *Adams Family Correspondence*, cit., pp. 269-270. The original spelling has been retained.

¹⁷⁰ C. Humphrey, "Barter and Economic Disintegration", 20(1), *Man, New Series* (1985), pp. 48-72.

¹⁷¹ A. Smith, *Wealth of Nations*, cit., book 1, chapters 2 and 4, pp. 25, 37.

¹⁷² Kames, *Sketches*, cit., book 1, sketch 3, pp. 74-76.

¹⁷³ Kames, *Sketches*, cit., book 1, sketch 3, p. 76, actually says that the price *is* the money exchanged, but that must be inaccurate: price is the exchange ratio of the quantities of two commodities exchanged in general, also in the case of barter, without any money being involved.

commodity, and that stands in a relationship to its quantity (today one would rather say, supply). Quantity beyond demand reduces the price and “renders even necessities of no value”, such as water (in Scotland), while a commodity of which the demand exceeds the available quantity will fetch a higher price. This is not (much) influenced by utility or intrinsic value, otherwise iron would be far more valuable than gold. The causes for the demand, so Kames, are difficult to ascertain, and do not necessarily follow a rational pattern¹⁷⁴. Where the quantity exceeds the usual demand, the prices will fall; where the demand rises considerably above the quantity, the price will rise in proportion, or mathematically put, the price is directly proportional to the demand, and inversely proportional to the quantity (this is what John Adams refers to in his letter to Abigail). The value of gold and silver is more easily fixed than with other commodities, being dependent on demand only (gold) and on quantity and demand only (silver), and so gold and silver could soon develop to becoming a standard for valuing every other commodity. If there is a variation in the quantity of circulating coin, then there is no change to the value of the commodities, but to the price, so if half of the coin is withdrawn, the prices will be reduced to half. Thus if the demand and quantity of *goods* continue to be the same, the price will be in proportion to the quantity of money; and if the demand and quantity of *money* continue to be the same, the price will fall with the increase of demand, and rise with the decrease of the quantity¹⁷⁵.

Money, Kames says, is “the oil, that lubricates the springs and wheels of a great machine, and preserves it in motion”¹⁷⁶, so a diminution of the necessary quantity of money retards industry and commerce (which is what Abigail Adams refers to in her letter¹⁷⁷), and only plenty of money increases industry, “building, ... husbandry, ... manufacture, and “other solid improvements”¹⁷⁸. The value of money, rising in proportion to its scarcity, will lower the price of manufacturing and promote exportation, and with successful exportation money (gold and silver) will flow into the country. Thus the establishment of a bank that issues paper money (or other titles, like promissory notes, bills of exchange¹⁷⁹) can be advantageous when money is scarce, as

¹⁷⁴ Kames, *Sketches*, cit., book 1, sketch 3, pp. 77-79.

¹⁷⁵ Kames, *Sketches*, book 1, sketch 3, pp. 80-82. See also D. Hume, *Political Essays*, ed. Knud Haakonssen, Cambridge 2003, “Of money”, “Of interest”, “Of the balance of trade”, pp. 123, 129, 138, where Kames’s observations probably derive from. Hume corresponded with Kames in this regard, see D. Hume, letter of 4 March 1758, *Letters*, I, cit., pp. 270-272. Some influence by Sir James’s Steuart’s *Principles of Political Economy*, books 3 and 4 (1767) is a possibility; see on the relationship between Hume, Kames and Steuart, I. S. Ross, *Lord Kames*, p. 183.

¹⁷⁶ The same metaphor in D. Hume, *Political Essays*, cit., “Of money”, p. 115, where it probably comes from. Similar A. Smith, *Wealth of Nations*, cit., book 2, chapter 2, p. 291, but Kames would obviously not have been influenced by Smith’s work which appeared after his own, except perhaps in personal discussion with Smith.

¹⁷⁷ On the question of paper money in the early years of the USA, see R. C. Simmons, *American Colonies*, cit., pp.203-204.

¹⁷⁸ Kames, *Sketches*, cit., book 1, sketch 3, pp. 82-83. Kames makes interesting observations about the impact of the rise of the money supply on the level of wages and on the position of a country in foreign trade relations, but these are not relevant in this context.

¹⁷⁹ In Kames’s time the terminology was not precise, see e.g. A. Smith, *Wealth of Nations*, cit., book 2, chapter 2, pp. 296-299, on the founding and type of activities of banks in Scotland. One also needs to

it increases the quantity of money which promotes industry, but where there is sufficient money, a bank may be harmful, unless it is established only for the discounting of (genuine) bills (of exchange). If the bank is founded for lending money, there is “the great danger of extending credit too far”, price of labor and manufacturing will be raised, affecting negatively foreign trade, as a result of too great an amount of money, “whether coin or paper”¹⁸⁰.

It is not entirely clear who Kames’s observations were inspired by¹⁸¹; essentially it is still a mercantilist theory of wealth and money¹⁸² and an example of the classical quantity theory of money. One of the founders of this theory is Hume, and it is highly likely that Kames was influenced by Hume in this regard¹⁸³, although he does not refer to him. Hume, however, spends more time on the effects of paper money and paper credit than Kames¹⁸⁴, which would certainly have been of great interest to John Adams. But it was Kames, not Hume, let alone Adam Smith who arrived on the scene too late, who was the transmitter and communicator of Scottish Enlightenment thought on this issue around the time of independence of the United States.

The modern monetary system rests on different foundations; it is debt-based and has abandoned convertibility of paper money into gold long ago¹⁸⁵. But certain problems do not disappear, and a good deal of the financial crisis of 2008 is rooted in the abundance of fictitious money, usually now not just issued paper money (banknotes), but bank money created by commercial banks as loans, or money-like financial products, such as securities and combinations of these in investment vehicles that ostensibly reduce risk by spreading it. John Adams already knew of the fundamental flaws in this system when it was still in its infancy, for the problem of finances and issue of paper money in the early years of the United States was his constant concern. He wrote in a letter to James Warren in 1779: “The only enemy, of great Consequence, which is left to Us is our Currency. Taxation and Oeconomy, must be the Cry in America. a Depreciation and Appreciation Law must be made... This vile Paper discourages and disheartens the Whiggs, and emboldens the Tories, more than it ought, blow it away, any way... Convince both sides that our Independence dont depend upon that”¹⁸⁶. And in this context a characteristic outburst in one of Adams’s famous marginal notes in a book he read should also be mentioned. Adams noted in the margins of pages 393-394 of his copy of Mary Wollstonecraft’s

note here that banknotes were historically debts embodied as negotiable instruments.

¹⁸⁰ Kames, *Sketches*, cit., book 1, sketch 3, p. 89.

¹⁸¹ See also Franklin’s letter to Lord Kames, London, Jan. 1, 1769, B. Franklin, *Papers*, cit., XVI, pp. 1-2, and above under 4.

¹⁸² Compare especially Kames, *Sketches*, cit., book 1, sketch 3, pp. 83, 87, 90). On mercantilism, see E. F. Heckscher, *Mercantilism*, II, E. F. Söderlund (ed.), London, New York 1955, pp. 186-216, on mercantilism as a monetary system. See also briefly W. J. Barber, *A History of Economic Thought*, Harmondsworth 1967, p. 18.

¹⁸³ Hume, *Political Essays*, cit., “Of money”, “Of interest”, “Of the balance of trade”, pp. 115, 126, 136.

¹⁸⁴ Hume, *Political Essays*, cit., “Of money”, “Of the balance of trade”, pp. 116, 142-146.

¹⁸⁵ See e.g. G. Crowther, *An Outline of Money*, London 1940, pp. 29-31.

¹⁸⁶ Letter from John Adams to James Warren, February 25th, 1779, *Warren-Adams Letters*, II, cit., p. 90. Also at: Massachusetts Historical Society, Microfilm Reel P-164, Warren-Adams Papers. Adams’s spelling has been retained.

*Origin and Progress of the French Revolution*¹⁸⁷, where she discussed France's accumulated debts during the French Revolution¹⁸⁸: Adams wrote:

Paper [money] is always a dangerous Expedient. It will soon make a well established Government, an ill established Government. | Paper Money never was and never will be conducted with any Moderation or any Sagacity. Neither the Monarchy nor the Democracy of France, nor the limited Monarchy of England nor the Representative Democracy of U. S. have ever discovered either Moderation or Sagacity on this Subject. | Did this Silly Woman think it possible for any Minister, or any King or any National Assembly to take decided Measures? No! This had ignorantly and madly introduced the Despotism of Old Anarchy and Old Chaos ...

One can see the spirit and influence of Lord Kames in this comment. However, one of Kames's chief works, the *Principles of Equity*, had not made any impact on Adams. He seemed not to have owned a copy of the book, and it is even doubtful whether he ever read it – knowledge of this work would not have been unusual for a lawyer. In contrast, the *Principles of Equity* were of great importance to Thomas Jefferson.

6. Thomas Jefferson

Law and Moral Philosophy

Thomas Jefferson came into contact with Lord Kames's writings through his teacher of law, George Wythe (1726-1806). Jefferson was introduced to Wythe by William Small, a Scotsman and professor of mathematics and natural philosophy at the College of William and Mary in Williamsburg, where Jefferson studied from 1760 onwards¹⁸⁹. Jefferson stayed in friendly contact with his old law teacher¹⁹⁰. The reading in his law studies with Wythe are reflected in his later reading recommendations he would make to aspiring younger lawyers: Coke, Blackstone, Hale's *History of the Common Law*, and Kames's *Historical Law-Tracts* and *Principles of Equity*, to name some of the most important works¹⁹¹.

As far as Kames's legal works are concerned, the *Principles of Equity* influenced

¹⁸⁷ M. Wollstonecraft, *An Historical and Moral View of the Origin and Progress of the French Revolution; and the Effect it has produced in Europe*, I, London 1794, pp. 393-394. Copy of Boston Public Library, John Adams Library, call no. Adams 221.15. One can conclude from the marginal note which carries on at p. 395 that it must have been written after 1812.

¹⁸⁸ On the monetary problems in the French revolution, see e.g. P. Vilar, *A History of Gold and Money 1450-1920*, London and New York 1984, pp. 302-307.

¹⁸⁹ M. D. Peterson, *Thomas Jefferson and the New Nation. A Biography*, New York 1970, p. 12, D. L. Wilson, "Thomas Jefferson's Early Notebooks", 42 (4) *The William and Mary Quarterly* (1985), pp. 433-452, at p. 444, N. E. Cunningham, *In Pursuit of Reason. The Life of Thomas Jefferson*, Baton Rouge and London 1987, pp. 5-6.

¹⁹⁰ See e.g. letter by Thomas Jefferson to George Wythe, Monticello, Nov. 1, 1778, Massachusetts Historical Society, Microfilm P-060, Reel 15. The letter contains Jefferson's reflections on criminal law and the proportionality between crime and punishment, and an enclosure "A Bill for proportioning crimes and punishments in cases heretofore capital".

¹⁹¹ N. E. Cunningham, *Life of Jefferson*, cit., p. 8, M. D. Peterson, *Jefferson*, cit., pp. 16-18, 58.

Jefferson probably most. Jefferson owned the first three editions of this book¹⁹². Jefferson had almost all of Kames's books in his library – it seems all those which had appeared during his formative years until the early 1770s¹⁹³. In 1791, Jefferson just remarked to Peter Carr, Jefferson's nephew: "A volume every fortnight or three weeks may be read of the remaining reporters, common law and chancery. Ld. Kaim's [sic] principles of equity, Blackstone and Hawkins's P.C. will take time"¹⁹⁴. And in a similar vein Jefferson wrote to John Garland Jefferson: "I doubt whether Kaim's *Principles of Equity* will admit of being commonplaced, or of being abridged. I am sure Blackstone cannot be; so that I mean to except these two authors from the recommendation of commonplacing every thing"¹⁹⁵. This mirrors Jefferson's own experiences. Jefferson himself commonplaced Kames's *Principles of Equity* extensively, over 30,000 words, in his Equity Commonplace Book in 1765 or 1766¹⁹⁶. The practice of commonplacing originated from the classical rhetorical tradition which regarded imitation of earlier authors as a foundation for one's own invention and originality, and rhetoric was connected with moral philosophy well into the eighteenth century. This is particularly true of Scottish moral philosophy (and, by extension, law) which looked to Cicero as a principal source of Stoic philosophy and rhetoric for its ideas of civic humanity¹⁹⁷. Normally Jefferson summarized the substance of his reading very succinctly, something which he apparently felt unable to do with the concisely and densely written works by Blackstone and Kames. Kames is frequently mentioned together with Blackstone, which indicates the high esteem Kames was held in at the time. Jefferson also copied long extracts from Kames's *Historical Law-Tracts* in his Legal Commonplace Book¹⁹⁸. The most incisive comment Jefferson made about the *Principles of Equity* was in 1792, prompted by a letter from Peter Carr. Carr wrote to

¹⁹² Apart from the *Principles of Equity*, see for Jefferson's library, E. M. Sowerby, *Catalogue of the Library of Thomas Jefferson. Complied with Annotations by E. Millicent Sowerby*, vols. I-V, Charlottesville 1983, II, pp. 192-193, entry no. 1716 (1st ed. 1760), entry no. 1717 (2nd ed., 1767), entry no. 1718 (3rd ed., 1778).

¹⁹³ E. M. Sowerby, *Catalogue*, cit., II, pp. 200, 318-319, 394-396, entry no. 1739 (Kames's *Remarkable decisions of the Court of Session from 1730 to 1752*, 1766), entry no. 2007 (Kames's *Essays upon Several Subjects concerning British Antiquities*, 3rd ed., 1763), entry no. 2008 (Kames's *Historical Law-Tracts*, 2nd ed., 1761), entry no. 2183 (Kames's *Statute Law of Scotland* abridged, 1757), entry no. 2186 (Kames's *Decisions of the Court of Session from its First Institution to the Present Time*, 1741). Notably absent are Kames's *Sketches of the History of Man* (1774) and *Elucidations respecting the Common and Statute Law of Scotland* (1777).

Jefferson's books by Kames as regards moral philosophy, aesthetics and other areas, see E. M. Sowerby, *Catalogue*, cit., I, p. 333, entry no. 710 (Kames's *Gentleman Farmer*, 2nd ed., 1779); E. M. Sowerby, *Catalogue*, cit., II, pp. 11, 47, entry no. 1254 (Kames's *Essays on the Principles of Morality and Natural Religion*, 1751), entry no. 1345 (Kames's *Introduction to the Art of Thinking*, 2nd ed., 1764); E. M. Sowerby, *Catalogue*, cit., V, p. 41, entry no. 4699 (Kames's *Elements of Criticism*, 3rd ed., 1765).

¹⁹⁴ Letter from Thomas Jefferson to Peter Carr, Philadelphia, May 8, 1791, Th. Jefferson, *Papers*, cit., XX, p. 378.

¹⁹⁵ Letter from Thomas Jefferson to John Garland Jefferson, Philadelphia, June 15, 1792, Th. Jefferson, *Papers*, cit., XXIV, p. 81.

¹⁹⁶ D. L. Wilson, *Early Notebooks*, cit., pp. 449-450; for arguments for dating the Legal and Equity Commonplace Books, *ibid.* at 445. See also N. E. Cunningham, *Life of Jefferson*, cit., p. 29.

¹⁹⁷ Th. P. Miller, "John Witherspoon and Scottish Rhetoric and Moral Philosophy in America", 10(4) *Rhetorica, A Journal of the History of Rhetoric* (1992), pp. 381-403, at p. 382.

¹⁹⁸ D. L. Wilson, *Early Notebooks*, cit., p. 450.

Jefferson on May 8th, 1792:

My travels in the land of law have been pretty constant and rather pleasant than otherwise. The principles of Equity by Ld. Kaims [sic] is a very masterly work indeed; my ideas had been very confused with respect to the boundary between law and equity: But, on the perusal of this work, the chaos was cleared away and I felt a gleam of light break in upon my mind, which I shall never forget. I think however, he would please me better if he was less fond of searching after final causes. He is on these occasions rather too metaphysical [sic]¹⁹⁹.

To that Jefferson replied on June 22nd, 1792:

Your objection to Ld. Kaims [sic] 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 tho" he has given us what should be the system of equity, yet it is not the one actually established, at least not in all it's 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 contradictions²⁰⁰.

What Jefferson means by mentioning Kames's too metaphysical method is that the *Principles of Equity* are built upon the philosophical framework of the *Essay on the Principles of Morality and Natural Religion*. In his moral philosophy Kames distinguishes between justice and benevolence. One type of benevolence is the foundation of equity, and it includes the specific body of law termed "equity". Unlike justice, benevolence cannot be enforced, except for specific cases which are susceptible to a precise rule and are taken under the authority of the legislature: that is the "law of equity"²⁰¹. The result of this approach is that the *Principles of Equity* are more a work of applied legal philosophy than a textbook on the law of equity, particularly the law of equity (and trusts) in England, and the book is therefore too philosophical and speculative for the average lawyer. The *English* law of equity developed from peculiar historical circumstances and not out of certain philosophical structures,²⁰² a point already made by Lord Mansfield: "the Opposition of Equity to Law as now administered in England by different Courts, is not ... deducible from Reason. It can only be explained positively & by Historical Deductions"²⁰³. What the law of equity really consists of in *Scots* law is still a subject of debates²⁰⁴. The *Principles of Equity*

¹⁹⁹ Letter from Peter Carr to Thomas Jefferson, Monticello, May 28, 1792, Th. Jefferson, *Papers*, cit., XXIII, p. 548.

²⁰⁰ Letter from Thomas Jefferson to Peter Carr, Philadelphia, June 22, 1792, Th. Jefferson, *Papers*, cit., XXIV, p. 108.

²⁰¹ Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 2, chapter 7, p. 61. Kames, *Principles of Equity*, cit., I, "Introduction", p. 9, and book 1, part 1, chapter 3, pp. 108-114.

²⁰² See the classical discussion by F. W. Maitland, *Equity. A Course of Lectures* (revised by John Brunyate), Cambridge 1949, pp. 1-22.

²⁰³ Lord Mansfield in a letter to Lord Kames, 27 February 1762, quoted in I. S. Ross. *Lord Kames*, cit., p. 238.

²⁰⁴ See A. Rahmatian, "Introduction", in Home, Henry, Lord Kames (2011 [1778]), *Principles of Equity*, Volumes 1 and 2, Clark, New Jersey 2011 [1778], pp. I-LIX, at pp. XXIII-XXXIII, with regard to the *Principles of Equity* and its relationship to Scots law.

effectively propose that equity is an underlying means of legal development based on the moral laws of nature²⁰⁵. This work presents a normative philosophical system rather than a descriptive discussion of a body of law, and it vacillates between Scots law and English law. But that, in turn, made this work initially highly relevant to the founders of the United States who had to build a new legal system.

Otherwise Jefferson's references to the *Principles of Equity* appear mostly on book lists and recommendations for reading. In 1787, Jefferson recommended the *Principles of Equity* to Hérault: "A person who would wish to have a good general idea of the laws of England, should read the following books. ... Kaim's [sic] Principles of Equity. 2. v. 8vo. 10s"²⁰⁶. One may debate whether the *Principles of Equity* were ever, and were intended to be, a faithful representation of the law of equity in England. The *Principles of Equity* appear again in a book list for John Garland Jefferson as recommended reading, in fact a very heavy diet comprising law, moral philosophy and history which "are necessary to form a lawyer". Jefferson arranged the book list in three columns: "... you should read those in the first column till 12. oclock every day; those in the 2d. from 12. to 2. those in the 3d. after candlelight...". Kames's *Principles of Equity* are in the first column, so apparently to be read in the morning, Kames's "moral essays" (the *Essays on the Principles of Morality and Natural Religion*), are in the lunchtime column from 12-2. Other authors in this reading list are Dalrymple's "feudal system" (that is: the *Essays towards a General History of Feudal Property*), Locke "on government", Montesquieu's *Spirit of Laws*, Adam Smith's *Wealth of Nations*, Beccaria, Voltaire's historical works, Burke's "George III"²⁰⁷, Coke on Littleton, Blackstone, Robertson's histories of Scotland and of America²⁰⁸. In another list, a book order, enclosed with a letter to Alexander Donald in 1792, "Invoice of Books and articles to be Bought in Dublin and London", the *Principles of Equity* feature again, with the notable remark "These are all to be 8vo. editions and where they are not to be had in 8vo. they are not to be sent. The Irish 8vos. are preferred to the English because cheaper"²⁰⁹. The *Principles of Equity* also appear in book lists later in Jefferson's life, 1798 in a reading list for William Munford – which also lists Kames's *Principles of Morality and Natural Religion*, *Gentleman Farmer* (stated as "Home's Gentleman farmer") and the *Elements of Criticism*²¹⁰; 1802 in a list sent to Abraham Baldwin prepared to be a catalogue for the library of Congress²¹¹; and again in 1802, in a list of books for the Library of

²⁰⁵ See discussion in M. Lobban, "The Ambition of Lord Kames's Equity", in: Andrew Lewis and Michael Lobban (eds), *Law and History* (Current Legal Issues 2003, VI), Oxford 2004, pp. 97-121, at p. 101.

²⁰⁶ Letter from Thomas Jefferson to Hérault, probably the French lawyer Marie Jean Hérault de Séchelles (1759-1794), July 5, 1787, Th. Jefferson, *Papers*, cit., XI, p. 547.

²⁰⁷ Jefferson presumably meant Burke's *Thoughts on the Present Discontents* (1770).

²⁰⁸ Letter from Thomas Jefferson to John Garland Jefferson, New York, June 11, 1790, Th. Jefferson, *Papers*, cit., XVI, pp. 480-481.

²⁰⁹ Letter from Thomas Jefferson to Alexander Donald with enclosure, Philadelphia, Oct. 11, 1792, Th. Jefferson, *Papers*, cit., XXIV, p. 469.

²¹⁰ Course of Reading for William G. Munford (William Green Munford (1781?-1804), 5 Dec. 1798, Th. Jefferson, *Papers*, cit., XXX, p. 594.

²¹¹ Letter from Thomas Jefferson to Abraham Baldwin, Washington, April 14, 1802, Th. Jefferson, *Papers*, cit., XXXVII, p. 230.

Congress²¹².

As said already, the *Essays on the Principles of Morality and Natural Religion*²¹³ also appear in recommendations what to read, for example in 1787²¹⁴, 1798²¹⁵, 1800²¹⁶, and 1809²¹⁷. But the *Essays* were not just “additional reading” in moral philosophy alongside Locke’s and Hume’s essays, or Cicero’s, Seneca’s and Epictetus’s philosophical works which always appear in these lists (one can detect a strong orientation towards Stoicism, as is characteristic of the Scottish Enlightenment²¹⁸). The *Essays* rather had a fundamental influence on Jefferson’s worldview. This becomes particularly apparent in Jefferson’s letter to Thomas Law in 1814²¹⁹, in which Jefferson discussed his position on the foundation of morality in man and the different opinions held in the moral philosophy of his time: “how necessary was the care of the Creator in making the moral principle so much a part of our constitution as that no errors of reasoning or of speculation might lead us astray from it’s observance in practice”. He then summarized different philosophical opinions²²⁰: Wollaston²²¹ considered truth as the foundation of morality – for Jefferson “the most whimsical” of all theories. Others regard the love of god the foundation of morality – again Jefferson takes issue: even atheists may be moral persons, for example, “Diderot, Dalember [sic], D’Holbach, Condorcet, are known to have been among the

²¹² Letter from Thomas Jefferson to William Duane, Washington, July 16, 1802, Th. Jefferson, *Papers*, cit., XXXVIII, p. 78.

²¹³ Kames, *Principles of Morality and Natural Religion*, cit.

²¹⁴ Letter from Thomas Jefferson to Peter Carr, Paris, Aug. 10, 1787, enclosure, Th. Jefferson, *Papers*, cit., XII, p. 18.

²¹⁵ “Course of Reading for William G. Munford”, Th. Jefferson, *Papers*, cit., 5 Dec. 1798, XXX, p. 594. Kames’s *Elements of Criticism* are also recommended.

²¹⁶ “A Course of Reading for Joseph C. Cabell ... recommended by Mr. Jefferson”, Sept. 1800, Th. Jefferson, *Papers*, cit., XXXII, p. 179.

²¹⁷ Letter from Thomas Jefferson to Samuel R. Demaree, Monticello, Oct. 4, 1809, enclosure: “Supplemental List of Recommended Books”, Th. Jefferson, *The Papers of Thomas Jefferson. Retirement Series*, Vol. I and Vol. VII, ed. J. Jefferson Looney, Princeton and Oxford 2004, 2007, I, p. 576. Kames’s *Elements of Criticism* are also recommended. These lists of recommended books are very similar.

²¹⁸ L. P. Agnew, *Outward, Visible Propriety: Stoic Philosophy in Eighteenth-Century British Rhetorics*, Columbia, SC 2008, pp. 95-107, 126-129, with particular reference to Kames and Hugh Blair. On the influence of Scottish moral philosophy and civic humanism of the eighteenth century on John Witherspoon, James Madison’s teacher, see Th. P. Miller, “John Witherspoon”, cit., pp. 400-401, and P. J. Diamond, “Witherspoon, William Smith and the Scottish Philosophy in Revolutionary America”, in Richard B. Sher & Jeffrey R. Smitten (eds.), *Scotland and America in the Age of the Enlightenment*, Edinburgh 1990, pp. 115-132, at p. 115.

²¹⁹ Letter from Thomas Jefferson to Thomas Law, Poplar Forest near Lynchburg, June 13, 1814, Th. Jefferson, *Papers. Retirement Series*, cit., VII, p. 412.

²²⁰ This discussion has a predecessor in Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 2, chapter 9, pp. 66-82. As will be shown in a moment, Jefferson had Kames very much in mind when writing this letter, although expository discussions of the various positions in moral philosophy were presumably common with many authors at the time. Jefferson’s letter of 1814, then already fairly anachronistic, also demonstrates how much Jefferson remained a man of the eighteenth century.

²²¹ Jefferson had in mind here the work by William Wollaston, *Religion of Nature delineated* (1722).

most virtuous of men”²²². Man has an innate sense of beauty, but that is not a branch of morality. Self-love, or egoism, can plausibly be substituted as the basis of morality, but it is no part of morality as such. Jefferson criticizes the French materialist writer Helvétius here who considers selfishness as the only basis for human actions²²³. Man is a social animal, so he must have social dispositions, which entails a moral sense in man. Some have rejected this idea of an innate moral sense because otherwise it would not be possible that an action can be considered as virtuous in one situation, but vicious in another. Jefferson answers that problem by claiming that the standard test of virtue is utility, and the same act can therefore be useful “and consequently virtuous”, and “injurious and vicious” in different circumstances. Jefferson concludes the letter with the following words:

I sincerely then believe ... in the general existence of a moral instinct. ... [it] might be added Ld Kaims [sic], one of the ablest of our advocates, who goes so far as to say, in his Principles of Natural religion, that a man owes no duty to which he is not urged by some impulsive feeling. This is correct if referred to the standard of general feeling in the given case, and not to the feeling of a single individual. Perhaps I may misquote him, it being fifty years since I read his book ²²⁴.

We have a brief record of Jefferson’s thought processes when he read Kames’s *Essays* some fifty years earlier because of the annotations he made in his copy of the work (the first edition of 1751). In a chapter entitled “*Law of Nations*” in the context of the development of the moral sense (“The moral sense also, though rooted in the nature of man, admits of great refinements by culture and education”²²⁵) Kames gives the example of the treatment of enemies and prisoners of war. The moral sense develops, and this moral sense is the “law of nature” because it is the “law of our nature”; this law of nature “must vary with the nature of man, and consequently refine gradually as human nature refines. Putting an enemy to death in cold blood, raises at present distaste and horror, and therefore is immoral; though it was not always so in the same degree”²²⁶. In his copy Jefferson annotated these comments by Kames as follows:

This is a remarkable instance of improvement in the moral sense. The putting to death captives in war was a general practice among savage nations. When man became more humanized the captive was indulged with life on condition of holding it in perpetual slavery. ... But the ceding his life in commutation for service admits there was no necessity to take it, because you have not done it. And if there was neither necessity nor right to take his life then there is no right to his service in commutation for it. This doctrine is acknowledged by later writers, Montesquieu²²⁷, Burlamaqui &c. who yet suppose it just to

²²² Letter from Thomas Jefferson to Thomas Law, Poplar Forest near Lynchburg, June 13, 1814, Th. Jefferson, *Papers. Retirement Series*, cit., VII, p. 413.

²²³ Especially in C. A. Helvetius, *De l’Homme, de ses facultés intellectuelles et de son éducation*. Tome premier. Londres 1773, section 4, chapter 4, but Jefferson refers to Helvétius, *De l’esprit* (1758) in his letter.

²²⁴ Letter from Thomas Jefferson to Thomas Law, Poplar Forest near Lynchburg, June 13, 1814, Th. Jefferson, *Papers. Retirement Series*, cit., VII, p. 415.

²²⁵ Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 2, chapter 8, p. 64.

²²⁶ Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 2, chapter 8, p. 65.

²²⁷ Jefferson commonplacéd Montesquieu’s *Spirit of Laws* in his Legal Commonplace Book in the

require a ransom from the captive. One advance further in refinement will relinquish this also. If we have no right to the life of a captive, we have no right to his labour; if none to his labour we have none to his absent property which is but the fruit of that labour. In fact, ransom is but commutation in another form²²⁸.

The latter part of Jefferson's observation is really a gloss on Locke's labour theory of property²²⁹, which Kames, Adam Smith and others also endorsed. Jefferson's reference to Kames in the letter to Thomas Law – "a man owes no duty to which he is not urged by some impulsive feeling" – is rather an overstated summary of Kames's idea of the moral sense. For Kames human conduct can be "fit and meet to be done" and can thus be termed "morally beautiful" in Kames's understanding that was influenced by Hutcheson's aesthetics and moral philosophy. So there is a *moral beauty* and *moral deformity* of human actions or a morality and immorality, "founded on a faculty termed the *moral sense*"²³⁰. This moral sense is the sense of approbation or disapprobation. There are two types of actions that are fit and meet to be done: duties, where we are under an obligation to act in a certain way, and virtuous actions out of benevolence and generosity. Duties are *primary virtues*; we are compelled to fulfill these duties, like the duty of justice, the duty of truth, without which society could not subsist. In contrast, benevolent actions are *secondary virtues*, commendable and morally beautiful, but there is no moral obligation²³¹. What Jefferson probably alludes to is Kames's postulation that a duty, rooted in our moral sense, compels us intrinsically to perform a certain act: this is the complex of moral necessity caused by a duty flowing from the moral sense. Moral necessity reduces considerably the ability of man to act as a free agent: there is no longer unfettered human liberty, but moral necessity impelled by duty which determines man's will: man is a free agent in principle, but this necessity determines his will and actions²³². The moral determinism in the *Essays*, especially in its original version of 1751 before the extenuations of the later editions, would cause a lot of difficulties for Kames, and for some time the conservative wing of the Church of Scotland instigated his excommunication, ultimately unsuccessfully²³³.

The *Essays on the Principles of Morality and Natural Religion* were a central work which introduced what would later be termed Common Sense philosophy, and Jefferson maintained contact with one of its protagonists, Dugald Stewart, Professor of Moral

1770s, see D. L. Wilson, *Early Notebooks*, cit., p. 448. He had here presumably the following passage in Montesquieu's *Spirit of Laws*, book 15, chapter 2, in mind, Ch. de Montesquieu, *Spirit of Laws*, cit., pp. 259-260: "It is false that killing in war is lawful, unless in a case of absolute necessity: but when a man has made another his slave, he cannot be said to have been under a necessity of taking away his life, since he actually did not take it away. ... All nations concur ... in detesting the murdering of prisoners in cold blood".

²²⁸ Jefferson's marginal note in his copy of Kames's *Essays* in E. M. Sowerby, *Catalogue*, cit., II, pp. 11-12.

²²⁹ J. Locke, *Two Treatises of Government*, ed. Peter Laslett, Cambridge 2005, *Second Treatise of Government*, chapter 5, paras. 27-28, pp. 287-289.

²³⁰ Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 2, chapter 2, p. 29.

²³¹ Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 2, chapter 3, pp. 32-33.

²³² Kames, *Principles of Morality and Natural Religion*, cit., part 1, essay 3, pp. 102-103, and *ibid.* at pp. 246-254, being the wording of the first edition of 1751 (also Jefferson's own copy).

²³³ I. S. Ross, *Lord Kames*, cit., pp. 152-157.

Philosophy in Edinburgh (following Adam Ferguson) and Thomas Reid's student and intellectual successor²³⁴.

However, the practical side did not get neglected in Jefferson's studies; the gentleman farmer Jefferson²³⁵ frequently recommended Kames's *Gentleman Farmer* ("*An Attempt to improve Agriculture by subjecting it to the Test of Rational Principles*", 1776)²³⁶, a book on the improvement of agriculture according to scientific ("rational") criteria²³⁷. In this context, he also mentioned Kames to George Washington at least once²³⁸.

7. James Wilson

Wilson's Lectures on Law

James Wilson is presumably one of the least known and least appreciated founders of the United States. He was one of the six very first judges George Washington appointed to the Supreme Court²³⁹ which was established by the new ratified American Constitution²⁴⁰. He was the architect of the constitution of Pennsylvania of 1790, became the first law professor at the College of Philadelphia, and he was one of the most educated, most learned and most erudite of all founders²⁴¹. His reputation suffered permanent damage because of his bankruptcy that followed his speculations. That and his subsequent imprisonment²⁴² exposed him to derision even among his own generation of founding fathers and made him disappear from the general

²³⁴ Letter from Thomas Jefferson to Dugald Stewart, Monticello in Virginia, April 26, 1824, Massachusetts Historical Society, Microfilm P-060 Reel 12: "Dear Sir – It is now 35 years since I had the great pleasure of becoming acquainted with you in Paris, and since we saw together Louis XVI. led in triumph by his people thro' the streets of his capital ...".

²³⁵ See also M. D. Peterson, *Jefferson*, cit., pp. 524-530.

²³⁶ For example, in 1798: "Course of Reading for William G. Munford", Th. Jefferson, *Papers*, cit., 5 Dec. 1798, XXX, p. 594, here referred to as "Home's Gentleman farmer". In 1809: Letter from Thomas Jefferson to John Wyche, Monticello, Oct 4, 1809, enclosure: "List of Recommended Books", Th. Jefferson, *Papers. Retirement Series*, cit., I, p. 581: "Home's Gentleman farmer 8vo". And again in 1809: Letter from Thomas Jefferson to Wilson Cary Nicholas, Monticello, Dec. 16, 1809, enclosure: "Catalogue of Books on Agriculture", Th. Jefferson, *Papers. Retirement Series*, cit., II, p. 82: "Home (Ld Kaim's) Gentleman farmer 8vo".

²³⁷ H. Home, Lord Kames, *The Gentleman Farmer. Being and Attempt to improve Agriculture, by subjecting it to the Test of Rational Principles*, Edinburgh 1776, Preface, p. xii: "... I laid aside my books, took heart, and like Des Cartes commenced my inquiries with doubting of every thing. I resorted to the book of nature ... I pretend only to have reduced the theory of agriculture into a sort of system, more concise at least, and more consistent, than has been done by other writers".

²³⁸ Letter from Thomas Jefferson to George Washington, Monticello, May 14, 1794, Th. Jefferson, *Papers*, cit., XXVIII, p. 75: "Ld. Kaims [sic] once proposed an essence of dung, one pint of which should manure an acre. If he ... could have rendered it so portable I should have been one of those who would have been greatly obliged to [him]".

²³⁹ R. G. McCloskey, "Introduction", in Robert Green McCloskey (ed.), *The Works of James Wilson*, I, Cambridge, MA 1967, pp. 1-48, at pp. 2, 28, P. Maier, *American Scripture*, cit., pp. 469-470.

²⁴⁰ Article III, section 1.

²⁴¹ R. G. McCloskey "Introduction", cit., pp. 37, 45.

²⁴² R. G. McCloskey "Introduction", cit., pp. 43-44, Ch. P. Smith, *James Wilson. Founding Father 1742-1798*, Chapel Hill 1956, pp. 380-385.

consciousness of the American people. Relevant is here that he had a particularly close connection to the Scottish Enlightenment, simply because he was born and raised in Fife in Scotland and studied at St. Andrews University before he emigrated to America in 1765²⁴³. His philosophical influence was the Common Sense philosophy of Thomas Reid²⁴⁴, and his legal influence was to a considerable extent Lord Kames, Reid's mentor at one time²⁴⁵.

In the *Lectures on Law*, which Wilson prepared upon the appointment to the first professorship in law in the College of Philadelphia in 1790²⁴⁶ (they were published in 1804, after his death in 1798), he referred to Lord Kames a few times, but interestingly for the purpose of invoking him as a moral authority of learning and studiousness rather than as a legal authority to argue a point of law. A good deal of the lectures, especially the long beginning²⁴⁷, was designed to describe, possibly establish, a national character of Americans in the new State, to show the fortunate and happily designed framework of the new Constitution of the United States, to prove the requirement of founding a regular study of law in the United States, and to invoke certain towering figures of intellectual history as *Penates* to ensure the necessary moral and intellectual attitude among future law students. The following passage shall give a flavour of the tone of these lectures:

I rejoice in my appointment to this chair, because it gives me the best opportunities to discover, to study, to develop, and to communicate many striking instances, hitherto little known, on which this distinguished character [i.e. the American character²⁴⁸] is founded. ... To protect and to improve social life, is ... the end of government and law. If, therefore, you have no share in the formation, you must have a most intimate connexion with the effects, of a good system of law and government. That plan of education, which will produce, or promote, or preserve such a system, is, consequently, and object to you peculiarly important. ... I mean not, that such of you as are designed for the practice of the law, should be inattentive to the emoluments of your profession; but I mean that you should consider it as something higher than a mere instrument of private gain. ... Suffer me to recommend most earnestly this [general] outline [of law studies] to the utmost degree of your attention. It comes to you supported with all the countenance and authority of Bacon, Bolingbroke, Kaimes [sic] – two of them 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 life²⁴⁹.

²⁴³ R. G. McCloskey "Introduction", cit., pp. 7-9, P. Maier, *American Scripture*, cit., p. 77, Ch. P. Smith, *James Wilson*, cit., pp. 13-16, 21.

²⁴⁴ A characteristic passage in this regard in J. Wilson, "Lectures" in *The Works of James Wilson*, vols. I and II, ed. Robert Green McCloskey, Cambridge, Mass. 1967, pp. 193-194.

²⁴⁵ I. S. Ross, *Lord Kames*, cit., pp. 357-360 (on Kames and Reid), Ch. P. Smith, *James Wilson*, cit., p. 28 (on Wilson).

²⁴⁶ The commencing parts had the role and are in the style of an inaugural lecture, see R. G. McCloskey "Introduction", cit., p. 37.

²⁴⁷ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., chapter 1, pp. 69-96.

²⁴⁸ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., p. 72, says that the virtues of the American character are "the love of liberty, and the love of law".

²⁴⁹ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., pp. 70, 82, 88, 90, 91.

The ideal lawyer of the new American state has to be a learned lawyer, with deep understanding of the new constitutional system, but well-versed also in many disciplines outside the law, a civic and rounded person in the spirit of Bacon, Bolingbroke and Kames as role models. It was a Jeffersonian idea of an American Enlightenment man²⁵⁰. This scholarly trinity of Bacon, Bolingbroke and Kames appears again in the discussion of “Municipal Law” (the law which governs a nation or state):

You have not, I am sure, forgotten, that, in an early address, which I made to you, I recommend, most earnestly, to the utmost degree of your attention, an outline of study, supported with all the countenance and authority of three distinguished and experienced characters – Bacon, Bolingbroke, Kaims [sic]: it will not, I am sure, be forgotten, that metaphysical knowledge, or the philosophy of the human mind, formed a very conspicuous part of that outline; one of those “vantage grounds”, which every one must climb, who aims to be really a master in the science of law²⁵¹.

However, we do not get much of an idea what the real importance or influence of Kames is supposed to be; the somewhat grandiloquent passage does not reveal much content. There is only one reference to Kames in Wilson’s *Lectures on Law* which deals with a substantive matter, the question of the jurisdiction of the courts: should the jurisdiction in equity cases and jurisdiction for the common law be committed to the same court or divided between separate courts? Lord Bacon thinks that jurisdiction should be divided, Lord Kames thinks they should be united²⁵². Wilson has here Kames’s *Principles of Equity* in mind, and probably even in front of him, because Kames discusses the same question, contrasting Bacon’s opinion with his own,²⁵³ and Kames’s reference to Bacon is also Wilson’s²⁵⁴. Wilson maintains that in the development of the law, and depending on the case at issue, the dividing line between law and equity changes: such developing factors are, among others, the state of property, the improvement of the arts, and the refinement of the people²⁵⁵. This

²⁵⁰ With women the matter was trickier. J. Wilson, “Lectures”, in J. Wilson, *Works*, cit., p. 86, claims that women and men were in principle equal, but then distinguishes: “a woman may be an able, without being an accomplished female character”, which means for Wilson that a talented and successful woman may “have too much of the masculine in them”, and so women should not “undertake the management of publick affairs”. Women “form the better part” in “domestick society: there the lovely and accomplished woman shines with superiour lustre”. John Adams’s view was more differentiated, see his letter to Mercy Warren, April 16th, 1776 (Massachusetts Historical Society, Microfilm Reel P-164, Warren-Adams Papers): “The Ladies I think are the greatest Politicians, that I have the Honour to be acquainted with, not only because they act upon the Sublimest of all the Principles of Policy, vizt. the Honesty is the best Policy but because they consider Questions more coolly than those who are heated with Party Zeal, and inflamed with the bitter Contentions of active, public Life”.

²⁵¹ J. Wilson, “Lectures”, in J. Wilson, *Works*, cit., pp. 195-196.

²⁵² J. Wilson, “Lectures”, in J. Wilson, *Works*, cit., pp. 484-485.

²⁵³ Kames, *Principles of Equity*, cit., pp. 26-28.

²⁵⁴ F. Bacon, *The Physical and Metaphysical Works of Lord Bacon, including the Advancement of Learning and Novum Organum*, ed. Joseph Devey, London 1886, “Advancement of Learning”, book 8, chapter 3, aphorism 45, p. 355.

²⁵⁵ J. Wilson, “Lectures”, in J. Wilson, *Works*, cit. p. 485.

thought is very much in Kames's spirit, if not even taken from his works: the idea of a development of property in stages connected with the development of man and society²⁵⁶, the refinement of the arts²⁵⁷ and of the manners of the people²⁵⁸. Wilson then concludes that, as law and equity are in a state of continuing progression with each covering ground the other has receded from, "every court of law ought also to be a court of equity"²⁵⁹, an idea that probably derives from Kames as well²⁶⁰. The question of separate equity courts or not was also a point of discussion in one of Benjamin Franklin's letters to Lord Kames²⁶¹.

A further reference to Kames is again ornamental, preparing the trilogy of the scholarly and moral authorities of Bacon, Bolingbroke and Kames, when Wilson quotes a passage from Lord Bolingbroke which "is vouched by the respectable authority of Lord Kaims [sic], who considered it, and justly, as a master piece of expression and thought"²⁶². In that passage Lord Bolingbroke says that "there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons ... There will be none such any more ... till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the "vantage ground," so my Lord Bacon calls it, of science ... Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions ...", and Kames quotes exactly this passage (in an unabridged form) in the Preface of his *Historical Law-Tracts*²⁶³. However, Kames did not consider all texts by Bolingbroke as "a masterpiece of expression and thought", for he introduces Bolingbroke's passage with a characteristically sarcastic qualification: "An author, in whose voluminous writings not many things deserve to be copied, has however handled the present subject with such superiority of thought and expression, that ... I may be allowed to cite the passage at large"²⁶⁴. Wilson makes another short reference to Kames, when he borrows a memorable phrase from him in the discussion of the nature and causes of the principle of obligation in law. This has been the subject of so much dispute among philosophers and writers on jurisprudence, that an account of these opinions would, "in the estimation of my Lord Kaims [sic], be a "delicate historical morsel"²⁶⁵. Kames uses the expression "a curious morsel of history" in his discussion of the history of execution against moveables and land²⁶⁶; perhaps this was the phrase Wilson had in mind.

²⁵⁶ E.g. Kames, *Sketches*, book 1, sketches 1, 2 (2007: 53, 68); Kames, *Historical Law-Tracts*, Tract 3 "History of Property" (1988 [1761]: 80-104).

²⁵⁷ Kames *Sketches*, cit., book 1, sketch 4, p. 91.

²⁵⁸ Kames's *Sketches*, cit., book 1, sketch 5, p. 163.

²⁵⁹ J. Wilson, "Lectures", in J. Wilson, *Works*, cit. p. 486.

²⁶⁰ Kames, *Principles of Equity*, cit., pp. 7, 30.

²⁶¹ See above under 4.

²⁶² J. Wilson, "Lectures", in J. Wilson, *Works*, cit., p. 90.

²⁶³ Kames, *Historical Law-Tracts*, "Preface", cit., pp. x-xi. The passage by Bolingbroke is from his *Letters on the Study and Use of History*, letter 5, H. St. J. Bolingbroke, Bolingbroke, Lord Viscount, *Letters on the Study and Use of History*, London 1752, pp. 149-150.

²⁶⁴ Kames, *Historical Law-Tracts*, "Preface", cit., p. x.

²⁶⁵ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., p. 100.

²⁶⁶ Kames, *Historical Law-Tracts*, Tract 10, "History of Execution against Moveables and Land for

There are indications in Wilson's texts that he probably consulted some of Kames's works without specific acknowledgement. It is remarkable that where Wilson refers to Kames by name, he does not cite the source, and where he engages in a more detailed discussion which seems to have been influenced by more substantive material that (also) derived from Kames, he does not normally mention Kames by name. A hidden reference, only mentioning the work but not the author's name, is a quote from Kames's *Elements of Criticism*. The quote is somewhat distorted²⁶⁷, because Kames paraphrases here other philosophers about the metaphysical doctrine "that no being can act but where it is; and, consequently, that it cannot act upon any substance at a distance"²⁶⁸, and then Kames proceeds to discuss the arguments by Descartes, Locke and Berkeley on this point.

But there are certain passages with no acknowledgement at all which are clearly indebted to Kames to a considerable extent. Wilson discusses, for example, Descartes's proof of existence – *cogito, ergo sum* – and concludes that if Descartes does not assume the existence of himself as a first principle, but was obliged to assume the existence of his thoughts as a first principle, how could he then, if he doubts his existence, be certain that he thinks²⁶⁹? Because of this sharp aphoristic style, one is inclined to assume that Wilson was influenced by Kames here, not Reid, because Kames says in his *Essays on the Principles of Morality and Natural Religion*, when discussing the same problem in the context of personal identity: "Had he [Descartes] not as good reason to doubt of his thinking as of his existing?"²⁷⁰. Another passage in Wilson's lectures is also reminiscent of a certain flow of argument in Kames's work. Wilson discusses the origin of society: "Some philosophers, however, have alleged, that society is not natural, but is only adventitious to us; that it is the mere consequence of direful necessity; that, by nature, men are wolves to men ... the only natural principles of man are selfishness..."²⁷¹. The reference to "some philosophers" here is sufficiently clear: Hume ("society is not natural")²⁷², Hobbes ("men are wolves to men")²⁷³, Helvétius ("only natural principles of man are selfishness")²⁷⁴. We find the same line of argumentation in Kames's *Essays* again, defending the idea of human society against a purely selfish system and criticizing expressly Hume (on his idea of justice as an artifice), and Helvétius (on his idea of selfishness as the only governing

payment of debt", p. 328.

²⁶⁷ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., p. 220.

²⁶⁸ H. Home, Lord Kames, *Elements of Criticism*, Vols. I-II, ed. Peter Jones, Indianapolis 2005, "Appendix", (based on the 6th edition 1786), p. 734, footnote by Kames (this footnote is on p. 513 of vol. II of the sixth edition (in the 2005 edition used here at pp. 733-735) which Wilson seems to have used, the footnote did not appear in the first edition of 1762).

²⁶⁹ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., pp. 223-224. See also, *ibid.*, at p. 205.

²⁷⁰ Kames, *Morality and Natural Religion*, cit., book 1, essay 4, p. 126. A parallel passage in Kames's *Sketches*, cit., book 3, sketch 1, pp. 630-631: "How does our author know that he thinks?" It is, however, not likely that Wilson was familiar with the unabridged Scottish edition of Kames's *Sketches*.

²⁷¹ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., p. 228.

²⁷² D. Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, Oxford: Clarendon Press 1960 [1739-40], book 3, part 2 section 2, pp. 484-489.

²⁷³ Th. Hobbes, *Leviathan*, ed. Crawford B. Macpherson, London 1985 [1651], chapter 13, pp. 185-186.

²⁷⁴ C. A. Helvétius, *De L'Homme*, cit., section 4, chapter 4, pp. 237-239.

force)²⁷⁵. It is likely that Wilson took his cue here from Kames as a principal communicator of these ideas, although they were by no means discussed only by Kames during the Scottish Enlightenment.

Beyond such observations, however, claims to further influences directed specifically to Kames become too hypothetical. Wilson structures his lectures on the lines of man as an individual, man in society, man as a member of a confederation, and then deals with government and constitution which would broadly reflect Kames's organization in his *Sketches*, but this organization was even then obvious and not original – already Hobbes had adopted a similar structure²⁷⁶. In any case, to what extent Wilson could have been inspired by Kames's *Sketches* which appeared relatively late in 1774, is rather speculation.

Comparison of the Lectures on Law with Kames's Approach

The whole spirit of Wilson's lectures is remarkably Scottish. There is the "Baconianism"²⁷⁷, a characteristic feature of the Scottish Enlightenment²⁷⁸. Another is the idea of a conjectural, philosophical history for the explanation of the evolution of man and society, including the law²⁷⁹. However, in his discussion on the history of property (in a fragment which is thought to have been intended to form a part of the lectures) Wilson does not seem to have taken account of Kames at all²⁸⁰, although on this topic Kames was probably really the most important authority of his time²⁸¹. A further idea, and that is where Wilson meets directly with Kames²⁸², is the insistence on law as being a science²⁸³, with the overtone of striving to attempt a precise system based on reason which seeks to emulate the natural sciences²⁸⁴.

Wilson is said to have been disappointed that his *Lectures on Law* did not make the impact he has hoped for²⁸⁵. It is uncertain whether this would have been radically different if Wilson's life and reputation had not ended in ruinous disaster. While Wilson's scholarly ambition is clearly recognizable, his lectures are overall too superficial when it comes to concrete legal content. He would no doubt have perfected and expanded them had he continued his academic career; after all, what is available to us was not intended to be published in its present form²⁸⁶. Imagination and a grand plan alone do not make an institutional writer, like Blackstone, the

²⁷⁵ Kames, *Morality and Natural Religion*, cit., book 1, essay 2, pp. 46-53, 73-77.

²⁷⁶ Th. Hobbes, *Leviathan*, cit., Parts 1, 2 and 3 (1985).

²⁷⁷ Examples in J. Wilson, "Lectures", in J. Wilson, *Works*, cit., pp. 635, 742, and throughout the work.

²⁷⁸ See Ch. J. Berry, *Social Theory of the Scottish Enlightenment*, Edinburgh 1997, pp. 52-54, for discussion.

²⁷⁹ See J. Wilson, "Lectures", in J. Wilson, *Works*, cit., pp. 80-84, 90-91.

²⁸⁰ J. Wilson, *Miscellaneous Papers*, "On the History of Property", in J. Wilson, *Works*, cit., pp. 711-720. See also G. Seed, *James Wilson*, Millwood, New York 1978, pp. 158-159.

²⁸¹ Especially Kames, *Historical Law-Tracts*, Tract 3, "History of Property", cit., pp. 79-143.

²⁸² E.g. Kames, *Historical Law-Tracts*, Preface, cit., p. xv, Kames, *Elucidations*, cit., pp. x, xiii, on law as a science.

²⁸³ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., pp. 72-73.

²⁸⁴ Ch. P. Smith, *James Wilson*, cit., pp. 325, 336-337.

²⁸⁵ R. G. McCloskey "Introduction", cit., p. 43.

²⁸⁶ R. G. McCloskey "Introduction", cit., p. 51.

authority Wilson frequently criticizes²⁸⁷. But Wilson does not provide a sufficiently sharply contoured system as an alternative that would have served as a good guidance for future generations of lawyers. Wilson would also have been labeled as being “too metaphysical” for a lawyer, something he shares with Kames²⁸⁸ who suffered the same criticism, in Scotland interestingly from Hume²⁸⁹, and in the United States from Thomas Jefferson, as we have seen²⁹⁰.

There is, however, a sharp difference between Wilson and Kames. Kames is disputatious and sceptical and allows nobody, no matter how venerable, to rise above reason, and he fights intrepidly against anyone whom he disagrees with after his own reflections, be that the translators of the King James Bible²⁹¹, Aristotle²⁹², Bacon²⁹³, Descartes²⁹⁴, Locke²⁹⁵, Newton²⁹⁶, Clarke²⁹⁷, Rousseau²⁹⁸, Hutcheson²⁹⁹, Smith³⁰⁰ and Hume anyway³⁰¹. For Kames, authority should have no space in a modern “science of the law”, although that was completely in contravention to the tradition of legal practice and scholarship: “No science affords more opportunity for exerting the reasoning faculty, than that of law; and yet, in no other science is authority so prevalent. ... In other sciences reason begins to make a figure: why should it be excluded from the science of law? ... authority ought to be subservient to reason”³⁰². Wilson, however, argues from authority, and ironically, one of these authorities is Kames himself. This is much in accordance with law making and law teaching up to the present day, but entirely at odds with Kames’s idea of an Enlightenment spirit – Kant’s *sapere aude!* – in the realm of the law. Wilson is not innovative enough to provoke changes and not precise enough to be relied on as a compendium to establish or continue a legal tradition. So Wilson’s lectures would presumably soon have

²⁸⁷ Blackstone whom Wilson criticises for his political views on republicanism, see J. Wilson, “Lectures”, in J. Wilson, *Works*, cit., p. 79.

²⁸⁸ On Wilson following Lord Kames in mixing metaphysics and law, see Ch. P. Smith, *James Wilson*, cit., p. 320.

²⁸⁹ Especially Hume’s famous comment on Kames’s *Historical Law-Tracts*, see Hume, letter to Adam Smith, 12 April 1759, *Letters*, I, cit., p. 304: “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”.

²⁹⁰ Letter from Thomas Jefferson to Peter Carr, Philadelphia, June 22, 1792, Th. Jefferson, *Papers*, cit., XXIV, p. 108, and above under 7.

²⁹¹ Kames, *Sketches*, cit., book 3, sketch 1, pp. 633-634.

²⁹² Kames, *Sketches*, cit., book 3, sketch 1, pp. 598, 637.

²⁹³ Kames, *Sketches*, cit., book 3, sketch 1, pp. 598, 623.

²⁹⁴ E.g. Kames, *Morality and Natural Religion*, cit., book 1, essay 4, pp. 125-126, Kames, *Sketches*, cit., book 3, sketch 1, pp. 630-631.

²⁹⁵ E.g. Kames, *Morality and Natural Religion*, cit., book 1, essay 4, p. 129.

²⁹⁶ E.g. Kames, *Morality and Natural Religion*, cit., book 2, essay 3, p. 171.

²⁹⁷ Kames, *Morality and Natural Religion*, cit., book 1, essay 3, pp. 103-104.

²⁹⁸ Kames, *Morality and Natural Religion*, cit., book 1, essay 2, p. 76, footnote.

²⁹⁹ Kames, *Morality and Natural Religion*, cit., book 1, essay 2, p. 31.

³⁰⁰ Kames, *Morality and Natural Religion*, cit., book 1, essay 2, p. 71.

³⁰¹ E.g. Kames, *Morality and Natural Religion*, cit., book 1, essay 2, and book 2, essay 5, pp. 82, 186-189.

³⁰² Kames, *Elucidations*, cit., Preface, pp. vii, x.

become mainly of historical interest in any case³⁰³. But his comparative discussion of the British and the then new US American constitutional systems in his lectures still deserves attention³⁰⁴.

8. Conclusion

Lord Kames – judge, jurist, moral philosopher, legal historian, and one of the founders of a proto-anthropology and sociology – was a central figure of the Scottish Enlightenment. He also shaped considerably the thinking of American intellectuals in the second half of the eighteenth century. That included some of the founders of the United States who saw this new state in many ways as a practical implementation of Enlightenment thought.

This article has concentrated on Benjamin Franklin, John Adams, Thomas Jefferson and James Wilson. These were the founders who read Kames's works extensively. Franklin was the only one among the founders who had a personal contact with Kames and over time would regard Kames even as a friend. Kames's *Introduction of the Art of Thinking* (1761) and his *Elements of Criticism* (1762) were probably the works which impressed Franklin most. For John Adams, who knew Kames from his own reading only, Kames's most important works were the writings on constitutional and legal history and on feudalism, particularly in the *Historical-Law Tracts* (1758) and in the *Essays upon Several Subjects concerning British Antiquities* (1747). Later, already during his politically active time, Adams also commented upon Kames's discussion of commerce and the monetary system in the *Sketches of the History of Man* (1774). Thomas Jefferson was introduced to Kames in his law studies, and the most relevant work to Jefferson as the lawyer and practitioner were Kames's *Principles of Equity* (1760). The book which influenced Jefferson's moral philosophy profoundly were Kames's *Essays on Morality and Natural Religion* (1751). James Wilson was familiar with Kames's writings in law, legal history and moral philosophy from his studies at St. Andrews University in Scotland before his departure to America in 1765, and he referred to some of them, particularly the *Historical Law-Tracts*, in his *Lectures on Law* (1790) in the College of Philadelphia.

Somewhat simplistically one may say that Franklin's relationship to Kames was personal, Adams's intellectual, Jefferson's educational, and Wilson's ornamental. For Franklin, Kames was an original thinker and a highly knowledgeable partner with whom he could exchange ideas about aesthetics and art, American affairs, or some of Franklin's inventions. For Adams, Kames was an authority on law and legal science, as well as legal history, with a singularly critical stance towards the traditional feudal system and, implicitly, the British constitutional framework. In some respects, Kames was one of Adams's teachers for becoming a legal thinker, political philosopher and practical politician. For Jefferson, Kames was a teacher of the law in an even more narrow sense, an authoritative writer of a legal treatise, the *Principles of Equity*, and well into old age Jefferson would recommend this and other works by Kames as essential

³⁰³ A somewhat more optimistic assessment of Wilson's law lectures in Ch. P. Smith, *James Wilson*, cit., p. 341.

³⁰⁴ J. Wilson, "Lectures", in J. Wilson, *Works*, cit., chapter 11, pp. 309-333. Discussion e.g. by G. Seed, *James Wilson*, cit., pp. 151-156.

reading for any lawyer who needed to be fully educated in the sense of the Enlightenment. But Kames was also a principal influence that shaped Jefferson's own moral philosophy, more than Reid or Hutcheson. For Wilson, Kames was a figure used as an argument from authority. Because of the central and prominent position Kames had as a lawyer and intellectual in the second half of the eighteenth century, Wilson stylized him as a member of the moral and scholarly trinity of "Bacon, Bolingbroke and Kaimes" in his lectures and made him a role model for young lawyers in a new American spirit. Kames's personality was really an ornament and support in a moral exhortation; his actual writings were less relevant here.

In all cases, the legacy of Kames's thought is considerable, and it has been more relevant to the thinking of these four founders of the United States than has commonly been assumed.

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