COMMENTARIES ON THE LAWS OF ENGLAND

Commentaries on the Laws of England

William Blackstone

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VOLUME II

Of the Rights of Things (1766)

With an Introduction by A. W. Brian Simpson

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INTRODUCTION TO BOOK II

BLACKSTONE, following a scheme devised nearly a century earlier by Sir Matthew Hale,[1] the great seventeenth-century jurist, devotes the second book of the *Commentaries* to what are curiously called the rights of things, *jura rerum*. By this expression are meant "those rights which a man may acquire in and to such external things as are unconnected with his person."[2] The subject matter therefore is property law, so considered as to embrace all rights which do not attach to individuals simply as such, whether naturally or as members of civil society. It would be hard to overemphasize the contemporary significance, both to professional lawyers and to Blackstone's lay readership, of property law, particularly real property law, as a branch of legal learning. His lectures at Oxford, out of which grew the *Commentaries*, were specifically directed to "gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation . . . . It is their landed property, with it's long and voluminous train of descents and conveyances, settlements, entails and incumbrances, that forms the most intricate and most extensive object of legal knowledge."[3] For the propertied classes, land, the permanent endowment of the governors, represented power, status, and security; for the lawyer, whose activities were very largely parasitic on the propertied classes, property law was where the money was to be got. At a theoretical level its importance was again undisputed. In the legal and political thought of the time, an extraordinary significance was attributed to the protection of property; for some indeed this was both the principal function of municipal law and the very reason for the establishment of civil societies. Freedom of property, classed by Blackstone as the third absolute right, inherent in every Englishman, the notion of which was classically expressed in John Locke's *Two Treatises of Government* (1689),[4] was of leading importance in the tradition of liberal thought associated with the French and American revolutions; not until the nineteenth century did freedom of contract come to achieve a similar status. Blackstone's second volume therefore seeks to set out, ex-

ERRATA.

Page 13, *line* 6: *before* heir *insert* their immediate
21, *line* 4: *for* and *read* or
96, *line* 4: *after* was *insert* virtually
103, *line* 4: *after* another *insert* and his heirs
121, *line* 3: *for* ſpecifice ſtate *read* ſpecific eſtate
149, *line* 17: *for* at *read* as
199, *line* 9: *for* alienes to *read* enfeoffs
272, *line* 25: *for* 32 *read* 23
276, (*note* [a] *and* [b]) *for* 152, 153, *read* 252, 253,
309, (*note* [w]) *for* 90 *read* n°. 24. 1 Vern. 348.
473, *line* 30: } *for* tradeſman *read* trader
474, *line* 12: }

plain, and justify the way in which the common law of England discharges one of its three principal obligations to its subjects.

The Theory of Property Rights

It is understandable, given the acknowledged primacy of the subject, that Blackstone begins with an incursion into the theory of property, "Of Property in General."[5] Today theories of property appear to excite neither the popular nor the specialist interest they once did. They rarely feature in legal study; much of the writing on the subject belongs to the tradition of natural law, and today few read the writings of authors in this tradition.[6] Such theories are concerned first with historical inquiry of a kind nowadays the preserve of anthropologists rather than historians: how did the institution of property come about? This question Blackstone tackles in a speculative manner, supposing a state of primitive simplicity, as in Genesis, in which all was in common. His views as to how and why private property in moveables, and eventually in immoveables, first emerged are derived from earlier writers, particularly the Swedish jurist Baron Pufendorf, whose *Of the Laws of Nature and Nations*[7] was available in an English edition published by the Oxford University Press in 1710 and widely read.

Theories of property are also concerned with the ethical justification of private property. Here Blackstone, who was primarily interested in property in land, took the orthodox view of the time: the individual's right derived from "occupancy."[8] But this left open the intriguing question of why the act of taking should confer an exclusive right to possession. Why, we might put it, should finding be keeping? Here there was a controversy. One school of thought claimed that the right depended upon some form of implied or tacit social contract, and that property rights therefore derived from the obligation to keep agreements; this was the view, for example, of Sir Robert Filmer,[9] Grotius,[10] and Pufendorf. In opposition was the view, primarily associated with John Locke, that there existed independently of contract, and thus independently of civil society, a *natural* right of property, derived from the individual's expenditure of labor in occupying; a form of this theory is now adopted by Marxists. Blackstone, never at his most lucid in high theory, belittles the controversy but, a theorist in

spite of himself, he principally follows Locke, conceiving of property as essentially an institution of natural law, whose extension beyond its natural bounds was due to developments in human, civil law. For example, no form of inheritance seemed to him to be "natural."[11] Blackstone's theoretical views are to be found scattered about Book II, and not simply in the first chapter;[12] they cannot easily be isolated from his general views on the nature of law itself. Opinions may differ as to whether his treatment of the subject is sophisticated in its complexity or merely confused.

Blackstone on Real Property

Blackstone then proceeds, in the following twenty-two chapters, to give an account of the law of real property. Broadly, real property, as opposed to personal property (dealt with in the final nine chapters), was the law of immoveables as opposed to moveables, or land as opposed to chattels. Over the preceding seven centuries the common law judges and sergeants, assisted intermittently by parliamentary legislation (itself the work of common lawyers), had evolved separate bodies of law for real property and personal property. To make matters even more confusing, they had constructed in "chattels real"—typically, leases—a hybrid creature, which Blackstone discusses under the heading of real property. Since the twelfth century, the law of real property, that body of law involved in the resolution of land disputes, had been the predominant concern of the royal courts, where the common law was made, and the common law as an intellectual system evolved from the elaborate procedures through which rights in real property were challenged, tested, and vindicated. The name "real property" itself is taken from the procedures, the real actions, through which landowners' rights were specifically enforced. The dominant status of real property law, early established, long persisted, and in Blackstone's time that body of law, viewed as the mechanism either for the resolution of land disputes, or, as it was used by the expert conveyancers for the cooperative, consensual organization of land ownership, remained the most important and intellectually developed branch of the common law. Extreme intellectual development in law is not necessarily a virtue, and real property law had become the victim of too many able minds refining too many distinctions for too long.

It was of almost incredible complexity; cynics like Oliver Cromwell called it an ungodly jumble. It had become a mystery, unintelligible except to experts.

Its unintelligibility was aggravated by another feature. The basic scheme of concepts in which rights in land had come to be expressed had been settled in the early Middle Ages, when society had been organized feudally; land law was in origin feudal law. In the immense period which had elapsed between the world of Norman feudalism and the world of Blackstone there had of course been many important developments and changes in the law, but at no point had there been any radical break in continuity. Indeed to this very day, both in the country of its origin and in countries to which it was exported in the colonial and imperial periods, the common law remains an essentially medieval body of law that has been unsystematically modified and patched up so as to make the system work, if not always well, as least tolerably. Accidents of history have sometimes produced a situation in which real property law retains more archaic features outside England than at home. The major reforms date from the nineteenth century; in Blackstone's day all these lay in the future, so that the system was in many respects archaic. Its procedures and doctrines were of baffling complexity, and a fear existed that any tinkering with so venerable and ramshackle an edifice could collapse the structure and throw all property into confusion.

Blackstone made what was previously a dark mystery comprehensible to those who did not propose to acquire an understanding of the subject by years of study in conveyancing chambers or attorney's office. To have written, in so brief a compass, a clear, readable account of real property law was an extraordinary achievement. Blackstone's second volume exemplifies his remarkable ability to separate out the essentials, the elements of the subject, from matters of elaboration or refinement. With this ability he combined the equally important gift of succinct, economical expression. It is easy, from reading Blackstone, to be misled into thinking that the law of the time was as simple as he makes it seem; it must be emphasized that this was not the case. A good example of his technique is to be found in chapter 11, where he discusses the doctrines governing contingent remainders, which were soon, in 1772, to be made the subject of a celebrated but esoteric work, Fearne's *Essay on the Learning of Contingent Remainders and Executory*

Devises.[13] Blackstone, after setting out in a few pages the basic principles involved goes on, "It were endless to attempt to enter upon the particular subtilties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions."[14] He knew what had to be cut out to hold his readers' attention.

Blackstone's Predecessors

Blackstone was not the first to compose a treatise on real property law: he had two celebrated predecessors. The first was Sir Thomas Littleton, a fifteenth-century lawyer and later judge, whose *Tenures*, a brief and mainly elementary statement of property law, was one of the earliest lawbooks printed in England, the first of its many editions appearing in about 1481.[15] Though according to tradition the *Tenures* was written for Littleton's son Richard,[16] I suspect that like the *Commentaries* it originated as lectures for students; this would explain its simplicity. Littleton's book was not, however, for laymen; indeed it was written not in English but in the Norman-French then used by lawyers as the private language of their mystery. For over a century it formed the staple diet of young law students.

Then in the early seventeenth century a fate typical of short successful lawbooks overtook the *Tenures*, it was made the subject of an elaborate gloss or commentary. The author was the most learned of all the black letter lawyers, Sir Edward Coke.[17] To Coke the *Tenures* was "the ornament of the common law, and the most perfect and absolute work that was ever written in any human science." In *The First Part of the Institutes of the Laws of England*, always known to lawyers as "Coke on Littleton," he expounded and dissected the words of the master with an incredible display of technical legal learning. Where Littleton's opening paragraph defines the fee simple in a hundred and ninety-four words, Coke's commentary on the same passage extends to over twenty thousand. Later commentators added further material, and in its final form, evolved in the late eighteenth century, Littleton's original text was submerged with notes by Francis Hargrave and Charles Butler superimposed on notes by Lord Nottingham and

Sir Matthew Hale expounding Coke's commentary. As a mine of learning on property law, "Coke on Littleton" was unrivaled, and its dominance continued until late in the nineteenth century. It was, however, a book to consult or study, being far too repulsive to read. If Blackstone's treatment of the subject owes anything to his predecessors, it must be to Littleton, not Coke, but there is no direct sense in which the *Tenures* formed a model.

Blackstone's Scheme

Blackstone himself acknowledged that an expositor of a complex subject, whose aim is simplicity, must hit on and adhere to a simple scheme.[18] After dealing with property in general, he treats of the objects of property (divided, in the case of real property, into corporeal things and incorporeal things), then with the tenures by which these forms of property are held, then with the interests those who hold them can have (the doctrine of estates), then with title to real property, and finally with modes of alienating real property. The scheme was not perfect, the principal difficulty being where to put that most characteristic of all the products of the ingenuity of English property lawyers, the trust. Blackstone's account of this institution is to be found principally in chapter 20, "Of Alienation by Deed,"[19] tucked away in an account of conveyancing forms. The subject is also discussed in chapter 8 ("Of Freeholds Not of Inheritance")[20] and in chapter 18 ("Of Title by Forfeiture").[21] Blackstone's account of the development of the trust from the use is inadequate, and he nowhere gives a clear account of the distinction between property rights established and recognized by the courts of common law as legal, and property rights—typically, the rights of a beneficiary under a trust—recognized in the Court of Chancery as equitable only. Essentially the distinction is that a legal property right is enforceable against the property into whomsoever's hands it has come, whereas an equitable right is liable to be defeated if the property comes into the hands of a purchaser in good faith for value of the legal estate without notice of the existence of the trust. The defective treatment of trusts is the only serious gap in Blackstone's comprehensiveness; it is a fault generated by his scheme of arrangement.

Blackstone and Feudalism

Blackstone's treatment of real property law within his scheme was essentially historical;[22] he believed that "It is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourse to the antient."[23] He seeks to explain existing law by setting out the manner of its evolution, using history for its explanatory and sometimes for its justificatory force; the majority of treatise writers have followed this technique ever since. Usually the picture is one of steady improvement, but at times Blackstone writes as if there was once a simple golden age of the common law, which thereafter suffered from new-fangled inventions.[24] Monks (Blackstone was hostile to monks) came in for a share of the blame.[25] Blackstone's historicism is particularly in evidence in his treatment of tenure. He emphasized, as he had to do, the feudal origins of English land law, and he begins with a somewhat idealized picture of "the nature and doctrine of feuds," whose principal legal expression is the dogma that all land is held of a feudal lord, and directly or ultimately of the monarch as supreme feudal lord. His historical views are largely derived from Sir Martin Wright's *Introduction to the Law of Tenures* (1730); Blackstone was not himself a historian, but a user of history. But in Blackstone's time the major and economically important consequences of tenure had largely vanished, as had the military tenures which were the typical expressions of Norman feudalism. Blackstone emphasizes feudalism partly because the structure and terminology of the law was still dominated by its origin, and partly because he was at pains to demonstrate that the common law, in spite of its feudal lineage, gave expression and protection to the natural right of individual private property. For feudalism seems, on the face of things, to deny this; subjects "hold" land conditionally from the monarch, they do not "own." Indeed it is part of the modern folklore of real property law that "the king owns all the land," a notion not, however, to be found in Blackstone. He is, however, anxious to demonstrate that feudalism (which he abominated)[26] had been largely deprived of its oppressive character, and that in spite of the survival of feudal elements and the universal doctrine of tenure, the common law does recognize individual private ownership.[27]

Blackstone on the Doctrine of Estates

The second leading characteristic of English land law is the doctrine of estates. The law of tenure having set out those rights, duties, and liabilities of the landholder which sprang from his relationship as tenant with his feudal lord, the doctrine of estates comprises an analysis of the quantum of interest of the landholder in terms of time. The most elegant statement of the doctrine, which Blackstone unfortunately does not quote, is to be found in the sixteenth-century *Walsingham's Case*: "The land itself is one thing and the estate in land is another thing: for an estate in the land is a time in the land, or land for a time: and there are diversities of estates, which are no more than diversities of time; for he who hath a fee simple in the land has a time in the land without end, or land for a time without end; and he who has land in tail has a time in land, or the land for a time, as long as he has issue of his body; and he who has an estate in land for life has no time in it longer than his own life; and so of one who has an estate in land for the life of another, or for years."[28]

The whole corpus of rules defining the estates which could exist, their incidents and manner of creation, and most importantly how they could be put together like an elaborate jigsaw, was enormously complex; Blackstone's simplification is remarkable. It is easy enough to grasp the notion of the fee simple—roughly, "ownership"—and of the estate for years, the familiar lease. What is more baffling is the scheme of estates associated with *family* landownership: the life estate, the entail, conditional and determinable fees, and estates in remainder and reversion. All the elaboration here was the product of aristocratic dynastic family landholding. To the wealthy landed classes, real property was the essential endowment not of individuals but of the family, a continuing but constantly changing entity forming and reforming around the basic family events—birth, the attainment of majority, marriage and death—and rendered continuous by the concepts of blood and inheritance. Land was to be exploited in the interests of the family, not the individual, but the mechanism for its exploitation was, paradoxically, a subtle manipulation of individual property rights; the family was never treated as an entity capable of itself owning or possessing rights, nor on the other hand were patriarchal notions

carried to the point at which only the father of the family enjoyed rights. In the complex history of the subject was expressed a continuous tension between two strategies. According to one, the family endowment is best secured by permitting individuals, particularly the current head of the family, as little discretion and power of disposition over the family lands as possible. According to the other, the same end was better achieved by a flexible system under which the endowment can be reallocated so as to adapt to changes in the family, catering for personalities and uncovenanted family events. The compromise commonly employed in Blackstone's time, and evolved in the seventeenth century, was the strict settlement under which the land was managed by a succession of life tenants, the settlement being reconstituted each generation to ensure that no single individual ever acquired an unfettered power to appropriate the family capital for his individual purposes. It is remarkable that in spite of Blackstone's exaltation of private *individual* property rights, the landowning class in reality had little use for them.

Of the strict settlement, which all his readers would know in practice, Blackstone gives no general account, though in Appendix II his specimen conveyance by lease and release is a strict settlement of typical form on the occasion of a marriage. For an account of the institution it is necessary to go outside the *Commentaries.*

Blackstone on Title and Modes of Alienation

The remainder of Blackstone's account deals with the principles governing both the establishment of title to real property, and the mechanisms of transfer which themselves constitute steps in the establishment of title. Blackstone presents this intricate body of law, which in reality gave rise to extensive insecurity of title, in the form of a set of exceptions to title by inheritance, which he viewed as "the principal object of the laws of real property in England." A romantic attachment to the hereditary principle, and particularly to the principle of primogeniture, long persisted in England, though the truth of the matter was that the landowning classes, as paradoxically as they shied away from individual property rights, avoided, by settlements either by will or *inter vivos*

(i.e., between the living, taking effect before death), the operation of the doctrine of inheritance wherever possible. To understand Blackstone one must appreciate this paradox.

Blackstone on Personal Property

The remainder of the volume deals with personal property, a branch of the law which was, in Blackstone's time, relatively less developed than that of real property, but one in which individual property rights were in reality more respected. The principal and historical reason for this was partly economic, partly social. The common law was essentially the law of the aristocratic landed classes, and in their world, as contrasted with the urban world of the mercantile classes, moveable, tangible property constituted a less significant form of wealth than land. In the main their personal property represented expenditure rather than investment. Blackstone himself makes much of the relative unimportance of chattels in his explanation for the way in which the law of moveables had evolved on quite different lines than real property law. In particular, moveables had never been subjected to the doctrines of tenure or estates, and consequently they could not be subjected to the elaborate scheme of the family strict settlement; relatively simple mechanisms were used to ensure that the more permanent forms of personal property devolved with the land. Blackstone's whole account of personal property, with its discussion of the problems of the beekeeper and the legal position of partridges in a mew, smells of the countryside; the law is the law of the country gentry, not Cheapside. The *Commentaries* reflects the essentially rural character of the high civilization of the eighteenth century.

Mercantile Custom and Personal Property

Today of course much wealth consists of various forms of intangible personal property: stocks and shares, life insurance policies, negotiable commercial instruments, copyrights, patents, commercial goodwill, and so forth. The legal institutions involved were essentially emanations of the urban commercial world of merchants, principally though not exclusively taking the form of

offshoots of commercial contract law. Historically the law merchant had been conceived of as a body of law quite distinct from the common law, as a personal law of those of the merchant class. In Blackstone's time theory had changed; he tells us that the custom of merchants, "however different from the common law, is allowed for the benefit of trade, to be of the utmost validity in all commercial transactions . . . ."[29] Particularly with the chief justiceship of Lord Mansfield (1756–88),[30] there was a major reception of mercantile custom into the common law.

In Blackstone's treatment of personal property this area of law is not emphasized. There is a discussion of copyright and a short account of bills of exchange, promissory notes, and insurance, the first tucked away in the discussion of title by occupancy and the second in the section on title by gift, grant, and contract.[31] In Blackstone's basic analysis of personal property rights, the newer forms of commercial intangible property presented peculiar difficulty. He adopted a traditional distinction between "things in possession" and "things in action," the latter comprising objects of private property rights which are recoverable by legal action, as opposed to being in the actual possession of the owner; an example is a debt. Blackstone supposed that title to all "things in action" had its basis in contract, express or implied.[32] Given this defective scheme it is not easy to see where to place intangibles generally; copyright for example is intangible but not based on contract. Blackstone never thought through the analytical problems, and his scheme is rendered even more difficult by the distinction he draws between "absolute" and "qualified" property.[33] As in the case of the trust, the source of difficulty is the original scheme.

Blackstone on Contract

The received concept of a "thing in action" as a form of property fathered what seems to modern readers to be the most peculiar feature of Book II. Lurking unexpectedly in chapter 30, which is devoted to modes of acquisition of personal property, is Blackstone's account of the law of contract, dealing both with formal contracts by sealed instruments and with the so-called simple or parole contracts by word of mouth, some evidenced by written documents.[34] Contracts are here conceived of as a sort of convey-

ance; either they pass property in tangible things such as a horse or book (as in the case of chattel sales), or they pass intangible property recoverable in action, such as a debt. Contracts to perform services or other acts, such as marriage, do not fit the analysis, since the right to the services is not technically a "thing in action," and such contracts are consequently hardly mentioned. Blackstone's treatment of contract is unsatisfactory because again he falls victim to the deficiency of his basic scheme which, in its failure to reflect the sophistication of contemporary law, has misled many into supposing that the law of contract was in his time little developed. Blackstone's scheme does, however, reflect the fact that in eighteenth-century legal thought contract had not achieved the status it was to gain in the nineteenth century, when it came to be viewed as the principal civilizing force in social development, and consequently as the branch of the law of the profoundest social significance. Freedom of contract was to overtake freedom of property; Blackstone never of course mentions freedom of contract.

A. W. Brian Simpson

NOTES

1. (1609–76). Hale's best known works are his *History of the Pleas of the Crown,* and *The History of the Common Law of England,* available in a paperback edition by the University of Chicago Press (ed. C. M. Gray). His *General Analysis of the Civil Part of the Law* was first published posthumously in 1713.
2. Blackstone, *Commentaries* II:1.
3. Id. Introduction I:7.
4. Available in numerous editions, perhaps most usefully in that by P. Laslett (1963).
5. Blackstone ch. 1 of Book II. See also I:138.
6. A useful introduction is A. P. d'Entrèves, *Natural Law* (1951).
7. First published in 1672. Baron Pufendorf (1632–89) was professor of the law of nature and nations at Heidelberg and later professor of jurisprudence at Lund.
8. The term translates *occupatio* of Roman law texts; the equivalent term for moveables is *perceptio,* "taking."

9. The *Patriarcha* and other political writings of Filmer (c. 1588–1653) are available in a modern edition by P. Laslett (1949). His theory of property is set out in § VIII–X. The *Patriarcha* was first published posthumously in 1680.
10. Hugo Grotius (1583–1645), whose *De Iure Belli ac Pacis* appeared in 1625.
11. Blackstone II:10.
12. See on inheritance id. I:134, II:400, IV:9; on occupancy II:258ff, especially the discussion of copyright at 405–7. The long discussion of the legal position of game and the prerogative is at II:410ff. On slavery see I:123 and II:402, discussed in F. O. Shyllon, *Black Slaves in Britain* (1974), in ch. 5. The passage in I:123 was altered in the second edition (1766) to conform more to the doctrine set out for captives at II:402.
13. Fearne went through numerous editions, suffering the fate of the good lawbook; from an original size of under a hundred pages it expanded in the hands of editors to over a thousand.
14. Blackstone II:172.
15. Littleton (c. 1410–81) became a judge in 1466; his effigy may still be seen in Worcester Cathedral.
16. The traditional story to this effect is based on the use of the expression "*mon fils*" in the text, but this was at the time the way one addressed young students generally.
17. (1551–1633).
18. See Blackstone ch. 1 of Book I.
19. Id. II:327–39. Notice also 296–97.
20. Id. II:137.
21. Id. II:271–74.
22. See also id. IV:435, where are set out "some rude outlines of a plan of the history of our laws and liberties."
23. Id. II:44.
24. See, e.g., II:331.
25. See, e.g., id. II:48.
26. See id. II:52.
27. See id. II:104–6.
28. Plowden, *Commentaries* 555 (1578).
29. Blackstone I:75.
30. The only modern life discussing Mansfield's contribution as a lawyer is C. H. S. Fifoot's *Lord Mansfield* (1936).
31. Blackstone II:405 and 458ff.
32. Id. II:397.
33. Id. II:389–91.
34. Blackstone, following Hale's scheme, also discusses contract when dealing with private wrongs.