COMMENTARIES ON THE LAWS OF ENGLAND

BOOK III OF PRIVATE WRONGS

WILLIAM BLACKSTONE

With an Introduction, Notes, and Textual Apparatus by Thomas P. Gallanis

OXFORD

THE OXFORD EDITION OF BLACKSTONE

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AND TEXTUAL APPARATUS BY
THOMAS P. GALLANIS

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Contents

Editor's Introduction to Book III

This brief introduction aims to introduce Book III of Sir William Blackstone's *Commentaries on the Laws of England* to the modern reader. The first edition of Book III was published in 1768.[1] Thereafter, the numbering of the editions jumps.[2] The next edition of Book III was published as part of the fourth edition of the *Commentaries* in 1770. Subsequent editions of Book III appeared during Blackstone's lifetime as part of the *Commentaries*' fifth (1773), sixth (1774), seventh (1775), and eighth (1778) editions. Blackstone died on 14 February 1780. The ninth edition of the *Commentaries* appeared in 1783 with, as stated on the title page, 'the last corrections of the author; and continued to the present time by Ri[chard] Burn'.[3]

This introduction is divided into three parts. The first surveys the subject-matter of Book III, a volume cryptically titled 'Of Private Wrongs', and identifies the principal sources on which Blackstone relied in writing it. Part 1 also compares Book III to the corresponding material in Blackstone's earlier-published treatise titled *An Analysis of the Laws of England*. Part 2 explores the reaction to Book III, focusing on the notices and reviews appearing in the immediate aftermath of publication. Part 2 also analyses Blackstone's changes ('varia') to later editions of Book III. Finally, Part 3 offers some reflections on the impact of Book III to the present day.

Subject Matter, Sources and Comparison with Blackstone's *Analysis*

Book III is titled 'Of Private Wrongs'. To modern readers, this might suggest a volume on matters of substantive private law, such as tort, contract, or property. But in fact, as Blackstone explained in the volume's introductory chapter, Book III is primarily about the 'redress of private wrongs, by suit or action in courts' (III. 2)—in other words, about courts and their procedures. In Blackstone's words, 'where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded' (III. 15). Book III primarily concerns these remedies and their processes.

Like Gaul, Book III can be divided into three principal parts. The first describes the multiple courts in England and their jurisdictions, including the wrongs cognizable in each of them (Chapters 3–7). The second describes some aspects of the

[1] In the newspapers of the day, the first announcement of Book III's publication appears in the *Gazetteer and New Daily Advertiser* of 11 May 1768.

[2] The reason for the jump in numbering is that the second and third editions of Books I and II appeared quickly. The year Book III was first published (1768) also saw the publication of the third edition of Books I and II.

[3] Richard Burn (*d.* 1785) was a clergyman and legal author, perhaps best known for his first book, *The Justice of the Peace and Parish Officer*, which went through thirty editions between 1755 and 1869. See N. Landau, 'Burn, Richard (1709–1785)', *Oxford Dictionary of National Biography*, ed. C. Matthew and B. Harrison, 60 vols (Oxford, 2004) and at oxforddnb.com (henceforth *ODNB*). Books cited were published in London unless otherwise noted.

substantive common law: wrongs to persons (Chapter 8) and wrongs to personal and real property (Chapters 9–16). The third describes the processes of litigation in the courts of common law (Chapters 18–26) and equity (Chapter 27, which concludes the volume). In addition to these three principal parts of Book III, Chapters 1 and 2 set the stage by explaining how the redress of private wrongs can be accomplished 'by the mere act of the parties' (Chapter 1) or 'by the mere operation of law' (Chapter 2); Chapter 17 explores 'the mode of redressing those injuries to which the crown itself is a party' (III. 169); and an Appendix to Book III contains sample writs and other documents illustrating the processes of litigation.[4]

Noteworthy is the brevity of treatment (Chapter 8 only) of the law of personal wrongs, what we would today call the law of tort. The focus of that chapter is on the *actions* to remedy a personal wrong. This should be unsurprising. Professor Ibbetson rightly observed that the law of tort in Blackstone's day was 'recognizably medieval … characterized by a division between the action of trespass and the action on the case'.[5] This would change dramatically in the nineteenth century. The word 'negligence' is absent from Blackstone's chapter, yet it would come to describe much of the law of tort in the Victorian period.[6]

Much of Book III is dry and technical, but there are some stirring and memorable passages. One of these appears in Chapter 4—on 'the Public Courts of Common Law and Equity'—where Blackstone defended England's multiple, often overlapping, courts by invoking a riparian metaphor: 'The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy' (III. 20). Later in the chapter, however, Blackstone acknowledged that the historical growth of the central royal courts at the expense of local tribunals might have been the source of delay as well as of justice: 'whether for the better or the worse, may be matter of some speculation; when we consider on the one hand the encrease of expense and delay, and on the other the more upright and impartial decision, that follow from this change of jurisdiction' (III. 21).[7] Indeed, when Blackstone enumerated the various

[4] Some of these documents were reproduced from Blackstone's *Analysis of the Laws of England* (Oxford, 1756): compare pp. 158–76 of the *Analysis* with pp. 305–21 of the Appendix. As Blackstone explained in the *Analysis* (p. ix), the documents 'were judged to be necessary for explaining certain Principles, and Matters of daily Practice; of which it was however impracticable to convey any adequate Idea by verbal Descriptions only'.

[5] D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), 169. Blackstone's commitment to this 'medieval … division' between trespass and case is evident in his dissenting opinion in *Scott v Shepherd* (1773), 2 Black. W. 892, 894; 96 ER 525–6: 'where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case'.

[6] See W. Cornish *et al.*, *The Oxford History of the Laws of England*, xii: *1820–1914 Private Law* (Oxford, 2010), 903–57.

[7] In his biography of Blackstone, Doolittle observed that Blackstone's earlier lectures at Oxford contained remarks highly critical of the decline of the lesser courts ('poor people, to their great detriment, dragged away to superior and more distant courts') but that these, and similarly harsh remarks on some other topics, were excised from the published *Commentaries*. See I. Doolittle, *William Blackstone: A Biography* (Haslemere, 2001), 83.

courts one by one, it is striking that he began not with the most prestigious court but with what he called '[t]he lowest,[8] and at the same time the most expeditious, court of justice known to the law of England' (III. 21)—the court of piepowder (*piepoudre*), which rendered speedy justice for personal wrongs committed at a fair or market.

Another stirring passage appears in Chapter 17—the chapter on 'injuries proceeding from, or affecting, the Crown'—wherein Blackstone detoured from his central subject to defend the unusual 'terms of art' (III. 176), 'intricacy' (III. 177), and 'fictions and circuities' (III. 178) of English civil procedure as being superior to any simplified code promulgated by 'the prince by his edict' (III. 177). The unfolding evolution of English civil process enabled procedural rules to be consistent with 'the frame of our constitution' (*ibid.*) and to respond to changing social and economic conditions ('the gradual influence of foreign trade and domestic tranquillity', III. 178) while still 'answer[ing] the purpose of doing speedy and substantial justice' (*ibid.*). As Blackstone put it in an evocative architectural metaphor, 'We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. . . . The inferior apartments, now converted into rooms of convenience, are chearful and commodious, though their approaches are winding and difficult' (*ibid.*).[9]

Blackstone took special effort in Book III to persuade his reader not to worry about English law's heavy reliance on legal fictions—to take but one example, the often-used fiction that 'a contract, really made at sea, was made at the royal exchange, or other inland place' (III. 72).[10] The use of such fictions (in this case, as a device for obtaining jurisdiction over the contract in the courts of common law, rather than in the court of admiralty) was, for Blackstone, both well pedigreed and highly valuable. In his words, 'such fictions are adopted and encouraged in the Roman law', which declared for instance 'that a son killed in battle is supposed to live forever for the benefit of his parents' (*ibid.*). As Blackstone explained in defence of all such fictional strategems, 'these fictions of law, though at first they may startle the student, he will find upon farther consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience' (III. 28).

Another remarkable excursus appears in Chapter 21—the chapter on 'issue and demurrer'—where Blackstone discussed the use of Latin and law French in the English courts. According to Blackstone, law French was originally a 'barbarous dialect' and '[a]n evident and shameful badge . . . of tyranny and foreign servitude' (III. 210), but over time it came to be a language in which lawyers thought they 'could express their thoughts more aptly and more concisely . . . than in any other' (*ibid.*). Blackstone lamented the tendency of 'many a student to throw away his Plowden and Littleton,

[8] Precisely why Blackstone labeled the piepowder court the 'lowest' is unclear.

[9] For an elaboration of this theme in Blackstone's writings and life, see C. Matthews, 'A "Model of the Old House": Architecture in Blackstone's Life and *Commentaries*', in W. Prest (ed.), *Blackstone and His Commentaries: Biography, Law, History* (Oxford, 2009), 15–34.

[10] Doolittle contrasted this aspect of Book III with Blackstone's earlier Oxford lectures, which observed more critically that fictitious actions were common but 'attended with many absurdities and inconveniences' (Doolittle, *William Blackstone*, 83).

without venturing to attack a page of them' when in fact 'upon a nearer acquaintance, they would have found nothing very formidable in the language' (III. 210–11). Turning to Latin, he remarked that it was a 'durable' and 'universal dialect' (III. 211) throughout the middle ages and, therefore, he asserted, its use cannot be considered a 'blemish' (*ibid.*) on the English nation. Indeed, the Latin of the law courts is 'calculated for eternal duration, and easy to be apprehended both in present and future times' (*ibid.*). As Blackstone put it in a stirring metaphor, '[t]he rude pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of Attica, Rome, and Palmyra have sunk beneath the stroke of time' (*ibid.*).

Book III occasionally reveals Blackstone's sense of humour.[11] In a footnote in Chapter 9—the chapter on 'injuries to personal property'—Blackstone recounted an anecdote about the student days of Sir Thomas More. Studying in Flanders, More encountered a professor 'who gave a universal challenge to dispute with any person in any science' (III. 101, note w). More is said to have responded to the challenge by sending the professor the following question: 'whether beasts of the plough, taken in *withernam*, are incapable of being replevied' (*ibid.*).[12] Frederic William Maitland used the same anecdote (citing Blackstone) in his Rede lecture of 1901.[13]

Probably the best known passages in Book III appear in Chapter 23—the chapter on 'the trial by jury'. Near the end of the chapter, after describing the processes of jury selection, evidence gathering, and verdict, Blackstone offered a lengthy encomium, pronouncing trial by jury to be 'the glory of the English law' (III. 249) and the 'best preservative of English liberty' (III. 251). This is not to say that Blackstone thought jury trial to be flawless. He discussed some of its flaws—for example, the absence of Chancery's powers of discovery and *subpoena*, the inability to examine witnesses abroad and receive their depositions, and the potential for local prejudice to affect the verdict (III. 251–2). Yet even taking the imperfections into account, he concluded that trial by jury is the 'best criterion, for investigating the truth of facts, that was ever established in any country' (III. 253).

Blackstone's approach in the *Commentaries* to English procedure was often, though not always, Panglossian—in the words of Voltaire's memorable character, 'everything is for the best' in this the 'best of all possible worlds'—and this approach is carried through into his final chapter in Book III, on 'proceedings in the courts of equity'.[14] There, Blackstone worked hard to downplay any substantive differences

[11] Or perhaps mine. After reading Blackstone's footnote, I laughed audibly.

[12] For an understanding of withernam, consider the following fact-pattern. Suppose that one person (*A*) sued another (*B*) and that, as part of the pre-trial process, *A* distrained chattels of *B* in order to force *B* to answer *A*'s accusation. Suppose that *A*'s claim against *B* was later dropped or was unsuccessful. *B* would be entitled to seek the return of his chattels from *A* by way of replevin. However, if the chattels could not be found within the county—in technical parlance, the chattels were 'eloigned'—then *B* would have a writ of capias in withernam commanding the sheriff to take other chattels of *A* as a substitute. *A* could not recover those chattels by replevin until *A* produced the chattels originally taken from *B*. Thus, as Blackstone explained, 'goods taken in withernam cannot be replevied, till the original distress is forthcoming' (III. 101).

[13] F. W. Maitland, *English Law and the Renaissance* (Cambridge, 1901), 17.

[14] Contrasted with Blackstone's earlier lectures, the published *Commentaries* are noticeably more cautious. Blackstone was 'anxious to avoid controversy', and '[r]emarks suitable for an Oxford academic could easily cause difficulty in London and elsewhere' (Doolittle, *William Blackstone*, 83).

between law and equity in an effort to reassure the reader that the judge in equity is not an 'arbitrary legislator' (III. 284). For example, Blackstone denied that a function of equity is 'to abate the rigour of the common law' (III. 282). He also erected, then demolished, the straw man that 'a court of equity is not bound by rules or precedents' (III. 284). This effort to minimize the distinctions between equity and law led Blackstone onto thin ice, at least on one point, when he suggested that there are 'trusts . . . cognizable in a court of law' (III. 283, referring to deposits, bailments, and assumpsit for money had and received).[15] He later clarified that the courts of equity, not law, determine 'the form and effect of a trust' (III. 287) and that the trusts jurisdiction of the courts of equity is 'exclusive' (III. 289).

What can be said about the content of Book III by way of summary? Professor Lobban rightly observed that, in Book III, 'Blackstone found himself facing a tension between his rule-based concept [of law] and the remedial common law system'.[16] England's multiple, often overlapping courts, and their differing, frequently fiction-laden procedures for the resolution of disputes, did not fit well into any 'rational structure'.[17] In a later century, Oliver Wendell Holmes wrote that '[t]he life of the [common] law has not been logic: it has been experience'.[18] Blackstone essentially admitted this when he said—in Chapter 22, on 'the several species of trial'—that '[t]he causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; . . . Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases' (III. 216). Blackstone portrayed this as a strength of the English legal system, built on real-world judicial decisions, in contrast to the academic commentary of the civil law (see III. 217). This 'superstructure' (*ibid.*) of legal institutions and procedural law rested on a foundation of history, the accretion over centuries of choices and accidents, not on the reason or natural law so prominent elsewhere in the *Commentaries*.[19] But this was hardly Blackstone's fault. The English courts and their processes were what they were. Blackstone achieved much in Book III in mapping the institutional and procedural terrain.[20]

In writing Book III, Blackstone relied on many sources, both primary and secondary. Blackstone's method in composing the *Commentaries* was noticeably different from the method by which Sir William Holdsworth has been characterized as writing the *History of English Law*, with a decanter of port and no more than three books, often secondary authorities,[21] in front of him at a time. Blackstone's writing

[15] On the distinction between such legal interests and the equitable interests in trust, see *Scott and Ascher on Trusts* (5th edn., New York, 2006), §2.3.

[16] M. Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford, 1991), 38.

[17] *Ibid.*, 41.

[18] O. W. Holmes, *The Common Law* (Boston, 1881), 1.

[19] See generally Lobban, *Common Law and English Jurisprudence*, 17–46.

[20] See generally S. F. C. Milsom, 'The Nature of Blackstone's Achievement', *Oxford Journal of Legal Studies*, 1 (Spring 1981), 1–12.

[21] On Holdsworth's *History of English Law,* see H. G. Hanbury, 'Holdsworth, Sir William Searle (1871–1944)', rev. D. Ibbetson, *ODNB*.

while at All Souls College admittedly was fuelled by port.[22] (Indeed, so was the writing of this introduction.) But, crucially, Blackstone cited directly to relevant statutes and case reports—as, in fact, did Holdsworth. The tables of cases and statutes in this variorum edition attest to that. Blackstone also, of course, cited secondary authorities; such sources in Book III are too numerous to list, but among the most frequently cited were Sir Edward Coke's *Institutes of the Laws of England* (the first part of which is known as Coke on Littleton),[23] Finch's *Law* (by the author and lawyer Sir Henry Finch),[24] Henry Rolle's *Abridgment des Plusieurs Cases et Resolutions del Common Ley* ('Abridgment of Many Cases and Resolutions at Common Law'),[25] Sir Robert Brooke's *Graund Abridgement*,[26] Sir Anthony Fitzherbert's *La Novel Natura Brevium* (New Natura Brevium),[27] and Sir Matthew Hale's posthumously published *History and Analysis of the Common Law of England*.[28] Blackstone also used medieval English sources, such as *Glanvill*, *Bracton*, and *Fleta*. Non-legal sources, such as *The Modern Part of an Universal History* or the *Journal of the Proceedings of the House of Commons*, also appear, as do sources of Roman or Continental law, such as Justinian's *Digest* and *Code*, as well as Johan Stiernhöök's *De Jure Sueonum et Gothorum Vetusto* ('On the Ancient Swedish and Gothic Laws'), published in Stockholm in 1672.[29]

Book III is unsurprisingly similar to the corresponding material in Blackstone's one-volume *Analysis of the Laws of England*, first published in 1756.[30] The *Analysis* had started life as 'four diagrammatic plans of [Blackstone's] lecture course, provided as printed broadsheets for the benefit of student audiences from 1753 onwards'.[31] The *Analysis* reached its fifth edition in 1762, and this was the edition in print when Book III

On Holdsworth and port see R. A. Cosgrove, 'The Culture of Academic Legal History: Lawyers' History and Historians' Law 1870–1930', *Cambrian Law Review*, 33 (2002), 29 (observing that Holdsworth's 'habit of snagging the All Souls' port bottle in the evening and then writing until it ran out is famous').

On Holdsworth and secondary authorities, see Cosgrove, 'Academic Legal History', 30 (stating that Holdsworth 'rarely engaged in original research and freely admitted that he worked from secondary authorities almost exclusively'). For a more careful assessment, see Hanbury, 'Holdsworth', *ODNB*.

[22] See N. Aubertin-Potter, '"A Mighty Consumption of Ale": Blackstone, Buckler and All Souls College, Oxford', in Prest (ed.), *Blackstone and His Commentaries*, 40.

[23] See A. D. Boyer, 'Coke, Sir Edward (1552–1634)', *ODNB*.

[24] See W. Prest, 'Finch, Sir Henry (*c.* 1558–1625)', *ODNB*.

[25] See S. Handley, 'Rolle, Henry (1589/90–1656)', *ODNB*.

[26] See J. H. Baker, 'Broke, Sir Robert (*d.* 1558)', *ODNB*.

[27] See J. H. Baker, 'Fitzherbert, Sir Anthony (*c.* 1470–1538)', *ODNB*.

[28] See A. Cromartie, 'Hale, Sir Mathew (1609–1676)', *ODNB*, observing that '[t]he *Analysis* at its conclusion is a complete taxonomy of matters handled by the common law; it was borrowed by William Blackstone with minimal modification and therefore provides the structure of Blackstone's *Commentaries*'.

[29] Oxford University's SOLO catalogue reveals that copies of Stiernhöök's book are now held by the Bodleian Library and in the libraries of New College and Queen's College, but not all college library holdings are listed. As the provenance of most copies (i.e. whether they were acquired before or after the publication date of Book III) is unclear, it is impossible to say which copy Blackstone consulted, if indeed it was one of these.

[30] This is confirmed by Doolittle: 'There was certainly no opportunity to make wholesale changes to the lectures in the years before they were published as *Commentaries on the Laws of England*. Thomas Bever's full set of notes in 1753–4 can be traced through to the printed form. With the assistance of another reasonably full set of notes from the Vinerian period (1761–2), as well as the successive editions of the *Analysis* …, it is possible to establish that Blackstone made few fundamental changes to the basic structure and content of his lectures' (Doolittle, *William Blackstone*, 82).

[31] W. Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford, 2008), 142.

of the *Commentaries* was published in 1768. The third book of the *Analysis*, on 'private wrongs or civil injuries', is divided into fewer chapters than Book III of the *Commentaries*—it has fifteen chapters in the first edition of the *Analysis*, rising to sixteen chapters in the fifth edition of the *Analysis*, compared with twenty-seven chapters in Book III of the *Commentaries*—but the structure and topics in the *Analysis* are fundamentally similar to Book III of the *Commentaries*. Every topic in the third book of the *Analysis* is in Book III of the *Commentaries*, though not quite the other way around. There is one chapter in Book III of the *Commentaries* the material of which is wholly absent from pre-1768 editions of the *Analysis*: namely, Chapter 17, on 'injuries proceeding from, or affecting, the Crown'. Blackstone dis–cussed this topic first in the *Commentaries*. Thereafter, he added it to the *Analysis*.[32]

Reception of Book III upon Publication; Blackstone's Varia

In notices and reviews appearing directly after its publication, Book III of Blackstone's *Commentaries* generally received high praise.[33] A notice in the 1768 *Annual Register* consisted primarily of quotations from the volume, the author of the notice observing that '[t]he utility of the work, and the great merit of the elegant and masterly writer, are so generally understood as to require no additional illustration; and our readers will justly think the little room that our limits afford, much better supplied by quotations from the original, than by any observations we should make on it'.[34] Reviews with more substance appeared in 1768 in the *Critical Review* and the *Monthly Review*.[35] The *Critical Review* lauded the volume as an 'excellent work' and said that

> [i]t is paying Mr. Blackstone too poor a compliment to call him the English Cujas,[36] or the modern Coke, as perhaps neither of these authors have equalled him in that perspicuity and order, which has been so much wanting in the study of the law. He has cleared it from technical terms; so that we can venture to assert, that every gentleman of tolerable good sense, though he is no scholar, by carefully perusing this work, may become no contemptible lawyer.[37]

The barrister Owen Ruffhead in the *Monthly Review* similarly described the volume as 'a work, in which knowledge, elegance, and spirit, are happily united with method and perspicuity' and an 'incomparable performance'.[38]

[32] See W. Blackstone, *An Analysis of the Laws of England* (6th edn., Oxford, 1771), 106.

[33] See Prest, *Blackstone*, 221.

[34] *Annual Register for the Year 1768*, 268. The notice also referred to Blackstone's account of trial by jury as 'very full and accurate' (*ibid.*, 270).

[35] See *Critical Review* (June 1768), 401–10; (July 1768), 29–36; *Monthly Review* (Nov. 1768), 329–44; (Dec. 1768), 461–8.

[36] Jacques Cujas (*d.* 1590), an eminent French jurist and scholar of Roman law.

[37] *Critical Review* (July 1768), 36. On the possibility that this notice was authored by Edmund Burke, see T. W. Copeland, *Edmund Burke: Six Essays* (1950), 144.

[38] *Monthly Review* (Nov. 1768), 329; (Dec. 1768), 468.

The reviews did have some minor criticisms, for example about Blackstone's use of the term 'municipal' law (III. 1) to describe the law of England;[39] about whether there was any real difference between the two etymologies offered by Blackstone (III. 32) of *piepoudre*;[40] and about whether the chancellor was truly 'the general guardian of all infants, idiots, and lunatics' (III. 47) by virtue of office or instead only by virtue of a writ from the king.[41] The reviews also had suggestions for additions or clarifications, for instance that Blackstone should emphasize that, before the establishment of the central royal courts, the county courts (discussed in Chapter 4) were the chief courts of the kingdom;[42] or that Blackstone should add to his list of the defects of trial by jury (III. 382–5) the requirement of unanimity.[43]

Blackstone seems largely to have ignored these criticisms and suggestions as he prepared subsequent editions. One suggestion that does correlate with subsequent varia—though it may have been merely the product of Blackstone's wordsmithing on his own initiative rather than responding to critique—was to be clearer about the distinction (III. 78) between the duchy of Lancaster and the county palatine.[44]

Blackstone has been aptly described as 'the sort of writer who found it very difficult to refrain from tinkering with his text'.[45] This habit of wordsmithing is amply illustrated by the varia in Book III (printed at the end of this volume). A good example of Blackstone's tinkering with language in an effort to enhance clarity and precision can be found in the very first instance of a change in Chapter 1 (III. 3). Here in the first edition of the *Commentaries*, Blackstone wrote: 'But as some injuries are of such a nature, that they furnish or require a more speedy remedy ...'. In the next edition to be printed he changed this sentence to read as follows (additions are underlined and deletions are struck through): 'But as <u>there are</u> ~~some~~ <u>certain</u> injuries ~~are~~ of such a nature, that ~~they~~ <u>some of them</u> furnish ~~or~~ <u>and others</u> require a more speedy remedy ...'.[46]

The varia in Book III provide good evidence of Blackstone-as-tinkerer, but otherwise they are unrevealing. In updating Book III, Blackstone did what most authors would have done in preparing subsequent editions: he clarified his text;[47] he added or deleted references to the occasional case,[48] statute,[49] or treatise;[50] and he

[39] See *Critical Review* (June 1768), 401–2; *Monthly Review* (Nov. 1768), 329–30.

[40] See *Critical Review* (June 1768), 403.

[41] See *Critical Review* (June 1768), 408.

[42] See *Monthly Review* (Nov. 1768), 335.

[43] See *Monthly Review* (Dec. 1768), 468.

[44] See *Critical Review* (July 1768), 34; ch. 6 ⟨11⟩, III. 54, 328. The Duchy of Lancaster is a private estate held by the monarch. See http://www.duchyoflancaster.co.uk/about-the-duchy. The county of Lancashire became a county palatine in the mid-fourteenth century, with its own separate court system (like county Durham).

[45] W. Prest, 'Blackstone and Biography', in Prest (ed.), *Blackstone and His Commentaries*, 9.

[46] Ch. 1 ⟨1⟩, III. 2, 323.

[47] The example just cited at footnote 46 is typical.

[48] See e.g. ch. 8 ⟨21⟩, III. 350, adding a reference to Jones's case (1677) 2 Mod 198, 86 ER 1023; ch. 11 ⟨8⟩, III. 336, adding a reference to Fair-Claim v Sham-Title (1762) Burr. 1290, 97 ER 837; ch. 16 ⟨2⟩, III. 339, adding a reference to Weekly v Wildman (1698) 1 Ld Raym 405, 91 ER 1169; ch. 18 ⟨13⟩, III. 341, adding a reference to Walter v Bould (1610) 1 Bulstr 31, 80 ER 735; ch. 24 ⟨21⟩, III. 350, adding references to Griesley's case (1588), 8 Rep 38, 77 ER 530, and Beecher's case (1608) 8 Rep 58, 77 ER 559.

[49] See e.g. ch. 6 ⟨5⟩, III. 327, adding references to five statutes, the most recent being 13 Geo. III c. 51 (1773); ch. 17 ⟨3⟩, III. 340, adding references to 21 Jac. I c. 2 (1623) and 9 Geo. III c. 16 (1769); ch. 23 ⟨43⟩, III. 348, adding a reference to 13 Geo. III c. 63 (1773).

[50] See e.g. ch. 10 ⟨14⟩, III. 340, adding a reference to *Coke on Littleton*; ch. 16 ⟨1⟩, III. 339, adding a reference to Finch's Law; ch. 22 ⟨3⟩, III. 345 adding a reference to Rolle's *Abridgment*.

added internal cross-references (to other parts of the *Commentaries*).[51] None of this is especially remarkable, nor does it shed much additional light on Blackstone's mind or method.

Perhaps the most interesting observation that can be made about the varia in Book III is about the path not taken, the varia that do not exist. *Ex ante* one might speculate that Blackstone would have made large changes from one edition to the next, with whole paragraphs added or subtracted, large sections fundamentally re-worked—especially in Chapters 4 (on the 'public courts of common law and equity'), 22 (on the 'several species of trial'), 23 (on trial by jury), or 27 (on the court of equity). These chapters do have ample varia. But here, as elsewhere in Book III, the varia are on the margins, as it were: a clause reworded, a reference added. We do not see Blackstone changing large swaths of his text. This is consistent with what we observed earlier: his non-response to a suggestion in the *Monthly Review* that Blackstone add to his critique of jury trial the requirement of unanimity.[52] To adopt this suggestion would have necessitated an entire paragraph, perhaps more, either to make the case that unanimity, too, was a defect of jury trial or to explain why he did not view it as such. Blackstone did neither. This kind of revision was not on the cards. He tinkered often but declined more substantial rewriting, at least in Book III.

Impact of Book III to the Present Day

Professor Baker has rightly called Blackstone's *Commentaries* 'the first connected and reasonably comprehensive survey of English law since [the thirteenth-century treatise known as] *Bracton*'.[53] A full assessment of the *Commentaries*' impact over 250 years, and in the many countries in which it has been published, is far beyond the scope of this essay.[54] Instead, let me offer three observations, focusing on Book III.

First, Book III provided a remarkable map[55] to the English courts and their procedures designed primarily for students and for the 'gentlemanly reader',[56] rather than for practising lawyers. This focus, rooted in the *Commentaries*' origin in Blackstone's Oxford lectures, had benefits and limitations. On the one hand, the

[51] See e.g. ch. 2 ⟨2⟩, III. 323, adding a cross-reference to Book II.

[52] See *Monthly Review* (Dec. 1768), 468

[53] J. H. Baker, *An Introduction to English Legal History* (4th edn., 2002), 191.

[54] See W. Prest, 'Beyond England' in W. Prest (ed.), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Oxford, 2014), 71: 'Tracing the dissemination, reception and impact of Blackstone's work within and beyond England, inside and outside the common law world, presents a scholarly challenge of massive proportions. While a start has been made, much remains to be done by way of mapping the extensive global dimensions and varying configurations of the influence exercised by the *Commentaries* over the past two and a half centuries.'

[55] The metaphor is Blackstone's: 'You will permit me however briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done. He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet' (I. 30).

[56] Lobban, *Common Law and English Jurisprudence*, 47.

many editions of the *Commentaries* produced and sold in England during Blackstone's lifetime, and for decades thereafter,[57] attest to the book's popularity and utility for its intended purposes. On the other hand, English lawyers in the second half of the eighteenth century typically looked for guidance elsewhere, to more detailed and specialized treatises. Among these, in the realm of procedure, were Sir Jeffrey Gilbert's *History and Practice of Civil Actions* and *Law of Evidence*, and Sir Francis Buller's *Introduction to the Law Relative to Trials at Nisi Prius* (based on the notes of his uncle, Henry Bathurst). Indeed, some lawyers were dismissive of the *Commentaries*' relevance to the practising bar, William (later Sir William) Jones, for example, writing that the *Commentaries* 'will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer'.[58] This understates the importance of Blackstone's map as a foundation, as Professor Milsom has rightly reminded us.[59] In assessing the impact of Book III, therefore, we must be mindful of Blackstone's intended audiences, and also of the groundwork that he laid and upon which so many others built.

Second, it must be acknowledged that, in England, the durability of Book III was blunted by Victorian reforms. The courts and procedures described by Blackstone lasted for decades, but not centuries, after Book III's initial publication. This was noticed by the legal historian Frederic William Maitland in his lectures on the forms of action at common law: 'Let us then for a while place ourselves in Blackstone's day, or, for this matters not, some seventy years later in 1830, and let us look for a moment at English civil procedure.'[60] By the beginning of the nineteenth century, the 'delay, vexation, and expense'[61] of English civil process attracted considerable criticism, most notably from Jeremy Bentham[62] and his ardent supporter in Parliament, Henry Brougham.[63] Commissions were appointed throughout the nineteenth century to examine the functioning of the courts and to recommend reforms. These reforms came piecemeal, culminating in transformative statutes enacted after Brougham and Bentham had died.[64] By the end of Victoria's reign in 1901, the reforms had brought together the three common-law courts of King's Bench, Common Pleas, and Exchequer within one Queen's Bench Division, and the separate jurisdictions of law and equity within one High Court; archaic and complex procedures had been

[57] See Milsom, 'Blackstone's Achievement', 1: 'working editions [of the *Commentaries*] appeared in England until about the time of the Judicature Acts [of the 1870s]'.

[58] W. Jones, *An Essay on the Law of Bailments* (1781), 3–4.

[59] Milsom, 'Blackstone's Achievement', 10–12.

[60] F. W. Maitland, *The Forms of Action at Common Law*, ed. A. H. Chaytor and W. J. Whittaker (Cambridge, 1971), 1.

[61] Bentham used the phrase repeatedly. For example, a search in the 'Making of Modern Law: Legal Treatises 1800–1926' database reveals 117 uses in the *Rationale of Judicial Evidence*, 5 vols (1827).

[62] See F. Rosen, 'Bentham, Jeremy (1748–1832)', *ODNB*. For examples of Bentham's criticisms of Book III, see J. Bentham, *A Fragment on Government*, ed. J. H. Burns and H. L. A. Hart (Cambridge, 1988), 20–2, 30 (originally published 1776).

[63] See M. Lobban, 'Brougham, Henry Peter, first Baron Brougham and Vaux (1778–1868)', *ODNB*.

[64] For discussion, see T. P. Gallanis, 'Victorian Reform of Civil Litigation in the Superior Courts of Common Law', in C. H. Van Rhee (ed.), *Within a Reasonable Time: The History of Due and Undue Delay in Civil Litigation* (Berlin, 2010), 233–53.

replaced with more straightforward and sensible ones; and judges had been given more power to control and shape their procedural environment, at the 'macro' level through the promulgation of rules of court but also in the individual case to permit amendments of pleadings or the temporary adjournment of trial.[65] English courts and procedure looked very different at the close of the Victorian era than they had done in the age of Blackstone. This blunted the duration and nature of Book III's impact in England.

Third, Book III had a longer and greater impact outside England, and especially in the United States. Much has been written, and rightly, about the importance of Blackstone's *Commentaries* in the American colonies and the early United States.[66] This impact included an influential role for Book III. Blackstone's affection for trial by jury, in particular, was shared by the American founders,[67] as reflected in the Sixth and Seventh Amendments to the US Constitution.[68] As a consequence of the central role of the jury in American procedure, Blackstone's panegyric on jury trial continues to be quoted by American judges and legal scholars.[69] Moreover, American courts, including the US Supreme Court, have repeatedly looked to Book III of Blackstone's *Commentaries* for guidance on the common law as it stood in the era of the Constitution's framing.[70]

[65] *Ibid*., 249–50.

[66] The scholarly literature addressing Blackstone's impact in America is extensive. See e.g. M. H. Hoeflich, 'American Blackstones', in Prest (ed.), *Blackstone and His Commentaries*, 171–84; S. Sheppard, 'Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall', *Iowa Law Review*, 82 (1997), 552–64; A. W. Alschuler, 'Rediscovering Blackstone', *University of Pennsylvania Law Review*, 45 (1996), 4–19.

[67] This is not to say that it was not at all shared in England. By way of illustration, Book III was quoted extensively in the preface to the London 1794 edition of *Hamilton's Juryman's Guide or the Englishman's Right*, pp iii–vii. Blackstone's influence on the American founders remains a subject of debate. Compare, for example, D. J. Boorstin, *The Mysterious Science of the Law* (Chicago, 1941), 3 ('[t]he influence of Blackstone's ideas on the framers of the Federal Constitution is well known') with D. R. Nolan, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact', *New York University Law Review*, 51 (1976), 731 (Blackstone's influence on the Constitution 'was indirect and delayed, not direct and immediate').

[68] The Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.' The Seventh Amendment provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'.

[69] On quotations by American judges see e.g. Chauffeurs, Teamsters and Helpers, Local No. 391 v Terry, 494 US 558, 580 (1990) (Brennan J, concurring); Snow v State, 216 P3d 505 (Wyo 2009).

On quotations by American scholars see, for a recent example, S. A. Thomas, 'Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States', *William & Mary Law Review*, 55 (2014), 1207.

[70] See e.g. *Alleyne v United States*, 133 SCt 2151, 2158 (2013); Munaf v Geren, 553 US 674, 693 (2008); Pasquantino v United States, 544 US 349, 356 (2005); Crawford v Washington, 541 US 36, 43 (2004); City of Monterey v Del Monte Dunes at Monterey Ltd, 526 US 687, 716 (1999); Haddle v Garrison, 525 US 121, 127 (1998); Likety v United States, 510 US 540, 543–4 (1994). See also J. Allen, 'Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone', in Prest (ed.), *Re-Interpreting Blackstone's Commentaries*, 215–20.

In 1841, Henry John Stephen published the first of his four volumes of *New Commentaries on the Laws of England (Partly Founded on Blackstone)*.[71] As he explained in the preface, 'Though the celebrated Treatise of Blackstone still remains without a rival, as an introductory and popular work on the Laws of England, the positions it contains have been nevertheless so entrenched upon by recent alterations in the law itself, that if a student were to rely upon its text, as containing an accurate account of our present system of jurisprudence, he would be led continually astray.'[72] Stephen's *New Commentaries* not only updated Blackstone's text but also reordered and refashioned it. Indeed, Stephen ventured that 'it is in that which regards the general arrangement, that the strongest claim of the present work to originality will be found. The order adopted by Blackstone is, in all its principal lineaments, derived from the *Analysis* of Hale; but though rendered venerable by the combined authority of names like these, I have not felt myself able to accede to it, without alteration.'[73] The part corresponding to Blackstone's Book III is Stephen's Book 5, 'Of Civil Injuries'—twenty chapters spanning part of the third and part of the fourth of Stephen's four volumes. Much of the content was familiar from Blackstone, yet also much was restructured and revised by Stephen. The *New Commentaries* was a success throughout the Victorian era and well beyond it, the final edition appearing in 1950.[74] This reflects well on the achievement of Blackstone's original. 'If I have seen further it is by standing on [th]e sho[u]lders of Giants.'[75]

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[71] See L. Stephen, 'Stephen, Henry John (1787–1864)', rev. P. Polden, *ODNB*.

[72] H. J. Stephen, *New Commentaries on the Laws of England (Partly Founded on Blackstone)*, vol. i (1841), p. iv.

[73] *Ibid*., p. vii.

[74] *Stephen's Commentaries on the Laws of England*, ed. L. C. Warmington *et al*. (21st edn., 1950).

[75] Letter from Isaac Newton to Robert Hooke, 5 February 1675/6, in H. W. Turnbull (ed.), *The Correspondence of Isaac Newton*, i: *1661–1675* (Cambridge, 1959), 416.

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Note to the Reader

This edition seeks to identify Blackstone's changes to the text of the *Commentaries* between the first edition of 1765–9 and the ninth and first posthumous edition which appeared in 1783 under the editorship of Dr Richard Burn.[1] All such authorial 'varia' are marked in each chapter by a preceding numeral enclosed in angled brackets. These cues are keyed to sequential lists, similarly numbered and grouped by chapter, at the end of each volume. Here, every item is preceded by the number of the edition in which the authorial change first occurred, enclosed in square brackets. The listing commences with the relevant word, clause, sentence, or longer passage from the first edition, followed by a vertical divider | separating the original from the altered text. Omitted text or footnotes are annotated accordingly, or indicated by an omission on the right-hand side of the divider. Textual changes to the same sentence or paragraph over more than one edition are represented by inserting the relevant information in square brackets, or listed sequentially following the first numbered entry.

To keep the varia lists within manageable proportions, the following are generally ignored: (i) changes in punctuation and/or spelling; (ii) unambiguous typographical errors, including misspellings, omissions, and erroneous repetition of single words corrected in subsequent editions; (iii) incorporation of footnotes in text or vice versa; (iv) changes in cross-references due to different pagination in later editions; (v) alterations made in one edition reversed in the next or following editions; (vi) changes of form which do not change meaning, as where adjacent words are transposed, or paragraphs are recast.

No attempt has been made to modernize Blackstone's language. While his spelling often does not accord with current usage, most variants are simply phonetic equivalents of the modern form. Except for removing the apostrophe from the possessive 'it's', a similar policy applies to punctuation, italics, and the use of capital letters, although evident misspellings and typographical errors are silently corrected.

Blackstone's footnotes present difficulties of a different kind. Apart from the use of lower-case letters of the alphabet rather than numerals, both for in-text cues and foot-of-page markers (usually, but not always, without the letters 'j' and 'v'), the notes themselves include often cryptic and inconsistent bibliographical citations, to which no key was originally provided. While the following list of Abbreviations identifies most such references, a few uncertainties remain. It should also be noted that Blackstone's quotation marks often denote paraphrases rather than verbatim transcriptions.

Editorial annotations and interventions are enclosed in square brackets, while editorial footnotes are placed below those of Blackstone. Where his footnotes refer to published reports of identifiable law cases, the case name is added before the citation. An appended Table of Cases provides dates and, where possible, a reference to the

[1] A fuller account of editorial methodology appears in the first volume (I. xliii–xlvi).

corresponding volume of the *English Reports* (although Blackstone sometimes cites differently paginated early editions of the nominate reports reproduced in that standard series), the yearbooks, or other sources. The Table of Statutes, also found at the end of the volume, is a chronological list and page index of charters and parliamentary legislation mentioned both in the text and footnotes.

In the text, the original pagination is indicated by numbers placed in the margins. In the footnotes Blackstone's own cross-references are retained, but supplemented with editorial cross-references keyed to the pagination of this edition.

The *Commentaries* use the old-style Julian calendar, in which each new year began on 25 March rather than 1 January, for events and parliamentary statutes before 1752, when Great Britain adopted the Gregorian calendar. Thus the Bill of Rights, presented to William and Mary in February 1689 according to our modern calendar, is dated by Blackstone to the previous year.

Wilfrid Prest

Abbreviations

Books listed were published in London, unless otherwise noted; the date given is that of first publication, together with the date of any later edition which appears to have been owned or used by Blackstone; for relevant book lists see Prest, *Blackstone*, 36–9. Books of the Bible (King James version) are not separately listed.

General Abbreviations

Abr.	Abridgment
ad calc.	*ad calceum* [at or towards the end]
A.R.	*anno regni* [regnal year]
ap.	*apud* [at, in the work of]
append.	appendix
b.	book
B. R.	*Bancum Regis* [King's Bench, court of]
c.	circa
c., ch., cap.	chapter
can.	canon
Canc	Chancery
C.B.	*Commune Bancum* [Common Pleas, court of]
d.	penny; died
Dom. Proc.	*Domus Procerum* [House of Lords]
fl.	flourished
H., Hil.	Hilary (term)
L., *l.*, lib.	book; pound sterling
L., LL	*leges* [laws]
M., Mich.	Michaelmas (term)
OT	Old Testament
pl.	plea(s)
pref., *proem.*	preface
Rot.	*Rotulus, -i* [roll, rolls]
s.	shilling
stat.	statute
t., tit.	title
tr.	tract; translated
T., Trin.	Trinity (term)
Westm.	Westminster
YB	yearbook

Bibliographical Abbreviations

And.	*Les Reports du Treserudite Edmund Anderson*, 2 vols (1664–5)
Artic. super cart.	*Articuli super Cartas* (Articles upon the Charters)
Ascon. *In Cic. Verr.*	Asconius, *Commentary on Cicero's In Verrem*
Ass., *Lib. Ass.*	*Liber Assisarum et Placitorum Coronae* (*c.* 1514)
Atk.	J. Atkyns, *Reports of Cases … in … Chancery*, 3 vols (1765)
Bacon's works	*Francisci Baconi … Opera Omnia*, 4 vols (1730)
Barrington, Barrington's observ.	D. Barrington, *Observations on the Statutes* (1766)
Berthelet stat. Antiq.	[T. Berthelet,] *Magna Carta cum alijs Antiquis Statutis*, 2 vols (1540)
Biogr. Brit.	W. Oldys (ed.), *Biographia Britannica*, 6 vols (1747–66)
Bohun instit. legal.	W. Bohun, *Institutio Legalis, or an Introduction to the Study and Practice of the Laws of England* (1708)

Booth	G. Booth, *The Nature and Practice of Real Actions* (1701)
Bodin. *de Republ.*	J. Bodin, *De Republica Libri Sex* (Paris, 1586)
Bract.	H. de Bracton [attrib.], *De Legibus et Consuetudinibus Angliæ* (1569; 1640)
Britt.	*Summa de Legibus Anglie que vocatur Bretone* (*c.* 1530; 1640)
Bro., Bro. *Abr.*	R. Brooke, *La Graunde Abridgement* (1573)
Brownl.	[R. Brownlow and J. Goldesborough], *Reports of… Cases in Law* (1651)
Bulstr.	*Reports of Edward Bulstrode* (1657–9)
Burn. eccl. law	R. Burn, *Ecclesiastical Law*, 2 vols (1763)
Burr.	J. Burrow, *Reports of Cases… in the Court of King's Bench… Part the Fourth*, 5 vols (1766)
C., Cod.	*Codex Justinianus*
Calv. Lex.	J. Calvin, *Lexicon Juridicum* (Frankfurt, 1600)
Capitul. Lud.	Capitularies of Louis the Pious
Cart., Carth.	T. Carthew, *Reports of Cases Adjudged… in the Court of King's Bench* (1728)
Chan. Cas.	[A. Keck], *Cases Argued and Decreed in the High Court of Chancery* (1697)
Chan. Rep., Ch. Rep.	*Reports of Cases… in the Court of Chancery* (1693)
Cic, *Cic.*	Cicero
Cic. *De Leg.*	Cicero, *De Legibus*
Cic. *Philipp.*	Cicero, *Philippicae*
Cic. Verr.	Cicero, *In Verrem*
Clerke *prax. cur. adm.*	F. Clerke, *Praxis Curiae Admiralitatis Angliae* (1667)
Co. Entr.	E. Coke, *Book of Entries* (1671)
Co. Litt.	E. Coke, *The First Part of the Institutes of the Laws of England*; or, *A Commentary upon Littleton* (1628)
Coke on bail and mainpr.	E. Coke, *A Little Treatise of Baile and Mainprize* (1635)
Com. journ.	*Journals of the House of Commons* (1742–)
Comb., Comberb.	R. Comberbach, *Report of Several Cases… in the Court of King's Bench* (1724)
Cop.	E. Coke, *The Compleat Copy-holder* (1641)
Cro. Car.	*The Reports of Sir George Croke Knight* (1657)
Cro. Eliz.	*The First Part… of the Reports of Sir George Croke Kt.* (1661)
Cro. Jac.	*The Second Part of the Reports of Sir George Croke Knight* (1659)
Dalt. sher., of sher.	M. Dalton, *Officium Vicecomitum* (1623)
Davis	[J. Davies], *Le Primer Report des Cases* & *Matters en Ley… en les Courts del Roy en Ireland* (Dublin, 1615)
De Augm. Scient.	F. Bacon, *De Dignitate et Augmentis Scientiarum*, tr. as *Of the Advancement and Proficiencie of Learning* (1640)
de bell. Gall., de bello Gall.	Caesar, *Commentarii de Bello Gallico*
De jure Saxonum	*see* Nicolson
de LL., de Laud. L	*see* Fortescue
De Mor. Germ., de morib. German.	*see* Tacitus
Decret.	*Decretum Gratiani*
Decretal.	Decretals, collected
Dial. de Scacch.	*see* Madox
Dissert. Epistolar.	*see* Hickes
Doderidge Hist. of Cornw.	J. Doddridge, *Historical Account of… the Principality of Wales, Duchy of Cornwall and Earldom of Chester* (1612)
D^{r}. & St.	C. St German, *Doctor and Student: Or, Dialogues between a Doctor of Divinity and a Student in the Laws of England* (1528–31; 1687)
Dugdal(e) *Orig. Jurid.*, Dugd. *chron. ser.*	W. Dugdale, *Origines Juridiciales, or Historical Memorials of the English Laws… Also a Chronologie* (1666)
Duke's char. uses.	G. Duke, *The Law of Charitable Uses* (1676)
Dyer	[J. Dyer], *Cy Ensuont Ascuns Nouel Cases* (1585)
Dyversite de courts	A. Fitzherbert [attrib.], *Diversite des Courtes* (1523; 1534)

Elem.	F. Bacon, *The Elements of the Common Lawes of England* (1630)
Encyclopedie.	D. Diderot and J. d'Alembert, *Encyclopédie… des arts et des métiers* (Paris, 1751–72)
Equ. Cas. abr.	*A General Abridgment of Cases in Equity* (1732)
F. N. B.	A. Fitzherbert, *La Novel Natura Brevium* (1534; 1584)
Feud.	*Libri Feudorum*
Ff.	Justinian's *Digest*
Finch., Finch. L.	H. Finch, *Law, or a Discourse Thereof* (1627; 1678)
Finch. R.	*Reports of Cases… in the High Court of Chancery during the Time of Sir Heneage Finch* (1725)
Fitzg., Fitzgibb.	J. Fitz-Gibbons, *The Reports of Several Cases… in the Court of King's Bench* (1732)
Fitzh. *Abr.*	A. Fitzherbert, *La Graunde Abridgement*, 3 vols (1514–17)
Flet.	*Fleta, seu, Commentarius Iuris Anglicani*, ed. J Selden (1647)
Fortesc. *de Laud. LL., de LL.*	J. Fortescue, *De Laudibus Legum Angliae* (1537)
Freem.	R. Freeman, *Reports of Cases… in the Courts of King's Bench and Common Pleas* (1742)
Gail, *observat*.	A. von Gail (Gaill), *Practicarum Observationum* (Cologne, 1578)
Gilb. Ev., evid.	G. (or J.) Gilbert, *The Law of Evidence* (Dublin, 1754)
Gilb. Hist. Com. Pl., Gilb. Hist. C.P.	G. (or J.) Gilbert, *The History and Practice of the Court of Common Pleas* (1737)
Gilb. hist. exch., hist of exch.	G. (or J.) Gilbert, *A Treatise on the Court of Exchequer* (1758)
Gilb. Rep.	G. (or J.) Gilbert, *Reports of Cases in Equity … in the courts of Chancery and Exchequer* (1734)
Gilb. Ten., Gilbert's *law of tenures*	G. (or J.) Gilbert, *A Treatise of Tenures* (1730)
Gilbert of Ejectm.	G. (or J.) Gilbert, *The Law and Practice of Ejectments* (1734)
Glanvil	Ranulf de Glanvil [attrib.] Tractatus de Legibus et Consuetudinibus Regni Angliae (*c.* 1554)
Gloss.	*see* Spelm. Gl.
Godbolt	*Reports of Certain Cases… at Westminster* (1652)
Hal. Anal.	M. Hale, *The Analysis of the Law* (1713)
Hal. Hist., Hale Hist. C., Hale Hist. C. L.	M. Hale, *The History of the Common Law of England* (1713)
Hal. P. C.	M. Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown,* 2 vols, ed. S. Emlyn (1736)
Hardr.	T. Hardres, *Reports of Cases… in the Court of Exchequer* (1693)
Hawk., Hawk. P.C.	W. Hawkins, *A Treatise of the Pleas of the Crown*, 2 vols (1716–21)
Hawk. Abr. Co. Litt.	W. Hawkins, *An Abridgment of the First Part of Ld. Coke's Institutes* (1711)
Hearne *ad Gul. Neubr.*	[William of Newburgh], *Historia sive Chronica Rerum Anglicarum*, ed. T. Hearne, 3 vols (Oxford, 1719)
Heinecc. *Antiquitat*.	J. Heineccius, *Antiquitatum Romanarum iurisprudentiam illustrantium syntagma* (Halle, 1719)
Hengh. Parv. & *Hengham Magna,* Hengham	*see* Selden
Hickes's Thesaur.	G. Hickes, *Linguarum Veterum Septentrionalium Thesaurus Grammatico-Criticus et Archaeologicus*, 2 vols (Oxford, 1705)
Hickes *Disser. Epistolar.*	G. Hickes, *Antiquae Literaturae Septenrionalis Libri Duo*, 2 vols (Oxford, 1703–5)
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Hob.	*The Reports of That Learned Sir Henry Hobart* (1641)
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T. Jones	[T. Jones], *Les Reports de Divers Special Cases* (1695) tr. as *Reports of Several Special Cases* (1729)
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Mod. Tenend. Cur.	*Modus Tenendi Curiam* (1534), *see* F. N. B.
Mod. Un. Hist.	*The Modern Part of an Universal History, from the Earliest Account of Time*, 44 vols (1759–66)
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COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE THIRD.

BY

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CHAPTER THE FIRST. 1

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

At the opening of these commentaries[a] municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong[b]." From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned[c] the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and under the latter are now to consider the *wrongs* that are forbidden and redressed, by the laws of England.

In the prosecution of the first of these enquiries, we distinguished rights into two 2
sorts: first, such as concern or are annexed to the persons of men, and are then called *jura personarum*, or *the rights of persons*; which, together with the means of acquiring and losing them, composed the first book of these commentaries: and, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or *the rights of things*; and these, with the means of transferring them from man to man, were the subject of the second book. I am now therefore to proceed to the consideration of *wrongs*; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that, before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* being necessarily prior to what may be termed *injuria*, and the definition of *fas* [what is right] precedent to that of *nefas* [what is wrong].

Wrongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemesnors*. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding volume.

[a] Introd. §. 2 [I. 36].

[b] *Sanctio justa, jubens honesta, et prohibens contraria*. ['A just order, commanding what is honorable, and prohibiting the contrary.' The first reference is to Cicero's *Philippicae*, a series of fourteen speeches condemning Mark Antony in 44–43 BC] Cic. 11 *Philipp*. 12. Bract. *l*. 1. *c*. 3.

[c] Book I. ch. 1 [I. 83].

THE more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined,
3 and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this volume will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as ⟨1⟩ some injuries are of such a nature, that they furnish or require a more speedy remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species; first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law*; and, thirdly, that which arises from *suit* or *action* in courts; which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

AND, first, of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

OF the first sort, or that which arises from the sole act of the injured party, is,

I. THE *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray[d]. For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it
4 lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

II. RECAPTION or *reprisal* is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully

[d] [YB 19 Hen. VI f. 31, pl. 59] 2 Roll. Abr. 546. 1 Hawk. P. C. 131.

claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace[e]. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it 5
is provided, that this natural right of reception shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seise him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen[f]; but must have recourse to an action at law.

III. As reception is a remedy given to the party himself, for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property is by *entry* on lands and tenements, when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and, like that too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise: it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A FOURTH species of remedy by the mere act of the party injured, is the *abatement*, or removal, of *nusances*. What nusances are, and their several species, we shall find a more proper place to enquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nusance; and such nusance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it[g]. If a house or wall is erected so near to mine that it stops my antient lights, which is a *private* nusance, I may enter my neighbour's land, and peaceably pull it down[h]. Or if a new gate be erected across the public highway, which is a *common* nusance, any of the king's subjects passing that way may cut it down, and destroy it[i]. And the reason why the law allows this private and 6
summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

[e] 3 Inst. 134. Hal. Anal. §. 46.

[f] [Higgins & Andrewes] 2 Roll. Rep. 55, 56. [Masters & Poolies case] 208. [Toplady(e) v Scaley (or Staley)] 2 Roll. Abr. 565, 566.

[g] [Penruddocks's case] 5 Rep. 101. [Batten's case] 9 Rep. 55.

[h] [Rosewell v Prior] Salk. 459.

[i] [James v Hayward] Cro. Car. 184.

V. A FIFTH case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distreining* cattle or goods for nonpayment of rent, or other duties; or, distreining another's cattle *damage-feasant*, that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain, whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness, by enquiring, first, for what injuries a distress may be taken; secondly, what things may be distreined; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

1. AND, first, it is necessary to premise, that a distress[j], *districtio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury, for which a distress may be taken is that of nonpayment of rent. It was observed in a former volume[k] that distresses were incident by the common law to every *rent-service*, and by particular reservation to *rent-charges* also; but not to *rent-seck*, till the statute 4 Geo. II. c. 28. extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it
7 down as an universal principle, that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's court[l], or other certain personal service[m], the lord may distrein, of common right. 3. For amercements [fines] in a court-leet a distress may be had of common right, but not for amercements in a court-baron, without a special prescription to warrant it[n]. 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds, *damage-feasant*; that is, doing him hurt or damage, by treading down his grass, or the like; in which case the owner of the soil may distrein them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament, (as for assessments made by commissioners of sewers[o], or for the relief of the poor[p]) remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distresses[q] are partly analogous to the antient distress at common law, as being repleviable and the like; but more resembling the common law process of execution, by seising and selling the goods of the debtor under a writ of *fieri facias*, of which hereafter.

[j] The thing itself taken by this process, as well as the process itself, is in our law-books very frequently called a distress.

[k] Book II. ch. 3.

[l] Bro. *Abr. tit. distress*. 15.

[m] Co. Litt. 46.

[n] Brownl. 36. [For these seigniorial or manorial courts, see III, ch. 4, and IV, ch. 19.]

[o] Stat. 7 Ann. c. 10 [For commissioners of sewers, see ch. 6.]

[p] Stat. 43 Eliz. c. 2.

[q] [Hutchins v Chambers] 4 Burr. 589 [The reference is to 1 Burr. 589; Blackstone adds '4' because Burrow styled his first two volumes as 'part the fourth'.]

2. Secondly; as to the things which may be distreined, or taken in distress, we may lay it down as a general rule, that all chattels personal are liable to be distreined, unless particularly protected or exempted. Instead therefore of mentioning what things are distreinable, it will be easier to recount those which are not so, with the reason of their particular exemptions[r]. And, 1. As every thing which is distreined is presumed to be the property of the wrongdoer, it will follow that such things, wherein no man can have an absolute and valuable property (as dogs, cats, rabbets, and all 8
animals *ferae naturae* [of a wild nature]) cannot be distreined. Yet if deer (which are *ferae naturae*) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature by reducing them to a kind of stock or merchandize, that they may be distreined for rent[s]. 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress; as an ax with which a man is cutting wood, or a horse while a man is riding him. But horses, drawing a cart, may (cart and all) be distreined for rent-arrere; and also if a horse, though a man be riding him, be taken *damage-feasant*, or trespassing in another's grounds, the horse notwithstanding his rider may be distreined and led away to the pound[t]. 3. Valuable things in the way of trade shall not be liable to distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a taylor's house; or corn sent to a mill, or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distreinable by him for rent: for otherwise a door would be opened to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distreined, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beasts, they are distreinable immediately afterwards for rent-arrere by the landlord[v]. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distreinable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence[u]. But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrein them, till they have been 9
levant and *couchant (levantes et cubantes)* on the land; that is, have been long enough there to have laid down and rose up to feed; which in general is held to be one night at least: and then the law presumes, that the owner may have notice whither his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in

[r] Co. Litt. 47.
[s] Davis v. Powel, *C.B. Hil.* 11 *Geo.* II.
[t] [Webb v Bell] 1 Sid. 440.
[v] [Read v Burley] Cro. Eliz. 549.
[u] Co. Litt. 47.

this case, though the cattle may have been *levant* and *couchant*, yet they are not distreinable for rent, till actual notice is given to the owner that they are there, and he neglects to remove ⟨2⟩ them[w]: for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. 4. There are also other things privileged by the antient common law; as a man's tools and utensils of his trade, the ax of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plough, *averia carucae*, and sheep, are privileged from distresses at common law[x]; while ⟨3⟩ goods or other sort of beasts, which Bracton calls *catalla otiosa* [non-working animals], may be distreined. But, as beasts of the plough may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions[y]. And perhaps the true reason, why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its nonpayment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress[z]. 5. Nothing shall be distreined for rent, which may not be rendered again in as good plight as when it was distreined: for which reason milk, fruit, and the like, cannot be distreined; a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distreined, because some damage must needs accrue in their removal: but a cart loaded with corn might; as that could be safely restored. But now by statute 2 W. & M. c. 5. corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distreined as well as other chattels. 6. Lastly, things fixed to the freehold may not be distreined; as caldrons, windows, doors, and chimneypieces: for they savour of the realty. For this reason also corn growing could not be distreined; till the statute 11 Geo. II. c. 19. empowered landlords to distrein corn, grass, or other products of the earth, and to cut and gather them when ripe.

Let us next consider, thirdly, how distresses may be taken, disposed of, or avoided. And, first, I must premise, that the law of distresses is greatly altered within a few years last past. Formerly they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage-feasant*, and for other causes, not altered by act of parliament; over which the distreinor has no other power than to retain them till satisfaction is made. But distresses for rent-arrere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our antient writers.

[w] [Kimp v Crewes] Lutw. 1580.
[x] Stat. 51 Hen. III. st. 4. *de districtione scaccarii*.
[y] [Hutchins v Chambers] 4 Burr. 589.
[z] *Ibid*. 588.

In pointing out therefore the methods of distreining, I shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress, and one taken for other causes.

In the first place then, all distresses must be made *by day*, unless in the case of 11
damage-feasant; an exception being there allowed, lest the beasts should escape before they are taken[a]. And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the ⟨4⟩ lease, but now[b] he may distrein within six months after the determination of such lease whereon rent is due. If the lessor does not find sufficient distress on the premises, formerly he could resort no where else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. But now[c] the landlord may distrein any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrein the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door[d]: and now[e] he may, by the assistance of the peace officer of the parish, break open in the day time ⟨5⟩ any place, locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground ⟨6⟩ to suspect that goods are concealed therein.

Where a man is intitled to distrein for an intire duty, he ought to distrein for the whole at once; and not for part at one time, and part at another[f]. But if he distreins for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distreined, and so takes an insufficient distress, he may take a 12
second distress to complete his remedy[g].

Distresses must be proportioned to the thing distreined for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man takes a great or unreasonable distress, for rent-arrere, he shall be heavily amerced for the same. As if[h] the landlord distreins two oxen for twelvepence rent; the taking of *both* is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distreined *one* of them. But for ⟨7⟩ homage, fealty, or suit, as also for parliamentary wages, it is said that no distress can be excessive[i]. For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy

[a] Co. Litt. 142.
[b] Stat. 8 Ann. c. 14.
[c] Stat. 8 Ann. c. 14. 11 Geo. II. c. 19.
[d] Co. Litt. 161. [Anon. (1686)] Comberb. 17.
[e] Stat. 11 Geo. II. c. 19.
[f] [Wallis v Savill *et al.*] 2 Lutw. 1532.
[g] [Anon. (1582/3)] Cro. Eliz. 13. Stat. 17 Car. II. c. 7. [Hutchins v Chambers] 4 Burr. 590.
[h] 2 Inst. 107.
[i] Bro. *Abr. t. assise*. 291. *prerogative*. 98.

for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law[j].

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distreined must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither, they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue[k]. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law[l].

A pound (*parcus*, which signifies any inclosure) is either pound-*overt*, that is, open overhead; or pound-*covert*, that is, close. By the statute 1 & 2 P. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, unless to a
13 pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19. which was made for the benefit of landlords, any person distreining for rent may turn any part of the premises, upon which a distress is taken, into a pound *pro hac vice* [on this occasion], for securing of such distress. If a live distress, of animals, be impounded in a *common* pound-overt, the owner must take notice of it at his peril; but if in any *special* pound-overt, so constituted for this particular purpose, the distreinor must give notice to the owner: and, in both these cases, the owner, and not the distreinor, is bound to provide the beasts with food and necessaries. But if ⟨8⟩ they be put in a pound-covert, as in a stable or the like, the landlord or distreinor must feed and sustain them[m]. A distress of household-goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distreinor must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held[n], that the distreinor is not at liberty to work or use a distreined beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded, till the owner makes satisfaction, or contests the right of distreining, by replevying the chattels. To *replevy* (*replegiare*, that is, to take back the pledge) is, when a person distreined upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and if that be determined against him, to return the cattle or goods once more into the hands of the distreinor. This is called a replevin, of which more will be said

[j] [R. v Ledgingham] 1 Ventr. 104. [Lyne v Moody] Fitzgibb. 85. [Hutchins v Chambers] 4 Burr. 590.
[k] Co. Litt. 160, 161.
[l] *Ibid*. 47.
[m] Co. Litt. 47.
[n] [Bagshawe v Goward] Cro. Jac. 148.

hereafter. At present I shall only observe, that, as a distress is at common law only in nature of a security for the rent or damages done, a replevin answers the same end to 14
the distreinor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distreinor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at the common law[o]. And for an amercement imposed at a court-leet, the lord may also sell the distress[p]: partly because, being the king's court of record, its process partakes of the royal prerogative[q]; but principally because it is in the nature of an execution to levy a legal debt. And, so in the several statute-distresses, before-mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament[r], in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security; the distreinor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And, by this means, a full and intire satisfaction may now be had for rent in arrere, by the mere act of the party himself, *viz.* by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.

Before I quit this article, I must observe, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for, if any one irregularity was committed, it vitiated the whole, and made the distreinors trespassors 15
ab initio [from the start][s]. But now by the statute 11 Geo. II. c. 19. it is provided, that, for any unlawful act done, the whole shall not be unlawful, or the parties trespassors *ab initio*; but that the party grieved shall only have an action for the real damage sustained; and not even that, if tender of amends is made before any action is brought.

VI. The seizing of heriots [most valuable beast or other chattel], when due on the death of a tenant, is also another species of self-remedy; not much unlike that of taking cattle or goods in distress.

As for that division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrein for this, as well as seize: but for heriot-custom (which sir Edward Coke says[t], lies only in *prender*, and not in *render*[1]) ⟨9⟩ the lords may seize the identical thing itself, but cannot distrein any other chattel for it[u]. The like speedy

[o] Bro. *Abr. t. distress*. 71.
[p] [Griesley's case] 8 Rep. 41.
[q] Bro. *ibid*. [R. v Speed] 12 Mod. 330.
[r] 2 W. & M. c. 5. 8 Ann. c. 14. 4 Geo. II. c. 28. 11 Geo. II. c. 19.
[s] [Welsh v Bell] 1 Ventr. 37.
[t] Cop. §. 25.
[u] [Odiham v Smith] Cro. Eliz. 590. [Major v Brandwood] Cro. Car. 260.

[1] Summarizing the difference between heriots and reliefs, Coke noted *(Compleat Copy-holder,* 38) that 'a Heriot lieth in Prender [i.e. to take], and a Reliefe in Render [i.e. to give]'.

and effectual remedy, of seizing, is given with regard to many things that are said to lie in franchise; as waifs [abandoned stolen goods], wrecks, estrays [stray animals whose owners are unknown], deodands, [objects causing death by misadventure] and the like; all which the person entitled thereto may seize, without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other, and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature, as might be out of the reach of the law before any action could be brought.

These are the several species of remedies, which may be had by the mere act of the party injured. I shall, next, briefly mention such as arise from the joint act of all the parties together. And these are only two, *accord*, and *arbitration*.

I. Accord is a satisfaction agreed upon between the party injuring and the party
16 injured; which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action[w]. By several late statutes, particularly 11 Geo. II. c. 19. in case of irregularity in the method of distreining; and 24 Geo. II. c. 24. in case of mistakes committed by justices of the peace; even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

II. Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as *umpire,* (⟨10⟩ *imperator)* to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice[x]. But the right of real property cannot thus pass by a mere award[y]: which subtilty in point of form (for it is now reduced to nothing else) had its rise from feodal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a ⟨11⟩ release of lands; and it will be a breach of the arbitration-bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitra-
17 tors or umpire therein named[z]. And experience having shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a

[w] [Peytoe's case] 9 Rep. 79.
[x] [Gage v Gilbert] Brownl. 55. [Anon. (1675)] 1 Freem. 410.
[y] [Horton v Horton] 1 Roll. Abr. 242. [Marks v Marriot] 1 Lord Raym. 115.
[z] Append. N°. III. §. 6. [III. 315–20].