

## THE COMMON LAW AND CIVIL LAW TRADITIONS

Most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, that sought to reform their legal systems in order to gain economic and political power comparable to that of Western European nation-states.

To an American familiar with the terminology and process of our legal system, which is based on English common law, civil law systems can be unfamiliar and confusing. Even though England had many profound cultural ties to the rest of Europe in the Middle Ages, its legal tradition developed differently from that of the continent for a number of historical reasons, and one of the most fundamental ways in which they diverged was in the establishment of judicial decisions as the basis of common law and legislative decisions as the basis of civil law. Before looking at the history, let's examine briefly what this means.

*Common law* is generally *uncodified*. This means that there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on *precedent*, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as year-books and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the

appropriate sentence based on the jury's verdict.

*Civil Law*, in contrast, is *codified*. Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes.

The following sections explore the historical roots of these differences.



Above: Woodcut of a court scene from *Praxis criminis persequendi*, Jean Milles de Souvigny, 1541. The Robbins Collection.



Above: Mosaic of Emperor Justinian I, 6th CE. Basilica of San Vitale, Ravenna, Italy.

## Historical Development of Civil Law

The term civil law derives from the Latin *ius civile*, the law applicable to all Roman *cives* or citizens. Its origins and model are to be found in the monumental compilation of Roman law commissioned by the Emperor Justinian in the sixth century CE. While this compilation was lost to the West within decades of its creation, it was rediscovered and made the basis for legal instruction in eleventh-century Italy and in the sixteenth century came to be known as *Corpus iuris civilis*. Succeeding generations of legal scholars throughout Europe adapted the principles of ancient Roman law in the *Corpus iuris civilis* to contemporary needs. Medieval scholars of Catholic church law, or *canon law*, were also influenced by Roman law scholarship as they compiled existing religious legal sources into their own comprehensive system of law and governance for the Church, an institution central to medieval culture, politics, and higher learning. By the late Middle Ages, these two laws, civil and canon, were taught at most universities and formed the basis of a shared body of legal thought common to most of Europe. The birth and evolution of the medieval civil law tradition based on Roman law was thus integral to European legal development. It offered a store of legal principles and rules invested with the authority of ancient Rome and centuries of distinguished jurists, and it held out the possibility of

a comprehensive legal code providing substantive and procedural law for all situations.

As civil law came into practice throughout Europe, the role of local custom as a source of law became increasingly important—particularly as growing European states sought to unify and organize their individual legal systems. Throughout the early modern period, this desire generated scholarly attempts to systematize scattered, disparate legal provisions and local customary laws and bring them into harmony with rational principles of civil law and natural law. Emblematic of these attempts is the Dutch jurist Hugo Grotius' 1631 work, *Introduction to Dutch Jurisprudence*, which synthesized Roman law and Dutch customary law into a cohesive whole. In the eighteenth century, the reforming aspirations of Enlightenment rulers aligned with jurists' desire to rationalize the law to produce comprehensive, systematic legal codes including Austria's 1786 *Code of Joseph II* and *Complete Civil Code of 1811*, Prussia's *Complete Territorial Code of 1794*, and France's *Civil Code* (known as the *Napoleonic Code*) of 1804. Such codes, shaped by the Roman law tradition, are the models of today's civil law systems.



Left: Originally issued in the year 1215, the Magna Carta was first confirmed into law in 1225. This 1297 exemplar, some clauses of which are still statutes in England today, was issued by Edward I. National Archives, Washington, DC.

## Historical development of English Common Law

English common law emerged from the changing and centralizing powers of the king during the Middle Ages. After the Norman Conquest in 1066, medieval kings began to consolidate power and establish new institutions of royal authority and justice. New forms of legal action established by the crown functioned through a system of *writs*, or royal orders, each of which provided a specific remedy for a specific wrong. The system of writs became so highly formalized that the laws the courts could apply based on this system

often were too rigid to adequately achieve justice. In these cases, a further appeal to justice would have to be made directly to the king. This difficulty gave birth to a new kind of court, the court of *equity*, also known as the court of Chancery because it was the court of the king's chancellor. Courts of equity were authorized to apply principles of equity based on many sources (such as Roman law and natural law) rather than to apply only the common law, to achieve a just outcome.

Courts of law and courts of equity thus functioned separately until the writs system was abolished in the mid-nineteenth century. Even today, however, some U.S. states maintain separate courts of equity. Likewise, certain kinds of writs, such as warrants and subpoenas, still exist in the modern practice of common law. An example is the writ of *habeas corpus*, which protects the individual from unlawful detention. Originally an order from the king obtained by a prisoner or on his behalf, a writ of *habeas corpus* summoned the prisoner to court to determine whether he was being detained under lawful authority. *Habeas corpus* developed during the same period that produced the 1215 *Magna Carta*, or Great Charter, which declared certain individual liberties, one of the most famous being that a freeman could not be imprisoned or punished without the judgment of his peers under the law of the land—thus establishing the right to a jury trial.

In the Middle Ages, common law in England coexisted, as civil law did in other countries, with other systems of law. Church courts applied canon law, urban and rural courts applied local customary law, Chancery and maritime courts applied Roman law. Only in the seventeenth century did common law triumph over the other laws, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law and declare other laws subsidiary to it. This evolution of a national legal culture in England was contemporaneous with the development of national legal systems in civil law countries during the early modern period. But where legal humanists and Enlightenment scholars on the continent looked to shared civil law tradition as well as

national legislation and custom, English jurists of this era took great pride in the uniqueness of English legal customs and institutions.

That pride, perhaps mixed with envy inspired by the contemporary European movement toward codification, resulted in the first systematic, analytic treatise on English common law: William Blackstone's (1723-1780) *Commentaries on the Laws of England*. In American law, Blackstone's work now functions as the definitive source for common law precedents prior to the existence of the United States.

### Civil law influences in American law

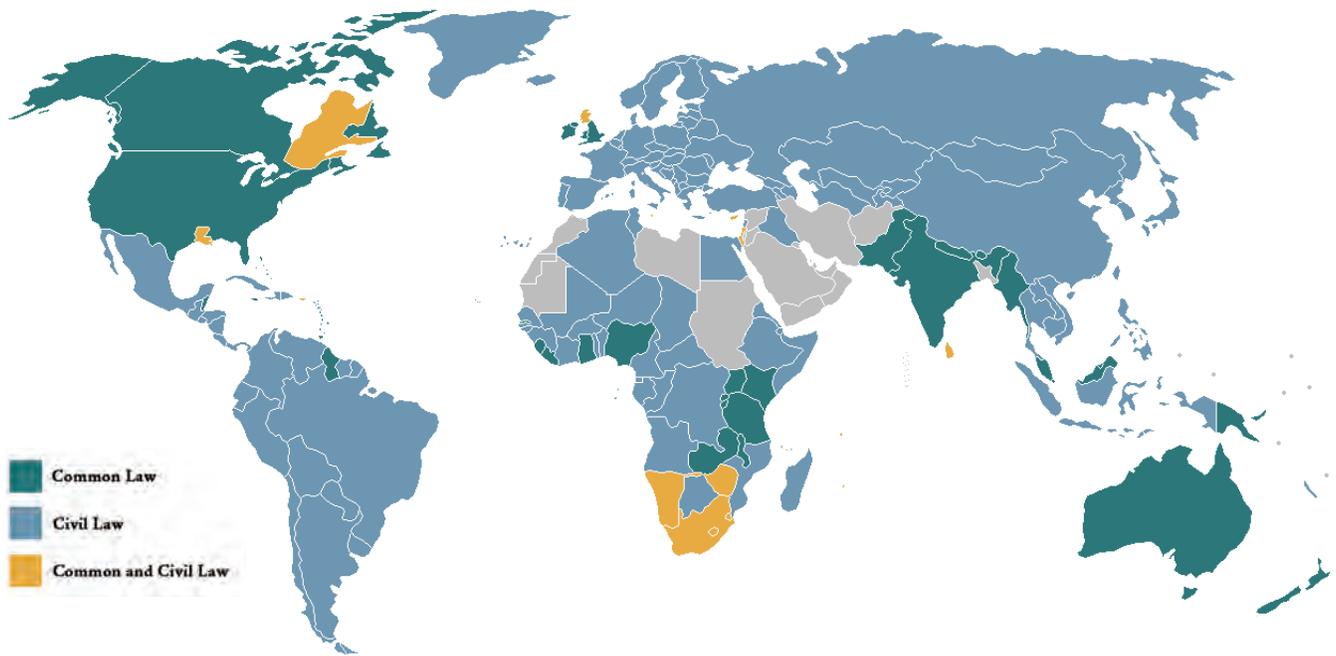
The American legal system remains firmly within the common law tradition brought to the North American colonies from England. Yet traces of the civil law tradition and its importance in the hemisphere maybe found within state legal traditions across the United States. Most prominent is the example of Louisiana, where state law is based on civil law as a result of Louisiana's history as a French and Spanish territory prior to its purchase from France in 1803. Many of the southwestern states reflect traces of civil law influence in their state constitutions and codes from their early legal heritage as territories of colonial Spain and Mexico. California, for instance, has a state civil code organized into sections that echo traditional Roman civil law categories pertaining to persons, things, and actions; yet the law contained within California's code is mostly common law.

And while Blackstone prevails as the principal source for pre-American precedent in the law, it is interesting to note that there is still room for the influence of Roman civil law in American legal tradition. The founding fathers and their contemporaries educated in the law knew not only the work of English jurists such as Blackstone, but also the work of the great civil law jurists and theorists. Thomas Jefferson, for example, owned several editions of Justinian's *Institutes*, and praised the first American translated edition from 1812, with its notes and annotations on the parallels with English law, for its usefulness to American lawyers. Indeed, a famous example of



Above: Sir William Blackstone, 1774, by Thomas Gainsborough. Oil on canvas. Tate Collection, London.

its use is the 1805 case of *Pierson v. Post*, in which a New York judge, deciding on a case that involved a property dispute between two hunters over a fox, cited a Roman law principle on the nature and possession of wild animals from the *Institutes* as the precedent for his decision. Today *Pierson v. Post* is often one of the first property law cases taught to American law students. *United States v. Robbins*, a 1925 California case that went to the Supreme Court and paved the way for the state's modern community property laws, was based upon a concept of community property that California inherited not from English common law but from legal customs of Visigothic Spain that dated to the fifth century CE. Cases such as these illuminate the rich history that unites and divides the civil and common law traditions and are a fascinating reminder of the ancient origins of modern law.



## Glossary

**Canon law** – the body of laws that govern the Catholic Church and its members, deriving from the decrees and rules (“canons”) made by the pope and ecclesiastical councils.

**Civil law** – the system of law that emerged in continental Europe beginning in the Middle Ages and is based on codified law drawn from national legislation and custom as well as ancient Roman law.

**Code** – the collection of laws of a country or laws related to a particular subject.

**Codification** – the process of compiling and systematizing laws into a code.

**Common law** – the system of law that emerged in England beginning in the Middle Ages and is based on case law and precedent rather than codified law.

**Corpus iuris civilis** – meaning “body of civil laws,” the name given to the compilation of Roman law ordered by the Byzantine emperor Justinian I in 529 CE.

**Equity** – in English common law tradition, a body of legal principles that emerged to supplement the common law when the strict rules of its application would limit or prevent a just outcome.

**Precedent** – a judicial decision in a court case that may serve as an authoritative example in future similar cases.

**Writ** – a formal written order from a judicial or administrative authority that directs a form of legal action. Originally writs were royal orders from the court of the English king.

**Yearbooks/reports** – collections of common law court cases and judicial opinions recorded and organized by year. Yearbooks were

Above: A world map showing countries today that have a civil law system (light blue), countries that have a common law system (green), and countries that have both (orange).

the earliest editions compiled in England from the mid-thirteenth century until 1535, when they were superseded by officially printed and bound editions called Reports.

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**I**n nomine domini nostri Iesu  
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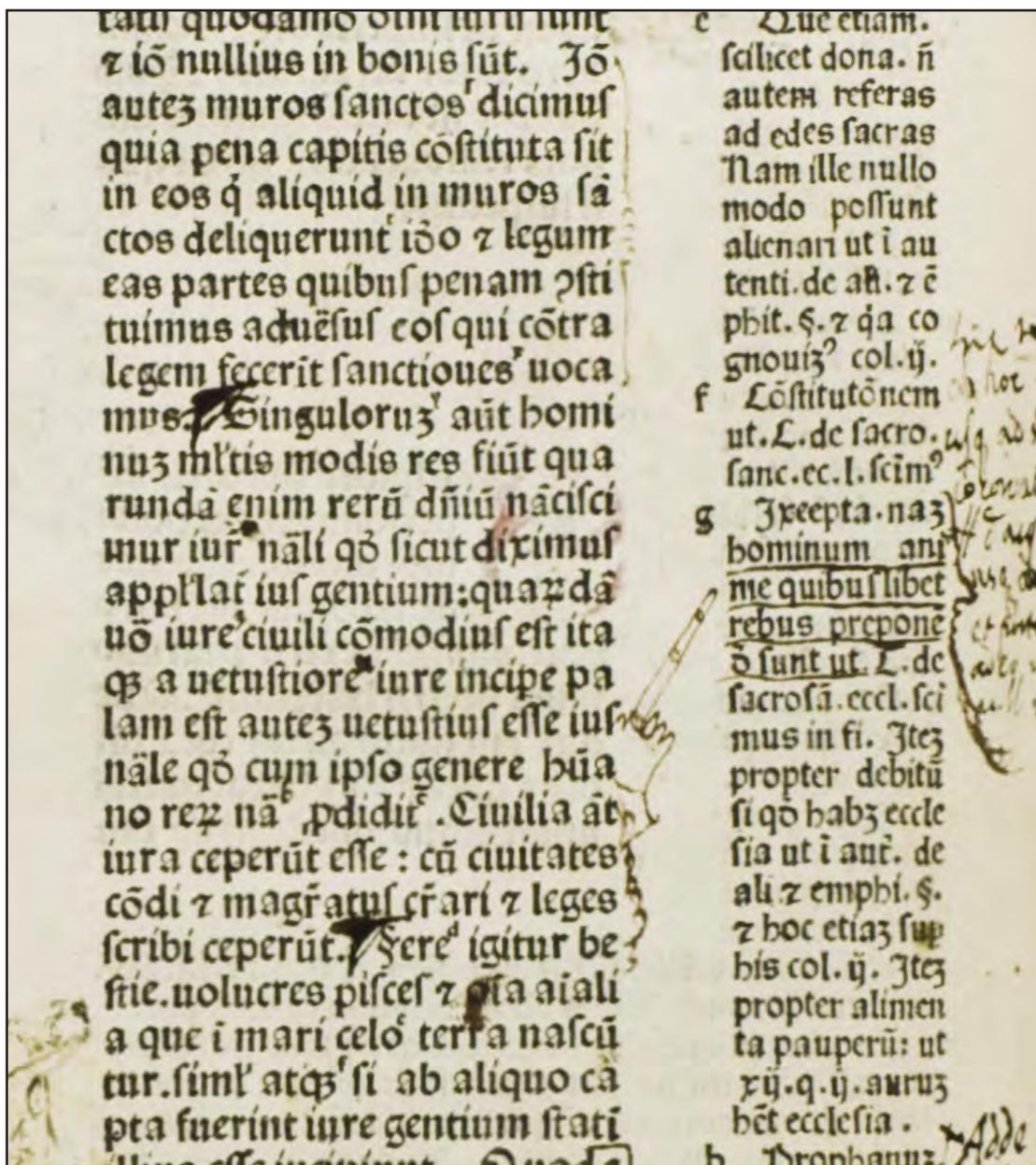
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 c. Quoru. utraq. si. ista. debent. esse. in. principe. tu. Justiniane. qd. feci  
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 d. Uigilys. quo. ad. leges. nam. ius. ciuile. uigilantibus. z. no. dormie  
 tib. scriptum. est. ut. ff. que. in. frau. cre. pupillus. in. fi. Accursius.  
 e. Prouidentia. f. quo. ad. arma. z. no. tres. esse. bonis. status. mema  
 ria. preteritorum. scientia. presentium. prouidentia. fatuorum.  
 f. Annuente. deo. deo. gratias. refert. cuius. triumphu. meruit. obtine

Justinian I  
 Institutes  
 Venice, 1478

One of the four parts of Emperor Justinian's monumental sixth-century compilation of Roman law, the Institutes was created as a textbook for law students. It has remained a resource for legal scholars for centuries because it offers a more rationally ordered and concise summary of the main concepts of Roman law than the much larger Digest. The illuminated detail from this early printed edition highlights the beginning lines of the Institutes: "Imperial majesty should be not only embellished with arms but also fortified by laws so that the times of both war and peace can be rightly regulated." Numerous marginal notes and markings reflect its use by students and scholars.



Even in modern common law culture, the Institutes and other important civil law sources may appear as precedent in case law. A classic case still taught to American law students today is the 1805 property law case of *Pierson v. Post*. At its heart was a hunting dispute in which the defendant killed and carried off from public land, in sight of the plaintiff, a fox that the plaintiff had been actively hunting with his dogs for some time. Deciding for the defendant, the New York Supreme Court cited Book II, Title 1, Section 12, of the Institutes as precedent for its finding that “pursuit alone gives no right of property in animals *ferae naturae* (wild by nature), which can be acquired only by possession.”

The original citation, which defines the right to ownership of wild animals, may be found in this text detail from the 1478 Institutes edition near the end of the page’s center text block, just below the ink-drawn manicula (pointing hand): “*Ferae igitur bestiae, et uolucres, et pisces, et omnia animalia, quae mari, coelo, et terra nascuntur, simul atque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est id naturali ratione occupanti conceditur: nec interest feras bestias et uolucres utrum in suo fundo quis capiat, an in alieno.*”

Examining this text detail closely, one can also see that the faint ink doodle just to the left of the passage is a human figure with what appears to be a falcon, a wild bird of prey, flying overhead—presumably the work of a long-ago law student looking for a moment’s diversion from his studies.

cipiunt : quod enim ante nullius est, id naturali ratione occupanti conceditur : nec interest, feras bestias et volucres utrùm in suo fundo quis capiat, an in alieno. Planè, qui alienum fundum ingreditur venandi ut aucupandi gratiâ, potest à domino, si is præviderit, prohiberi, ne ingrediatur. Quicquid autem eorum ceperis, eousque tuum esse intelligitur, donec tuâ custodiâ coercetur ; cum verò tuam evaserit custodiam, et in libertatem naturalem sese receperit, tuum esse desinit, et rursus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio.

*tor : for natural reason gives to the first occupant, that which had no previous owner : and it is not material, whether a man take wild beasts or birds upon his own, or upon the ground of another : although whoever hath entered into the ground of another for the sake of hunting or fowling, might have been prohibited by the proprietor, if he had foreseen the intent. Whatever of this kind you take, is regarded as your property while it remains under your coercion; but when it hath escaped your custody, and recovered its natural liberty, it ceases to be yours and becomes the property of the first who seizes it. It is understood to have recovered its natural liberty, if it hath escaped your sight ; or although not out of sight, yet if it cannot be pursued and retaken without great difficulty.*

## De vulneratione.

§ XIII. Illud quæsitum est, an si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intelligatur. Et quibusdam placuit, statim esse tuam, et eousque tuam videri, donec eam persequaris : quod si desieris persequi, desinere tuam es-

§ 13. *it hath been questioned, whether a wild beast belongs to him, by whom it hath been so wounded, that it may be taken. And, in the opinion of some, it doth so, as long as he pursues it ; but, if he quits the pursuit, it ceases to be his, and again*

Thomas Cooper  
The Institutes of Justinian  
Philadelphia, 1812

This is a page from the first American edition of the Institutes, translated and annotated by Thomas Cooper, a distinguished scholar whose long career began with his appointment by Thomas Jefferson as the first professor of natural science and law at the University of Virginia. Cooper sent a copy of the translated edition to his friend Jefferson, who replied, "I possessed Theopilus, Vinnius' and Harris' editions, but read over your notes and the addenda et corrigenda, and especially the parallels with the English law, with great satisfaction and edification. Your edition will be very useful to our lawyers, some of whom will need the translation as well as the notes."

The page shown here shows the translation of the passage cited in *Pierson v. Post*: "Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by law of nations, the property of the captor: for natural reason gives to the first occupant, that which had no previous owner."

COMMENTARIES  
ON THE  
LAWS  
OF  
ENGLAND.  
BOOK THE FIRST.

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Sir William Blackstone  
*Commentaries on the Laws of England*  
Oxford, 1765-1769

This title page is from the first edition of Blackstone's *Commentaries*, considered by some scholars to be "the most important legal treatise ever written in the English language." Published in four volumes from 1765 to 1769, it was the first treatise on common law that was comprehensive yet clear and accessible to a lay audience. As such, it was not only powerfully influential in Britain, but also provided much of the common law foundation of the American legal system.

Each volume of the *Commentaries* addresses a distinct area of law: Book One treats "the rights of persons," Book Two treats "the rights of things" (property), Book Three treats "private wrongs" (torts and civil procedure), and Book Four treats "public wrongs" (crimes and criminal procedure).

## CHAPTER THE TWENTY FIFTH.

## OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels personal, may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

I. FIRST then of property in *possession absolute*; which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts, when severed from the plant, or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

BUT with regard to *animals*, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there

Like the pages excerpted from the Institutes, these two pages from Book Two of Blackstone's *Commentaries*, on "the rights of things," discuss laws relating to animals as property. One may see in the text how Blackstone compares the English common law on the subject to Roman law as well as the contemporary laws of other nations.

there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitae*, and such as are *ferae naturae*; some being of a *tame*, and others of a *wild* disposition. In such as are of a nature tame and domestic, (as horses, kine, sheep, poultry, and the like) a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property<sup>a</sup>: in which our law agrees with the laws of France and Holland<sup>b</sup>. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry<sup>c</sup>. But in animals *ferae naturae* a man can have no absolute property.

OF all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England<sup>d</sup>, as well as Rome<sup>e</sup>, "*si equam meam equus tuus praegnantem fecerit, non est tuum sed meum quod natum est.*" And, for this, Puffendorf<sup>f</sup> gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expence and care: wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them<sup>g</sup>. But here the reasons of the general rule

<sup>a</sup> 2 Mod. 319.

<sup>b</sup> *Vinn. in Inst. l. 2. tit. 1. §. 15.*

<sup>c</sup> 1 Hal. P. C. 511, 512.

<sup>d</sup> Bro. *Abr. tit. Propertie. 29.*

<sup>e</sup> *Ff. 6. 1. 5.*

<sup>f</sup> L. of N. 1. 4. c. 7.

<sup>g</sup> 7 Rep. 17.