COMMON LAW

The system of unwritten law that derived its authority from ancient **usage**, **custom** and **precedent**. Law that is not created but develops by successive decisions under the principle of ***stare decisis***—'to abide by a decided case'. Law that is "from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law", 1 *Bl Comm* 73. Accordingly, common law was propagated in the courts of common law (set up in England after the Norman Conquest in order to unify local customs into a system that was common to every man); in particular the Courts of Exchequer, Common Pleas and King's Bench; from where it was reported and recorded as judicial precedent; and its doctrines and principles refined in early textbooks. The common law of England, as distinguished from the **civil law** and **statute law**, "comprises that body of principles and rules of action, relating to the government and security of persons and property, which derive their authority from usages and customs …". It may be contrasted with **equity**, which was (i) "grounded on the precepts of conscience and justice", *David A. Lockmiller on Sir William Blackstone* (1938), p. 11 n.; and (ii) a more fluid system of law making.

In different contexts, common law can have the following meanings: (i) unwritten law, especially the Anglo-American traditions of law-making, as distinguished from a written code of law (whether a civil code or statute law); (ii) law that was administered by the English Courts of Common Law prior to the Judicature Acts 1873–75, as distinguished from the rules of equity administered in the Court of Chancery; (iii) law that is common to an entire realm, as distinguished from local rules or customs accepted by a group of individuals; (iv) an evolving judge-made law, as distinguished from ecclesiastical, admiralty or statute law; (v) law that was shaped in England, based on Anglo-Saxon and Norman laws, became the basis of law in the Commonwealth and formed the basis of law in most states in the US, as distinguished from law based on a Constitution or statute adopted by a particular nation or state (in French law, the term common law—*droit commun*—is used primarily to refer to law that applies to the entire state, as distinguished from local or regional rules); (vi) specific to the US, the law adopted by each state and applied as local law, based on local usage, subject to alteration by statute; there being "no common law of the United States as a unit" different states having adopted the 'common law' in a different manner and at a different time ("'Common law' is not a very precise

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term; it refers to law made by courts and is, of course, subject to change over time. There is, therefore, no single and authoritative source we can refer to when speaking of the common law, which has spanned many centuries in England and the United States", 4 Thompson on Real Property (2nd ed. Charlottesville, VA: 1994) § 37.06, pp. 289–90). In general, common law is found in the unwritten (or uncodified) laws of the particular state, *lex non scripta*, which follows from the common law of the courts of England (and sometimes its Parliament prior to the War of the Revolution) and that is "not locally inapplicable, nor in conflict with the Constitution of the United States, the acts of Congress, or of the constitution and laws of the particular states, and which are suitable to the condition of their inhabitants, in force at the time of the emigration of our ancestors", Browning v. Browning, 3 NM (Johns) 659, 9 P 677, 682 (1886) (1 Kent Comm 471; Wheaton and Donaldson v. Peters and Grigg, 8 Pet 591, 33 US 591, 8 L Ed 1055, 1080 (1834); Application of Ashford, 50 Hawaii 314, 440 P.2d 76, 78 n. 3 (1968)). This 'common law' is created and preserved in the body of the decisions of the courts and is promulgated by the doctrine of *stare decisis*, where not varied or in opposition to statutes or the Constitution. Thus, it may be considered that there are common law systems within each state with its own precedents and when there is no applicable law in one state a consideration of precedents from other states. In many situations decisions rendered in any number of states may be considered to arrive at the applicable law in a particular state.

In the US, 'common law' may also refer to an action that arises from the common law-rights such as nuisance, negligence or trespass, especially law that has a foundation in history and is of generally application, as distinguished from a constitutional, code or statutory right that is based on the express and positive will of a legislature, either federal or state or a local code.

In modern usage, the term common law may be applied in a general sense to draw a distinction with the civil law; or, in a particular sense, to refer to the body of English law built up from the reign of Henry II (1154–1189) until the Judicature Acts 1873–75, by judges sent out on circuit by the Crown to create a common body of law throughout the realm (which generally included the colonies)—*la commune lay*, but not including matters decided in 'equity'. In either sense, common law is based on a requirement to establish solutions to particular disputes and, unlike the civil law, it does not propound universal precepts, but remains in a continuous state of development. (In no sense is this 'common law' similar to the *jus commune* or *Gemeines Recht* which is part of a revived Roman law that was developed in continental Europe from the 12th century onwards, became an important part of the Romano-Germanic system, and played a significant part in the development of the European law of 'obligations'.)

English common law has formed an important element in establishing the foundations of modern land law so that even today, as a result of this established body of law, all land is considered to be held from the Crown; there is no absolute form of land **ownership**

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recognised in common law; a leasehold interest is considered **personal property** (a 'chattel real'); distinct legal and equitable interests can, and in certain cases must, be held in the same land; and the modern form of **trust** stems from the former conflict of common law with equity.

The term 'at law' or 'law' is frequently used, especially in English statutes, to refer to rules derived from common law as distinguished from principles established 'in equity', thereby making them actionable as of right and not merely at the discretion of the court (this distinction is noticeable in the English Law of Property Act 1925). 'At law' may also mean in all courts of law, as distinguished from 'in equity', which means in a court of equity with the element of discretion appertaining thereto.

In this web site, unless the context indicates to the contrary, the expression 'common law' or 'the common law' refers to the body of law built up by the precedents of the courts since the reign of Henry II and applied throughout England and Wales and many other jurisdictions that adopted the same legal system (including the American colonies before the American Revolution).

Oliver Wendell Holmes. The Common Law (Cambridge, MA: 1881, reprint 1963).
1 Thompson on Real Property (2nd ed. Charlottesville, VA: ©1994-), §§ 4.01—4.04.
15A Am.Jur.2d., Common Law (Rochester, NY), §§ 1–18.
15A Cor.Jur.Sec., Common Law (St. Paul, MN), §§ 1–22.

Cheshire and Burn's Modern Law of Real Property (17th ed. Oxford: 2006), Ch. 2 'The Common Law System'.

T.F.P. Plucknett. *A Concise History of the Common Law*

This information is intended as an introductory guide and is intended to point out issues that may be of interest to a foreign investor.

It does not constitute legal advice and should not be relied on as such. Professional advice is recommended on any issue referred to herein.

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