法律英语教程
（精读）

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A Course Book of Legal English

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前言
Foreword

法律是体现统治阶级意志、由国家制定或认可并由国家强制力保证实施的行为规范的总和。法律与语言的关系十分密切。英国著名学者大卫·修谟曾经说过："法与法律制度是一种纯粹的语言形式，法的世界肇始于语言，法律是通过语词订立和公布的。"语言是表述法律的工具，是法律的载体，法律不能脱离语言而独立存在。

法律英语，在英语中被称为 forensic language，legal English，legal Language 或 the language of the law，是表述法律科学概念及诉讼或非诉讼法律事务时所用的语种，包括立法、司法和执法时所使用的各种语言形式。换言之，法律英语乃美国、英国、加拿大、澳大利亚、新西兰等普通法系国家（common-law countries）法律人所使用的一种社会方言，其在词汇、句式、篇章方面都具有不同于普通英语的特点，如大量使用正式词汇；大量使用外来词；大量使用古体词；大量使用法律术语与行话；大量使用具有不同意义的常用词；大量使用情态动词；大量使用名物化结构；大量使用被动句；等等。此外，法律英语中还大量使用替换结构、在句法上大量使用长句或复杂句、在绝大多数情况下不使用口语、俚语和方言、很少使用带主观感情色彩的形容词和副词。这些特点使法律英语成为一种具有法学专业特色的社团方言。

本教材在编写过程中，从选材、注释、练习设计等多方面都做了精心的考虑和安排，既强调学生英语语言技能的培养，又考虑到对学生法学知识的输入与拓展，同时也注意到教材的连贯性和知识的循序渐进性，以提高学生法律英语的阅读能力和写作能力，从而满足我国日益增长的对涉外复合型法

、律人才的需要。

本教材共15个单元，内容全部选自英美法系原版法律文献，包括普通法和衡平法制度、宪法、刑法、民法、诉讼法、商法、合同法、票据法、侵权法、公司法、财产法、知识产权法、继承法、国际法、WTO法律制度、法律文书写作等。

本教材的适用对象为英语专业的本科生、法学专业的本科生和硕士研究生。

主　编

2017年2月于西南政法大学

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Lesson One

The Development of Common Law and Equity

One of the most ancient and continuous sources of law in England, Wales and Northern Ireland is the "common law".

Before the Norman Conquest, there was no unified legal system. Cases were tried in such types of courts as the Shire Courts, the Hundred Courts[1] and the Franchise Courts. When the English legal system first began to take shape, judges were appointed to administer "the law and customs of the realm". They built up their own set of rules and principles based on general customs and, this part of the law was called "common" in contrast to that which was particular or special, such as canon (or ecclesiastical) law or local customs.

Strictly speaking, the common law refers to the legal rules which have evolved over many centuries from judges' decisions in court cases. These rules are based on the concept of binding precedents, whereby lower courts are bound by the decisions made by higher courts until those higher courts themselves overturn the precedents. This occurs when the cases before the court has similar material facts and involves similar legal principles to the precedent.

Even if a preceding judgment is binding on the courts, only some parts of the judgment are important. Lawyers distinguish two parts of a judgment: the *ratio decidendi* and *obiter dicta*. The *ratio decidendi* means the reason for the decision. This is the principle of law on which the decision is made and can become a binding precedent. The *obiter dicta*, on the other hand, is a term used to describe the remainder of the judgment. This is not binding but may be persuasive. In the absence of a binding *ratio decidendi* the court may be influenced by *obiter dicta*. Its strength depends on the seniority of the court and the reputation of the judge.

Common law forms the basis of the law in England and Wales and Northern Ire-

land, except when superseded by statute law made by Parliament. Scotland's system in the past has made more use of jurists' writings, although common law principles are now usually applied.

The royal courts, before which the parties named in the various writs were ordered to appear, were presided over by officials sent from the *Curia Regis* called itinerant justices. They acquired this name because their journeys were regular and fairly predictable. Unless they were killed by dissatisfied litigants (far from unknown), they would follow the circuits traced most clearly under the reign of Henry II[2] (1159 – 1189), to whom Englishmen owe a great debt for the structure of the legal system. Indeed the circuits survive today, and were in regular use until the early 1970s.

Royal officials had visited locally and extensively for the first time in 1085 and 1086 during the compilation of the "Doomsday Book"[3]— an amazing achievement, without parallel in the European history, and only possible in a conquered country. It shows the activity of William I[4] as an administrator and systematiser rather than as a legislator. The original two volumes, and the chest constructed for their preservation, are still to be found in London. In the Middle Ages it was so respected that it was referred to simply as "The Record". Every county, every village was described; all the owners and servants were noted; even the livestock was counted. The objects were to establish the rights of the Crown, owner of everything by conquest, and, more importantly, to establish the potential for taxation. The reverence for "The Record" is thought to underlie the respect still paid to the official records kept by the administration and by the courts. Indeed it is not too much of a leap in imagination to see these royal officials, representatives of the king, the apex of the feudal structure of the country, becoming judicial officials, royal justices. They were called on a regular basis for the administrative and, later, judicial purposes.

The idea of a judge on circuit is very familiar. Even in the worst "western" films an accused person is thrown into jail until the judge visits the town. It was much the same with the itinerant justices. Whilst it was a reliable and attractive, although expensive, proposition to have a dispute settled in the royal courts at Westminster, it was a more realistic proposition to have it settled locally and avoid the bother, ex-

pense and danger of travel. Thus the royal courts sitting locally became increasingly popular.

The law applied in these local courts was, obviously, the local customary law. Gradually, however, by a process of sifting and choosing among varying local customs found whilst on circuit, the justices, when meeting together at Westminster (where they were based), gently moulded together the common law, the law common to the whole country.

The process was neither simple nor swift, but it seems largely to have been completed by about 1250 when Henry of Bratton[5], or Bracton as he is commonly called, the first great writer of English law wrote his *Treatise on the Laws and Customs of England*[6]. This very important work created the impression of English law as a whole body of connected principles. He cited more than 500 cases of the king's judges. He was a judge himself, working mostly in Devonshire. From his work it is clear to see the emergence of the use of the past cases as the authority for the result of the case in hand. This is broadly called the doctrine of precedent. It is vital to the development of English law today. By this time the king's courts were the arenas for most cases of importance (except those involving ecclesiastical disputes). There were few statutes to hamper the judges. There was little of the pressure of Parliament (so familiar today) against the orderly development of the law. There are few local customs which deviate from the common law. As the royal courts supplanted the local courts so the common law replaced local customs. Their procedure was better. Trial by jury was developed.

There are few landmark dates, but 1215 is one: the Lateran Council[7] then forbade the involvement of the clergy in the awful trials by ordeal. Since no representative of the Almighty to whom the settlement of the question had been submitted was available, trial by ordeal vanished, to be replaced with trial by jury. The importance of the local courts was further eroded.

The central royal court at Westminster developed gradually from the administrative function of the *Curia Regis*. The first was the Court of Exchequer, which emerged from the tax department of the *Curia* as the arena for the settlement of revenue disputes although this jurisdiction was widened by various methods. For example,

the court obtained jurisdiction to try cases brought over debts by use of a trick (properly called a legal fiction) called *quominus*. It worked like this: A cannot pay money he owes the Exchequer because he has none. However, B owes A money and it is for this reason that A is less able to pay (*quominus* means "by which the less"). Therefore if the court were to reconcile the dispute over the debt it would be able to enforce the issue of revenue collection, its proper function. The jurisdictional distinctions between the common law courts grew very cloudy.

The next to appear was the Court of Common Pleas[8], which was basically a court for the adjudication of civil disputes between individuals. This was created by Henry III in answer to a promise in *Magna Carta* (1215)[9] to have a fixed place for the settlement of "common pleas".

The third court was called the Court of King's Bench. It developed from hearings of both civil and criminal matters within the *Curia* at meetings "*coram rege*" ("in the presence of the king"). Apart from civil and criminal work the Court of King's Bench, presumably because of its royal origin, possessed a supervisory jurisdiction over the procedures used (although not strictly the decisions taken) in the other courts.

By the thirteenth century there were problems in these common law courts. The judges were professional lawyers, whereas before they had been clerics. As lawyers they seemed more devoted to procedural matters than the development of the law and its use to achieve justice in the individual cases. So much so that litigants who made procedural errors had their cases dismissed — whatever the depth of injustice they had suffered.

More specifically, many potential litigants were unable to bring actions before the courts because there was no writ on the Register of Writs to match the claim they wished to bring. The creation of entirely new writs had been stopped, so novel actions went unheard. Obviously, to bring an action on the writ closest to the claim amounted to a procedural error, and a waste of time and, importantly, money. Furthermore, even if a suitable writ could be found the only remedy available to the successful plaintiff was damages. The basic common law remedy was, and is, damages. There were plaintiffs for whom damages, a financial award, were inadequate or

unsuitable. The plaintiff wanted his property back, not its monetary value. He wanted a persistent infringement of his legal rights stopped, not an award of money to compensate for the interference. So for these procedural and substantive reasons there grew a need for an alternative approach.

In a feudal system with a strong centralized administration, the logical avenue of complaint about the shortcomings of the mechanisms provided is towards the centre, to the king. Dissatisfied claimants petitioned the king in person. At first these petitions were dealt with individually by the king and justice was administered by him as the "fountain of justice", despite the rules and procedures of the courts. Naturally the pressures grew. Equally naturally the work was delegated.

A central figure in the administration, the *Curia Regis*, was the Chancellor. He was responsible for the chancery where his clerks issued writs to prospective litigants. He was the logical choice of the official to deal with the petitions about injustice on behalf of the king.

At first these were dealt with at the formal meetings within the *Curia*. By the mid-fourteenth century petitions were addressed to the Chancellor alone rather than to the king or the *Curia*. In 1474 there was recorded the first case where the Chancellor issued a decree in his own name rather than in the name of the king. The Court of Chancery[10] had emerged.

Over the years a body of principles developed within this court. This became known as Equity. It was (and is) not a systematic body of law. It was never intended to be so. It was only developed as and when the procedure or the substance or the remedy offered within the common law courts was seen to be inadequate.

As Lord Cowper explained (in *Dudley v. Dudley*, 1705):

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances a-

gainst the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

So it is today. There is a supplementary system of law called equity. The most important part of it is the law of trusts. It is no longer necessary to go to a different kind of court to bring an action on, for example, a trust. The court system was radically restructured by the Judicature Acts of 1873 – 1875. It is true that the work of the courts is split amongst them for administrative convenience, but the necessity to go to court twice for, say, damages as compensation for an infringement of legal rights in the past (common law court) and then an injunction to prevent repetition in the future (court of equity) has gone. The administration of the two systems — the mainstream common law and the supplementary tributary equity — has been merged, although the systems themselves remain separate.

It follows that if a plaintiff is seeking a remedy which lies in the traditional jurisdiction of equity — say an injunction to prevent unlawful behavior in the future, or a decree of specific performance whereby the court will instruct an uncooperative party to a contract to perform his side of the bargain — then that plaintiff must satisfy the same standards which were required by the Chancellor back in the fourteenth century. The award of an equitable remedy lies in the discretion of the court. On the other hand the award of damages in an action based on principles of common law is automatic. The successful plaintiff must get damages if he proves his case (although the amount of money, called the "*quantum*" is for the court to decide).

These standards required by the Chancellor included the fact that the petitioner must have come "with clean hands". This means that a petition based on unfairness and injustice by the defendant could not be brought by a plaintiff who himself had acted unfairly or unjustly. Consider, for example, the plaintiff in the case *Overton v. Bannister* (1844). Here a minor was entitled to benefit from a trust on attaining full age. She masqueraded herself as having done so, and the trustees paid up. Later when she really did come of age she sued them, asking to be paid again. She could prove her real age. The strict construction of the trust documents might have indicated that she had a right to be paid. However the case concerned the law of trusts, a part of the law of equity developed by the Court of Chancery over the centuries on the ba-

sis of justice, fairness and good conscience. Naturally the plaintiff lost.

Another centrally important feature, or maxim, of equity is "delay defeats equity". The complaint is of unfairness and injustice and the petition is for a remedy. It is not surprising, then, that the court would (and will) refuse to award an equitable remedy if the plaintiff has delayed making his application. As Lord Camden said [in *Smith v. Clay* (1767)]:

"A court of equity has always refused its aid to stale demands when a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence."

In the early days the Court of Chancery acted in inconsistent ways, case by case, each on its merits. Indeed the Chancellor's judgment of fairness and justice varied as between successive holders of the office. So much so that one of the greatest English historical scholars, John Selden (who lived from 1584 to 1654), wrote: "Equity is a roguish thing, for it varies with the length of the Chancellor's foot."

It would be a mistake to regard equity today as being anything haphazard. It is rooted in a sense of natural justice, but it is staked and fixed by the doctrine of precedent and by the laws of evidence and procedure to the same extent as the common law. It is, however, still true to say that whereas the occasion upon which an equitable remedy can be sought is settled, its actual award is still at the discretion of the court.

Words and Expressions

ecclesiastical *a.* of or relating to a church especially as an established institution 宗教的

curia *n.* a judicial tribunal held in the sovereign's palace; a royal court [英] 国王法庭，皇家法庭

apex *n.* the highest point 顶点

mould *v.* form in clay, wax, etc; make something, usually for a specific function 塑造

deviate *v.* turn aside from a course or way; or depart, as from a norm, purpose, or subject; stray 偏离，背离

revenue *n.* government income due to taxation 税收

adjudication *n.* ①the legal process of resolving a dispute; the process of judicially deciding a case. 审理；审判 ②judgment 判决；裁定

writ *n.* a formal written order issued by a body with administrative or judicial jurisdiction 书面命令；令状

claimant *n.* one that asserts a right or title 原告；索赔人；请求人

tributary *n.* a stream or river that flows into a main stem (or parent) river or a lake 支流

minor *n.* a person who has not reached full legal age; a child or juvenile. 未成年人

masquerade *v.* pretend to be someone or something; disguise oneself 假装

maxim *n.* a saying that is widely accepted on its own merits 格言

acquiesce *v.* to consent or comply passively or without protest 默认，默许

roguish *a.* dishonest or unprincipled; mischievous or arch 调皮捣蛋的；顽皮的

haphazard *a.* marked by great carelessness; dependent upon or characterized by chance 无计划的，随意的，偶然任意的

Notes

1. **the Hundred Court** 百户区法庭。百户区指英格兰盎格鲁·萨克逊时期建立的郡下面的一级行政组织，形成于公元6世纪。百户区由高级治安官管理，并有自己的法庭。百户区法庭是一种较大的封建法庭，一般每隔3至4周开庭一次，审理的案件一般为轻微的民事案件。1867年，百户区法庭制度由《郡法院法》(County Court Act) 废除。

2. **Henry II** 亨利二世。亨利二世（1133－1189年）是英格兰国王（1154－1189年）。亨利二世在其统治期间的主要成就是强化了国家的财政管理，使土地保有期更为合理化，同时他还对司法制度进行了改革，改进了刑事诉讼程序。

3. **the "Doomsday Book"**《末日审判书》。英王威廉一世统治时期编制的一种关于英格兰财产状况的调查记录，现存于英国国家档案馆。该调查主要的目的是弄清楚国王及其直属封臣土地的范围和价值，以便为征收赋税提供依据。该调查册上列明一切僧俗封建主的土地占有状况、每个庄园的面积和牲畜头数、各类农民的人数等。传说这次统计十分严格，犹如末日审判，故

得名。《末日审判书》从1081年开始编制，1086年完成，分为两卷，它成为当时英格兰法的重要权威资料，其中记载的材料成为确定争议事实的最终依据。

4. **William I** 威廉一世或征服者威廉一世（William I, the Conqueror）。亦称为英格兰的威廉一世（William I of England）和诺曼底的威廉二世（William II of Normandy）。1035年起连续担任诺曼底公爵。威廉于1066年率军入侵英格兰，并获得英格兰王位，这就是著名的诺曼征服（Norman Conquest）。在他统治时期，诺曼—法兰西文化被带到英格兰，对英格兰中世纪时期的很多方面产生了较大的影响。

5. **Henry of Bratton** 布莱克顿（1210－1268年）。英国著名法学家，曾于1247年至1250年和1253年至1257年任御前会议法官（御前会议为后来王座法院的前身）。1257年退休后，他继续在司法委员会（judicial commissions）供职。布莱克顿在亨利三世（1216－1272年）执政时任王室法官18年，曾向威卡利亚学过罗马法，著有《布莱克顿论英国法律与习惯》（*Bracton on the Laws and Customs of England*）一书。

6. ***Treatise on the Laws and Customs of England*** 《论英格兰法律与习惯》。这是由著名法学家布莱克顿（Bracton）编写的巨著，共分五卷，是对英国普通法的第一次系统阐述。该书被F. W. 梅特兰（F. W. Maitland）赞誉为“英国法学的皇冠和奇葩（the crown and flower of English jurisprudence）”。

7. **Lateran Council** 拉特朗公会。指在7至18世纪期间，罗马教会在罗马拉特朗举行的五次主要会议和各种一般性会议。五次主要会议均制定出关涉寺院和市政法方面的重要立法。

8. **the Court of Common Pleas** ［英］皇家民事法庭，民诉法庭，普通民事诉讼法庭。1875年之前英国最重要的三个中央法庭——王座法庭（Court of King's Bench）、皇家民事法庭（Court of Common Pleas）和大法官法庭（Court of Chancery）之一。该法庭12世纪逐渐从御前会议（*curia regis*）中分离出来，不同于随国王流动的法庭。皇家民事法庭设在威斯敏斯特宫（Palace of Westminster）。该法庭属于高级的存卷法庭，由1名首席法官和5名助理法官组成。该法庭于1875年并入高等法院（High Court of Justice）。

9. ***Magna Carta*** （亦称Magna Charta或Great Charter）《大宪章》。英格兰国王约翰（King John）在封建领主迫使下于1215年6月15日在伦尼梅特

(Runnymede) 签署的保障公民自由和政治权利的宪法性文件，被公认为英格兰宪法自由权的基础。大宪章共63条，后经多次修订确认。其主要内容是针对当时一些不公正的社会现象从法律上规定了补救措施，如司法职权的公正实施，世俗和教会裁判权的界定，公民人身自由和财产权的保障，征税限制和教会权利不受侵犯等。大宪章对后世的巨大影响不在于其具体条款而是其语言的内在重要含义。如大宪章保障自由民除经合法审判外，不得被任意逮捕、监禁、没收财产或放逐出境。在司法公正方面规定，不得任意出卖权利和公正，也不得任意拒绝或拖延赋予任何人权利或公正。

10. **Court of Chancery** 衡平法院，大法官法庭。该法庭是英格兰和威尔士的衡平法院。英国15世纪随衡平法的出现而逐渐形成的与普通法法院平行的法院，由文秘署（chancery）长官（chancellor）即大法官根据“公平正义”原则，审理不属普通法诉讼形式范围的民事案件，以弥补普通法的不足。其诉讼程序较普通法院简便。根据1873年和1875年先后颁布的法院组织法，衡平法院与普通法院合并，其职权由高等法院下设的Court of Chancery行使，负责审理有关房地产、委托、遗嘱、合伙和破产等的民事诉讼。

Exercises

I. Answer the following questions according to the text.

1. Why is common law so called?
2. What is the relationship between customary law and common law?
3. Why did dissatisfied claimants petition the king in person?
4. What is the relationship between common law and equity?
5. What are the main features of equity?
6. Under what circumstances would equitable remedy be granted?

II. Choose the most appropriate words to complete the following sentences.

1. Britain is in the process of incorporating the European _____ on Human Rights into domestic law which will enable people to take human rights cases through the courts in Britain.

A. reconciliation　　B. contract　　C. agreement　　D. convention

2. It is presumed that a United Kingdom statute is consistent with the law of the

European Union unless and until it is _____ by a court to be inconsistent.

A. declared B. claimed C. pled D. denounced

3. If the court does not have territorial or personal _____ over a crime, there are two other circumstances in which the ICC can exercise limited jurisdiction on a case by case basis.

A. power B. right C. jurisdiction D. trial

4. Common law is that law which _____ from rules developed by the English royal courts principally to bolster a robust administrative system and to safeguard the royal revenues, as well as from custom and commonly-accepted practice during the early years of the Norman Conquest.

A. revolved B. evolved C. was resulted D. involved

5. "Equity" was a system parallel to the Common Law. Equity in the current sense is the body of law applied where there is no _____ under common law: the effort by courts to bring justice in circumstances not otherwise covered by rules of law. The term comes from the Latin for "fair" or "even", meaning just, impartial, and fair.

A. injunction B. sanction C. damages D. relief

6. The civil law way involves a judge referring to (and being compliant with) _____ principles prescribed in advance, whereas the common law approach tends to have judges focusing on the facts of the particular case in the effort to arrive at a fair and equitable outcome for litigants.

A. statutory B. customary C. legislative D. practical

7. The court of second instance held that the Appellant infringed upon the Appellee's copyright of the software involved in the case and the compensation amount determined in the first instance is correct, thus it _____ the appeal and affirmed the original judgment.

A. dismissed B. denied C. supplanted D. discharged

8. When a law court must decide a case, unless specific legislation applies to the issue, the court must look at past cases for guidance. This is called "precedent". The common law applies only to civil cases. In criminal cases, a person cannot be _____ of a crime unless they have broken a specific law as passed by a legislative