

CHAPTER I

The Common Law

Let me set the stage for appreciating the heritage of the trial lawyer. Unlike many other countries governed in large part by statutes, we in the United States and the United Kingdom are governed in large part by the common law.

The common law embraces the body of customs, rules, and precedent—rather than statutes—memorialized in judicial opinions that constitute much of the law that governs our lives. It emphasizes the importance of the courts in stating and restating the law based upon precedent and experience. At its center are the judges, juries, and lawyers involved in the resolution of disputes, both criminal and civil.

The origin of the common law is ancient, with seeds planted in the 1160s by Henry II, who created the King’s Bench, a circuit of judges known as the Assizes. They extended the customary law of the Normans throughout the realm, instilling it as “common” for all.

It was not long before these decisions were circulated in written digests used as precedent by those arguing before the courts, with the full liberty of judges to expand and contract the principles expressed in prior decisions.¹

As the courts of Henry II developed, those appearing before them would make notes of the decisions and repeat them to judges in other cases. Glanvill’s treatise is believed to be the first organized presentation of England’s laws and customs.

In 1215, the Magna Carta created the Court of Common Pleas in England. The average citizen then had a resort for personal disputes that did not concern the monarchy. Soon, “year-books” and “law reports”

1. See *Oliver Wendell Holmes: A Life in War, Law, and Ideas*, Stephen Budiansky, 168–69 (2019).

appeared, providing a record or precedent of prior opinions of common law issued seriatim by each judge. By the late 1200s, Bracton had collected hundreds of cases.

Unofficial judicial opinions appeared in the late 1530s. In the late 1500s, Plowden, one of the best-known reporters, included arguments of lawyers.² Reporters prompted consistency in court opinions by lawyers reminding judges of prior rulings. Precedents were established and followed.³ One lawyer argued: “[C]ourt ought to weigh its decision well because the judgment that you shall now make will be used hereafter. . . .”⁴

But few standard bearers for the common law exceed Lord Edward Coke’s vigor in protecting the common law. His *Institutes of the Laws of England*, a veritable tome, provides a history of common law in many different aspects. Coke successfully upheld the common law in the courts. He maintained that the common law took priority over legislation. For pleasure, I urge you to read *The Lion and the Throne: The Life and Times of Sir Edward Coke* (1956), by Catherine Drinker Bowen. Lord Coke (1532–1634) was attorney general under the reign of Queen Elizabeth, and chief justice during the reign of King James.

In the mid 1700s, Chief Justice Lord Mansfield authored opinions that stated new law. Of significance, Mansfield’s “reporter” made a record of his opinions, praising them as valid principles of law.

Then came Blackstone in the late 18th century. His famous commentaries emphasized the importance of the common law: “The common law worked itself pure, and was superior to legislation.”⁵ Blackstone affirmed the right of judges to interpret statutory law.

The doctrine of binding precedent as a force of law took hold in England in the 19th century. Credit is given to law reporters and the courts giving the same weight to precedent as to legislation. As common law grew over centuries, it incorporated almost every type of dispute imaginable—from property disputes to personal injury, free speech, and even abortion.

2. *Evolution of the Judicial Opinion*, William D. Popkin (2007).

3. *The Chief Sources of English Legal History*, Percy H. Winfield (1925).

4. *Id.* at 140.

5. Popkin, *supra* note 2, at 172.

English common law seeped into the custom and practices of the American judiciary. With the doctrine of separation of powers espoused by Montesquieu and adopted by the founding Americans in state and federal constitutions, the American judiciary achieved a unique role with the legislature.

Courts expanded common law by developing the practice of writing and publishing opinions “by the Court” and not *seriatim*. The practice of publishing opinions in official law reports was also established. Hence, the preservation of case law and the precedents established were available for resolution of future disputes, and development of the rule of law.

No review of the common law should omit Oliver Wendell Holmes and his seminal work, *The Common Law*. Written in 1881, the future Justice reviewed and praised the common law in specific types of cases. According to Holmes, the life of this common law is based in large part on experience and the “felt necessities of time.” There are numerous biographies of Justice Holmes.⁶

Today the strength and continued development of the common law depends on great trial lawyers and jurists to carry on with determination and courage in support of the rule of law. We certainly need to train young trial lawyers to take up the mantle from our predecessors, or we are at risk of experiencing a collapse of the foundation of our legal system, including trial by jury.

6. *See*, for example, Budiansky, *supra* note 1.