

Textbook

TEST QUESTIONS

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1. What possible meanings does the expression "common law" carry?

According to the context, its meaning may differ.

It may signify law common to the whole country – **national law** in contrast to **local law**.

It is law based on **judicial decisions (case law)** in contrast to the law made by Parliament (**statute law**).

The expression distinguishes **common law legal systems** based on **precedents** from **civil law jurisdictions** based on **civil codes**.

It comprises the rules developed by the **common law courts** in contrast to those produced by **the courts of equity**.

2. What are the essential characteristics of English law?

It is based on **the common law tradition**, e.g., **a system of judge-made law** continuously developed over the years through **the decisions of judges in cases decided by them**. These decisions are called **judicial precedents**, and they form an important preliminary source of law in the English legal system.

English judges have an important role in developing case law. They **legislate** by setting judicial precedents and interpreting **Acts of Parliament**.

The judges are independent of both **the government** and the people appearing before them. They are free **to make impartial decisions**. Court procedure is **accusatorial**, which means that judges do not **investigate the cases** but **reach a decision** based only on **the evidence** presented to them by **the parties to the dispute**. Such a system is called **adversarial**.

3. How does the Polish civil law system differ from the common law system?

In Poland, the civil law system has been **codified** or systematically collected to form a consistent body of legal rules. Thus, it can be said that the rules of the common law system evolved **inductively** from decision to decision involving similar facts, so they are firmly grounded upon **the actualities of litigation** and the reality of human conduct. New cases lead onwards to reaching new rules. Its principles

are to employ the popular phrase “open-ended”; they are not firm and inflexible **decrees**.

On the other hand, the court’s task in the civil law systems based on **codes** is **deductive**: to subsume the present case under **the generalized and codified rule**.

4. What is the inquisitorial court procedure?

In **the inquisitorial court procedure**, the court actively participates in **investigating facts of the case**.

5. What is the disadvantage of the adversarial system of justice?

In the adversarial system of justice, **the case is decided on the evidence presented to the court by the parties to the action**. This evidence is **subjective** in that it is **in favour of the party** presenting it: there is no independent body to investigate the case objectively. This can result in crucial evidence being ignored and not being heard by the court.

6. What is the law of equity?

Equity is a special area of English law that was first created by the Lord Chancellor and then developed by the Court of Chancery (now called the Chancery Division of the High Court). It consists of **rules and remedies** that supplement the common law when necessary for justice in a particular case.

7. What are equitable maxims?

The purpose of equity is **to achieve justice and fairness**. To do this the courts have developed **a set of rules to govern the application of equity**. These are called **the maxims of equity**. They are different from the rules which **apply in common law**.

There are many equitable maxims, of which the following are just brief examples:

- ♦ Equity will not suffer **wrong** to be without **remedy**. Equity will only intervene when there is no **adequate** common law remedy.
- ♦ Equity **follows the law**. Equity **recognizes legal rights** and does not replace the common law.
- ♦ He who comes to equity must come with clean hands. **A litigant** who has behaved unfairly **in the dispute** will **be denied an equitable remedy**.
- ♦ Equitable remedies are **discretionary**. Litigants do **not have a right** to an equitable remedy. The court will decide whether **to grant a remedy** after considering **the individual circumstances of each case**.

8. Why is the law of equity distinct from common law?

The maxims of equity are the reason why we continue to distinguish between common law and equity. They are different from the rules that apply in common law, and one of the most essential features

of equity that distinguishes it from common law is the maxim that equitable remedies are discretionary.

9. What are law reports?

The judgments of higher courts are published in **the series of law reports** because they form an important part of the law. They have to be available to lawyers and the public.

The most common series of law reports are: **All England Law Reports, Weekly Law Reports, Queen's Bench, King's Bench, Appeal Cases, Chancery, and Criminal Law Reports.**

10. What should be understood by the word "case"?

The word "**case**" in the legal context means **the legal action or dispute** brought to the court for **resolution**. The judges' decision is the law – hence, the English law system is often referred to as "**case**" law.

11. What does the standard reference of the report of an individual case contain?

A standard reference tells the reader where an individual case report may be found. It includes the year in which the case was published, the name of the publication in abbreviated form, and the page number at which the case can be found. When the case reports for a single year are contained in more than one volume of a publication, the number of the volume will appear before the name of the publication, e.g., a case reported at **[1979] 3 All E R 365** will be found in **the third volume of the All England Law Reports for the year 1979 at page 365**. Square brackets signify that the year is essential to finding the case report. If the case is cited with the year only and not the reference, round brackets are used, e.g., *Donaghue v. Stevenson (1932)*.

Case names are always highlighted in some way, either in italics or if they are handwritten, they should be underlined.

12. What is the "case law" system of judicial precedent?

Judges are not free to reach any decision they wish to when they decide the case presented to them; they **are bound** to follow specific rules, which form **the system of judicial precedent**.

13. What is the ratio decidendi and obiter dictum?

A judgment comprises two parts: **the ratio decidendi** and **obiter dictum**. It is ratio decidendi, which is **binding** in later cases. The obiter dictum is merely **persuasive**; it may help future judges reach a decision, but they are not bound to follow it. The ratio decidendi of a case is **the principle of law** on which the decision is based. An obiter dictum means "**something said by the way**;" thus, it comprises the judge's speculations about what his decision would or might have been if the **facts of the case** had been different.

The ratio is not a decision itself, as only **the litigating parties** are bound by the actual decision in a case. In contrast, the ratio of a case states the law for all persons and may be binding in later cases.

A judge can **relegate the ratio to the status of obiter dicta in a later case**. Since the facts of two cases are unlikely to be identical, the judge in **the latter** usually has the task of either **restricting or enlarging the ratio of the earlier case** and therefore, the ratio decidendi must always depend on the particular facts of the individual case. To discover the ratio of a case, all facts considered relevant by the judge must be taken into account. If a judge gives two or more reasons for his decision, they may be both or all rationes decidendi and not mere obiter dicta.

14. What are the typical stages of a case study?

These are: **background, complaint, action, defence, judgment, and reasons**.

Miller v. Jackson [1977] QB 966

The facts: The plaintiffs owned a house adjoining a cricket ground. Cricket had been played on the ground long before the house was built (**background**). The plaintiffs **complained of damage** caused by cricket balls and loss of enjoyment of their property (**complaint**). They **brought an action against** the cricket club for private nuisance, seeking **damages (common law remedy)** and an injunction (**an equitable remedy**) to prevent cricket being played on the ground (**action**). The cricket club argued that it had done everything possible to stop the balls from entering the plaintiffs' garden, including erecting a fifteen-foot fence (**defence**).

Held: The cricket club was liable to the plaintiffs for private nuisance. They were awarded damages, but a majority of the Court of Appeal refused to grant an injunction to prevent cricket from being played (**judgment**).

Per Lord Denning MR: The court, when deciding whether to **exercise its equitable jurisdiction** and grant an injunction, must have in mind that it is under a duty to consider the public interest. Where the effect of granting an injunction would be to prevent cricket being played on a ground where it had been played for seventy years or so, **the special circumstances** are such that **the public interest must prevail over the hardship of the individual householders** who were deprived of the ability to enjoy, in peace and quiet, their house and garden while cricket was being played (**reasons**).

15. What does the doctrine of the binding case state?

By the doctrine of the binding case, the authority of the courts is hierarchical; a court that is **inferior in authority to another court is obliged to follow (bound by) a court of superior authority** if called upon to decide upon facts similar to facts already tried by the superior court.

The House of Lords used to be **the highest appeal court** in the English legal system. Its decisions were binding on all the courts. Until 1966, the House of Lords had also been bound by its own previous decisions. This year, the Lord Chancellor, Lord Gardiner, issued a Practice Statement which stated “while treating former decisions of this House normally binding,” their Lordships would “depart from a previous decision when it appears right to do so.”

In 2009, the Supreme Court of the United Kingdom started to function as the highest appeal court in the English legal system.

The Court of Appeal is below the Supreme Court. It is bound by the decisions of the Supreme Court, and its decisions are **binding on all lower courts**. It is also bound to follow its own previous decisions except when **an earlier decision of the Court of Appeal conflicts with the decision of the Supreme Court**, or there are **two conflicting Court of Appeal decisions** when it must choose which one to follow, and when a previous decision was **given per incuriam (through lack of care – generally when some relevant law was not taken into consideration)**. These exceptions to the rule that the Court of Appeal must abide by its own decisions are called **the rules in *Young v. Bristol Aeroplane Company* (1944)**, the case in which the rules were laid down.

The court **below the Court of Appeal** is the **High Court of Justice**. It is bound to follow the decisions of the House of Lords and the Court of Appeal. Judges in the High Court will generally follow the decisions of fellow High Court judges, but they are not obliged to do so. **The Crown Court, the court of first instance for criminal cases**, is bound by the House of Lords and the Court of Appeal. **The lowest courts in the hierarchy, the county courts, and the magistrates’ courts** are bound by the High Court, the Court of Appeal, and the House of Lords. The decisions of these lower courts bind no court.

16. Was the House of Lords which used to be the highest court of appeal in the English legal system, the same body as the second chamber in Parliament?

Although this court had the same name, it was a separate body whose members were judges known as Law Lords. They were also members of the House of Lords in its legislative capacity but, by convention, did not take part in politically controversial debates. However, the Supreme Court was established by Part 3 of the Constitutional Reform Act 2005, and on 1 October 2009, it replaced the Appellate Committee of the House of Lords. The Supreme Court of the United Kingdom is the final court of appeal in the UK for civil cases and criminal cases in England, Wales, and Northern Ireland. It hears cases of the greatest public or constitutional importance affecting the whole population. The Supreme Court’s 12 Justices maintain the highest standards set

by the Appellate Committee but are now explicitly separate from the Government and Parliament. The High Court of Justiciary remains Scotland's supreme court for criminal cases. Additionally, it hears cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 2006. This jurisdiction was transferred to the Supreme Court from the Judicial Committee of the Privy Council.

17. What is reversing? In most cases, **the unsuccessful party may appeal to a higher court. The lower court's decision is said to be reversed** if the higher court **decides in favour of the appellant**.
18. What is overruling? **Overruling** occurs when a higher court in a later case **refuses to endorse** the statement of law in an earlier case.
19. What is "distinguishing"? **Distinguishing** occurs when the facts of a later case are sufficiently different to **justify the court reaching a different decision from an earlier case involving the same legal principle**.
20. What is statute law? **Statute law is the law enacted by Parliament**. Although Parliament has **supreme legislative power** and **the judiciary has no authority to question the validity of an Act of Parliament**, judges have a crucial role concerning **legislation**. **Parliament passes the laws**, and **the courts apply them to individual cases**, but before the law can be applied, the judges must decide on its meaning. This process is called **statutory interpretation**.
21. What is a bill? Individual legislation is known as a **bill** during its **legislative process** and is called **an act** after receiving **the Royal Assent**.
22. What test do the courts apply to examine the validity of legislation in the UK? The only test for **the validity of an Act of Parliament** is that it **has passed the necessary legislative procedures, has been approved by a majority of both Houses of Parliament, and received the Royal Assent**. This procedure is known as **"The Queen in Parliament"**.
23. What is the purpose of statutory interpretation? The purpose of statutory interpretation is to find the meaning of the words used in the statute.
24. Why does the need for statutory interpretation arise? There is a need for statutory interpretation because of the complex nature of the words, which are often imprecise and may convey many meanings. Foreseeing every situation that may arise **under a particular legislation is also impossible**.

25. What aids are available to assist judges in the interpretation of statutes?
- Several **presumptions** guide a judge when he is called upon to interpret an Act. There are presumptions that **the Act applies to the whole of the United Kingdom but no further, that the Crown is not bound, that the statute is not retrospective, and that the common law is not altered.**
- Apart from that, there are certain other aids for judges. **Internal aids** such as the **title of the Act, its preamble** (setting out its purpose), **headings to sections, and Schedules** may be looked at in appropriate circumstances, but not marginal notes as these are not inserted by Parliament.
- External guidance**, such as textbooks, may not be used. Nevertheless, external aids to interpretation comprise “The Oxford English Dictionary,” which may be referred to as a guide to ordinary meaning possessed by words used in the Act and **the Interpretation Act 1978**. Where a United Kingdom Act of Parliament **incorporates an international treaty, travaux préparatoires proceedings** may be considered if publicly available and unequivocally **point to a particular legislative intention.**
26. What does the name Hansard stand for?
- Hansard is the name of the official report of debates in the UK Parliament. It is not to be cited in interpreting the Act as debates are two or many-sided affairs from which no sure indication can be gained.
27. What does the Interpretation Act 1978 provide?
- The Interpretation Act 1978 gives a particular meaning to various words used in legislation unless a contrary intention appears. For example, the Act says that the masculine gender includes the feminine and the singular includes the plural (s. 6), and references to the time of the day are given to Greenwich meantime (s. 9) and Sch. I contains a fivepage list of “words and expressions” defined.
28. What is the ejusdem generis rule?
- The expression “**ejusdem generis**” means “**of the same kind**”. The **ejusdem generis rule** says that where general words follow two or more particular words, the general words are to be read concerning those particular ones. For example, **under the provisions of the Betting Act 1853**, keeping a “house or office or other place” for betting with persons resorting thereto **is prohibited**. The question arose if Tattersall’s Ring (an open-air enclosure reserved for certain bookmakers) **fell within the statute**. The court applied the ejusdem generis rule and said that “other place” referred to other covered accommodations and did not, therefore, include Tattersall’s Ring.
29. What are the canons of construction?
- The canons of construction** are **the rules of practice** for how judges should **construe the statutes.**

There are three canons of construction: **The Literal Rule, The Golden Rule, and The Mischief Rule.**

The Literal Rule says that where there is no ambiguity, the literal or usual meaning must be given to words, even if hardship results.

The remedy for this hardship lies in an amending Act of Parliament.

The Golden Rule says that if the grammatical and ordinary sense of the words leads to an absurdity, repugnancy, or inconsistency with the rest of the instrument, the grammatical or ordinary sense of the words may be modified to avoid such absurdity, repugnancy, or inconsistency, and no further.

Another canon of construction is the Mischief Rule, which provides that in case of ambiguity, the court may look at the old law to discover the wrong (mischief) that the Act sought to remedy and then interpret the words of the Act in light of this. This rule is also known as **the rule in Heydon's Case (1584).**

30. Are English courts authorized to interpret the meaning of any Treaties of the Communities or a Community Instrument?

This matter is regulated by The European Communities Act 1972, which provides that such questions shall be treated as questions of law and, if they are not referred to the European Court, they shall **be decided following the principles laid down by any relevant decision** of the European Court. Thus, it follows that in interpreting **Community legislation**, the English courts **are bound by the decisions** of the European Court, which **is outside the area of jurisdiction** of the English courts.

31. What are customs?

Customs are social habits and behaviour patterns, which all societies seem to evolve without express formulation or conscious creation. In a sense, custom must be given a proud place as one of the principal sources of law since, to a large extent, if not in the majority, the law was initially based on it. Moreover, custom is not solely crucial as a source of law, for even today, some customary rules are observed in their own right, and they command almost as much obedience as rules of law proper; they only differ from rules of law in that the organs of the State do not enforce their observance.

In modern times, most general customs (i.e., customs universally observed throughout the realm) have either fallen into desuetude or become absorbed in the rules of law. For example, many of the early rules of the common law were general customs that the courts adopted and, by this very act of adoption, made into law. So, too, much of the modern mercantile law owes its origin to the general customs of merchants, which the courts assimilated during the seventeenth and eighteenth centuries, and, indeed, they are still assimilating international banking practice. Also, many rules related to the sale of goods

originated as customs, were adopted by the courts, and eventually moulded into a statutory code by the Sale of Goods Act 1893. General custom has, therefore, now ceased to operate as an essential source of law, for law, whether enacted or judicially declared, has in most fields superseded custom.

32. Why does the English judge have a central position in the English legal system?

The English judge has, through precedent, the **power to make new law**. **Decided cases** form the precedents; thus, a practitioner who is asked to consider a legal matter will look to the reported decisions of the courts, and he will do this even though **a statute regulates the point in issue**, for statutes are interpreted by the courts, and a decision which is concerned with the interpretation of the statute is as binding as any other decision.

Even today, **cases of "first impression"** sometimes arise from facts that bear no resemblance to the facts of any previous case. When the judge **rules in such a case, he legislates** because future courts must always follow him.

In distinguishing between previous decisions and following one rather than another, the judge, though appearing only to apply existing law, in fact, **exercises quasi-legislative discretion**.

33. What is procedural or adjectival law?

Procedural or adjectival law consists of the rules that **determine the course of an action**; they **govern** such matters as how **the case is to be presented**, in **what court it shall lie**, or when **it is to be tried**. Procedural rules govern **the machinery** as opposed to **the subject matter of litigation**.

34. What is substantive law?

Substantive law is the area of law that **lays down people's rights, duties, liberties, and powers**. These are rules **on which the courts base their decisions**.

35. How is the criminal law distinct from the civil law?

A simple distinction between criminal and civil law is that the latter regulates the relationship between **individuals or bodies**, and the former regulates **the legal relationship** between the State and individuals or bodies.

36. What is the difference between the criminal law and the civil law reflected in the terminology and procedure of the law?

Examples of **civil law include the law of contract, tort, and property**. In civil law, you **commit a civil wrong (negligence)**, while in **criminal law, you commit a crime (or a criminal offence)**, which ranges from **petty (e.g., parking offences) to very serious (e.g., murder, rape)**. The distinction between a crime and a civil wrong cannot be stated depending on what is done because each case may be the same. The true distinction resides not in the nature of **the wrongful act** but

in **the legal consequences** that may follow it. If criminal proceedings can follow the wrongful act (or omission) it is regarded as a crime (otherwise called an offence). It is considered a civil wrong if civil proceedings can follow it. If it happens to be capable of being followed by both, it is both a crime and a civil wrong.

Criminal and civil proceedings are easily distinguishable due to the different **procedures, outcomes**, as well as **terminology**.

In criminal proceedings, a **prosecutor prosecutes a defendant**; and, if successful, the result of the **prosecution is conviction**. The defendant may **be punished** by one of a variety of **punishments** ranging from **a fine to life imprisonment**. However, he may also **be released on probation or discharged without punishment**.

In **civil proceedings**, a **plaintiff generally sues (e. g. brings an action) against a defendant**. The proceeding, if successful, **results in judgment for the plaintiff**. The judgment may order the defendant to pay the plaintiff money, transfer property to him, **do or not do something (injunction)**, or **perform a contract (specific performance)**.

The word **"guilty"** is used primarily for **criminals**, while **the corresponding word in civil cases is "liable,"** although it is also used in criminal contexts.

37. What are the rules for naming cases?

The way the cases are cited reflects a further difference between civil and criminal law.

Trials on indictment are in the name of the Queen or the King (as Representing the State); thus, a **criminal case** is generally called **R. v. whomever it is – R. being short for Regina or Rex, and v. being short for versus**, e. g. *R. v. Sikes*. In some textbooks on criminal law cases may be referred to simply by *Sikes*.

When cases are tried **summarily before the magistrates**, the title of the case will not contain Rex or Regina before v. but will **include the name of a private person**; thus, the name of the **actual prosecutor** (e.g., a policeman) appears instead of **the nominal prosecutor, the Queen**. A **civil case will usually be cited by the parties' names**, e. g. *Rylands v. Fletcher*. If the Queen (as representing the Government) is a party, she is usually called **"The Queen"** and similarly to **"The King,"** thus: *British Coal Corporation v. The King*. Nevertheless, R. may also be used.

However, these peculiar conventions are used in pronouncing the names of cases.

- (1) **A criminal case**, such as *R. v. Sikes* can informally be referred to as R. v. Sikes. **In the court, the proper method is to call it "The King (or The Queen) against Sikes."**

- (2) In civil cases, the “v.” coupling the parties’ names is always pronounced “and” in court and out of it.

38. What is the main difference in the judicial hierarchy between the British and many continental systems?

Most judges hear both **civil** and **criminal** cases. Judges in the **Supreme Court** hear **only appeal cases**, whilst judges in the **High Court** and **Crown Court** have **first instance** as well as **appellate jurisdiction**. A distinctive feature of the British system in comparison with many continental systems is that it does not have a **judicial career structure**. British judges are chosen from **lawyers** who have gained considerable experience as **legal practitioners** before **being appointed to the judiciary**.

In continental systems, law graduates can choose to be judges at the outset of their careers and gain experience as **practicing judges**.

39. What is the function of the jury?

Today, **the jury** consists of twelve ordinary people with no special knowledge, chosen at random to act as **impartial judges of the facts of a case**. In a **jury trial**, the **trial judge** advises the jury on the relevant law. Its function is **to apply the law to the facts**, and then **decide in criminal cases whether the defendant is guilty or not guilty** and, **in civil cases, whether the defendant is liable to the plaintiff**. The decision of the jury is called a **verdict**. In civil cases, the jury will also **decide on the amount of damages to be awarded to the plaintiff**. In practice, however, the role of a jury has been greatly diminished over recent years.

40. Who are barristers and solicitors?

The legal profession in England and Wales is divided into: **barristers** and **solicitors**.

Barristers are primarily **concerned with advocacy** and have an **exclusive right of audience in the High Court, the Court of Appeal, and the Supreme Court**. However, they are not confined to advocacy and may devote much of their time to **giving expert opinions on legal matters**.

Solicitors are **concerned with legal work out of court**, but they have a **right of audience in magistrates’ courts, county courts**, and, in some instances, **in the Crown Court**.

41. What is the court of first instance?

The court in which a **case is first heard** is called **the court of first instance**.

42. What are appellate courts?

In almost all cases, it is possible **to appeal to a higher court to reconsider the original court’s decision**. These courts are called **appellate courts**.