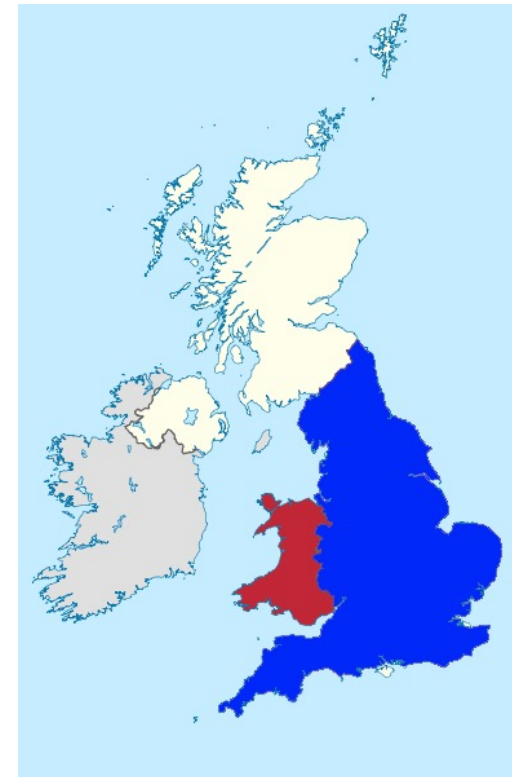


# § 3: Der anglo-amerikanische Rechtskreis (1)

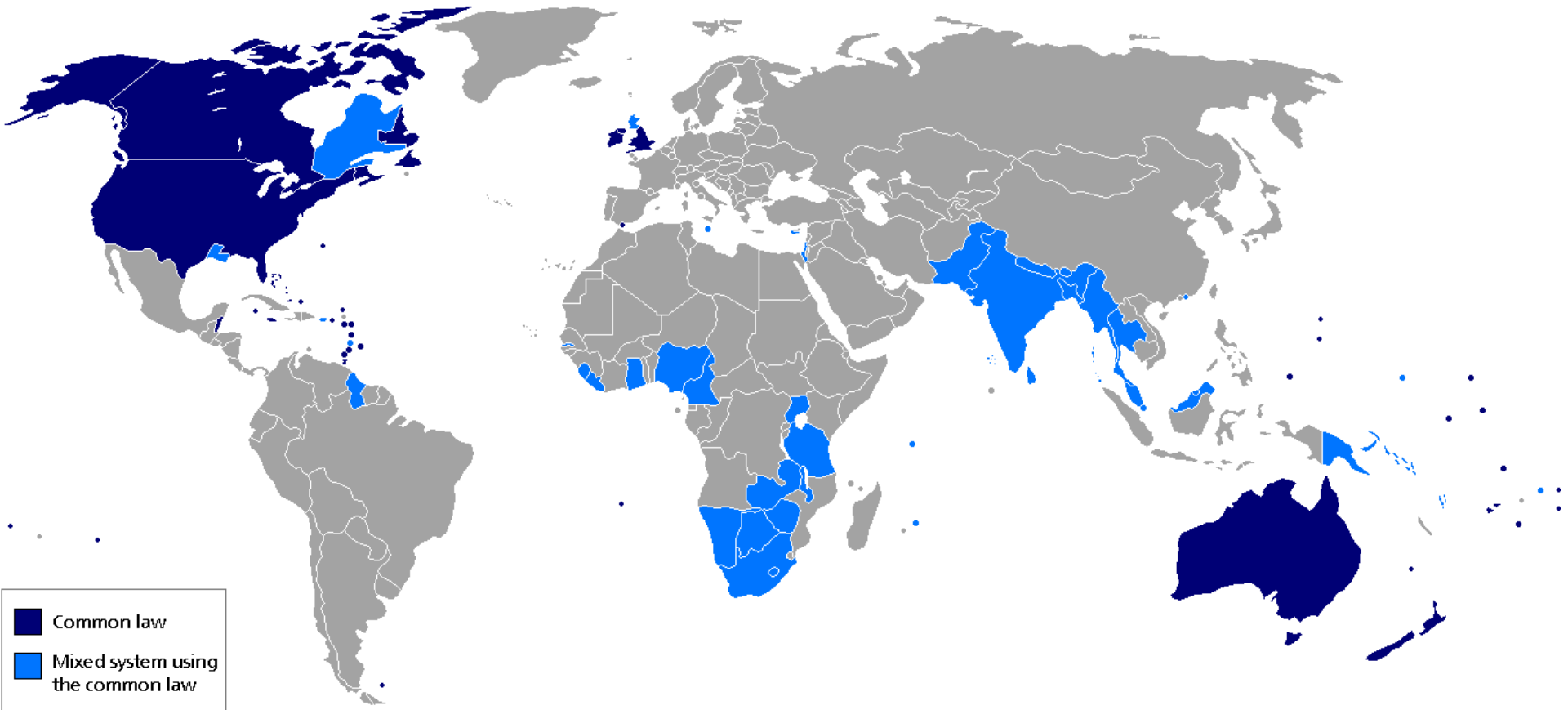
– Recht von England & Wales –

# Was ist das Recht von England & Wales?

- Englisch-Recht = Recht von England & Wales
- England  $\neq$  Großbritannien  $\neq$  Vereinigtes Königreich
- Abzugrenzen ist England auch vom Commonwealth



# Bedeutung des englischen Rechts (1)



Quelle: wikipedia

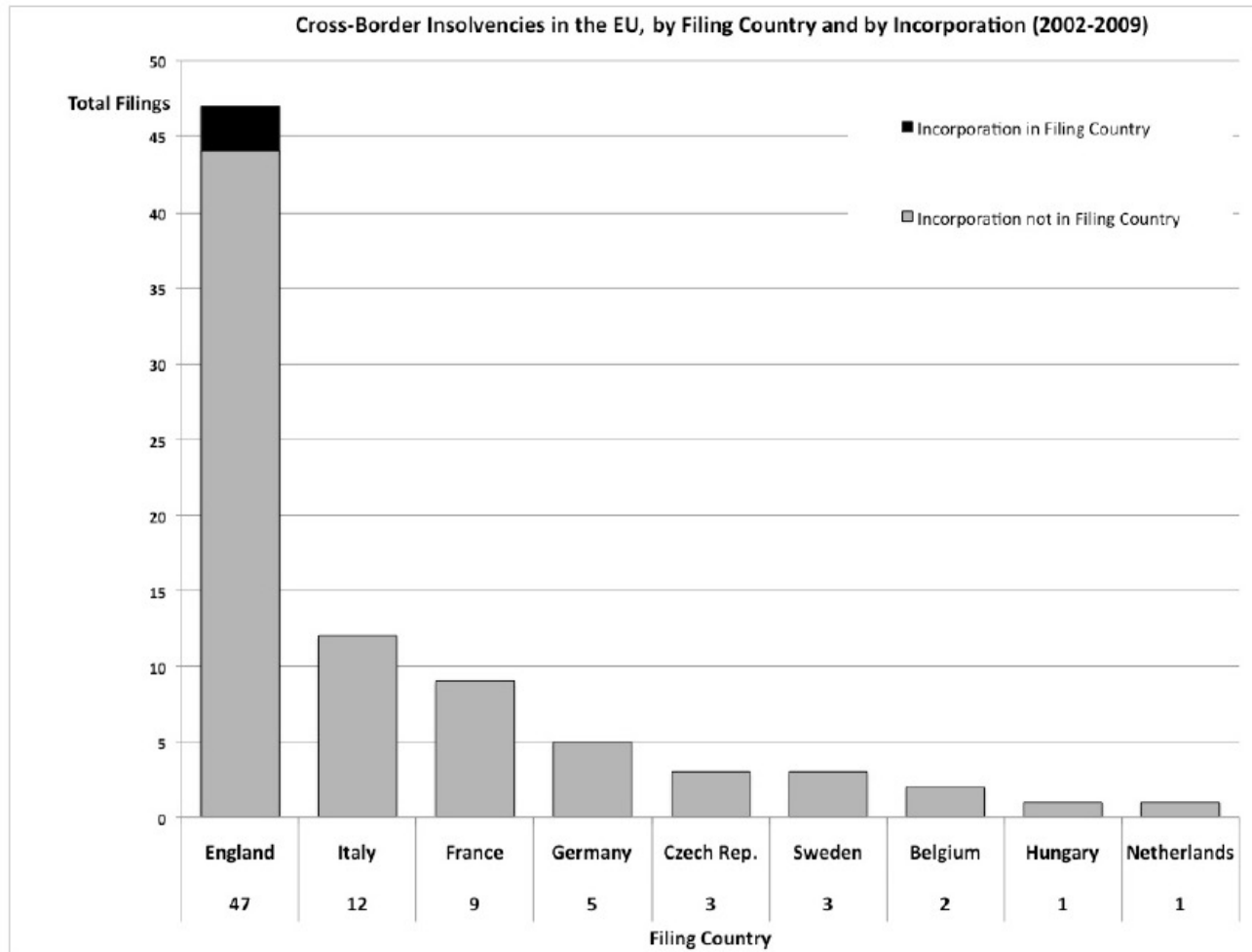
## Bedeutung des englischen Rechts (2)

- **Wettbewerb der Rechtsordnungen** in Europa → englisches Gesellschafts- und Insolvenzrecht steht hoch im Kurs
- **Lord Denning** in *House of Lords (The Atlantic Star)*, [1974] AC 436, 453:

„... England, it is a good place to shop in, both for the quality of the goods and the speed of service“

# Bedeutung des englischen Rechts (3)

Figure 1.



Quelle: Banda,  
Study (2011)

# Bedeutung des englischen Rechts (4)



# Quellen englischen Rechts (1)

- Richterrecht (Case Law)

- Precedent and the Doctrine of stare decisis

- Court of Appeal in Young v Bristol Airplane Co [1944] KB 718

1944 **YOUNG v. BRISTOL AEROPLANE COMPANY, LIMITED.**

June 6, 7, 8:  
July 28.

*Court of Appeal—Obligation to follow previous decisions.*

The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the "full" court is in the same position in this respect as a division of the court consisting of

three members. The only exceptions to this rule are :—(1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow ; (2.) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords ; (3.) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.

C. A.

1944

**YOUNG  
v.  
BRISTOL  
AEROPLANE  
Co., LD.**

Lord Greene  
M.R., Scott,  
MacKinnon,  
Luxmoore.

## Quellen englischen Rechts (2)

- Court of Appeal in *Worcester Works v Cooden Engineering* [1972] 1 QB 210
- as bailee: and accordingly, if the person who had sold goods continued in possession as a bailee, he did not “continue in possession” within the meaning of the section. But those cases are no longer good law. They were disapproved by the Privy Council in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.* [1965] A.C. 867: and, although decisions of the Privy Council are not binding on this court, nevertheless **F** when the Privy Council disapprove of a previous decision of this court, or cast doubt on it, then we are at liberty to depart from the previous decision. I am glad to depart from those earlier cases and to follow the Privy Council. The words “continues in possession” refer to

- Distinguishing
- Gesetzesrecht
  - Statutory Law: acts, rules & schedules – is it in force?
  - Auslegung: [Interpretation Act 1978](#); Literal Interpretation; Golden Rule; Mischief Rule
  - Vorrang des Gesetzesrechts vor dem Richterrecht



# Quellen englischen Rechts (3)

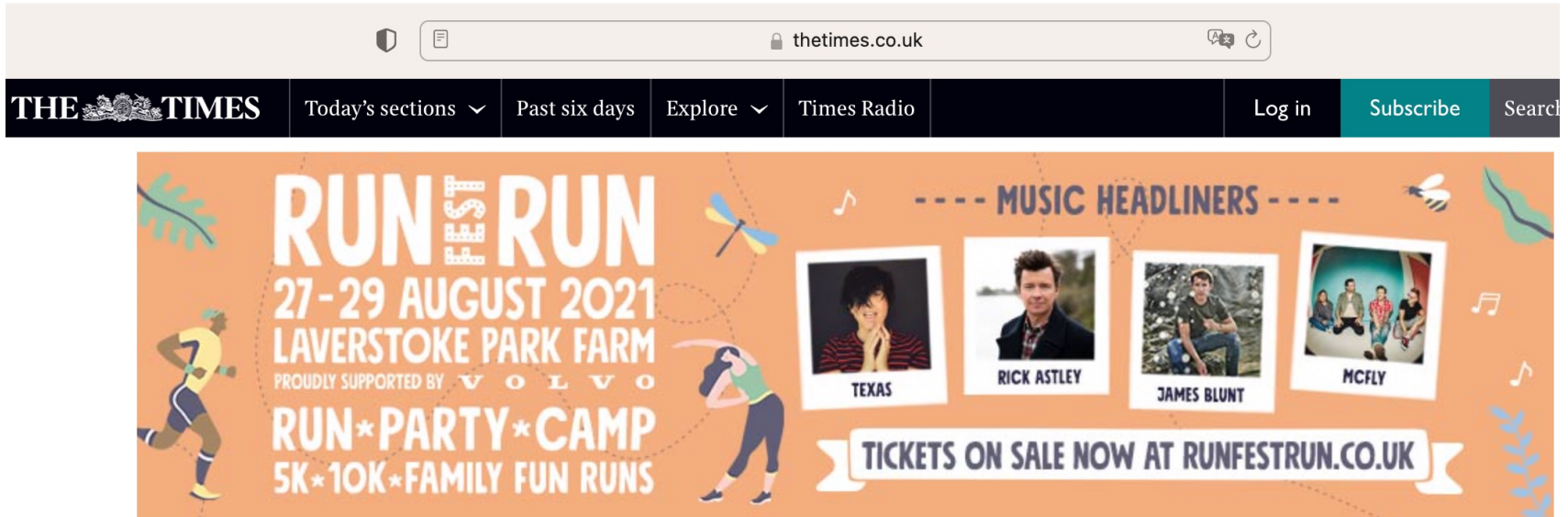
- Sonstige Rechtsquellen

- Gewohnheitsrecht (geringe Rolle, etwa *lex mercatoria*)
- EMRK, sonst. Völkerrecht

- Rolle der Wissenschaft

- Grds. geringe Rolle der Wissenschaft in Rechtsprechung
  - abstrakt-genereller Ansatz der Wissenschaft vs konkret-individueller Ansatz des case law
- **Books of Authority** (z.B. Blackstone, Dicey etc.)
  - Alte Werke, die von z.T. Wissenschaftlern verfasst wurden
  - Ähneln aber den Law Reports
  - Häufig werden diese Books of Authority aber zitiert

# Quellen englischen Rechts (4)



## Lord Denning

Master of the Rolls from 1962 to 1982 who became the most widely known member of the English judiciary

Thursday November 15 2007, 5.16pm  
GMT, The Times

Lord Denning was Master of the Rolls from 1962 to 1982 and, in all, held high judicial office for a remarkable 38 years. Towards the end of this long period it often happened that experienced counsel appeared before him who had not been born when he first went on the Bench. He lived to become the most widely known member of the English judiciary and in retirement he remained in the public eye for his forthright pronouncements on a wide range of legal issues.

# Geschichte des Common Law (1)

- Ursprünge im Mittelalter
- Um das 6. Jahrhundert **Herrschaft germanischer Stämme** (Angeln, Dänen, Jüten, Sachsen) in Kleinkönigreichen
  - Geltung der verschiedenen Gewohnheitsrechte in den verschiedenen Gebieten Englands
  - Rechtsprechung durch lokale Feudalherren
- Mit **normannischer Eroberung im Jahre 1066** (William the Conqueror) wurde England mit normannischem Lehenssystem überzogen
  - Rechtsprechung fortan von sog. County/Hundred Courts
  - Anwendung des noch geltenden Gewohnheitsrechts
- Im **Jahre 1154** Einführung eines königlichen Gerichtssystems neben den lokalen Rechten durch **König Henry II (Curia Regis)**
  - **Riding Circuit** (auf Geheiß des Königs reisen Richter durch das Land und sprechen Recht; regelmäßige Überprüfung und Fortentwicklung des Rechts beim König → **Entwicklung des Common Law**)

## Geschichte des Common Law (2)



William the Conqueror –  
Quelle: BBC

## Geschichte des Common Law (3)



King Henry II – Quelle:  
BBC

# Geschichte des Common Law (4)

## ■ System der **writs**

- Writ (von „to write“, schreiben) ist ein dem römischen Aktionenrecht verwandtes Instrument, ursprünglich als Befehl des Königs an den Sheriff verstanden prozesseinleitende Maßnahmen zu ergreifen
- Entwicklung **vielfältiger Writs für konkrete Sachverhalte** in **streng formalisiertem Verfahren**
- **Provisions of Oxford (1258)**

## ■ **Common Law & Equity**

- Common Law aufgrund Formalisierung recht starr, keine Einzelfallgerechtigkeit
  - Writs sahen auch nur beschränkte Rechtsfolgen (z.B. Schadensersatz, nicht aber Erfüllung) vor
  - Bürger wandten sich an König, der anhand von **fairness und reasonableness** entschied
  - Aus diesen Abläufen entwickelte sich ein neues Gericht, der sog. **Court of Chancery** und eine neue Gerichtsbarkeit (**Equity**)
- Parallelität von Common Law & Equity (**Earl of Oxford's Case (1615 I Ch Rep I, 21 ER 485)**)

## Geschichte des Common Law (5)

The **EARL OF OXFORD'S CASE** in **CHANCERY**. With the Lord Chancellor's Arguments, touching the Jurisdiction of the said Court. Mich. 13 Jac. 1 [1615].

The present Master of the College having by undue Means obtained the Possession of one of the 130 Houses, whereof one Castillion was Lessee, who being secure of his Title both in Law and Equity, [3] sealed a Lease thereof for three Years to one Warren, who thereupon brought an Ejectment against one John Smith, for Trial of the Title in B. R. wherein a Special Verdict was had; and while that depended in Argument the Lease ended, and so no Possession could be awarded for the Plaintiff, nor Fruit had of his Suit.

Yet he proceeded to have the Opinion of the Judges to know the Law (which was a voluntary Act of his), to the Intent, if the Law were with him, he might begin a new Suit at Law, and spare to proceed in Equity; and if the Law were against him, that then he might proceed in Chancery. And the Judges of that Court having delivered their Opinions against his Title, before any Judgment entered upon the Roll

## Geschichte des Common Law (6)

to join Hand in Hand, in moderating and restraining all Extremities and Hardships.

By the Law of God, He that builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof; and it was a Curse upon the Wicked, that they should build Houses and not dwell in them, and plant Vineyards and not gather the Grapes thereof. Deut. 28. v. 30.

[5] And yet here in this Case, such is the Conscience of the Doctor, the Defendant, That he would have the Houses, Gardens and Orchards, which he neither built nor planted: But the Chancellors have always corrected such corrupt Consciences, and caused them to render *quid pro quo*; for the Common Law it self will admit no Contract to be good without *quid pro quo*, or Land to pass without a valuable Consideration, and therefore Equity must see that a proportionable Satisfaction be made in this Case.

As in the Case of Peterson *vers.* Hickman, the Husband made a Lease of the Wife's true Value of the new Building and Planting since the Conveyance, and convenient Allowance for the Purchase.

And Equity speaks as the Law of God speaks. But you would silence Equity.

1st. Because you have a Judgment at Law.

2dly. Because that Judgment is upon a Statute-Law.

To which I answer,

First, As a Right in Law cannot die, no more can Equity in Chancery die, and therefore *nullus recedat a Cancellaria sine remedio*, 4 E. 4, 11, a. Therefore the Chancery is always open, and although the Term be adjourned the Chancery is not; for Conscience and Equity is always ready to render to every one their Due, and 9 E. 4, 11, a. The Chancery is only removable at the Will of the King and Chancellor; and by 27 E. 3, 15. The Chancellor must give Account to none but only to the King



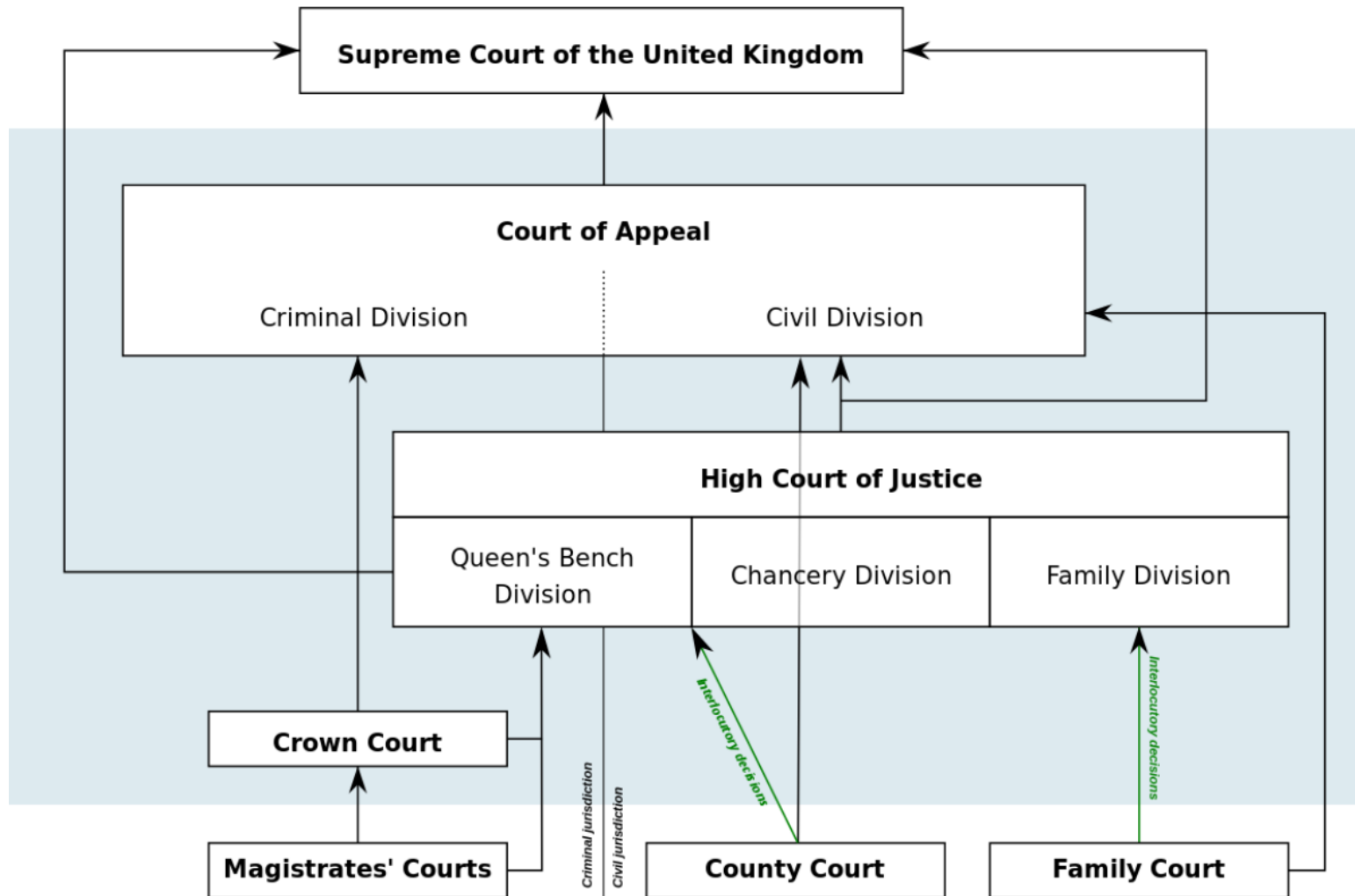
# Geschichte des Common Law (7)

## **Section 49 (1) Senior Courts Act 1981 (Concurrent administration of law and equity.):**

Subject to the provisions of this or any other Act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the **rules of equity shall prevail**.

- **Common Law Procedure Act 1852**
  - Abschaffung der einzelnen writs zugunsten einer einzigen Form **writ of summons**
- **Supreme Court of Judicature Act 1873**
  - Einheitliche Gerichtsbarkeit: Zusammenführung der Common Law Gerichte und des Court of Chancery im Supreme Court of Judicature (dieser war unterteilt in High Court of Justice und Court of Appeal)
  - Anwendung von Common Law und Equity durch alle Gerichte nebeneinander

# Gerichtsverfassung (heute)



Quelle: [www.wikipedia.org](http://www.wikipedia.org)

# Juristen in England

- Judges
  - Ernannt vorwiegend aus dem Kreis der Barrister
  - Langjährige Berufserfahrung notwendig
- Solicitors
  - Früher hauptsächlich in der Beratung tätig, kein Auftreten vor Gericht
  - Heute ist dies liberaler; vorwiegend aber Tätigkeit bei unterinstanzlichen Gerichten
- Barristers
  - Auftreten insb. in Verfahren vor dem Supreme Ct
  - Organisation in den Inns of Court
  - Q.C.= Queen's Council
- Scholars
  - Lecturer
  - Professors in Law

# Stilprägende Merkmale des englischen Rechts (Auswahl)

- Fallrecht und Doctrine of Stare Decisis (siehe oben)
- Fragmentarische Gesetzgebungsakte
- Strikte Auslegungsregeln bei Gesetzen, große Bedeutung des Wortsinns
- Besondere Rechtsinstitute
  - Trust und dessen Unterteilung in fiduziarisch gehaltenes und rechtliches Eigentum
    - Legal owner ist der Trustee, equitable owner ist der Beneficiary
  - Consideration als notwendiges Element des Vertragsschlusses (nur solche, die nicht in einer Urkunde (deed) verbrieft wurden; dazu später)
  - Interest in land → Folge des Lehenssystems

# Zusammenfassung

- Große Bedeutung des englischen Rechts weltweit und in Europa
- Rechtsquellen
  - Richterrecht (Case Law)
  - Statutory Law
  - Books of Authority
- Entwicklung des „Common Law“-Systems durch Aufbau eines einheitlichen, königlichen Justizsystems
- Entwicklung materiell-rechtlicher Rechtspositionen über formalisierte Rechtsbehelfe (writs)
- Parallelität von Common Law und Equity
- Gerichtsaufbau
- Juristen in England (Judges, Solicitors, Barristers, Scholars)
- Stilprägende Merkmale des englischen Rechts