



**Universität  
Zürich** <sup>UZH</sup>

**Rechtswissenschaftliche Fakultät**

---

# **Introduction to the History of Common Law**

Elisabetta Fiocchi Malaspina



## General Information

- Lecture 4, 8.10: Introduction to the History of Common Law
- Lecture 7, 1.11: Property Law
- Lecture 8, 8.11: Trust Law
- Lecture 9, 15.11: International Law

Office Hours: Friday, 10.00-12.00, RAI.H.97, [elisabetta.fiocchi@rwi.uzh.ch](mailto:elisabetta.fiocchi@rwi.uzh.ch)



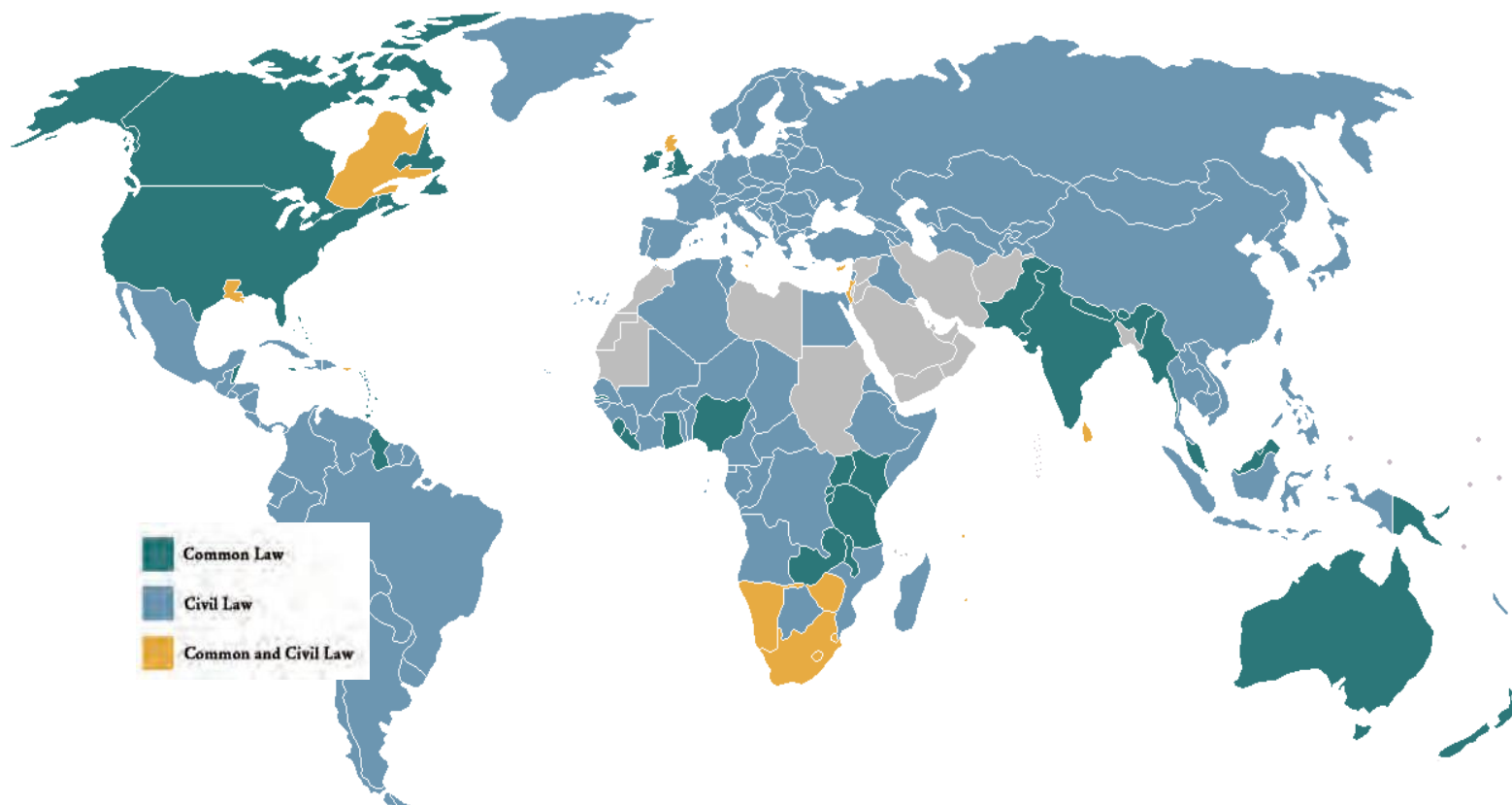


**Universität  
Zürich** <sup>UZH</sup>

**Rechtswissenschaftliche Fakultät**

---

# **Common Law and Civil Law**





## **Dillon, Laws and Jurisprudence of England and America, Boston 1894, p. 155**

The expression "the common law" is used in various senses: (a) sometimes in distinction from statute law; (b) sometimes in distinction from equity law c) sometimes in distinction from the Roman or civil law [...] . I deal with the fact as it exists, which is that the common law is the basis of the laws of every state and territory of the union, with comparatively unimportant and gradually waning exceptions. And a most fortunate circumstance it is, that, divided as our territory is into so many states, each supreme within the limits of its power, a common and uniform general system of jurisprudence underlies and pervades them all; and this quite aside from the excellences of that system, concerning which I shall presently speak. My present point is this: That the mere fact that one and the same system of jurisprudence exists in all of the states, is of itself of vast importance, since it is a most powerful agency in promoting commercial, social, and intellectual intercourse, and in cementing the national unity.



<b>Common Law</b>	<b>Civil law</b>
Not codified Law (exceptions: statute law)	Codified law
role of judges: stare decisis, set precedent	Role of judges: make rulings, application of the law
No clear separation between public and private law	Separation between public and private law
No clear separation between substantive law and procedural law	Separation between substantive law and procedural law



## Other Features

- Common Law has grown rather than been made
- There is a Common Law not made by any legislator

Statute law and Common Law

Statute Law: made by the UK Parliament + Royal Assent = Act

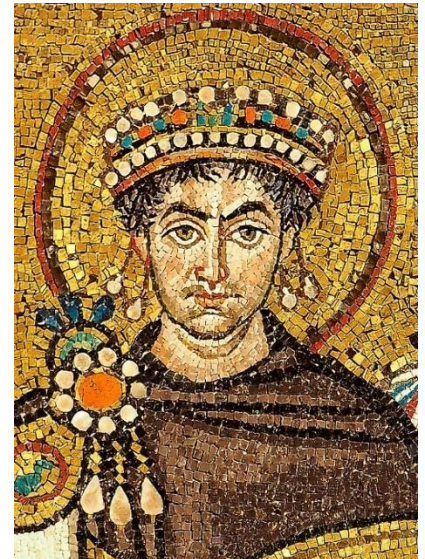




# Creativity of royal judges from the 12th century

## Civil Law

- Codex Iustianinus, 6th century
- 11th century: Glossators; Corpus iuris civilis
- 14-15th century: Commentators (dealing with the interpretation of the Corpus iuris civilis)
- 16th century: Legal Humanism
- Late 16-17th century: natural law doctrines
- 18th century: European Enlightenment
- 19th century: Napoleonic Code, ABGB, BGB

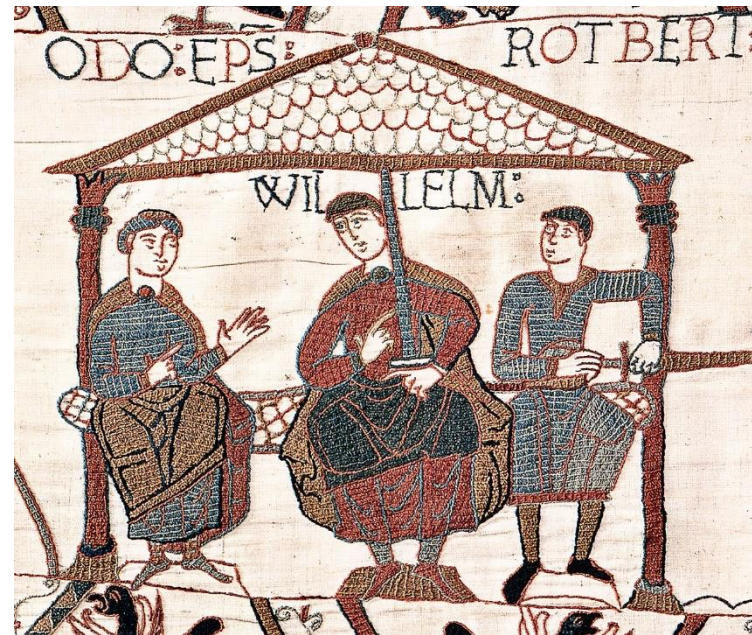


## The origin of the Common Law

- Norman conquest 11th Century
- 1066: Battle of Hastings
- William the Conqueror (1028-1087)

The entire territory of the kingdom belonged to the king

Separation between royal and ecclesiastical jurisdiction (king's sovereignty, autonomy from the Church, king's control over ecclesiastical power).





## The origin of the Common Law

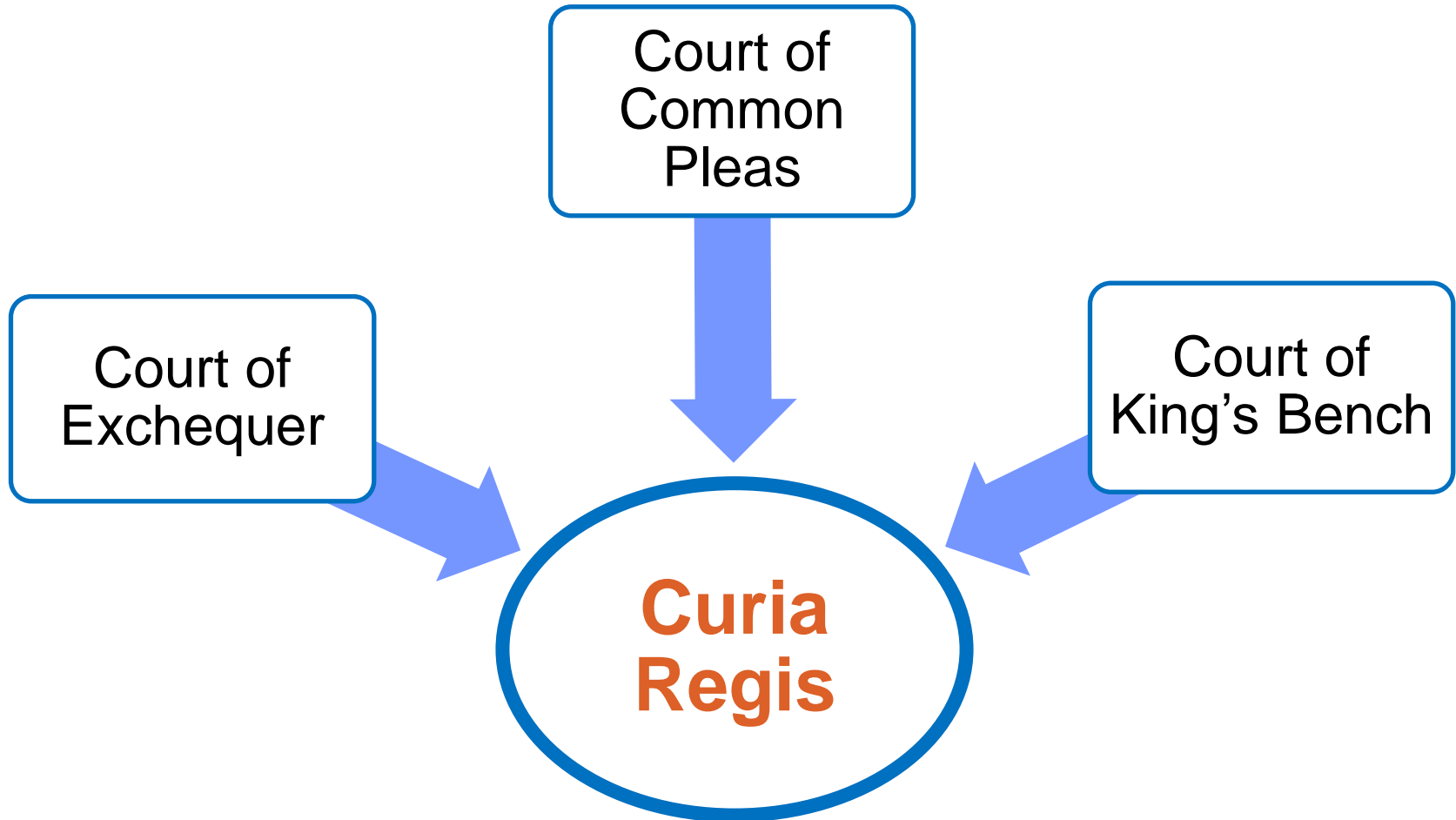
- Centralisation of administration: territorial partitioning and organisation
- Centralisation of justice:
  - Writ-system
  - Royal Courts



## Royal Courts

Curia Regis: King's Court administered all of the King's financial legislative and judicial affairs

- Court of Exchequer: responsible for fiscal and financial matters
- Court of Common Pleas: responsible for disputes between private parties, which did not involve a direct interest of the King (as for example a title to land)
- Court of King's Bench: criminal, feudal and civil cases





## Writ-system

Writ (breve/formal action) = a formal written order from the Royal Chancery that directs a form of legal action.

Royal courts could only act on the basis of the writs

Writ comparable to actio: Law could only be enforced if there was an action for it.





## Definition «writ»

*« a command of the King directed to the relevant person (official, judge), containing a brief indication of a matter under dispute and instructing the addressee to call the defendant into his court and to resolve the dispute in the presence of the parties»*

K. Zweigert- H. Kötz, An Introduction to Comparative Law, Cambridge, 1998, p. 194.





## Types of writs: examples

- Writ of right (breve de recto): foundation of a proprietary action

*“Henry, by the Grace of God, King of the English ...to the Abbott of Thorney, greeting. I order you to do full right without delay to Richard Fitz Adam concerning one virgate of land in Twyell, which he claims to hold from you by the free service of five shillings a year, and of which Roger de Bachelor deprives him. And unless you do it, the sheriff of Northampton shall do it, that I hear no further complaint thereof for lack of justice. Witness Ranulf de Glanvill. At Geddington”.*



## Types of writs: examples

- Writ praecipe quod reddat: “command that he render.” it was a writ that directs a defendant to return certain property
- Writ of debt: directs debt repayment. A writ which lies where the party claims the recovery of a debt, i. e. a liquidated or certain sum of money alleged to be due to him
- Writ of covenant: issued to a person who claims damages as a result of a breach of promise under seal or other covenant



## Types of writs: examples

Writ of trespass:

- 13th century
- principal instrument for obtaining retribution from person who had committed a tort
- Presupposed an act of violence against a person, movable or real possession
- Based on proof submitted to the jury for deliberation
- Granted the right of demanding compensation from the king's judges for the damage inflicted



**Universität  
Zürich** <sup>UZH</sup>

**Rechtswissenschaftliche Fakultät**

---

# **Common Law and Equity**



## Equity

- Court of Chancery: Chancellor received jurisdictional powers by the King
- The chancellor judged “according to conscience”
- Chancellor (mostly clergymen) was influenced by canon law, and indirectly by Roman *ius commune*)
- From the 15th century it became complementary to the common law royal courts

Development of the principles of equity jurisdiction parallel to common law jurisdiction



## Equity and Common Law

Earl of Oxford's Case (1615): Court of Chancery issued a common injunction prohibiting the enforcement of a common law order.

Sir Francis:

*'in the event of any conflict between the common law and the law of equity, equity would prevail'.*

Lord Ellesmere:

*'Men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppression of what nature so ever they be, and to soften and mollify the extremity of law.'*



## *Judicature Acts 1873 and 1875*

Supreme Court of Judicature (today: Senior Courts of England and Wales)

- Court of Appeal
- High Court of Justice:
  - Court of Chancery
  - Court of Common Pleas
  - Court of Exchequer
  - Court of King's bench
  - Court responsible for Probate, Divorce, and Admiralty

The result of this Acts 1) the conversion of the exclusive and separate jurisdiction of equity into a concurrent jurisdiction.

2) Abolishment of the auxiliary jurisdiction = it was not necessary to go to a separate court if one wishes to obtain an equitable remedy.



## Rule of precedent

- «Stare decisis», «to stand by a decision» 17th century Judge Hale (1670)

It emerged gradually:

- Originally the reference to precedents by advocates in a trial was not binding in itself, but rather as a custom
- Decisions taken by Exchequer are considered binding (16<sup>th</sup>-17<sup>th</sup> century)
- Equity is binding (17<sup>th</sup> century)
- In the 19th century: a single precedent has an absolute binding force for a lower judge





The English Reports (1220-1873)

<http://www.commonlii.org/uk/cases/EngR/1220/>

The Law Reports (1865-1875; 1875-1890; 1891-today)



**Civil Law**

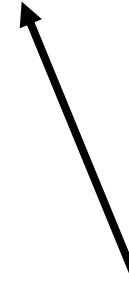
**Common Law**

Common  
Law

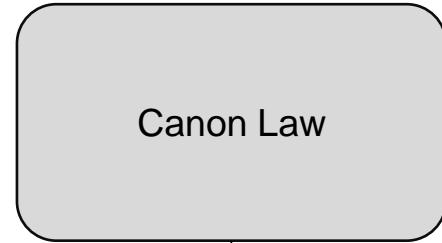
Equity



BGB



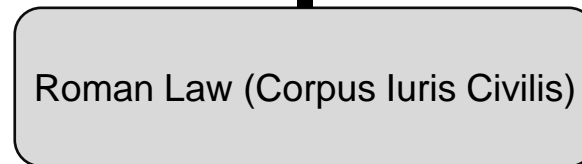
Pandectist



Canon Law



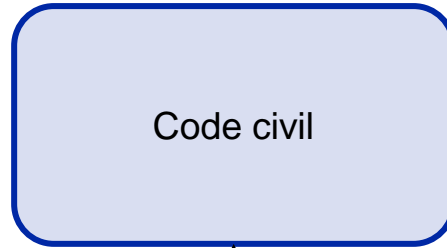
Canon Law- Middle Age



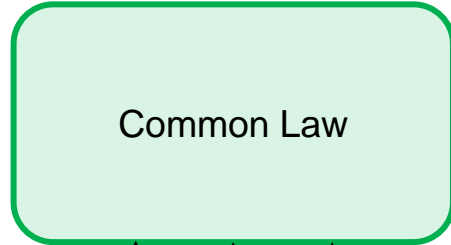
Roman Law (Corpus Iuris Civilis)



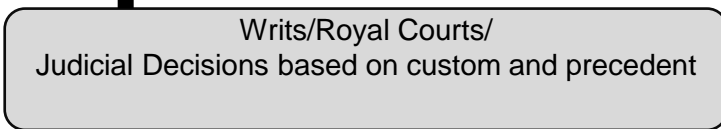
Ius Commune



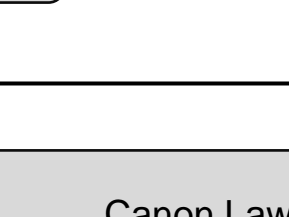
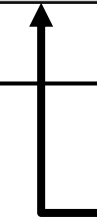
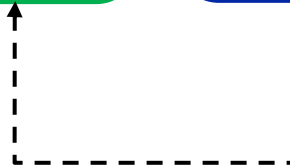
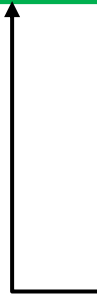
Code civil



Common Law



Writs/Royal Courts/  
Judicial Decisions based on custom and precedent

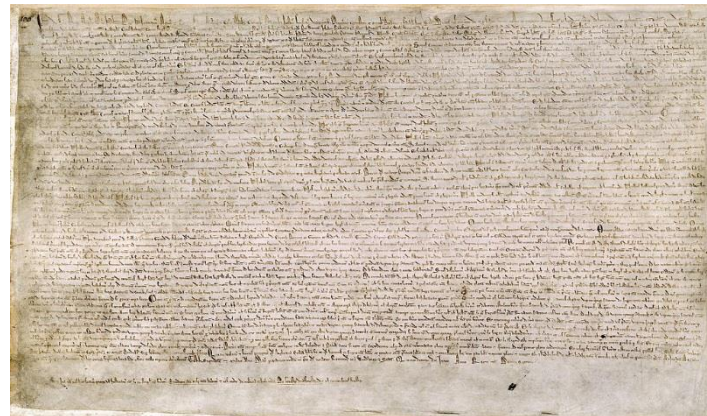




# English Legal History

# English Legal History

**Magna Carta: [1215]** = recognition of prerogatives of the lords with regard to their subjects, freemen and tenants (judicial rights)





- **Statute of Westminster, Edward I [1275]** = legal principles in civil and criminal law. [51 chapters]

“This act is almost a code by itself; it contains fifty-one clauses, and covers the whole ground of legislation. [...] on the one hand common right is to be done to all, as well poor as rich, without respect of persons; on the other, elections are to be free, and no man is by force, malice or menace, to disturb them. The spirit of the Great Charter is not less discernible: excessive amercements, abuses of wardship, irregular demands for feudal aids, are forbidden in the same words or by amending enactments”.



- **Act of Supremacy: [1534]** = King Henry VIII the head of the Anglican Church. Chancellor Thomas Moore was executed for refusing to recognize the king as the ecclesiastical leader.

The king is "the only supreme head on Earth of the Church of England" with "all honours, dignities, preeminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity."



- **Petition of Rights: [1628]:** Charles I, petition from Parliament. Predecessor of the Bill of Rights.
- **Act of Habeas Corpus [1679]:** prevention of detention of persons without trial
- **Bill of Rights: [1689]** =William III. and Mary II. Guaranteed the rights and powers of parliament and guaranteed the protection of personal freedoms. England was declared a constitutional monarchy.

It declared “illegal”, without prior authorization from Parliament, order given by the King: to suspend the application of a law, to impose permanent taxes and to maintain an army in time of peace.





”And thereupon the said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare

That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;

That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”



“Now in pursuance of the premises the said Lords [...] do pray that it may be declared and enacted that all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient and indubitable rights and liberties of the people of this kingdom, [...].”



**Universität  
Zürich** UZH

**Rechtswissenschaftliche Fakultät**

---

# Legal Professions



## William Blackstone (1723-1780)

Professor at the Oxford University

*Commentaries on the Laws of  
England* (4 volumes)

Key text both in England and the  
USA

- «reasoned exposition of the law as  
a whole, setting out broad  
principles»





## Barrister and Solicitor: Definition and History

Barrister: 'a lawyer who is a member of one of the Inns of Court and who has the privilege of pleading in the higher courts'

Solicitor: 'whose services consist of advising clients, representing them before the lower courts, and preparing cases for barristers to try in the higher courts'

King Edward I (1272-1307)

Inns of Court: professional associations for barristers (13th century)

- The Honourable Society of Lincoln's Inn
- The Honourable Society of Gray's Inn



## Final remarks

- History of common law and civil law
- Equity and common law
- Stare decisis
- Legal professions