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Causa and *opinion evidence:* the Roman-canonical origins of the prohibition of opinion evidence in the common law*

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Abstract
Since Bentham's critical analysis, the historical narrative would appear to be settled once and for all: the English law of evidence is a recent creation of the common law and should be understood as a reaction against its particular procedural features. What if one questions that postulate and is prepared to accept the opposite theory of ancient origins, which would have been contemporary to the legal re-invention of the Roman-canoncal *ius commune* on the Continent? In such an alternative approach, one may find that the sources reveal correspondences between the two legal traditions, perhaps even an influence from one tradition on the other, and also functional adjustments of the imported institutions and mechanisms. The point may be illustrated through the law of testimonial evidence, more precisely two of its features. The argument may start with a very common case from 1349. An important development of the Roman-canonical law, which greatly affected legal practice on the Continent, insisted on the requirement that witnesses should found the statement of their knowledge they made before the court on the use of their own senses. A similar rule exists in English law, the prohibition of "opinion evidence". It is possible to identify a Medieval origin to that principle and to form the hypothesis that it was inspired by canon law. The English system was nevertheless original and its effects were specific to the way the common law operates. In any event, the relationship between witnesses and the jury makes it possible to understand the specificities of the English rules. However, the role of the jury cannot by itself allow the historian to explain why and how those rules were adopted, nor, therefore, the law of evidence was developed.

Keywords
Common law, Roman-canonical procedure, law of evidence, opinion evidence, witness, jury

Even the common law, although often characterised as an autonomous creation, is not the result of a spontaneous generation. A particularly interesting example of the external influences which affected its development is the opinion evidence rule, which, paradoxically, is nowadays regarded as a specific feature of the English law of evidence. It is described in the following terms :

> A witness may not give his opinion on matters calling for the special skill or knowledge of an expert unless he is an expert in such matters, and may not give an opinion on other matters if the underlying facts can be stated without reference to it in a manner equally conducive to the ascertainment of the truth[1].

Its purpose is therefore twofold : the need (in certain cases) for a witness to act as an expert and to be, accordingly, specially qualified to give his opinion ; on the other hand, the prohibition (in other cases, except if it would be required by the nature of the facts in issue) to found his statement on deduction instead of observation.

* The present contribution is the translation of part of my longer article "*Sans lour scient de veritie dire*. Aux origines romano-canoniques de l'interdiction de l'*opinion evidence* en *common law*", published in *La culture judiciaire anglaise au Moyen Age, I^re^ partie*, Paris, Mare & Martin, coll. Histoire du droit & des institutions, 2017, pp. 185-210. I express my thanks to prof. Alain Wijffels for having kindly accepted to translate it and to the publisher of the original version for having authorised the publication of the present version in English.

[1] *Cross & Tapper on Evidence*, 12th ed., Oxford, 2010, pp. 529 ss.

The Year Books[2] make it possible to retrace in remarkable detail the origins of the opinion evidence rule in English legal practice. The rule first appeared during the reign of Edward III in the context of the assizes of novel disseisin, almost at the same time as witness evidence itself. In those days, the importance of local assizes was increasing, at the expense of the Court of Common Pleas, but often with the assistance of London judges. The rule was first expressed in 1337 in an authoritative statement by William de Shareshull, justice of the Court of Common Pleas. After some vacillation, it reached its final form in 1349, when William de Thorpe was Chief Justice of the King's Bench. Through the courts' decisions, it appears that the rule was elaborated by importing into the common law an essential principle of the Roman-canonical procedure.

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During Michaelmas Term 1337, the assize in Wiltshire presided by William de Shareshull[3] tried the case of a writ of novel disseisin[4]. The plaintiff was a child under age. The defendant

[2] The *Year Books* have been checked systematically in David J. Seipp's index (https://www.bu.edu/law/seipp/). The edition of 1678-1680, on which Seipp's remarkable work is based, is also the one cited hereafter in the present contribution. One should bear in mind the specific features of that edition : it does not record all the cases, nor even in full all the cases which it includes, but only those cases which present some particular interest, such as a fresh legal problem or some legal novelty. Because of these qualifications, the source does not allow for a quantitative analysis of the workings of the English judicial institutions. On the other hand, it is a reliable source for dating with confidence the emergence of the various rules developed through legal practice. This is particularly true for the time from the *Libri Assisiarum* onwards, when the Year Books since Edward III's reign provide increasingly more detailed report.

[3] See Putnam, B.H., *The Place in Legal History of Sir William Shareshull*, Cambridge, 1950, new ed. 2013. The *report* only refers to the name « Schard ». – In a different, more detailed report of the same case (11. Edw. 3, [63], edited by Horwood, A. J., *Year Books of the Reign of King Edward the Third. Years XI and XII*, Part B, vol. I, Rolls Series, 31, London, 1883, new imprint 1964, pp. 338-341), the name is given as « William Schar. ». The confusion between William de Shareshull and, among others, John de Shardelow, has been thoroughly researched by B. Haven Putnam (*op. cit.*, p. 91 ss.). William de Shareshull's knowledge of canon law has been duly evidenced, including his acquaintance with the maxim " *negativa nihil implicat "* (see also Putnam, B.H., *op. cit.*, p. 112). Several elements make it more likely that the justice was William de Shareshull.

[4] 11. Edw. 3, Lib. Ass. 19, fol. 31. See Anthony Fitzherbert, *La Graunde Abridgement*, London, 1577, « Attaint », § 26 (vol. I, fol. 79) and 53 (vol. I, fol. 80 v ; referring to 23. Edw. 3, Lib. Ass. 11, fol. 110-110v, see *infra*) ; Robert Brooke, *La Graunde Abridgement*, London, 1573, « Attaint », § 57 (fol. 71), « Testmoignes », § 7 (fol. 262 v-263 ; referring to 18. Edw. 3, Lib. Ass. 11, fol. 59). – By the 14th century, it had become difficult to identify the facts behind an assize of novel disseisin, because the use of that action in legal practice had become far removed from its original purpose, which had been close to that of possessory interdicts in the Roman-canonical procedure. Only free land came into consideration : in the present case, the reference to *feoffment* is an indirect reminder of the principle. In most cases, however, the plaintiff was lo longer a vassal who had been evicted by his lord, but a person of the same social status as his opponent, and the lord was not involved in the litigation (see Milsom, S. F. C., *Historical Foundations of the Common Law*, 2nd ed., Oxford, 1981, new imprint 2009, pp. 137-143 ; the idea that the assize of novel disseisin was originally only used against the lord has been strongly criticised by some of the more recent legal historians, who argue that from its very beginning, the assize's purpose was to maintain the peace. See Brand, P., "The Origins of English Land Law: Milsom and After ", in: *idem*, *The Making of the Common Law*, London-Rio Grande, 1992, pp. 203-225, 222-224 (I am indebted to prof. Paul Brand for the exchanges we had on this question). Moreover, the complaint of disseisin was often used as a fiction in order to lead the judicial discussion to the issue of the title of « ownership ». Thus, in this case, did the plaintiff really attempt to enter the land so as to be evicted (see Milsom, S. F. C., *Historical Foundations...*, *op. cit.*, pp. 157-161)? Was his father really still in possession at the time of his death? In that case, the plaintiff could have claimed his right of entry (see *idem*, "What was a Right of Entry?", *Cambridge Law Journal* 61/3 [November 2002], pp. 561-574), but at that time, legal practice preferred the assize of novel

tried to avert the action against him by pleading *en barre*, referring to a charter of *feoffment* from the plaintiff's father, who, he claimed, had transferred without consideration his right to possess the land under litigation. The charter included a *garant,* a warranty against eviction, and mentioned several witnesses. As a minor, the plaintiff did not have to answer the plea based on the charter and the court proceeded to investigate the matter *ex officio*[5]. Therefore, there was strictly speaking no issue between the parties. The procedure was nevertheless continued as if the plaintiff had been of age and had challenged the charter, resulting in proceedings instituted against the witnesses[6]. The latter did not appear before the assize and it was decided to proceed without them. According to the Statute of York of 1318, that would only have been possible if the charter had effectively been challenged in the context of a *mise*, i.e. of the issue between the litigants themselves. Conversely, « si la Court voil' enquerir de office, *Ut supra*, le proces demurre a le *Common Ley* ». Because of that difficulty, the case was adjourned and referred to the Court of Common Pleas. An *obiter* dictum of the report adds :

> Et en cest plea fuit dit pur *Ley*, que si tesmoignes soient joyn a l'Enquest, et accordant a les xii. que la party counta que ils trove, etc. n'aura jammes l'*Attaint*, pur ce que les xii. ne poient estre Attaints, si les tesmoignes ne soient, et eux ne seront pas, car lour serement est a dire veritie dont attrench, auxy come Jury en un grand *Ass[ise]* sur brief de droit, et nemy a dire veritie a lour assent etc.

The procedure of *attaint* was based on the notion that a wrong verdict implied perjury by the twelve jurymen who had taken the initial oath.[7] According to the established law (" Ley "), if

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disseisin, which was both easier and more swift than the writ of entry (see *idem*, *Historical Foundations...*, *op. cit.*, pp. 143-149). For his defence, the defendant could oppose hiw own title, based on a charter, in the present case signed by the plaintiff's father. The proceedings would then focus on the verification of the instrument. In the case where the deceased had been the legitimate tenant, there was still the possibility that the document had been obtained through force or fraud while the deceased was still living, or it could be a forgery made after his death. The heir could then succesfully challenge the opponent's seisin. However, if the land's transfer had been valid, the heir's case would fail.

[5] 11. Edw. 3, Lib. Ass. 19, fol. 31 v : "Et pur ce que le pl[eint] fuit deins age, il ne fuit pas chase de respondre al' fait etc. Mes dit fuit par la Court, qu'ils voilent en avantage del' pl[eint] enquirer de touts les circumstances del' fait, etc. et de le title le pl[eint], si le fait soit trove bon". In the report published in the *Rolls Series*, the entry reads "Schar dit qe la Court d'office enquerreit de la chartre, qe si ceo fut le fet le piere et de autres circumstances, si lez tenementz passerent par le fet, et si soun piere fut de pleyn age, de seyn memorie et hors de prisoun" (ed. as *supra* [n. 5], p. 339). – That device aimed at protecting the person under age is to be found in several reports, but it seems that from the 1350s onwards, it became controversial ; the question would deserve a study of its own.

[6] 11. Edw. 3, Lib. Ass. 19, fol. 31 v : "*Et nota*, proces fuit fait vers les tesmoignes auxy avant come il ust este de plein age, et dedit le fait".

[7] The procedure was initially only followed in the (petty) assizes, where the executory effect of the verdict resulted from a royal order, and not from the will of the litigants, as in the case of the (grand) jury, to which the litigants first had to declare their submission (see Pollock, Sir Frederick, and Maitland, F. W., *The History of English Law Before the Time of Edward I*, 2nd ed., Cambridge, 1898, reprint 1968, vol. II, p. 541 s.; *mutatis mutandis*, one is inevitably reminded of the principle of submission to the criminal inquest in other legal systems, see Esmein, A., *L'acceptation de l'enquête dans la procédure criminelle au moyen âge*, Paris, 1888. However, when the litigants decided to enter the plea to issue, that was deemed to change the assize into a jury, see Pollock, Sir Frederick, and Maitland, F. W., *The History...*, *op. cit.*, vol. II, p. 49). The rule was amended by the Statute of Westminster I (3. Edw. 1 [1275]) in order to counter the proliferation of perjuries, but also at the time when the consensual origins of the jury had largely become a fiction (Ch. 38, *in* : *The Statutes of the Realm*, vol. I, London, 1810, reprint. London, 1963, p. 36 : "[...] Purveu est que desoremes le Rei de son office dorra ateintes sur les enquestes, en plai de tere, ou de [fraunchise] qui touche fraunk tenement, quant il li semblera que bosoigne seit"). – Incidentally, one may note the difference between the jurymen of the grand assize (on a writ of right, "brief de droit"), who were still close to the status of witnesses, to such extent that Shareshull thought it

witnesses were joined to the jury (in an "enquest") and if the verdict was consistent with their statements ("accordant a les xii."), the jurymen could only be challenged if the witnesses were also liable to be challenged. This was a coherent approach, since the verdict was based on the witnesses' statements and it these statements seemed reliable, one could hardly blame the jury for having followed the witness evidence in deciding the case.

Whether the witnesses' statements were reliable or not was a purely formal matter. It would be impossible to question those statements, as the witnesses had promised under oath to say the entire truth ("veritie dont [*sic*, for "tout"] attrench"), and not only according to their knowledge ("a lour assent"). Those two phrases express, respectively, primary knowledge which is based on the perception by the senses, and secondary knowledge, which depends on intellectual reasoning[8]. The following cases will clarify the distinction. If the oath by which the witnesses had promised to tell the truth operated as a bar for challenging the witnesses' statements, that implies that the proceedings did not aim to prove their perjury because they had allegedly lied intentionally. Such an approach would have been tantamount to accusing the witnesses directly, and it would have required the proof of false testimony. In the present case, the approach was different : the verdict had to be proven wrong, which required that its testimonial foundation be first called into question. In other words, one needs to envisage the possibility that the reality may have been different from what the witnesses believed to be true in order to "attaint" ("atteindre") the jury without challenging directly the witnesses themselves. One may understand how that would have been possible if the witnesses had made an oath to state their opinion, which would only have compelled them to express exactly their subjective inner conviction, but not the objective state of facts. On the contrary, the oath to tell the truth precluded such a qualification of their statement, at least when they asserted the veracity of the *count* ("que la party counta que ils trove"), i.e. when they established that the plaintiff's claim stated at the beginning of the proceedings was well-founded (or, more generally, the claim of the party on whom the onus of proof rested). The affirmative character of the witness's statement is hereby essential, for a statement which denies the facts will open the possibility to doubt their veracity. Here again, the succeeding cases will clarify the matter more explicity. In 1337, however, neither Justice Shareshull himself nor the reporter insisted on the importance of the principle[9].

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necessary to explain the latters' status through the former, and the jurymen of the petty assizes, whose particular features would only later gradually develop (see *infra*).

[8] The distinction may recall to some extent the distinction in the Roman-canonistic tradition between the oath *de ueritate*, which witnesses were obliged to take (Mausen, Y., *Veritatis adiutor. La procédure du témoignage dans le droit savant et la pratique française [XII^e^-XIV^e^ siècles]*, Milan, 2006, p. 190 ss.), and the oath *de credulitate,* which experts had to take (Cavallar, O. "La '*benefundata sapientia*' dei periti: Feritori, feriti e medici nei commentari e consulti di Baldo degli Ubaldi", *Ius commune* 27 (2000), pp. 215-282). However, we shall see in the following case to be discussed that in the Medieval common law, the distinction was rather a differentiation between witnesses and members of the jury.

[9] The report published in the *Rolls Series* does not even mention it : "Et en ceo plee Schar. dit qe la ou les tesmoignes sunt joynt a les xii. qe homme n'avera jammes ateynte pur ceo qe les xii. ne pount jammes estre atteintz tanqe les tesmoignes ne soient, et eux ne serront pas pur ceo qe lour serement est a dire verite tut atrenche auxi com ils sunt jurez en un graunt assise, et nemye a lour ascient. (Simile adjudicatur in assisa apud Leycestriam anno xl. regis Edwardi tertii coram T. de Ingelby, ou le pleintif fut deins age et proces fait vers les tesmoignes)" (ed cited *supra* [n. 5], p. 339/341). The case mentioned *in fine* could be (more likely than 40. Edw. 3, Lib. Ass. 19, fol. 242-242 v, the report of which does not mention anything about that question, or than the case reported in the *Assize roll* No. 1472, but unpublished) 40. Edw. 3, Lib. Ass. 23, fol. 243 v-244 v, which will be referred to further on in the present article. However, that case was tried before the *King's Bench*, and not during an assize at Leicester.

In 1338, another assize, where, again, William de Shareshull was present, had to deal with a writ of novel disseisin[10]. Two of the defendants made a plea *en barre* by a *rel*[*ais*] of the plaintiff, who was alleged to have conveyed to them the possession of land which they already occupied at the time :

> L'*Assise* vient, et charge a dire veritie a lour *Science*, et les tesmoignes sans lour scient de veritie dire, et loyalment enform l'enquest.

One of the witnesses was then *challengé* because the *writ* mentioned him as *disseisor*, but the court refused to allow the challenge :

> *Non obstante* que il avoit (pendant le brief) purchase le demesne : car il ne sera my jure sur la seisin et disseisin : oveque ceo il puit nosme en le barre touts les tesmoignes etc. par que il fuit jure. *Non obstante* que dit fuit, que il puit excuser le tenant de la disseisin. Et la *Court* dit, qu'il n'avoit my view tesmoigns challenge, etc.

This time, it was not the jury's verdict which was being challenged *a posteriori*, but the challenge was submitted *a priori* directly against one of the witnesses, who was suspected of having an interest in the case. Here, too, however, the oath was deemed to be a sufficient gurantee of the witnesses' statement. The possibility that the oath might be violated remained unmentioned. A witness appears to be trusted as a matter of principle, as if the oath had a performative power : it is deemed to be a fact that by his oath, the witness is required to tell the truth. Above all : the oath restricts the witness's statement to the objective truth. Thus, the oath may well ensure the veracity of the witness's statement, because it prohibits any mendacious statement, but above all because it excludes any error, since it restricts the statement to a strict record of the facts. More than two centuries later, Robert Brooke emphasised the point in his summary of the case in his *Graunde Abridgement* : " il n'est iure sur le seysin et disseysin mes sur le fait "[11]. This is why there are witnesses and this is also the difference between them and the jury : " ratio videtur eo que ils [les témoins] ount precise notice del fait, et issint ne poet l'assise auer que ne fuit present "[12].

Although the relation between the oath to tell the truth and the witness *oyant* and *voyant* had still not been explicitly established, the comparison with the *causa* required from a witness in Roman-canonical legal science appears here more clearly. By declaring the *causa* of his statement, the witness also discloses the source of his knowledge. Through the *causa*, he only states what he knows *de visu* or *de auditu*, holding on to facts that could be perceived and which he has actually perceived[13]. That is why, already in the 13th century, Innocent IV could prohibit a witness to express a legal qualification of the facts, for example by giving his opinion on whether a person has the ownership, or whether a person is angry or drunk, because " he has not been called as a judge, but as a witness "[14]. In the common law, as in the

[10] 12. Edw. 3, Lib. Ass. 12-13, fol. 34 v. See Anthony Fitzherbert, *op. cit.* (n. 5), "Challenge", § 9 (vol. I, fol. 171 v) ; Robert Brooke, *op. cit.* (n. 5), "Challenge", § 99, "Testmoignes", § 8 (fol. 263). The edition of the *Year Books* from the end of the 17th century used by D. J. Seipp divide the case in two parts. Les *Abridgements* of the previous century presented it correctly in its entirety as a single case. Only the second part (No. 13) mentions the presence of "Shard". On the confusion beween William de Shareshull and, among others, John de Shardelow, see *supra*, n. 4.

[11] Robert Brooke, *op. cit.* (n. 5), fol. 263 ("Testmoignes", § 8) ; see also : "Challenge", § 99.

[12] *Ibidem*, fol. 263.

[13] Mausen, *Veritatis adiutor*, *op. cit.* (n. 9), pp. 610 ss.

[14] *Commentaria. Apparatus in V Libros Decretalium*, Frankfort-on-the-Main, 1570, reprint Frankfort-on-the-Main, Minerva GmbH, 1968, fol. 262 vb : "Ipsa enim ratio ex his quæ apprehendit sensibus corporis bene

ius commune tradition, the witnesses are merely substitutes for the judge's (or the jury's) eyes and ears. The mental process which gives a meaning to the facts, is not their province. Their task is to tell the facts, by which they simply express the minor thesis of the evidence's syllogism. It is the judge's (or the jury's) task to draw the conclusion.

In 1348, the same scenario as in 1337 was repeated on a writ of assize : a plaintiff, under age, and a defendant pleading *en barre* on the ground of a charter issued by the father of the plaintiff as *garant*[15]. One counsel, only identified through the abbreviated form " Peng. ", acting for the defendant, supports the request for *ex officio* proceedings against the witnesses appearing in the charter, " come si le fait [*i. e.* the charter] fuit dedit d'un home de pleyn age "[16], whereas William de Fifhide, sergeant acting for the plaintiff, would have preferred to proceed immediately in the assize. He argues that this would reflect the spirit of the law, which, in such a case, opens the way to an *ex officio* inquest, but only prescribes that procedure as an advantage granted to the minor of age[17]. In this particular case, however, the plaintiff could certainly not expect any advantage. On the contrary, he had good reasons for being apprehensive of an inquest which might well conclude that the document produced against him would be authenticated and thus prevent him from bringing the attaint against the jurymen :

> Ore si proces ceo fait vers les tesm[oignes], et ils soy joynassent a l'*Assise*, et trove fuit le fait l'anc[estor], il seroit oustre de *Attaint* a touts jours. Per que tout sans les tesm[oignes] vous prendre maint[enant] l'*Assise*.[18]

The position of the defendant, who gives the impression of having been confident about his case, was therefore apparently strengthened by the attitude of his opponent, who was obviously more apprehensive about the outcome of the proceedings. The subsequent stages of the proceedings nonetheless revealed a twist in the story, whereas no action was taken against the witnesses. The charter appeared to have been drafted under duress, while the father of the plaintiff was imprisoned by the defendant. It was therefore an authentic document, as the witnesses could only have confirmed, but the consent had been defective.

The plaintiff's strategy was apparently aimed at retaining the possibility to challenge the verdict, which required him to forsake his defence. The rule devised some ten years earlier had therefore apparently been adopted in the mean time by judicial practice. Yet, Peng.'s reply is also an indication that in the absence of an adequate explanation – or because of its complexity –, the foundation and the operation of the rule were still misapprehended :

> En v[ostre] case, il ser[oit] reason de vous oustre d'*Attaint*. Et mesm le disavantage averomus nous de nostre part, s'il disoit que ceo ne fuit son fait.[19]

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potest iudicare eum dominum uel ebriosum uel iracundum, sed ipse non adducitur in iudicem sed in testem "; further texts in the same vein are cited in Mausen, Y., *Veritatis adiutor*, *op. cit.* (n. 9), p. 636, n. 151.

[15] 22. Edw. 3, Lib. Ass. 15, fol. 88 v-89. V.: Anthony Fitzherbert, *op. cit.* (n. 5), "Proces", § 176 (vol. II, fol. 117v ; referring to 18. Edw. 3, Lib. Ass. 11, fol. 59 ; 26. Edw. 3, Lib. Ass. 65, fol. 132).

[16] 22. Edw. 3, Lib. Ass. 15, fol. 88v.

[17] 22. Edw. 3, Lib. Ass. 15, fol. 88v-89 : "*Fifh.* Sir, il n'est pas reason qu'il eit greinder disavantage par son nonage que il n'avoit s'il fuit de plein age. Ore Sir, en nostre cas, s'il fuit de plein age maintenant vous prendres l'*Assise* [...] : et aveque ceo la *Ley* est en ceo cas d'enquirer de circumstances de fait ; et ceo fuit ordeine pur avantage cesty deins age, [fol. 89] et non pas revers".

[18] 22. Edw. 3, Lib. Ass. 15, fol. 89.

[19] *Ibidem.*

A distinction was made between a positive proof (*viz.* establishing the authenticity of the charter) and a negative proof (*viz.* denying the authenticity), but it is formulated with regard to each of the litigants respectively. As a result, its effects are offset. If the witnesses testify in favour of the defendant, the plaintiff is unable to benefit from an attaint. Conversely, if they were to testify on behalf of the defendant, the latter would lose the same benefit. In either case, the litigant to whom it would be beneficial would not be in a position to challenge the verdict. That was hardly the outcome that Justice Shareshull would have had in mind.

The following year, in 1349, William de Thorpe took the opportunity to clarify the reasoning of his colleague and to connect the two sides of the question, i.e. the challenge of the witnesses and the attaint of the jurymen[20]. In the case before him, a writ of novel disseisin had been served against several defendants. All but one entered a plea *per baylie.* The one who did not join the other defendants made a plea *en bar* through a *rel[ais]* in the plaintiff's hand. That document mentioned several witnesses. The plaintiff opposed the *fact* that proceedings were taken against the witnesses. From there onwards, the case develops as a standard lecture on the law of testimonial evidence. One of the witnesses is appointed as a member of the jury, but he is immediately *outré*, because Thorpe reminds us that " la *Court* prendra un *Assise* entre les tesm[oignes] et eux ne ser[ont] fors ajoints a l'*Assise* et tesm[oignent] la verité "[21]. Another witness is *challengé* because he is a cousin of the plaintiff, but the court does not allow the challenge :

> car les tesm[oignes] ne sont pas chal[enge] pource que le verdit ne sera resceu d'eux, mes de ceux de l'*Assise* et les tesm[oignes] furont jur[e] simple a dire la verite sans dire a lour estient, car ils doivent rien tesm[oigner] fors ceo qu'ils veront et oyront.[22]

As in 1338, the argument of the oath of making a true statement serves to protect the witnesses against the attacks of the opponent and this time, the connection between the oath of truth and the witnesses' perception as the foundation of their statement is explicitly made. In the following proceedings, the inquest established that the document was a forgery and the plaintiff demanded "que le fait fuit damne", i.e. that the charter of *relais* would officially be declared void. Justice Thorpe declined the plaintiff's request :

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[20] 23. Edw. 3, Lib. Ass. 11, fol. 110-110 v. See Anthony Fitzherbert, *op. cit.* (n. 5), "Challenge", § 132 (vol. I, fol. 175v) ; Robert Brooke, *op. cit.* (n. 5), "Attaint", § 67 (fol. 71v), "Challenge", § 115, "Enquest", § 61 (fol. 270), "Faits", § 58 (fol. 327), "Testmoignes", § 12 (fol. 263). See Anthony Fitzherbert, *The New Natura Brevium*, London, 1718, p. 235 (fol. 107) : " And if a Man plead a Deed in Bar, in which there are Witnesses, and the Deed is denied, for which Process is awarded against the Witnesses, which joyn with the Jury, and it is found the Plaint[iff's] Deed, now he shall not have an Attaint, etc. because the Witnesses do affirm the Verdict by their Testimonies. But if it be found not his Deed, then the other Party shall have an Attaint, for the Witnesses cannot prove a Negative, but of the Affirmative they may have Notice whether it be his Deed or not ". The editor has added in the margin the following references, which have already been cited *supra*, *passim* : " 11. Ass. 19 ; Br[ooke], Attaint. 57 ; 23 Ass. 11 **;** [Fitzherbert,] Challenge 132, Thorp.; 11 E. 3, [Fitzherbert,] Attaint 16 [*sic*, *loco* " 26"]". I have not been able to check the original edition (in French) of this work (*La novelle Natura Brevium*, London, 1534). – On Sir William de Thorpe, see Kaeuper, R. W., "Thorp, Sir William (d. 1361)", *Oxford Dictionary of National Biography*, Oxford, 2004 (http://www.oxforddnb.com/index/27/101027386/).

[21] 23. Edw. 3, Lib. Ass. 11, fol. 110.

[22] *Ibidem* – Even during the 18th century, the only admissible challenge in the common law based on the family relationship between a litigant and a witness was that between spouses (Jeffrey Gilbert, *The Law of Evidence*, London, 1756, p. 138 : « But no other Relation is excluded, because no other Relation is absolutely the same in Interest »), and our case is referred to as an illustration of the point (William Nelson, *The Law of Evidence*, London, 1717, p. 59, § 68 : « *23* Ass. *12.* [*sic*] An Exception was taken to a Witness because a Cousin*, et non allocatur* »). See Mausen, Y., "*Duæ Animæ in Una Carne*. The Disqualification of the Spouses in Common Law", *Family Law and Society in Europe from the Middle Ages to the Contemporary Era* (M. G. di Renzo Villata, ed.), Studies in the History of Law and Justice, 5, Cham, 2016, pp. 217-227.

> *Thorp.* Non sera ; car le tenant [*i. e.* le défendeur] peut aver un *Attaint* quant le verdit est passe sur parol neg[ative] coment que les tesm[oignes] fur[ent] parties a ceo verdit ; car les testm[oignes] doivent rien tesm[oigner] fors ceo que ils soient de certein, s[cilicet] ceo que ils veront ou oyront. Et pour tant en cas qu'ils ussent dit que le fait ust este vray, le pl[eint] n'avra jamais *Atteint* ; car les tesm[oignes] av[erent] ajuge par certein discret[ion] ceo estre vray, mes sur le parol [fol. 110 v] neg[ative] la *Ley* est auter : car coment que les tesm[oignes] disont par certein discretion ce fait nemy estre vray, encore il est possible que le fait est vray, et les tesm[oignes] scient rien de ceo ; car ils ne fur[ent] pas al' temps de confecc[ion] present, mes le fait sera parol en parol, issint que le t[enant] n'avra jamais avantage de ceo, s'il ne soit per voy d'*Attaint*.

The document was therefore to be transcribed verbatim ("parol en parol") in the court's records[23], so that the defendant would not be prevented from using his evidence in case he would decide to proceed by attaint. The significance of the judge's ruling is that, although the witnesses were joined to the jurymen and the final verdict was consistent with their statements, the verdict could nevertheless be challenged. That was the very hypothesis put forward by Peng. in the 1348 case, but, contrary to that counsel's assumption, the defendant could now still proceed by attaint. This is because witnesses should only report what they know for certain ("ceo que ils soient de certain") and, as Thorpe had pointed out with regard to the oath of truth, that was necessarily what they had seen or heard ("ceo que ils veront et oyront"). The plaintiff could therefore never have had the benefit of the attaint if the witnesses had asserted the authenticity of the charter, because then they would have testified about their presence at the time when the document had been made. On the contrary, as the witnesses can only testify what they saw or heard, denying the authenticity of the document could only mean that they were not present at the time when the charter was drawn up. That does not prove anything, because the contract may have been passed at a different time and in a different place. Consequently, in such a case the defendant should be allowed to proceed against the jurymen, whose verdict no longer rests on certain testimonial evidence.

It is a question of logics, which Robert Brooke summed up in the formula : "negative n'implie rien"[24]. The question was familiar to civil lawyers, who were trained in the scholastic tradition. For those cases where the place or the time is specified, the glossators used the device of the indirect proof to the contrary, which follows a reasoning based on an affirmative proposition. It infers that the parties could not be present in person, because at the time they were in a different place[25]. That idea was not pursued before the assizes of novel disseisin, because there, only the supposed witnesses to the drafting of the instrument were taken into account. That particular consideration should not detract our attention from the scholarly source of inspiration of the common lawyers. It is obvious, even without any explicit references or quotation, and even without succombing to the temptation of identifying the *ley* mentioned in the English sources with the supreme *leges*, those of the civil law. The acquaintance of the most eminent common lawyers with the canonistic literature in particular supports the association. Furthermore, in an *obiter dictum*, the court makes sure that, for future purposes, the system should be fully understood :

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[23] Here, Robert Brooke states more clearly : " le fait sera enrol de verbo in verbum " (*op. cit.* [n. 6], fol. 327 ["Faits", § 58]).

[24] *Ibidem*, fol. 71 v ("Attaint", § 67).

[25] See for a general survey of the question : Mausen, Y., "*Per rerum naturam factum negantis probatio nulla sit*. Le problème de la preuve négative chez les glossateurs", in *Mélanges en l'honneur d'Anne Lefebvre-Teillard* (B. d'Alteroche, F. Demoulin-Auzary, O. Descamps, F. Roumy eds.), Paris, 2009, pp. 695-706.

> Et auxy fut parle que en case ou tesm[oignes] sont ajoint a un Enquest et les tesm[oignes] et l'*Enquest* ne puissent pas assenter a un verdit, le verdit sera pris de l'*Enquest* a par luy et en tiel cas la partie (contra que il passa) peut aver l'*Attaint*, etc.[26]

The reasoning is entirely consistent. If the jury does not return a verdict in keeping with the witnesses' statements, they subvert the verdict's very foundation and they forfeit the protection which the witnesses had provided them. They become entirely liable by themselves for the decision and determination of the case and the question of the possibility of an attaint is no more an issue than if there had been no witnesses.

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The rule combining the attaint and the challenge still had to be elaborated more in detail and more precisely before the requirement of a testimonial evidence based on perception could develop autonomously. In order to achieve that result, early-modern doctrine had to work out further the Medieval jurisprudence[27]. Conventional historiography tends to ignore both these developments as decisive factors in the formation of the law of evidence. Instead, it prefers to explain the origins and development of the law of evidence by referring to its context rather than to its object. According to that line of thinking, evidence in English law is not deemed to be governed by a process seeking to assess the inherent quality of the evidence, but is supposed to depend entirely on the evolution of procedural practice in the common law since the end of the Middle Ages, and foremost only since the 18th century. According to John H. Wigmore, the decisive factor was the jury, because it had no means to deal with external sources of information[28]. For Edmund M. Morgan, the most important factor was the development of the practice of counter-examination, which gave means of control to the opponent[29]. More recently, John H. Langbein has argued that the adversarial criminal procedure provided the source of the earliest clear rules on the law of testimonial evidence adopted in civil proceedings[30]. Eventually, Michael R. T. Macnair at least suggested that there may be a connection, in early-modern times, between, on the one hand, the system of evidence in the common law, and, on the other, the rules applicable in the courts of Equity and the procedural principles of the civil lawyers[31].

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[26] 23. Edw. 3, Lib. Ass. 11, fol. 110 v.

[27] See Mausen, Y., "Sans lour scient...", mentioned *supra* (n. 1).

[28] Wigmore, J. H., *A Treatise on the System of Evidence in Trials at Common Law*, Toronto-Boston, 1905, vol. I, ch. 1, § 8 (" A General Survey of the History of the Rules of Evidence "), p. 23 ss. The analysis may be based on Pollock, Sir Frederick, and Maitland, F.W., *The History of English Law Before the Time of Edward I*, Cambridge, 1895, and Thayer, J.B. *A Preliminary Treatise on Evidence at the Common Law*, Boston, 1898.

[29] "The Jury and the Exclusionary Rules of Evidence", *The University of Chicago Law Review*, 4/2 (Feb. 1937), p. 247-258. See also, by the same author, the new edition of another treatise by J. B. Thayer (*Select Cases on Evidence at the Common Law*, Cambridge, 1892), previously with revisions by J. Maguire (Morgan, E.M., Maguire, J., *Cases on Evidence*, Chicago, 1934).

[30] Langbein, J. H., "Historical Foundations of the Law of Evidence: A View from the Ryder Sources", *Columbia Law Review* 96 (1996), pp. 1168-1202. See also, along the same lines: Gallanis, T. P., "The Rise of Modern Evidence Law", *Iowa Law Review* 84/3 (March 1999), pp. 499-560.

[31] Macnair, M. R. T., *The Law of Proof in Early Modern Equity*, Comparative Studies in Continental and Anglo-American Legal History, 20, Berlin, 1999. The author's argument deserves to be taken into account, but he follows the chronology already established by J. H. Wigmore and the arguments developed by J. H. Langbein (p. 25). He also tends to underrate the influence of the Roman-canonical procedure on the common law (p. 292 s.).

However ingenious and erudite those explanations may be, they all appear to follow the conventional wisdom since the 19th century, which asserts the relatively late, in any case post-medieval, development of the law of evidence. That is the premise which first needs to be jettisoned.

The history of the opinion evidence rule has been traced back to the 14th century and leads to a law on testimonial evidence which stands on its own. For if the witnesses are barred from testifying on what they have neither heard nor seen, that is because in such a case their statement does not support any evidence. Nor are they allowed to testify beyond what they have seen or heard, as such a testimony would leave their evidence without any probatory value. The presence of the jury did not affect, in the first case, the logical truth, nor, in the second case, the procedural logic. That is why, at the beginning, the rules could be imported from the *ius commune* by the English royal judges. Once the rules of evidence had been adopted by the common law, they acquired a new significance in the specific judicial context of the assizes, not because of the rationale of the prohibitions they entailed, but because of the effects produced by their application. In the case of the opinion evidence rule, the effect was the impossibility to challenge the verdict if the testimonial evidence was affirmative. It was also the difficulty of justifying the challenge of witnesses in so far as their testimonials were based on perception. In contrast, the Roman-canonical law allowed *remedia* against judicial decisions regardless whether the witnesses' statements were affirmative or not and it admitted the *reprobationes* against witnesses in spite of the necessarily sensory nature of their statements. Perhaps the particular character of the procedure before a jury may explain those specific features. It would nevertheless be problematic to attribute these features to the twelve jurymen, at least originally. On the contrary, the sources highlight that an objectively valid proof was trusted because it appeared consistent with its character. The jurymen were free to follow or not the testimonial evidence, and they would only incur liability if they turned away from it, precisely if they appeared to be cirumspect in their verdict. That, as we have seen, was when attaint became once more a procedural option.

In later developments, the jury lost some of its autonomy and the parts played by all actors in the proceedings were reallocated. This resulted also in changes affecting the use of the law of evidence, to such a point that the Roman-canonical *ordo* was sometimes reinvented. Thus, as regards the opinion evidence rule, one may recognise today one of the earliest meanings of the *causa* in statements made before the court, *viz.* the test for distinguishing between the witness and the expert. In the Roman-canonical procedure, the expert, as opposed to the witness, gave his statement *de scientia* or *de intellectu*, interpreting the facts in order to infer conclusions, without necessarily referring to his own perception, and definitely not restricting his statement to his direct perception. One century after Innocent IV had prohibited witnesses to act as judges, Bartolus could teach that experts are not, strictly speaking, witnesses, but that " one regards them much rather as judges "[32]. This would seem to anticipate the status that the expert would acquire in the common law towards the end of the 20th century, when the prohibition of opinion evidence was gradually relaxed with regard to expert statements ![33]

[32] *De testibus*, in *Tractatus uniuersi iuris*, t. IV, Venice, 1584, fol. 64vb, § 12 : " non enim sunt proprie testes, sed magis ut iudices assumuntur ad illum causæ articulum iudicandum "; other texts along the same lines are mentioned by Mausen, Y., *Veritatis adiutor*, *op. cit.* (n. 9), p. 641, n. 161. More generally, see *ibidem*, p. 640 ss.; *idem*, "*Ex scientia et arte sua testificatur*. À propos de la spécificité du statut de l'expert dans la procédure judiciaire médiévale", *Rechtsgeschichte. Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte*, 10 (2007), pp. 127-135.

[33] 1970 : *Law Reform Committee*, 17. Report *Evidence of Opinion and Expert Evidence* ; 1972 : *Civil Evidence Act*, 3. section ; 1973 : *Criminal Law Revision Committee*, 11. Report *Evidence (General)* ; 1988 :

However, neither the question of the civil law's influence, nor the jury's role, nor even the common law procedure in general in the formation of the English law of evidence really matter in order to acknowledge that it originated in the Middle Ages. By the end of the 19th century, James B. Thayer offered the following definition of the trial :

> any determination by a court which weighs this testimony or other evidence in the scale of reason, and decides a litigated question as it is decided now.[34]

Evidence, therefore, can only be

> probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort.[35]

Evidence here is not being defined by its origins (the modality of the evidence), but by its finality (its purpose). That is the reason why its rational qualification cannot be determined from its constitution, but only from its conformity with a rational use. Evidence is by itself neither "rational" nor "irrational", but, one could say, "a-rational". The purely sensory substance of testimonial evidence, when it has not been subjected to a rational process, is the archmodel of such evidence. The aim of the law of evidence is therefore to ensure that the substance of the proof, which is a-rational, will be consistent with its finality, which is rational. In that sense, the syllogistical concept of proof which prevailed during the Middle Ages and which also operates in the common law was certainly the result of the legal professionals' acute awareness of those requirements and is no doubt constitutive of a law of evidence. The opinion evidence rule may well be the keystone of that legal edifice.

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[34] Thayer, J. B., *A Preliminary Treatise...*, *op. cit.* (n. 29), Ch. 1, p. 10.

[35] *Ibidem*, Appendix B, "The Presumption of Innocence in Criminal Cases ", p. 576.

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