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# **DEVELOPMENTS IN THE PRINCIPLES OF CIVIL EVIDENCE IN NINETEENTH CENTURY ENGLAND**

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## **1. INTRODUCTION**

The nineteenth century witnessed several significant changes in the rules of evidence by the English civil courts. In summary, the long-standing rules concerning testimonial competence were abolished, the rules of admissibility, particularly regarding hearsay, that had begun to develop in the eighteenth century developed yet further, and there was an increasing convergence of the rules of evidence between the different civil courts. Most of these changes appear to have occurred between approximately 1825 and 1875. The first and second of these changes have been examined in Chris Allen's history of Victorian evidence law.<sup>1</sup> The third change has recently been discussed briefly by Remco van Rhee, in relation to the broader question of whether there is a European procedural *ius commune*.<sup>2</sup> My interest here is not in the detail of the changes in these rules of evidence, but in the broader picture of developments in the principles that

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<sup>1</sup> C Allen *The Law of Evidence in Victorian England* (Cambridge UP 1997).

<sup>2</sup> C van Rhee 'Civil Procedure: A European Ius Commune?' (2000) *European Review of Private Law* 589; C van Rhee 'Towards a Procedural Ius Commune?' in J Smits and G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (Antwerp 2003) 217.

underlay those changes. I am interested ultimately in the jurisprudence of civil evidence law, in order to understand the dynamics of civil evidence law in England today. I also wish to investigate the possible basis for a common European evidential framework (which we might call a *ius commune*), that may be of practical benefit for such projects as Article 6 of the European Convention on Human Rights,<sup>3</sup> and Article 65(c) of the EC Treaty.<sup>4</sup>

The task of extracting principles from rules is not straightforward, for any branch of law, and there is no established method for such a project. In addition, there are two further challenges specific to the identification of principles of civil evidence. The first is that nineteenth century civil evidence has received relatively little attention, and most of the work that has been done has focussed on evidence in the common law courts.<sup>5</sup> It is therefore necessary to do some ground work to establish what evidence law was, and how it developed, in the various civil courts in the course of the nineteenth century. The second challenge is that the rules of evidence overlap with the rules of procedure. Indeed, in many continental countries, such as France, the rules on evidence will be held in the procedural code. The nineteenth century is a period of significant procedural reform everywhere. There is therefore always a possibility that what may appear to us to be an evidential reform was really just incidental on a broader procedural

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<sup>3</sup> Article 6(1) ECHR provides that ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.....’ Convention rights should be applied consistently across member states, subject to a margin of appreciation. However, there are particular difficulties in the application of Article 6 (‘the right to a fair trial’), since there is no consistent understanding of how evidence law should function. See, for example, *Dombo Beheer BV v The Netherlands*, ECtHR, 27 Oct 1993, Ser A, no 274.

<sup>4</sup> Article 65(c) EC enables the Council to adopt ‘Measures in the field of judicial cooperation in civil matters having cross-border implications... in so far as necessary for the proper functioning of the internal market’. These measures ‘shall include:... (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States’. The concept of civil procedure should almost certainly be taken here in a broad sense to include evidence law, if only because this is the way in which the majority of member states classify evidence law domestically.

<sup>5</sup> Eg T Gallanis ‘Aspects of the Common Law of Evidence, 1754–1824, With Special Reference to the Rule against Hearsay PhD thesis Cambridge 1997; J Langbein *The Origins of Adversary Criminal Trial* (Oxford UP 2003); Allen (n 1).

or jurisdictional reform. It is therefore necessary to understand the course of nineteenth century civil procedural reform.

Mindful of these challenges, this paper is divided into two sections. The first is a summary of the main changes to evidence rules, taking snapshots of practice in 1825 and 1875, and looking at a period of significant change during the 1850s. The second section considers what developments in evidential principles, if any, might explain these rule changes. In particular, it examines the relationship between evidential and procedural reform. Four evidential principles are proposed that may have developed in the course of the century: first, cases should be decided on all available evidence that is relevant and reliable; secondly, parties should assist the court in achieving the accurate determination of facts; thirdly, oral party cross-examination is the most effective way to test the reliability of evidence; fourthly, the tribunal of fact should be suited to the type of facts involved. The origins of these principles, and their possible justifications, are discussed in the second half of the paper.

## **2. THE MAIN CHANGES TO EVIDENCE RULES**

Let us begin by taking three snapshots of the rules of evidence in England in the nineteenth century. First, I take 1825 as an example of evidential practice at the start of the century, before the evidence reforms of the 1830s. I then consider 1875, straight after the implementation of the Supreme Court of Judicature Acts 1873 and 1875 ('the Judicature Acts'), the last major change before the end of the century. My third snapshot is of the changes that occurred in the 1850s. This third snapshot is particularly important because it seems to be common to ascribe most of the evidential and procedural changes to the 1870s Acts. For example, Chorus has recently suggested that 'the new forms of process [under the Judicature Acts]... must be regarded as the triumph of chancery, and thus the

triumph of civilian ideas',<sup>6</sup> while van Rhee has proposed that it might be shown that the Judicature Acts were influenced by the New York Field Code of 1848 and consequently by the Roman–canon procedure.<sup>7</sup> The evidence presented in this paper, however, indicates that the Judicature Acts merely completed an indigenous process that had been begun in the 1850s. There is no evidence of a continental European influence on the Judicature Acts.

### a) Civil Evidence in 1825

#### (i) At Common Law

In 1825, actions at Common Law were commenced by a writ, which usually gave rise to 'special pleading'. The parties would seek to identify a single factual issue on which the case would turn. Pleadings, which were not under oath, contained facts stated according to their legal effect and operation, rather than as they actually existed.<sup>8</sup> Once the single factual issue had been identified, this could be put to a jury, with supporting evidence. But by 1825, it had become common to bring an action under the more flexible legal fiction of a writ of trespass or ejectment.<sup>9</sup> This fiction allowed 'general pleading', which meant that parties did not have to narrow the issues, and could bring a whole factual argument to trial.

Evidence was given orally in open court before a jury, and witnesses were examined and cross–examined by the parties. The rules of admissibility had begun to take shape in the eighteenth century, and continued to develop in the nineteenth. Like admissibility, cross–examination was relatively new, developing

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<sup>6</sup> J Chorus, 'Civilian Elements in European Civil Procedure', in D Carey Miller, R. Zimmermann (eds) *The Civilian Tradition and Scots Law*, (Duncker & Humblot Berlin 1997) 303.

<sup>7</sup> Van Rhee 2000 (n 2) 227; van Rhee 2003 (n 2).

<sup>8</sup> C Langdell 'Discovery under the Judicature Acts, 1873, 1875, Part I' (1897) 11 Harvard L R 137, 140.

<sup>9</sup> For ejectment, see J Baker *An Introduction to English Legal History* (4<sup>th</sup> edn Butterworths London 2002) 545. The writ was against a defendant alleged to have unlawfully ejected the plaintiff from a property.

in civil process in the final decades of the eighteenth century.<sup>10</sup> The most striking feature of civil evidence at this time is that evidence could not be received under oath from parties to the action, their spouses, or those with any interest in the outcome of the case.

(ii) In Chancery

The rules of evidence and procedure in the Court of Chancery in 1825 had been adapted from the Roman–canon tradition.<sup>11</sup> Summary Roman canon procedure was still used at this time in the ecclesiastical and admiralty courts.<sup>12</sup> The plaintiff in Chancery issued a Bill, under oath, which would combine a statement of the facts on which relief was sought, interrogatories directed to the defendant, and requests for the disclosure of relevant documents. The defendant could issue a statement in response, and a counter–bill. The parties would then progressively respond to each other’s statements and interrogatories. This practice, known as ‘scraping the defendant’s conscience’, would either lead the opponent to admit the weakness of the case, and settle, or else reduce the number of facts in issue. The facts still in issue would then be put to witnesses, who would be examined in secret by an Examiner or Commissioner using pre–prepared interrogatories. Evidence would be recorded as depositions, which were all published together at the end of the evidence gathering phase.<sup>13</sup>

By the 1830s common law rules of evidence had been grafted onto those of the Roman–canon tradition.<sup>14</sup> For example, the civilian requirement that there be two witnesses for a proof (*‘responsio unius non omnino audiatur’*) was modified

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<sup>10</sup> Gallanis (n 5).

<sup>11</sup> M Macnair *The Law of Proof in Early Modern Equity* (Ducker and Humblot Berlin 1999); R N Gresley *A Treatise on the Law of Evidence in the Courts of Equity* (Saunders and Benning London 1836) 3.

<sup>12</sup> P Dodd and G Brooks *The Law and Practice of the Court of Probate, Contentious and Common Form: with the Rules, Statutes and Forms* (Stevens & Sons London 1865) 1–12. On discovery in the ecclesiastical courts, and how it differed from canon procedure, see Langdell Part I (n 8).

<sup>13</sup> A Birrell ‘Changes in Equity, Procedure and Principles’ in W Odgers (ed) *A Century of Law Reform* (Macmillan London 1901) 177, 188–90.

<sup>14</sup> Gresley (n 11) 3. Compare Macnair (n 10) and Langdell Part I (n 8).

in Equity to be a requirement for corroboration, either by a second witness or circumstantial evidence.<sup>15</sup> In the absence of a jury, Equity also allowed disputed evidence to be read.<sup>16</sup>

### **b) Civil Evidence in 1875**

From 1875, under the Judicature Acts, an action commenced ‘by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action’ (Ord II.1). This was a simple statement, unlike the Chancery Bills that had gone before. Initially, there appears to have been some concern that this would mean that a writ would be accompanied by a detailed setting out of the facts, in the fashion of a Chancery Bill. Griffith, on the other hand,<sup>17</sup> saw this as simply a restatement of the unsuccessful provisions of section 2 of the Common Law Procedure Act 1852.<sup>18</sup> However, it became clear that in practice the writ was the simple statement of facts that was intended.<sup>19</sup> One important change under the Judicature Acts from the practice of Chancery Bills was that the plaintiff was no longer required to answer on oath.<sup>20</sup>

The rules of evidence were fundamentally those of common law. Unless the parties agreed otherwise, witness testimony would be taken ‘vivâ voce and in open court’, using the common law practice of cross-examination. The use of juries was optional in all types of case, and a judge could refer a matter to a

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<sup>15</sup> Eg *Walton v Hobbs* 2 Atk 19; *Janson v Rany* 2 Atk 140. C Langdell ‘Discovery Under the Judicature Acts, 1873, 1875, III’ (1898) 12 *Harvard L Rev* 151, 153 therefore appears to be wrong to say that the evidence of two witnesses was required in Chancery.

<sup>16</sup> *Newton v Preston* Ch Pre 104 (Powell J sitting in Chancery); *Gresley* (n 11) 6.

<sup>17</sup> D Griffith *The Supreme Court of Judicature Acts 1873 & 1875: with the Rules, Orders and Costs Thereunder: edited with Copious Notes, References, and a Very Full Index and forming A Complete Book of Practice under the Above Acts* (Stevens and Haynes, London, 1875) 120.

<sup>18</sup> 15 & 16 Vict C 76.

<sup>19</sup> D Griffith *The Supreme Court of Judicature Acts 1873 & 1875* (2<sup>nd</sup> edn Stevens and Haynes, London, 1877) 156.

<sup>20</sup> F Haynes *The Supreme Court of Judicature Act 1873 with Explanatory Notes* (Maxwell and Sons London 1874) 1.

referee, or appoint an assessor to sit with him. Section 56 of the Judicature Act 1873 allowed the High Court to refer ‘any question arising in any [civil] cause or manner’ to an official or special referee, and may also appoint one or more assessors to sit with the court. This provision was intended in part to allow for the continuance of the Admiralty Court’s use of assessors, but of course extended this form of court expertise to all types of action.

The old common law rules of admissibility applied. The judge did however retain a discretion ‘for sufficient reason’ to order that any particular fact be proved by affidavit.<sup>21</sup> Discovery under the Rules of Court 1875 were a modified form of those previously existing at Common Law rather than in Equity.<sup>22</sup> For example, following the Common Law practice, a judge could disallow an interrogatory unless he was satisfied that it was relevant, while in Equity the party was bound to answer unless he could show that the discovery sought was ‘immaterial’. Common law arguments about whether an interrogatory was relevant were made without oath in chambers rather than before the court.<sup>23</sup> While in Equity discovery was a lengthy process, that ran as part of Bill pleading, at Common Law it was a separate event, as it had been at canon law.<sup>24</sup>

### **c) Civil Evidence Reform in the 1850s**

The evidence rules of the Judicature Acts and the Rules of Court 1875 did not represent a dramatic break from common law and equitable evidential traditions. Rather, they built on reforms that had already been attempted in the 1850s. These reforms were largely inspired by attempts to make available to all courts those elements of procedure that were thought to represent what we might now call ‘best practice’. For example, in 1851 an anonymous writer in Charles Dickens’

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<sup>21</sup> Ord XXXVII ‘Evidence Generally’. The provisions for affidavits replicated those of the Court of Chancery Act 1852 (15 & 16 Vict C 86) s 18.

<sup>22</sup> Rule 25 of the Rules of Procedure 1873; Order 31 of the Rules of Court 1875.

<sup>23</sup> Haynes (n 20) Rule 25.

<sup>24</sup> Langdell Part I (n 8).

journal *Household Words*, complained that whether a party was subject to oral cross-examination in open court or was able to hide behind deliberation and the aid of a clever special pleader depended on which side of Westminster Hall one stood on.<sup>25</sup>

(i) At Common Law

A simplified common law writ system had been introduced in 1832 and 1833.<sup>26</sup> At the same time, the New Pleading Rules of Hilary Term 1834 (known as the ‘Hilary Rules’) replaced general pleading with special pleading. This was a response to a concern that general pleading was requiring parties to prepare too many legal and factual issues for trial, and so adding to expense and delay.<sup>27</sup> The concern was a valid one, but the remedy was ill-conceived, and civil justice rapidly became bogged down in baroque minutiae of special pleading. In 1852 the Common Law Procedure Act was therefore passed to reform the process, practice and mode of pleading.<sup>28</sup> It effectively allowed a return to general pleading, and required parties to plead the actual facts of the case, rather than the facts required to have the necessary legal effect<sup>29</sup>

In the thirty years between 1825 and 1855, the rules on testimonial competence were also radically reformed. Lord Denman’s Act of 1843 made substantial inroads into the rule against people testifying who had an interest in the outcome of the case, and also abolished the rules disqualifying people with certain criminal convictions. The Evidence Amendment Act 1851 (‘Lord Brougham’s Act’) made parties to civil proceedings competent in most cases. This reform was one of the most important in nineteenth century evidence law,

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<sup>25</sup> — ‘Bringing out the Truth’ (1851) 4 *Household Words* 38, 39.

<sup>26</sup> Baker (n 9) 67

<sup>27</sup> Baker (n 9) 88

<sup>28</sup> 15 & 16 Vict C 76.

<sup>29</sup> R Morris and W Finlason *The Common Law Procedure Act, with Numerous Notes, Explanatory of its Practical Effect. As to Process, Practice and Pleading; and an Introductory Essay Illustrative of the Tendency of the New Measure to Restore the Ancient System of Pleading* (V & R Stevens and G S Norton London 1852) iii Original italics.



although brought in against significant resistance from the common law legal profession:

Perhaps no measure of Lord Brougham's was regarded with greater distrust by the bench, the bar and the attorneys; yet it is now, with common assent, allowed to be one of the most admirable measures for the advancement of truth and justice that have ever been passed.<sup>30</sup>

The reform was to some extent pre-empted by the creation of land rights tribunals in the 1830s, tax tribunals in 1842,<sup>31</sup> and the county courts in 1846, before which parties would testify under oath. The Evidence Amendment Act 1853 further made spouses competent and compellable for or against one another in civil matters. For those unable to take an oath on religious grounds, the right to affirm in civil cases was extended to all with religious convictions in 1854. An earlier Bill, introduced by Lord Denman in 1838, had been defeated. The use of an oath, for both non-conformists and atheists, only became possible in 1869.

The final change was that the Common Law Procedure Act 1854 allowed both parties to agree to a case being decided without a jury.<sup>32</sup> The Act also allowed the court to compel the parties to resolve the matter in arbitration before a Referee.<sup>33</sup> Discovery was introduced into the Common Law courts in the mid nineteenth century.<sup>34</sup> It was introduced at least in part to remove the need for common law parties to incur expense and delay by taking the action to Chancery in order to discover a document.<sup>35</sup> That practice was in any case made

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<sup>30</sup> – 'Lord Brougham's Acts and Bills from 1811 to the Present Time' (1859) 105 *Quarterly Rev* 504, 523.

<sup>31</sup> C Stebbings *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge UP 2006) 209–216.

<sup>32</sup> M Lobban 'The Strange Life of the English Civil Jury, 1837–1914' in J Cairns and G McLeod (eds) *The Dearest Birth Right of the People of England: the Jury in the History of the Common Law* (Hart Oxford 2002) 173, 180.

<sup>33</sup> Judicature Commission *First Report of the Commissioners* (HMSO London 1869) 12.

<sup>34</sup> Langdell Part III (n 15) 138.

<sup>35</sup> The new tribunals were routinely given statutory powers to order disclosure: Stebbings (n 31) 218. When the Tithe Commissioners were established, the power to order disclosure was

problematic by limits being placed on the reuse of documents obtained under disclosure<sup>36</sup>

(ii) In Chancery

Meanwhile, in Chancery, the Court of Chancery Act 1852 sought (and largely failed)<sup>37</sup> to end the verbose nature of Bills, by requiring that every bill shall contain as concisely as possible a narrative of the ‘material facts, matters and circumstances’ upon which the plaintiff relied.<sup>38</sup> The Act also reformed the taking of evidence. Depositions were replaced in 1852 by a system of oral testimony or affidavits.<sup>39</sup> Oral examination took place in the presence of parties, counsel, solicitors or agents. In practice, however, parties agreed to use affidavits. Cross-examination and re-examination on an affidavit took place before an examiner in much the same way as had happened with depositions<sup>40</sup>

The 1852 Act enabled a judge in chambers to seek the assistance of experts.<sup>41</sup> It may have been, as Beuscher has suggested, that the Act simply incorporated an existing power.<sup>42</sup> This 1852 provision may be the power to which Sir Page-Wood, Vice-Chancellor, was referring when he said in 1860 that ‘in many cases he had availed himself of the privilege which was accorded to judges of the Chancery Court, of calling in disinterested witnesses in matters of

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restricted to documents relevant to the commutation of tithes. However, the need to examine documents relevant to title frequently arose, and discovery could only be obtained by a costly bill of discovery in equity. This was addressed by the Tithe Commutation Amendment Act 1840 3 & 4 Vict c 5, s 24.

<sup>36</sup> Eg *Richardson v Hastings* (1844) 7 Beav 354.

<sup>37</sup> Langdell Part III (n 15) 167.

<sup>38</sup> 15 & 16 Vict c 86, s 10.

<sup>39</sup> Birrell (n 13) 188. 15 and 16 Vict C 86 s 28. Before 1852, affidavits had been only properly used to support motions and petitions: Gresley (n 11) 412. In New York, Chancellor Kent, had allowed Masters to take oral evidence by 1817: *Remsen v Remsen* 2 Johns Ch 495, 499 (NY Ch 1817).

<sup>40</sup> 15 and 16 Vict C. 86 s 38.

<sup>41</sup> Court of Chancery Act 1852 (15 & 16 Vict c 80 s 42), carried over into Ord 55 r 19 of the Rules of the Supreme Court.

<sup>42</sup> J Beuscher ‘The Use of Experts by the Courts’ (1941) 54 Harvard L Rev 1105, 1118.

opinion'.<sup>43</sup> Its previous existence is not, however, clear from the authority of *Lushington v Boldero* cited by Beuscher.<sup>44</sup>

Lord Cairn's Act of 1858 gave Chancery the power to award damages as an alternative to specific performance.<sup>45</sup> For this purpose, it introduced juries, at the discretion of the judge in the individual case.<sup>46</sup> This measure was not widely adopted.

### (iii) The Civilian Courts

There was also significant civil evidence reform in the civilian courts of Probate and Admiralty in the 1840s and 1850s. The probate jurisdiction of the ecclesiastical courts was transferred to the new Court of Probate in 1857.<sup>47</sup> The rules of evidence in Probate became those of the other courts at Westminster.<sup>48</sup> This represented a marked change of practice, giving weight to evidence effectively excluded before, by the two witness rule, while excluding other evidence under admissibility rules.<sup>49</sup> As with the Divorce Act 1857 (s 43), parties were entitled to use affidavits but rarely did so. The judge decided whether he would hear the case alone or with a jury.<sup>50</sup>

Evidence reform of the Admiralty Court had begun earlier than in the Ecclesiastical courts. This may have been because Admiralty was in a neglected

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<sup>43</sup> L Blom-Cooper and P Cooper 'Historical Background' in L Blom-Cooper (ed) *Experts in the Civil Courts* (Oxford UP 2006) 1, 8.

<sup>44</sup> *Lushington v Boldero* (1819) 6 Madd 149, 56 ER 1048 Ch.

<sup>45</sup> 21 & 22 Vict C 27.

<sup>46</sup> Lobban 2002 (n 33) 181–182.

<sup>47</sup> Court of Probate Act 1857 – 20 & 21 Vict C 77.

<sup>48</sup> A Hill *A Manual of the Practice of the Court of Probate* (Sweet London 1859) 24. Court of Probate Act 1857, s. 33.

<sup>49</sup> Hill (n 48) 45. Compare Denman CJ in *Wright v Doe dem Tatham* 7 A&E 401.

<sup>50</sup> Court of Probate Act 1857, s 35. The summoning of juries was subject to the general provisions of the Common Law Procedure Act 1854, s 107.

condition until the 1830s.<sup>51</sup> In 1840, oral evidence had been allowed for the first time,<sup>52</sup> and issues could be referred to a common law jury.<sup>53</sup> Certainly by 1868, however, neither provision had been particularly used.<sup>54</sup>

### 3. DEVELOPING PRINCIPLES

What principles, if any, lay behind the evidence rule reforms of the nineteenth century? With the possible exception of Bentham,<sup>55</sup> contemporary law reformers seemed to have difficulties enunciating their guiding principles. For example, in 1850 John George Phillimore, wrote a *History and Principles of the Law of Evidence*.<sup>56</sup> The book is an unstructured and largely anecdotal manifesto for evidence reform. When Phillimore does come to identify his principles, he stumbles, and never manages to produce a list.<sup>57</sup> James Fitzjames Stephen fared a bit better in his 1872 *Principles of Judicial Evidence*,<sup>58</sup> but kept finding that he could not formulate any effective rules, for example about hearsay, that were not either too tight or too loose. This difficulty might have been resolved if Stephen had had access to a conceptual distinction between rules and principles.

From studying the developments in the rules of evidence across jurisdictions in the course of the nineteenth century, I should like to propose four principles for civil evidence that developed in England at this time: first, cases should be

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<sup>51</sup> R Williams and G Bruce *The Jurisdiction and Practice of the High Court of Admiralty, including a Sketch of the Proceedings on Appeal to the Privy Council* (William Maxwell London 1868) 12–15.

<sup>52</sup> 3 & 4 Vict C 65 s 7.

<sup>53</sup> 3 & 4 Vict C 65 s 11–16.

<sup>54</sup> Williams and Bruce (n 51) 260, 273.

<sup>55</sup> W Twining *Theories of Evidence: Bentham and Wigmore* (Weidenfeld and Nicolson London 1985).

<sup>56</sup> J Phillimore *The History and Principles of the Law of Evidence as Illustrating our Social Progress* (William Benning London 1850).

<sup>57</sup> Eg Phillimore (n 56) 579–580.

<sup>58</sup> J Stephen *The Principles of Judicial Evidence, Being an Introduction to the Indian Evidence Act (I of 1872)* (Thacker Spink & Co Calcutta 1872)

decided on all available evidence that is relevant and reliable; secondly, parties should assist the court in achieving the accurate determination of facts; thirdly, oral party cross-examination is the most effective way to test the reliability of evidence; fourthly, the tribunal of fact should be suited to the type of facts involved.

Before exploring these principles, I should like to consider briefly my earlier methodological difficulty, that many of these changes in the rules of evidence are fundamentally bound up with debate and changes surrounding questions of procedure and jurisdiction.<sup>59</sup> By the 1840s, it was clear that there were conceptual and practical difficulties with having multiple jurisdictions and forms of evidence and procedure. Parties had become adept at moving cases between courts in order to benefit from their different features. Thus many of the 1850s reforms were concerned with resolving procedural anomalies. These procedural reforms were not as effective as might have been hoped, and so the 1870s went further, and merged jurisdictions. This appears to have been almost a foregone conclusion by 1869, when the first report of the Judicature Commissioners appeared, analysing the arguments, and proposing the solution, in a mere twenty pages. In part, the Judicature Commissioners were able to draw on the experience of the increasingly successful county court system:

Divorce apart, the county courts were [from 1868] practically courts of complete jurisdiction in civil matters, Judge Daniel claiming that in his courts there was a practical fusion of law and equity which caused very little difficulty. There were those who felt that some county

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<sup>59</sup> See also M Lobban 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I' (2004) 22 *Law and History Rev* 389; M Lobban 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 *Law and History Rev* 565; J Getzler 'Chancery Reform and Law Reform' (2004) 22 *Law and History Rev* 601; J Oldham 'A Profusion of Chancery Reform' (2004) 22 *Law and History Rev* 609; M Lobban 'The Chancellor, the Chancery, and the History of Law Reform' (2004) 22 *Law and History Rev* 615.

court judges had been mingling the waters for many years and with the benefit of any authority.<sup>60</sup>

England was not unique in these difficulties. In 1848, the state of New York created a new supreme court, in which the jurisdictions of common law and equity were merged.<sup>61</sup> This was principally work of the law reformer David Dudley Field. The 'Field Code' was based on extensive comparative research both in North America and Europe.<sup>62</sup> A particular source for Field was the Louisiana Civil Codes of 1808 and 1825, which was strongly influenced by Spanish (and probably not French) civil law.<sup>63</sup>

In India, a Code of Civil Procedure in 1859<sup>64</sup> made no distinction between common law and equity,<sup>65</sup> and the judge sat without a jury. The Code of Civil Procedure in India replaced a far more complex system than existed in England, since there were both Royal and East India courts, and the applicable law depended on the ethnic origin of the parties. American commentators would appear to have seen the Indian code as influenced by the New York code, but this is surely wrong, as the Indian Code was extensively civilian in its nature.<sup>66</sup> Trials consisted of judges taking evidence, over a series of hearings, and producing

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<sup>60</sup> P Polden 'A History of the County Court, 1846–1971' (Cambridge UP 1999).60. County courts had acquired an equitable jurisdiction in 1865, and an Admiralty jurisdiction in 1868.

<sup>61</sup> — 'Comparative Anatomy of Judicial Procedure – On the Recent Consolidation of the Courts of Law and Equity in New York' (1848) 8 Law Rev 387, 394. Part IV of the Field Code concerned rules of evidence.

<sup>62</sup> R Batiza 'Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code' (1986) 60 Tulane L Rev 799, 807; M Coe and L Morse 'Chronology of the Development of the David Dudley Field Code' (1941) 27 Cornell LQ 238; S Subrin 'David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision' (1988) 6 Law and History Rev 311.

<sup>63</sup> A Yiannopoulos 'Louisiana Civil Law: A Lost Cause?' (1980) 54 Tulane L Rev 830; D Clark 'The Civil Law Influence on David Dudley Field's Code of Civil Procedure' in M Reimann *The Reception of Continental Ideas in the Common Law World (1820–1920)* (Duncker and Humblot Berlin 1993) 63.

<sup>64</sup> — 'The Code of Civil Procedure in India' (1907) 8 (NS) J Society of Comparative Legislation 235.

<sup>65</sup> W Morley *The Administration of Justice in British India: its Past History and Present State, Comprising an Account of the Laws Particular to India* (Williams and Norgate London 1858) 2–3.

<sup>66</sup> — 'The New York System of Procedure: Its Theory, History and Progress in the United States, England and India' (1877) 16 Albany LJ 48, 48

documents equivalent to continental dossiers, with narrative accounts of evidence.<sup>67</sup>

New York and India appear, however, to have had little practical influence on English reform, despite Lord Brougham's enthusiasm.<sup>68</sup> The first report of the Judicature Commissioners, for example, referenced these reforms very much in passing. This suggests that they did not form a central part of the Commissioners' deliberations. Phillimore suggested, as an aside to his general discussion of the need for law reform, that

It would greatly diminish the expense of suitors, if we were to adopt the provisions of the code of Louisiana more than we have done, and oblige the party, whenever a suit is brought on an instrument under private signature, at common law to acknowledge or deny it.<sup>69</sup>

This appears to suggest that English law had already been reformed in line with the Louisiana Code, but there is no other evidence of this having happened. The Judicature Commissioners did not mention Louisiana.

The authors of the Judicatures Acts and associated Rules seem to have tried to bring through as much as possible of the old systems, on a purely pragmatic basis. Where there was a direct conflict, then the common law provisions prevailed. Pre-trial discovery was Common Law-style, and evidence at trial was adduced in the Common Law manner, orally and under party cross-examination. Many of the provisions of the Judicature Acts already had precedent in England. The Admiralty and Probate courts already allowed for a choice of written or oral evidence, and juries could be appointed in Probate, or for costs in Chancery. In the County Courts since 1846, common law actions were commenced by a simple

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<sup>67</sup> A Lewis *The Code of Civil Procedure* (WH Allen London 1871)

<sup>68</sup> — 'The Code of Civil Procedure of the State of New York' (1850) 12 Law Rev 366; — 'The Code of Civil Procedure of the State of New York' (1851) 13 Law Rev 65; — 'History of the New York Code and its Applicability to this Country' (1851) 13 Law Rev 213. Field's visits to Brougham's Society for Promoting the Amendment of the Law further fuelled this enthusiasm..

<sup>69</sup> Phillimore (n 56) 601.

claim form, laying out the facts on which the action was based.<sup>70</sup> A jury was optional, and in practice hardly used.<sup>71</sup> Other work on the Judicature Acts suggests that the main attention was on the practicalities of jurisdictional fusion.<sup>72</sup>

This brief diversion on the mechanics of procedural reform has been extremely helpful, because it provides us with an idea of the extent to which many of the evidence reforms of the nineteenth century were simply manifestations of broader procedural and jurisdictional reforms, and some of the rationales behind the nature of those changes. In the remainder of this section I discuss the four evidential principles that I am proposing may have developed at this time.

**a) Cases should be decided on all available evidence that is relevant and reliable.**

This principle is about where one strikes the balance in evidence between relevance and reliability. This principle requires the most discussion of the four, and in a sense the other three follow on from this principle. The abolition of the rules on testimonial competence is a particularly good example of an evidence reform that was at least partly pragmatic. Changes to England's socio-economic landscape in the nineteenth century meant that much of civil litigation was difficult or impossible to conduct, since the only people involved in a dispute could not testify at common law. It was also anomalous that litigants and other interested parties could give sworn evidence in writing through Chancery Bills. This socio-economic explanation is not fully satisfactory on its own, however, as other European jurisdictions continue to maintain some of the rules of testimonial competence. We must therefore consider a more principled argument.

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<sup>70</sup> 9 & 10 Vict C 95. C Pollock *The Practice of the County Courts* (Sweet London 1851) 2. Polden 1999 (n 60).

<sup>71</sup> Lobban 2002 (n 33) 178.

<sup>72</sup> Eg P Polden 'Mingling the Waters' (2002) 61 Cambridge LJ 575.



Evidence theorists were aware of the balancing of reliability and relevance at the start of the nineteenth century. For example, in his 1806 translation of Pothier's treatise on the law of obligations, Evans had written that the two aims of any system of evidence were the manifestation of truth, and the exclusion of falsehood. But Evans thought that the full attainment of these aims was often impossible because 'the latitude which is requisite for the one is inconsistent with the caution which is too often necessary for securing the other.'<sup>73</sup>

The Benthamites argued that no evidence should be excluded except where this was required to avoid preponderant delay, vexation and expense. For Bentham, writing on evidence in the 1820s,<sup>74</sup> the unwarranted exclusion of evidence was a fundamental corruption in the legal system. Bentham was cynical about lawyers, who he depicted as operating together as 'Judge & Co', arguing for the need for more lawyers. Bentham was not the only person at this time to suspect that much of the procedural mechanics of civil justice was driven by vested interests rather than higher goals such as truth and justice. For example, when it came to reforming the civil court system in the 1870s, the main arguments were over the number, responsibilities and remuneration of the judge.<sup>75</sup>

Chris Allen has rightly shown that Bentham's role in nineteenth century evidence reform has often been exaggerated.<sup>76</sup> That does not mean that it can be completely ignored. Some reformers, such as Lord Denman, were directly influenced by Bentham. Others may have been indirectly influenced, through the diffusion of ideas via Benthamite reformers, such as Cairns and Brougham, although whether Brougham should be considered a true Benthamite is questionable.<sup>77</sup> Bentham's influence was perhaps greater in North America, for

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<sup>73</sup> R Pothier *A Treatise on the Law of Obligations* (A Strahan London 1806 trans W Evans) II.141.

<sup>74</sup> 1823 *Traité des preuves judiciaires* (Paris); 1824 published in English in serial form in the *Law Journal*; 1825 published as a complete work in English; 1827 *Rationale of Judicial Evidence*.

<sup>75</sup> Polden 2002 (n 72).

<sup>76</sup> Allen (n 1) 104.

<sup>77</sup> M Lobban 'Henry Brougham and Law Reform' (2000) 115 *English Hist Rev* 1184, 1188.

example in the work on Edward Livingston in Louisiana, David Dudley Field in New York, and John Appleton in Maine. Livingston, a ‘staunch disciple’ of Bentham, was the codifier of the Louisiana legal system in the 1820s.<sup>78</sup> Field was the main author of the New York codes of the 1840s (‘the Field Codes’), mentioned above. John Appleton was a Justice of the Supreme Court of Maine between 1852 and 1862, and then Chief Justice until 1883. An enthusiastic follower of Bentham, Appleton wrote a series of articles, published as a collection in 1860 as *The Rules of Evidence Stated and Discussed*, in which he expounded Benthamite principles. He was the prime mover behind the adoption in Maine in 1856 of provisions to extend competency to parties in civil suits, and secured the right to testify for criminal defendants in 1864.<sup>79</sup> This Benthamite influence in North America is significant for a consideration of evidence reform in England if we consider the possible influence of Livingston’s work on Field’s, and in turn Field’s possible influence on Brougham.

Contemporary opponents of this Benthamite argument,<sup>80</sup> such as Best, objected that Benthamites had failed to understand that judicial evidence was not necessarily like other evidence.<sup>81</sup> Similarly, in 1824 Starkie wrote that, ‘To admit every light which reason and experience can supply for the discovery of truth, and to reject that only which serves not to guide, but to bewilder and mislead, are the

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<sup>78</sup> H McMahon ‘The Proposed Louisiana Code of Practice: A Synthesis of Anglo–American and Continental Civil Procedures’ (1953) 14 *Louisiana Law Rev* 36.

<sup>79</sup> D Gold *The Shaping of Nineteenth Century Law: John Appleton and Responsible Individualism* (New York 1990).

<sup>80</sup> For a more detailed discussion of what we might mean by the term ‘free proof’, see D Dwyer ‘What Does It Mean to be Free? The Concept of Free Proof in the Western European Legal Tradition’ (2005) 3(1) *Int Commentary on Evidence* art 6 <<http://www.bepress.com/ice/vol3/iss1/art6/>>.

<sup>81</sup> Best wrote in the Preface to his 1849 *Principles of the Law of Evidence* that he had made much use of both Bonnier’s 1843 *Traité theorique et Pratique des Preuves* and also Bentham’s *Rationale of Judicial Evidence* 1827. Best’s *Principles* is an interesting work in part because it is never clear what the principles are. In the 1870 5<sup>th</sup> edition, he commends the Common Law Procedure Act of 1854 for removing ‘various anomalies... from the forensic procedure affecting our law of evidence, and the system itself [has been] brought more into harmony with its own principles’. He again does not elaborate on what those principles are.

great principles which ought to pervade every system of evidence.’<sup>82</sup> Superior tests of truth, Starkie says, are required in the context of litigation because the evidence on which an individual in everyday transactions might safely rely could not, without such further security, be safely relied on, or even admitted, in judicial investigations. There do not exist as many opportunities or temptations in everyday life to practise deceit as there do in legal investigations.<sup>83</sup>

There are at least three possible explanations for admitting more evidence, through removing the rules on testimonial competence. The first is that people (presumably including parties and witnesses) were believed to be more truthful than they used to be. This reason, which may seem to us rather extraordinary, was given by Phillimore in his 1850 *History of the Law of Evidence*.<sup>84</sup> The second reason is that people are able to evaluate facts more effectively than lawyers often give them credit for, and we can see this in the type of evidence that people rely on for everyday decisions. This is the reason given by Bentham. The third reason is that modern civil litigation requires us to take greater risks that an action will wrongly succeed. We might see this re-assignment of risk as a utilitarian argument, that is to say it is in the interests of society as a whole that we increase the likelihood of a defendant occasionally wrongly losing her case.

The Roman–Canon position appears to have been that it is better to take the risk that there is an injustice in the world between individuals than it is for the court to risk wrongly exercising its authority over an individual. This would adversely affect the dignity of both the court and the wronged individual. Thus, in the Roman–canon tradition there were a lot of evidential burdens that one had to overcome in order for the court to reach a verdict. In particular, the court required full proof before it would act and it would be very cautious about what counted as

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<sup>82</sup> T Starkie *A Practical Treatise on the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings* (Clarke London 1824) l.iv.

<sup>83</sup> Quoted in Allen (n 1) 23.

<sup>84</sup> Phillimore (n 56), quoted in ‘Bringing out the Truth’ (n 25).

evidence for proof.<sup>85</sup> Although there were attempts to ameliorate Roman–canon proof requirements, for example through the extensive use of evidential presumptions,<sup>86</sup> the main impetus for change may have come from courts hearing commercial matters. Nörr has suggested that the Roman–canon concern for the dignity of the individual was of no concern in the commercial legal world, where the focus was on wealth. In consequence, commercial courts across Europe regularly sought to follow drastically simplified rules of evidence and procedure.<sup>87</sup> These developments in the commercial courts may in turn have affected civil practice generally.

Today, we might be tempted to say that a move from civilian to common law evidential principles would mean a marked reduction in the evidence that is available to the court, because of the application of Anglo–American rules of admissibility, in contrast to the approach to open admissibility that we see in civilian jurisdictions. However, this focus on admissibility fails to take into account other evidential constraints that may operate.<sup>88</sup> For example, when the Court of Probate Act 1858 provided that Probate proceedings would switch from civilian evidence to common law evidence, Hill was of the opinion that this would probably allow more evidence to be admitted, rather than less, because one suddenly would not be bound by all the issues surrounding full proof, such as the two witness rule.<sup>89</sup>

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<sup>85</sup> See J Langbein *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago UP 1977); F McAuley ‘Canon Law and the End of the Ordeal’ (2006) 26 OJLS 473.

<sup>86</sup> J Menochius *Tractatus de Praesumptionibus, Conjecturis, Signis et Indiciis* (Venezia 1590); G Palazzolo *Prova Legale e Pena: la Crisi del Sistema Tra Evo Medio e Moderno* (Jovene Napoli 1979).

<sup>87</sup> K Nörr ‘Procedure in Mercantile Matters: Some Comparative Aspects’ in V Piergiovanni *The Courts and the Development of Commercial Law* (Duncker & Humblot Berlin 1987) 195, 195.

<sup>88</sup> Dwyer (n 80).

<sup>89</sup> Hill (n 48) 9.

**b) Parties should assist the court in achieving the accurate determination of facts, and courts should in turn rely on parties to do this.**

Under Common Law pleading, parties pleaded the facts required to have the necessary legal effect, rather than the actual facts. As Cotton LJ said in the 1888 Chancery case of *Spedding*, ‘The old system of pleading at common law was to conceal as much as possible what was going to be proved at trial.’<sup>90</sup> In Chancery, parties included every conceivable fact in their pleadings. In both cases, the parties used pleading as a tactical device, rather than as a means by which to present a simple statement of the relevant facts.

The great object of the Judicature Acts, according to the barrister Finlason writing in 1877, was to get at the truth as soon as possible, for it may be that it may at once show that there can only be one end to the suit, and so the parties end it at once.<sup>91</sup> The effect of this was that the court might realistically expect to be better informed on the evidence eventually presented. The 1875 Rules of Court required factually reliable claims, enabled disclosure, and provided greater judicial discretion in how evidence might be received, and in particular whether it should be oral or in writing. It is worth noting the limits of this principle. The court does not have a general duty to discover the truth, or to investigate evidence that it suspects is not all that it seems. There are no powers to investigate facts. However, the courts do appear to experiment with instructing their own experts immediately after the Judicature Acts. In the case of *Kennard*, for example, the judge decided that the evidence of the surveyor experts appointed by the parties was so unreliable that he appointed a court expert to inspect the property.<sup>92</sup>

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<sup>90</sup> *Spedding v Fitzpatrick* (1888) 38 ChD 410 (Cotton LJ).

<sup>91</sup> W Finlason *An Exposition of Our Judicial System and Civil Procedure as Reconstructed under the Judicature Acts including the Act of 1876 with Comments on their Effect and Operation* (Longmans Green & Co London 1877) 307.

<sup>92</sup> *Kennard v Ashman* (1894) 10 TLR 213 Ch. See also *Badische Anilin und Soda Fabrik v Levinstein* [1881] 24 ChD 156.

**c) Oral party cross-examination is the most effective way to test the reliability of evidence.**

At the start of the nineteenth century, Common Law and Equity had markedly different ways of ensuring the reliability of evidence. At Common Law, only those with no interest in the case could testify under oath, and this testimony was oral, in open court, and subject to *viva voce* cross-examination. In Equity, the parties provided sworn evidence through Bill pleading. The examination of witnesses was then taken in secret before trial, and published to the parties and the court once all the evidence was collected. Full cross-examination was a relatively late development in the common law courts, perhaps coming at the end of the eighteenth century.<sup>93</sup> However, from the end of the eighteenth century, in England and the United States, there seems to have been a consensus that cross-examination was the most effective way of getting to the truth. As early as 1789, the United States Congress mandated that Equity adopt the common-law approach to presenting testimony orally in open court.<sup>94</sup> Bentham, seemingly critical of almost every other provision of English evidence law, thought that '[a]gainst erroneous or mendacious testimony, the grand security is cross-examination...'<sup>95</sup> For Starkie it was 'absolutely essential to the ascertainment of truth.'<sup>96</sup> Wigmore, writing in 1904, thought cross-examination to be 'the greatest legal engine ever invented for the discovery of truth', but was also aware of its ability, when misused, to defeat the discovery of truth.<sup>97</sup> Cross-examination was

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<sup>93</sup> Gallanis (n 5).

<sup>94</sup> Judiciary Act 1789, s 30. This approach was not initially implemented, but was achieved through incremental change: A Kessler 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial' (2005) 90 Cornell L Rev 1181, 1204 and 1225.

<sup>95</sup> J Bentham *Rationale of Judicial Evidence Specially Applied to English Practice* (London 1827) vol 5, 212 n. See also S Landsman 'From Gilbert to Bentham: The Reconceptualization of Evidence Theory' (1990) 36 Wayne L Rev 1149, 1181-1182.

<sup>96</sup> Starkie (n 82) 101 quoted in Gallanis (n 5) 519.

<sup>97</sup> J Wigmore *Evidence in Trials at Common Law* (Tillers and others revision Little Brown Boston 1983) vol V 32 s 1367.

made available in Chancery in England from the 1850s, although it continued to function on an almost exclusively written evidential basis until oral testimony and cross-examination were effectively mandated under the Judicature Acts.

Cross-examination was not an inevitable choice of the way in which the court can best determine the truth. The production of a set of written evidential statements, taken in secret, was the method not just of Equity but of the Roman-canon tradition as a whole, and it was prevalent in Europe. Equity assumed that parties and witnesses would usually tell the truth under oath. Any inconsistency within a witness' evidence would be identified before the witness signed the evidence. An inconsistency would be taken as a mistake, which could be rectified.<sup>98</sup> The main focus of opponents and the courts in looking for fabricated evidence was in inconsistencies between witnesses, and this was one of the main benefits of taking evidence in secret.<sup>99</sup> In Bill pleading, it was hoped that although a party might seek to evade answering a question, she would not directly lie, as such a lie would be difficult to prove. Equity lawyers suggested, however, that the ability to cross-examine would have been largely irrelevant anyway, since equity cases rarely depended on contested facts, and inconsistencies could be rectified when identified.<sup>100</sup>

The Common Law believed that witnesses usually told the truth, but parties could not be relief upon to do so. While Equity saw an inconsistency in evidence as something to be remedied, common lawyers saw such a slip as revealing the true state of the witness' thoughts, as they were forced to recall a fact or explain an earlier factual statement without time for reflection. To a large extent the expansion of cross-examination to non-Common Law courts in the middle of the nineteenth century may simply have reflected the perceived success of cross-examination in the courtroom. While cross-examination emerged at the end of the eighteenth century in Common Law courts, it took half a century to be

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<sup>98</sup> Gresley (n 11) 2.

<sup>99</sup> Kessler (n 94) 1216.

<sup>100</sup> Gresley (n 11) 6.

introduced (without enthusiasm) into Chancery. This development may also have turned in part on a change in attitudes towards the epistemological value of written and oral evidence. While the evidence law of the eighteenth century had focussed on the primacy of written documents as a source of reliable evidence, Starkie writing in 1824 was of the view that

[O]ral testimony... in natural order precedes written evidence. It is in general more proximate to the fact than written evidence, being a direct communication by one who possesses actual knowledge of the fact by his senses; whilst written evidence in itself requires proof... from those who possessed actual knowledge of the facts.<sup>101</sup>

Oral testimony was therefore important, in Starkie's view, because it comes directly from the person who experienced the facts. This emphasis may reasonably be taken as being the result of the influence of the empiricism of John Locke on English evidence law.<sup>102</sup> The rise of cross-examination is therefore in part a manifestation of developments in legal epistemology.

This marked faith in the powers of cross-examination is important, because it may help to explain the greater willingness to admit evidence, discussed in my first principle above, in terms of a greater confidence generally in assessing the veracity of evidence. It also provides an explanation for the increasing aversion that the courts displayed to hearsay evidence from the end of the eighteenth century.<sup>103</sup> A witness could not meaningfully be cross-examined on the substance of what she said someone else had said.

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<sup>101</sup> Starkie (n 82) 108, quoted in Gallanis (n 4) 519.

<sup>102</sup> J Locke *An Essay Concerning Human Understanding* (1690); G Gilbert (d 1726) *The Law of Evidence* (London 1754); Bonnier (n 80) *Traité théorique et pratique des preuves en droit civil et en droit criminel* (2<sup>nd</sup> edn Durand Paris 1852); W Best *Principles of the Law of Evidence and Practice as to Proofs in Courts of Common Law* (2<sup>nd</sup> edn Sweet London 1854) 2–9.

<sup>103</sup> J Langbein *The Origins of Adversary Criminal Trial* (Oxford UP 2003) 245–246.



**d) The tribunal of fact should be suited to the type of facts involved**

The fourth principle is that the tribunal of fact should be adjusted to meet the needs of the type of case, rather than the jurisdiction. Thus, in the 1850s it not only became possible for a common law trial to dispense with its jury, but for a Chancery court to instruct its own jury. Similarly, a common law court could delegate fact finding to a referee. These provisions were consolidated by the Judicature Acts and the 1875 Rules of Court. The Judicature Acts thus embody the principle that different types of case require different procedure,<sup>104</sup> drawn from a single procedural code (the Rules of Court). The choice of procedure was a judicial decision based on the individual case, not on the court in which the action was brought. This was because, in practice, certain courts preferred certain procedural options, such as whether evidence should be given orally or by affidavit, or whether the case should be heard by a judge or by a jury.

If one looks at an Admiralty procedural manual written straight after 1875, for example, the only changes to Admiralty practice under the new rules would appear to be that the special form of pleading in Admiralty has gone, and evidence is no longer to be assessed *secundum allegata et probata* but according to the common law principle of whether the evidence adduced at trial supports the general merits of the facts pleaded.<sup>105</sup> For example, if P alleges that D's ship struck his ship three times, but is only able to prove two times, then the action would fail in Admiralty before 1875. The justification for this is that,

It is of great importance to the due administration of justice that parties who seek relief in the Court of Admiralty should state the injury of which they complain with sufficient clearness and accuracy

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<sup>104</sup> Finlason (n 91) xii.

<sup>105</sup> R Williams and G Bruce *The Jurisdiction and Practice of the High Court of Admiralty, including a Sketch of the Proceedings on Appeal to the Privy Council, with Numerous Forms of Pleadings, Bills of Costs, &c* (William Maxwell London 1868) 246d; *The Ann* (1862) Lushington 55.

to enable their adversaries to know the case which they have to meet...<sup>106</sup>

This is a different interpretation of the civilian maxim ‘*secundum allegata et probata*’ to that adopted in Chancery, which was closer to the Common Law approach to proof.<sup>107</sup> After 1875, using the Common Law approach, such an action would succeed, because P would have been required only to prove the substance of the merit of his claim.

#### 4. CONCLUSION

I have suggested that the changes in the rules of civil evidence in England in the nineteenth century were primarily the product of pragmatic measures to effect first procedural and then jurisdictional convergence. There are a number of procedural principles around cost-effectiveness, simplicity and timeliness of process that may have affected the development of evidential principles. The main change in evidential principle is an increasing belief that cases should be decided on as much of the available evidence as is available, and that the tribunal of fact should be competent to assess that evidence. This competence is assisted by two things. First, the tribunal may be a judge, a judge with assessors, a jury or a referee, depending on the nature of the facts.<sup>108</sup> Secondly, all evidence will be subject at least in principle to cross-examination. The tactics of fact avoidance that had been developed through pleading in common law and equity trials were thankfully ended.

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<sup>106</sup> *The Amalia* (1864) Browne & Lushington 314 (Lord Kingsdown).

<sup>107</sup> M Macnair *The Law of Proof in Early Modern Equity* (Ducker and Humblot Berlin 1999) 46–47

<sup>108</sup> The nineteenth century witnesses considerable uncertainty about the ability of lay people to decide specialist matters. The statutory tribunals that were created from 1799 relied extensively on the presence of one or more specialist members on an adjudicatory panel: Stebbings (n 30) 121–128. When the Judicature Commissioners considered commercial litigation, in their *Third Report* of 1874, they recognised that the courts lacked the specialist technical and practical knowledge needed to adjudicate properly in commercial cases, and recommended appointed assessors to sit with the judge, but have no say in the final judgment: Judicature Commission *Third Report of the Commissioners* (HMSO London 1874) 8–9.

Although it would assist in developing an evidential *ius commune* to say that the dominant evidential principles at the end of the century were civilian in origin, there is in fact little evidence for this. Specifically, there is no evidence for direct continental influence on developments in English evidence law, and the evidence for indirect influence, for example via the New York Field Code, is far from conclusive. The Judicature Acts saw a triumph of common law evidence over equitable and civilian evidence, and that triumph appears to have been entirely indigenous.