Evidence law and the evidentiary objection: a view from the *British Trials* collection

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‘When a man raises his eyes from the common-law system of evidence’, wrote Professor Thayer in 1898, ‘he is struck with the fact that our system is radically peculiar’.¹ Thayer explained: ‘Here, a great mass of evidential matter, logically important and probative, is shut out . . . by an imperative rule, while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a “Law of Evidence”; but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine’.² Today, more than a century later, Thayer’s observations retain nearly all of their original force. Despite statutory modifications, Anglo-American law remains devoted to the exclusion of otherwise probative testimony,³ an attitude wholly unfathomable to lawyers trained, for example, in the civilian systems of Continental Europe.⁴

How, when, and why did this quintessentially Anglo-American approach to testimony develop? There seems to be a working assumption among legal historians that it emerged first in civil trials, where lawyers had been active for centuries, and spread to criminal trials in the late eighteenth century when lawyers began doing regular criminal work.⁵ On its face, this assumption is plausible. The only problem is that newly available sources point in exactly the opposite direction. Chadwyck-Healey has recently released on microfiche more than one thousand pamphlet accounts of civil and criminal trials. This collection, entitled *British Trials 1660–1900*, contains the only readily accessible and near-verbatim accounts of civil trials from the 1760s, 1770s, and 1780s, decades crucial to understanding how the rules of evidence developed.⁶ An examination of these pamphlets suggests that the routine use of the objection to oral evidence in civil cases developed only *after* lawyers had begun to appear regularly in criminal trials.

I conducted a sample of the civil trial pamphlets in the *British Trials* collection dating from the years 1745 to 1820.⁷ The average number of objections per case is displayed in Figure 1.1. The data in this chart tell the story. Between

Figure 1.1 *Objections to oral evidence in civil cases, 1745–1820*

Source: *British Trials 1660–1900* (Cambridge: Chadwyck-Healey, 1990–), Units 1–3.

1745 and 1760, the cases in the sample contained no objections whatsoever to oral evidence. Between 1765 and 1780, the average number of such objections per case increased slightly, first to 0.67 and then to 1.0.⁸ This pattern of minimal growth was replaced by a noticeable jump between 1785 and 1790, when the average number of objections per case rose to 3.5. A moderate increase then brought the number to 5.0 between 1795 and 1800, followed by a mild downturn between 1805 and 1810. Finally, in the last set of cases (between 1815 and 1820) another increase raised the number to 8.0.

Lord Jowitt was fond of saying that the secret of a good lawyer’s success is to discover the worst thing an opponent can say and then to say it oneself.⁹ With this admonition in mind, I should say a few words about two possible weaknesses in the data. First, the number of cases in the sample is very low. Each six-year average is based on somewhere between one and eight cases, and the mean number of cases for each calculation is only 3.4. These numbers are quite small and candour requires me to say that it is theoretically possible that the phenomenon I have described – a significant increase in the use of objections – did not actually exist. My reading of the cases, however, leads me to discount this possibility. There is a marked change in tone between the cases at each end of the sample. Even today, trials at which witnesses can testify unimpeded sound very different from trials interrupted by constant objections. The cases in the middle of the eighteenth century flow much more naturally

Figure 1.2 *Length of pamphlet accounts of civil cases, 1745–1820*

Source: *British Trials 1660–1900* (Cambridge: Chadwyck-Healey, 1990–), Units 1–3.

than those in the late 1810s, a phenomenon that did not go unnoticed by observers at the time.¹⁰ Accordingly, I am inclined to think that the sample, although small in overall numbers, does reflect a real change in trial practice.

The second potential weakness in the data is that the trials are of varying length. The fourteen-fold increase in the number of objections per case would be less significant if the trials at the beginning of the sample were fourteen times shorter. I have therefore graphed in Figure 1.2 the average page length of the trial reports in each six-year sample. As the numbers reveal, there is not much of an upward or downward pattern in the data. The cases at the end of the sample are approximately twice as long as those at the beginning, but between the starting and ending points, the graph moves up and down erratically. It therefore seems sensible to say that the observed increase in the use of objections is not just a reflection of the length of the trial.

Having examined and rejected these two possible weaknesses, let us assume that the numbers in the sample reflect reality. What then? What could have caused the use of testimonial objections in civil cases to develop in the late eighteenth century? The answer, I argue, is the influence from criminal procedure. I base this argument on three grounds: first, chronology; second, the restrictions in criminal cases on counsel's power; and third, the particular lawyers raising most of the objections.

According to the data, a noticeable increase in the number of objections to oral evidence began sometime in the 1780s. I have been unable to find any reason particular to civil cases that would explain this phenomenon. To take just two examples, the procedural reforms introduced by Lord Mansfield were

either unrelated or too early,¹¹ and the *nisi prius* reports – which Professor Wigmore saw as an important factor in the history of evidence¹² – did not begin until 1790.¹³ All of this led me to ask: if there was no obvious cause in civil practice, might the chronology fit better with developments in criminal litigation? The answer to this question is yes. Thanks to the work of Professor Langbein and others, we know that the use of lawyers at the Old Bailey rose sharply in the late eighteenth century.¹⁴ Professor Beattie has quantified this increase, which seems to have begun around the year 1780.¹⁵ According to Beattie, the percentage of cases with defence counsel stayed at or below 6 per cent until 1780; in that year, the percentage rose to 7.3, followed by 12.8 per cent in 1782, 17.6 per cent in 1784, and 20.2 per cent in 1786.¹⁶ A similar rise occurred on the prosecution side, where counsel appeared in less than 1 per cent of the cases in 1775, 3.8 per cent in 1780, more than 7 per cent in 1782 and 1784, and 10.9 per cent in 1786.¹⁷ What these numbers show is a dramatic rise in legal representation in criminal trials. In the short time between 1775 and 1786, the use of counsel at the Old Bailey increased approximately ten-fold.¹⁸ It is highly suggestive that the use of testimonial objections in civil cases rose only a few years after an increase in the appearance of lawyers on the criminal side. But to be persuasive, the connection between the two must rest on more than mere chronology.

More than chronology supports this article's thesis. Certain aspects of criminal practice suggest that the objection was more likely to develop there than in the civil trial. In particular, lawyers representing criminal defendants had much less power than their counterparts in civil practice. In the late eighteenth century, even as the use of lawyers in criminal cases was rising rapidly, the prisoner's counsel was allowed to do little more than cross-examine the victim and the other witnesses supporting the charge.¹⁹ Significantly, he was not allowed to address the jury.²⁰ On this point, an Old Bailey judge in 1790 was emphatic; as he told the prisoner, 'Your counsel cannot speak for you. If you have any account to give of yourself to the jury . . . or if you have any thing to observe on the evidence, you must do it yourself.'²¹

This restriction on defence counsel remained formally in place until 1836²² and had important implications for evidentiary practice. On the civil side, lawyers were well equipped to deal with potentially dangerous testimony. Not only did they have the right to examine and cross-examine witnesses, but they routinely spoke directly to the jury, which enabled them either to explain away unsafe testimony or to disparage its reliability.²³ Lawyers representing criminal defendants, however, were forced to focus their energies on vigorous cross-examination and the use of evidentiary objections.²⁴ To use a theatrical metaphor, we can think of lawyers in criminal cases spending comparatively little time on stage; while the curtain was up, they had to make every moment count. And this new level of courtroom warfare did not go unnoticed. One observer remarked in the late 1780s that ordinary citizens did not want to report crimes and go to court for fear of being 'entangled' in cross-examination.²⁵

Another observer writing in the 1790s argued that defence counsel had become so powerful that only a system of public prosecution could bring back a level playing field.²⁶ Although potentially alarming at the time, the vigorousness of lawyers in criminal trials was the logical response to the limited ways in which they were able to act on behalf of their clients.

All of this made sense in the criminal context. But how did the objection migrate into civil litigation? To answer this question, we need to look closely at the particular lawyers who made the most use of evidentiary objections. One advantage of the *British Trials* pamphlets is that they often identify the lawyers involved in each civil action. As I was reading the cases in the sample, I noticed that some lawyers raised objections to oral evidence much more frequently than others. In fact, a small set of lawyers seemed to be doing most of the objecting. The precise data are contained in Table 1.1, which lists the

Table 1.1 *Lawyers raising objections to oral evidence in civil cases, 1765–1820*

Name	Number of objections						Total
	1765–70	1775–80	1785–90	1795–1800	1805–10	1815–20	
Messing	2						2
Davy		1					1
Thurlow		1					1
<i>Bearcroft</i>			5				5
<i>Adair</i>			7				7
Grose			2				2
Garrow			2	4	2	4	12
Lawrence			1				1
Baldwin			2				2
Bower			2				2
LeBlanc				1			1
Shepherd					1		1
<i>Gibbs</i>					5		5
<i>Best</i>					8	9	17
Dauncey					1		1
Gurney					1	1	2
<i>Lens</i>						13	13
Copely						2	2
<i>Vaughn</i>						5	5
Topping						3	3
<i>Scarlett</i>						17	17
Hullock						2	2
Raine						1	1
<i>Cross</i>						7	7

Source: *British Trials 1660–1900* (Cambridge: Chadwyck-Healey, 1990–), Units 1–3.

Note: Lawyers raising five or more objections are shown in italics.

lawyers in the order in which they first raised an objection. The total number of objections made by each person is contained in the final column.

Who were the big objectors? In the first half of the table, and therefore reflecting the early development of this new practice, the lawyers raising the most objections were Edward Bearcroft (five objections), James Adair (seven objections), and William Garrow (six objections before 1800 and six objections thereafter). Comparatively little biographical information exists about Bearcroft.²⁷ Various sources reveal that he practised on the Oxford Circuit,²⁸ and he was described in a book of legal sketches as an 'eminent advocate'.²⁹ But no information appears to survive about the range of matters he handled, and to what extent (if at all) he acted in criminal cases. With respect to Adair and Garrow, however, biographical material is far more plentiful. Both men had extensive experience with criminal trials and, in particular, with the proceedings at the Old Bailey. For Adair, this experience came during his tenure as recorder of London, a post he held from 1779 to 1789.³⁰ One of the recorder's duties was to sit as an Old Bailey judge, and during his ten years on the job, Adair presided over exactly eighty sessions.³¹ After stepping down, he worked predominantly on civil cases, concentrating his practice in the Court of Common Pleas.³² Adair's tenure as recorder straddled the benchmark year 1780, around which time lawyers began appearing more and more in criminal trials. One of these lawyers, and perhaps the most well known, was William Garrow. So much has been written about him that only a few words are needed here.³³ Garrow's early career centred on the Old Bailey, and he quickly distinguished himself as a master at cross-examination.³⁴ By the early 1790s, less than ten years after being called to the bar, Garrow was widely regarded as the leading criminal barrister in London.³⁵ He also practised in civil cases, and in 1793, after being named a King's Counsel, began to work exclusively on the civil side.³⁶

No two men by themselves could have established the evidentiary objection as a regular feature of civil practice, but I would argue that it is right to think of Adair and Garrow as members of a larger group of lawyers whose experiences in criminal practice had an influence on their conduct in civil litigation. As lawyers began working more and more in criminal trials, it is natural that the skills and techniques needed for success in that arena would, over time, be deployed on the civil battlefield as well.

Mindful of Lord Jowitt's advice, let me be the first to say that the surviving sources do not contain the proverbial smoking gun, but then few sources ever do. Instead, this hypothesis relies on three important pieces of the puzzle: chronology, the limits on counsel's power in criminal cases, and the particular lawyers raising these objections in civil trials. It is highly suggestive that, in civil litigation, the use of the objection to oral evidence rose just after the appearance of lawyers in criminal practice did the same. This chronological connection makes sense, because the restricted role of counsel in criminal cases naturally led them to focus their adversarial energies on vigorous

cross-examination and the repeated use of evidentiary objections. The connection can also be demonstrated empirically, because the lawyers raising the most objections in the late eighteenth century – Adair and Garrow – had extensive experience with criminal practice at the Old Bailey.

The conventional wisdom has long held that the distinctively Anglo-American approach to evidence law and evidentiary practice must have developed first in civil cases, where lawyers had been practising since the Middle Ages, and then migrated much later into the criminal context. But the pamphlets examined in this article tell a different story. Indeed, they point in exactly the opposite direction. They suggest that a crucial impetus for the development of the modern rules limiting oral evidence – a more aggressive attitude on the part of lawyers striving to keep problematic testimony from the ears of the jury – manifested itself first in the criminal courts and spread from there into civil litigation.

Notes

This chapter is a revised version of the introduction and Part IV of T. P. Gallanis, ‘The rise of modern evidence law’, *Iowa Law Review* 84: 3 (1999), 499–560, which received the Selden Society’s David Yale Prize for 1999. The present article was prepared while the author was a Mellon Fellow at the Institute for Advanced Study, Princeton, and he thanks the Andrew W. Mellon Foundation and the Institute for Advanced Study for their support of his research.

- 1 J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little Brown, 1898), pp. 1–2.
- 2 *Ibid.*
- 3 E.g., R. Bagshaw (ed.), *Cross and Wilkins: Outline of the Law of Evidence*, 7th edn (London: Butterworths, 1996), p. 2.
- 4 See J. H. Langbein, ‘The English criminal trial jury on the eve of the French Revolution’, in A. P. Schioppa (ed.), *The Trial Jury in England, France, Germany: 1700–1900* (Berlin: Duncker & Humblot, 1987), pp. 33–4; J. H. Langbein, ‘The German advantage in civil procedure’, *University of Chicago Law Review*, 52: 4 (1985), 829.
- 5 E.g., J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), p. 144. Professor Langbein has questioned this working assumption but has left it to other scholars to test it. J. H. Langbein, ‘Historical foundations of the law of evidence: a view from the Ryder sources’, *Columbia Law Review*, 96: 5 (1996), 1202.
- 6 On the importance of these decades, see Gallanis, ‘Rise’, pp. 536–7.
- 7 I read all cases that fell within six-year increments between 1745 and 1820 (in other words, 1745–50, 1755–60, and so on).
- 8 Please note that I am referring here to objections raised by counsel, shown in Figure 1.1 in black. Interventions by judges also occurred, but these were very infrequent. See Figure 1.1, where the white bars represent the combined number of objections raised by counsel and judges.
- 9 R. F. V. Heuston, *Lives of the Lord Chancellors, 1940–1970* (Oxford: Clarendon Press, 1987), p. 115.

- 10 As one writer put it in 1819: 'There are few abuses at the Bar more crying . . . than the mode in which the examination of witnesses is sometimes conducted. . . . [A witness] may enter the box with a resolution to tell a plain straight-forward story, and to adhere closely to the facts within his own knowledge; but if he be not a man of more than ordinary firmness and acuteness, his purpose will be defeated by those who have attained such skill in confusing what is clear, and involving what is simple'. [J. P. Collier,] *Criticisms on the Bar* (London: W. Simpkin & R. Marshall, 1819), pp. 109–10.
- 11 For discussions of these reforms, see C. H. S. Fifoot, *Lord Mansfield* (Oxford: Clarendon Press, 1936), pp. 52–81; Oldham, *Mansfield Manuscripts*, pp. 140–60.
- 12 J. H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd edn (Boston: Little Brown, 1940), vol. 1, p. 238.
- 13 J. H. Baker, *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002), p. 412.
- 14 J. H. Langbein, 'Shaping the eighteenth-century criminal trial: a view from the Ryder sources', *University of Chicago Law Review* 50: 1 (1983), 124–6; J. M. Beattie, 'Scales of justice: defense counsel and the English criminal trial in the eighteenth and nineteenth centuries', *Law and History Review*, 9: 2 (1991), 226–30.
- 15 Beattie, 'Scales', pp. 227–8.
- 16 *Ibid.*, p. 227.
- 17 *Ibid.*
- 18 These numbers concentrate on criminal practice in London. Information about lawyers on assize is considerably sketchier. There are a few hints here and there that lawyers were more prominent on assize, but none of these dates from the late eighteenth century. E.g., C. Cottu, *De l'Administration de la justice criminelle en Angleterre et de l'esprit du gouvernement anglais* (Paris: H. Nicolle, 1820), p. 93; Oldham, *Mansfield Manuscripts*, p. 137. For the moment, the best guide is probably Professor Beattie's study of the Surrey Assizes. The relevant records in Surrey do not survive for the years after 1774; but at least until then, Beattie argues persuasively, the appearance of counsel in Surrey and at the Old Bailey followed the same 'broad pattern'. J. M. Beattie, *Crime and the Courts in England, 1660–1800* (Oxford: Oxford University Press, 1986), p. 360. It therefore seems reasonable to assume that the use of lawyers on assize also increased during the 1780s, even though at this point we have no way to quantify that rise.
- 19 Langbein, 'Shaping', p. 129; e.g., *R. v. Smith*, *Old Bailey Sessions Papers* [hereafter *OBSP*] July 1755 (no. 268), pp. 234–5.
- 20 E.g., *R. v. Davis*, *OBSP*, October 1755 (nos 390–2), p. 354.
- 21 *R. v. Newton*, *OBSP*, January 1790 (no. 128), p. 139.
- 22 Beattie, 'Scales', pp. 250–8.
- 23 For two examples out of many in the *British Trials* pamphlets, see *Onslow v. Horne* (1770) *British Trials 1660–1900* (Cambridge: Chadwyck-Healey, 1990–) [hereafter *BT*], no. 59, pp. 5–19, 31–9; *Knowles v. Gambier* (1757), *BT*, no. 57, pp. 4–11, 33–9, 51–6.
- 24 For recent commentary, see Beattie, 'Scales', pp. 232–6; S. Landsman, 'The rise of the contentious spirit: adversary procedure in eighteenth-century England', *Cornell Law Review*, 75: 3 (1990), 548–57.
- 25 J. Hawkins, *The Life of Samuel Johnson LL.D.* (Dublin: Chambers, 1787), p. 462. I owe this reference and the next one to Professor Beattie.

- 26 P. Colquhoun, *A Treatise on the Police of the Metropolis* (London: H. Fry, 1796), pp. 31–2, 246–7.
- 27 For example, Bearcroft's obituaries in the *Annual Register* (Chron. 1796, p. 44) and the *Gentleman's Magazine* (1796, p. 44) contain little information about his legal practice.
- 28 *Masters of the Bench of the Honourable Society of the Inner Temple, 1450–1883, and Masters of the Temple, 1540–1883* (privately printed, 1883), p. 81 (available in the University Library, Cambridge, under shelfmark LE.7.122); J. A. Venn (ed.), *Alumni Cantabrigienses: Part II, 1752–1900*, vol. 1 (Cambridge: Cambridge University Press, 1940), p. 202; T. A. Walker, *Admissions to Peterhouse or S. Peter's College, 1615–1911* (Cambridge: Cambridge University Press, 1912), p. 304.
- 29 [A. Polson,] *Law and Lawyers*, 2 vols (London: Longman, 1840), vol. 1, p. 182.
- 30 *Dictionary of National Biography* [hereafter DNB], vol. 1 (London: Smith Elder, 1908), pp. 69–70.
- 31 According to the OBSP, Adair's first session was held in October 1779; his last session was held in June 1789.
- 32 DNB, vol. 1, p. 69; e.g., *Brown v. Phoenix Assurance Company* (1789), BT no. 896.
- 33 For sketches of his life, see DNB, vol. 7, pp. 907–8; E. Foss, *A Biographical Dictionary of the Judges of England* (London: John Murray, 1870), pp. 289–90; Polson, *Law and Lawyers*, vol. 1, pp. 216–18. For more recent commentary, see Beattie, 'Scales', pp. 236–47.
- 34 DNB, vol. 7, p. 908.
- 35 Beattie, 'Scales', p. 237.
- 36 *Ibid.*