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Dutch Notaries: Do They Have a Future? How the Historical Foundations of the Civil Law Can Help Survive a Modern Crisis

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**DUTCH NOTARIES: DO THEY HAVE A FUTURE?
HOW THE HISTORICAL FOUNDATIONS OF THE
CIVIL LAW CAN HELP SURVIVE A
MODERN CRISIS**

Kees Cappon*

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I. INTRODUCTION

The notarial profession in the Netherlands is going through difficult times. The media and professional journals warn that Dutch notaries are on the brink of disaster,¹ speak of an ongoing crisis in the profession,² and document the loss of the good relations among notaries that have been carefully preserved and cherished for so long.³ Herman Tjeenk Willink, vice-president of the Council of State, wrote in his last annual report that the independence and impartiality of the notariat are showing signs of strain.⁴ Those who prefer a bolder turn of phrase have even used the word ‘degeneration.’⁵ Dutch notaries feel under siege, and a mantle of uncertainty has settled over them. What they feel uncertain about, in essence, is the very future of their ancient profession.

II. THE SEEDS OF UNCERTAINTY

It has a worrying ring: uncertainty among the very professionals whose task it is to provide certainty. Without legal

1. L.C.A. Verstappen, *De practycke van de notaris. Een notariële idylle en haar nuchter slot*, in 106 ARS NOTARIATUS 3 (Deventer, Kluwer, 2001) (inaugural lecture Groningen).

2. At the conference “Marktwerking in het notariaat: droom of nachtmerrie?” (“A free market system in the notariat: dream or nightmare?”), which was organized on November 5, 2009 by the Stichting tot Bevordering der Notariële Wetenschap in Amsterdam, L.C.A. Verstappen spoke about a “crisis” in the Dutch notariat. The proceedings of this conference are published in H.J.C. Isenee & Barbara Baarsma, *Marktwerking in het notariaat: droom of nachtmerrie?*, in 143 ARS NOTARIATUS (Deventer, Kluwer, 2010).

3. Verstappen, *supra* note 1, at 3; J. de Gruiter, *Help, de notaris brandt op. Burn out: zorgwekkend nieuw fenomeen*, 3:1 NOTARIAAT MAGAZINE 10-14 (2003); H.D. Tjeenk Willink, ‘De Raad in de staat—Algemene beschouwingen’, in JAARVERSLAG 2008 VAN DE RAAD VAN STATE 15-38 (The Hague, Raad van State 2009); and *id.* at 18.

4. Tjeenk Willink, *De Raad in de staat* 19; see also *Politiek heeft volgens de Raad van State oren te veel laten hangen naar de markt*, HET FINANCIËLE DAGBLAD, Apr. 9, 2009.

5. At the conference “Marktwerking in het notariaat,” M.-J. van Mourik spoke about the “degeneration” which threatens the notariat. “Marktwerking in het notariaat,” *supra* note 2. See also R. Didde, *Broedertwist. Verloedert het notariaat nu wel of niet?*, MR. MAGAZINE VOOR JURISTEN, Aug. 8, 2008, at 94-101. *Id.* at 94, page where one finds a quotation of Van Mourik with the same qualification.

certainty, for government and the public alike, creating a reasonably well-ordered society would seem an impossible task. By implication, this uncertainty may well be prejudicial to the Dutch legal community. How can a profession described as being of ‘vital importance’ to Dutch society have allowed such a situation to develop?⁶ Allow me to outline the steps that led to this crisis with a few broad brushstrokes.

When the Dutch welfare state completely outgrew its financial limits at the end of the 1970s, the reaction came in the form of a fairly fundamental reorientation. Inspired by Anglo-American economic theories and the policies derived from them by Reagan and Thatcher, and stimulated by the challenge of European cooperation, the Dutch government initiated a process of deregulation in the 1980s, allowing market forces to come to the fore.⁷ The fall of the Berlin Wall in 1989 injected a powerful forward thrust into this policy. Deregulation came to symbolize the ultimate triumph of the principle of a market-led democracy.⁸ This policy, which has endured to the present day, has expanded not only the power of the market, but also that of the state, which has created instruments for itself to supervise those very freed-up market forces.⁹ In the course of the 1990s, this tended to undermine the autonomy and self-regulatory powers of the legal professions.

In those same decades, a sharp rise in the demand for specialist services from government and the business community led to the growth of large commercial offices offering a variety of legal services such as advocacy and notariat working alongside

6. N.J.H. Huls & Z.D. Laclé, *Het notariaat: Latijns, Angelsaksisch of provinciaals?*, 77 NEDERLANDS JURISTENBLAD 1408-1413 (2002). “*De maatschappelijke behoefte aan een onpartijdige deskundige jurist als notaris is immense*” (The public demand for an impartial, expert lawyer such as a notary is enormous). *Id.* at 1409.

7. For the historical context and the political, philosophical and economical motives for the wave of deregulation and the embrace of the free market as a regulation mechanism in the Western world since the 1970s, read the captivating article of the English historian Tony Judt, *What is living and what is dead in social democracy?*, in LVI THE NEW YORK REVIEW OF BOOKS nr. 20, 86-96 (2009). The views set forth in this article are also to be found in a broader context in Judt’s latest and last book *ILL FARES THE LAND: A TREATISE ON OUR PRESENT DISCONTENTS* (London, Allen Lane, 2010).

8. Willink, *supra* note 3.

9. *Id.* at 18.

each other and in some cases together. This trend was further enhanced by the internationalization or Europeanization of economic and administrative/political structures. Following the example of the big law firms in the United States, cooperative structures were created by British and Dutch firms, in some cases culminating in mergers.¹⁰ The Anglo-Saxon commercial mindset gradually took possession of the top ranks of Dutch legal services.

Another profound influence, one that should not be underestimated, has been the growth of communication and information technology. Not only has the digital revolution radically altered the nature of the work done by individual lawyers, but it has also made cooperation among different legal professions, in both national and international frameworks, virtually indispensable, and has brought legal services, in a manner of speaking, into the client's home. The internet has turned professional expertise into simple merchandise. That, in a nutshell, is how the legal professions have developed in the Netherlands over the past few decades.¹¹

III. THE NEW NOTARIES ACT

The Dutch notariat was not in the vanguard of these developments in the period I have just described, but notaries gradually became aware that ignoring them was not an option. Starting in the 1970s, the Royal Dutch Notarial Society (KNB) appointed one committee after another to formulate conclusions regarding the future position and working methods of the notariat.¹² These exercises produced little in the way of concrete

10. A.A. Van Velten, *Het notariaat: inderdaad een elastisch ambt. Het Nederlandse notariaat in de tweede helft van de twintigste eeuw, geschreven ter gelegenheid van het vijftigjarige bestaan van de Stichting tot bevordering der notariële wetenschap*, 108 ARS NOTARIATUS 147-170 (Amsterdam, Stichting tot Bevordering der Notariële Wetenschap, 2000).

11. W. ARTS ET AL., *EEN KWESTIE VAN VERTROUWEN. OVER VERANDERINGEN OP DE MARKT VOOR PROFESSIONELE DIENSTEN EN IN DE ORGANISATIE VAN VRIJE BEROEPEN* 13-15 (Amsterdam, Amsterdam University Press, 2001) (the developments in the legal professions sketched in this paragraph are more broadly described); Huls & Laclé, *Het Notariaat: Latijns, Angelsaksisch of provinciaals?*, 2002 NETHERLANDS JURISTENBLAD (NJB) 1410 (2002) (for an abstract of this description).

12. Van Velten, *supra* note 10, at 110-114.

results—until the Purple Coalition,¹³ driven by an old-fashioned belief in progress based on the principle of economic rationalism, took the initiative.

On May 3, 1994, the then state secretary for justice, Aad Kosto, introduced into parliament a bill for a new Notaries Act,¹⁴ to replace the Notaries Act of 1842. According to the explanatory memorandum accompanying the bill, the pressing need for this new legislation arose mainly from ‘the greatly increased complexity of society,’ which had led to a proliferation of legislation and to the ‘juridification’ of society. This in turn had created a great need for scale expansion, said the state secretary. To achieve this, the existing system in which practices were established in fixed places should be replaced by one in which notaries were free to set up business where they chose.¹⁵

The state secretary had a second deregulation measure in store: the scrapping of fixed fees.¹⁶ Until then, the fees for notarial services had been laid down in the 1847 Tariffs Act.¹⁷ But these fees had never been amended since then;¹⁸ the fee for a notarial act was nominally the same in 1994 as it had been in 1847: three guilders. So this Act was of no practical significance. Since the 1930s, notaries had charged fees according to rates laid down by their professional body, the KNB. In this respect, the Netherlands was out of step with other European countries, where governments set these fees by act of parliament.¹⁹ But state secretary Kosto argued that a system of uniform fees imposed centrally had no

13. The “purple coalition” consisted of Labour (PvdA), the conservative liberal party VVD, and the liberal democrat party D66.

14. “Wetsvoorstel wettelijke regeling van het notarisambt. . . .” *Kamerstukken II* 1993-1994, 23.706, nr. 1-2.

15. “Memorie van toelichting bij het wetsvoorstel wettelijke regeling van het notarisambt. . . .” *Kamerstukken II* 1993-1994, 23 706, nr. 3, at 2; Huls & Laclé, *supra* note 11, at 1409.

16. “Memorie van toelichting bij het wetsvoorstel wettelijke regeling van het notarisambt. . . .” *Kamerstukken II* 1993-1994, 23 706, nr. 3, at 2, 10-11, 43-47 and the *Nota naar aanleiding van het verslag, ontvangen op, Jun. 25, 1996, Kamerstukken II* 1995-1996, 23 706, nr. 6, at 12-14, 17.

17. *Staatsblad* 1847, nr. 12, at 5-6.

18. For notarial fees since 1847, *see* G. CHR. KOK, *HET NEDERLANDSE NOTARIAAT 74-76* (Deventer, Kluwer, 1971) (doctoral dissertation, Leiden University).

19. “Memorie van toelichting bij het wetsvoorstel wettelijke regeling van het notarisambt. . . .” *Kamerstukken II* 1993-1994, 23 706, nr. 3, at 10-11, 43.

place in a government policy geared towards encouraging market forces. The fees for notarial acts should be determined by the market. Tellingly, it was the ministry of economic affairs that had added the operation of market forces to the bill at the last moment; the justice ministry initially resisted the idea.²⁰

The passage of this bill through parliament took five years. At the beginning, the House of Representatives balked at introducing market forces into notarial services. Only the liberal democrat party D66 was really enthusiastic.²¹ After the government made a number of concessions concerning the pace at which market forces would be allowed to take over, the House of Representatives finally passed the bill on April 16, 1998, with only the two members of the Socialist Party voting against it.²² Then the Bill went to the Senate, where it encountered opposition that was based more on points of principle. The small Christian parties rejected the notion that a notarial act should be seen as ‘a pure economic product for which a price could be negotiated as if it were a box of oranges at the market.’²³ The Labour Party (PvdA) saw the bill as ‘an example of confidence in the blessings of market forces being taken to extremes.’²⁴ And the conservative liberal party VVD called the bill’s abandonment of standardized fees ‘a serious flaw.’²⁵ The Senate eventually passed the bill with

20. Zayènne Dyanirah Laclé, *Notabelen vernieuwen. Gevolgen van marktwerking in het notariaat* (doctoral dissertation, Leiden University), 137 ARS NOTARIATUS 73-74 (Deventer, Kluwer, 2007).

21. See *Verslag van de vaste Commissie van Justitie, vastgesteld op 14 oktober 1994, Kamerstukken II 1994-1995*, 23.706, nr. 5; see *id.* at 12-14 (for the position of D66).

22. *Handelingen II 1997-98*, at 5466-5472, 5646-5647. In the Nadere memorie van antwoord which was sent to the Eerste Kamer (Senate) on November 20, 1998, the state secretary of Justice M.J. Cohen summarized the opinion in the Tweede Kamer (Lower House) in the following words: “Na het wetgevingsoverleg van 8 april 1998 bleken de meeste fracties in de Tweede Kamer, die aanvankelijk negatief stonden tegenover het vrijlaten van de tarieven, uiteindelijk vóór het wetsvoorstel te stemmen, waardoor het voorstel vrijwel unaniem door de Tweede Kamer is aangenomen” (*i.e.*, the parties which were negative about the bill in the beginning all voted in favour of it in the end). *Kamerstukken I 1998-1999*, 23 706, nr. 25a, at 11.

23. *Handelingen I 1998-99*, 24ste vergadering, at 1012.

24. *Id.* at 1014.

25. *Id.* at 1017.

35 votes in favour and 28 against.²⁶ Here too, political support for the bill ended up trumping objections to its content.

IV. THE CIVIL-LAW OR LATIN NOTARIAT

Just how warranted were the misgivings expressed by many members of the Senate has now become very clear, ten years on. The introduction of freedom of establishment and of market forces has precipitated the notarial profession into a crisis. There is nothing incomprehensible here. Abandoning old certainties and accepting radical change is difficult and takes time, especially when the profession's internal crisis is exacerbated by an economic malaise in which notarial firms have been hit badly.²⁷ But does all this also constitute sufficient reason to question the viability of the notariat as an independent profession of public officers, as some voices—not the least authoritative voices by any means—have occasionally suggested?²⁸ I do not believe so.

26. *Id.* 1126.

27. The legal professions were hit hard by the credit-crunch of 2008-2009. *The Economist* of January 21, 2010 published that 2009 was “the worst year ever for law-firms lay-offs.” *Laid-off lawyers, Cast-off consultants*, *THE ECONOMIST*, Jan. 21, 2010, <http://www.economist.com/node/15330702> (Last visited November 11, 2011). And while the *Financieele Dagblad* of February 18, 2010 said “*Topadvocaten weerstaan recessive*” [“Top-lawyers withstand recession”] and “*Na eerste schrik floreren advocaten aan de Zuidas ook tijdens recessive*” [“After the first shock the lawyers along the Amsterdam Zuidas thrive again”], one could also read that the law firm Boekel de Nerée in 2009 let 12 of their 27 notaries go, among which three of the seven associates. *Topadvocaten weerstaan recessive*, *FINANCIEELE DAGBLAD*, Feb. 18, 2010, at 13. In all fairness it should be noticed that this reorganization was not only due to the credit-crunch. The positive coverage in the *Financieele Dagblad* met no response in the *NRC Handelsblad* which said on March 26, 2010, “*Grote advocatenkantoren krimpen door crisis*” (“Big law firms shrink as a result of the crisis”). *Grote advocatenkantoren krimpen door crisis*, *NRC HANDELSBLAD*, Mar. 26, 2010, at 13. Many law firms in the top fifty have reduced their number of lawyers by ten to twenty percent. Especially the law firms with an Anglo-Saxon mother reduced their staff. The crisis in the notariat resulted in a decline from 601 to 564 notaries at the fifty biggest law firms, according to *NRC Handelsblad*. *Id.*

28. L. Hardenberg writes in his review of E.W.A. Henssen's *Twee Eeuwen Advocatuur in Nederland*: “*De volgende eeuw zal dat afronden [d.i. het opgaan van verschillende juridische professies in de advocatuur] en, naar ik vermoed, ook het notariaat in de advocatuur zien versmelten*” (i.e., Lawyers and notaries will merge). L. Hardenberg, 67 *LEGAL HIST. REV.* 405-406 (1999) (reviewing E.W.A. HENSSEN, *TWEE EEUWEN ADVOCATUUR IN NEDERLAND 1798-1998* (Deventer: Kluwer 1998)). Ironically, van Velten writes that already in 1959,

In one of six G.M. Trevelyan lectures delivered at Cambridge University in 1961, the famous historian and historical theorist E.H. Carr (1892-1982) said: 'It is at once the justification and the explanation of history that the past throws light on the future, and the future throws light on the past.'²⁹ In the spirit of the first part of this aphorism, I shall take a closer look at the history of the public notariat, a history that inspires me with confidence that the profession will weather this storm too. It is a long and volatile history, and one that is closely intertwined with the legal culture of continental Europe. It can be encapsulated in a single phrase: the civil-law or Latin notariat.

The term 'Latin notariat' is often used incorrectly. For instance, in the course of the five-year parliamentary debate on the new Notaries Act, the question was repeatedly raised of whether the introduction of market forces did not amount to a break with the tradition of the Latin notariat. From the numerous comments made on this issue by ministers, state secretaries and MPs, it is clear that those concerned were basing themselves on a narrow and in some cases quite false definition of the Latin notariat. Take André Rouvoet, who was the leader of the parliamentary party of the Protestant RPF. At a meeting held to discuss the proposed bill on April 8, 1998, he said: 'The difference of opinion is limited to a few points, and these are precisely the points which constitute infringements of the Latin notariat: freedom of establishment and the freedom to set fees.'³⁰ So in Rouvoet's view, fixed places of establishment and fixed fees were characteristic features of the Latin notariat. But this picture of the Latin notariat is actually based on the notarial profession as it had existed in the Netherlands since the Second World War. That is obviously a highly relevant

Nouwen (a Dutch notarial professor) foresaw that notaries would soon merge with lawyers. A.A. van Velten, *Het notariaat: Interdaad een ElastischAmbt, Het Nederlandse Notariaat in de Tweede Helft van de Twintigste Eeuw*, 70 LEGAL HIST. REV. 164, n. 58. See also "Notarissen kraaien oproer," MR. MAGAZINE VOOR JURISTEN 5, 7, nr. 11 (2009) (In which notary H. Oosterdijk is quoted with the words "De kwaliteit en het voortbestaan van het notariaat staan op het spel" ("The quality and the survival of the notaries is at risk"))).

29. E.H. CARR, *WHAT IS HISTORY?* 117 (2d ed., Basingstoke, Palgrave Macmillan, 2001).

30. *Verslag van een wetgevingsoverleg, vastgesteld 16 april 1998, Kamerstukken II 1997-1998, 23 706, nr. 32, at 22.*

context for a politician. But it is a narrow view of the term—too narrow. If politicians had been better informed about the history of the notarial profession, a great many discussions about ways in which the new Notaries Act supposedly violated the essence of the Latin notariat could have been pursued differently, or avoided altogether. But it is not just politicians who sometimes have a rather limited historical perspective. What is more worrying is discovering inaccurate descriptions of the Latin notariat in doctoral dissertations in law. In her 2007 dissertation at Leiden University on the consequences of the introduction of market forces in the notariat, Zayènne Laclé writes: “The Latin notariat was created by the Napoleonic Ventôse Law that served as an example in many European countries.”³¹ Now Napoleon was certainly responsible for numerous innovations in the spheres of law and administration, but the Latin notariat is not one of them. So both among politicians and law graduates, it appears that the Latin notariat is not always fully understood. All the more reason to try to provide a little clarity on this issue this afternoon. What is the Latin notariat? What is its essence? And why does this very essence instill confidence for the future?

V. THE RISE AND SPREAD OF THE LATIN NOTARIAT

The notariat as it is now known in the Netherlands, as a profession of public officers who derive their income from providing services to the public, is one of the creations of the Italian legal genius that laid the foundations of our legal system during the twelfth-century Renaissance, with some help from

31. Laclé, *supra* note 20. In a speech at the 11th International Congress of the Latin Notariat in Athens on October 8, 1971, Adriaan Pitlo, the founder of the notarial science in the Netherlands, asked “Why the designation Latin notariat?” His answer: “I suppose for two reasons. Latin, because of the origin of the Latin notary in Italy during the Middle Ages and because of the fact that the Latin notary found its definite, official form in the Napoleonic legislation.” Adriaan Pitlo, *Le notariat et la culture européenne*, in *ATLAS DU NOTARIAT: LE NOTARIAT DANS LE MONDE. HUIT SIÈCLES DE NOTARIAT LATIN—QUATRE DÉCENNIES D’UNION INTERNATIONALE* (E.M. van der Marck ed., Deventer, Kluwer, 1989) (Essais édités par les soins de la Fondation pour la promotion de la science notariale à l’occasion du XIXe congrès de l’Union Internationale du Notariat latin, du 21 au 27 mai 1989 à Amsterdam); 42 *ARS NOTARIATUS* 367-375, 369 (Deventer, Kluwer, 1989).

Roman law.³² The public notary was born from a symbiosis of Northern Italian legal practice of the High Middle Ages and Justinian ideas.³³ Although ancient Rome did not have a notariat in the sense defined above, Roman law did help to shape this institution, through the agency of the glossators, the first legal scholars to devote Justinian's *Corpus Iuris Civilis* to systematic study.³⁴ The *Corpus Iuris* contained many of the terms and concepts that mediaeval jurisprudence linked to the incipient notarial profession.³⁵

32. The best synthesis of the origins of the European legal science is written by F. Wieacker. WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY* 28-46 (Tony Weir trans., Oxford, Clarendon Press, 1995). See also P. KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* (4th ed., Munich, C.H. Beck'sche Verlagsbuchhandlung, 1966). Among legal historians, some of Koschaker's theses are considered a bit out of date.

33. "We hebben het notariaat van de elfde eeuw te danken aan een gelukkig samengaan van rechterlijke instanties van het oude Rome en van de Lombarden" (*i.e.*, We owe the notariat of the eleventh century to a happy union of the legal institutions of ancient Rome and of the Lombards). Pitlo, *supra* note 31, at 716. C.M. Cappon, "Het notariaat in de late middeleeuwen (± 1250 - ± 1540)," in A. Fl. Gehlen, *Het notariaat in de Lage Landen (± 1250 -1842). Opstellen over de geschiedenis van het notariaat in de Lage Landen vanaf de oorsprong tot in de negentiende eeuw*, 117 *ARS NOTARIATUS* 3-29 (P.L. Nève ed., Deventer, Kluwer, 2005).

34. 2 A. de Boüard, *L'acte privé*, in *MANUEL DE DIPLOMATIQUE FRANÇAISE ET PONTIFICALE 163-181* (Paris, Auguste Picard, 1929); A. Wolf, *Das öffentliche Notariat*, in *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE: ERSTER BAND, MITTELALTER (1100-1500). DIE GELEHRTEN RECHTE UND DIE GESETZGEBUNG*, (hereinafter "HANDBUCH DER QUELLEN") 505-514 (Helmut Coing ed., Munich, C.H. Beck'sche Verlagsbuchhandlung 1973); M. Oosterbosch, "De fide instrumentorum. De notariële oorkonde en haar bewijskracht in de middeleeuwen," in P.L. Nève, *Instrumentum quantum pactum. Zes opstellen over de kracht van de notariële akte vanaf de tijd van keizer Justinianus tot aan het huidige recht*, *ARS NOTARIATUS* 13-38 (Deventer, Kluwer, 1991).

35. In discussing the legislation of Justinian (529-534) concerning the *tabelliones* and the probative value of the deeds made by them, Hans Ankum shows that the concepts of the medieval public notariat owe very much to Roman law. H.A. Ankum, 'Les tabellions romains, ancêtres directs des notaires modernes', in *ATLAS DU NOTARIAT: LE NOTARIAT DANS LE MONDE. HUIT SIÈCLES DE NOTARIAT LATIN-QUATRE DÉCENNIES D'UNION INTERNATIONALE* 5-44 (E.M. van der Marck ed., Deventer, Kluwer, 1989). The early history of the public notariat is a very fine example of the early reception of Roman law. Boüard, *supra* note 34, at 174; Oosterbosch, *supra* note 34, at 15-17; A.H.P. Van den Bichelaer, *Het notariaat in Stad en Meierij van 's-Hertogenbosch tijdens de late middeleeuwen. Een prosopografisch, diplomatisch en rechtshistorisch onderzoek* 11-13 (Amsterdam, Thela Thesis, 1998) (doctoral dissertation, VU University Amsterdam).

These developments took place in Lombardy in Northern Italy. From the end of the eighth century onwards, this kingdom witnessed a development that, in retrospect, was crucial to the genesis of the public notariat. At this time, Lombardy had officials who combined the roles of judges and notaries. When such a judge-notary drew up an act for a private citizen, a purchase agreement for instance, he did so in the form of a report of legal proceedings, with claim, defence, and judgment. The judge-notary essentially staged legal proceedings, and the legal transaction therefore took the form of a judgment. This contentious jurisdiction had great evidentiary advantages. Like any judicial document, the notarial act too now constituted *prima facie* proof; it was regarded as authentic. The formulation of a notarial act in the form of a judgment handed down by a court was a decisive step in the creation of the public notariat. Even when this judicial form was abandoned in the eleventh century, the notarial act retained its authentic character.³⁶

Two developments in Northern Italy in the eleventh and twelfth centuries did much to help this Lombardic judge-notary grow into a legal institution that would spread throughout Europe in the course of the Middle Ages. Europe, and Northern Italy in particular, enjoyed a marked economic and cultural revival in the eleventh and twelfth centuries.³⁷ This greatly boosted the demand for notaries' services, and the number of notaries steadily increased. At the same time, the study of jurisprudence was developed at the University of Bologna on the basis of the study of Justinian's *Corpus Iuris*.³⁸ The glossators discovered in the Justinian legislation scores of passages referring to public clerks

36. Boïard, *supra* note 34, at 166-174. G.R. Dolezalek, *De kerkelijke notaris in de middeleeuwen*, in C.C.T.M. VAN HAREN ET AL. GEPASSEERD: DE ROL EN POSITIE VAN NOTARISSEN IN HET VERLEDEN 316 (Nijmegen, Gerard Noodt Instituut, 1987); Van den Bichelaer, *supra* note 35, at 10-11.

37. CH.H. HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* (Harvard University Press, 1927); WIEACKER, *supra* note 32, at 28-30; *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* (R.L. Benson & G. Constable eds., Oxford, Clarendon Press, 1982).

38. KOSCHAKER, *supra* note 32, at 55-86; WIEACKER, *supra* note 32, at 30-46.

known as *tabelliones*.³⁹ As was customary among mediaeval jurists, they interpreted these passages in the context of their own times, in other words they related them to their own notariat.⁴⁰ In so doing, they wove the notariat of Northern Italy into the authoritative framework of Roman law and endowed it with a sophisticated barrage of legal terminology. It is no exaggeration to say that without this academization of law, the dissemination of the notarial profession throughout Europe would not have been possible.

Like the Roman *tabellio*, the mediaeval notary was a clerk who offered his services to the public. To express this, they referred to themselves more and more frequently in the course of the eleventh and twelfth centuries as *notarius publicus*. The term *publicus* also had a second meaning—it signified ‘public confidence.’ A notarial act was therefore also known as an *instrumentum publicum*, a document that inspired public confidence, an authentic document. The notary owed this public confidence to the fact that he was appointed by the public authorities—something that was always strongly emphasized by mediaeval legal scholars. Understandably so, since this was what defined a notarial act as *prima facie proof*.⁴¹

What was the public authority responsible for appointing notaries? In Northern Italy, the right to appoint notaries initially resided with the kings of Lombardy. When this monarchy fell to the Holy Roman Emperor in the tenth century, this created the conditions for the spread of the public notariat throughout the known Western world. In theory the emperor’s authority was absolute,⁴² which meant that the notaries he appointed could work

39. See *supra* note 34. About the glossators, see H. LANGE, *RÖMISCHES RECHT IM MITTELALTER, BAND I, DIE GLOSSATOREN* (Munich, C.H. Beck’sche Verlagsbuchhandlung, 1998).

40. For this method of the mediaeval jurists, see KOSCHAKER, *supra* note 38, at 87-91; see also P. STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 71-74 (Cambridge, Cambridge University Press, 1999).

41. Dolezalek, *supra* note 36, at 7-9; Oosterbosch, *supra* note 34, at 17-22; C.M. Cappon, *De opkomst van het testament in het Sticht Utrecht. Een studie op grond van Utrechtse rechtsbronnen van het begin van de achtste tot het midden van de veertiende eeuw*, 57 *ARS NOTARIATUS* 135-141 (Deventer, Kluwer, 1992).

42. H. KRAUSE, *KAISERRECHT UND REZEPTION* 14-15, 3640, 45, 49-50 (Heidelberg, Carl Winter, Universitätsverlag 1952). See ROBERT FEENSTRA, *FATA IURIS ROMANI: ETUDES D’HISTOIRE DU DROIT* 27-39 (Leyde, Presses

wherever they chose. The other universal ruler in the Middle Ages, the pope in Rome, had claimed the right to appoint public notaries in the twelfth century.⁴³ They performed exactly the same duties as the notaries who worked by imperial authority, and they too could offer their services in any part of Christendom by virtue of the pope's universal authority.⁴⁴

How did this public notariat spread from Northern Italy to the rest of Europe?⁴⁵ In answering this question, we must distinguish between Southern and Northern Europe. In Italy, Southern France, and Spain, after the fall of the Western Roman Empire (AD 476) Roman law continued to exist but at a low ebb, mainly in the form of customary law.⁴⁶ Jurists who had studied Roman and canon law at university could set to work in that system straight away. In these conditions, the public notariat, which—thanks to the glossators—bore the clear imprint of Roman law, spread easily. Its dissemination was facilitated by the great value that the legal culture of Southern Europe, with its tradition of Roman law, attached to written evidence. Around 1200, public notaries appeared throughout the Southwest European part of the Mediterranean region.⁴⁷ They worked there by authority of the

Universitaires de Leyde, 1974); LEIDSE JURIDISCHE REEKS XIII (Leyden, Presse Universitaire de Leyde, 1974); J.P.H. DE MONTÉ VER LOREN, HOOFDLIJNEN UIT DE ONTWIKKELING DER RECHTERLIJKE ORGANISATIE IN DE NOORDELIJKE NEDERLANDEN TOT DE BATAAFSE OMWENTELING 50-51, 85-86, 285-286 (7th ed., J.E. Spruit ed., Deventer, Kluwer, 2000).

43. Oosterbosch, *supra* note 34, at 18-19.

44. Dolezalek, *supra* note 36, at 6-11. Van den Bichelaer, *supra* note 35, at 12-13.

45. Cappon, *supra* note 33, at 7-9.

46. W.J. ZWALVE, HOOFDSTUKKEN UIT DE GESCHIEDENIS VAN HET EUROPESE PRIVAATRECHT. I, INLEIDING EN ZAKENRECHT 16-17 (3rd revised ed., The Hague, Boom Juridische Uitgevers, 2006).

47. Boüard, *supra* note 34, at 183-187; Dolezalek, *supra* note 36, at 7; Van den Bichelaer, *supra* note 35, at 13-14; F. Roumy, *Histoire du notariat et du droit notarial en France*, in HANDBUCH ZUR GESCHICHTE DES NOTARIATS DER EUROPÄISCHEN TRADITIONEN 125-168 (M. Schmoeckel & W. Schubert eds., Rheinische Schriften zur Rechtsgeschichte, Baden-Baden, Nomos, 2009) (hereinafter "HANDBUCH ZUR GESCHICHTE"). Roumy states that in the South of France the notariat makes his first appearance in the cities around the middle of the twelfth century; only in the course of the thirteenth century it spreads over the countryside of the Midi. At which moment the notariat really became a public notariat, Roumy finds difficult to say, but at the end of the twelfth century

emperor and/or the pope, and were appointed by city councils or sovereign rulers; they could therefore only work within the borders of the civic or sovereign territory.⁴⁸

Northern Europe had less favourable conditions for the adoption of the public notariat. The law in Northern France, the Netherlands, Britain, and Germany was of Germanic origin. An essential feature of this law was the emphasis on oral proceedings and evidence.⁴⁹ So in contrast to Southern Europe, this region had no practice that linked up seamlessly to the services offered by a public notariat. In consequence, the notariat did not penetrate this region in a more or less spontaneous process, as it had in Southern Europe, but instead entered through the channels of ecclesiastical courts.⁵⁰ As a universal power, the Church had jurisdiction over diverse areas of law throughout the Christian world. This ecclesiastical justice, like the Roman law from which it derived, was based on written proceedings.⁵¹ Since 1215, it had been a requirement of this Roman canon law that a written record must be kept of the proceedings by a *persona publica*, that is, a public notary, or by two other reliable persons.⁵² So public notaries first appeared in Northwest Europe around 1239, as clerks of ecclesiastical courts.⁵³ But they had come to stay.

all notarial deeds have an authentic form. Roumy thus has the same period in mind as Dolezalek and Van den Bichelaer.

48. Boüard, *supra* note 34, at 194-195; Van den Bichelaer, *supra* note 35, at 13-14; Roumy, *supra* note 47, at 131-132.

49. Boüard, *supra* note 34, at 229. R.C. VAN CAENEGEM, *LA PREUVE DANS LE DROIT DU MOYEN AGE OCCIDENTAL: RAPPORT DE SYNTHÈSE*. STUDIA HISTORICA GANDENSIA, reprint from *La Preuve*, IIe partie: RECUEILS DE LA SOCIÉTÉ JEAN BODIN XVII 691-753 (Brussels, Université Libre de Bruxelles, 1965). D. Bieresborn, *Klage und Klageerwiderung im deutschen und englischen Zivilprozess. Eine rechtshistorische und rechtsvergleichende Untersuchung unter besonderer Berücksichtigung der Beeinflussung durch das römisch-kanonische Verfahren*, 195 RECHTSHISTORISCHE REIHE 74 (Frankfurt am Main, Peter Lang, 1999). A very clear introduction to the German procedural law is to be found in C.L. Hoogewerf, *Het Haarlemse stadsrecht (1245). Inleidende beschouwingen, tekst, vertaling en artikelsgewijs commentaar* 46-89 (Amsterdam, Cabeljauwpers, 2001) (doctoral dissertation, VU University Amsterdam); Roumy, *supra* note 47, at 137.

50. Dolezalek, *supra* note 36, at 12.

51. Boüard, *supra* note 35, at 247-248.

52. Dolezalek, *supra* note 36, at 7-9; Oosterbosch, *supra* note 34, at 17-19; Van den Bichelaer, *supra* note 35, at 14-17.

53. Dolezalek, *supra* note 36, at 12.

VI. THE NOTARIAL PROFESSION
IN THE NORTHERN NETHERLANDS

Between 1250 and 1350 the public notariat was introduced into the Netherlands and became an established profession there.⁵⁴ Just as in other parts of Europe, two factors played an important role in this development. The first factor was the presence in the country of itinerant notaries from Southern Europe, some of whom operated independently while others worked in the retinues of papal legates. The second was the influence of the ecclesiastical courts: the ecclesiastical judges or Officials in the Netherlands started hiring notaries around 1300.⁵⁵ These notaries worked under the auspices of the imperial or papal authorities, but were also permitted to offer their services independently. They were initially appointed by the bishop, and in the late Middle Ages increasingly by sovereign rulers.⁵⁶ Ecclesiastical and secular authorities alike had a considerable stake in guaranteeing reliable legal transactions within their jurisdictions. From this time on, the public notariat was permanently entrenched in the Netherlands.

54. Van den Bichelaer, *supra* note 35, at 13-17; Cappon, *supra* note 33, at 9-15. Instructive for the Belgian history of the notariat is P.L. Nève, *Schets van een geschiedenis van het notarisambt in het huidige België tot aan de Franse wetgeving*. Rechtshistorische reeks van het Gerard Noodt Instituut nr. 34, (Nijmegen, Gerard Noodt Instituut, 1995). P.L. Nève, "Het notariaat in de Habsburgse Nederlanden," "Het notariaat in het prinsbisdom Luik," "Het notariaat in het vorstendom Stavelot-Malmédy," "Het notariaat in Staats-Vlaanderen," in Gehlen, *supra* note 33, at 37-89, 137-144; F. Stevens, *Histoire du notariat en Belgique*, in HANDBUCH ZUR GESCHICHTE, *supra* note 47. 12 RHEINISCHE SCHRIFTEN ZUR RECHTSGESCHICHTE 361-373 (Baden-Baden, Nomos, 2009). For a brief outline of the Dutch history of the public notariat with an exhaustive bibliographie, see S. Roes, *Geschiede und Historiographie des niederländischen Notariats*, in HANDBUCH ZUR GESCHICHTE, *supra* note 47. 12 RHEINISCHE SCHRIFTEN ZUR RECHTSGESCHICHTE 319-360 (Baden-Baden, Nomos, 2009). Roes presents a survey of the first records of activities of public notaries in the Northern Netherlands. *Id.* at 324.

55. J. KUYS, KERKELIJKE ORGANISATIE IN HET MIDDELEEUWSE BISDOM UTRECHT 150-161 (Nijmegen, Uitgeverij Valkhof Pers, 2004); Van den Bichelaer, *supra* note 35, at 25-26; A.Fl. Gehlen, *Benelux. Le notariat aux Pays-Bas: perspective historique*, in ATLAS DU NOTARIAT: LE NOTARIAT DANS LE MONDE. HUIT SIÈCLES DE NOTARIAT LATIN-QUATRE DÉCENNIES D'UNION INTERNATIONALE 127-142 (E.M. van der Marck ed., Deventer, Kluwer, 1989); 42 ARS NOTARIATUS (Deventer, Kluwer, 1989).

56. Van den Bichelaer, *supra* note 35, at 26.

VII. THE NOTARIAT IN THE TIME OF THE UNITED PROVINCES

In the sixteenth century, the Northern Netherlands severed the universal, mediaeval ties that had bound it to Church and Empire.⁵⁷ The Reformation and the Dutch Revolt naturally had repercussions on an institution that owed its public confidence and dissemination (though not, it should be recalled, its existence) to the public heirs to the greatness of Rome. But these religious and political convulsions did not induce any revolutionary change in the notariat. Secular rulers had already taken a keen interest in the notariat in the fifteenth century, and this trend became more pronounced in the first half of the sixteenth century. Legislation enacted by the country's overlord Charles V established the notariat definitively as a regional institution. From then on, notaries were appointed by the regional overlord—that is, the country's sovereign ruler—and after the Act of Abjuration in 1581 they were appointed by the regional States.

The Reformation in turn had the effect of making it impossible, in the long run, for notaries operating under papal authority to work in the Netherlands. The profession became secularized: clerics in lower orders were replaced by lay notaries. Only those who belonged to the Reformed Church were admitted: the notariat, as a public office, was not open to Catholics.⁵⁸ Still, the essence of the profession was unaffected by these developments: a notary remained a clerk who was certified and appointed by the public authorities and who provided the public with authentic documents.

VIII. FRENCH-STYLE NOTARIAT

To say that the French revolutionaries had little respect for the legal system of the *ancien régime* is something of an understatement. But the notariat formed an exception to this rule.

57. DE MONTÉ VER LOREN, *supra* note 42, at 249-268.

58. A. Pitlo, *De zeventiende en achttiende eeuwse notarisboeken. Een verhandeling over notarisboeken, notarisambt en notarieel recht onder de Republiek der Verenigde Nederlanden*, 128 ARS NOTARIATUS 123, (2nd ed., A.Fl. Gehlen ed., Deventer, Kluwer, 2004). R. Huijbrecht, 'Het notariaat in de gewesten Holland en Zeeland', in Gehlen, *supra* note 33, at 145-190.

Its abolition was proposed, but never given serious consideration. Quite the contrary, the revolutionaries found the notariat indispensable, as a provider of legal services to the people and a guardian of legal certainty.⁵⁹ Frequently quoted are the words of the lawmaker Favard de Langlade in 1791: ‘the notariat stands firm amid the ruins of the revolution;’ he was, after all, the son of a notary to the king.⁶⁰ A legislative committee wrote in 1799 that the notariat had been retained during the Revolution ‘parce qu’elle est bonne en elle-même’—because it was good in itself;⁶¹ a rare quality, to be sure! And that same year, Favard de Langlade remarked that the notary fulfilled ‘one of the most important functions in society.’⁶² So to any Dutch notary who finds himself troubled by doubts concerning the reputation of his profession, I would say: do not go looking for a personal coach, but read the legislative history of the Ventôse Law. You will start the next day’s work brimming with self-confidence.

Certain changes did ensue from the Revolution, in particular, as a result of that celebrated Ventôse Law of 1803, which the French, true to their reputation for nationalist pride, see as the foundation of the modern Latin notariat.⁶³ As I have already noted, these changes were not revolutionary. True, the papal and seigneurial notariats were abolished, but neither was very significant, and the possibility of purchasing the office was abolished in 1791; but royal notaries were subsequently appointed for life. What is important, of course, is that the notary’s status as a public officer, a status the profession had long enjoyed in France, was retained. Notaries set fees for their services in consultation

59. F. Stevens, “Als een rots in de branding? Het notariaat en de Franse revolutionaire wetgeving over het notarisambt (1791–1803),” in P.L. Nève, J.A.E. Kuys & J.J. Verbeek, *Quod notemus. Zes opstellen over de regelgeving betreffende het notariaat van de middeleeuwen tot vandaag*, 63 *ARS NOTARIATUS* 39-57, (Deventer, Kluwer, 1993); B. Duinkerken, *Notariaat in overgangstijd 1796–1842*, 40 *ARS NOTARIATUS* 34 (Deventer, Kluwer, 1988) (doctoral dissertation, Leiden University).

60. Stevens, *supra* note 59, at 44. About Favard de Langlade, see P. ARABEYRE ET AL., *DICTIONNAIRE HISTORIQUE DES JURISTES FRANÇAIS (XIIIE-XXE SIÈCLE)* 322 (Paris, Quadrige/Puf, 2007).

61. Stevens, *supra* note 59, at 50.

62. *Id.* at 51; Duinkerken, *supra* note 59, at 40.

63. F. STEVENS, *LA LOI DE VENTÔSE CONTENANT ORGANISATION DU NOTARIAT ET SA GENÈSE. DE VENTÔSE-WET OP HET NOTARISAMBT EN HAAR GENESE* (Brussels, Bruylant, 2004); see also Stevens, *supra* note 59, at 39.

with the client. So the notion of standardized fees laid down by the government was unheard of in 1803.⁶⁴

On March 1, 1811, following the Netherlands' annexation by the French Empire, the Ventôse Law entered into effect in this territory, introducing uniformity into the notarial legislation. Another consequence of this law was the introduction of the notariat into parts of the Netherlands that were as yet unacquainted with it. The Ventôse Law remained on the statute-books until it was replaced on July 9, 1842 by the Notaries Act, a piece of legislation to which many people now look back—ten years after its demise—with a sense of nostalgia.

IX. THE DUTCH NOTARIAT UNDER THE 1842 NOTARIES ACT

Strictly speaking, of course, the 1842 Notaries Act was a home-grown piece of legislation, but like the Civil Code that was adopted in 1838, it was a revised version of a French law.⁶⁵ It retained the notary's status as a public officer appointed by the Crown. Still, the Act did make certain changes. For instance, it held out the prospect of the introduction of fixed fees. In this respect, it included more government control than the Ventôse Law, which provided that the fee should be agreed in consultation between notary and client.

So was the notarial profession content with the new Act, which introduced only minor changes—statutory fees—in comparison to the Ventôse Law? Not a bit of it! From the moment it entered into effect until the beginning of the twentieth century, the 1842 Act was the butt of sometimes harsh criticism.⁶⁶ But dissatisfaction with the Act and its perceived flaws was not the only cause of the general mood of disgruntlement into which the

64. The changes brought about by the law of Ventôse are described by Duinkerken, *supra* note 59, at 37-42.

65. B. Duinkerken, *Het Nederlandse notariaat vanaf de Bataafse Republiek tot de invoering van de Notariswet van 1842*, in Gehlen, *supra* note 33, at 231-261.

66. H.W. Heyman, *Het ontwerp voor een nieuwe notariswet van de Staatscommissie van 1867. Een blik op de problematiek van het notariaat rond het midden van de negentiende eeuw*, in Nève, Kuys & Verbeek, *supra* note 59, at 69-104. R. de Jong, *Tussen ambt en vrij beroep. Het notariaat tussen 1842 en 1999*, 116 *ARS NOTARIATUS* 11-13 (Amsterdam, Stichting tot Bevordering der Notariële Wetenschap, 2002).

Dutch notariat slumped after 1842. Notaries were also incensed at the competition they were facing from informal representatives (*zaakwaarnemers*).⁶⁷ Such representatives performed numerous tasks that lay within the notary's working field but for which the latter had not been granted exclusive competence—in other words, legal transactions that did not require an authenticated deed. Numerous people with a ready pen, from municipal officials and court registrars to bailiffs, schoolmasters and former notary's clerks, discovered that drafting private documents could generate a fine source of income. These informal representatives could charge a lower fee and provided fierce competition, causing many notaries to vent their indignation in writing. Some were unable to suppress their rage, calling informal representatives 'parasites' and comparing their actions to the spread of a fatal disease. The falling income among notaries that resulted from the actions of informal representatives heightened competition among notaries themselves, triggering a new hunt for business; the notarial profession became commercialized. This did not enhance the quality of the services that were provided; 'abuses' were reported.⁶⁸ Browsing through the notarial journals that were published in this period, one is left with the impression that some notaries had succumbed to existential doubt; they believed that the profession was in a state of 'serious decline.'⁶⁹ The doom-laden mood that took hold of the notarial profession around 1870 exhibits striking parallels with the situation at the present time. But around 1870, that same disgruntled notariat—it is a historian's privilege to point out—was in fact standing on the threshold of a century of growth and prosperity.

I started this historical excursion with the aim of clarifying the essence of the Latin notariat. The principle of fixed places of establishment is not, as Rouvoet suggested in 1998, a defining feature of the Latin notariat. The early efforts of the notarial profession to steer the establishment of notaries within its jurisdiction in the right direction arose from a concern to consolidate the profession's reliability. It was a supervisory

67. Heyman, *supra* note 66, at 76-80. De Jong, *supra* note 66, at 22-26.

68. See, e.g. Heyman, *supra* note 66, at 73.

69. *Id.* at 77-78.

measure that derived quite naturally from the government's direct responsibility for the public notariat. After all, it was the government that certified and appointed each new notary. Fixed fees are likewise not a defining feature of the Latin notariat. Not until the mid-nineteenth century did a central system of standard fees come into play for notaries' diverse services. It was unknown under the *ancien regime*, and the Ventôse Law did not provide for any such mechanism. In the Netherlands, statutory, standard fees for notarial services were not introduced until 1847. Clearly then, it is completely wrong to say that the major innovations introduced by the Notaries Act of 1999 constituted a break with the Latin notariat. In fact, taking a historical view, one might well argue that a public notariat with freedom of establishment and freedom to charge fees is closer to the original model of the Latin notariat than the Dutch notariat as it had existed since the Second World War.

The essence of the Latin notariat consists solely of the power to issue self-authenticating documents, *prima facie* pieces of evidence that lose their probative value only if they are proven to have been forged or falsified. Since time immemorial, issuing self-authenticating pieces of documentary evidence has been the prerogative of the public authorities. And since time immemorial, judgments handed down by a court of law and deeds drawn up by authorized public officers have constituted *prima facie* proof. The public notariat evolved from the office of judge in Lombardy and has retained the character of a public office ever since. Indeed, it could not be otherwise. Without government authority there would be no authenticity. The unique characteristic of this public officer is that he is not employed by the government. He works for a fee in private practice. When I was preparing this address, the conviction gradually took hold of me that a hybrid profession of this kind could only have originated in Italy. For there is surely no other European culture that can be so flexible and practical in its creative solutions. No other European culture takes such an instrumental view of the state as to legalize a combination of a public office with a private income. In that respect too, the notariat is a true Bartolian construct.⁷⁰

70. The fourteenth-century Italian school of the Commentators or Bartolists, called after Bartolus de Sassoferrato (1313/14-1357), is known by a very free

X. A FEW COMPARATIVE NOTES:
ENGLISH COMMON LAW SYSTEM

The central feature of the notariat, then, is the power to draw up and issue authentic acts. A brief excursion into comparative law will demonstrate the correctness of this proposition. In England, the public notariat never developed into full maturity.⁷¹ It has always played a very modest, albeit not unimportant, role.⁷² The explanation for this should be sought in English procedural and evidentiary law. English law, of course, is so-called common law, which is a different legal system than that of continental Europe. Common law is of Germanic origin, while the civil law of continental Europe is rooted in Roman law. The procedural law of the late Roman Empire that was introduced on the continent, through the intervention of the Church, as the Roman canon law of procedure, was based on written sources.⁷³ This system was based on written evidence, such as notarial acts. The Germanic law of procedure was in principle based on oral proceedings, and the common law system has held firm to this emphasis over the centuries. The openness and public nature that are characteristic of numerous legal transactions in Germanic law

and practical method of interpretation of the *Corpus iuris civilis* of the Byzantine emperor Justinian (527-565). Partly due to the method of the Commentators the Roman law of Justinian found its way into European society. Of course I'm aware of the fact that the earliest history of the Latin notariat dates from before the Commentators. However, already in the earliest Italian legal science (twelfth century) one finds the tendency for a practical interpretation of the Justinian legislation. The Latin notariat is at least partly a product of a practical interpretation of the *Corpus iuris* too and in this broad sense also to be seen as a bartolistic construct. The famous *ars notariatus* (treatise about notarial deeds) of Rolandinus Passagerii (died 1300) has been written after the golden age of the glossators (1100-1250) and is to be considered as an early bartolistic work. N. Horn, *Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts*, in HANDBUCH DER QUELLEN, *supra* note 34, at 354-355.

71. VAN CAENEGEM, *supra* note 49, at 59.

72. C.W. BROOKS ET AL., NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION 3 (London, The Erskine Press, 1991) (the origins of the notaries public in England); C.R. CHENEY, NOTARIES PUBLIC IN ENGLAND IN THE THIRTEENTH AND FOURTEENTH CENTURIES (Oxford, The Clarendon Press, 1972).

73. VAN CAENEGEM, *supra* note 49, at 37, 60-61.

have always remained inherent to proceedings under common law.⁷⁴ These qualities are reflected, for instance, in a strong preference for oral rather than written testimony.⁷⁵ This preference was strengthened by the introduction of the jury system, given that many jurors, in the past, were partly or wholly illiterate.

This explicit preference for oral testimony explains why common law courts have never accorded a special evidentiary status to written legal instruments, including notarial acts.⁷⁶ In common law, every legal instrument in principle possesses equal probative value: in this system, no private legal instrument can acquire the status of a self-authenticating act, that is, an act regarded as *prima facie* proof; only acts of parliament and judicial records have such probative force. The court will subject all other written pieces of evidence, including acts drawn up privately, to the same evidentiary procedure as any other kind of evidence. In short, in countries such as England, in which written documents do not possess any particular probative value, the public notariat has only a very modest role to play.

XI. CONCLUSION

English law helps to highlight *a contrario* the defining feature of the public notariat: it is the strong probative value of the written forms of evidence that notaries issue to members of the public. This essential quality of the notariat gives me confidence for the future of this venerable institution. As long as the civil law holds fast to written proceedings, to the centuries-old Roman canon law of procedure, the public notariat will remain indispensable.

74. *Id.* at 59.

75. M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD ENGLAND 1066-1307 97 (2d ed., Malden, Oxford and Carlton, Blackwell Publishing, 1993).

76. BROOKS ET AL., *supra* note 72, at 5-8. CHENEY, *supra* note 72, at 44, 52-53.