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Controlling Jury Composition in Nineteenth-Century Ireland

NÍAMH HOWLIN

Difficulties in securing convictions in nineteenth-century Ireland led the authorities to resort to various methods of ensuring that petty juries delivered guilty verdicts in cases where this was clearly warranted by the evidence. This article examines some of the 'stratagems' put forward by David Johnson and suggests a number of other practices which were used, arguing that many of these mechanisms centred around controlling the composition of trial juries. Examples included altering the property qualifications for jurors, the system of asking jurors to 'stand aside' and the use of fines to compel attendance. While some of these were the legitimate exercise of established procedures, it will be seen that the crown on occasion abused or over-used its powers.

I. PROBLEMS WITH JURY TRIAL IN IRELAND.

Writing about juries and law enforcement in Ireland in the late nineteenth century, Dicey explained that the jury was a 'device of more or less ingenuity for preserving harmony between the action of the law and the sentiment of the people.' He said that '[w]herever and whenever the class from whom juries are taken do not sympathise with the law, the system leads to an utter failure in the attempt to enforce punishment.'¹ The unique social and political conditions prevailing in nineteenth-century Ireland,² along with waves of crime and criminality at different stages throughout the century,³ profoundly affected the evolution and operation of the criminal justice system generally, and the jury trial in particular. It has been pointed out elsewhere that the composition of the Irish jury was distinctive,⁴ and there were two sets of factors affecting this: those coming from below (demographics, including issues

¹ A.V. Dicey, 'How is the law to be enforced in Ireland?' (1881) 3 (179) *Fortnightly Review* (n.s.) 537, 549.

² There were various social and political conditions which were unique to Ireland in the nineteenth century, including the campaign for Catholic emancipation and the movement to repeal the Act of Union in the early years of the century, the tithe war of the 1830s (see below, n.3), the attempted uprisings of 1848 (see below, n.65-n.68) and 1865 (see below, n.189-n.190), and the agrarian agitation of the 1870s and 1880s (see below, n.3, n.14, n.249-n.252). Political and religious divides were more pronounced in Ireland than in England, and were a frequent source of tension. The largely rural population was susceptible to frequent crop failures and famines, most notably the great famine of the 1840s. The death toll from the famine, coupled with widespread emigration in its aftermath, resulted in a sharp decrease in the population, and living standards began to improve in the latter half of the century. See Gearóid. Ó Tuathaigh, *Ireland before the famine, 1798-1848*, Dublin, 1990 and F.S.L. Lyons, *Ireland since the famine*, London, 1971.

³ The most high-profile examples are the tithe war of the 1830s, when resistance to attempts to collect tithes for the established Church of Ireland resulted in political agitation and violence, and the land war of 1879-1882 (see below, n.14, n.249-252), which resulted from tensions between landlords and tenants. Another wave of disturbances occurred between 1846 and 1849. Vaughan notes that '[e]ven during the relatively quiet period between the immediate aftermath of the famine and the onset of the land war, there were periods of tension.' These include the years between 1849 and 1852, the early 1860s, and between 1869 and 1870. W.E. Vaughan, *Landlords and tenants in mid-Victorian Ireland*, Oxford, 1994, 138-139.

⁴ N. Howlin, 'English and Irish jury laws: a growing divergence 1825-1833' in S. Donlan and M. Brown (eds), *The Boundaries of the State: Law in Ireland, 1700-1850* (forthcoming, Hampshire, 2010).

of relative wealth or poverty) and those imposed from above (the controls exerted by the authorities). It is with the latter that this article is primarily concerned.

Johnson observes that in late nineteenth-century Ireland, the rules of jury procedure often had to be bent because in certain types of cases, especially those with political connotations,⁵

witnesses were reluctant to give evidence and juries unwilling to convict; the result was that many offenders went unpunished. To combat this tendency and, as they saw it, to make the administration of justice more effective, the prosecuting authorities felt obliged to adopt various stratagems.⁶

One method mentioned by Johnson was the trying of cases before magistrates where possible, because the lighter sentences available were considered more likely to lead to convictions. Similarly, offences were sometimes downgraded (such as prosecuting for manslaughter instead of murder), and multiple retrials were common.⁷ Alternatively, cases could be tried away from the location where the alleged crime took place, in order to escape local prejudices. It is suggested that many of the frequently-used approaches appear to have revolved around controlling the composition of the jury trying the case, in the hope of replacing 'hostile' jurors with more 'reliable' men, who could be counted upon to deliver what the authorities would consider to be the 'correct' verdict. These included the frequent adjusting of the prescribed qualifications for jury service, as well as the enthusiastic use of such mechanisms as jury challenges and the 'stand aside' procedure. While the latter meant that the crown exerted its influence at the trial stage, affecting the jurors empanelled to try a specific case, the former meant influencing the jurors' lists and jurors' books, from which the jury panels were taken.⁸

This article proposes to identify some of these mechanisms and demonstrate how they operated and were developed over time to influence the composition of petty juries in criminal cases.⁹ Whether or not the practices identified by Johnson can strictly be deemed 'stratagems', which connotes a certain degree of deviousness or illegitimacy, is open to question. Most of the practices engaged in by crown solicitors, crown counsel and the government authorities at Dublin Castle, in their attempt to secure verdicts in politically-charged cases were in fact legitimate (albeit sometimes extreme or frequent) uses of

⁵ Criminal prosecutions arising from political unrest and disturbances were tried in the ordinary courts alongside more run-of-the-mill cases.

⁶ David Johnson, 'Trial by jury in Ireland 1860-1914' (1996) 17(3) *Journal of Legal History*. 270, 270.

⁷ *Ibid.*, 271.

⁸ See below, n.42-n.60.

⁹ There were numerous categories of jury in nineteenth-century Ireland. It was observed in 1859 that 'the fertile womb of the law has brought forth such a litter of juries that their mother has not names for them all. They can only be compared to the numberless tribes of dogs, all differing in colour and size and shape but as the naturalists say, all of one species.' J. Brown, *The dark side of trial by jury*, London, 1859, 7-8. In the context of the criminal trial, the first main distinction to be drawn is between grand and petty juries. At the beginning of an assizes, the grand jury decided whether the bills of indictment against accused persons were 'true bills', in other words, whether the prosecutor had made a *prima facie* case. If so, then the case went on to be tried by a petty (or petit) jury. Petty juries could be either special or common. The majority of cases, especially in the criminal field, were tried by common juries, but in certain circumstances it was considered necessary that a case be tried by men of a higher calibre. Special juries were generally used on the civil side, in commercial cases where the issues were deemed too complex for ordinary jurors. In the criminal field they tended to be resorted to in controversial cases where for one reason or another, it was thought a satisfactory verdict could not be secured from a regular jury. The men who sat on such juries had to meet higher property qualifications, and were considered to be superior socially, educationally and intellectually, as well as being wealthy enough to be impervious to bribes.

established procedures and customs. On the other hand, men holding such offices as sheriff and sub-sheriff were often suspected of abusing their powers, particularly with regard to jury selection in the early part of the century.¹⁰ The precise impact of these machinations and manoeuvres upon jury composition, and, ultimately, conviction rates, is beyond the remit of this article, which confines itself to identifying and analysing some of the main techniques and procedures used in relation to Irish juries, and constructing a framework for further research.

Jury composition was an important factor behind almost all of the Irish jury legislation passed in the nineteenth century.¹¹ This is significant, especially when account is taken of the various other problems plaguing the jury system at the time, such as corrupt and incompetent officials, inconsistent practices around the country, and the intimidation of jurors by secret societies,¹² to name but a few. This is not to say, however, that the Irish jury system was entirely unworkable; during politically tranquil periods, both civil and criminal juries operated relatively smoothly – though the system was far from flawless. The frequent allegations of ‘jury packing,’¹³ as will be seen, were often exaggerated in order to garner support for nationalist movements. When juries acted in a manner seen as perverse, it is submitted that this was usually as a result of specific external or internal pressures, such as threats, bribes, or allegiance to a particular religious or political cause, and was not in every case merely a symptom of sheer antipathy towards the legal system.

In November 1881, during a period of agrarian and political unrest in Ireland,¹⁴ Dicey contended that ‘in all matters which do not concern political differences or agricultural questions the law is as well kept in Ireland as elsewhere. The criminal statistics of the country compare, it is said, favourably with those of other lands.’¹⁵ However, more recent studies of

¹⁰ See below, n.42-n.60.

¹¹ In particular, the Juries (Ireland) Act 1833 (3 & 4 Wm. IV, c. 91), the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65), the Juries (Ireland) Act 1873 (36 & 37 Vic., c. 27), the Jurors Qualification (Ireland) Act 1876 (39 & 40 Vic., c. 21) and the Juries Procedure (Ireland) Act 1876 (39 & 40 Vic., c. 78).

¹² Various secret societies operated at different periods in Ireland, and most of them identified with the nationalist cause. The Whiteboys were a secret agrarian organisation which used violent tactics to defend tenant farmer land rights in the eighteenth century, though over time, they became synonymous generally with rural violence connected to secret societies. One group commonly identified as having been involved in the intimidation of jurors was the Ribbon Society, which first appeared sometime between 1805 and 1807. M.R. Beames, ‘The ribbon societies: lower-class nationalism in pre-famine Ireland’ (1982) 97 *Past & Present* 128, writes that ‘[b]etween the demise of the United Irish movement and the emergence of Young Ireland, the Ribbonmen were the only organised section of Irish Catholic community that expected Irish independence to be achieved by rebellion and violence.’ See also T. Garvin, ‘Defenders, ribbonmen and others: underground political networks in pre-famine Ireland’ (1982) 96 *Past & Present* 133 and Gale E. Christianson, ‘Secret societies and agrarian violence in Ireland, 1790-1840’ (1972) 46 (3) *Agricultural History* 369. They were identified by the display of certain ribbons as part of their attire, and operated under different names in different parts of the country, including: the Ribandmen, the Threshers, the Carders, the Molly Maguires, the Rockites, the Caravats, the Shanavests, and Paudin Gar’s men: H.B.C. Pollard, *Secret societies of Ireland, their rise and progress*, London, 1922. They had their own oaths, signs, passwords and rituals, and engaged, according to Pollard, mainly in sectarian warfare against Protestants, particularly Orangemen, and ‘the usual agrarian outrage’. Pollard, 32-34.

¹³ That is, using a variety of means to ensure that a majority of jurors enamelled to try a particular case were sympathetic to the crown. This could be through extensive use of challenges (see below, n.74, n.152-158), having men excluded from the jurors’ lists or jurors’ book (see below, n.42-n.60), or including special jurors on a common jury (see above, n.9).

¹⁴ See above, n.2, n.3 and below, n.249-n.252. The land war broke out in 1879 as tensions between the landlords and tenants, represented by the Land League (later the National League), increased. Between 1879 and 1882, 11,215 families were evicted and 11,320 agrarian outrages were recorded. In 1881 the Land Law (Ireland) Act (44 & 45 Vic., c. 49) was passed, and over the ensuing decade, £1.2 million was struck off the rents of 277, 160 holdings. See Vaughan, above, n.3, 208-216 for a discussion of the reasons behind the land war.

¹⁵ Dicey, above, n.1, 537.

both eighteenth- and nineteenth-century Irish criminal statistics would suggest otherwise. S.J. Connolly has noted that throughout the nineteenth century, ‘Ireland’s uneasy position within the British state was reflected in episodes of armed resistance wholly without parallel elsewhere in what became the United Kingdom. Even in the absence of overtly political violence, equally, Ireland was consistently seen as presenting unique problems of crime and disorder.’¹⁶ Newspaper reports from various parts of the kingdom suggest that there was indeed a body of opinion which considered Ireland as presenting unique problems in this regard. For example, the *Aberdeen Journal* stated in 1838 that

no variety of familiar English crime has yet been detected which involves hostility to the whole system of established social order, and to every grade of the administrators of that system. A large class of Irish crimes, on the contrary, are nothing else than an embodiment of high treason ... Irish murders ... extend their influence far beyond the person of the victims. These influences are, in fact, levelled against the state – against the established system of social order.¹⁷

Although it is clear that there was generally perceived to exist in Ireland certain problems in relation to crime and social disorder, it is difficult to pin down accurate statistics demonstrating the levels of detection and punishment for serious crimes. Indeed, Connolly notes that the limitations of criminal statistics are ‘enormous’.¹⁸ There are several reasons for this: recorded crime will only ever represent a fraction of the total crime committed; definitions and categories of crime change over time; it is difficult to distinguish changes in behaviour over time from changes in the efficiency of crime detection or prosecution, or changes in legal codes.¹⁹ Differences between the criminal justice systems of England and Ireland also hinder attempts to compare the criminality levels or conviction rates in the two countries. As Vaughan has pointed out, the general impression of disorder in Ireland ‘was increased by law enforcement arrangements in Ireland, which differed considerably from those in the rest of the United Kingdom.’²⁰ He cites the existence of professional prosecutors,²¹ a centralised constabulary and the use of special legislation as examples. Historians have drawn upon judicial statistics²² and ‘outrage’²³ returns by the constabulary,²⁴ and despite the evident discrepancies between these two sources, Connolly points out that ‘even taken as a rough indication, the Irish return of outrages confirms the high level of violence relative to other parts of the United Kingdom. It suggests that the homicide rate in

¹⁶ S.J. Connolly, ‘Unnatural death in four nations: Contrasts and comparisons’ in *Kingdoms United? Great Britain and Ireland since 1500: Integration and diversity*, Dublin, 1999, 201.

¹⁷ *Aberdeen Journal*, 5 Dec. 1838.

¹⁸ Connolly, above, n.16, 202.

¹⁹ *Ibid.*

²⁰ Vaughan, above, n.3, 139.

²¹ Ireland had a system of public prosecution well in advance of England, as discussed below, n.144-n.151. This clearly impacted upon the nature and number of prosecutions.

²² See for example Johnson, ‘Trial by jury’, above, n.6.

²³ Some outrages were classified as ‘agrarian’, and these differed from ordinary outrages in that they tended to fluctuate more dramatically, their composition was different, and they attracted more attention from both officials and the press. The annual returns of outrages did not define agrarian outrages, though Vaughan points out that they were commonly perceived as arising from disputes between landlords and tenants. However, he demonstrates that in fact ‘the typical agrarian homicide was caused by a family dispute or a row between neighbours.’ Agrarian crime was a catch-all in the taxonomy of total crime, for they included not only outrages caused by disputes between landlords and tenants, but all crimes caused by disputes about land. Vaughan, above, n.3, 141-144, 149.

²⁴ Ian O’Donnell, ‘The fall and rise of homicide in Ireland’, in S. Body-Gendrot, and P. Spierenburg (eds), *Violence in Europe: Historical and Contemporary Perspectives*, New York, 2008, 82.

Ireland between 1835 and 1850 was two-and-a-half times that recorded in England and Wales in the 1850s and 1860s.²⁵

Johnson's comparison of conviction and imprisonment rates in England and Ireland is based on data from the judicial statistics, and demonstrated, for example, that of those prosecuted for offences against the person in Ireland in 1860, fifty-one % were convicted, and thirty-five % were imprisoned, whilst in England and Wales, sixty-six % were convicted and sixty-five % were imprisoned. Ten years later, sixty-two % of those in Ireland were convicted, with forty-eight % being imprisoned, whilst in England and Wales the figure was seventy-five % on both counts. The discrepancy was even wider by 1880, with just forty-one % of those prosecuted in Ireland being convicted, and twenty five % receiving prison sentences. In the same year, seventy-six % of those prosecuted in England and Wales were both convicted and imprisoned. Johnson goes on to consider other categories of crime, including violent and non-violent offences against property, forgery offences and offences against the currency, malicious injuries to property, and other offences, and clearly indicates that 'in *all* categories of crime the conviction and punishment rates were lower in Ireland.'²⁶

Johnson also demonstrates that conviction rates were lowest in rural areas, which is significant given that Ireland was less urbanised than England in the nineteenth century. Looking at conviction rates at assizes and quarter sessions, he shows that the conviction rate in urban Ireland (defined as consisting of Antrim, Belfast, Dublin city and county, Cork city and Limerick city) was sixty-seven point five % in the early 1860s, compared with fifty-four point four % in rural Ireland. This trend continued for the next two decades, and by the late 1870s there was a difference of seventeen point three % between urban and rural conviction rates.²⁷ Johnson suggests a number of interesting factors contributing to these low figures – for example, a reluctance to convict which was often a result of the close relationship between the accused, the witnesses and the jurors in rural Ireland.²⁸ Another factor was the attitude towards violent crime in Ireland at the time – society appears to have been considerably more tolerant of violence compared with England or Wales.²⁹

Garnham has examined petty jury verdicts and conviction rates in England and Ireland in the late eighteenth century,³⁰ and proffers several reasons for the low conviction rates in Ireland during that period,³¹ including the corruption of juries, officials charged with initiating prosecutions and witnesses. He also cites landlords' influence and the reluctance to convict men who acted under the influence of alcohol. The intimidation and external pressures under which jurors were often obliged to act in Ireland may also have been a factor.³² It is certainly impossible to consider the working of the Irish criminal justice system in the eighteenth and nineteenth centuries in the absence of a political and social context.

Other writers corroborate the assertion that conviction rates in Ireland were low. Woodward, for example, notes that the number of indictments far outweighed the number of

²⁵ Connolly, above, n.16, 206.

²⁶ Johnson, 'Trial by jury', above, n.6, 275.

²⁷ *Ibid.*, 276.

²⁸ *Ibid.*, 277. This was exacerbated by the system of extensive challenges; see below, n.74, n.152-158.

²⁹ *Ibid.*, 278.

³⁰ Neal Garnham, 'The limits of English influence on the Irish criminal law, and the boundaries of discretion in the eighteenth-century Irish criminal justice system', in S. Donlan and M. Brown (eds), *The Boundaries of the State: Law in Ireland, 1700-1850* (forthcoming, Hampshire, 2010).

³¹ Although Garnham's focus is on the eighteenth century, much of his discussion has relevance for an examination of the jury system in the nineteenth century, because many of the issues affecting conviction rates had not abated.

³² Garnham, above, n.30.

convictions in Irish courts.³³ The statistics presented to the Dublin Statistical Society by James Houghton in 1850 demonstrated that in the years 1842-1848, between fifty-two and sixty per cent of those committed for trial in Dublin were convicted.³⁴ This difficulty in obtaining convictions did not go unnoticed. In 1848 the *Belfast News-Letter* reported that '[i]t is now an ascertained fact that in political cases, almost always, and in agrarian cases, not seldom, a verdict in accordance with the evidence cannot be counted upon in Ireland.'³⁵ There was a common belief that the criminal justice system in Ireland was beset by unique difficulties, typified by a statement from an English newspaper in 1862: '[w]e take it there is no country in the world in which justice, both civil and criminal, is so fairly administered as in England ... How is it that they manage these things differently in Ireland?'³⁶

The main reasons ascribed to the difficulties associated with securing convictions were the intimidation and allegiances of both witnesses and jurors. A paper in 1882 emphasised '... the necessity of dealing strongly with those who endeavour to tamper with the administration of justice, whether by intimidating the witnesses or by seeking to prejudice the jurors.'³⁷ So problematic was jury trial in Ireland that one English newspaper declared in 1848 that a recent high-profile failure to convict was '...proof of the utter inapplicability of the present jury system to the present state of society in Ireland.'³⁸ Another newspaper reported on the same day that '[t]he perversion of the jury-box in Ireland has been one of the many evils which have resulted from that misgovernment which separated the people into rival parties, embittered against each other by religious and political enmities.'³⁹

As McEldowney has pointed out, given the many problems facing the operation of the jury system in Ireland in the nineteenth century, the fact that it survived at all 'was a remarkable achievement.'⁴⁰ So how did this 'remarkable achievement' come about? One factor which guarded against the collapse of the system of trial by jury was its popularity with the Irish judiciary. Similarly, the legitimacy of the law in Ireland depended on its acceptance by the general population, among whom jury trial proved to be popular. Another major contributing factor, it is argued, was the lengths to which both crown authorities and defendants manipulated the system, each to their own ends.

II. CONTROLLING JURY COMPOSITION.

For better or for worse, trial by jury was to remain a permanent fixture of the Irish criminal justice system, and it was up to the prosecuting authorities to develop what Johnson describes as 'stratagems' for ensuring its effective operation. The principal means of exerting control over the jury was the regulation of the qualifications as to age, gender and property which had to be met by all jurors. The most important of these, whether one sat as a special or

³³ Nicholas Woodward, 'Transportation convictions during the great Irish famine' (2006) 37(1) *Journal of Interdisciplinary History* 59, 65.

³⁴ James Haughton 'Statistics of crime' (1850) 2 *Journal of the Statistical and Social Inquiry Society of Ireland* 1.

³⁵ *Belfast News-Letter*, 22 Aug. 1848.

³⁶ *The Leeds Mercury*, 23 June 1862. R. Swift, 'Villains or heroes? The Irish, crime and disorder in Victorian England' (1997) 29(3) *Albion* 399, explores some English attitudes towards Irish criminality in the nineteenth century.

³⁷ *The Penny Illustrated Paper and Illustrated Times*, 26 Aug. 1882.

³⁸ *Liverpool Mercury*, 22 Aug. 1848. The trial referred to by the newspaper was the second trial of Kevin Izod O'Doherty, discussed below, n.66.

³⁹ *Manchester Times and Gazette*, 22 Aug. 1848

⁴⁰ John McEldowney, "'Stand by for the Crown": An historical analysis' (1979) *Criminal Law Review* 272.

common juror⁴¹ were the property requirements contained in numerous pieces of nineteenth-century legislation. Alongside these were a number of statutory exemptions excusing groups and individuals who were otherwise qualified. Additionally, certain categories of person were barred from serving. Qualification alone did not guarantee a place on a jury: jurors could be challenged by both the prosecution and the defence for a variety of reasons, as will be discussed below. The rules as to exemptions, disqualifications and challenges each affected the composition of the jury, and the government used each of these mechanisms in turn to exert a degree of control over who ultimately sat in the jury-box for the trial of a particular case.

1. Preparing the jurors' book

Before going on to consider the various factors affecting who sat in the jury-box, it is worth mentioning how the jurors' lists and jurors' books were drawn up. The rules prescribing how this was to be done were set out extensively in legislation. Under the Juries (Ireland) Act 1833,⁴² within a week after the commencement of the midsummer sessions,⁴³ the clerk of the peace in every county, city or town issued and delivered a precept⁴⁴ to the high constable and the collectors of the grand jury cess, or local rate, in each barony or administrative division within the county.⁴⁵ This required them, within one month, to prepare 'a true List of all Men residing within their respective Districts qualified with respect to Property, and liable to serve on Juries.'⁴⁶ The high constable and the cess collector or collectors made out, in alphabetical order, a list of qualified jurors in the barony, with 'the true place of Abode, the Title, Quality, Calling, or Business, and the Nature of the Qualification of every such Man.'⁴⁷ They delivered the list to the clerk of the peace, who kept it in his office for three weeks, 'to be perused by any of the Inhabitants of such County ... at any reasonable time during such Three Weeks'.⁴⁸ At the end of the three weeks, the lists were to be presented before the justices assembled at a special sessions two or three months after the start of the October general or quarter sessions.⁴⁹ The place and time of such special sessions were publicised. The justices, high constables and cess collectors attended, with the constables and collectors liable to answer questions on oath, in order to determine whether any unqualified men had been included on the lists, or whether any qualified man had been omitted. The justices then delivered an amended list to the clerk of the peace, to be kept among the county records and

⁴¹ As noted above, n.9, most petty juries consisted of common jurors, but cases deemed to require a higher standard of juror were tried by special juries.

⁴² 3 & 4 Wm. IV, c. 91.

⁴³ The Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65) was more specific as to the dates by which the various elements of the procedure had to be completed.

⁴⁴ 3 & 4 Wm. IV, c. 91, sch. A.

⁴⁵ Under the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65, s. 8), the precept was issued to the clerk of each poor law union, except in Dublin, where it was issued to the collector-general of rates. 34 & 35 Vic., c. 65, s. 10.

⁴⁶ 3 & 4 Wm. IV, c. 91, s. 4. Under the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65, s. 8), the precept required 'a true list, in writing ... of the names of all men rated for the relief of the poor within the said union, who are qualified and liable to serve as jurors'.

⁴⁷ 3 & 4 Wm. IV, c. 91, s. 5. Under the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65, s. 9), the clerk of the poor law union, made 'due inquiry' with the assistance of the poor rate collector or collectors. They then prepared the list in alphabetical order of surnames, and this was called the general list of jurors for the barony.

⁴⁸ 3 & 4 Wm. IV, c. 91, s. 9.

⁴⁹ 3 & 4 Wm. IV, c. 91, s. 9. A similar procedure was laid down in the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65, s. 12).

copied into a book to be delivered to the sheriff, the under-sheriff or the town clerk. This was known as the jurors' book,⁵⁰ and was brought into use on 1 January the following year.⁵¹

Before any assize or other court sessions where there were civil or criminal issues to be tried by jury, a writ of *venire facias*⁵² was issued, directing the sheriff to return 'Twelve good and lawful Men from the Body of his County.'⁵³ The sheriff took these names from the current jurors' book for the county, and under the 1833 Act he had discretion as to the names he selected.⁵⁴ After the reforms of the Juries Act (Ireland) 1871 Act were introduced, however, he was obliged to take the names from the book 'in a regular alphabetical series', taking one name from each letter of the alphabet and going through the alphabet as many times as necessary.⁵⁵ This measure was introduced in response to frequent claims of bias or unscrupulousness on the part of the sheriff.

When returning the writ of *venire facias*, the sheriff annexed a panel listing the names and other details of 'a competent Number of Jurors named in the Jurors' Book.' There were to be between thirty-six and sixty jurors listed, unless the assize or session judge ordered that there be a greater or lesser number. These men were competent to try all the issues at the next assizes or sessions.⁵⁶ The sheriff kept a copy of the panels in his office for seven days before the court sat, for the parties to inspect if they wished.⁵⁷ Under the 1833 Act, the jurors were then summoned by means of a hand-delivered note six days before their attendance was required.⁵⁸ The 1871 Act provided that they were only to be summoned four days in advance,⁵⁹ and the summons was sent by post in Dublin.⁶⁰

The name of every man summoned was to be written on a piece of parchment or card. These were delivered to the judge's clerk, and kept in a box. Whenever any issue came to be tried, the clerk, in open court, drew out twelve cards. If any of the men whose names were called did not answer, or were challenged, then more cards could be drawn until a jury of twelve was assembled.⁶¹ These men were then sworn in to try the issue.⁶² Any man who did not appear, or who was present in court but did not answer when his name was called three times, or who absented himself from the court, was liable to be fined.⁶³

2. *The importance of jury composition*

⁵⁰ The same procedures were used in the preparation of the special jurors' book. See also the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65, s. 11).

⁵¹ 3 & 4 Wm. IV, c. 91, s. 9.

⁵² Under the Act (Ireland) 1871 (34 & 35 Vic., c. 65), there was no writ of *venire facias*, but the sheriff's duties in this regard were essentially the same. Before a court requiring a jury was to sit, he had to procure all precepts 'necessary for commanding the return of jurors before the court.' The sheriff (or other officer) had to 'select a sufficient number of names' from the relevant jurors' book, 'and prepare a panel thereof.' A written or printed panel containing the jurors' names, addresses and so on, as well as whether or not they had previously been summoned as a juror in the past two years, was prepared by the sheriff seven days before the date mentioned in the precept. A printed copy of this panel was to be made available, upon the payment of a fee, to any party requiring it. 34 & 35 Vic., c. 65, s. 18.

⁵³ 3 & 4 Wm. IV, c. 91, s. 10. See also 34 & 35 Vic., c. 65, s. 13.

⁵⁴ 3 & 4 Wm. IV, c. 91, s. 11. If there was no jurors' book, he was to use the book from the previous year.

⁵⁵ 34 & 35 Vic., c. 65, s. 19.

⁵⁶ 3 & 4 Wm. IV, c. 91, s. 12.

⁵⁷ 3 & 4 Wm. IV, c. 91, s. 14.

⁵⁸ 3 & 4 Wm. IV, c. 91, s. 18.

⁵⁹ 34 & 35 Vic., c. 65, s. 21.

⁶⁰ 34 & 35 Vic., c. 65, s. 22.

⁶¹ Although the ballot procedure only extended civil cases under the 1833 Act, under the 1871 Act it applied in both civil and criminal cases. 34 & 35 Vic., c. 65, s. 41.

⁶² The same jury could try several issues in succession if the parties consented. 3 & 4 Wm. IV, c. 91, s. 19.

⁶³ 3 & 4 Wm. IV, c. 91, ss. 32 and 41, and 34 & 35 Vic., c. 65, s. 48.

Jury composition had the potential to affect the outcome of all types of cases, most notably those of a political hue. In a country whose population was divided by politics and religion, it is unsurprising that the make-up of the jury often came under scrutiny, particularly in the wake of high-profile cases where composition appeared to have been a crucial factor. One example was the trial of Daniel O’Connell in 1844, discussed below.⁶⁴ Four years later, the 1848 State trials also generated considerable controversy. The widespread misery and discontent after the Great Famine of the 1840s had driven many young men to join such nationalist groups as the Young Irelanders, which were an extremist section of the earlier Repealers.⁶⁵ In 1848 they staged an abortive uprising which was opposed by the clergy, and was easily quashed. After the trials of some of the leaders – John Mitchel, John Martin, Kevin Izod O’Doherty, and Richard Dalton Williams – for treason-felony, a petition entitled ‘No Jury Packing’ was signed by several thousand Roman Catholics. Mitchel, Martin and O’Doherty were convicted and sentenced to long terms of transportation, and ‘[u]pon none of the juries by which they were convicted, was there one Roman Catholic’.⁶⁶ At Mitchel’s trial in May 1848, there had been 122 Protestants and twenty-eight Catholics on the panel.⁶⁷ The Catholics’ names were at the end of the panel, so that they were unlikely to be called. It was resolved to challenge the array, but Wheeler, the chief clerk in the sheriff’s office, who had prepared the panel, had fled to London on the evening when it was made known that the array would be challenged.⁶⁸ The Attorney General, James Monahan, defended the panel, and it was impossible, under the rules of evidence, to show that there were a greater number of Roman Catholics than Protestants on the book. In August, at the trials of Martin and O’Doherty, only thirty of the 130 jurors on the panel were Catholics. At O’Doherty’s first trial there was one Roman Catholic on the jury; there were two at his second, and none at his third. The panel of 176 at this last trial had contained the names of forty-two Catholics.

Another case illustrating the perceived importance of jury composition were the 1887 ‘Sligo trials’. Resistance to evictions at Woodford, county Galway, during the land war in 1886 resulted in the imprisonment of seventy-five farmers, and it was decided to try the cases in Sligo, a neighbouring county. It was said that in county Sligo, Catholics outnumbered Protestants nine to one,⁶⁹ but the jury panel consisted of 128 Protestants and 122 Roman Catholics. It was alleged that the panel had been packed, and Palles CB quashed the panel. After an adjournment of eight days a new panel was put together, but still the religious imbalance was obvious. The government withdrew the charges of felony, in order to reduce the number of challenges allowed to the prisoners.⁷⁰ The first panel contained twenty-nine Protestants and forty-eight Roman Catholics, but by the time the crown had exhausted its ‘stand-by’ powers, there were ten Protestants and just two Catholics. This, it was claimed by one pamphleteer, ‘was not an isolated case, but was part of a system persevered in day after day by the Conservative Government, in spite of the protests of jurors, the comment of Chief Baron Palles, and the refusal of Counsel to plead before the packed juries’.⁷¹ On the second day of the trials, a jury composed entirely of Protestants was empanelled. The third day saw a jury of eleven Protestants and one Catholic. This led the defence counsel to withdraw from the case, stating that it was ‘a humiliation to be compelled to take part in a trial in which their

⁶⁴ See *R v O’Connell* (1844) 8 Ir LR 261 and *O’Connell v R* (1844) 11 Cl & F 155; 8 ER 1061.

⁶⁵ Pollard, above, n.12, 40.

⁶⁶ *Juries: petition against exclusion of Roman Catholics*, National Archives of Ireland (N.A.I.) OP/1848/110.

⁶⁷ *Freeman’s Journal*, 25 May 1848.

⁶⁸ This can be compared with the recorder who had conveniently left the country at the time of Daniel O’Connell’s trial in 1844 when the array in that case was to be challenged. See further below, n.159-n.175.

⁶⁹ E.P.S. Counsel, *Jury packing*, 2nd ed., Dublin, 1887, 9.

⁷⁰ See below, n.152-158.

⁷¹ Counsel, above, n.69, 9-10

co-religionists were systematically and insultingly excluded from the jury-box, as if Papist was only another word for perjurer⁷²

These prominent cases generated fierce debate and fuelled perceptions that the composition of a criminal trial jury was an issue of utmost importance. Although such perceptions may have been incorrect, the very fact that the jury system could be so construed is significant, indicative as it is of a wider distrust of the machinery of government. Whenever the criminal justice system – and, by implication, the jury system – came under pressure, the administration's response was usually an attempt to tighten control of or alter significantly the constitution of the jury. This indicates that the general population was not alone in attaching importance to this issue. McEldowney points out that 'legal devices and institutions did not operate in Ireland in a political vacuum. On the contrary the political and religious problems overshadowed the working of every law.'⁷³ This was no less true in relation to juries, and their constitution in particular presented problems in terms of political and religious representation. He adds that the crown's powers to challenge jurors for cause and to order them the stand aside without showing cause 'gave some control over who was able to sit on a jury. Although questions of religion and politics were not intended to be the main criteria for excluding jurors, there was little in reality to prevent such considerations being invoked in the mind of the crown solicitor.'⁷⁴

3. Qualifications

We now turn to consider the first level of jury control: the legislatively-prescribed conditions which had to be met by every juror. Originally, the qualifications for jurors were minimal; they were to be men who were 'free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant.'⁷⁵ Coke also outlined the requirements for jurors:

He that is of a jury must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedom of mind as he stands indifferent as he stands unsworn. Secondly, he must be *legalis*. And by the law, every juror that is returned for the trial of any issue or cause, ought to have three properties. First, he ought to be dwelling most near to the place where the question is moved. Secondly, he ought to be most sufficient both for understanding, and competency of estate. Thirdly, he ought to be least suspicious, that is, to be indifferent as he stands unsworn: and then he is accounted in law *liber et legalis homo*; otherwise he may be challenged, and not suffered to be sworn.⁷⁶

⁷² R.B. O'Brien, *Dublin Castle and the Irish people*, 2nd ed., London, 1912, 131-132. See: *Parliamentary Debates*, series 3, vol. 310, cols. 387-389, 1 Feb. 1887 (House of Commons) *Parliamentary Debates*, series 3, vol. 310, cols 896-897, 8 Feb. 1887 (House of Commons) and *Parliamentary Debates*, series 3, vol. 310, cols.1389-1390, 14 Feb. 1887 (House of Commons). See also (1887) 21 *Irish Law Times and Solicitors' Journal* 72.

⁷³ J.F. McEldowney, 'Some aspects of law and policy in the administration of criminal justice in nineteenth-century Ireland', in J. McEldowney and P. O'Higgins (eds.), *The common law tradition: essays in Irish legal history*, Dublin, 1990, 154.

⁷⁴ *Ibid.*

⁷⁵ F. Pollock and F.W. Maitland, *A History of English Law before the Time of Edward I*, 2 vols., 2nd ed., Cambridge, 1898, repr. 1911, vol. 2, 621. See also J.H. Thomas, *A systematic arrangement of Lord Coke's first institute of the laws of England*, 3 vols, Philadelphia, 1836, vol. 3, 365; Coke 155b.

⁷⁶ Coke 155b, above, n.75.

The eighteenth and nineteenth centuries saw an increasing ‘patchwork’⁷⁷ of legislation dealing with juror qualification, though the most important restriction on eligibility for jury service was always the property requirement.⁷⁸ Until the middle of the eighteenth century, the Irish property qualification⁷⁹ was always lower than the English one, and is largely attributable to the inadequate supply of suitable men.⁸⁰

The purpose of the Juries (Ireland) Act 1833⁸¹ was essentially to make Irish jury laws more similar to the English laws.⁸² A qualified juror henceforth had to enjoy either ten pounds annually in land or rents held in fee simple, fee tail or for life, or fifteen pounds annually in lands held by a lease originally made for not less than twenty-one years. He could alternatively be classified as a resident merchant, a freeman, or a householder in a town, with an annual value of twenty pounds.⁸³ Commentators in 1839 and again in 1852 complained vociferously about the standard of jurors empanelled in Ireland after the passing of this Act.⁸⁴ It has been observed that ‘[w]hatever the merits of the [1833] act at the time, during the post-famine period it became largely unworkable.’⁸⁵ Several observers were critical not of the jurors themselves, but of the continued scarcity thereof, especially after the famine years, which led the sheriffs to use ever more inventive means to secure jury panels, often returning men who were not qualified in accordance with the statute. This, along with the sheriff’s discretion in selecting the names from the jurors’ book, outlined above, contributed towards allegations of jury-packing. In many counties the sheriff effectively had a free hand in choosing who served on juries. Although some of them abused their powers, even those who did not could nevertheless be tainted with the suspicion of corruption.

Meanwhile, since 1825 English jurors had qualified on the basis of the rateable value of their lands, as opposed to their simple value. It had not been possible in 1833 to introduce

⁷⁷ John H. Langbein, ‘The English criminal trial jury on the eve of the French Revolution’, in A. Schioppa (ed.), *The trial jury in England, France, Germany 1700-1900*, Berlin, 1987, 24. Note that while Langbein refers to the proliferation of legislation in England, similar levels of legislative activity were evident in relation to Irish juries during this period.

⁷⁸ *Ibid.*, 25.

⁷⁹ The principal pieces of legislation during this period were the Sheriffs Act (Ireland) 1725 (12 Geo. I, c. 4, s. 17), the Regulation of Juries (Ireland) Act 1735 (9 Geo. II, c. 3) and the Sheriffs (Ireland) Act 1755 (29 Geo. II, c. 15).

⁸⁰ Neal Garnham, *The courts, crime and criminal law in Ireland 1692-1760*, Dublin, 1996, 135.

⁸¹ 3 & 4 Wm. IV, c. 91.

⁸² *Parliamentary Debates*, series 3, vol. 21, col. 1054, 4 March 1834 (House of Commons), *per* Daniel O’Connell. See Howlin, above, n.4, ‘English and Irish jury laws’.

⁸³ There was an additional category for cities and towns: resident merchants, freemen or householders with personal estate to the value of one hundred pounds. This was the first time that personalty sufficed as a jury qualification.

⁸⁴ *Report from the Select Committee of the House of Lords, appointed to enquire into the state of Ireland in respect of crime, and to report thereon to the House* H.C. 1839 (486) xi, 1; xii, 2. One grievance was the apparently lower class of jurors; see for example para. 1072. Hill Wilson Rowan, a resident magistrate, told the committee, para. 2258, that under the new Act, there were many Ribandmen or ribbon-men serving (see above, n.12), some of whom held estates of over one hundred acres. It was his opinion that many of these people would not have been summoned to serve under the previous qualifications. The Juries (Ireland) Act 1833 (3 & 4 Wm. IV, c. 91) was also criticised for producing a lower standard of jurors than existed in England. Complaints were also made about the effect it had on the trials of Protestants: Chief Constable Hatton, para. 3037-9, told the Committee that prisoners who were Roman Catholic were now much more confident of receiving a fair trial, while those who were Protestant were less confident than previously. Another committee on crime and outrage was established in 1852: *Report from the Select Committee on Outrages (Ireland)*, H.C. 1852 (438) xiv, 1. It seems that little had changed in the intervening fourteen years, and many of the sentiments expressed before this committee echoed the comments of 1839. In fact, many of the witnesses themselves gave evidence before both committees.

⁸⁵ Johnson, ‘Trial by jury’, above, n.6, 271.

such a system in Ireland, because the poor laws were not yet operative.⁸⁶ By the 1850s however, calls were being made for the extension of the poor law rating system as a basis for jurors' qualifications. Between 1854 and 1868, nine abortive bills were introduced in attempts to give effect to these recommendations.⁸⁷ By 1870, it was clear that the Juries (Ireland) Act 1833⁸⁸ had become 'virtually obsolete.'⁸⁹ With the Juries Act (Ireland) 1871,⁹⁰ the Irish Lord Chancellor, Lord O'Hagan⁹¹ proposed to 'put an end to existing qualifications and to substitute a simple and uniform qualification',⁹² thus finally giving effect to the recommendations of the 1852 select committee on outrages in Ireland.⁹³ Under section five of what became known as O'Hagan's Act, jurors in both civil and criminal cases were now to be rated for the relief of the poor with respect to lands of a specified annual value. The required net annual value of the jurors' property varied around the country,⁹⁴ with twenty pounds being the specified amount in most counties, though it went as low as twelve pounds in some districts. For example, in Antrim the qualification for common jurors was twenty pounds in the countryside and twelve pounds in cities and towns, whilst in the towns of Drogheda and Galway it was slightly higher at fifteen pounds. The qualification in county Leitrim was twelve pounds in both urban and rural areas. Special jurors' qualifications were also affected,⁹⁵ and varied from a low of thirty pounds in such towns as Waterford, Kilkenny and Carrickfergus, to a high of one hundred pounds in the counties of Tipperary, Meath and Kildare.⁹⁶

Although the new rating system was generally welcomed in principle, the Juries Act (Ireland) 1871⁹⁷ itself was widely criticised for having set the bar too low.⁹⁸ Some were

⁸⁶ See R.B. McDowell, *The Irish administration 1801-1914*, London, 1964, 175-190.

⁸⁷ See *Parliamentary Debates*, series 3, vol. 133, col. 1023, 26 May 1854 (House of Commons); *Parliamentary Debates*, series 3, vol. 133, col. 1234, 2 June 1854, (House of Commons); *Parliamentary Debates*, series 3, vol. 135, cols. 116-121, 12 July 1854 (House of Commons); *Parliamentary Debates*, series 3, vol. 136, cols. 299-300, 14 Dec. 1854 (House of Commons); *Parliamentary Debates*, series 3, vol. 136, col. 461, 18 Dec. 1854 (House of Commons); *Parliamentary Debates*, series 3, vol. 140, col. 219, 5 Feb. 1856 (House of Commons); *Parliamentary Debates*, series 3, vol. 140, cols. 970-972, 18 Feb. 1856 (House of Commons); *Parliamentary Debates*, series 3, vol. 141, col. 1469, 25 April 1856 (House of Commons); *Parliamentary Debates*, series 3, vol. 149, col. 982, 13 April 1858 (House of Commons); *Parliamentary Debates*, series 3, vol. 149, col. 2008, 29 April 1858 (House of Commons); *Parliamentary Debates*, series 3, vol. 150, col. 2014, 14 June 1858 (House of Commons); *Parliamentary Debates*, series 3, vol. 150, col. 2285, 17 June 1858 (House of Commons); *Parliamentary Debates*, series 3, vol. 178, col. 629, 3 April 1865 (House of Lords). McEldowney notes that there is no apparent reason for the failure of these bills, though it does seem that petty rivalries and loyalties may have played a significant part. J.F. McEldowney, *Lord O'Hagan and the Irish Jury Act 1871*, thesis submitted for the degree of Doctor of Philosophy, Cambridge University, 1981, 95.

⁸⁸ 3 & 4 Wm. IV, c. 91.

⁸⁹ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 5.

⁹⁰ 34 & 35 Vic., c. 65.

⁹¹ See J.F. McEldowney, 'Lord O'Hagan (1812-1885): A study of his life and period as Lord Chancellor of Ireland (1868-1874)' (1979) 14 *Irish Jurist* 360. McEldowney's thesis, above, n.87, also examines in detail the factors leading to the passing of the 1871 Act, as well as its consequences. See also McEldowney, 'The case of *the Queen v McKenna* and jury packing in Ireland' (1977) 12 *Irish Jurist* 339; Daire Hogan, 'Arrows too sharply pointed: the relations of Lord Justice Christian and Lord O'Hagan, 1868-1874', in J.F. McEldowney and P. O'Higgins (eds), *The common law tradition: essays in Irish legal history* Dublin, 1990; F.E. Ball, *The Judges in Ireland 1221-1921*, London, 1926, 302; E.J. Moore, 'Lord O'Hagan', (1908) 42 *Irish Law Times and Solicitors' Journal* 255.

⁹² *Parliamentary Debates*, series 3, vol. 206, col. 1031, 19 May 1871 (House of Lords).

⁹³ *Report from the Select Committee on Outrages (Ireland)*, H.C. 1852 (438) xiv, 1.

⁹⁴ 34 & 35 Vic., c. 65, sch. 4.

⁹⁵ The Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65), sch. 5. See above, n.9.

⁹⁶ Varying land values around the country were a factor affecting these sums.

⁹⁷ 34 & 35 Vic., c. 65.

⁹⁸ These criticisms were summed up by James Charles Coffey, QC, who was the crown prosecutor for county Clare, and chairman the bench of the city and county of Londonderry: '[i]n principle I approve of the rating

vehement in their condemnation, claiming that the rating qualification was ‘so low, that it provided an entirely superfluous number of jurors, and they had no knowledge whatever of their duties.’⁹⁹ Indeed, in the words of the fifth Marquess of Lansdowne,¹⁰⁰ a ‘general complaint’ arose that

popular representation in the jury-box had been carried a little too far, and that while the Act had certainly provided an abundant supply of jurors, it had not been successful in securing the presence in the box of men of independence and intelligence, or in excluding persons who were very much the reverse of intelligent, and totally devoid of independence.¹⁰¹

In response to such criticisms, Lord O’Hagan noted the differences in the operation of the rating system in England and Ireland, and said that the ‘experiment in Ireland was as novel as it was difficult’. He described the new system as having ‘wrought, in a sense, a social revolution’ by opening the jury box to ‘classes who had for generations been jealously precluded from any interference with the Courts of Justice.’¹⁰² W.E. Vaughan has since expressed surprise at the government’s decision to lower the jury qualification at this time of such political unrest.¹⁰³ As O’Hagan himself later admitted, it “‘had gone before its time.’”¹⁰⁴ The radical changes effected by these new qualifications had a profound impact on the crown’s ability to predict and control who sat in the jury-box. As will be seen, in the wake of these reforms other procedures – such as, for example, the right to challenge jurors with or without cause – became increasingly important.

Although one of the intended effects of the Juries Act (Ireland) 1871¹⁰⁵ was to broaden the jury franchise and introduce greater diversity in the jury-box, in fact it had the opposite effect. This was illustrated by Justice John David Fitzgerald shortly after the Act came into effect, when he produced for the benefit of the 1873 select committee on the Irish jury system some recent jury panels from Limerick and Cork.¹⁰⁶ On the panel from the Limerick summer assizes of 1872, there were 141 individuals listed, of whom thirty-seven were described as ‘esquire’ (this included magistrates and men of high social position), thirty-four were gentlemen or shopkeepers, and seventy were listed as farmers. At the spring 1873 Limerick assizes, the first assizes to have taken place since the Juries Act (Ireland) 1871 came into force, there were five justices of the peace,¹⁰⁷ seven gentlemen and 128 farmers. This represented an increase in the proportion of farmers from just under fifty percent to just over ninety percent. A similar pattern was evident with the panels for the Cork assizes; the percentage of farmers jumped from about eleven per cent of the panel, to over seventy per

qualification; I think that it is sound, but in my judgment it is too low, and it must be raised.’ *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, para. 647,

⁹⁹ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 300.

¹⁰⁰ This was Henry Charles Keith Petty Fitzmaurice, who chaired the 1881 Select Committee on Irish Jury Laws. See *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1.

¹⁰¹ *Parliamentary Debates*, series 3, vol. 261, col. 1035, 23 May 1881 (House of Lords).

¹⁰² *Parliamentary Debates*, series 3, vol. 231, cols. 497-498, 4 Aug. 1876 (House of Lords).

¹⁰³ Vaughan, above, n.3, 141.

¹⁰⁴ D.S. Johnson, ‘The trials of Sam Gray: Monaghan politics and nineteenth century Irish criminal procedure,’ (1985) 20 *Irish Jurist* (ns) 109, 133.

¹⁰⁵ 34 & 35 Vic., c. 65.

¹⁰⁶ *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, para. 3223.

¹⁰⁷ Robert Vere O’Brien, the clerk of the peace for county Clare pointed out to the 1881 parliamentary committee that some of those listed as farmers were also justices of the peace. *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 2206.

cent.¹⁰⁸ These figures, said Fitzgerald, ‘at once show[ed] compendiously the practical operation of the Act.’¹⁰⁹ Similarly, the following year, James Hamilton QC, the chairman of the county Sligo bench informed the 1874 select committee on the working of the Irish jury system that in his county the jurors were ‘principally farmers,’¹¹⁰ which was a positive development for cases of larceny and damage to property,¹¹¹ but presumably less so in more violent agrarian cases.¹¹² At a time when agrarian-related crime was widespread throughout the Irish countryside, some lamented the new prevalence of farmers on the petty jury. Speaking before the 1881 select committee on Irish jury laws, Thomas DeMoleyns presented jury panels from the previous three or four assizes in Limerick, from which it was clear that the majority of jurors were farmers.¹¹³ He criticised this ‘want of diversity’, complaining that there was ‘no variety’, and that it ‘would be a great object in all trials to endeavour to ensure a diversity of qualifications; at present they all appear, I think, to have the same habits, the same feelings, and to move in the same groove.’¹¹⁴

The general consensus¹¹⁵ among those who worked within the criminal justice system was that the Juries Act (Ireland) 1871¹¹⁶ had gone too far in widening the franchise, creating a jury almost devoid of diversity, with the new jurors more susceptible to intimidation and corruption. Within months of the Act coming into effect at the 1873 spring assizes, steps were taken to remedy the negative consequences of Thomas O’Hagan’s ‘experiment’: a parliamentary committee was appointed to inquire into the Act’s operation.¹¹⁷ Almost immediately it issued a preliminary report, whose recommendations were given expression in the Juries (Ireland) Act 1873,¹¹⁸ a temporary Act which raised the rating qualification for special and common jurors. The committee was re-appointed in 1874, and its final report concluded that the rating qualifications introduced in 1871 were too low, and that some of the

¹⁰⁸ At the 1872 summer assizes there were twenty-two farmers out of a total of 189 jurors, whilst in spring 1873 there were 174 out of 240. *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, para. 3223.

¹⁰⁹ *Ibid.*

¹¹⁰ *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, para. 9.

¹¹¹ *Ibid.*, para. 9. He said ‘jurors are willing enough to convict in petty larceny cases. They are principally farmers, and if a person is indicted for stealing a sheep or a cow, they are very willing to convict indeed.’

¹¹² In 1881, Lewis Mansergh Buchanan, clerk of the peace for Tyrone claimed that majority of those serving on juries outside Dublin were ‘the better class of farmers’: *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 319.

¹¹³ Similar evidence was presented by Charles Kelly, the chairman of the bench of county Clare, who demonstrated that at the 1881 June sessions, there were in his county sixty jurors, fifty-one of whom were farmers. *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 3011. Thomas Fitzgerald, the crown solicitor for Donegal and Londonderry, also demonstrated, para. 2893, that in Donegal, the panel for the 1881 assizes listed 130 people, of whom ninety-nine were farmers.

¹¹⁴ *Ibid.*, para. 1604. Alexander Morphy, who was a circuit crown solicitor for Clare and Kerry, told the Committee of 1873 that farmers, in county Clare were ‘unequal to the obligations which were imposed upon them,’ and that he would rather that there were none on the jury panels. *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, para. 3752-3.

¹¹⁵ See, for example, *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, H.C. 1873 (283), xv, 389, per James Robinson, QC, para. 3849, and *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, per Thomas de Moleyns, para. 1905. De Moleyns was the chairman of the county Kilkenny bench and the crown prosecutor for Limerick city and county.

¹¹⁶ 34 & 35 Vic., c. 65.

¹¹⁷ *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389. See Anon., ‘Irish Juries’ (1873) 7 *Irish Law Times and Solicitors’ Journal* 284.

¹¹⁸ 36 & 37 Vic., c. 27.

sums fixed by the Juries (Ireland) Act 1873 needed to be raised.¹¹⁹ The various recommendations were embodied in two Acts of 1876 – the Juries (Procedure) Ireland Act,¹²⁰ and the Jurors (Qualification) Ireland Act.¹²¹ The latter impacted upon the problem of jury diversity. Section two¹²² raised the rating qualification for lands in rural areas from thirty¹²³ to forty pounds, and reduced the qualifications for private homes, offices and curtilage from twelve or twenty pounds¹²⁴ to either six or ten pounds.¹²⁵ The 1876 Act distinguished between cities and counties: in Dublin, Cork, Limerick and Waterford, the new rating was twenty pounds, whilst in the towns of Kilkenny, Carrickfergus, Drogheda and Galway it was to be fifteen pounds. Generally, the qualification for urban dwellers was reduced, whilst for those in the countryside it was increased. This was generally welcomed as excluding inexperienced and incompetent jurors.¹²⁶ The lowering of the qualification from twelve to ten pounds in towns was not, however, met with such unreserved approval; William Edward Whelan, a Portadown resident magistrate, was of the view that this was ‘much too low,’ and that ‘[t]he county jurors are better than they were, and the town jurors are worse.’¹²⁷ Where the qualification was reduced, it was often alleged that the new ‘lower class’ jurors were reluctant to convict, coming as they did from the same social class as many of those accused.¹²⁸

Coupled with the increasing presence of farmers on juries was the growing aversion to jury service amongst men from higher social classes. Many such men simply chose to ignore jury summonses, as will be discussed below. It will also be seen that many of those who obeyed the summonses were liable in any case to be challenged by the prisoner, who could challenge a certain number of jurors without cause. It could be argued that attempts to compel upper-class jurors to attend were at times futile, because if the prisoner fully exhausted his challenges, there might be few – if any – such men sitting on the actual jury empanelled to try the case.

4. Exemptions and disqualifications

Certain categories of person were exempted from sitting on juries.¹²⁹ Many otherwise qualified jurors relished their exemption; in 1873, Chief Justice Monahan remarked that ‘There is not a man in Ireland wishes to be on a jury.’¹³⁰ Section two of the Juries (Ireland)

¹¹⁹ *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557. See Anon., ‘The Jury Act’ (1873) 7 *Irish Law Times and Solicitors’ Journal* 167 where the prevailing opinion on the Act was summed up: ‘[t]he principle involved in it is right, but the qualification is, for the minute, too low.’

¹²⁰ 39 & 40 Vic., c. 78.

¹²¹ 39 & 40 Vic. c. 21.

¹²² 39 & 40 Vic. c. 21.

¹²³ 36 & 37 Vic., c. 27, sch.1.

¹²⁴ 36 & 37 Vic., c. 27, sch.1.

¹²⁵ 39 & 40 Vic. c. 21, sch. 2.

¹²⁶ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, *per* Buchanan (see above, n.112) para. 305, 321.

¹²⁷ *Ibid.*, para. 1532-3.

¹²⁸ Although it is difficult to compare the rating system with the earlier system of qualification according to the annual value of one’s property, it does appear that even after 1876 the qualifications allowed poorer men onto the jury that had been the case under the 1833 Act.

¹²⁹ While such exemptions usually stemmed from legislation, at times they could be granted by the crown: see the English case of *R v Perceval and others* (1659) Sid 243; 82 ER 1083.

¹³⁰ *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, para. 2647-8.

Act 1833¹³¹ listed as exempt from jury service such categories as peers, persons connected with the administration of justice, clergymen and members of certain professions, including surgeons, apothecaries and postmasters. Section six of the Juries Act (Ireland) 1871¹³² ‘absolutely freed and exempted’ certain groups from jury service. While the list was similar to those exempted in 1833, some newly-exempted groups were MPs, masters of vessels and licensed pilots, civil engineers, public notaries, actuaries, professors, schoolmasters and teachers. One group who lost their exemption were justices of the peace.¹³³

It has been noted that the Juries Act (Ireland) 1871¹³⁴ resulted in an increase in the number of jurors – perhaps to an excessive extent, according to some complaints made to the 1873 and 1874 parliamentary committees.¹³⁵ Proposals to raise the qualification were coupled with suggestions that the categories of exemptions be narrowed, so as to maintain a sufficient number of jurors. The *Irish Law Times and Solicitors’ Journal* noted in 1872 that

some objections have been made to the proposed curtailment of exemptions, and the rendering liable ministers of religion and members of Parliament. We do not see any good reason why any person should be relieved from serving on juries unless otherwise actively engaged in services which are of public importance or connected with the courts.¹³⁶

Section twenty of the Juries (Procedure) Ireland Act 1876¹³⁷ repealed all previous provisions, and the first schedule to the Act listed those persons who were henceforth excused. Though similar to the Juries Act (Ireland) 1871,¹³⁸ there were one or two new categories, such as ‘persons who cannot read or write the English language,’ practising ‘pharmaceutical chymists duly registered,’ and small publicans. Although the exemptions in Ireland were not nearly as numerous as those in England,¹³⁹ nevertheless there was a general feeling that the Juries (Procedure) Ireland Act 1876¹⁴⁰ had gone too far.¹⁴¹ Witnesses before the 1881 parliamentary committee complained that the number of exempt classes was too great, and called for a limitation.¹⁴² Nevertheless, despite the criticisms levelled at it, the Juries (Procedure) Ireland Act 1876¹⁴³ remained unamended and the situation persisted for the remainder of the century.

5. Challenging jurors

¹³¹ 3 & 4 Wm. IV, c. 91.

¹³² 34 & 35 Vic., c. 65.

¹³³ They had previously been allowed to sit on juries except at any sessions of the peace within their own jurisdiction. 3 & 4 Wm. IV, c. 91, s. 38.

¹³⁴ *Ibid.*

¹³⁵ *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389; *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557.

¹³⁶ Anon., ‘Juries Bill 1871’ (1872) 6 *Irish Law Times and Solicitors’ Journal* 326.

¹³⁷ 39 & 40 Vic., c. 78.

¹³⁸ 34 & 35 Vic., c. 65.

¹³⁹ Under the English Juries Act 1870 (33 & 34 Vic., c. 77), the schedule of exempt persons was considerably longer than that contained in the Juries Procedure (Ireland) Act 1876 (39 & 40 Vic., c. 78), and specifically listed, *inter alia*, judges, Roman Catholic priests, Jewish ministers, certified conveyancers, special pleaders, coroners, and gaolers. Another controversial group exempted in England were the income-tax commissioners.

¹⁴⁰ 39 & 40 Vic., c. 78.

¹⁴¹ *Report of the Select Committee on law and practice relating to summoning, attendance and remuneration of special and common juries*, H.C. 1867-68 (401), xii, 677, 579, *per* Sir William Erle, para. 1076.

¹⁴² *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, *per* Justice Fitzgerald, para. 2982. John Byrne, the collector general of rates in Dublin, who had responsibility for preparing the jurors’ lists for the city of Dublin, claimed, para. 790, that the high number of exempt categories had ‘considerably impaired’ the quality of juries.

¹⁴³ 39 & 40 Vic., c. 78.

Before describing the various types of jury challenges allowed to both the accused and the crown in criminal cases, the significance of public prosecutors in Ireland is worthy of note. In England, criminal prosecutions were by and large brought by private individuals,¹⁴⁴ whereas in Ireland, all prosecutions came under the direct personal control and supervision of the Irish attorney general.¹⁴⁵ According to McEldowney, this Irish system of public prosecutions emerged partially ‘as a response to the peculiar difficulties of enforcing English criminal law in Ireland.’¹⁴⁶ He later adds that in Ireland, law enforcement was ‘a politically sensitive issue;’¹⁴⁷ it was difficult to get witnesses and prosecutors to come forward ‘for fear of their lives’, especially in cases of agrarian crimes, for which it was difficult to secure a conviction from a jury.¹⁴⁸ The system of public prosecution was at first seen as an addition, rather than an alternative to the private system, but by the middle of the nineteenth century, private prosecutors played a minor role. The Irish attorney general appointed a crown solicitor for each county, who sent him instructions for opinion on each case sent forward by the magistrates for trial at the assizes.¹⁴⁹ McLennan noted that in 1835 “the appointment of these solicitors secured the effective prosecution of a very large class of cases, chiefly assaults, arising out of riots at fairs or other assemblies of the people.”¹⁵⁰ Crown solicitors were, according to McEldowney, ‘the essential link between the local magistracy and the central government. They effectively chose the Crown Counsel employed by the Crown in each case.’¹⁵¹

Both crown counsel and the accused’s counsel were entitled to challenge a certain number of jurors. Both could challenge an unlimited number ‘for cause’, and the accused was, in addition, allowed a certain number of peremptory challenges.¹⁵² Parallel to this was the crown’s right to order an unlimited number of jurors to ‘stand aside’, without showing cause, until the full list of jurors’ names had been called.¹⁵³ The right to challenge was a safeguard against biased or otherwise unsuitable jurors, and was traditionally seen as a vital aspect of jury trial.¹⁵⁴ The rules,¹⁵⁵ as will be seen, were fairly complex, and the volume of

¹⁴⁴ See John H. Langbein, ‘The origins of public prosecution and common law’ (1973) 17 *American Journal of Legal History* 313.

¹⁴⁵ For a comparative analysis, see W.H. Dodd, ‘The preliminary proceedings in criminal cases in England, Ireland, and Scotland, compared’ (1878) *Journal of the Statistical and Social Inquiry Society of Ireland* 201. See also W.N. Hancock, ‘The cost of adopting a complete system of public prosecutions in England, as illustrated by the results of the working of the Scotch and Irish systems of prosecution.’ (1878) *Journal of the Statistical and Social Inquiry Society of Ireland* 271. The only cases in Ireland where the attorney general could not prosecute were those concerning embezzlement in banks and other large establishments.

¹⁴⁶ J. McEldowney: ‘Crown prosecutions in nineteenth-century Ireland’ in D. Hay and F. Snyder, *Policing and prosecution in Britain 1750-1850*, Oxford, 1989, 428.

¹⁴⁷ *Ibid.*, 430.

¹⁴⁸ *Ibid.*

¹⁴⁹ Dodd, above, n.145, 202.

¹⁵⁰ J.F. McLennan, *Memoir of Thomas Drummond*, Edinburgh, 1867, 281.

¹⁵¹ McEldowney, ‘Crown Prosecutions’, above, n.146, 437.

¹⁵² See R.B. Browne, “‘A delusion, a mockery, and a snare’”: array challenges and jury selection in England and Ireland, 1800-1850’ (2004) 39(1) *Canadian Journal of History* 2. In Ireland, persons accused of misdemeanours could challenge six jurors without cause; in England, there was no such right. In felonies, defendants in Ireland could challenge twenty peremptorily, while in England, they could challenge just six.

¹⁵³ McEldowney, ‘Stand by’, above, n.40, 274. See below, n.176-n.181.

¹⁵⁴ See McEldowney, ‘Stand by’, above, n.40, 273. According to Coke, the term ‘challenge’ was ‘derived of the old word caloir or chaloir, which in one signification is to care for, or foresee. And for that to challenge jurors is the meane to care or foresee that an indifferent trial be had, it is called calumnaire, to challenge, that is to except against them that are returned to be jurors.’ Coke 155b, above, n.75. Giles Duncombe, *Tryals per pais*, 6th ed., London, 1725, 122 said that ‘[c]hallenge is a Word common, as well to the English as the French ... and the Latin Word is Vindicare...’ See also M. Bacon, *A new abridgement of the law*, London, 1736, 251.

case-law generated by disputes over challenges¹⁵⁶ is some indication of the perceived importance of the practice. The challenge procedure was an important mechanism for determining who actually sat upon a jury, especially in the early nineteenth century before the extensive statutory regulation of juror qualifications. Stephen wrote in 1883 that given the early role of jurors as witnesses, the right to challenge jurors was ‘in very ancient times equivalent to the choice of the witnesses by whom matters of fact were to be determined.’¹⁵⁷

There were two types of challenge: challenges to the polls and challenges to the array. A challenge to the array was an objection to the way in which the jury panel had been compiled – in other words the entire jury was objectionable, usually because of bias or partiality on the part of the sheriff. A challenge to the polls, on the other hand, was an objection to a specific juror. There was no limit to the number of challenges to the polls for cause in civil and criminal trials.¹⁵⁸ If a challenge to the polls for cause failed, a prisoner might still succeed with a peremptory challenge.

The issue of challenging the array of the jury came to the fore during the trial of Daniel O’Connell for conspiracy in 1844.¹⁵⁹ This trial was described as being ‘from the commencement to the close, in length, and extent, and importance, without precedent or parallel.’¹⁶⁰ O’Connell, a Roman Catholic MP, had organized a series of ‘monster meetings’ in order to agitate for repeal of the Union. He was arrested in October 1843, and proceedings commenced in the Court of Queen’s Bench before Pennefather CJ, Perrin, Crampton, and Burton JJ in November.¹⁶¹ O’Connell and his seven co-defendants sought to have the trial postponed until the new year, because the jury lists contained significant errors. It was claimed that on the 1843 Dublin special jury lists, there were 388 names, at least seventy of

¹⁵⁵ The rules were grounded in common law: the Criminal Law (Ireland) Act 1828 (9 Geo. IV, c. 54), s. 9 reaffirmed existing practices. See Coke 158a, above, n. 75; Matthew Hale, *Pleas of the crown*, 8 vols., London, 1678, vol. 2, 275; William Blackstone, *Commentaries upon the Laws of England*, 4 vols., London, 1822, vol. iv, 346-347; Henry Holmes Joy, *On peremptory challenges of jurors, with the judgment of the Queen’s Bench in the Queen v Gray*, Dublin, 1844.

¹⁵⁶ In the criminal sphere, see for example: *R v Sheridan and Kirwan* (1811) 31 How St Tr 543 (See *Cobbett’s Weekly Political Register*, 1 Feb. 1812); *R v Delany* (1828) Jebb CCR 88; 169 ER 1048; *R v Phelan* (1832) 1 Cr & Dix 189n; *R v Whelan* (1832) 1 Cr & Dix 189n; *R v Adams and Langton* (1832) Jebb CCR 135; *R v Hanly* (1832) 1 Cr & Dix CC 188; *R v Dunne* (1832) 1 Cr & Dix CC 190n; *R v Fitzpatrick* (1838) Cr & Dix Abr 513; *R v. Conrahy and Lalor* (1839) 1 Cr & Dix CC 56; *Francis Hughes’ case* (1841) Ir Cir Rep 274; *Patrick Wood’s case* (1841) Ir Circ Ca 276, (1832) 1 Cr & Dix 189n; *Lavin and Healy’s case* (1843) Ir Circ Ca 813; *R v Gray* (1843) 6 Ir LR 259; *R v O’Connell* (1844) 8 Ir LR 261; *Fogarty v the Queen* (1846) 10 Ir LR 53; *O’Brien v the Queen* (1848) 1 Ir Jur (os) 169; 2 Cl & F 465; *Thomas Luby’s case* (1866) *Report of the Proceedings at the first sitting of the Special Commission for the County of the City of Dublin held at Green-Street Dublin for the trial of Thomas Clarke Luby and others*, Dublin, 1866, 318; *R v Burke* (1867) 10 Cox CC 519; *R v McGinley and Burns* (1877) 11 ILTR 58; *R (Bridge) v Casey* (1877) 13 Cox CC 646; *R v Parnell and others* (1881-2) 8 LR Ir 17, the trial of John Dillon and others, reported at length in D. Crilly, *Jury packing in Ireland*, Dublin, 1887, and see M. O’Callaghan, *British high politics and a nationalist Ireland: Criminality, land and the law under Foster and Balfour* Cork, 1994, 61-70.

¹⁵⁷ James Fitzjames Stephen, *A history of the criminal law of England*, 3 vols., London, 1883, vol. 1, 301.

¹⁵⁸ See Coke 158a, above, n.75.

¹⁵⁹ *R v Daniel O’Connell and others* (1844) 8 ILR 261. The others were John O’Connell, Richard Barrett, Thomas M. Ray, John Gray, Thomas Steele, Charles Gavan Duffy and Thomas Tierney. See also (1844) 11 Cl & F 155; 8 ER 1061, and J.S. Armstrong and E.S. Trevor, *A report of the proceedings on an indictment for a conspiracy in the case of the Queen v Daniel O’Connell and others*, Dublin, 1844. See generally Maurice O’Connell, *The correspondence of Daniel O’Connell*, 8 vols.: vols. i-ii Shannon, 1972; vols. iii-viii Dublin, 1974-1980 and ‘*O’Connell v Regina*’ (1844) 1 *Law Magazine* 47.

¹⁶⁰ W.C. Townsend, ‘The trial of Daniel O’Connell, esq., MP and others for Conspiracy’ in *Modern State trials*, Dublin, 1844, 392, 393.

¹⁶¹ J. Flanedy (ed.), *A special report of the proceedings in the case of the Queen against Daniel O’Connell, Esq., M.P.*, Dublin, 1844, 9.

whom were apparently disqualified for one reason or another.¹⁶² Of the 388, only fifty-three were Roman Catholic, and thirty of these were exempt, because they were town councillors or magistrates, leaving only twenty-three. Pierce Mahony, acting for the defence, was of the view that there were at least 300 Roman Catholics in the city of Dublin who qualified as special jurors. Contemporaneously with the proceedings in the Court of Queen's Bench, much attention was focused on the revision of the jury lists taking place in the recorder's court in Green St. One commentator remarked that 'the proceedings ... excited for several days more attention than even the proceedings in the Queen's Bench.'¹⁶³ The revision of the lists started on 14 November and lasted a fortnight, and meanwhile a trial date was set for 15 January 1844. Among those who attended the revision were counsel and agents on behalf of O'Connell and the others, who entered numerous objections and applications. For example, on one of the lists, fifteen names had been omitted, thirteen of whom were Roman Catholics. The list was found in an inner office of the clerk of the peace, under a desk.¹⁶⁴

Eventually the lists were completed, and on 29 December, the crown solicitor served notice upon the defendants that the special jury would be nominated in early January 1844.¹⁶⁵ The defendants did not receive a copy of the panel until the night before this was due to take place. At the crown office the following day, 4 January 1844, James Whiteside, QC, complained that they had discovered that the names of a large number of duly qualified men listed on the special jurors' book had been omitted from the list.¹⁶⁶ Seven of those omitted were Roman Catholics. The nomination proceeded nevertheless in accordance with Juries (Ireland) Act 1833.¹⁶⁷ Cards inscribed with the names of the 716 special jurors were put into a box and forty-eight were drawn out. On 5 January, counsel for the crown and counsel for the traversers each struck out twelve names, leaving a panel of twenty-four jurors. All of the Roman Catholics who had been on the panel were struck off by the crown. On the first day of the trial, 15 January, the jury list was reduced to twelve in the Court of Queen's Bench. This was done by calling out the twenty-four in court, and the first twelve men to answer to their names were to be the jury to try the case. Before the jury were sworn, counsel for the traversers challenged the array, because the jury lists were not made out in accordance with the 1833 Act.¹⁶⁸ It was alleged that the names of fifty-nine qualified jurors had been fraudulently omitted from the general lists from which the jurors' book was composed. This jury-packing, it was claimed, was intended to prejudice the defendants.¹⁶⁹ After much debate,¹⁷⁰ the court refused to allow this challenge, and the jury was sworn in.

While Perrin J was of the view that there were sound grounds to challenge the array, Crampton J held that the defendants had failed to establish that the 1844 jury list had been fraudulently made up in order to prejudice them, or that the fraud had in fact prejudiced them. He noted that the facts were to a considerable degree undisputed by the parties, but that there was considerable discrepancy in the inferences drawn from those facts.¹⁷¹ Counsel for the traversers, he claimed, 'indulge largely in surmise, suspicion, and imputation.' He considered it 'remarkable' that although fraud was alleged, the allegation was not directed towards any specific individual. There could be no imputation of fraud on behalf of the

¹⁶² Ibid., 71.

¹⁶³ Ibid., 92.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., 95. See above, n.42-n60.

¹⁶⁷ 3 & 4 Wm. IV, c. 91.

¹⁶⁸ Flanedy, above, n.161, 100-101. See also above, n.42-n.58.

¹⁶⁹ *R v O'Connell* (1844) 8 Ir LR 261, 267. See above, n.13.

¹⁷⁰ James Simpson Armstrong and Edward Shirley Trevor, *A report of the proceedings on an indictment for conspiracy in the case of the Queen v Daniel O'Connell and others*, Dublin, 1844, 117*-48.

¹⁷¹ Ibid., 288.

Recorder – he had left the country – and the crown solicitor was unconnected with the preparation of the list. The clerks of the peace were acquitted; Magrath and his clerks denied the fraud and were not accused. Thus, in the words of Crampton J, ‘the matter of fraud is rested upon the general allegation that somebody committed it.’ The court could not presume fraud, and he concluded that it was probably attributable to ‘negligence in some of the clerks in the office of the Recorder’s acting registrar’¹⁷² but that there was ‘no fraud whatever in the transaction.’ As to whether the alleged negligence had prejudiced the defendants, there seemed little possibility, in Crampton J’s view, that the jurors were biased against O’Connell, or that the jury was ‘packed’ against him.¹⁷³ He was adamant that the court could not speculate on the constitution of juries;

We cannot, sitting here as Judges, notice any difference of religious persuasion in the parties or the Jurors who come before us. We cannot assume that there is any difference in legal competency or fitness to discharge the office of Jurors in any case between Protestants and Roman Catholics; we must rather assume that with the same evidence before them, a Jury of Protestants, and a Jury of Roman Catholics, and a Jury mixed of both classes, acting honestly and conscientiously, as we must suppose them to do, would arrive upon their oaths at the same conclusion.¹⁷⁴

Ultimately, the jury delivered a verdict of guilty, and O’Connell was sentenced to one year’s imprisonment and a fine of £2000. On appeal to the House of Lords the judgment was later reversed because of errors in the indictment.¹⁷⁵ The nature of the challenges to the array by O’Connell and the publicity surrounding the revision of the jury lists in this case indicate a general awareness of the supposed importance of jury composition.

As mentioned above, another important aspect of jury challenges was the ‘stand aside’ or ‘stand by’ power. McEldowney notes that as well as being responsible for prosecutions at the assizes, crown solicitors were ‘given discretion as to whether or not to exercise the Crown’s power to stand by jurors.’¹⁷⁶ This controversial power meant that the crown could exclude certain jurors without showing cause. The origin of this right can be traced to a statute of 1305,¹⁷⁷ which stated that ‘if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same shall be inquired of ...’ The courts interpreted this as meaning that the crown did not have to state the cause of the challenge until the whole panel was gone through,¹⁷⁸ and McEldowney notes that in practice, the crown could ‘direct that jurors stand-by, postponing the giving of cause until the entire panel was gone through. In fact the Crown seldom gave cause for standing such jurors aside.’¹⁷⁹ In essence, a juror whose name was called out in court was asked to ‘stand aside’ until all of the names on the panel had been called. In theory, he was only being asked to do so temporarily, but in reality, a second calling-over of the panel was rarely resorted to, and so those men did not make it onto the jury. It thus appeared that the crown had considerably greater powers of challenge than the accused.

¹⁷² *Ibid.*, 289-290.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, 291.

¹⁷⁵ See O’Connell, *Correspondence*, above, n. 159, letters 3039, 3048, 3073, and 3086.

¹⁷⁶ McEldowney, ‘Crown Prosecutions’, above, n.146, 437.

¹⁷⁷ 33 Ed. I, stat. 4.

¹⁷⁸ McEldowney, ‘Stand by’, above, n.40, 275. He notes that the power was questioned during the 1794 state trials of Horne Tooke, John Thelwall and Thomas Hardy, but that ‘[a]lthough this construction of the statute 33 Ed. I was questioned, it was generally upheld.’ *Ibid.*, 276.

¹⁷⁹ *Ibid.*

The power was controversial because it was unlimited.¹⁸⁰ From 1835 onwards, the Irish attorney general would sometimes issue instructions to crown solicitors, '[p]artly to provide a uniform policy of challenging jurors and also to indicate situations where the power should not be exercised'.¹⁸¹ Whether these instructions had any great effect on the use of the power is unclear, and Johnson notes that the crown used the power 'with great vigour, on occasions to the point where it laid itself open to the charge of jury packing'.¹⁸² One example of the crown's over-use of the power was the trial of a blind man names Smith for murder in county Cavan in late 1873. Describing the case to the 1874 parliamentary committee on the Irish jury system, James Hamilton pointed out that the case involved no agrarian or political feeling; yet, 'in the presence of the Attorney General, the Crown solicitor set aside 56 jurors out of the panel.'¹⁸³ Johnson lists numerous examples of the over-use of the power, including the high-profile trial of Montgomery, a sub-inspector of the Royal Irish Constabulary, for the murder of a bank clerk in county Tyrone in June 1871.¹⁸⁴ Although not involving political, religious or agrarian considerations, it was nevertheless considered by Justice Barry, who presided at the trial, to be a very serious and important case.' Montgomery was tried three times. At the first two trials, the jury disagreed, with a majority of eleven in favour of a guilty verdict.¹⁸⁵ At one of the early trials, before the 1871 Act had been revised, Justice Barry said,

When I went into court I was amazed at the crowd in court of, apparently, a very inferior class of peasants ... I asked who were all those men, and I was told that they were the jurors. I was really aghast. Without saying anything disparaging, you had nothing to do but look at the men to see that they were of a class entirely unfit to cope with such a case. Then the jury were called, and then, for the first time, did I see such a number of men struck off by the Crown.¹⁸⁶

Justice Lawson could not specify how many jurors had been set aside by the crown,¹⁸⁷ but James Hamilton estimated that about 200 jurors were summoned, and 120 were set aside by the crown.¹⁸⁸ Further examples of cases where the power was exercised, albeit in political cases, were the State trials of 1866.¹⁸⁹ At the trial of prominent fenian leaders, the crown used this power to a degree which rankled with many observers, although as Kostel points out,

¹⁸⁰ See *R v Gray* (1843) 6 Ir LR 259, and Johnson, 'Sam Gray', above, n.104.

¹⁸¹ McEldowney, 'Stand by', above, n.40, 277. See also Johnson, above, n.6, 283, and *Instructions given to Crown Solicitors on each Circuit respecting Challenge of Jurors in Crown cases, by various Attorney-Generals; specifying the particulars in which they differ*, H.C. 1842 (171), xxxviii, 339 and *Rule for Guidance of Crown Solicitors in Ireland in relation to the Impannelling of Jurors*, H.C. 1894 (33), lxxii, 29.

¹⁸² Johnson, 'Trial by jury', above, n.6, 282. See also above, n.13.

¹⁸³ *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, para. 3. See above, n.110.

¹⁸⁴ See *Lloyd's Weekly Newspaper*, 9 March 1873, *The Graphic*, 15 March 1873, *The Belfast News-Letter*, 22 July 1873, 31 July 1873. See also *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, per James Hamilton, para. 1-6, and Baron Deasy, para. 2555.

¹⁸⁵ Apparently the juror who held out against a conviction at one of the early trials 'notoriously held the opinion that no man should be hanged for anything; and he went on the jury with those opinions, and of course would find no verdict.' *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, per Cecil Moore, registrar of the Irish court of common pleas, para. 3981.

¹⁸⁶ *Ibid.*, per Justice Barry, para. 1463.

¹⁸⁷ *Ibid.*, para. 4114.

¹⁸⁸ *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, para. 3. See above, n.110.

¹⁸⁹ The offices of the nationalist Fenian newspaper, the *Irish People*, were raided in September 1865, resulting in the prosecutions of leaders O'Donovan Rossa, Luby and O'Leary.

defence counsel were not slow to use their own peremptory challenges and challenges for cause.¹⁹⁰

Corfe points out that in the summer of 1882, at the height of the land war, ‘convictions were difficult to secure because of the intimidation of witnesses and jurors’. It thus ‘became customary ... to transfer cases to Dublin and to pack the juries with men of conservative and unionist sympathies, which usually meant members of the respectable Protestant middle class.’¹⁹¹ Two high-profile murders which took place in the summer of 1882 were those of Lord Frederick Cavendish, the chief secretary, and his Under Secretary, T.H. Burke, in the Phoenix Park on 6 May.¹⁹² They were stabbed to death by a secret society known as the Invincibles. These became known as the Phoenix Park Murders. One of those tried was Timothy Kelly.¹⁹³ At his first trial on 20 April 1883, twenty-nine special jurors were ordered to stand-by.¹⁹⁴ They were unable to reach a verdict,¹⁹⁵ and Kelly was tried again a few days later,¹⁹⁶ at which trial forty jurors were asked to stand by.¹⁹⁷ Between forty-two and fifty-four jurors were ordered to stand by at the trial of Michael Fagan.¹⁹⁸

A few months later, another high-profile prosecution saw the crown once more making quite extensive use of the ‘stand-aside’ procedure. These were the trials arising from the murders of members of the Joyce family in Maamtrasna, county Galway, on 17 August 1882.¹⁹⁹ Two days after the discovery of the murders, ten men were arrested and charged. Patrick Joyce was the first to be tried before Barry J and a special jury in Dublin in November 1882. Peter O’Brien QC, known as ‘Peter the Packer’ (later appointed lord chief justice of

¹⁹⁰ R.W. Kostel, ‘Rebels in the dock: the prosecution of the Dublin Fenians, 1865-6’ (1999) 34 *Eire-Ireland*, 79-80.

¹⁹¹ Tom Corfe, *The Phoenix Park murders: Conflict, compromise and tragedy in Ireland, 1879-1882* London, 1968, 150. See above, n.2, n.3, n.14, n.13.

¹⁹² See *Parliamentary Debates*, series 3, vol. 269, cols. 315-320, 8 May 1882 (House of Lords) and *Parliamentary Debates*, series 3, vol.269, cols. 320-326, 8 May 1882 (House of Commons). For further discussion of the murders, see Lyons, above, n.2, 168-169. It was in the aftermath of these murders that the Prevention of Crime (Ireland) Act 1882 (45 & 46 Vic., c. 25) was passed, abrogating the right to trial by jury and allowing for cases of treason, murder and assault to be tried by special commissions of three judges. It also provided for special juries (see above, n.9) to be used instead of common juries in certain cases. This met with fierce opposition, not least from the Irish bench. The *Freeman’s Journal* described the Bill as ‘a tremendous instrument ... perhaps the fiercest Coercion Act ever proposed for Ireland.’ The *Freeman’s Journal*, 12 May 1882. Around this time, the *Irish Law Times and Solicitors’ Journal* reported that ‘at a meeting of the judges on Thursday the following resolution was passed unanimously: - “That, in the opinion of the Judges of the Superior Courts, the immediate imposition upon them of the duty proposed by the Prevention of Crime (Ireland) Bill would seriously impair the public confidence in the administration of justice in Ireland.” Anon., ‘The administration of justice in Ireland’ (1882) 16 *Irish Law Times and Solicitors’ Journal* 232. For further discussion of the operation and effects of the Act, see H. Humphreys, *The Prevention of Crime (Ireland) Act 1882, 45 & 46 Vict., cap. 25, with a review on the policy, bearing, and scope of the Act*, Dublin, 1882. He noted, vi, that trial by jury had ‘failed by reason of a large portion of the community having, through fear or a corrupt motive, lost its sense of horror at the commission of certain crimes’.

¹⁹³ See E.P. de Blaghd, ‘Tim Kelly guilty or not guilty?’ (1971-72) 25 *Dublin Historical Record* 12. See also *The Leeds Mercury*, 15 Jan. 1883 and the *Manchester Times*, 27 Jan. 1883.

¹⁹⁴ *The Freeman’s Journal*, 20 April 1883.

¹⁹⁵ See the *Aberdeen Weekly Journal*, 20 April 1883 and the *Freeman’s Journal*, 21 April 1883.

¹⁹⁶ See *The Pall Mall Gazette*, 25 April 1883 and *The Leeds Mercury*, 26 April, 1883.

¹⁹⁷ At the second trial, the jurors were sent back to their room five times, yet two of them held out in favour of an acquittal. He was finally convicted at a third trial, and sentenced to death.

¹⁹⁸ *The Leeds Mercury*, 26 April 1883, reported that there were forty-two jurors ordered to stand-by, and twenty challenged by the prisoner; however, it was reported in the House of Commons that there were fifty-four jurors ordered to stand by (see above n.176-181): *Parliamentary Debates*, series 3, vol. 278, cols. 1134-5, 26 April 1883 (House of Commons).

¹⁹⁹ T. Harrington, *The Maamtrasna massacre*, Dublin, 1884, i.

Ireland), acted as crown prosecutor.²⁰⁰ One commentator remarked that the juries in the Maamtrasna trials ‘were packed after the manner of all political and agrarian trials in Ireland.’²⁰¹ Two special jury panels, consisting of 200 names, were called over by the deputy clerk of the peace, though only 117 men answered.²⁰² Nineteen men were challenged by the prisoner. George Bolton, the crown solicitor, ordered thirty-six men to ‘stand by’.²⁰³ At the trial of Myles Joyce, the crown ordered twenty-seven men to stand aside, and the prisoner challenged fifteen without cause and unsuccessfully challenged one juror for cause.²⁰⁴ Both men, along with Patrick Casey, were found guilty, and were executed on 15 December, and it later became clear that Myles Joyce had in fact been innocent.

The crown’s right to order jurors to ‘stand by’ was seldom exercised in England²⁰⁵ and charges of jury packing were less frequent. The fact that this power was used comparatively rarely in England indicates the extent to which it was regarded as something of an Irish solution to an Irish problem – the problem having been exacerbated in 1871. When taken to the extreme²⁰⁶ it amounted to the crown attempting to hand-pick the jurors to help secure convictions even in political trials where convictions were unlikely. Johnson opines that the over-use of the stand-by power did not come about until after the Juries Act (Ireland) 1871²⁰⁷ (O’Hagan’s Act) allowed the new class of men onto the jury.²⁰⁸ These new jurors often had much in common with accused persons, particularly in cases of an agrarian character. However, it is submitted that the high water mark of the controversy was not reached until 1887, when several high-profile criminal cases saw the crown seeking to exclude Catholics and nationalist sympathisers from juries altogether.²⁰⁹

6. Changing the venue

At common law the general rule was that the trial of any crime should take place in the county where the alleged crime had been committed.²¹⁰ In certain circumstances, however, an indictment could be moved from an inferior court up to the Court of Queen’s Bench by a writ of *certiorari*,²¹¹ which could order that the issue be tried at bar, by *nisi prius* in another county, or by *nisi prius* in the original county. Until the 1880s, the procedures involved in securing a change of venue were both cumbersome and costly; an accused had no automatic

²⁰⁰ See generally N. McAree, *Murderous justice: A study in depth of the infamous Connemara murders, Limerick*, 1990. See above, n.13.

²⁰¹ Harrington, above, n.199, ii.

²⁰² J. Waldron, *Maamtrasna the murders and the mystery*, Dublin, 1992, 62.

²⁰³ Harrington, above, n.199, app., 3. See above, n.228.

²⁰⁴ *Ibid.*, app., 32-33.

²⁰⁵ Johnson, ‘Trial by jury’, above, n.6, 282.

²⁰⁶ See above, n.183-n.204.

²⁰⁷ 34 & 35 Vic., c. 65.

²⁰⁸ Johnson, ‘Trial by jury’, above, n.6, 283.

²⁰⁹ These were the infamous ‘Sligo trials’; see above, n.69-n.72.

²¹⁰ See, for example, William Hawkins, *Treatise of the pleas of the Crown*, 2 vols, 8th ed., London, 1824, vol. 2, 403. Inevitably, numerous exceptions to this rule were developed, and many were put on a statutory footing. See M. O’Shaughnessy, ‘The venue for trials, civil and criminal’, (1865) 4 (30) *Journal of the Statistical and Social Inquiry Society of Ireland* 193, 195 and Glanville Williams, ‘Venue and the ambit of criminal law’ (1965) 81 *Law Quarterly Review* 276, 395, 518, 277.

²¹¹ ‘*Certiorari*’ means ‘to be fully informed of.’ The writ of *certiorari* has its origins in the common law. It was a writ issuing either out of the Court of Chancery, the crown side of the Court of Queen’s Bench, or the Court of Common Pleas. It was addressed, in the Queen’s name, to judges or officers in inferior courts, commanding them to certify or return the records of a case depending before them, to the end that justice might be done. See also A. Fitzherbert, *The new natura brevium*, London, 1677, 245. The writ of *certiorari* to remove an indictment from an inferior court rendered all subsequent proceedings in that court void. See Hawkins, *op. cit.*, ii, 292.

right to apply for such a writ,²¹² security for costs had to be given,²¹³ and certain time limits had to be observed.²¹⁴ Unless it was necessary for the jurors to view the location of the alleged crime,²¹⁵ or for the case to be tried by a special jury, an application by a defendant had to be based either on the ground that a fair trial could otherwise not be secured, or on the ground that difficult questions of law were likely to be raised at the trial. Applications to change the venue of criminal trials were most frequent during times of political turmoil. A parliamentary committee²¹⁶ established in 1831 to examine various issues surrounding the tithe war²¹⁷ was informed by many witnesses about the widespread intimidation of jurors. Soon afterwards, the Trial of Offences (Ireland) Act, 1833²¹⁸ was passed, allowing for the trial of violent offences relating to the tithe agitation in any adjoining county, or in Dublin.

It was not only in political or agrarian cases that a change of venue might be sought; murders arising out of lovers' quarrels and testamentary disputes aroused the public interest, and were fodder for the local press. In many such cases a change of venue was necessary due to the level of interest generated locally and the possible impact this might have on jurors.²¹⁹ At times criminal libel prosecutions also saw applications for changes of venue,²²⁰ usually as a result of the high-profile nature of such cases when public figures were involved.²²¹ Another interesting category of case where changes of venue were deemed necessary were those concerning clerical influence at elections.²²² In cases of an agrarian character, attempts were frequently made to change the venue to another county, with Dublin city being particularly popular, as Dublin juries were perceived as being more likely to convict.²²³

The parliamentary committee which was appointed during the agrarian upheavals of the 1880s 'to inquire into the operation of the Irish Jury laws as regards trial by jury in

²¹² A writ of *certiorari* could be obtained as a matter of course by the attorney general on behalf of the crown: Hawkins, *op. cit.*, ii, 287. A defendant, on the other hand, could not obtain an order for such a writ as a matter of course – he had to state some ground for the application. See rule 28 of the Crown Office (Ireland) Rules, 1891.

²¹³ A party seeking to remove an indictment by *certiorari* was required to enter into a recognizance with condition to proceed with the trial, and to pay the costs of the other party in the event that he was unsuccessful. The exceptions to this rule were the attorney general or the prosecutor of a corporate body. Rules 29, 30 and 31 of the Crown Office (Ireland), Rules 1891 detailed the procedures involved.

²¹⁴ The applicant did not have to wait until after the indictment was found before applying for the writ of *certiorari*, but once the jury had been sworn in, this was considered too late, according to the English case of *R v North* (1795) 1 Salk 144; 91 ER 433.

²¹⁵ Before 1871, there could be no view in a criminal case at the assize without the consent of the prosecutor. Section 11 of the Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65) stated that on the trial of any indictment or information, the court could, at any time after the jurors were sworn and before they gave their verdict, order that they have a view. The procedures for viewing in criminal cases were quite distinct from the procedures in civil actions.

²¹⁶ *Report from the Select Committee on the State of Ireland* H.C. 1831 (12), xvi, 677.

²¹⁷ See above, n.2 and n.3.

²¹⁸ 3 & 4 Wm. IV, c. 79. Also known as the Change of Venue Act, this temporary measure expired in 1834.

²¹⁹ Examples of such cases include *R v Fay* (1872) IR 6 CL 436, extensively reported in the *Anglo Celt* (see further below, n.281). This concerned Fay's alleged murder of his pregnant lover Mary Lynch, near Ballyjamesduff in county Cavan. *R v McEneaney* (1878) 14 Cox CC 87; 2 LR Ir 236 concerned the prisoner's alleged murder of his own brother while he slept; see the *Northern Standard*, the *Meath Herald* and the *Belfast News-Letter*.

²²⁰ As indeed did civil libel actions.

²²¹ See *R (Lord Lucan) v Cavendish* (1847) 2 Cox CC 175; 10 Ir LR 536, and *R (Bridge) v Casey* (1877) 13 Cox CC 614.

²²² See for example *R v Conway* (1858) 7 Ir CLR 507 and *R v Duggan* (1873) IR 7 CL 94.

²²³ One such case which dominated the headlines was *R v Barrett* (1870) IR 4 CL 285, which concerned the attempted assassination of a Galway landlord, Captain Lambert. *R v Phelan* (1881) 14 Cox CC 579, was a murder arising out of an agrarian dispute in county Kilkenny.

criminal cases²²⁴ devoted considerable attention to the laws and procedures relating to changing the venue in criminal cases. Some witnesses felt that there ought to be a simpler mechanism for having the venue changed in cases of ‘local excitement’.²²⁵ There was a general feeling that in most, if not all, political and agrarian cases, ‘a certain number of the jury are influenced by terror or sympathy,’²²⁶ thus rendering it virtually impossible to secure a fair trial in such cases. As one witness pointed out, the ‘power and organisation of the Land League at present in the south and west is such as to influence all juries to such a degree that you cannot regard them as fit to try a case involving a question of an agrarian or political character.’²²⁷ It was generally felt that existing procedures were insufficient,²²⁸ and that some sort of alternative would have to be introduced. Justice Lawson and Justice Fitzgerald were both highly critical of the procedures associated with securing a change of venue²²⁹ with the latter noting that ‘the defendant in a criminal case is not very likely to be a monied man’,²³⁰ and that ‘the expense of what we call change of venue is very great.’²³¹

Several witnesses were asked where they thought the venue of a controversial trial should be moved to, and the majority expressed the view that the best option would be to move the trial as far away as possible from the original county.²³² While some went so far as to suggest trying controversial agrarian trials in England,²³³ others were of the opinion that it would be sufficient to move such cases from the south and west to Ulster,²³⁴ away from the influences of the Land League, ‘because in the north of Ireland ... you find in the jury box men of every shade and opinion.’²³⁵ Others argued against what they perceived to be the folly and inherent unfairness of such an extreme step, pointing out that this would ‘cause a great amount of dissatisfaction.’²³⁶ A resident magistrate from Munster named Clifford Lloyd²³⁷ saw the procedure as essentially pointless:

The revolution in Ireland is pretty well general now, except in those counties which we may call the Protestant counties, where Orangism has a considerable footing; it would certainly look like an unfair thing to take a so-called Nationalist, and put him up to be tried by a jury of Protestants, many of whom, no doubt, would be Orangemen; unless you did that, I do not see where you would take him to.²³⁸

²²⁴ *Parliamentary Debates*, series 3, vol. 261, col. 1033, 23 May 1881 (House of Lords), *per* the Marquess of Lansdowne.

²²⁵ For example, *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, *per* Robert Ferguson, QC, chairman of the bench for the west riding of county Cork, para. 3387, 3396.

²²⁶ *Ibid.*, *per* Serjeant John O’Hagan, para. 2144. John O’Hagan practiced in the Irish Court of Chancery and was married to Thomas O’Hagan’s daughter.

²²⁷ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, *per* Cecil Moore (see above, n.185), para. 4019. See above, n.14.

²²⁸ George Bolton, the county Tipperary crown solicitor, *ibid.*, para. 3899, said the current system entailed ‘great expense and waste of time’.

²²⁹ *Ibid.*, para. 4059, 1456, 1350, 4199.

²³⁰ *Ibid.*, para. 4205.

²³¹ *Ibid.*, para. 4207.

²³² *Ibid.*, *per* John Chute Neligan, QC, the chairman of the benches of counties Meath, Westmeath, King’s county and Longford para. 3446.

²³³ *Ibid.*, *per* Stephen Huggard, clerk of the peace for county Kerry, para. 926, and Henry Arthur Blake, resident magistrate at Tuam, county Galway, para. 265.

²³⁴ *Ibid.*, *per* O’Hagan (see above, n.91), para. 2146, and Moore (see above, n.185), para. 4019.

²³⁵ *Ibid.*, *per* Blake (see above, n.233), para. 167.

²³⁶ *Ibid.*, *per* William O’Connor Morris, quarter sessions chairman and a Kerry County Court judge, para. 3664.

²³⁷ Resident magistrate at Kilmallock (bordering Cork and Limerick).

²³⁸ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 3197.

It was suggested by two members of the Irish bench that temporary suspension of trial by jury would be preferable to some of the more extreme suggestions put to the committee,²³⁹ whose eventual recommendation was as follows: '[w]e consider that in all crimes of a political or agrarian complexion it is desirable to offer every facility for the removal of the trials whenever the circumstances of the locality appear to call for such a step...'²⁴⁰ The Marquess of Lansdowne later raised the question in the House of Lords of whether the Government planned to implement this recommendation.²⁴¹ He highlighted the need for drastic measures to deal with the existing situation, and observed that 'the whole class of aggravated assaults were looked upon in a particularly favourable light by common juries.'²⁴² He continued, 'as miscarriages of justice were often owing to local and social influences, these influences might be avoided by transferring the trial, in all cases where such influences might be expected to operate, to places beyond the reach of such influences.'²⁴³

Agrarian agitation escalated during the late 1880s, and the National League launched the Plan of Campaign,²⁴⁴ which was essentially a rent strike accompanied by 'widespread and vicious boycotting of persons alleged to be supporting landlord interests.'²⁴⁵ In a speech near Rosslea on 11 January 1887, John Dillon referred to this as 'a policy which no Irish jury will convict us for adopting'.²⁴⁶ On 21 March 1887, the Irish chief secretary, Arthur Balfour, introduced a bill 'to make better provision for the prevention and punishment of crime in Ireland.'²⁴⁷ This bill was debated at length in the House of Commons,²⁴⁸ and was enacted as the Criminal Law and Procedure (Ireland) Act 1887.²⁴⁹ This introduced a scheme for the proclamation of associations as dangerous by the lord lieutenant. Section two of the Act provided for summary trials²⁵⁰ for certain offences associated with the Plan, such as boycotting, or 'taking part in criminal conspiracy to compel or induce others not to fulfil their legal obligations, or not to let, hire, use or occupy any land, or not to hire any person or persons in the ordinary course of trade.'²⁵¹ Defendants could also be summarily tried for participating in riots or unlawful assemblies. Under section three, where an indictment was found against a defendant in a proclaimed district, the Irish attorney general could apply to have the case tried by a special jury. The propertied men who sat on such juries were considered less likely to sympathise with the National League's cause. The attorney general was also entitled to seek a change of venue where it appeared to him that a fair and impartial

²³⁹ Ibid, *per* Morris (see above, n.236), para. 3665, and John Fitzgerald, para. 4212.

²⁴⁰ Ibid., para. 63.

²⁴¹ *Parliamentary Debates*, series 3, vol. 268, col. 429, 31 March 1882 (House of Lords).

²⁴² *Parliamentary Debates*, series 3, vol. 268, col. 435, 31 March 1882 (House of Lords).

²⁴³ *Parliamentary Debates*, series 3, vol. 268, cols. 437-438, 31 March 1882 (House of Lords).

²⁴⁴ See L.M. Geary, *The Plan of Campaign, 1886-1891*, Cork, 1986 and Lyons, above, n.2, 181-187.

²⁴⁵ K. Costello, 'R. (*Martin*) v *Mahony*: the history of a classical certiorari authority' (2006) 27 *Journal of Legal History* 267, 273.

²⁴⁶ *The Times*, 12 Jan. 1887.

²⁴⁷ *Parliamentary Debates*, series 3, vol. 312, cols. 857-858, 21 March 1887 (House of Commons).

²⁴⁸ See *Parliamentary Debates*, series 3, vol. 312, cols. 1624-1729, 28 March 1887 (House of Commons), *Parliamentary Debates*, series 3, vol. 312, cols. 1785-1786, 29 March 1887 (House of Commons), *Parliamentary Debates*, series 3, vol. 312, cols. 1790-1932, 30 March 1887 (House of Commons),

²⁴⁹ 50 & 51 Vic., c. 20. This was also known as the Crimes Act 1887. *Parliamentary Debates*, series 3, vol. 313, cols. 88-182, 31 March 1887 (House of Commons), *Parliamentary Debates*, series 3, vol. 313, cols. 245-345, 1 April 1887 (House of Commons).

²⁵⁰ 50 & 51 Vic., c. 20, s. 11 provided that in Dublin, the trial was to take place before a divisional justice; elsewhere, there were to be two resident magistrates in petty sessions.

²⁵¹ 50 & 51 Vic., c. 20, s. 2(1).

trial could not be had in the proclaimed county where the indictment was found.²⁵² It was passed in September 1887 and continued in force until 1890.

7. Using fines to compel attendance

It has been noted that wealthier individuals tended to shirk jury duty if possible – those who could not legitimately claim exemptions often simply ignored jury summonses. Their antipathy towards jury service was exacerbated after O'Hagan's 1871 reforms introduced a whole new class of men to the jury-box.²⁵³ In 1876 Lord O'Hagan stressed his hope that 'jurors of station and wealth in Ireland' would be 'compelled to do the duties which, in spite of repeated remonstrance and rebuke from the bench, they have too much abandoned to their humbler colleagues. This is a great public evil'.²⁵⁴ Unfortunately, by the 1880s, the problem persisted, and it is clear from the evidence given before the parliamentary committee that there was still reluctance among the wealthier classes to participate in jury service, particularly during the years of the land war.²⁵⁵ The Marquess of Lansdowne outlined for the House of Lords a few reasons why 'persons of wealth and station' still habitually failed to take their place in the jury box:

In the first place, from the limited number of those persons of superior position who are in theory liable to serve on petty juries you must deduct all who are liable to serve on Grand Juries or as special jurors. That weeds out a considerable number of the better class of jurors. As to those who are not taken for the Grand Jury, or for special juries, I fear we cannot disguise from ourselves the fact that such persons are, as a rule, not very anxious to do their duty as jurors, or to be shut up for hours in the box with small farmers and tradesmen for their colleagues, and that many of them make up their minds to shirk service.²⁵⁶

The increasing unrest around the country in the 1870s and 80s no doubt intensified their unwillingness to sit on juries. At this time, as noted, the majority of jurors were farmers, likely to have been involved at some level with the agrarian movement. At certain periods, the wealthier minority's evasion of jury duty probably had as much to do with fears for their personal safety both during and after the trial, as unwillingness to mingle with the so-called lower orders. The desirability of having men of means sitting on juries also stemmed from the belief that jurors should be 'to some extent ... removed beyond the probable rank of the usual

²⁵² 50 & 51 Vic., c. 20, s. 4. See *O'Brien v the Queen* (1890) 26 LR Ir 451.

²⁵³ The Juries Act (Ireland) 1871 (34 & 35 Vic., c. 65).

²⁵⁴ *Parliamentary Debates*, series 3, vol. 231, col. 498, 4 Aug. 1876 (House of Lords).

²⁵⁵ See above, n.2, n.3, n.14, n.249-252. Serjeant John O'Hagan (see above, n.226) said that in county Clare, where he had previously acted as chairman of the bench for six years, he 'rarely found a man of a superior class upon the common juries.' *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 2134. Similarly, Thomas Boyd, the sessional crown solicitor for Tipperary, said, para. 2444-5: 'I really cannot bring to mind that there is one in fifty cases of a gentleman ... appearing on a jury ... they do not attend ... they are a very small class, too.'

²⁵⁶ *Parliamentary Debates*, series 3, vol. 261, col. 1039, 23 May 1881 (House of Lords). Benjamin Whitney, the clerk of the peace and clerk of the crown for county Mayo, indicated that in general, the upper class jurors considered it to be beneath them to attend upon common juries: *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 2593.

classes of offenders.²⁵⁷ After 1871 the general consensus²⁵⁸ was that the new jurors were incompetent, easily influenced, and generally unfit for the task, whereas the wealthier, long-serving jurors were considered to be less susceptible to intimidation, and more capable of detached assessment. James Robinson QC bemoaned the deterioration in the social class of jurors, recalling that a few years previously, there had been outrage because a juror at a prominent trial, who was a farmer, had had an open collar and an exposed chest which had been reddened by the sun. Since 1871, claimed Robinson, aghast, it was more unusual to see jurors who were not of such an appearance.²⁵⁹

There were a number of means employed by these men to avoid jury service. Usually, prospective jurors either ignored the jury summonses, or refused to answer to their names in court.²⁶⁰ As noted, failure to answer to one's name on the third calling-over of the list was, under the legislation, to incur a fine.²⁶¹ Many of these men were quite happy to take this risk; judges tended to be 'very soft-hearted,'²⁶² and the majority of fines were not in fact enforced.²⁶³ Even those low fines which were enforced could be looked upon as 'insurance paid for their safety.'²⁶⁴ Indeed, the general view was that the system of levying fines was almost entirely ineffective.²⁶⁵ Joseph Bullen Johnson, the sub-sheriff of county Cork pointed out that in his county, so many ten pound fines were imposed that 'they would have amounted in all to thousands of pounds', but that in reality, only nine pounds had been levied.²⁶⁶ As one witness put it, '[y]es, a great number are fined, and then they get time to appeal, to make excuses; and they come before the judges at the next after sittings, and they generally get off somehow.'²⁶⁷ It was suggested that perhaps the better approach would be to

²⁵⁷ *First, second, and special reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389, *per de Moleyns* (see above, n.115) para. 348. James Whiteside, chief justice of the Irish Court of Queen's Bench said, para. 4231, that there was a convict on one of the recent juries in Clonmel, county Tipperary.

²⁵⁸ See above, n.98-n.101, n.115.

²⁵⁹ *Ibid.*, para. 3841-2.

²⁶⁰ See the comments of Constantine Molloy, *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 641. Molloy, who had drafted the Juries Act (Ireland) 1871, was a practicing barrister and a crown prosecutor for King's county. Some witnesses before the parliamentary committees suggested that prospective jurors sometimes kept their houses in their wives' names, although this does not appear to have been frequently done: *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, *per* T. Newenham Harvey, the secretary of the Waterford Jurors' Association, para. 823. See also Thomas Edmonson, the honorary secretary of the Dublin Jurors' Association, *ibid*, para. 442, who cited a Dublin employer which told some of its employees to 'enter your premises in the names of your wives, and then you will not be summoned as jurors.' He also cited one instance of a man taking out a lease in his wife's name 'on purpose to evade service on a jury', para. 475. Men who did this could also, by implication, lose their parliamentary franchise. For the development of womens' property rights, see the Married Women's Property Act 1882 (45 & 46 Vic., c. 75) and Ben Griffin, 'Class, gender, and liberalism in Parliament, 1868-1882: The case of the Married Women's Property Acts' (2003) 46 (1) *The Historical Journal* 59.

²⁶¹ 3 & 4 Wm. IV, c. 91, s. 32 and s. 41; 34 & 35 Vic., c. 65, s. 48; and 39 & 40 Vic., c. 78, s. 4(1).

²⁶² *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, *per de Moleyns* (see above, n.115), para. 225.

²⁶³ For example, in 1833, it was reported that in the previous year, twenty-two people had been fined five pounds for non-attendance at the Kildare quarter sessions. The fact that ten of these later had their fines remitted raises questions as to the effectiveness of this scheme. *Return of Persons on the Sheriffs Panel as Jurors, in the County of Kildare, who were fined at the Quarter Sessions for the said County within the last twelve Months*, H.C. 1833 (602) (724), xxxv, 501, 503.

²⁶⁴ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 150, *per* Blake (see above, n.233). Byrne (see above, n.142) told the same committee, para. 784, that he thought that 'aldermen would pay a fine of £100 cheerfully to avoid being called upon a jury'.

²⁶⁵ Witnesses before the 1874 parliamentary committee on the Irish jury system criticised the ineffectiveness of the apparatus for fining jurors who failed to appear. *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, para. 558.

²⁶⁶ *Report from the Select Committee on Jury System (Ireland)* H.C. 1874 (244) ix, 557, para. 967-968.

²⁶⁷ *Ibid.*, para. 489.

raise the property qualification, so that the jurors were less likely to be drawn from the ranks of the poorer farming classes, and thus wealthier men would be less averse to serving. John George Gibson, QC, summed up the problem as follows:

My impression is that in Ireland it is very difficult to get any one to attend to what is an unpleasant and dangerous duty. I can conceive that a man of the better class would sometimes prefer the possible infliction of a fine to the perhaps very serious consequences of being marked down for holding out against an acquittal in a case of a certain character.²⁶⁸

He told the committee that in comparison to other persons involved with the trial of agrarian offences:

Of course, the judge is safe, and he gives a strong charge; and the counsel are safe, and they make fine strong speeches; and the attorneys are, or used to be safe; but I believe they are safe no longer, because they are Boycotted if they take part in cases of a certain character. But the juror who is known either to have taken part in a conviction, or to have resisted an acquittal, I think, occupies a position of great unpleasantness.²⁶⁹

Several witnesses stressed to the 1881 parliamentary committee the importance of having more upper-class jurors in certain types of case. John Byrne said that the wealthier jurors were ‘far more likely to be independent in rendering their verdicts.’²⁷⁰ This was probably true in so far as the upper classes were less susceptible to bribes; although their independence could well have been tempered by their own views in relation to the land agitation, whether these were sympathetic or antipathetic. Blake, for example, was of the opinion that criminal cases in particular would benefit from having more of these jurors on the panel, as they could ‘guide the opinion of a small proportion’ of the jurors, and secure a guilty verdict, or at least effect a disagreement among the jurors, so as to avoid an outright acquittal.²⁷¹

There was apparently a general belief that although the upper class jurors were in the minority, and had little in common with their fellow jurymen, they would somehow manage to exert a considerable amount of influence over the latter and their deliberations.²⁷² Whitney noted that the reason why upper class jurors were so desirable was because they were ‘men of

²⁶⁸ Ibid., para. 2286-7.

²⁶⁹ Ibid. One juror who was famously targeted because of his role in delivering an unpopular verdict during the land war (see above, n.2, n.3, n.14) was Denis Field: see Corfe, above, n.191, 234, 254; the *Western Mail*, 28, 29 Nov. 1882. Field had been on a jury which had recently convicted Michael Walsh of the murder of Constable Kavenagh, and was targeted by the Invincibles, the group responsible for the Phoenix Park Murders (see above, n.192-n.198). It was probably not quite accurate to state that jurors were the only persons at risk of violence during turbulent times: around the same time, Justice Lawson, deeply unpopular with nationalists, was the subject of an attempted assassination: see *The Times*, 10 Feb. 1883; the *Western Mail*, 28 Nov. 1882 and Corfe, above, n.191, 233. H. Montgomery Hyde observes that when Edward Carson was crown prosecutor, he acted ‘literally at the risk of his life’. He received threats on his life regularly, was stoned in the streets, and sometimes when driving along country roads, the police would travel ahead of him, ‘and beat out the hedges on either side in search of possible assassins.’ H. Montgomery Hyde, *Carson: The life of Sir Edward Carson, Lord Carson of Drumcairn*, London, 1974, 81.

²⁷⁰ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 755. See above, n.142.

²⁷¹ Ibid., para. 152-153. See above, n.233.

²⁷² Justice Barry, para. 1407, thought that if there were even one educated man on the jury, the others would listen to him.

better education, and, in consequence of that, [were] better qualified for the sifting of evidence, and arriving at a proper conclusion, and, in consultation with their brother jurors, [were] sure to show them the desirability of their thought being brought to bear upon the subject.²⁷³ Charles Kelly was also ‘perfectly certain that if gentlemen attended, they would have enormous influence upon the humbler class of jurors.’ He went on say that some gentlemen had informed him that ‘when they have been on a jury, some of the humbler class of jurors have asked them how they must vote, saying, “I will vote as your honour wishes”, “whichever way your honour tells me.”’ There is no doubt that the attendance of gentlemen on the juries would have a beneficial effect.²⁷⁴

III. THE EFFECTIVENESS OF THESE ‘STRATAGEMS’.

Johnson makes the point that various devices employed by the Irish administration helped to keep trial by jury operating under what can only have been trying circumstances. This article has attempted to build on this by identifying some of the methods used, and exploring the way in which they were used. Whilst the changes to the legislative qualifications for jury service were paramount, the use of challenges and the change of venue procedure also had a significant impact. It is difficult to assess the extent to which the different methods outlined above actually affected jury composition and verdicts in criminal cases.²⁷⁵ It was common to equate high conviction rates with ‘good quality’ jurors; in other words, jurors who would probably strictly enforce the criminal law. McEldowney notes that in the Irish courts in the nineteenth century, efficiency goals were measured in terms of conviction. This, he says, was ‘used as a major justification for many practices in Ireland.’²⁷⁶ High conviction rates were seen as a sign that the administration of justice was working, and low rates were perceived as indications that the system was in a state of disarray.

With agrarian disturbances on the increase from the 1870s, the problems inherent in the new composition of juries had become apparent. Indeed, some commentators went so far as to say that it was impossible to prosecute effectively after the 1876 Act, particularly in cases of an agrarian, political or religious nature.²⁷⁷ Johnson remarks, however, that after the dramatic lowering of the property qualification by the Juries Act (Ireland) 1871²⁷⁸

²⁷³ Ibid., para. 2601-2. See above, n.256.

²⁷⁴ Ibid., para. 3032. See above, n.113.

²⁷⁵ The following data provided by Buchanan (see above, n.112) to the parliamentary committee provides some insight, although his figures, unfortunately, do not add up. Between 31 Dec. 1865 and 31 Dec. 1870, he cites 609 cases, out of which there were 137 guilty pleas, 122 guilty verdicts, 157 acquittals and twenty-three disagreements. This only accounts for 439 cases. Between 31 Dec. 1875 and 31 Dec. 1880, he claims that out of 635 cases at the quarter sessions, there were 109 guilty pleas, 189 guilty verdicts, 144 acquittals and four disagreements; again, there are 189 cases unaccounted for. Although the value of these figures is obviously questionable, they indicate that there was a slight decrease in the number of acquittals and hung juries, the number of guilty verdicts actually increased, particularly in relation to the number of guilty pleas. It should be borne in mind however that other factors, such as improved practices within the constabulary, may also have affected the increased conviction rate. *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 310.

²⁷⁶ McEldowney, ‘Law and Policy’, above, n.73, 154.

²⁷⁷ For example, Blake (see above, n.233) said, ‘I think that in cases where there is a prevailing public sentiment in either political or agrarian cases, it is very difficult to get a conviction.’ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, para. 131. Theobald Purcell, the chairman of the benches of the city and county of Limerick, said, para. 6-7, that in certain types of case (presumably those of an agrarian nature), it was still almost impossible to secure a conviction.

²⁷⁸ 34 & 35 Vic., c. 65.

(O'Hagan's Act) there was, somewhat surprisingly, no great drop in the conviction rates in Ireland. He notes a slight fall in the rate from about fifty-eight point six per cent to fifty-seven point five per cent between 1868 and 1877 for the country as a whole, with a slightly greater drop in rural areas of about two point five per cent.²⁷⁹ These conviction rates, he argues, were maintained only

by the Crown's increased use of its powers of ordering jurors to stand by. Rather than the composition of the jury being settled, at least to an extent, in the privacy of the sub-sheriff's office; it was determined in open court. Jurors who were technically qualified to serve were effectively being told they were not suitable.²⁸⁰

It is submitted that conviction rates were also helped by the extension of exemption categories, so that 'undesirables' such as publicans (who it was felt would vote in accordance with their own business interests) were kept off the juries. In addition, the increased use of fines in an attempt to coerce the attendance of wealthier jurors, and frequent changes of venue in political cases both contributed to securing convictions in difficult cases

Although it had a considerable arsenal, the crown never quite managed to exert full control over jury composition, much less over the unruly jurors themselves. Even if full jury control had been achieved – and jurors in a given criminal prosecution were all 'crown-friendly' – this was no guarantee of securing a favourable verdict. Defendants were not entirely powerless in the face of the crown's control of the jury. First there were the threats and intimidation of jurors by or on behalf of defendants or secret societies²⁸¹ which were not uncommon during certain fraught periods. These often resulted in, at the very least, a hung jury. There were also legitimate means which defendants could employ: they too could seek to influence the composition of the jury through the use of challenges or applications for a change of venue. They could also effect a delay by, for example, seeking an order to have the case tried by a different type of jury,²⁸² or requesting a view jury, a change of venue or a trial at bar.²⁸³

Thus the administration on the one hand and defence counsel on the other each exploited the rules and procedures relating to the jury system to their own ends. Was this part of the problem inherent in the system, or were the underlying difficulties beyond the control of either the prosecution or the defence? Political dissent and demographic peculiarities were probably the most serious issues affecting the system, and perhaps both sides did what they could to circumvent these problems. This type of manoeuvring meant that the jury system was adapted for use in the Irish climate, and certainly goes a long way towards explaining the jury's continued existence in Ireland, arguably against the odds.

²⁷⁹ Johnson, 'Trial by jury', above, n.6, 272.

²⁸⁰ Ibid.

²⁸¹ See above, n.12. *Report from the Select Committee of the House of Lords, appointed to enquire into the state of Ireland in respect of crime, and to report thereon to the House* H.C. 1839 (486) xi, 1; xii, 2, per Rowan (see above, n.84), para. 1882. For example, see *R v Fay* (1872) IR 6 CL 436, a murder trial where both jurors and witnesses were intimidated by the defendant and his family, who had Fenian connections (see above, n.219). Further examples include the trial of Peter Barrett, (1870) IR 4 CL 285 and the 1848 state trials (see above, n.65-n.68), when threatening notices were posted around Dublin and reprinted in the nationalist press: see the *Freeman's Journal*, 25 May 1848.

²⁸² The different types of jury which could be requested, depending on the circumstances, included the special jury (see above, n.9) or the jury *de medietate linguae* (a jury composed of six locals and six aliens, available in civil or criminal cases until 1870, though infrequently used in Ireland).

²⁸³ This was a trial before all of the judges in the Court of Queen's Bench, usually necessitating a special jury. In the nineteenth century it was used in controversial political criminal cases and cases concerning difficult issues of law, and it was controversial because of the considerable expense and delays involved. Daniel O'Connell was tried at bar in 1844; *R v O'Connell* (1844) 8 Ir LR 261 (see above, n.159-n.175).

