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“Land Valuations, Market Practices, Pregnancy, Insanity: There’s a Jury for That”

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Abstract:

Contemporary legal practitioners and academics are familiar with the use of juries in criminal trials. To a lesser extent, the use of juries in civil actions, although a rarity in 21st century Ireland, is recognised as having been the norm in the past, and continues to be an essential part of the administration of justice in other common law systems, notably the United States. Juries also continue to be used at coroners’ inquests, delivering verdicts on the causes of death. What might be less widely appreciated, however, was that in the past, juries were used in a much wider range of situations, ranging from the determination of pregnancy or insanity, to the regulation of market practices and the conducting of land valuations. The term ‘jury’ in these scenarios is to be given a wide interpretation, generally meaning a panel of laypersons with no judicial or other specialised training. In this paper, I propose to explore some of these ways in which panels of laypersons were used in 18th and 19th century Ireland as an essential aspect of law, order and the regulation of society. Why were juries used in such diverse contexts? What were the advantages or disadvantages of doing so? Were there alternatives?

Introduction

Although juries are now limited to serious criminal offences and the occasional civil action, in the eighteenth and nineteenth centuries, juries were used in a plethora of situations. These ranged from the determination of pregnancy or

insanity, to the regulation of market practices and the conducting of land valuations.

Although called ‘juries’, many of these were not juries as a twenty-first century lawyer would recognise them. I use the term ‘jury’ to refer to the many bodies or panels of laypersons which had legally-recognised decision-making powers. The fact that they were all referred to as ‘juries’ in the eighteenth and nineteenth centuries underlines the fact that they were widely accepted, just as trial juries were.

In the eighteenth and nineteenth centuries, jury decision-making was firmly entrenched both in the legal system and in the public psyche. In a sense, the zeal for lay decision-making has gone full circle - consider the constitutional Convention¹ and the proposed lay majority on judicial appointment panels.² As Dzur observes, ‘the use of jury-like procedures to address complex problems of urban planning, environmental protection, biotechnology, and more has become increasingly attractive to academics and public officials.’³ However, while Dzur characterises these modern uses of lay decision-making as democratically-inspired attempts to re-engage citizens with policymaking, it will be seen that there was little emphasis on democracy or civic engagement underlying juries in the eighteenth and nineteenth centuries.

Eighteenth- and nineteenth-century juries were not representative in a modern sense. Eligibility was limited by class, income, profession, gender and, in eighteenth-century Ireland, religion.

Categories of Jury

Grand juries indicted prisoners who subsequently went on to be tried by petty juries. Most criminal cases were tried by common juries, while commercial civil cases tended to be tried before special juries. Juries de medietate linguae determined civil and criminal cases involving aliens, while leet and baron juries decided minor cases in local manorial courts.

Market juries regulated fairs and markets, coroner’s juries conducted inquests on dead bodies, and juries of matrons determined pregnancy in specific criminal and civil cases. Lunacy juries determined whether persons were of sound mind and

¹ Convention on the Constitution: <https://www.constitution.ie/>

² Judicial Appointments Commission Bill 2017.

³ Albert Dzur, *Punishment, Participatory Democracy and the Jury* (Oxford University Press 2012) 107.

wide-street juries conducted valuations on properties which were to be compulsorily purchased.

I do not propose, in this short paper, to explore each of these categories of jury in detail, but I will explain some of the less well-known ones in more detail.

Wide Streets Juries

The Dublin Wide Streets Commission was established by legislation in 1757 as part of a plan to improve the streetscapes of Dublin.⁴ The commissioners' original remit was to rebuild Essex bridge and the street leading to Dublin castle (Parliament street), and their powers were subsequently extended by further legislation. They were empowered to compulsorily purchase such lands and buildings as were necessary to complete the project.

Where the owners of property refused to agree to the sale, or where purported owners could not demonstrate clear title, the commissioners could issue a warrant to the sheriff of the city of Dublin to empanel a jury. There were no specific details in the legislation as to the jurors' qualifications, other than that they were to be 'substantial and disinterested persons.'⁵ The tasks required of these juries were not straightforward; they had to examine deeds, evaluate rental incomes and so on. It was probably for this reason that men of business and property were usually empanelled.

In the early days the Dublin wide streets commission met at the tholsel, on Skinner's Row, near Christchurch cathedral.⁶ Detailed maps were furnished to them to assist with their valuations, and they were authorised to view the premises in question.

The jurors were sworn to 'truly and impartially enquire of the value of such houses...', and were obliged to enquire into the value of the lands and buildings, and investigate the titles, interests and rights of all interested parties. . Valuations and the swearing-in of jurors were well-publicised in the press. Given the nature of the work of the wide streets commission, the juries usually valued a number of adjoining or neighbouring properties at a time.

⁴ An act for making a wide and convenient way, street, or passage, from Essex-bridge to the castle of Dublin, and for other purposes therein mentioned 1757 (31 Geo II, c 19).

⁵ Ibid, s 5.

⁶ *Minutes of the Dublin wide streets commission* (Dublin City Archive, WSC/Mins/1).

Until its statutory abolition in 1849⁷ the wide streets commission had a significant impact on the development of Dublin city, although the contribution made by laypersons empanelled on its juries to conduct the valuations is often overlooked.

Lunacy Juries

Lunacy juries were empanelled to determine whether or not a person was deemed to be of unsound mind. Traditionally, the crown had jurisdiction as *parens patriae* over the person and property of persons deemed to be idiots or lunatics.⁸ The power was delegated personally to the lord chancellor. This was to ensure that unscrupulous family members or outsiders did not take advantage of an insane person's circumstances.

The chancellor could order a writ *de lunatico inquirendo*, which directed an inquiry, originally held before five escheators, and later before a jury of twelve, as to whether a named person was insane. If the person was found to be of unsound mind, then immediate control could be exercised over their estate. It was open to the person to traverse this finding.

The Lunacy Regulation (Ireland) Act 1871,⁹ which was to be the primary statute governing lunacy procedures over the next century, was an attempt to further streamline and reform lunacy proceedings.

Lunacy commissions tended to be before special jurors, who were paid for their time and trouble. Commissions of lunacy were held in public, often in very crowded courtrooms.¹⁰ The public interest and press reporting of these commissions meant they often became 'celebrated or notorious cases in which medicine's definitions of insanity were subjected to highly public and supremely intensive investigation.'¹¹ Although the testimony of witnesses, including doctors, was publicly given, the person who was the subject of the lunacy commission generally testified before the commissioners and jury in private.

Unsworth observes that the procedures were 'property-driven rather than person-oriented, and in practice was usually reserved for cases where control over heard of family wealth was at issue.' It was not unheard of that persons with an interest

⁷ Dublin Improvement Act 1849 (12 & 13 Vic, c 97).

⁸ See Clive Unsworth, 'Law and Lunacy in Psychiatry's "Golden Age"' (1993) 13 *Ox J Leg Stud* 479-507 and Leslie Gerald Eyre Harris, *A Treatise on the Law and Practice in Lunacy in Ireland* (Corrigan and Wilson 1930) 1.

⁹ 34 & 35 Vic, c 22.

¹⁰ Eg Commission of lunacy regarding John Gustavus Crosbie, *Irish Times* 9, 11 and 12 Aug. 1857

¹¹ Unsworth 491.

in the alleged lunatic's property would petition for them to be declared insane or of unsound mind, and the lunacy jury could be a safeguard against unscrupulous relatives.

For example, the commission regarding Mary McOwen in 1872 was taken by her sister Elizabeth, a Carmelite nun. Mary was to inherit one third of her late brother's estate but was declared to be of unsound mind; Elizabeth was declared to be her sole heir, and therefore inherited two-thirds of the estate.¹²

While earlier juries acted on their own understandings of sanity and mental disorder, there was later a greater reliance on medical evidence, which arguably diminished the role of the jury in these proceedings, although juries *de lunatico inquirendo* existed until the twenty-first century.

Jury of Matrons

The jury of matrons was the only nineteenth-century jury composed of women, and was used to determine pregnancy in both civil and criminal cases.

This jury was not regulated by statute, and it was one of the only juries whose members were not required to hold freehold or comply with other typical jury qualifications or residency requirements. The jury of matrons consisted of married women, or widows who had experience with childbirth; they did not have to be midwives.¹³ There was no list of matrons; they were summoned *de circumstantibus* from the bystanders in and around the court, and it was sometimes necessary to shut the courtroom doors to prevent women in attendance from trying to avoid being empanelled.¹⁴

In the eighteenth and nineteenth centuries, the jury of matrons was usually empanelled to determine whether a woman convicted of a capital offence was pregnant. If she was, then she could in theory have her death sentence postponed until after she had given birth. Sometimes a full reprieve would be granted and the death penalty was never executed.¹⁵ However, this practice was not universal.

For example, Bridget Murray was convicted in 1818, on the testimony of her twelve-year-old daughter, of aiding and abetting her paramour in the murder of

¹² *Irish Times*, 20 November 1872.

¹³ See generally James C Oldham 'On Pleading the Belly: A History of the Jury of Matrons,' *Crim Jus Hist* 6 (1985) 1-64

¹⁴ Eg *R v Wycherley* (1838) 8 Car & P 262: 173 ER 487.

¹⁵ Eg *Freeman's Journal*, 21 October 1780.

her husband. A jury of matrons found her to be pregnant, and she was delivered of a baby some six months later. Despite her protestations of innocence her execution was unfortunately carried out.¹⁶

Similarly, Mary Fairfield, convicted of murder, was found pregnant by a Dublin jury of matrons in October 1783. She was brought before the court the following February and September, not yet having given birth, but eventually the court ruled that the law was to take its course.¹⁷

The matrons' task was a difficult one, given the limited understanding of pregnancy before the nineteenth century. It was not enough merely to be pregnant or 'with child' – she had to be 'quick with child.'¹⁸ To be quick with child generally meant that the woman (and the jurors) must have felt the child quickening, or moving in the womb – after about sixteen weeks of pregnancy. Oldham notes that until the late eighteenth century, human life was not considered to have begun until this happened. By the early nineteenth century this view was in decline, and the difference between a baby who had 'quickened' and one who had not was increasingly seen as arbitrary. The British Medical Association described it in 1841 as 'making a distinction where there is no distinction.'¹⁹

As the century progressed, public opinion began to favour qualified physicians over the amateur matrons, and doctors began to be sworn in to assist the jury in reaching their decision. Several erroneous verdicts by juries of matrons in England led to calls for the jury's abolition during the 1870s. The Juries Procedure (Ireland) Act 1876²⁰ abolished the jury *de ventre inspeciendo*. In cases where pregnancy was claimed in capital conviction cases, the prisoner was now to be examined by 'one or more medical men' The jury of matrons was not abolished in England until 1931,²¹ and even as late as 1913 a committee on jury law and practice noted that a jury of matrons was still 'sometimes, though very rarely empanelled.'²²

Market Juries

¹⁶ *Freeman's Journal*, 16 March and 15 August 1818.

¹⁷ *Freeman's Journal*, 19 August 1784.

¹⁸ Leonard MacNally, *The Justice of the Peace for Ireland*, 2 vols (H Fitzpatrick 1808) 580.

¹⁹ Anon, 'Historical Sketch of the British Medical Association' (1882) 1 *British Medical J* 847-85, 854

²⁰ 39 & 40 Vic, c 78, s 13.

²¹ The Sentence of Death (Expectant Mothers) Act 1931.

²² *Report of the departmental committee appointed to inquire into and report upon the law and practice with regard to the constitution, qualifications, selection, summoning, &c. of juries* [C-6817] 1913, xxx, 403, 7.

Market jurors were men empowered to inspect markets, bake-houses and other places where food was prepared or held out for sale, to ensure that all relevant regulations were being complied with. Some market juries had medieval origins, while others were created by statute in the eighteenth century. For example, a 1765 act observed that the rapid growth of Cork city meant that the mayor could not 'so strictly attend the inspection of the markets of the said city as usual'.²³ It allowed justices of the peace to issue a precept to the sheriff to return twenty-four 'citizens of the same city', twelve of whom could be sworn as a market jury for the city. They remained the market jury until the next quarter sessions, and could be fined for failing to carry out their duty.

Any three or more of these jurors could act, although subsequent amending legislation allowed them to act individually. They could, 'at reasonable hours' visit the 'markets, store houses, working houses, cellars and shops in the said city, where provisions and victuals are sold or made up or making up for sale in the said city, and to inspect the quality of the said provisions and victuals.' They had the power to seize any food or ingredients 'fraudulently or illegally made up', or found in the hands of traders or manufacturers not in compliance with the various rules and regulations governing markets. The jurors could bring the food and its owner or seller before the mayor, to be dealt with in accordance with law.

Legislation couched in similar language was enacted with respect to Dublin in 1773,²⁴ and in 1775 legislation extended the market jury to several cities.²⁵

While there were usually twelve market jurors appointed, the number could vary between two and twenty-four. A foreman was appointed in some places. Market juries went into decline in many places in the 1820s, sometimes as a result of a lack of local support. Serving on such juries was considered 'most troublesome',²⁶ 'rather heavy',²⁷ and generally very inconvenient.²⁸

²³ An act for altering and amending several statutes heretofore made for the better regulation of the city of Cork, and for regulating trials by juries in the court of record of said city; and for making wide and convenient ways, streets and passages in the said city and suburbs thereof; and for preventing frauds committed by the bakers and meal makers of the said city 1765 (5 Geo III, c 24), s 15.

²⁴ An act for paving and lighting the streets, lanes, quays, bridges, squares, courts and alleys within the city and county of the city of Dublin, and other purposes relative to the said city of Dublin, and other places therein particularly mentioned, 1773-4 (13 & 14 Geo III, c 22), s 73.

²⁵ An Act for amending the laws relative to the lighting and cleaning of several cities, and for establishing of market juries therein; and for other purposes, 1773 (13 & 14 Geo III, c 20).

²⁶ *The fifteenth report of the commissioners appointed to inquire into the duties, salaries and emoluments, of the officers, clerks, and ministers of justice, in all temporal and ecclesiastical courts in Ireland. Office of sheriff HC 1826 (310) xvii, 29, 503, (Walter Golding, a bailiff of Dublin).*

²⁷ *Report from the select committee on manor courts, Ireland; together with the minutes of evidence, appendix and index HC 1837 (494) xv, 1, 28,*

In 1835 the Commission on Municipal Corporations heard that many towns and cities no longer had market juries.²⁹ Many of the duties traditionally carried out by market juries came to be taken over by police or corporations and the market jury eventually became redundant. They were officially abolished by the Juries (Procedure) Ireland Act 1876.

Conclusions

Scholarship on nineteenth-century Irish juries has concentrated on the criminal trial jury, and has usually focused on the problems encountered. However, if one takes a broader view of lay participation in the Irish justice system, the picture is less bleak. The system of lay participation was not entirely unworkable; during politically tranquil periods, both civil and criminal trial juries operated effectively and uncontroversially.

The idea of a jury verdict was clearly held in relatively high esteem by legislators and policy-makers. The proliferation of different types of jury in the eighteenth century, to decide all sorts of matters from land valuations to market infringements to sanity, indicates that the administration was generally comfortable with lay decision-making. Laypersons were drafted in to make decisions in a range of different contexts.

Why did lay decision-making become so popular with politicians and lawmakers? Lay decision-making in the twenty-first century is often portrayed as an expression of democracy. However, far from representing some sort of democratic ideal, in the late eighteenth century it was more likely to have been political pragmatism. Delegating decision-making to juries may have been a shrewd move when it came to matters such as property valuations, for example. These were generally carried out by men of substantial property, and thus could hardly be viewed as democratic in the representative sense. Moreover, such delegation also tended to ensure that decision-making power remained largely in the hands of the protestant minority.

Another factor may have been cost; lay juries often represented relatively good value for money. They were usually remunerated either poorly or not at all. Even the wide streets juries, which were the best-paid Irish juries, were not paid nearly

²⁸ *Fairs and markets commission, Ireland. Report of the commissioners appointed to inquire into the state of the fairs and markets in Ireland. Part II. Minutes of evidence I* [C-1910] HC 1854-55 xix, 395.

²⁹ *First report of the commissioners appointed to inquire into the municipal corporations in Ireland, I* [C-23-28] HC 1835 xxvii, xxviii, 51, 79, 199, 953.

as much as the wide streets commissioners. Valuation juries were an economical alternative to appointing and paying professionals to carry out the same functions.

Lay jurors also had the advantage of being available to shoulder some of the administrative and judicial burdens of local government. Mayors, for example, could not realistically monitor and deal with all market issues, so it made sense to delegate these tasks to jurors. It was also a relatively straightforward matter to summon and assemble a panel of laypersons. By the time of the proliferation of lay decision-making bodies in the eighteenth century, the procedure and mechanisms for summoning panels of jurors already existed and were well-established with sheriffs.

Community acceptance was another crucial factor in the survival of the jury. Lay participation in the system of justice was popular among the Irish public. Despite various shortcomings people generally acknowledged the legitimacy of jury decision-making. This was important for the general acceptance of the law in the country. Lay decision-making permeated many aspects of life, from pregnancy to death. A land valuation or a determination of sanity carried out by lay peers may have been easier to accept than one conducted by state officials.

Taking a more international view, the nineteenth century was the golden age of juries both in Europe and in the British Empire, whatever might be said of its popularity at its point of origin. It has been observed that '[i]n the late nineteenth century a jury was regarded as the sine qua non of the rule of law in every developed European country.' The jury as the bulwark of liberty, interposing between the people and the state was increasingly regarded as an essential aspect of any civilised system of justice.

A final important factor which guarded against the collapse of the jury system in the nineteenth century was its popularity among the Irish judiciary.

A fuller account of the matters discussed here can be found in:

N Howlin, *Juries in Ireland: Laypersons and Law in the Long Nineteenth Century*
(Four Courts Press 2017)