Fenians, Foreigners and Jury Trials in Ireland, 1865-70.

Dr Niamh Howlin
Queen's University Belfast

Introduction

This article examines the circumstances which led to the empanelling of a Swiss watchmaker, a French professor and an Italian hatter, along with nine others, to try an American Fenian in Cork in 1865. This was the trial of Captain John McCafferty, a former Confederate soldier who later became an important figure in the Irish nationalist movement. His trial for treason-felony in 1865 is a fascinating example of the use of what was known as a jury *de medietate linguae*; a mixed jury consisting of half locals and half aliens. It is significant because it appears to be the only recorded use of a mixed jury in Ireland, although interestingly, it attracted very little comment, despite the unusual nature of the tribunal. After a brief history of the origins and development of this unique tribunal, this article will compare the historical use of mixed juries in common law countries. McCafferty's trial will then be considered in the wider context of the Fenian organisation's activities in the 1860s, and particularly in light of subsequent Fenian cases where mixed juries were sought.

The History and Development of Mixed Juries

The story of McCafferty's trial begins with a consideration of the special provision historically made for aliens in the criminal justice system. Traditionally, aliens were neither obliged nor entitled to sit on regular trial juries, but could be called upon to sit on what was known as the jury *de medietate linguae*, or *per medietatem lingua.* This was the "jury of the half-tongue", or "of a moiety of tongues", consisting of half aliens and half locals. Early forms of mixed juries were available initially to Jews, then to alien merchants and burgesses and eventually to aliens in all civil actions and all non-capital criminal cases. Oldham considers the "animating spirit" of such juries to be similar to that of the eighteenth-century special jury;[1] presumably, these jurors had specialised knowledge of the mores and customs of their own communities.

Special protection for Jewish litigants

It has been observed that the "archetypal alien in medieval society was the Jew",[2] and the practice of using mixed juries has its roots in the history of Jews in England. After the arrival of William the Conqueror in the eleventh century there was

[1] J.C. Oldham, "The Origins of the Special Jury" (1983) 50(1) *University of Chicago Law Review* 137, at p. 171 (hereafter Oldham, 'Origins').
[2] L.H. LaRue, "A Jury of One's Peers" (1976) 33 *Washington and Lee Law Review* 841, at p. 849.

a considerable influx of Jews into England.[3] Jacobs points out that a "misinterpretation" of *Luke vi. 35*[4] meant that charging interest on loans was forbidden by the Church, and because many trades and professions were closed to them, the practice of money-lending became almost the exclusive domain of the Jewish community.[5]

To say the least, Jews had an unfavourable position under the law. Not only were usurers considered infamous by the Church, but the State confiscated usurers' chattels upon death. Tallages or taxes were frequently levied upon the Jewish community,[6] and they were subject to expulsion or arrest at a moment's notice.[7] Whenever the king was in need of funds, he would order the arrest of large numbers of Jews and levy heavy taxes upon them. In this sense, the Jews functioned as "a reserve of capital upon which the crown could draw when necessary."[8]

Separate tribunals settled disputes arising between members of the Jewish community,[9] and because the property in question would remain in that community (and would thus still be available to the crown), such disputes were of little significance to the crown. However, disputes between Jews and Christians were another matter; the crown had a substantial interest in the outcome of such cases, and in ensuring insofar as possible that the property in dispute remained in Jewish hands. As Rigg puts it, "the Jews were far too valuable a prey to be left by the Crown to indiscriminate appropriation."[10] Thus measures were introduced to counteract popular prejudice and ensure fair and impartial proceedings between Jews and Christians.[11]

In 1190, violence and riots against Jews abounded,[12] and in order to protect his interests, Richard I enacted a Charter at Rouen which provided that:

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[3] The first recorded arrival of Jews in Ireland is recorded in the Annals of Innisfallen as 1079, when "five Jews came over the sea bearing gifts to Fairdelbach [*sic*] and they were sent back over the sea." J. Jacobs, *The Jews of Angevin England* (London, 1893), at p. 255. See S. Mac Airt (ed.), *The Annals of Inisfallen* (Dublin, 1951), at p. 235. Hyman points out that these were probably a delegation from either England or Normandy, "pleading to secure for their co-religionists the right of entry." L. Hyman, *The Jews of Ireland* (Shannon, 1972), at p. 3. He also suggests that Irish Jews shared the fate of those in England, who were expelled in 1290.

[4] "But love ye your enemies, and do good, and lend, hoping for nothing again; and your reward shall be great, and ye shall be the children of the Highest: for he is kind unto the unthankful and to the evil." (King James Version).

[5] See above Jacobs, at p. 255.

[6] R.R. Mundill, *England's Jewish Solution: Experiment and Expulsion, 1262-1290* (Cambridge, 1998), at p. 6.

[7] J.M. Rigg, *Select Pleas, Starrs, and other records from the rolls of the exchequer of the Jews, A.D. 1220-1284* (Selden Society, 15, London, 1902), at p. ix. In 1279, all the Jews of England were arrested; see above Mundill, at p. 26.

[8] D.A. Ramirez, "A Brief Historical Overview of the Use of the Mixed Jury" (1993–1994) 31 *American Criminal Law Review* 1213, at p. 1215 (hereafter Ramirez, "Historical Overview"). See also R.C. Stacey, "The Conversion of Jews to Christianity in Thirteenth Century England" (1992) 67(2) *Speculum* 263. Mundill, see above, at p. 54, observes that the Jew was essentially "Crown property".

[9] The Jewish Exchequer, which operated from about 1190 until 1290, tried cases involving Jews or Jewish law, and kept records of financial transactions between Jews: A. Carver Cramer, "The Origins and Functions of the Jewish Exchequer" (1941) 16(2) *Speculum* 226. See also P.Brand (ed.), *Plea Rolls of the Exchequer of Jews. Vol VI: Edward I, 12779-81* (London, 2005) for more detailed analysis of the powers and functions of this court.

[10] Rigg, above, at p. x. Jacobs, above, at p. xix, describe the kings as the "sleeping-partner in all the Jewish usury".

[11] D.A. Ramirez, "The Mixed Jury and the Ancient Custom of Trial by Jury *de Medietate Linguae*: A History and a Proposal for Change", (1994) 74 *Boston University Law Review* 777, at p. 783 (hereafter Ramirez, "Mixed Jury").

[12] See above Mundill, at p. 17.

> "if any quarrel arise between a Christian and Ysaac, or any of his children or heirs, he that appeals the other to determine the quarrel shall have witnesses, viz., a lawful Christian and a lawful Jew. And if the aforesaid Ysaac, or his heirs, or his children, have a writ about the quarrel, the writ shall serve them for testimony; and if a Christian have a quarrel against the aforesaid Jews let it be adjudicated by the peers of the Jews." [13]

In 1201, this was reaffirmed by King John, in exchange for which the Jewish community paid the crown four thousand marks.[14] By the mid-thirteenth century, the introduction of usury laws allowed Christians to lend money, and the crown began to exercise greater powers of taxation over the general native population.[15] Anti-Semitism was on the increase, and it culminated in the banishment of Jews from England in 1290.[16]

The growing importance of European merchants

After the banishment of the Jews, European merchants became the King's financial agents in the fourteenth and fifteenth centuries.[17] Ramirez emphasises the importance of these men to the English economy—they imported and exported, lent money, and paid higher tariffs and taxes than natives.[18] The merchants wielded considerable power and influence, and persistently attempted to secure further privileges for themselves.[19] One privilege they enjoyed was that in civil cases and non-capital criminal cases, they were entitled to the resolution of disputes by a jury *de medietate linguae*, half of whom were to be locals, and half of whom were to be natives of the merchant's own country, where possible.[20] This common law right to a mixed jury was codified in the 1353 Statute of the Staple, which stated:

> "If the One Party and the other be a Stranger, it shall be tried by Strangers; and if the One Party and the other be Denizens, it shall be tried by Denizens; and if the one Party be Denizen, and the other Party

[13] Charter by which many liberties are granted and confirmed to the Jews, 22 March 1190. See above Mundill, at p. 56 and see above Jacobs, at pp. 134-6. Jacobs, at p. 201, mentions a case from 1199-1200, wherein a jury was composed of "12 lawful Jews of Lincoln and 12 free and lawful Christian men of the neighbourhood of Lincoln." This "remarkable" double jury was obtained from the King in exchange for "one palfrey [a riding horse] and one blue sparrow-hawk".

[14] See above Jacobs, at pp. 212-5.

[15] See above Ramirez, "Historical Overview", at pp. 1215–6.

[16] See above Mundill, at pp. 249–85.

[17] These came originally from Italy, and later from Germany. See H. Hall, *Select Cases of the Law Merchant* (2 vols, Selden Society, 23, 46, London, 1908, 1929), i, at p. xxxvii.

[18] Ramirez, "Historical Overview". See M.S.Giuseppe, "Alien Merchants in England in the Fifteenth Century" (1895) 9 *Transactions of the Royal Historical Society* (ns) 75. See generally K.Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, 2001) for a discussion of the legal status of aliens.

[19] G. Faulkner Ward, "The Early History of the Merchants Staplers" (1918) 33(131) *The English Historical Review* 297, at p. 302.

[20] See Hall, above, ii, at p. xxi.

> an Alien, the one half of the Inquest, or of the Proof, shall be of Denizens, and the other half of Aliens."[21]

As Duncombe later pointed out, "this Statute extended but to a narrow Compass, to wit, only where both Parties were Merchants or Ministers of the Staple, and in Pleas before the Mayor of the Staple."[22] The following year the Statute of the Staple was confirmed and extended.[23] The 1354 Statute provided for inquests *de medietate linguae*, "in all Manner of Inquests and Proofs, which be to be taken or made among Aliens and Denizens, be they Merchants or other, as well before the Mayor of the Staple, as before any other Justices or Ministers, although the King be Party."[24] Pole points out that although the legislation did not alter common law procedures, nevertheless it "implicitly recognised that different communities had their own customs, moral perspectives and codes, which were entitled to consideration by English law."[25] The mixed jury has thus been said to exemplify the concept of personal law—the concept that laws attach to a person by virtue of their membership of a certain class or community, as opposed to their geographical location.[26]

The merchants' right to the mixed jury was temporarily lost in the early fifteenth century, during a time of some tension between the foreign merchants and the native English.[27] A 1414 statute provided that jurors in cases concerning homicide, disputes over land or disputes to the value of forty shillings, had to hold lands or tenements of a yearly value of forty shillings or more.[28] This was interpreted as excluding alien merchants, who could not hold real property under common law.[29] As a result, they began to cease trading in England, causing economic hardship,[30] a

[21] Statute of the Staple 1353 (27 Ed. III, st. 2, c. 8).

[22] G. Dubcombe, *Tryalls Per Pais: or, The Law of England Concerning Juries By Nisi Prius* (2 vols, London, 8th ed., 1766), ii, at p. 241.

[23] Confirmation of the Statute of the Staple Act 1354 (28 Ed. III, c. 13). See F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I* (2 vols) (Cambridge, 2nd ed., 1898–1899) i, at p. 465.

[24] Confirmation of the Statute of the Staple Act 1354 (28 Ed. III, c. 13).

[25] J.R. Pole, "'A Quest of Thoughts': Representation and Moral Agency in the Early Anglo-American Jury" in J.W.Cairns and G.McLeod, (eds.) *'The Dearest Birth Right of the People of England': the Jury in the History of the Common Law* (Oxford, 2002), at p. 109.

[26] See for example M. Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago, 1994), at p. 25. Raeburn explains that "[t]he theory of the Personal Law is that everyone (for certain purposes at any rate) enjoys as of right the laws of his 'own folk', that is, normally, the people of the community into which he was born, and whose laws are those of the *territorium juris* or 'law district' in which they live. Furthermore, the theory requires that in the interests of mercantile and social intercourse, the individual should be free, where and when he pleases, to choose his own community." W.Raeburn, "Dispensing with the Personal Law" (1963) 12(1) *The International and Comparative Law Quarterly* 125, at p. 125.

[27] It has been noted that, "[t]he Rolls of Parliament for the period contain a multitude of petitions to the Government urging the enactment of various regulations intended to restrict the liberties of alien merchants. Above all, it was sought to limit the duration of their stay in the country, to prohibit them from direct dealings with other aliens and from all retail trade, and to deny them the privilege of owning houses of their own." See above Giuseppe, at p. 76.

[28] The Qualifications of Jurors Act 1414 (2 Hen. V, stat. 2, c. 3). Another statute passed in the same year provided that jurors on inquests into heresy were to "have within the Realm an Hundred Shillings of Lands, Tenements, or Rent by Year": 2 Hen. V, Stat. 1, c.7.

[29] See J.C.W.Wylie, *Irish Land Law* (London, 3rd ed., 1997), at p. 1121, who notes that, "an alien could not hold land and any attempt to convey land to one resulted in forfeiture to the Crown." This was the case until the Naturalisation Act 1870; see below.

[30] See below, Inquests Act 1429 (8 Hen. VI, c. 29). For a more general discussion of fifteenth-century economic decline in England, see J. Saltmarsh, "Plague and Economic Decline in England in the Later

"great diminishing of the King's Subsidies, and grievous Loss and Damage to all of his said Realm".[31] The merchants' reaction, according to Ramirez, demonstrates the importance they attached to the right. Eventually, in 1429 the right to the mixed jury was reaffirmed in a statute which stated that:

> "…many of the same Merchants Aliens have withdrawn, and daily do withdraw them, and eschew to come and be conversant on this Side the Sea, and likely it is, that all the same Merchants Aliens will depart out of the same Realm if the said last statute be not more plainly declared...".[32]

The Act confirmed that it had not been the intention of the 1414 statute to "hinder or prejudice" the 1353 and 1354 Acts.

Mixed Juries for all Aliens

In 1354, the right to a mixed jury was extended to all aliens in both civil and criminal cases.[33] Ramirez points out that whilst in the case of the Jews, the crown had a material interest in the outcome of disputes, in the case of the alien merchants, there was no such direct commercial interest. There was, however, a broader economic need to maintain the presence of foreign traders in England, and reassuring them that their interests would be safeguarded in the civil and criminal courts was one means of achieving this.[34] The function and purpose of mixed juries changed over time, and even when these purely economic considerations had receded, the practice of allowing such juries endured. Mixed juries were available in both civil and criminal cases until the early nineteenth century,[35] when legislation passed in England in 1825[36] and in Ireland in 1833[37] restricted juries *de medietate linguae* to criminal felonies and misdemeanours.

Middle Ages" (1941) 7(1) *Cambridge Historical Journal* 23, and J.M.W.Bean, "Plague, Population and Economic Decline in England in the Later Middle Ages" (1963) 15(2) *The Economic History Review* (ns) 423. It is clear that there was a general contraction in international trade throughout Europe in the fifteenth century, so it is possible that the merchants who withdrew from England after 1414 did not do so solely as a consequence of the law passed. See W. Marsh, "Commerce and Trade" in *The New Cambridge Medieval History* (7 vols) (Cambridge, 1998), vii, at p. 145. This appears to have been connected with population decline, a shortage of bullion and war.

[31] Inquests Act 1429 (8 Hen. VI, c. 29).

[32] Inquests Act 1429 (8 Hen. VI, c. 29). See above Oldham, "Origins", at pp. 211–2.

[33] Confirmation of the Statute of the Staple Act 1354 (28 Ed. III, c. 13), s.2.

[34] See above Ramirez, "Historical Overview", at p. 1217.

[35] J. Lilly, *A Continuation of the Practical Register* (2 vols, London, 1719), ii, stated at p. 125: "[i]n all Cases where an Alien is Plaintiff or Defendant, the Trial, whether Civil or Criminal, ought to be *Per medietatem Linguae*, and a Suggestion to be made upon the record to that Purpose; and when the Jurors appear they swear one English and one Foreigner, and so on till they have a full Jury." Similar statements were made in later editions: see J. Lilly, *A Continuation of the Practical Register* (2 vols, London, 1735), ii, at p. 157 and J. Lilly, *A Continuation of the Practical Register* (2 vols, London, 1745), ii, at p. 157. See also G. Dubcombe, *Tryalls Per Pais: or, The Law of England Concerning Juries By Nisi Prius* (2 vols, London, 8th ed., 1766), ii, at p. 240.

[36] The County Juries Act 1825 (6 & 7 Geo. IV, c. 50), s.47.

[37] The Juries Act (Ireland) 1833 (3 & 4 Wm. IV, c. 91), s.38.

The English Reports contain references to the procedure being invoked from the sixteenth century onwards,[38] and the nineteenth century saw a number of high-profile cases in England.[39] Two particularly widely-reported cases were *R v Bernard*[40] and the notorious *R v Manning and Manning*.[41] The last mixed jury trial was *Levinger v the Queen*[42] in 1870. Although the right to the jury *de medietate linguae* remained on the statute-books until 1870, there are much fewer reported instances of it being invoked in Ireland.[43]

[38] For example, of *R v Dyckson* (1571) 3 Dyer 304a; 73 E.R. 683, *Caesar v Cursiny* (1592) Cro Eliz 305, case 3, B.R.; 78 E.R. 556, *Vangagell* v. *Browning* (1685) 1 Keb 547; 83 E.R. 1104, *R v d'Eon* (1746-1779) 1 Black W 510; 96 E.R. 295 and *Symons v Spinosa* (1794) 3 Dy 357; 73 E.R. 801.

[39] For example, in *Giuseppe Sidoli's Case* (1832) 1 Lew 244; 168 E.R. 1027, Sidoli was a native of Parma, in Italy, and was indicted for manslaughter. Despite successfully invoking the right to a jury *de medietate*, he was convicted and transported. *R v Giorgetti* (1865) 4 F & F 546; 176 E.R. 684 was a murder trial. The sheriff had had notice that a jury *de medietate linguae* would be required, and so he had returned to the court the panel with the names of a number of foreigners residing in the area on it. *R v Ayes* (1825) R & R 166; 168 E.R. 741 concerned a charge of manslaughter against a Frenchman. Pierre Ayes was accused of the manslaughter of Jean Berjeant, a fellow prisoner at the Mill prison, in Plymouth. The assault resulted from a disagreement over a tobacco-box whilst the prisoners were gambling (apparently unsupervised), and under extreme intoxication.

[40] (1858) 1 F & F 239; 175 E.R. 709, 8 St Tr (ns) 887. Simon Bernard, a French refugee living in England, was indicted and tried in 1858 as accessory before the fact to the murder of a *Garde de Paris*. Felice Orsini and others had thrown grenades at Emperor Napoleon III in "the most spectacular of a long series of assassination attempts on the Emperor": H.C. Payne and H. Grosshans, "The Exiled Revolutionaries and the French Political Police in the 1850s" (1963) 68 (4) *American Historical Review* 954, at p. 969. The emperor and empress escaped unhurt, but eight people were killed and 148 injured: H. Hearder, "Napoleon III's Threat to Break off Diplomatic Relations with England during the Crisis over the Orsini Attempt in 1858", (1957) 72 (284) *The English Historical Review*, 474, at p. 475. Bernard was suspected of having manufactured the bomb. The French government made a formal request for his extradition, but this was refused. Bernard was subsequently brought to trial in England and despite being informed of his right to a jury *de medietate linguae*, Bernard chose to be tried by a jury comprised entirely of Englishmen. This was most likely because of the politically sensitive nature of his involvement with the revolutionaries. He was acquitted by the English jury. In the aftermath of this affair, Napoleon III attempted to break off diplomatic relations with England.

[41] (1849) 1 Den. 468; 169 E.R. 330, 2 Car & K 387; 175 E.R. 372. Frederick George and Maria Manning were indicted for the murder of Patrick O'Connor, apparently an ex-suitor of Mrs Manning's with whom she had maintained an intimate relationship even after her marriage. His body was found buried under a flagstone in their house, and the facts surrounding the case gave rise to considerable public interest; see Anon., "The Bermondsey Horror – The Commodity of Murder" *Punch*, (1849) vol. 17, at p. 83. The story generated an amount of popular literature, for example: : Anon., *the Bermondsey Murder: A Full Report of the Trial of Frederick George Manning and Maria Manning for the Murder of Patrick O'Connor* (London, 1949), M.Alpert, *London 1849, A Victorian Murder Story* (London, 2003), A.Borowitz, *The Woman who Murdered Black Satin: the Bermondsey Horror* (London, 1981) and *The Bermondsey Horror: the Murder that Shocked Victorian England* (London, 1989). Maria le Roux had been born in Switzerland, and married Frederick George Manning in 1847. At her trial, she sought a jury *de medietate linguae*. Under the Aliens Act 1844 (7 & 8 Vic., c 66), s.16 she was deemed to have been naturalised by virtue of her marriage to a natural-born British subject, and she therefore enjoyed all the rights and privileges of a natural-born subject. It was argued on her behalf that this did not deprive her of the right to a mixed jury but the court rejected this argument, and both she and her husband were tried and convicted by an all-English jury. See Anon., *A Full Report of the Trial of Manning and his Wife* (London, 1849), at p. 44.

[42] (1870) 7 Moo PC (ns); 17 E.R. 26. In this case the right was claimed under s.3 of the Victorian Juries Statute 1865, No. 272, which was identical to the English County Juries Act 1825 (6 Geo. IV, c. 50). The Bavarian appellant was tried for murder by a jury *de medietate linguae* consisting of half British subjects and half aliens. He was convicted of manslaughter in the Supreme Court of Victoria, and subsequently appealed on a procedural issue to the Privy Council. The appellant claimed that he was denied the right to peremptorily challenge the alien jurors; this was upheld by the Privy Council.

[43] See below. There certainly does not appear to be any evidence of its use in cases involving native Irish speakers—such cases generally involved the use of interpreters. Interpreters were used in the

Mixed Juries Elsewhere

While the jury *de medietate linguae* was part of English civil and criminal law for hundreds of years, mixed juries were not unique to this part of the world; they spread throughout the British Empire, and also appeared in various guises in the American colonies.

America

Mixed juries of one sort or another were a feature of the American colonies from an early stage, and Ramirez has identified their use in early Massachusetts, New York, Pennsylvania, South Carolina, Kentucky and Virginia.[44] Kawashima describes the use of mixed juries in cases involving Native Americans in late seventeenth century New England.[45] In the eighteenth century, in certain areas they were regularly summoned for the adjudication of cases involving other Native Americans.[46] This may be contrasted with the position of African Americans: Kawashima notes that during the period in question, there were no instances of them being empanelled to sit on juries.[47]

Thomas Jefferson, in his correspondence with James Madison over the US Constitution, approved of the use of mixed juries for the trial of aliens.[48] In the years

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Maamtrasna trials which stemmed from the massacre of five members of the Joyce family in Maamtrasna, Co. Galway, on 17 August 1882. A seriously flawed investigation and prosecution led to the wrongful execution of Myles Joyce. See T. Harrington, *The Maamtrasna Massacre* (Dublin, 1884),, J. Waldron, *Maamtrasna: The Murders and the Mystery* (Dublin, 1992) and M. Dungan, *Conspiracy: Irish Political Trials* (Dublin, 2009), at pp. 129–170. Neither the defence counsel nor the defence solicitor in this case spoke Irish, whilst a number of their clients spoke little or no English. Controversially, the court-appointed interpreter in that case was an RIC constable. A number of Irish-speaking witnesses were examined using interpreters. There are records of court interpreters being used in Meath until at least 1826. J. Brady, "Irish Interpreters at Meath Assizes" (1959) 2(1) *Ríocht na Midhe* 62. All of this indicates that the *medietate* jury had more to do with nationality than language, although by the nineteenth century the very concept of nationality was in a state of flux.

[44] Ramirez, above, "Historical Origins", at p. 1220.

[45] Y.Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts* (Connecticut, 1986), at p. 129. He cites a case where a jury of six Indians and six white settlers found an Indian named Tom guilty of rape in 1674, and another instance where the murder of a Christian Indian named John Sassamon in Plymouth in 1675 resulted in a mixed jury being empanelled. In the latter case there were Native Americans on the jury in addition to the twelve white men. See also J. P. Ronda and J. Ronda, "The Death of John Sassamon: An Exploration in Writing New England Indian History" (1974) 1(2) *American Indian Quarterly* 91.

[46] Kawashima, above, also mentions a case where four Native Americans were tried for murder. The jury consisted of twelve white settlers and six Native Americans.

[47] See fn. 45 at p. 130. In fact, it was not until the late nineteenth century that the Supreme Court in *Strauder v West Virginia* 100 U.S. 303, 310 (1879) declared that a statute prohibiting African Americans from sitting on juries was unconstitutional. This case involved a black man convicted of murder in West Virginia, where the law did not permit black persons to sit as jurors. The court in *Strauder* explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. It was almost another century before racially-motivated jury challenges were outlawed in *Batson v Kentucky* 476 U.S. 79, 89 (1986). During the trial of a black defendant, the prosecutor used his peremptory challenges to exclude all prospective black jurors. It was noted that as established in *Strauder*, a defendant had no right to a jury composed in whole or in part of persons of his own race. However, the equal protection clause of the Fourteenth Amendment was said to guarantee that the State would not exclude members of a defendant's race from the jury venire on account of race, and this included the use of peremptory challenges.

[48] Thomas Jefferson to James Madison, 31 July 1788, in A. Koch and W. Peden (eds.), *The Life and Selected Writings of Thomas Jefferson* (New York, 1944), at p. 451. He wrote that, "[i]n disputes

following, it seems that the right to a mixed jury was recognised, and the nineteenth century occasionally saw such juries being granted to defendants in criminal cases. For example, in the 1823 case of *United States v Cartacho*,[49] Supreme Court Chief Justice John Marshall allowed a mixed jury in the trial of an alien for murder and piracy. The jury *de medietate linguae* was described as "a privilege, sometimes accorded to alien criminals by our courts, with whom it is discretionary."[50] In Virginia, in *Richard v Commonwealth*,[51] an Englishman charged with perjury was granted a mixed jury in 1841.[52] However, the Supreme Court of Virginia ruled that the 1354 Statute had not been incorporated into Virginian law by the 1776 Ordinance of Convention which provided that all statutes made before 1560 were to remain in force until altered by the legislature, provided they were of a general and not a local nature.[53]

Such cases appear to have been exceptional. In the North Carolina case of *State v Antonio*[54] in 1825, an alien charged with murder was denied a jury *de medietate linguae*. It was held that although the North Carolina Biennial Act of 1715 had declared that all statute laws of England providing for the privileges of the people were to be in force, the fourteenth century statutes which provided for juries *de medietate linguae* were not covered by this, because they dealt with the privileges of aliens, not the privileges of the people.[55] It was also said that these statutes were local in nature, and not suited to the colonies.[56] The mixed jury was also unsuccessfully claimed in subsequent cases in Louisiana,[57] California[58] and Kentucky.[59] In 1936, the Supreme Court declared that the Sixth Amendment does not include a right to a mixed jury.[60]

This has not, however, put the matter to rest in the United States; over the past sixty years there has been sporadic debate over the possibility of introducing racially-balanced or racially-mixed juries in cases involving minority ethnic groups, particularly African-Americans and Hispanics.[61]

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between a foreigner and a native … the remedy will be to model the jury, by giving the *medietates linguae*, in civil as well as criminal cases."

[49] 25 F. Cas. 312; 1823 U.S. App. LEXIS 368.

[50] At p. 313.

[51] 38 Va. 690; 1841 Va. LEXIS 26; 11 Leigh 690.

[52] However, of the six Englishmen summoned, only three appeared in court, and the judge made up the deficit with bystanders. The accused successfully appealed his conviction on the basis that this had not been a true *medietate* jury. See La Rue, above at pp. 860–2.

[53] At p. 692.

[54] 11 N.C. 200; 1825 N.C. LEXIS 29; 4 Hawks 200. The three judgments given on appeal are discussed in some detail by LaRue, above, at pp. 857–60.

[55] However, there was reference in this case (at p. 200) to an instance where such a jury was granted to a group of Frenchmen a few years earlier.

[56] Henderson J. (at pp. 206-207) pointed out that the history of foreign traders under the colonial system was markedly different to that in Britain: "[f]oreign merchants were prohibited from trading with us, and artists were certainly not encouraged, for it was the policy of the mother country to supply the colonists with manufactures of her own production, and to keep the colonists engaged in the cultivation of the earth, to grow the raw materials for the manufacturers of the mother country".

[57] *State v Fuentes* 5 La. Ann. 427; 1850 La. LEXIS 208. The defendant, from Spain, was convicted of the manslaughter of a "free man of colour".

[58] *People v Chin Mook Sow* 51 Cal. 597; 1877 Cal. LEXIS 21. The defendant was Chinese, and convicted of murder.

[59] *Wendling v Commonwealth* 143 Ky. 587; 137 S.W. 205; 1911 Ky. LEXIS 474. The defendant in this case was a French citizen convicted of murdering a child.

[60] *United States v Wood* 299 U.S. 123 (1936).

[61] See for example D.W. Van Ness, "Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases" (1994-1995) 28 *John Marshall Law Review* 1;

Other Common Law countries

It has been observed that "[i]n Victorian times it seems to have been a widely accepted view that the benefits of the English jury system should be extended whenever feasible to all corners of the rapidly expanding Empire."[62] One aspect of jury trial which found a foothold in many overseas territories was the mixed jury. Even after such juries were abolished in England, persons of British or European descent continued to be entitled to them in many British territories; for example, Brown listed almost a dozen territories which still provided for mixed juries in 1951.[63]

In Barbados[64] and after 1876 in Nigeria,[65] aliens were entitled to a jury consisting of one-half aliens.[66] Aliens in this context meant people who were not British subjects—persons who would be deemed aliens if on trial in England. This was taken further in some colonies; in Brunei, Johore, Kelantan and the Federated Malay States,[67] Europeans could require a racial majority on juries.[68] In Aden (now Yemen) this right was extended to US citizens, and in Nyasaland (now Malawi) it applied to all aliens.[69] In North Borneo, Europeans or Indians who were British subjects, or non-British Europeans or Americans could have a jury with a majority of

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A.W.Alschuler, "Racial Quotas and the Jury" (1995) 44(4) *Duke Law Journal* 704; M.S. Zucklie, "Rethinking the Fair Cross-Section Requirement" (1996) 84(1) *California Law Review* 101; S.L. Johnson, "Black Innocence and the White Jury" (1985) 83(7) *Michigan Law Review* 1611; R. Randall, J.A. Woods and R.G. Martin, "Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool" (2008) 29(1) *Justice System Journal* 71; L.Ellis and S.S.Diamond, "Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy" (2003) 78 *Chicago-Kent Law Review* 1033. In the 1970s, calls were also made for the use of mixed juries in other countries. In *R v Grant and Lovett* [1972] Victorian Reports 423, for example, a jury empanelled for the trial of an Aboriginal labourer in Australia was unsuccessfully challenged on the ground that because it contained neither Aboriginals nor labourers, it could not be deemed a jury of his peers. See A. Dickey, "The Jury and Trial by One's Peers" (1973–74) 11 *University of Western Australia Law Review* 205. The defendants did not make an application for a jury *de medietate linguae*; instead, they sought to challenge the array of the panel on the grounds that it did not represent a jury of the defendants' peers. In England, around the same time, two cases arose where the racial composition of the jury was called into question. In *R v Broderick* [1970] Crim. L.R. 155, a black defendant sought to be tried by a black jury. There was one black person on the panel, and the defendant's counsel sought to cross-examine other potential jurors to ascertain whether they were prejudiced against him on racial grounds. The trial judge refused to allow this, and his decision was upheld by the Court of Appeal.

[62] Knox-Mawer, above at p. 160.

[63] A.Browne, *The Juryman's Handbook* (London, 1951), at p. 115

[64] See A. Browne above.

[65] In 1870 it was stated that jurors were to be either natural-born or naturalised British subjects, which Mittlebeeler points out was "a term broad enough to include many black inhabitants". E.V. Mittlebeeler, "Race and Jury in Nigeria" (1973–75) 18 *Howard Law Journal* 88, at p. 92 (hereafter Mittlebeeler, "Nigeria"). Before this, there was no legislation setting out the qualifications for jurors, but as Mittlebeeler points out, at p. 92, there was widespread acceptance of English law, and "one may assume that efforts were made to recruit jurors possessing the same qualifications as English jurors". An examination of 1879 jury lists indicates some level of diversity, containing both African and European names. However, many of the Africans who served on juries were Sierra Leonians. Mittlebeeler, "Nigeria" at p. 105. Any alien could serve on the jury if they met the basic literacy requirements.

[66] Mittlebeeler, "Nigeria", above, at p. 97.

[67] On the history of jury trials in the Federated Malay States, see S. Ramankutty and C.M. Shunmugam, "The Introduction and Development of Trial by Jury in Malaysia and Singapore" (1966) 8 *Malaya Law Review*.

[68] See Browne, above.

[69] See Browne, above.

their race. In the Gold Coast (now Ghana), Gambia and Sierra Leone, there was no right to trial by a jury *de medietate linguae,* but from 1935 in the Gold Coast, non-native defendants in capital cases could have up to four non-native jurors on a jury of seven. This, according to Jearey, was "to allay European fears of unjust treatment by a predominantly African jury."[70] In Malta, special provision was made in 1829 for the trial of the most serious cases, punishable by death or life imprisonment. There was to be a foreman and six jurors; three to be Maltese and three to be British.[71]

In some African territories, only Europeans were entitled to trial by jury. In Kenya, the right to trial by jury extended only to Europeans and Americans, and they were to be tried by juries consisting of Europeans. Native Africans could not serve on juries.[72] In Southern Rhodesia (now Zimbabwe), there was initially no racial qualification for jurors, although property qualifications in effect excluded Africans,[73] as was the case in nineteenth-century Natal (now part of South Africa).[74] Juries in South Africa were always all-white, though as in Southern Rhodesia, early legislation made no mention of race.[75] For example, a Cape Colony Act of 1891 imposed residency and property-owning requirements along similar lines to nineteenth English and Irish legislation, making it difficult for Africans to qualify.[76] In 1954, non-Europeans were expressly banned from sitting on juries,[77] and in 1969 jury trials were done away with altogether.[78]

In Southern Rhodesia, juries existed from 1899, and from 1908 legislation provided that jurors had to be "of European descent"[79]—this probably did not effect much significant change in practice, but as Jearey notes, it was "a retrograde step".[80] This continued until 1927, when jury trial for Africans was abolished.[81] Similarly, in Zanzibar, jury trials were available only in the Consular or British Court in the nineteenth century, effectively restricting the right to cases involving British subjects, British-protected persons, and the subjects of foreign Christian powers.[82] The Jurors' and Assessors' Regulations 1907 provided that juries were to consist of five persons, unless the accused was a European, Indian or American, in which cases there were to

[70] J.H. Jearey, "Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I" 4(3) (1960) *Journal of African Law* 133, at p. 143.
[71] J.J. Cremona, "The Jury System in Malta" (1964) 13 *American Journal of Comparative Law* 570, at pp. 570–1. The jury system had existed in Malta since 1815.
[72] The Criminal Procedure Ordinance 1906 established trial by jury in Kenya. Jearey comments that "[t]he granting of a right to jury trial to one race only was an entirely new departure in the history of the jury system" in Africa. J.H. Jearey, "Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: II" (1961) 5 *Journal of African Law* 36, at p. 41. This, he explains, at p. 42, was as a result of two conflicting factors: the settlers' claims that it was an Englishman's birthright to be tried by a jury of his peers; and the fact that the jury system "is not fitted to function, even with adaptation, in a heterogeneous and largely uneducated community".
[73] Jearey (II), above, at pp. 43–4. See also E.V. Mittlebeeler, "Race and Jury in Rhodesia", (1968–1969) 15 *Howard Law Journal* 181 (hereafter Mittlebeeler, "Rhodesia").
[74] Spiller, above, at p. 132. See also S.A.Strauss, "The Jury in South Africa" (1973–74) 11 *University of Western Australia Law Review* 133.
[75] E.V. Mittlebeeler, "Race and Jury in South Africa" (1968) 14 *Howard Law Journal* 90, at p. 93 (hereafter Mittlebeeler, "South Africa").
[76] Ibid., at pp. 93-94.
[77] Criminal Procedure and Jurors Amendment Act 1954. See Mittlebeeler, "South Africa" above, at p. 101.
[78] The Abolition of Juries Act 1969; see Strauss, above, at p. 138.
[79] The Juries Law Amendment Ordinance (no. 10 of 1908), cited in Jearey (II), above, at p. 45.
[80] Jearey (II), above, at p. 44.
[81] Jearey (II), above at p. 42.
[82] Jearey (II), above, at pp. 37–8.

be nine jurors, with the majority of the same race as the accused. By 1917, the right to trial by jury was reserved for Europeans, and they were to be tried by juries entirely composed of Europeans, and in 1934 the number of jurors in murder or treason trials was increased to twelve.[83] This continued to be the case until legislation extended the right to trial with the aid of assessors to the entire population.[84] In Fiji, jury trial was reserved for Europeans.[85]

Although in New Zealand jurors officially had to hold estates in fee simple,[86] an 1841 Ordinance provided that the main qualification for jurors was that they were to be British subjects resident in the colony for at least six months.[87] Maori were excluded from sitting on criminal juries, but in the civil sphere, mixed juries were provided for where one party was Maori.[88] Apparently, however, this provision and other "attempts to accommodate the interests of the majority population" drew hostility from the settlers, "and, as a result, seems to have remained largely, if not entirely, a dead letter."[89] Nevertheless, the mixed-race jury remained on the statute books until 1962, when legislation provided that Maori were eligible to sit on all juries.[90]

Other types of mixed jury: burgesses, scholars and clerics

There are examples of other types of mixed juries or mixed tribunals used over the centuries, in addition to the original juries consisting of either half Jews or half alien merchants. For example, fourteenth-century borough customs required a jury half-composed of burgesses—who were a special class of urban tenant[91]—in the trial

[83] Jearey (II) above at p. 39.
[84] The Criminal Procedure (Amendment) Decree 1949.
[85] N.Vidmar, "Juries and Law Assessors in the Commonwealth: A Contemporary Survey" (2002) 13(3) *Criminal Law Forum* 385, at p. 400.
[86] Supreme Court Ordinance 1841.
[87] Sessions Courts Ordinance 1841. See N. Cameron, S. Potter and W. Young, "The New Zealand Jury: Towards Reform" in N. Vidmar, *World Jury Systems* (Oxford, 2000) (hereafter Vidmar, *World Jury Systems*). The requirement that jurors be British subjects was repeated in the Juries Act 1908. See P.T.Burns, "A Profile of the Jury System in New Zealand" (1973–74) 11 *University of Western Australia Law Review* 105, at p. 107.
[88] This was provided for by the Juries Ordinance 1842. See Cameron *et al*, *World Jury Systems*, above at p. 172. Cameron *et al* note in another publication that, "from 1844 onward, minor civil disputes in which one or both parties were Maori and criminal cases in which both parties were Maori were subject to special procedures that made use of tribal authority structures and native assessors". N. Camreon, S. Potter and W. Young, "The New Zealand Jury" (1999) *Law and Contemporary Problems* 103, at p. 110. The authors note that all-Maori juries were abolished with regard to civil cases in 1867, and with regard to criminal cases in 1891. The use of native assessors to determine disputes arising between members of the indigenous population was common throughout the British Empire—see for example P.R.Spiller, "The Jury System in early Natal (1846-1874)" (1987) 8(2) *The Journal of Legal History* 129, at p. 138.
[89] Cameron *et al*, *World Jury Systems*, above at p. 172. A judge writing in 1921 observed that the right to be tried by a mixed jury was never in fact exercised by Maori defendants: F.R.Chapman, "The Law of Status in New Zealand" (1921) 3(1) *Journal of Comparative Legislation and International Law* 62, at p. 67. This view was also expressed in the *Report of the Royal Commission on the Courts* (Wellington, 1978), at p. 14.
[90] Juries Amendment Act 1962, s.2
[91] Found in many medieval Irish manors, Burgesses did not owe suit to the court of the manor, but to the "hundred", which was a court composed of their fellow burgesses. A.J. Otway-Ruthven, *History of Medieval Ireland* (London, 1968), at p. 112.

of any burgess outside the borough.[92] Oldham points out that university and ecclesiastical proceedings also had something resembling the jury *de medietate linguae*, or "party jury".[93] Blackstone observed that when a university scholar was indicted for treason, felony or mayhem,[94] the vice-chancellor of the university could claim jurisdiction. The resulting trial took place before the high steward and a jury formed *de medietate*—half from a panel of eighteen freeholders returned by the sheriff, and half from a panel of eighteen matriculated laymen returned by the beadles of the university.[95] In the ecclesiastical courts, a writ of *jus patronatus* concerned the "right of patronage".[96] In the event of a dispute over the identity of a patron, a commission issued from the bishop to summon a jury of six clergymen and six laymen of the neighbourhood. The number of jurors could be increased indefinitely, as long as the ratio was preserved.[97]

The changing rationale for mixed juries

Oldham and Thayer suggest that the initial rationale for mixed juries was to ensure "fair dealings" for minority groups.[98] However, it is submitted that the crown's initial concern was chiefly one of economic (and political) pragmatism.[99] Certainly the original rationale was not to ensure that the jury and the parties to the dispute shared a language; the first mixed juries were granted to adherents of a specific religion rather than members of a specific ethnicity who might have a shared language.

By the late sixteenth century, however, some of the underlying principles of the *medietate* jury may have been eroded; the 1571 case of *R v Dyckson*,[100] for example, saw language highlighted as the primary justification for such juries.[101] Levine also points to a number of fifteenth and sixteenth century sources which indicated that the jurors were to be of the same nationality as each other, and as the

[92] M. Bateson (ed.), *Borough Customs* (2 vols, Selden Society 18, 20, London, 1904, 1906), i, at p. 10. Records from Co. Kilkenny in the fourteenth century stated that if any of the town burgesses were charged with "trespass, debt, account, covenants, or of any manner of contracts made in the foreign, or be adjudged of felony or of conspiracy in the foreign", half of the jurors were to be burgesses of the town and the other half were to be from the place "where the said deed was supposed to be done". (Citing "Chartae Hiberniae").

[93] Oldham, "Origins", above, at p. 169.

[94] This was the intentional maiming or removal of a body part or limb that would hinder a person's ability to defend himself in combat.

[95] W.Blackstone, *Commentaries on the Laws of England*, (London: 4 vols., 1791), iv, at p. 275. See Oldham, "Origins", above, at p. 169. For example, in the 1669 case of *Trassel v Morris* (1669) Noy 19; 74 E.R. 990, it was stated that, "if any scholar was indicted he should be tryed *per medietatem scholarium* … a Clerk of a Court tryed *per medietatem clericorum*".

[96] A benefactor who built a church, and endowed it with lands whose income would support a priest, had the right of patronage—a right to present a priest to the benefice (gift of land). This right in itself was an incorporeal hereditament.

[97] J. Mirehouse, *A Treatise on the Law of Advowsons* (London, 1824), at p. 288 and J. Mallory, *Qaere Impedit* (London, 1737), at p. 169. These jurors were bound to appear, "under Pain of Spiritual Censures: the Clergy, of Sequestration, and the Laity of Excommunication". Both the clergy and the laity were sworn "to make faithful Enquiry, *viz* first, a Clerk, and then a Layman".

[98] J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (London, 1898), at p. 94. See Oldham, "Origins", above, at p. 169.

[99] Pole too emphasises the importance of policy in the development of this procedure: Pole, above, at p. 110.

[100] (1571) 3 Dyer 304a; 73 E.R. 683. For a detailed discussion of this case, see M. Levine, "A More Than Ordinary Case of 'Rape', 13 & 14 Elizabeth I" (1963) 7(2) *American Journal of Legal History* 159.

[101] See Levine, above, at p. 161.

alien defendant or party.[102] The reasons for this shift away from the original justification are unclear, but it seems that from the early eighteenth century the language or nationality requirement had largely been abandoned.[103] Presumably there had at different stages been difficulties in gathering sufficient men from the defendant's own country. Certainly by the time Lilly was writing in 1719, the requirement appears to have disappeared. He wrote that, "[i]t is not necessary, in a *medietate Linguae*, that the Foreigners should be all of the same Country that the Foreigner is of, who is to have the trial; so that they be Foreigners, and every Man of a several Nation, it is sufficient".[104] This continued into the nineteenth century, and neither the English Jury Act 1825 nor the Juries (Ireland) Act 1833 made any stipulation as to the nationality of the alien jurors.[105] An Irish writer, Theobald Purcell, noted in 1848 that, "an alien, in cases of felony and misdemeanour, has a right to be tried by a jury consisting one half of alien foreigners *generally*, and not exclusively, of the prisoner's countrymen".[106] This again indicates that in cases where there were insufficient men from the prisoner's home country available, any foreigners would do. At the trial of the American John McCafferty, discussed below, defence counsel Isaac Butt was not contradicted when he informed the court that the alien jurors in his case, "need not be Americans, they may be of any country".[107]

Oldham refers to the "ludicrous image of the polyglot jury" which, he points out, is "hardly consistent with the original justification for this type of trial."[108] However, as Constable points out, the term "*medietate linguae*", meaning "moiety of tongues", was only introduced in the sixteenth century, and earlier sources refer to juries of different communities. Indeed, looking to the early use of the mixed jury for Jews and burgesses, it is clear that language considerations were of little importance. The inconsistencies associated with the rationale for mixed juries are probably due to its origins as a remedy for persons of a specific religion or a specific local community rather than persons from a specific country; the idea of "tongues" was imposed upon the practice at a later date,[109] then abandoned when it became unworkable.

Mixed juries in Ireland

As noted, mixed juries were rarely empanelled in Ireland, and there are few reported cases of such juries even being sought by defendants. Ireland was a less multicultural

[102] See Levine, above, at p. 159.
[103] See Levine, above at p. 159.
[104] J. Lilly, *A Continuation of the Practical Register* (2 vols, London, 1710), ii, at p. 125. Similarly, Duncombe wrote that, "it matters not, whether the Moiety of Aliens be of the same Country as the Alien, Party to the Action, is: for he may be a *Portugal* and they *Spaniards*, &c. because the Statute speaks generally of Aliens". He went on to suggest at p. 213 that an alien seeking this type of tribunal should "suggest in what Parts beyond the Sea he was born, that Men of the same Country might be upon the Jury, if they were found". G. Duncombe, *Tryalls Per Pais* (London, 1655), at p. 212.
[105] See s.47 of the 1825 Act. Hawkins, writing in 1826, noted that the aliens need not have come from the same country as the accused: M.Hawkins, *Treatise of the Pleas of the Crown* (2 vols) (London, 8th ed., 1824), ii, at p. 420. Kennedy, writing in the same year, made the same point. J. Kennedy, *A Treatise on the Law and Practice of Juries* (London, 1826), at p. 88.
[106] T. Purcell, *A Summary of the Criminal Law of Ireland* (Dublin, 1848), at p.166.
[107] *Cork Special Commission, December 1865, Queen v John McCafferty (Shorthand-writer's report of the proceedings upon the application on the part of the prisoner for a jury de medietate linguae* (Cork, 1866) (hereafter *Cork Special Commission*), at p. 2.
[108] J. Oldham, *Trial by Jury: the Seventh Amendment and Anglo-American Special Juries* (New York, 2006), at p. 140 (hereafter Oldham, *Trial by Jury*).
[109] See also Constable, above, at pp. 112–20.

society than England, with its large international port cities such as London, Southampton and Bristol, and it is probable that criminal prosecutions of foreigners were relatively rare in Ireland. The most notorious cases in which the *medietate* jury was sought were cases involving the Irish nationalist movement the Fenian Brotherhood.

The Fenians

Fenianism, or the Irish Republican Brotherhood, had evolved from the 1848 Young Ireland rising, and "developed in the context of a fissile but active nationalist popular culture in the late 1850s".[110] Founded in 1858, the Fenians spurned constitutional agitation, and national independence was their primary goal.[111] As the Fenian movement gathered momentum from about 1861 onwards, its leadership promised action, and James Stephens let it be known that 1865 was to be the year of armed rebellion.[112] The Fenians were very much attuned to developments on an international level, and as British relations with both France and the United States deteriorated, conditions became increasingly favourable for an Irish uprising.[113] Money and support made its way across the Atlantic from sympathetic veterans of the American Civil War[114] and exiled Irish nationalists but, for various reasons, the rising of 1865 petered out before it had even begun. Although the Fenian movement is better remembered for the abortive uprising of 1867, the 1865 events nevertheless had some significance.

The trial of John McCafferty

As the only reported instance of the use of a jury *de medietate linguae* in Ireland, the trial of John McCafferty sheds light on the way in which such juries were empanelled, and how the legislative provisions governing such juries were interpreted. It also tells us something about the way such juries were viewed by the public, the legal profession and the judiciary.

Captain John McCafferty[115] was a US citizen born in Sandusky, Ohio,[116] who was tried for treason-felony before a jury composed half of aliens in Cork in 1865.[117] As one of those who made his way from the United States to Ireland with the aim of participating in armed rebellion in 1865, McCafferty was an interesting character, and a significant player in the Irish nationalist movement. Like many of those who promoted Irish nationalism, he had played a part in the American Civil War. This

[110] A. Jackson, *Ireland 1798-1998* (Oxford, 1999), at p. 93. See R.V. Comerford, "Conspiring Brotherhoods and Contending Elites" in W.E. Vaughan (ed.), *A New History of Ireland, vol. v, Ireland Under the Union, I 1801-70* (Oxford, 1989), at pp. 415–419.
[111] E. Curtis, *A History of Ireland* (7th ed., London, 2002), at p. 320.
[112] Jackson, above, at p. 98. See also R.V. Comerford, "Gladstone's First Irish Enterprise" in Vaughan, above, at p. 437.
[113] Jackson, above, at p. 94.
[114] The Civil War lasted from 1861 until 1865. Eleven Southern states declared their secession from the United States and formed the Confederate States of America. The conflict was between these Confederate States (the Confederation) and the United States (the Union).
[115] Various reports of the case refer to the prisoner as McRafferty, McAfferty and McCafferty.
[116] *Cork Constitution*, 16 December 1865.
[117] J.Savage, *Fenian Heroes and Martyrs* (Boston, 1868), at p. 178 and the *Freeman's Journal*, 16 and 18 December 1865.

conflict had "provided many Irish Americans with military experience and with an eagerness to take on the true, Saxon, enemy. The Civil War therefore seemed to create unique opportunities for the Irish revolutionary cause; and the Irish Fenians, who were well grounded in American and Irish American politics, were keen to respond."[118]

Unlike the majority of Irishmen involved in the American Civil War, McCafferty joined the Confederate army.[119] At the end of the conflict in 1865, he took the amnesty oath, and soon thereafter left New York, bound allegedly for Paris.[120] He arrived at Queenstown, Co. Cork on the *City of Limerick* in September 1865.[121] The *Freeman's Journal* reported that after the other passengers had disembarked the steamship, the local police boarded it and found in the possession of an American "who gave his name as Robinson McRafferty, a number of documents said to be of treasonable nature".[122] He was also found to be in possession of a number of firearms.[123] Around twenty-five years old,[124] McCafferty was depicted alternatively in the local press as "a very fierce looking Yankee"[125] and as "a young man of very gentlemanly appearance".[126] A more detailed description in the *Cork Herald* described him as "rather tall, with an intelligent but slightly effeminate cast of features, dark eyes, and dark hair, which he wore long behind ... [with] a slight beard and moustache, after the fashion of his own countrymen".[127] He has since been described as "charismatic" and "[i]mpetuous, headstrong, [and] schooled in the less than rigorous code of military discipline observed by Confederate irregulars during the civil war".[128]

McCafferty was immediately brought before the local magistrates, and was committed for trial. He was charged with treason-felony,[129] and sent for trial at the Cork Special Commission, which opened amidst a strong military presence on 14 December.[130] On the third day of the Commission, McCafferty (along with another Fenian prisoner, Charles Underwood O'Connell) was transported from the county

[118] Jackson, above, at p. 94.
[119] As Isaac Butt put it, McCafferty, "had the misfortune to espouse the Confederate cause". *Cork Constitution*, 16 December 1865. While Irishmen and Irish-Americans fought on both sides in the Civil War, most of the Irish involvement was on the Union side. For an overview of the involvement of Irish-Americans in the conflict, see C. McCarthy, *Green, Blue and Grey: The Irish in the American Civil War* (Cork, 2009). C.S. Samito, *Becoming American Under Fire: Irish Americans, African Americans, and the Politics of Citizenship During the Civil War Era* (Cornell, 2009) specifically considers the contribution of Irish-Americans who fought for the Union. See also S.U. Bruce, *the Harp and the Eagle: Irish-American Volunteers and the Union Army, 1861-1865* (New York, 2006). On the Irish who fought on the Confederate side, see P.T. Tucker, *Irish Confederates: the Civil War's Forgotten Soldiers* (Texas, 2007).
[120] Letter from E.G. Eastman, Consul of the United States of America, reproduced in *Cork Special Commission, December 1865*, above, at p. 1. A copy of this report is available in the Oireachtas library in Dublin.
[121] Savage, at p. 177. *Freeman's Journal*, 19 September 1865. See also the *Birmingham Daily Post*, 21 September 1865.
[122] *Freeman's Journal*, 20 September 1865.
[123] *Freeman's Journal*, 21 September 1865.
[124] *Cork Constitution*, 15 December 1865.
[125] *Cork Constitution*, 19 September 1865.
[126] *Cork Examiner*, 19 September 1865.
[127] *Cork Herald*, 16 December 1865.
[128] B. Jenkins, *The Fenian Problem: Insurgency and Terrorism in a Liberal State 1858-1874* (Canada, 2008), at p. 81.
[129] Savage, above, at p. 178.
[130] *Cork Constitution*, 15 December 1865.

gaol to the courthouse in a prison van, "accompanied by the military and constabulary, and followed by a large group of women and children".[131]

At the courthouse, McCafferty pleaded not guilty in a "distinct voice".[132] He was represented by Isaac Butt QC, who was rising to prominence for his defence of Fenian prisoners around this time. He claimed that his client was entitled to be tried by a jury "half of natives and half of aliens",[133] as provided for in section 38 of the Juries (Ireland) Act 1833.[134] The Attorney General demanded to know "what foundation there is for the truth of the statement that the prisoner is an alien",[135] and the court required a sworn affidavit. McCafferty swore that he had been born in Ohio, and owed allegiance to the United States of America and no other government.[136] He produced a letter form the US Consul and a certificate from the Clerk from the District Court of the United States for the Eastern District of Michigan, stating that he had taken the oath of allegiance as an American citizen.[137]

Once satisfied that McCafferty was in fact an alien, FitzGerald J. made the order for the jury *de medietate linguae* under section 38 of the 1833 Act. He ordered the return to be made "forthwith, so that a competent number of aliens be summoned". After an hour or so, the high sheriff, Henry Lavallin Puxley, returned a panel of twelve aliens' names.[138] Whilst it may seem surprising that the sheriff was able to compile a list of twelve foreigners within such a short space of time, the alien jurors seem to have been relatively easy to identify.[139] Almost all of them were businessmen with premises in the centre of Cork city, mostly within a kilometre or so of the courthouse on Great George's St (now Washington St).[140] Three of the jurors traded on St. Patrick's St; two were on Warren's Place (now Parnell Place); two were on South Mall; one was on Marlborough St and one was on Coal Quay. Of the remaining three, one worked in the Queen's College on Western Road, and the final two were consuls with offices in Queenstown, though they may also have had city premises for their other business interests.

[131] *Cork Herald*, 16 December 1865.
[132] *Cork Examiner*, 15 December 1865.
[133] *Cork Special Commission*, at p. 1. See also The *Freeman's Journal*, 16 December 1865, Savage, above, at p. 178 and *The Hull Packet and East Riding Times*, 22 December 1865.
[134] 3 & 4 Wm. IV, c. 91.
[135] *Cork Constitution*, 16 December 1865.
[136] *Cork Special Commission*, at p. 1.
[137] Details of these can be found in the *Cork Special Commission*, at pp. 1–2.
[138] The *Cork Examiner*, 15 December 1865, reported that the aliens' names were handed in after "about an hour's delay". The shorthand-writer's transcript of the trial listed the alien jurors as Raymond de Venicom, Scipic Chalrel, Felicier Venille, Charles Sivel, Alphonse de Pautem, George Pistoli, Pasquali Tomassini, Nicholas George Yarrdi, Auguste Mollard, Paolo Stefano Minich, John Firmo and Frederick Antonio Klein. *Cork Special Commission*, at p. 3. (Some of these names were misspelt on the shorthand-writer's report). The sheriff certified that he knew of no other aliens within his bailiwick who could be summoned. This was in addition to some 310 locals on the county panel. The *Cork Constitution*, 14 December 1865 and the *Cork Daily Herald*, 14 December 1865 listed all of the Cork county jurors summoned for the Commission, and the *Cork Constitution*, 15 December 1865 listed all the city jurors summoned.
[139] See further below.
[140] *Henry and Coghlan's Directory 1867* describes Cork city centre in the 1860s thus: "The principal streets are St Patrick Street, the Grand Parade, Great George's Street and George's Street ... there is also the South Mall, containing the residences and places of business of professional men, as well as some public buildings."

The ordinary panel was first called over, and seventeen jurors were challenged before the six locals were sworn.[141] When the alien panel was called over, eight of them answered to their names.[142] The first to be sworn was Louis Raymond de Véricour.[143] De Véricour was the Professor of Modern Languages at Queen's College, Cork.[144] One of only thirteen professors in the College, he was the author of a number of works in both French and English.[145] De Véricour had been involved in the religious controversy which surrounded the Queen's Colleges in the early 1850s, and would have been well-known locally as a result.[146] Accounts of his 1879 funeral indicate that he was well-known and enormously popular among staff and students at the College, as well as the residents of Cork.[147]

The next juror to be called was Scipio Chabrel,[148] a French hat maker based on St. Patrick's St.[149] His solicitor, Mr John Horgan, presented to the court a sworn

[141] He had the right to challenge twenty jurors without cause, and as many more as he could give cause for. For a more detailed discussion of jury challenges, see N. Howlin, "Controlling Jury Composition in Nineteenth-Century Ireland" (2009) 30(3) *The Journal of Legal History*, at pp. 245–6.

[142] *Cork Special Commission*, at p. 4.

[143] Cited as "de Venicom" in the shorthand-writer's report.

[144] See *Thom's Directory*, 1865, *Irish Times*, 16 September 1875 and 15 October 1875. See also the *Anglo Celt*, 10 August 1849. He had previously worked in the University of Paris: see the *Caledonian Mercury*, 9 August 1849.

[145] These included: *A Historical Analysis of Christian Civilization* (London, 1850) (see the ensuing controversy, discussed below), *Principles of History* (London, 1845), *Modern French Literature* (Boston, 1848), *The Life and Times of Dante* (London, 1858), *The Claims of the Dumb Creation* (Dublin, 1869), as well as numerous scholarly articles and works in French. See further J.C., 'Two Franco-Cork Professors: R. L. De Véricour and Claude Marcel' (1909) 2 (xv) *Journal of the Cork Historical and Archaeological Society*, 99, for a brief discussion of some of de Véricour's works.

[146] The Queen's Colleges in Belfast, Cork and Galway had been founded in 1845 as a solution to the education of Ireland's growing middle class, and especially to redress the lack of university education acceptable to Catholics. In the late 1840s and early 1850s, the non-denominational, non-residential nature of the three Queen's Colleges was a cause of controversy. Since the eighteenth century, 'Catholic mistrust of the education provided by the state' had been grounded in a fear that education would be used for proselytizing: Donal A. Kerr, *A Nation of Beggars? Priests, People and Politics in Famine Ireland, 1846-1852* (Oxford, 1994), at p. 214. The Galway and Cork colleges, would provide educational opportunities for middle-class Catholics, but more militant Catholics were hostile to what were perceived as 'godless' colleges: John A. Murphy, *The College: A History of Queen's/University College Cork, 1845-1995* (Cork, 1995), at p. 12.There had been some 580 applications for the sixty chairs in the three Colleges. Raymond de Véricour, applied in December 1848, prepared to accept a chair in either modern languages or history. Within a year of the opening of the College, de Véricour was embroiled in the 'godless colleges' controversy. Murphy, above, at p. 47, describes how the storm unfolded. In 1850 de Véricour published his *An Historical Analysis of Christian Civilisation*, with 'Queen's College, Cork' on the title-page beneath his own name. The book was presented as a historical textbook, and was critical of the papacy's political role. As a result, it was immediately placed on the Index. The college council reacted strongly to the publication of the book, and wanted the president to recommend removal of de Véricour from his office. The issue was vigorously debated among both staff and students, and in the local press. De Véricour's supporters claimed that he was being made a scapegoat in order to appease the Catholic bishops. He was summoned before the council in September 1850, and was prepared to remove both his professorial designation and the college address from the next edition, as well as his recommendation of it as a textbook. In return, he was reinstated to his professorship, though not to his position as Dean. The whole affair was considered to have damaged the image of 'mixed education' in Cork.

[147] See the *Irish Times*, 8 January 1879.

[148] Cited as "Chalrel" in the shorthand-writer's report.

[149] A couple of years before being called as a juror in McCafferty's trial, Chabrel had prosecuted an employee named James Sweeny for stealing two shillings and sixpence from the shop's till, having caught him re-handed while spying on him. *The Cork Examiner*, 21 October 1862.

affidavit, in which Chabrel claimed that he was a native of France, and "that from his want of thorough understanding of the English language, he would not be conscientiously justified in taking the juror's oath".[150] Considering the fact that the entire purpose of summoning such a man was to ensure a number of aliens on the jury, it is surprising then that the Attorney General was of the view that this was a valid reason to exempt him. He suggested that Chabrel might be allowed to stand by; FitzGerald J., however, intervened: "[o]f course, you know the very summoning of aliens, and the expression 'de medietate linguae' imply an imperfect knowledge of the English language". He asked Chabrel directly whether he spoke English, and when he replied that he could speak well enough to conduct his business, Keogh J. ordered that the juror be sworn.

The third juror called was Felicien Vuille,[151] a Swiss watchmaker and jeweller with a premises on Marlborough St.[152] The solicitor Horgan made a similar representation about the man's poor grasp of English, and Fitzgerald J. called him for questioning. Although Vuille claimed to have an insufficient grasp of English, Keogh and Fitzgerald JJ., on questioning him, deemed him able enough to understand the language. When Keogh J., who appeared to be growing impatient at this stage, said "[o]h, swear him", Vuille then interjected: "I am in a delicate state of health, my lord. I can get a letter from the doctor, and have been under his care since last March."[153] He was then ordered to stand by.[154]

The next juror called, an Italian hotelier named Pasquali Tomassini, was also ordered to stand by.[155] Nicholas George Yourdi,[156] a corn merchant and a vice-consul for Greece,[157] was called next. He asked the court whether there was not some exemption for consuls, to which FitzGerald J. replied: "None whatever. They are the

[150] The *Cork Special Commission*, at p. 4.
[151] The report lists him as Venille.
[152] See I. Slater, *Slater's Royal National Commercial Directory of Ireland 1870* (Manchester and London, 1870), and I. Slater, *Slater's Royal National Commercial Directory of Ireland 1881* (Manchester, 1881).
(Manchester, 1881), and *Henry and Coghlan's General Directory for Cork 1867* (Dublin, 1867).
[153] *Cork Special Commission*, at p. 4.
[154] For a discussion of the crown's power to order jurors to stand by, see Howlin, above, at pp. 249–52. In this instance, the ordering of Vuille to stand by seems to have been somewhat irregular. When the list of alien jurors was called over a second time, Vuille informed the court, "I would not be able to act as a juror. I can get a doctor's certificate that I am suffering from bronchitis, and that I have been under his care since last March". *Cork Special Commission*, at p. 6. The Attorney General was willing to allow the juror to stand by, rather than submitting to the expense and delay involved in swearing the juror, and later examining a physician as to the state of the juror's health. However, the Attorney General had no power to order a juror to stand by a second time. The rule was that the Crown could order any number of jurors to stand by on the first calling-over of the panel, but that if the panel were to be called over a second time, the jurors had to be sworn, or challenged for cause. Butt unsurprisingly objected to the Attorney General allowing Vuille to stand aside for a second time. The Solicitor General pointed out that the panel should not have been called over a second time until every means possible had been employed to secure the attendance of the missing jurors, and it was agreed that it would be better to wait until more of the aliens who had been summoned actually turned up.
[155] Tommassini lived at 37 Warren's Place in Cork, where he kept a hotel known as The Italian Hotel. (*Henry and Coghlan's Directory 1867*). He was later called as a witness in the trial of Patrick Condon on 29 and 30 May 1867: *Cork Special Commission, 29th and 30th May 1867. Queen v Patrick J. Condon. Report of the Evidence upon the trial.* He also testified in the case of *R v Octave L Fariola*: *Commission Court, October 1867, Index to Witnesses.*
[156] The surname was reported as Fourdi in the *Freeman's Journal*, 18 December 1865, Yourdis in *Thom's Directory* and Yaardi in the shorthand-writer's transcript of the trial.
[157] See Slater, above, 1870 and 1881, and *Thom's Directory 1865*, at p. 1278. Yourdi's business was at 82 South Mall, while the consular office was in Queenstown.

very class of people we would like to have."[158] Yourdi was then duly sworn onto the jury. The next juror, glove-maker August Mollard,[159] was ordered to stand by. Paolo Stefano Minich was next called, and was sworn onto the jury without incident. Minich was the consul or vice-consul for Haiti, Chili and Honduras,[160] an enterprising Italian businessman,[161] and a rather colourful character.[162]

John Firmo, a wholesale fruiterer[163] was called, and was challenged peremptorily by McCafferty. Frederick Antonio Klein, Charles Sivel and Alphonse de Pautem failed to answer when their names were called. George Pistoli,[164] who was a corn merchant and commission agent,[165] was challenged peremptorily. By this stage the alien panel had been exhausted, and there were only ten jurors sworn in total.[166] The list of alien jurors was called over a second time on fines of fifty pounds,[167] and after some disagreement between Butt and the Attorney General over the proper course to take in relation to an ill juror,[168] Charles Sivel, a clock and watchmaker and jeweller,[169] who was probably French, entered the court, and having answered to his name, was sworn in as the eleventh juror.

The panel was then called over again. Alphonse Le Painteur,[170] a professor of French[171] (probably the Alphonse "de Pautem" who had failed to answer earlier) answered to his name, and the Attorney General asked him to stand by. Butt strongly objected, stating that as the panel was now being called for a third time, the Crown ought to show cause for their challenge of this juror.[172] The Solicitor General argued that the panel was now only on its second calling—he clearly did not count the partial

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[158] *Cork Special Commission*, at p. 5.

[159] See Slater, above, 1881. Mollard's business was at 77 St Patrick's St (*Henry and Coghlan's Directory, 1867*), though by 1881 he is listed at 62 Grand Parade. Although his nationality is not known, it is suggested that he may have been French, by virtue of his surname.

[160] *Thom's Directory 1865*, at p. 1278 and *Henry and Coghlan's Directory, 1867*, at p. 22.

[161] He was also registered as a shipping agent and an interpreter: *Irish Times*, 30 March 1878.

[162] See the advertisement in the *Irish Times*, 30 September 1870 and *Francis Guy's City and County Cork Almanac and Directory for 1875*, at p. 293. A number of advertisements in *The Irish Times* and the *Belfast News-Letter* in 1870 indicate that he was involved in the sale of large amounts of Guano on behalf of the Bolivian government: "Guano! Guano!! Guano!! 400,000 tons of guano to be sold on behalf of Chilean and Bolivian governments, by PS Minich, consul for Chili [sic]", *Irish Times*, 30 September 1870. See also the *Belfast News-Letter*, 22, 23 September 1870. In 1878 he came before the courts charged with perjury and conspiracy to defraud, *Irish Times*, 26 and 30 March 1878. This came about when an Italian ship owned by Minich was stranded en route from Philadelphia to Cork, and Minich attempted to defraud the insurance company. He was indicted by a Cork grand jury, and interestingly, retained Isaac Butt as his counsel. He later appeared as a plaintiff in the English Queen's Bench Division before the Lord Chief Justice and a special jury, in an unsuccessful libel action against Goodlake, the printer and publisher of the *Times*. The libel concerned a report of a case in which Minich had been described as being summoned as a juror but failing to appear. *Daily News*, 8 July 1880.

[163] See Slater, above, 1870, and *Henry and Coghlan's Directory, 1867*. Firmo was based at 25 and 26 Coal Quay.

[164] Possible Pistolli—see *Henry and Coghlan's Directory 1867*.

[165] See Slater, above, 1870.

[166] *Cork Special Commission*, at p. 5.

[167] *Cork Constitution*, 16 December 1865.

[168] See above.

[169] See Slater, above, 1870 and *Henry and Coghlan's Directory, 1867*. Sivel's business was on 121 St. Patrick's St.

[170] Possible Le Panteur or Le Pantieur—see Henry and Coughlan.

[171] Le Painteur but was not associated with the Queen's College—he probably taught in a private school or in private homes. He is one of several language and music professors listed in *Henry and Coughlan's Directory 1867*. Le Painteur is listed at 68 South Mall.

[172] *Cork Special Commission*, at p. 7.

second calling. Keogh J. asked the clerk to see if he could find any more of the alien jurors listed on the panel. He found Auguste Mollard, who was challenged by Butt when he answered to his name. After some argument between Butt and Keogh J., this challenge was withdrawn, and Mollard was sworn in as the twelfth juror. The Irish jurors in the case, taken from the Cork county jurors' book, were Joseph Coughlan,[173] Thomas G. Dwyer,[174] Thomas Hayes,[175] William Davis,[176] John Bowen[177] and Nicholas Evans.[178]

Once the jury was assembled and sworn in, the trial began with the Attorney General's lengthy opening statement.[179] Attorney General James Lawson expressed confidence in the mixed jury that had been empanelled:

> "McAfferty [sic] appears to be an American citizen, and it affords me the sincerest pleasure that he has claimed, and has received, the full benefit of the privilege which our law gives him, even in a case of this kind … namely, the privilege of having fully one-half the jury composed of persons who are not natural-born subjects of the Crown of Great Britain. I feel perfectly confident that the Crown is as safe, and, I need not say, the prisoner is as safe, in having this case committed to your charge as if it had been committed in the ordinary way to twelve jurors of this county."[180]

He emphasised that in a treason trial such as this, the alien jurors could have no prejudice either way. The rest of the day was taken up with the examination and cross examination of the crown witnesses.[181] At around seven in the evening, the Commission adjourned, and the question arose as to whether the jurors could leave. Because the local jurors in the case were Cork county jurors, they could not leave the courthouse. This was because during the sittings, the courthouse was deemed to be part of the county of Cork, even though it was situated in Cork city, which was considered a separate legal county. Jurors in criminal cases could not leave the county until the end of the trial, so in this case they were accommodated overnight in the grand jury room.[182]

The following morning, when the court had reconvened but before the jury had been called back in, Fitzgerald J. raised an issue that he and Keogh J. had discussed the previous evening. They suggested that as an alien, McCafferty had owed no allegiance to the Queen before he entered the country, and thus could not be held liable for conspiring or acting outside the jurisdiction. The Attorney General argued that McCafferty had entered the country with treasonable documents in his

[173] Coughlan, the foreman, was from Ballygarvan, Co. Cork: *Cork Constitution*, 14 December 1865. He sat on a number of the juries at this Cork Special Commission.
[174] Possibly Dyer, from Commeen, Carrigaline. *Cork Constitution*, 14 December 1865.
[175] From Crosshaven House in Crosshaven. *Cork Constitution*, 14 December 1865.
[176] From Friar St in Youghal, Co. Cork: *Cork Constitution*, 14 December 1865.
[177] Bowen was from Codrum, near Macroom. *Cork Constitution*, 14 December 1865.
[178] Evans was a Justice of the Peace from Newtown, Doneraile: *Cork Constitution*, 14 December 1865 and *Henry and Coghlan's Directory 1867*. These county jurors had to travel on average between thirteen and twenty-five miles to the courthouse.
[179] *Cork Constitution*, 16 December 1865.
[180] The *Freeman's Journal*, 18 December 1865.
[181] *Cork Constitution*, 16 December 1865 and also *Cork Examiner*, 16 December 1865.
[182] *Cork Constitution*, 16 December 1865. The following morning, they assured Fitzgerald J. that they had spent the night comfortably: *Cork Daily Herald*, 18 December 1865.

possession, and that this became treason as soon as he stepped on British soil. After considerable debate, the judges retired to consider the issue, and eventually ruled that there was insufficient evidence to establish the overt acts of treason alleged.[183] They concluded that McCafferty ought to have the benefit of the doubt, and ordered the jury to acquit, on the ground that as an alien, McCafferty was not liable for acts done outside the jurisdiction.[184] After his acquittal, it was reported that McCafferty was advised by Keogh J. to leave the country as soon as possible.[185] This advice did not go unheeded.

Further Fenian trials

The issue of mixed jury trials resurfaced in Ireland two years later, once again in the context of the activities of the Fenian Brotherhood. As noted above, the proposed uprising of 1865 failed to materialise, and 1866 saw a reorganisation of the Fenians under new leadership, and the long-awaited rebellion took place in early 1867.

As an interesting aside, John McCafferty continued to play a part in the activities of the Fenians in North America, and arrived in England[186] in time for the 1867 rebellion. After an unsuccessful raid on a lightly-guarded munitions store in Chester,[187] he returned to Ireland on the *New Draper*, and was immediately arrested along with a number of others, and was committed to Kilmainham Gaol pending trial for high treason. He came before FitzGerald J. for a second time on 3 May 1867 and on this occasion at a Dublin Special Commission.[188] Once more he was defended by Isaac Butt, but interestingly, this time he did not seek a jury *de medietate linguae*. This was despite the fact that his nationality was raised as a relevant issue before the jury had been sworn.[189] McCafferty was convicted by the regular jury,[190] and was sentenced to death.[191] However, he was released under amnesty in 1871 and returned to the United States.[192]

Aside from the failed Chester raid in February 1867, and a minor uprising in Co. Kerry, the rising had two main focuses: Dublin and Cork. There were also skirmishes in Tipperary, Limerick, Clare, Louth, Queen's County and Waterford. Jackson notes that the "broad strategy" was "to hold out until the appearance of Irish

[183] *Cork Constitution*, 18 December 1865.
[184] *Cork Examiner*, 16 December 1865.
[185] The *Daily News*, 4 January 1866. Another Fenian, William Mackay, was similarly advised.
[186] B. Jenkins, *The Fenian Problem: Insurgency and Terrorism in a Liberal State 1858-1874* (Canada, 2008), at p. 78.
[187] B. Jenkins above at p. 81.
[188] *The Commercial Journal and Family Herald*, 4 May 1867.
[189] Perhaps in reliance on the ruling in McCafferty's earlier trial, Butt claimed that, "[a] citizen of America cannot commit treason out of his own country". The Attorney General accepted that McCafferty was an alien. *The Daily Express*, 2 May 1867.
[190] *The Daily Express*, 6 May 1867. McCafferty challenged twenty-two jurors peremptorily and sixteen for cause, and the crown ordered fourteen to stand aside: *The Daily Express*, 2 May 1867.
[191] The trial was covered extensively in *The Daily Express*, 3, 4 and 6 May 1867. In his opening statement, the Attorney General referred to McCafferty's 1865 trial and acquittal, pointing out that he had not "profit[ed] by the lesson of mercy he was then taught". *The Daily Express*, 2 May 1867. The jurors in this case were obliged to stay overnight in the Green St courthouse for reasons similar to those in the 1865 trial.
[192] See Strange, above, at p. 184. McCafferty remained prominently involved in the Irish nationalist movement for a number of years. For example, he acted as a liaison between the Irish Americans and the men who murdered Lord Frederick Cavendish and Thomas Burke in the 1882 Phoenix Park Murders. See Jenkins, above, at p. xiii.

American reinforcements ... Beyond these highly preliminary and defensive plans, there seems to have been very little except a faith in improvisation".[193] Help from the United States appeared in the form of the ship *Erin's Hope*, which landed in May 1867, "carrying a handful of Irish American sympathizers".[194] The ship, under the name *The Jacmel*,[195] had left New York on 12 April 1867, apparently bound for the West Indies.[196]

The men on board were captured when they came ashore at Helvick, outside Dungarvan in Co. Waterford—twenty-eight out of the thirty-one men were arrested within a day of landing on Irish soil.[197] Among those arrested was Captain John Warren, who was brought before Keogh J. and Pigott C.B. at a Dublin Special Commission in October 1867. Warren was charged with treason-felony, and he sought to be tried by "a jury composed of natives and Americans in equal numbers."[198] Originally from Clonakilty, in Co. Cork, but now a naturalised American citizen, Warren had emigrated to the United States in 1856, and fought on the side of the Union in the American Civil War. Warren was arrested along with John Nagle, and their citizenship status became an issue almost as soon as they were arrested. The American Government hired defence counsel for both men,[199] and the trials—especially that of Warren—generated a huge amount of publicity in the United States.

At the opening of the proceedings, Heron QC handed in a suggestion that Warren was a citizen of the United States, and sought a mixed jury consisting of both Americans and natives:

> "[H]e is an alien, and he prays the writ of our said Lady the Queen to cause to come here twelve good and lawful men of the said county, by whom the truth of the matter may be better known … whereof one half to be natives, and the other half to be of aliens; to wit, born in the United States of America, under the allegiance of the said United States of America, to try the issue."[200]

It is interesting that in this instance, counsel for the defendant specified that the alien jurors were all to be from the same country. This seems contrary to the weight of legal writing and precedent at the time, and actually went against the text of section 38 of the Juries (Ireland) Act 1833, discussed above. As McCafferty's trial, with its polyglot jury, had taken place less than two years previously, this suggests that either the defence counsel had not been paying attention to the most obvious precedent, or else that McCafferty's trial simply had not attracted much attention. In any event, the court in this case did not comment on the fact that Warren was claiming a jury composed of six Irish and six Americans.

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[193] Jackson, above, at p. 101.
[194] Jackson, above, at p. 102.
[195] The name of the ship is variously cited as *The Jacknel* and *The Jacnell*, though apparently *The Jacmel* is correct.
[196] The expedition is documented in detail in A.M. Sullivan, *The Dock and the Scaffold* (Dublin, 1868), at pp. 65–72.
[197] Samito, above, at p. 194.
[198] The *Freeman's Journal*, 31 October 1867.
[199] Samito, above, at p. 197.
[200] W.G. Chamney, *Report of the Trial of John Warren for Treason-Felony* (Dublin, 1867), at pp. 6–7.

The Attorney General objected to the suggestion that Warren be tried by a mixed jury, and Pigott C.B. sought *prima facie* evidence that Warren was in fact an alien. The following exchange was reproduced in the *Freeman's Journal*:

Pigott C.B.:	Do you mean that he is an alien by reason of his being a citizen of the United States?
Dowse QC:	Yes; we contend that a man cannot be a citizen of a monarchy and a republic at the same time.[laughter]
Keogh J.:	Is there any case in which such a jury was given unless the prisoner stated that he was an alien?
Solicitor General:	No; he must show that he is an alien born, and of alien born parents.

The Chief Baron again sought evidence that Warren was an alien, and Dowse QC again pointed out that he was "alien by reason of being a citizen of the United States". Pigott was unhappy with the wording of the suggestion, and demanded that it state that Warren "was born in this country". Heron QC told the court that Warren had been born in Cork, and had been an American citizen since 1 October 1866. He also read out the letters of naturalisation, but this did not seem to suffice.

Ultimately, Pigott CB refused the application for the jury *de medietate linguae*, emphasising that the person claiming such a jury "must *be* an alien". He pointed out that, "he who is once under the allegiance of the English sovereign remains so for ever".[201] With this, Warren dismissed his counsel, and stood trial as a British subject. He was convicted by the court, and sentenced to fifteen years' imprisonment.[202]

After Warren had been sentenced, Augustine Costello was brought up for trial. He too was charged with treason-felony, and Heron QC handed in another "suggestion" that Costello, though born in Galway of Irish parents, was an alien. He sought a jury *de medietate linguae*, but at the objection of the Attorney General, Keogh J. refused this.[203] Before Costello's sentencing,[204] he was allowed to address the court, and he stated:

> "I am proud to say that I am an Irishman, but I am also proud and happy to state that I am an adopted citizen of the United States; and while true to the land of my birth, I can never be false to the land of my adoption. That is not an original phrase, but it expresses the idea which I mean to convey. Now, my lords, my learned and very able counsel, who have conducted my case with the greatest ability and zeal, and of whom I

[201] When this was refused, Warren then directed his counsel to retire, and conducted his own defence. The *Freeman's Journal*, 31 October 1867. See Sullivan, above, at p. 74.
[202] See Samito, above, at p. 198 and the *Freeman's Journal*, 2 November 1867,
[203] The *Freeman's Journal,* 7 November 1867.
[204] He was sentenced to 12 years.

> cannot speak in terms of sufficient praise, demanded for me a jury half alien. I was refused it."[205]

The cases of Warren and Costello have been described as "notorious",[206] and Warren's trial in particular caused outrage in the United States. This was at a time when, between the Civil War and the passing of the Fourteenth Amendment, the very concept of American citizenship was in a state of flux. Although legislation had given effect to the principles of *ius sanguinis* in 1855[207] and *ius soli* in 1866,[208] until the Civil War the United States was primarily concerned with 'assimilating its millions of immigrants and establishing the legal primacy of national citizenship over state citizenship.'[209] The rights of naturalised citizens were also unclear, and the scope of US citizenship was also made uncertain by judicial use of the 'perpetual allegiance' principles adhered to in British courts.[210] In the aftermath of the Civil War, questions of what constituted citizenship were being raised by those who had fought on the side of the Union, particularly African-Americans and naturalised immigrants.[211] The right of expatriation for American citizens (whether natural-born or naturalised) was not expressly provided for in legislation. Warren's trial "galvanized Irish Americans, and the larger American public, to the cause of sanctifying expatriation rights."[212] A review of the case was undertaken by the US Attorney General, Henry Stanbery, and Warren petitioned the House of Congress. The issue gathered pace, and Samito notes that:

> "While the country debated the Fourteenth Amendment in late 1867 and early 1868, tens of thousands of Americans, both Irish-born and native-born, attended public meetings held from Milwaukee, Wisconsin, to Bridgeport, Connecticut, from Cincinnati, Ohio, to Nashua, New Hampshire, to urge that the federal government provide equal protection to native-born and naturalised American citizens abroad ... Through meetings, petitions, resolutions from state legislatures, and congressional debates, Americans discussed allegiance and expatriation within the

[205] Sullivan, above, at p. 83. The ruling in these cases was relied upon the following year when a number of other Fenians were tried in London. Richard Burke and others were indicted for their part in the Fenian conspiracy, and tried at London's Central Criminal Court: see ***R v Burke, Casey and Mullady*** (1868) 11 Cox CC 138. Ernest Jones, on behalf of Burke, applied for a jury *de medietate linguae*, on the basis that his client was an alien. The Attorney General, Karslake, objected, however that a mere suggestion that Burke was an alien would not suffice, and that it should be stated that he was a natural-born subject of the Queen. He referred to the *Warren* case in this respect. Bramwell B. received the suggestion, but "on the footing that it meant that he was not a natural-born subject". Burke's counsel showed the court a passport belonging to his client, and called a member of the American Bar[205] to prove that such passports were only granted to natural-born citizens of the United States. It was ruled that this evidence was inadmissible, and the jury found that Burke was not an alien. The regular jury which tried the case found him guilty, and he was sentenced to fifteen years' penal servitude. *Reynold's Newspaper*, 3 May 1868.

[206] M. Brown, "Expatriation of Infants: Being a Study in the Conflict of Laws between Canada and the United States" (1939) 3(1) *University of Toronto Law Review* 97, at p. 98.

[207] Act of 10 February 1855, ch. 71, § 1, 10 Stat. 604, cited in D.K. Duvall, 'Expatriation under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship' (1970) 56(3) *Virginia Law Review* 408, at p. 412.

[208] Civil Rights Act 1866, Ch. 31, §1, 14 Stat. 27.

[209] Duvall, above, at p. 412.

[210] Ibid, at p. 413.

[211] See generally Samito, above.

[212] Ibid., at p. 197.

> context of considering what comprised a republican government, who had rights to participate in and be protected by it, and what it meant to be an American citizen."[213]

On 9 January 1868, a Resolution was passed in the US House of Representatives, requesting the President to intercede to secure the release of Warren.[214] The expatriation issue took on considerable significance in the context of the 1868 presidential election campaign, and legislation passed later that year provided that expatriation was a natural and inherent right for all citizens.[215] In February 1869, the Royal Commission in England recommended that perpetual allegiance be done away with, and on 12 May 1870, an Act was passed allowing British subjects to naturalise abroad. This was the Naturalisation Act 1870,[216] which radically overhauled the laws on naturalisation, aliens' rights, allegiance and subjecthood. The following day, a treaty was concluded between Britain and the United States, recognising that citizens of either country could naturalise in the other, and would be deemed as citizens of their adopted country in all respects and for all purposes.[217]

Conclusion

It was not until 1870 that juries *de medietate linguae* was finally abolished in England and Ireland. They were the subject of criticism by the 1868 Royal Commission[218] and in the Houses of Parliament,[219] and were abolished by section 5 of the Naturalisation Act 1870.[220] In the same year, the English Juries Act 1870[221] allowed aliens to sit on regular juries for the first time, provided they satisfied the other qualifications.[222] There was no equivalent measure passed in relation to Irish juries.

The Warren and Costello trials played a major role in these developments—they sparked major debates over the meaning of citizenship in both Britain and the United States and were instrumental in effecting major legislative changes to the status of aliens and the boundaries of subjecthood in Britain. Their trials also placed further strain on the already precarious diplomatic relations between the two countries. In the United States, the trials became part of the wider question of expatriation which was one of the significant issues in the American presidential campaign, and they also fed into the wider debate on the Fourteenth Amendment and the meaning of citizenship. As Samito notes, the Fenian rebellion "failed in its objective of liberating Ireland from British rule, but it did accomplish a number of unanticipated goals in the United States".[223]

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[213] Ibid, at p. 200.
[214] *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance*, 1868-69 HC [4109] xxv. 607, App., at p. 60.
[215] The Expatriation Act 1868. See further Samito, above, at p. 211.
[216] 33 & 34 Vic., c. 14.
[217] Samito, above, at p. 211.
[218] *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* 1868-69 HC [4109] xxv. 607, at xi.
[219] See *Hansard 3*, cxcix [1131] and *Hansard 3*, 199 [1129]–[1132], House of Lords, 3 March 1870.
[220] 33 & 34 Vic., c. 14.
[221] 33 & 34 Vic., c. 77.
[222] Note that the Juries Act (Ireland) 1871 contained no such provision.
[223] Samito, above, at p. 214–5.

By contrast, the McCafferty trial appears to have attracted very little commentary, and seems to have been overshadowed by Warren and Costello's subsequent trials. Even in the newspapers, it was reported in a very matter-of-fact style, and received no more coverage than any of the other Fenian trials at the 1865 Cork Special Commission. Legally speaking, it could be said that the trial was nothing out of the ordinary. McCafferty was tried and acquitted by a type of jury which was clearly provided for in legislation, and to which he was clearly entitled because of his nationality. His trial represented a straightforward use of a mixed jury, and there were no complicated or controversial legal issues arising out of this. However, on a narrower or more local level, McCafferty's trial was quite remarkable. Mixed jury trials were unusual in England, and a rarity in Ireland. This was a time when the Irish jury system was frequently the subject of derision and ridicule.[224] It was the subject of scrutiny both at home and England, and moves were afoot to radically overhaul the qualifications necessary for jurors. The lamentable state of the Irish jury system was a common topic in newspapers, legal circles and in Parliament.[225] This makes the lack of commentary on McCafferty's trial all the more remarkable. One would imagine that the empanelling of a motley crew of foreigners to try one of the would-be Fenian rebels of 1865 might have attracted more than a couple of inches of the *Freeman's Journal* and a handful of regional newspapers.

Either mixed jury trials were more common than previously thought, or they were simply not considered interesting enough to merit recording in the law reports. Even this short account of McCafferty's trial has necessitated the synthesis of a number of sources, including newspaper accounts, a shorthand-writer's report and various street directories, in order to piece together a coherent narrative of what happened at the Special Commission and who the alien jurors were. Perhaps McCafferty's trial was not the only instance of such a jury being invoked in the nineteenth century—but for the time being, any other instances of this method of trial seem to be lost in obscurity.

Dr Niamh Howlin is a lecturer in the School of Law, Queen's University Belfast.

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[224] See for example N. Howlin, "Controlling Jury Composition in Nineteenth Century Ireland" (2009) 30(3) *The Journal of Legal History* 227, at pp. 232–3.

[225] A parliamentary committee on crime and outrage had considered problems inherent in the Irish jury system in 1852: *Report from the Select Committee on Outrages (Ireland)*, HC 1852 (438) xiv, 1. See Howlin, above, at pp. 238–9, for a brief discussion of the various attempts to legislate for Irish juries in the 1850s and 1860s. Irish jury laws were eventually overhauled by Thomas O'Hagan, the Irish Lord Chancellor, in 1871: The Juries Act (Ireland) 1871 (34 & 35 Vict., c.65).