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Trials in Ireland of female convicts transported to Van Diemen’s Land

STEPHEN K. LUCAS

DURING THE PERIOD 1803 to 1853, 3,775 women were convicted of offences in Ireland and transported to Van Diemen’s Land. Most trials were of short duration. What was the quality of justice in the trials?

I have examined the procedures in trials during the years 1841 to 1843 using my training as a solicitor. There are limitations. The records are scanty and transcripts of evidence and of the judges’ charges to the juries do not exist. There are, however, records relating to prisoners who sought clemency and summaries of the evidence by the judges which give reasonable accounts of the trials. I have concentrated upon the most common types of offence, larceny and receiving stolen property.

The Irish Context

To gain an understanding of the fairness of the trials, the wider political and social context must be understood. Poverty was widespread in Ireland, particularly amongst the Catholic peasants. Maps showed the country divided into two areas – those close to Dublin (within ‘the Pale’) and those outside. Outside the Pale, society had changed little over the centuries. Most Catholic peasants lived in cabins, small constructions with mud walls and thatched roofs, and Gaelic rather than English was often the first language.

Adding to the difficulties, Ireland was occupied by the British, who brutally suppressed a major uprising in 1798 by the United Irishmen. An eyewitness wrote that in her village the bodies of rebels killed by government forces were left in the street and the best that family and friends could do was to keep the pigs away from the bodies. For several months, there were no sales of bacon in Ireland ‘for the well-founded dread of the hogs having fed on the flesh of men’. The period 1803 to 1853 was a period of political unrest. Sometimes violence was open but it always simmered.

The Legal System in Ireland

By the time of the period of transportation, English law had many excellent features. Power was entrusted to the state on the basis that the rights of citizens would be respected. In 1820 a leading English lawyer, Joseph Chitty, expressed this: the Crown had certain prerogatives but in return there were boundaries for the benefit of citizens ‘wisely woven into the texture of the Constitution’. A critical boundary to the power of government was the right to a fair trial before judge and jury. In theory, Ireland had shared the same common law system as England since the thirteenth century. However, the British authorities held numerous parliamentary inquiries, with little success, into the poor state of the Irish jury system.

At first glance, the legal system in Ireland was impressive. By 1803 an extensive judicial machinery existed throughout the country. The superior courts were located in Dublin, being the courts of Chancery, King’s Bench, Exchequer and Common Pleas, each with its own jurisdiction. Two of these courts had jurisdiction to hear criminal cases: King’s Bench where a crime involved a breach of the king’s peace and Common Pleas where a private person, usually the victim, could bring a criminal charge. On the face of it, trials resembled those in England. A criminal trial took place before judge and jury, and equivalent rules of evidence applied.

The courts of King’s Bench and Common Pleas went on circuit several times a year and held assizes in Irish counties. A typical assize first dealt with the civil and then the criminal cases. The senior judge at an assize held the rank of Baron. Judges expected to be treated with great
respect and were addressed as ‘My Lord’. Resident magistrates sat with the judge on the assize court. In some counties the court was also assisted by a municipal official. This introduced local knowledge, but also local prejudice, into the work of the court. Those who could afford it engaged counsel at assizes, as charges could attract serious penalties.

Below the assizes were the courts of Quarter Sessions. A barrister or assistant barrister headed the court and sat with magistrates. Cases heard at Quarter Sessions were less serious than at assizes, for example, larceny of goods over a certain value, assault or running a house of ill-repute. Penalties included transportation.

The Court of Petty Sessions was at the bottom of the system and did not have jurisdiction to hand down a sentence of transportation. However, it could conduct committal proceedings to determine if a prosecution should be heard at the assizes.

Ireland had a large police force: by 1845 Ireland was the most policed place in the British Empire. For example, the geographically small County Laois had 41 police stations, 52 constables and 262 sub-constables. The force was experienced, having been established in the 1780s. In addition, a crown solicitor functioned in different counties, to brief counsel on behalf of the Crown and to advise the police.

Criminal cases were heard by judge and jury at both assizes and Quarter Sessions. Cases were decided by the trial or ‘petty’ jury, composed of twelve men. ‘Grand Juries’ were also used at assizes and performed preliminary work, for example, determining whether a charge was supported by sufficient evidence. Grand jurors were the wealthiest men, the gentlemen of the county.

The average juror was a different type of person from a prisoner. Only a man could be a juror. Catholics could be jurors, but they were under-represented on juries because jurors had to own some property. For example, in 1833 a juror had to have £10 in land or rents per year or be a ‘resident merchant’. Few Catholics met these requirements. Further, jury lists were compiled by the local sheriff who could ensure that Catholics were kept off them, and this was regularly done.

People dreaded jury service – it was ‘the terror of their lives’. In many areas, particularly outlying ones, conditions for jurors were very uncomfortable. In a criminal case, a juror received no payment. This caused hardship to jurors who ran their own businesses or farms. To be a juror could be dangerous. Society was so divided that any verdict was likely to be unpopular with some elements, and there were people prepared to use violence and intimidation to influence the outcome of a case.

One rule relating to the jury tended to make verdicts unpredictable. From early times the law provided that ‘a jury ... ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment’. (Emphasis added.)

In other words, after the jury retired to consider its verdict, it was required to stay together until agreement was reached, even if this meant remaining for days (and through the nights).

There were instances when a jury could not agree and the judge was due to leave the county. For example, in 1836, in a case heard by Justice Torrens in County Laois, the jury was unable to reach a verdict. The jury was taken in carts (and the three prisoners in a chaise) to the county boundary. The judge met them in a nearby town and they still could not agree. Only then was the jury discharged. There were other cases where lack of food and drink endangered the health or life of a particular juror. If there was medical advice to this effect, the judge was able to make an exception to the rule and order in food and drink.

There was probably well-intentioned thinking behind these practices. It was originally believed that if all the twelve men on the jury could not be sure of guilt, they would acquit, in other words, as hunger set in the jury would be forced to give the prisoner the benefit of the doubt. No doubt this sometimes happened. However, there must have been many other cases, certainly in Ireland, where the jury convicted an innocent person just to end their discomfort. One suspects that this was likely where the jurors were all men who were well-off and Protestant and the prisoner was destitute, Catholic and seen as a burden to the community.

The behaviour of judges could be dictatorial. For example, if Chief Justice John Doherty of the Court of Common Pleas was displeased by a prisoner, he was prepared to inflict a harsh penalty. In the trial of
I was never more shocked than to hear the blasphemy of the prisoner in appealing to God for her innocence on so trifling a charge — she is a dangerous woman. Let her be transported for seven years.  

On the other hand, the workload of the court was heavy and judges had to be familiar with a wide range of law. Many of the assize judges were fine jurists. For example, Baron Richard Pennefather presided at many assizes in the 1840s. He had a high reputation for integrity and ability. Justice Robert Torrens of the Court of Common Pleas enjoyed a similar reputation.  

The appeals process (or the lack thereof) would have influenced the behaviour of judges. In practice there was no legal appeal and it is fair to say that the prospect of an appeal tends to make a judge more careful. It is true that a type of administrative appeal existed. A petition seeking clemency could be lodged with the head of the government, the lord lieutenant. A report was then made by the trial judge, who gained information about the prisoner from local officials such as magistrates and the police. A decision would be announced by the lord lieutenant, who varied the sentence or, as usually happened, returned the petition with the words, 'The law must take its course'. Reasons would not be given. An administrative appeal of this type is very different from an appeal to an impartial appeals court.  

Bartholomew McKeon, the prisoner pleaded guilty to having stolen cattle in his possession. He was sentenced to transportation for ten years. Upon receiving his sentence, he said to the judge, 'Thank God you can do no more' — no doubt a stupid thing for a prisoner to say. The judge added another five years to his sentence. The prisoner's wife petitioned the Lord Lieutenant of Ireland, saying that her husband had made the remark through 'ignorance'; they had two infant female children without any means whatsoever to support them; her husband earned only four pence per day; recently he could get no work at all and starvation had forced him to commit the offence. The petition was rejected.  

Again, in the 1843 Kildare Assizes Pegge O'Hara was charged with receiving stolen property, a cloak worth two shillings and six pence. She did not call witnesses but protested her innocence, appealing to God as her witness. Chief Justice Doherty was taken back and said:
A SELECTION OF CASES

Larceny

Larceny and receiving stolen property constituted the majority of crimes committed by women transported to Van Diemen's Land. Most related to the theft of food or clothing, indicating that the offenders were breaking the law in order to survive or to feed their families. Most of the sentences were predictable. If the value of the property was small, the penalty was likely to be a term of imprisonment. However, if the value was high or if it was a second offence, the usual penalty was transportation for seven years.

In 1841 Ellen Magee was charged with larceny at the Fermanagh Assizes. She had stolen a small amount of turf, pleaded guilty and was duly convicted. She had prior convictions for stealing turf and a blanket. Ellen was sentenced to transportation for seven years. A number of concerned citizens petitioned the lord lieutenant, saying the turf in question was only worth one penny, Ellen had previously been of good character and transportation would cause great sorrow to her parents. The petition was to no avail and her sentence was confirmed.

A private prosecutor, Thomas Doolan, charged two sisters, Anne Larney and Margaret Corcoran, with larceny. Their trial was held in 1841 at the Parsonstown Quarter Sessions before an assistant barrister (sitting with a panel of magistrates) and a jury. The evidence showed that Thomas Doolan had two servants, one a man, Richard Ardill, and the other Daniel Pye, a boy of eleven or twelve years of age. For a long period Mr Doolan had been losing potatoes until finally it was discovered (through Daniel Pye) that Ardill was carrying on 'improper intercourse' with one of the prisoners and, because of this, allowing the prisoners to steal his master's potatoes. The batch of potatoes in question was taken on the night of 6 March 1841 and to ensure that Pye did not say anything, one of the prisoners seduced him into 'criminal intercourse' and, as it turned out, infected him with a venereal disease.

The prisoners were both found guilty of larceny. Anne Larney had one prior conviction for larceny and Margaret Corcoran had none. The assistant barrister initially considered that transportation would be harsh. However, the magistrates persuaded him that both the prisoners were 'irreclaimable'. He was moved to agree, noting that the offence was 'of the lowest species', involving 'prostitution' with Ardill and the 'grossness of seducing a child like Pye'. Both prisoners were sentenced to transportation for seven years.

The prisoners submitted a petition to the lord lieutenant. The accounts of illicit sex took a further turn at this point. Margaret Corcoran alleged that Doolan had seduced her, fathering her illegitimate child, and that she committed the offence to feed the child. She believed Doolan now wanted her out of the country to prevent her seeking maintenance for their offspring. The assistant barrister was not deterred by this claim. In his report to the lord lieutenant, he said that he knew nothing of the truth of the allegation and would require testimony before placing any weight on it.

The lord lieutenant decided that the sentence imposed on Anne Larney must stand. However, Margaret Corcoran's sentence was commuted to two years' imprisonment with hard labour. The different treatment could have been because Margaret did not have a prior conviction or perhaps the lord lieutenant was influenced by the allegation that Doolan had fathered her child. Curiously, one of the prisoners (we do not know which) had had sexual relations with young Daniel and yet, despite his infancy, no charge was brought because of this. Such conduct would today be treated far more seriously than stealing a few potatoes.

Eliza Baskerville was an interesting young woman. She was certainly a person with spirit. She was charged with larceny and the trial took place in 1842 at the Kildare Assizes before Chief Justice Doherty and a jury. She was found guilty and sentenced to transportation for seven years.

The chief justice subsequently summarised the case for the lord lieutenant:

The prisoner is a very young and respectable looking person; she was a servant with the Sawyer family who lived in Athy, County Kildare. On the 16th of February she went to the sawmill in search of her master's dog. She found the dog and went home. She was charged with the theft of a pair of boots, valued at three shillings and sixpence. The day before the trial, she stated that she had not, as was alleged, attempted to steal a pair of boots. When asked why she had not told her master, she replied that she had not been asked. The chief justice said that he had found the prisoner guilty and sentenced her to transportation for seven years.
were arrested. One of the women was Eleanor Mahony. Tallan was shown the potatoes in the six bags and he said that they 'agreed exactly' with his other potatoes. He had observed the tracks of bare feet around the pit. The five women were all barefooted when arrested. The police later found Ward, who said that he and the five women had taken the potatoes. The prisoners made no defence.

Three of the women, including Eleanor Mahony, had prior convictions for theft. They were all sentenced to transportation for seven years. Two had no prior convictions and they were sentenced to imprisonment for three months.

Eleanor Mahony’s mother lodged a petition. She said that she had been in hospital for four months and her daughter had no means of support. ‘Severe want and starvation’ compelled her daughter to take the potatoes. The Protestant chaplain at the gaol gave a supporting statement to the effect that Eleanor had a good reputation. In response to the petition, the assistant barrister commented to the lord lieutenant that the offence was of ‘very frequent occurrence’ in this part of the county and that the offenders were of ‘the very worst character’. He added that the five magistrates who had been on the bench with him considered the prisoners should be transported as they were all ‘bad characters’. The decision of the lord lieutenant was that ‘the law must take its course’.

‘Women on the Town’

Women who earned money from prostitution were said to be ‘on the town’. The women had little protection – if a client did not pay and in retaliation the woman stole money from the client, she could be charged with larceny at the suit of the client.

The cases indicate that often women were convicted on the basis of weak evidence. Two principles of the Criminal Law, fundamental to a fair trial, were frequently breached: the onus of proof is on the prosecution to prove the charge, and the case must be proven beyond all reasonable doubt. Frequently the clients were not questioned closely about matters they might find embarrassing, even where it was necessary to clarify facts relevant to the guilt or innocence of the women.

For example, Ann Day and her husband ran a house of ‘ill-fame’ in the town of Mountmellick. Ann was charged with stealing a pocket handkerchief and a book from William Fryle, and Margaret Madden was charged with receiving this property. The prosecution was brought by William Fryle and heard by John Scholes, assistant barrister, and a jury in County
Lois Quarter Sessions. Ann Day pleaded not guilty and Margaret Madden pleaded guilty.26

The evidence was that the prosecutor met Ann on the streets of Mountmellick on the night of 23 October 1843. He said that when he met her, the stolen articles were in his pocket. The two went into a gateway together, where they remained for two or three minutes. Immediately after they separated, he missed the book and pursued Ann but could not catch her. (He did not notice at the time that the pocket handkerchief was not in his possession.) Shortly thereafter, a police constable found Margaret Madden in a gateway with another man. The book was in her possession and she said that Ann gave it to her. On 25 October 1843 a police officer went to Ann's house where he found the pocket handkerchief in a small unlocked box on the table.

Fryle identified Ann as the person he was with in the gateway and he considered that no one else could have taken the articles. Ann did not call any witnesses. The jury 'without hesitation' found her guilty and she was sentenced to transportation for seven years. In pronouncing the sentence, the assistant barrister said that the court was influenced by a report of the police constable and confirmed by some of the magistrates on the bench, that Ann and her husband were 'the notorious keepers of an infamous house, the breaking up of which would be of much advantage to the town'. Mountmellick was a Quaker centre. The Quakers were well-intentioned people but had a very strict approach to sexual transgressions.

After the trial Ann submitted a petition saying that on 22 October 1843 the articles in question had been brought to the house by 'a strange woman', Margaret Madden. The Days gave her lodgings for the night 'out of charity'. Margaret Madden had then gone out leaving the handkerchief in the box and carrying the book.

Chief Justice Buthe, the Lord Chief Justice of the King's Bench, 1822-1841. Engraving by John Kirkham, 1841 (National Library of Ireland)

There should have been a problem with the conviction. There was no direct evidence as to how the articles left Fryle's possession. It was not explained what he and Ann Day were doing in a gateway for two or three minutes, whether they were standing or lying down and how a book and a handkerchief could have been taken from his pocket without this being noticed. Perhaps Fryle somehow dropped items in the gateway or perhaps he did not have them at all at that stage. It could have been embarrassing to Fryle but the court should have determined the details of what the couple was doing in the gateway as it was very relevant as to how he lost possession of the goods. The petition was rejected, no doubt to the relief of the good citizens of Mountmellick.

Another unconvincing story about a man and 'women on the town' concerned Mary Linn.27 Mary was seventeen years of age and with another woman, Peggy Mucklem, was prosecuted in the Belfast Court House by Thomas Dixon for larceny. Dixon alleged that 'he was ordered' by the two women to accompany them to a house in the town of Ballymena. Shortly after arriving one of the women held up his arms whilst the other emptied his pockets of a considerable sum of money. He claimed that when he resisted, to secure his compliance Mary cried out, 'don't hurt the woman, there is her brother'. Mary's defence was that the other woman took the money and that she was not involved. Dixon looks a willing participant up to the point that he was robbed. It is hard to believe that two women could have successfully 'ordered' him to go to the house. If he was not completely truthful about the early facts, it could have cast some doubt on his veracity as a witness generally. However, Mary was convicted and sentenced to transportation for seven years.
There was an obvious power imbalance between ‘women on the town’ and their customers. Catherine Dalton was charged with Petty Larceny and went to trial before Chief Justice Bushe in 1841 at the Kildare Assizes. A petition in her support stated:

Catherine is an extremely poor girl with an aged mother and two sisters who depend upon her for support; she met a man who induced her to go to his home; once there he took liberties with her for which he declared that he would compensate her ‘hansomely’; subsequently, he would not give a penny so she took £3 from him to which she considered that she was justly entitled.

She was found guilty and sentenced to transportation for seven years. Her petition was unsuccessful.

‘Turning Queen’s Evidence’

With a hostile community, the British government found law enforcement in Ireland very difficult. An easy way to secure a conviction is to persuade an offender to ‘turn Queen’s evidence’. In other words, in return for an indemnity from prosecution and sometimes a payment of money, an offender becomes a Crown witness against another offender. This procedure is tempting for the authorities but poses dangers to the fairness of a criminal trial – an offender who turns Queen’s evidence may implicate another person (who is perhaps wholly innocent) to avoid prosecution. Thus the law has long held that the judge must warn the jury that it is dangerous to rely on such evidence and that corroboration is necessary. The judge should also direct the jury that the corroboration must be evidence from a source quite independent of the person who has ‘turned Queen’s evidence’.

Daniel and Margaret Griffen were tried in 1841 at the Limerick Assizes by Justice Richard Greene and a jury, on the charge of receiving stolen property. Justice Greene summarised the evidence: a large gang had committed burglaries in Limerick and Clare; Margaret Moore, the prosecutrix, was a member of the gang; goods stolen by the gang were brought to the Griffen’s house; Mrs Griffen purchased several articles of silver plate and a diamond ring known to be worth £20 for a small sum of money and some of the articles were found in places of concealment so that no doubt can be entertained as to the guilt of the prisoners. The Griffen’s house was well known for the disposition of stolen goods. Both prisoners were convicted and each sentenced to transportation for seven years.

The prisoners lodged petitions with the lord lieutenant. In his report Justice Greene stated that although the prosecutrix was a woman of ‘very bad character’ and had been involved in several burglaries, her evidence was lawfully corroborated ‘so as to leave in the mind of the jury no doubt of the guilt of the prisoners’.

A petition was submitted to the lord lieutenant by a number of respectable persons: three magistrates, two Protestant clergymen and three Catholic clergymen. The petition stated that the Griffens were known for their ‘industry, sobriety, honesty and good moral conduct’ in the line of dealing; in this case they purchased the goods in business and that on hearing that robberies had been committed by the prosecutrix they were intimidated and denied having the goods but subsequently gave them up voluntarily to the police on the promise of being forgiven, and further they had four ‘young and helpless children’. William S. O’Brien submitted a supporting petition. (He was probably William Smith O’Brien, a well-known politician.)

O’Brien pointed to the strength of the first petition, saying that all the signatories lived in the immediate neighbourhood of the Griffens and were thus in a position to know their characters. The lord lieutenant rejected the petition. Had they been treated fairly? The court had relied on the evidence of Margaret Moore, who had turned Queen’s evidence and was a person of very bad character. There was some corroboration: the Griffens had purchased the goods for a low price and then concealed them. The jury was entitled to consider this evidence and accept it or reject it.

However, there were unfair aspects in the case. The prosecutrix was Margaret Moore, who had turned Queen’s evidence. It would have been far better if the charges had been brought by an independent prosecutor with a duty to present proper evidence to the court. Further, the judge allowed evidence to go to the jury that the Griffen home was a ‘known place’ for disposal of stolen goods. Such information sounds like talk around town by those involved in illegal activities. If so, it was heresy (and unreliable) and should have been disallowed. No doubt it would have been highly prejudicial to the prisoners. As to penalty, the Griffens were dealt with harshly. Their reputation in the community was good and they had four children. They were entitled to feel aggrieved by the outcome.

Informers

The troubled state of Ireland led to the formation of societies of Catholics, operating in secret and sometimes using violence and threats to achieve their ends. Organisations such as the Ribbon Society, the Blackfeet and the
Rockites were active in many counties, engaging in agrarian terror using the weapons of arson, cattle maiming, intimidation and assassination. A way to undermine the societies was to use an informer: a person who has knowledge of criminal activities and in return for money supplies information to the police. As with a person who turns Queen’s evidence, an informer may be an unreliable witness. One thing is certain, informers increased distrust and tension in the country.

Such problems came out in a case in 1841 involving Anne and Thomas McGibney. McGibney had been a Ribbonman but then became an informer for the Crown in a number of prosecutions of his former associates. In return for his services he was in receipt of a daily retainer of four shillings and six pence. This was a generous payment at a time when a poor labourer might be paid only a few pence a day. However, the time came when he was in trouble himself. With his wife, Anne, he was charged with receiving stolen shawls and other goods to the value of £10. It was a private prosecution brought by the owner of the goods, Mr Hewston. In fact, the goods had been stolen by Hewston’s young son, Guy, and it was alleged that he sold the goods to the McGibneys. The police investigated and Guy Hewston absconded. The case came on quickly at the Longford Quarter Sessions before Robert Tighe, assistant barrister, and a jury. The McGibneys were represented by counsel who gave the unfortunate advice that the case should run as the prosecution could not possibly succeed on the evidence. This turned out to be wrong and the McGibneys were sentenced to transportation for seven years.

After the trial, there was a flurry of activity and a petition was lodged on behalf of the McGibneys. A Mr Brock came forward and said that he had been helped by Thomas McGibney. Brock had fallen foul of the Ribbonmen and his life and business had been in danger. His workmen had been threatened, some were severely beaten and they had all left his employment. To assist him, McGibney had given him information as to the activities of the Ribbonmen. Brock complained about the ‘hurried manner’ in which the trial had been conducted and claimed this had denied the McGibneys the opportunity to make their defence. He was convinced that there was a plot to frame them. He pointed to the fact that the goods were stolen by the son of the prosecutor and that the McGibneys had actually paid three-quarters of their full value. He thought that the local magistrates appeared pleased to remove the informer from the county.

Edward Tierney, crown solicitor, supported the petition and submitted that Thomas McGibney had given evidence ‘very fairly’ in earlier Ribbon trials. He also noted that a near relative of Brock had been murdered some years before in Longford. The petition was rejected.

Just what really happened in this case is impossible to resolve now. On the face of it, the case against the McGibneys appears weak. There is not compelling evidence that they knew that the goods had been stolen and it is odd that the prosecution was brought by the father of the thief. What is certain is that two days was not enough time for a defence to be prepared and that there must have been great hostility in the community towards the informer, Thomas McGibney. It may well be that there was a plot to frame the McGibneys. Threats could have been made to the jurors and perhaps to the magistrates who then formed the view that, fairly or not, it was best to remove the McGibneys from the community.

Attitudes to Capital Punishment

As we have seen, in cases of larceny the courts showed little mercy. However, there are cases to indicate that at least by the 1840s, the judges and many others in the community were reluctant to see the death penalty carried out.

Margaret Kelly and her mother, Catherine Kelly, were charged with murder and tried in 1842 at the Leitrim Assizes before Justice Richard Greene and a jury. The evidence was as follows. Margaret Kelly lived at home with her family. She became pregnant and the child was delivered by her mother. No one else was present at the birth. Neighbours had noticed that she had been pregnant and after the birth she told people ‘that it was born before its time’. The local police sergeant came to the house to make enquiries. When told by Margaret’s mother that the child had been born dead, he asked to see the body. After some persuasion, Margaret’s mother took the sergeant into a room where she began to dig into the floor with a toy (a spade). The sergeant took the toy off her and dug carefully until he found the arm of the child. He did not disturb the scene further and left two policemen on guard. (The sergeant was acting carefully – a good reflection on the professionalism of the Irish police.)

The next day Dr Allingham examined the body and found that it was that of a male child. He considered that the child could not have been dead long and that it was fully grown. He washed the body and found no sign of violence. He then performed the ‘hydrostatic’ test, removing the heart and lungs and placing them in water. They floated and he concluded that the lungs must have been aerated, indicating that, for a time, the child had breathed. In the child’s throat he found what appeared to be pig’s dung which was
still moist. He considered that this had been deliberately stuffed into the child’s mouth and was sufficient to cause death. In cross-examination Dr Allingham admitted that the Hydrostatic test was a ‘very equivocal one’. However, both prisoners were found guilty and sentenced to death.

A petition was submitted by Mr J. Loden, a past editor of the Dublin Warden and Statesman Newspaper. He argued in general terms against the death penalty, saying that it had ‘no salutary, lasting and beneficial effect’ on behaviour of possible offenders. There were punishments which had a better deterrent effect, he said, such as imprisonment for life with hard labour and solitary confinement. Local merchants also submitted a petition which asked for clemency, saying that the two prisoners had previously lived as ‘moral, sober, industrious and well conducted women’.

The judge reported to the lord lieutenant that he had put the case to the jury as favourably as he could, charging the jury that if they had doubt they could find the prisoners not guilty of murder but guilty of concealing the birth of the child. He added that it appeared that Margaret Kelly became insensible and did not see the child after the birth, and on enquiring of her mother was told that the child had been stillborn. He considered it was ‘not improbable’ that the mother was in such a weakened condition that she would have been unable to collect the pig’s dung and put it into the child’s mouth. He recommended to the lord lieutenant that the mother’s life be spared.

The jury had some evidence to find Margaret’s mother guilty. She was the only person who could have put the pig’s dung into the child’s mouth. However, there was no evidence that Margaret was actively involved in the death of her child. The judge said as much when he commented on the petition. It is impossible to understand why Margaret was convicted. The lord lieutenant commuted both death sentences to transportation for life.

Two charges of murder were tried in 1841 at the Carrickfergus Spring Assizes before Justice Robert Torrens and a jury. The first was that of The Queen v. Eliza McIlvenne. The prisoner owned a ‘house of ill-fame’ in Belfast and was indicted for the murder of another woman who lived there, Catherine Kearns. The prisoner and the deceased had been out during the afternoon and when they came back to the house the deceased locked the prisoner out. This enraged the prisoner who made statements such as ‘I will kick the bloody soul out of you’. When she was able to get into the house, this is just what she did, continually beating the victim. The jury found Eliza guilty and recommended mercy. She was sentenced to death.

The second case was that of The Queen v. Mary Moody. The prisoner, an orphan aged seventeen years, lived with her uncle, Alexander Boyle. She asked Johnny Nevin to buy poison for her as everything in the house was being eaten by ‘rabid’ mice. Johnny was twelve or thirteen years of age. Mary gave him two and half pence and something to eat. Johnny went off to the High Street, paid one penny for arsenic and spent the rest on apples. He delivered the arsenic to Mary who asked him not to tell anyone what he had bought for her. That night the uncle woke in great pain saying he was dying and the next morning he was dead. An examination by the doctor found arsenic (or white powder which he thought was arsenic) in his stomach. The uncle was about forty years of age and had been in good health. The prisoner denied administering the poison to her uncle.

At the trial she was represented by counsel, who submitted that her relationship with her uncle had been good and that she had no motive to commit the crime. In fact, she depended on him for support. Counsel put it to the jury that the deceased had eaten ‘stirabout’ (a type of porridge) the night before his death and in all likelihood mistook the arsenic for salt. He noted that it was ‘much the habit of the lower classes to put huge quantities of salt in stirabout’. Counsel would have hoped that this raised sufficient doubt as to Mary’s guilt but she was convicted and sentenced to death.

Following the sentences, there was disquiet in Belfast and a campaign was started to have the sentences commuted to terms of imprisonment. The Presbyterian Church was active and five petitions were presented by separate parishes. One noted that there was a ‘strong feeling of sympathy on the part of the public’ for Mary Moody and that the chaplain who had visited her daily since her trial considered her innocent.

The Dean of Connor petitioned the lord lieutenant, arguing that the crown case against Mary Moody was merely circumstantial and there must be a doubt as to her guilt. The dean might have added that much of this circumstantial evidence came from Johnny Nevin, a boy of twelve or thirteen; in particular, his statement that Mary had asked him to say nothing about purchasing the poison. This was damaging evidence but such a young person could have been confused or pressured by the police. The dean also pointed to the peaceful character of the county despite the fact that there had not been an execution for eleven years. Justice Torrens reported to the lord lieutenant that he thought the verdict correct. He had charged the jury that if they had a ‘reasonable’ doubt as to Mary Moody’s guilt they should acquit. However, he was aware of the widespread view in Belfast that the death sentence should not be imposed. The lord lieutenant considered the petitions relating to Eliza McIlvenne and Mary Moody, and in both cases their sentences were commuted to transportation for life.
My Verdict

In practice, a prisoner could not be assured of a fair trial. This was not because the principles of English law were not sound, but rather their application was defective in Ireland. Many of the judges were no doubt good lawyers in the sense that they knew their law and on occasions showed, or at least expressed, compassion. However, they were busy and too often not strict in requiring that a criminal case be proven beyond all reasonable doubt. Again, the judges relied on the opinions of magistrates who resided in the locality. When commenting on petitions, the judges frequently referred to prisoners as of ‘bad character’ or ‘irreclaimable’ or the like, no doubt reflecting the opinion around town. A criminal trial can be fair only if the court relies solely on the evidence produced at the trial. This gives the prisoner the opportunity to challenge the evidence.

The jury is the critical arbiter of the facts in a criminal case, yet during this period in Ireland it was dysfunctional. When pressured to come to a verdict and performing its function in unpleasant and unhealthy conditions (without pay), it was inevitable many verdicts would be wrong. It is not to the point to say that the majority of the prisoners were probably guilty. This can be expected when desperately poor people steal small amounts of food or clothing. However, a good number of the prisoners were not guilty, or guilt was not proven beyond all reasonable doubt. The consequence of unfairness is to bring the reputation of the courts into disrepute and to cause hostility in the community.

As to the sentences imposed, the judges showed an inflexible approach. Offences involving property were invariably punished harshly and generally the judges did not consider the hardship inflicted on the prisoners and their families. Further the judges did not show independence from the executive arm of government. Often they thought clemency appropriate but left any to the lord lieutenant who exercised a discretion unfettered by the possibility of further review and without giving reasons for the decision. On the positive side, at least by the 1840s, there was a hesitancy to execute women and I have noted four cases above where death sentences were commuted to transportation for life.

It can be demonstrated that the legal system in Ireland fell short by comparing it to the development of the law in the Australian colonies. In 1856, just three years after transportation ended, an Australian court faced a big test. A bloody uprising had occurred in Ballarat by diggers unhappy with the imposition of licence fees and a high-handed government. They armed and built a fortification, the ‘Eureka Stockade’. It was stormed by the troops and police and thirteen of the diggers were charged with high treason, contrary to the Treason Felony Act 1848, the gist of the charge being that the prisoners intended to displace Her Majesty in respect of the Colony of Victoria. They faced the death penalty. The prisoners could have had sedition in their hearts but proving a criminal intention beyond all reasonable doubt is often not easy. The men said they had no intention to rebel, but simply to defend themselves against a bullying police force. Again, perhaps they were guilty of riot but not treason. Fortunately, Australia was not Ireland and the prisoners received support from the press and all levels of society. The presiding judge for most of the trials was Justice Redmond Barry, an Orangeman from Ireland. However, he took a fair approach and charged the jury that it was ‘essential to prove the intention of the person charged’, the evidence before the court was not ‘very palpable’ and the charges must be proven beyond all reasonable doubt. All the prisoners were acquitted.

One of the prisoners was Raphaello Carboni, a famous Italian revolutionary, a quite different person from the conservative Justice Barry. Yet by the end of the trial they had things in common. Carboni spoke highly of the quality of the justice he had received and thought that the judge had reason to be proud of the following remarks to the jury:

The prisoner in the dock has come 16,000 miles to get away from Austrian rule – from the land of tyranny to that of liberty and so he had. He had the privilege of being tried by a jury, who would form their verdict solely from the facts adduced at the trial.

What effect would the different legal systems have had on the women transported to Van Diemen’s Land? Even though they lacked education, the women would have appreciated that in Ireland the law was loaded against them. Too often they were assumed to be guilty and sentences of transportation handed down despite the terrible effect this was likely to have on them and their families. In time the women and their descendants would see that the courts in Australia took a different approach, leading to a better and more cohesive society.

The work of Colleen Arulappu, a member of the Female Convict Research Group, is acknowledged. Colleen transcribed the records of the trials and assisted generally with this article. I also thank Sean Murray, an Archaeologist from County Laois, for reading the draft and making useful comments.
The scandal at Montfort Farm: the Sarah Bromley–George Steele affair

DON BRADMORE AND JUDITH CARTER

IN 1829, Mrs Sarah Bromley, 32 years old, was left penniless in Van Diemen's Land when her husband, a former high-ranking government official, returned to England in disgrace after being held responsible for the loss of over £8000 from the Treasury coffers. Struggling to maintain herself, her three children and the two adult daughters of her husband's previous marriages on a farming property provided to her by a group of charitable friends, she invited George Steele, a young fellow of reputedly unsavoury character, to act as her farm manager. The scandal which followed was to blight the remaining fifteen years of her life.

But the story is more than the salacious tale of an illicit relationship between a lonely woman and a brash and immature ne'er-do-well. Rather, it illustrates the difficulties a woman, husband-less and without family to help her, could have in maintaining herself and her children in a grossly lopsided, male-dominated society. It exemplifies the importance, especially of a woman, of reputation which, once lost, could not easily be regained. It gives rise to issues of governance, where authorities were faced with the onerous task of protecting the welfare of the individual while simultaneously curbing the immorality and corruption of a convict-based society.

A 'Debauched House'

On 24 October 1831, Ann Green and Sarah Bennett, convicts assigned to Mrs Bromley, absconded from her Montfort Farm property at Hamilton and fled to Bothwell. There they complained to the police magistrate, Captain D'Arcy Wentworth, that they had witnessed scenes of grossly immoral behaviour between Mrs Bromley and George Steele. It was, they claimed, a 'debauched house' and 'a most improper place in which to stay'.