

"The Sayer Street Outrage": Gang Rape and Male Law in 19th Century Toronto

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I. THE CRIME

THE 15 DECEMBER, 1858, TORONTO NEWSPAPERS shrieked of depravity and wickedness. "Shocking Brutality" and "Horrible Outrage on a Woman" headlined the accounts of a gang rape that had taken place on Monday evening, 13 December. It was, asserted the *Toronto Leader*, "a state of things as existing in our midst which could not be surpassed by the most barbarous people in the world."¹

Ellen Rogers and Mary Hunt were the two rape victims, whose home had been violently broken into by a gang of fifteen unruly, drunken young men. Each woman had been physically assaulted and raped by four or five of the youths. The young men had then burglarized the house, making off with cash and jewellery. What made the case even more salacious was that the two women were living in a "house of bad repute", and were described as "not of very good character".²

Ellen Rogers was a married woman whose husband had left her almost a year earlier. In his absence she kept company with a professional gambler known as George Irwin. He was in the habit of spending the night at her Sayer Street home, but on the evening in question he was working late and had not yet arrived. Ellen Rogers' Sayer Street residence was located in a working-class neighbourhood between Agnes Street and Osgoode Street, just around the corner from Osgoode Hall. She also owned a house on Edward Street, west of Yonge. Both houses appear to have been used as brothels. Although

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¹ [*Toronto*] *Daily Globe* (15 December 1858); [*Toronto*] *Leader* 15 December 1858.

² [*Toronto*] *Daily Globe* (15 December 1858); [*Toronto*] *Leader* (15 December 1858).

her birthplace is not known, Ellen Rogers was a Francophone, who spoke English poorly.³

Mary Hunt was boarding at Ellen Rogers' Sayer Street residence, where she had been staying since her release from a one-month stint in gaol some weeks earlier. She was a prostitute who had run afoul of the law when she "had some words with a girl on the streets". It was not clear whether Mary Hunt was actually working as a prostitute for Ellen Rogers, but at the very least she was doing "housework and sewing" in exchange for her room and board. She too had a male companion, John McCallum, who was in the habit of visiting her at the Sayer Street house most evenings. He was present on the night of the rapes, but as we shall see, he was unsuccessful in his attempts to impede the youths.⁴

Both women put up a valiant fight against their assailants, exhibiting tremendous courage in the face of such a large number of violent men. Inevitably, they were overpowered. As soon as she could, Ellen Rogers made her escape and went immediately in search of a constable. Several police officers arrived on the scene while the men were still milling around the place. The women urged the police to make arrests immediately, but Constable Dunlop sent the boys home and told the women they should get warrants in the morning.⁵

Both Ellen Rogers and Mary Hunt took their complaints to a Toronto magistrate the next morning. Most criminal proceedings were initiated by concerned citizens at this time. Fledgling police forces were simply unequipped to handle much more than preliminary investigation and arrests. The Toronto constabulary had increased from eight men in 1843 to fifty in 1858, but true professionalization of the police force would take until the 1880s. The laying of charges was a fairly heavy responsibility for private citizens to bear, but as we shall see, it also permitted considerable freedom for individuals to

³ See *[Toronto] Daily Globe* (20 December 1858); *[Toronto] Daily Globe* (14 January 1859); *[Toronto] Leader* (14 January 1859); *Toronto City Directory* (1856) at 30, 72-3, 212.

⁴ *[Toronto] Leader* (20 December 1858); *[Toronto] Daily Globe* (20 December 1858).

⁵ *[Toronto] Daily Globe* (15 & 20 December 1858); *[Toronto] Leader* (20 December 1858).

activate the criminal law. Without that autonomy, this case might never have come to court at all.⁶

Most of the rape charges that came to court in the 19th century involved young, unmarried women still living with their fathers, or married women who lived with their husbands. Most were women dependent on a father or husband. In many cases the parents or the husband seemed to be the instigators of the charge. It was rare to find independent women launching a rape prosecution, and even more unusual where such women were involved in sexually-explicit occupations. But then Ellen Rogers and Mary Hunt were extraordinary women, as their behavior during the legal proceedings would so amply demonstrate. They had an unrelenting belief in their own right to privacy and bodily integrity, and for this they were willing to insist on the full activation of the law.⁷

This was the information that Ellen Rogers laid before the magistrate, as published in full by the *Toronto Leader*:

I live on Sayer Street, between Osgoode and Agnes Streets. On the night of Monday last...about midnight, there being then no other person in the house except Mary Hunt, as I was sitting up at work, though in my night-clothes, a crowd of young men came to the door and demanded admittance, which I refused, and then they threatened to burst open the door, if I did not open it.

I told them I had no girls there and was sick myself, and could not allow them in. They then burst open the front door, and a number rushed in. I ran upstairs to get out of their way, and at my bedroom door I saw a number of them (twelve as I counted them) who rushed upstairs after me.

Mary Hunt was at this time locked in her own room, and I cried out to her for assistance. She jumped out of bed and opened the door, but on seeing so many rioters she became frightened and ran back to her own room.

One of them, named Robert Gregg...here caught hold of me, and wanted me to go into another room. I refused and he then pulled me onto his knees, on a chair, at the foot of the bed, upon which four or five other rioters had got and were holding down Mary Hunt. Gregg and another then dragged me from that room into another, while a third person locked the door on the inside.

⁶ N. Rogers, "Serving Toronto the Good" in V.L. Russell, ed., *Forging a Consensus: Historical Essays on Toronto* (Toronto: University of Toronto Press, 1984) 116; P. Romney, *Mr. Attorney* (Toronto: Osgoode Society, 1986) at 232-8.

⁷ For details about which rape victims initiated criminal proceedings, see C. Backhouse "Nineteenth-Century Canadian Rape Law 1800-92" in D.H. Flaherty, ed., *Essays in the History of Canadian Law* vol. 2 (Toronto: Osgoode Society, 1983) 200 at 224-5.

Gregg then ordered me to strip **** [the newspaper interjected here that this portion was “unfit for publication”]. I refused and he then threw me down on the bed, ****. He then stripped himself and began his violence. I screamed when he called out to the other man, “strike her”, “choke her, the d--d French ---”, and he held me by the throat, **** he succeeded in forcibly violating my person.

Then Gregg held me by the neck while the other fellow effected the same object. After this the man who had the door locked, and who stood on the outside, got into the room and forced me in the same way, and then another man did the same, making in all four men who violated my person. While this was going on in my room, I heard the scream of Mary Hunt from another room, crying out, “They are murdering me!”, “Ellen, come help me!” etc. etc.

The moment I was released from the violence of these men I ran out, almost naked, to the Avenue Saloon, where I put on a petticoat. On my return I found that they had broken in my cupboard and stolen nearly four dollars in money therefrom and did other damage.

The name of the person who held me **** while Gregg committed the first violation of my person is -- Hughes, and the other three persons whom I now see in custody, viz., William Ross, Alexander Doig and John Hellam, were among the rioters who broke into my house and assaulted Mary Hunt and myself that night.⁸

Mary Hunt’s information was similar, although she noted that her “friend”, John McCallum, had been present and had tried unsuccessfully to come to her aid:

I lately boarded in the house of Ellen Rogers, on Sayer Street. About mid-night on Monday last, just as I and Ellen Rogers had retired to our respective bed rooms, we heard knocks and kicks at the front door. Ellen Rogers went down stairs, and I heard her ask who was there, and if it was George. George was the person who lives with her. To this a reply came from the outside, “No, it is a friend.” She asked “What do you want?” and the reply was, “We want to get in.”

She told them they could not come in, as there was no one they could see. I called to her not to let them in. She opened the back-door to afford her a chance of escaping. I “hollered” from up stairs, upon which a young man named John McCallum came in from a neighbouring house and entered my room, the door of which I locked.

The party outside burst the door open and rushed up stairs. Mrs. Rogers called out to me to open my door, and I did so and let her in, when five or six men entered the room and threw themselves across me on the bed, and afterward dragged me into another room.

Gregg laid hold of Ellen Rogers, and asked her to go out into the hall with him. She refused, and then he and another man named Hughes, (not yet in custody) dragged Ellen Rogers into another room.

⁸ [Toronto] Leader (18 December 1858).

Those who stayed in the room were trying to throw me on the bed, when John McCallum tried to protect me. Ross knocked him down, and he and the others kicked him and beat him. Ross then ordered me to go down stairs and get him a drink of water. After some objections I went down stairs, and as soon as I got down, Ross dragged me into the sitting-room, put out the candles, fastened the door, and tried to violate my person.

I resisted when he drew a knife from his right-hand vest pocket, and threatened to "stick" me if I did not submit. I called out to Mrs. Rogers, "He is going to stick me." Ross succeeded in forcing me, and when he had done so, he went out, and another of the party came in, he also violated my person.

Three others came in afterwards, and did the same thing. The last one who did so was Hellam. When this was done, Ross came again into the room, and forcibly took the rings from my fingers, and also the rings from my ears.

Gregg was the leading person in the party. He dragged Rogers away with him when he left the room. Mrs. Rogers escaped from the house after the violence. After she was gone the rioters searched all over the house. I saw one of them take some money, about four dollars, from the cupboard. The man who did so is not in custody.⁹

II. THE PRELIMINARY HEARING

FOUR OF THE MEN, Robert Gregg, William Ross, Alexander Doig and John Thomas Hellam, were arrested and taken into custody. George Hughes, the only other young man identified, had escaped and was never brought to trial. On Friday, December 17th, the hearing began in front of Toronto's police magistrate, George Gurnett. Gurnett was a lay magistrate, with no formal legal training. An active city politician, he had variously served as alderman, mayor, and district clerk of the peace when he was appointed Toronto's first police magistrate in 1850. Presumably he was not unfamiliar with prostitutes, since he had been defeated in his mayoralty candidacy of 1841 by rumours that he was renting a house to a brothel keeper.¹⁰

⁹ [Toronto] *Daily Globe* (20 December 1858).

¹⁰ [Toronto] *Leader* (18 & 20 December 1858); [Toronto] *Daily Globe* (20 December 1858); [Toronto] *Patriot* (12 January 1859).

For biographical details on Gurnett, see *Dictionary of Canadian Biography*, vol. 9 at 345-347 [hereinafter D.C.B.]; W.S. Wallace, ed., *The Macmillan Dictionary of Canadian Biography*, 4th ed. (Toronto: MacMillan of Canada, 1978) at 321.

The process of appointing a crown attorney to prosecute criminal cases was still in its infancy; see *An Act for the Appointment of County Attorneys, and for Other Purposes in Relation to the Local Administration of Justice in Upper Canada*, S.C. 1857, c. 59; Romney, *supra*, note 6. Richard Dempsey, the attorney for the counties of York and Peel, was assigned to the case, but he took a very inactive role. Even the press described

The fanfare in the press had piqued the curiosity of the public, bringing hordes of people down to the courtroom to watch the proceedings. By Saturday, the *Toronto Leader* described the scene:

The court was crowded to excess. So thick did they pour in, that before long, notwithstanding the great coldness of the day, the windows had to be opened, in order to afford some purification of the thick atmosphere within. Head over head might be seen on the far wall of the building, outside the bar, and every available hole and corner found an occupant.

The physical location of the court room, in a room at City Hall overlooking the main fruit and vegetable market, added to the disruptive commotion.¹¹

Mary Hunt was sworn in, and she related the events that had led to the charges. James Boulton, the defence lawyer for Gregg, Ross and Hellam, was determined to undermine Mary Hunt's credibility. Focusing on the witness's reputation as a prostitute, Boulton began:

Q. Are you a very quiet person generally?

A. I am sometimes not very quiet. (Laughter)

Q. Were you drunk on this occasion?

A. I was not.

Q. How many years have you been engaged in your present line of business?

A. I don't think I am bound to tell that. [After some discussion and delay, Mary Hunt eventually admitted to two years.]

Q. Two years since you went astray?

A. Yes, two years since I went astray.¹²

his position as merely “watching the case for the Crown”: “Richard Dempsey” in *Caverhill's Toronto City Directory 1859-60* at 60; [*Toronto*] *Daily Globe* (20 December 1858).

¹¹ [*Toronto*] *Leader* (20 December 1858). For details about the operation of the Toronto Police Court, see P. Craven, “Law and Ideology: The Toronto Police Court 1850-80” in Flaherty, *supra*, note 7 at 248.

¹² [*Toronto*] *Leader* (20 December 1858).

Boulton and Mary Hunt then entered into a discussion about John McCallum's role that evening. Despite the fact that she had already admitted to "sexual impropriety", Mary Hunt seemed determined to cling to her statement that McCallum had been an innocent passer-by who just happened to come to her rescue.

Q. Was McCallum in the room before Ross came into the house?

A. He was not.

Q. Was it necessary that McCallum should have his coat off, and his pants and his shoes, to defend you?

A. He had only his coat off.

Q. What did he take off his coat for?

A. He took it off, and placed his back to the door.¹³

Of course these last exchanges had virtually no bearing at all on whether the rape had actually occurred. James Boulton was attempting to emphasize Mary Hunt's reputation for sexual promiscuity. Her character was what was at stake, not the deeds of the men charged with rape. Nineteenth-century judges and juries were almost pathologically driven in their quest to assess the reputation of raped women. Women who were known to imbibe alcoholic beverages or indulge in extra-marital sex were virtually guaranteed legal rebuff when they complained of violent rape. In the language of the courts, they lacked "credibility". The legal system typically restricted the protection of rape law to virtuous women who lived their lives in modesty and above reproach.¹⁴

There was a second defence lawyer present in the court room that day. S.B. Campbell was representing Doig. His turn at Mary Hunt came next:

Q. What resistance did you make?

¹³ [Toronto] *Leader* (20 December 1858).

¹⁴ See Backhouse, *supra*, note 7 for a description of some of the many cases in which rape complainants with "suspicious reputations" were denied protection of the criminal rape law. For good examples, see: *R. v. Edwin Cudmore* (19 October 1865) AO RG22, York County Minute Books; *R. v. John English* (18 April 1866) AO RG22, York County Minute Books.

A. (hesitating) - When I made an effort to scream, Ross put his hand on my mouth. When he took his hand off my mouth, I did not scream; I hollered to Mrs. Rogers. The candle was out, but there was a fire in the stove. I opened the stove door, when Ross left me, with my skirt, for the purpose of seeing the faces of the others as they came in.

Q. Oh! I see you have got it to fit. I was wondering where the light came from. Did you expect the others to come in?

A. Doig came in next. He was the worse of liquor. He came in and took hold of me, but I was too strong for him. He went to the door and said to those outside that I was too strong for him, but they said go back and try again. He came into the room and put his hands behind my back and threw me on the floor. He then forced me. I got away from him the first time he came in.

Q. Did you lie still on the floor?¹⁵

At this point, Mary Hunt quite properly had had enough. Instead of answering, she stood up and tried to leave the witness stand. Ordered to return and answer the question, she did so reluctantly, stating "I tried to get away. I could not open the windows to scream for help, as they were nailed down." But S.B. Campbell just would not quit. The cross-examination got nastier and nastier. Mary Hunt made several attempts to leave the stand during the next segment of the cross-examination. This extract was from the press report:

Q. I ask you this. Did you make any resistance with your hands when they were attempting to violate you?

A. I did.

Q. You say you could overcome Doig when he came the first time into the room, how was it that you were unable to do so a second time?

[The witness did not reply to the question.]

Q. Have you ever tried to settle this matter for a sum of money?

A. I never have.

Mr. Campbell: I have sufficient testimony of a respectable character to prove that you did; evidence that cannot be gainsayed.

[At this time the witness appeared to be very reluctant to answer any further questions.]

Q. Is Irwin known as your "fancy" man?

¹⁵ [Toronto] Daily Globe (20 December 1858).

A. (with great pertness and levity) - No Sirree!

[A loud laugh from the audience following this remark, His Worship said he would have the enquiry conducted in future with closed doors, as there had been most unseemly conduct during the investigation. He considered the case was one of a very grave character, and ought not to be treated with levity.]

Q. I ask you how you know there were from ten to fifteen persons in the room?

A. I will not answer the question, I have told you before.

[She here left the stand, but was again put back by Sergeant Hastings. She then exclaimed "I will not answer you any more questions."]

Q. You will have to be committed to gaol then. Did McCallum come in during or after the knocking commenced at the door?

A. He came in during the knocking.

Q. Is there a yard at the back of the house?

A. Go up there and see. (Laughter) I have been here long enough. (Laughter)

Q. Did McCallum tell you that there were "rowdies" at the door, when he came into your room?

A. I will not tell you. (Laughter) I won't answer any more questions to any one. I am not going to stand here all day answering questions. (Laughter)¹⁶

Mary Hunt's spirited resistance on the stand mirrored her courageous and resourceful attempts to stop the rapists the night in question. That she was able to muster such strength in front of a jeering, insolent crowd was truly a tribute to her character.

Ellen Rogers was subjected to similar treatment. At one point, she objected to James Boulton's cross-examination. According to the *Toronto Daily Globe*, she replied in a "loud pert tone":

I am neither English nor Irish, and do not know the language. If you wish me to answer your questions, I will do so in French. (Laughter) It is hard to be bothered in this manner after being used so bad.

Q. Oh! You can speak English well enough when you like. How long have you known any of the prisoners at the bar?

A. Six or seven months.

¹⁶ [*Toronto Daily Globe* (20 December 1858)].

Q. Were these men in the habit of visiting at the house?

A. All the prisoners, with the exception of Doig, had visited me at my other house. I never saw Doig before that night. On the occasions I refer to, they conducted themselves in a disorderly manner.¹⁷

Boulton stopped her here, before she could give the details of the "disorderly" behavior of his clients on former occasions. Later, the information would surface that crowds of young men had terrorized Ellen Rogers at her other house, forcibly breaking their way in as many as twelve or thirteen times, and as often as twice a week. Climbing in through windows or breaking through door panels, they would detain the women "till all hours", often making off with money and goods. None of them had ever tried to attack Ellen Rogers physically before, but their growing sense of bravado and immunity had finally escalated to the level of rape. Clearly the marauding male gangs were completely out of control.¹⁸

John McCallum was called to the stand next. Initially he maintained that he had come up to Mary Hunt's room only in answer to her screams for help. "I stripped off my coat, waistcoat and hat in order to make them believe that I was looking for the place", he offered rather lamely. Yet faced with an increasingly derisive court room audience, McCallum stood steadfast in his defence of the two women:

I placed my back against the door, but when they pushed against it too strongly, I was forced to let it open. The room at once crowded up, and I thought there would never be an end to them. (Laughter) Says I to myself "my end is come at last." (Laughter)

The men then tumbled into the bed where Mary Hunt was lying and began to treat her roughly. I tried to protect her and I got a kick in the shoulder, which no one would like to get. (Laughter) It was Ross that kicked me.

The girl then got out of bed, and the fellows took her down stairs against her will, after which I heard her screams in the sitting room. That is all I know about Mary Hunt. Ellen Rogers was dragged into another room. Gregg was the principal party who did this. She resisted in going into the room, but they dragged her in spite of all she could do. Three or four of the parties remained in the room with me, but I do not know who they were.

¹⁷ [Toronto] *Daily Globe* (20 December 1858).

¹⁸ [Toronto] *Leader* (14 January 1859).

When I came down I saw Mary Hunt lying on the sofa pale and apparently exhausted. All the fellows ran away when they saw the policeman coming.¹⁹

S.B. Campbell then tried to take McCallum apart in cross-examination:

Q. Was it starlight?

A. I didn't look up. (Laughter)

Q. Was it raining?

A. I believe it was, now that you have reminded me of it.

Q. Was there anything peculiar about that night?

A. Didn't see anything new about it. (Laughter)

Q. Were you wet or dry that night?

A. That's a question. (Laughter)

Q. Were you drunk or not?

A. That's my business.

Q. Were you drunk or sober?

A. I was as sober as I am this minute. When up stairs I had my boots off. I had two shirts on last Monday night, one red and one white. The white one outside the red.

Q. How did you take that white shirt off?

A. (Hesitatingly) I was so put about that I didn't know what I was doing. That's all I'm going to tell you now - look out. (Laughter)

Q. Did you take your neck-tie off?

A. Well, I did.

Q. That's good, so far. Did you take the white shirt off?

A. I did not.

Q. Were your trousers off?

¹⁹ [*Toronto*] *Leader* (20 December 1858).

A. No.²⁰

After this exchange, S.B. Campbell went through a long series of questions about what had happened after the two women were removed from the room. To the continuing punctuation of laughter from the audience, John McCallum began to get completely mixed up. He testified at one point that he had been left alone in the room, and subsequently that four or five of the men had stayed in the room with him. Crowing with satisfaction, Campbell announced that the great discrepancies in the evidence of the witness left it without a shred of credibility.²¹

Finally Constable Dunlop was called to testify. He stated that when he arrived at the house, fifteen or sixteen men were coming out. Upon entering, he saw Mary Hunt sitting on the sofa. Constable Dunlop pronounced himself highly sceptical of her story:

Mary Hunt appeared when I first saw her, as if she had just got out of bed. She had a petticoat on. She had not the appearance of having been recently ill-used.

Q. What did she say to you?

A. She only told me she had been “pulled about”.

Q. What did the young men do when you told them to go home?

A. They went away. They did not appear as if afraid that I would arrest them. I saw nothing to indicate that there had been any row in the sitting room. I did not look at the door to see if it was broken. If Hunt had told me all about the violence committed, I would have tried to arrest some of the men. I think if the women had screamed for help, they would have been heard in the houses adjoining. Hunt did not appear as if she had been crying.²²

Mary Hunt’s reluctance to confide in the constable was no doubt influenced, in part, by the strained relations between the police and prostitutes. After all, she had just been released from gaol for causing a disturbance herself. And one wonders just how Constable Dunlop would have preferred Mary Hunt to look. No doubt completely distraught and dishevelled, with evidence of torn clothing and visible physical injury. Nineteenth-century courts were very reluctant to con-

²⁰ [Toronto] *Leader* (20 December 1858).

²¹ [Toronto] *Leader* (20 December 1858).

²² [Toronto] *Daily Globe* (20 December 1858).

vict unless the rape victim had put up a discernable show of resistance.²³

Despite the unsupportive testimony of Constable Dunlop, Magistrate George Gurnett seems to have been as impressed with the spunk of the women as he was by the insinuations and hair-splitting of the defence counsel. His role at this point was not to deliver a final verdict, but simply to determine whether there was sufficient evidence to put the matter over for a full-fledged trial at the forthcoming Winter Assizes. Lay magistrates seldom dismissed charges at this stage. Without giving any reasons, Gurnett committed all four of the accused men to trial, setting their bail at £50 each.²⁴

Remarkably both Ellen Rogers and Mary Hunt had also been confined to gaol throughout the hearing. Rumours were rife that friends and relatives of the accused men were attempting to bribe the two women to drop the charges. The press reported that the women were ordered confined to custody to prevent the "compromising" of justice. The fact that Ellen Rogers and Mary Hunt were associated with prostitution lowered their status to the point that they could be treated in virtually the same manner as the accused men.²⁵

III. THE TRIAL

IT MUST HAVE BEEN A TENSION-FILLED CHRISTMAS SEASON as the parties and the community awaited the day of trial. Chief Justice John Beverley Robinson opened the Winter Assizes in Toronto a few

²³ See Backhouse, *supra*, note 7 for cases outlining the standard of resistance expected. Good examples include *R. v. Fick* (1866), 16 U.C.C.P. 379; *R. v. Antoine Legacy* (4 Oct. 1883) AO RG22, Renfrew County Minute Books; *R. v. Henry Waggstaff* (4 Oct. 1887) AO RG22, York County Minute Books.

²⁴ [*Toronto*] *Daily Globe* (20 December 1858). For discussion of the low frequency with which 19th century lay magistrates in England dismissed charges at preliminary hearings, see D. Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall L.J.* 165 at 169.

²⁵ [*Toronto*] *Leader* (18 & 20 December 1858); [*Toronto*] *Daily Globe* (20 December 1858). The latter report noted that once the accused men had been committed for trial, the two women were finally released from custody.

See also A.K. Clark, "Rape or seduction? A controversy over sexual violence in the nineteenth century" in London Feminist History Group, *The Sexual Dynamics of History* (London: Pluto Press, 1983) 13 at 26, where it is noted that English rape victims were often imprisoned after pressing charges "if they were too poor or did not have a husband to post bond to ensure that they would prosecute."

weeks later on 12 January 1859. It was customary for the judges to make a formal speech at the opening of the court, in which they frequently commented on the cases set to come before them, for the general edification of the community. Robinson spoke at some length about the Sayer Street affair:

There are four persons charged with rape and house-breaking. With regard to the rape, if it should turn out that, knowing this house to be disorderly, those persons broke into the house with any intention to gratify their passion by the commission of a crime of that kind, it would be no mitigation of their crime, that in getting in there they found only disreputable females. They cannot be molested thus because of their being such. Otherwise there would be but little chance of their reformation.

The commonest prostitute in the world has the same protection in law as the most virtuous. The guilt of the parties committing the crime would not therefore be lightened in such an event. It would only necessitate a keener inspection of the case by the jury.²⁶

At first blush, these opening remarks appear to be quite promising. Here we have the Chief Justice of the Court of Queen's Bench clearly articulating the premise that all women, regardless of their status or reputation, deserved protection from sexual assault. His statement also had some backing in the accepted legal rhetoric of the day. Sir William Blackstone, long considered the foremost text-writer on English common law, had written along these lines in the late 18th century. Dealing specifically with the question of whether a prostitute or "common harlot" could be raped, Blackstone had stated that it was a felony "to force even a concubine or harlot: because the woman may have forsaken that unlawful course of life."²⁷

The catch, of course, was the qualification in Blackstone's comment. There was to be a clear separation between reformed prostitutes and the unrepentant, abandoned women who still flouted the sexual mores of the community. Indeed, that was the whole rationale behind Robinson's lecture. The compassion he extended went only as far as the goal of "reformation". He did not mean to suggest that courts

²⁶ [Toronto] *Patriot* (12 January 1859).

²⁷ W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769) at 213. Canadian legal treatises, such as W.C. Keele, *The Provincial Justice, or Magistrate's Manual, Being a Complete Digest of the Criminal Law of Canada*, 3d ed. (Toronto: H. Rowsell, 1851) espoused this view as well: "Nor is it any excuse [in a charge of rape] that the woman is a common prostitute; for she is still under the protection of the law, and may not be enforced": at 565.

should be concerned to protect sexually unconventional women from rape because of their inherent right to be free from criminal assault.

Prostitutes lived on the margins, never quite encompassed within the circle of legal protection. And there was always that chronic suspicion of their veracity. As Robinson had cautioned, the jury should be instructed to give the testimony of such witnesses "a keener inspection". The law of rape had always required "corroboration", evidence beyond the mere affirmative oath of the woman herself. Medical evidence or testimony from family and friends typically functioned to lend strength to the account of the woman herself. Here there should have been little difficulty. The two women could corroborate each other's evidence, and John McCallum was practically an eye-witness to the rapes. Yet Robinson's admonishment to higher vigilance had sounded an ominous note of warning.²⁸

Archibald McLean was the judge who was actually assigned to preside over the trial. McLean had been appointed to the bench in 1837, leaving behind a flourishing legal practice in Cornwall and a political career as a Tory member of the Assembly. Contemporaries described him as a "commanding presence, tall, straight, and well formed in person, with a pleasant, handsome face." An undisputed member of the Family Compact, McLean was noted for his pro-British leanings. He had a particular fondness for the highly demarcated class structure of British tradition. McLean's studied interest in preserving class differentiation would inevitably shape the way in which he heard the testimony of these two rape victims. As prostitutes, Ellen Rogers and Mary Hunt clearly fell within the lowest gradation that could be assigned to Victorian women.²⁹

John Hillyard Cameron, Q.C., the lawyer appointed to represent the Crown, made his opening address. Crown attorneys were typically appointed to prosecute criminal assize cases on an *ad hoc*, part-time

²⁸ On corroboration, see W.E. Auckland, *Principles of Penal Law* (London: B. White & T. Cadell, 1771) at 236-37; T.L. Chapman, "Sex Crimes in the West 1890-1920" (1986) 35 *Alberta History* 6 at 14.

²⁹ "The Hon. Archibald McLean" (1865) 1 U.C.L.J. (N.S.) 281 at 282; D.B. Read, *Lives of the Judges* (Toronto: Rowsell & Hutchinson, 1888) 158-75; D.C.B. vol. 9, *supra*, note 10 at 512-13.

The criminal procedure of the time required that the case be heard first by the Grand Jury, a group of influential citizens who were empanelled at the Assizes to screen the cases before trial. The Grand Jury here had returned "true bills" against Robert Gregg, William Ross, Alexander Doig, John Hellam and George Hughes for burglary, rape and robbery. All but Hughes, who could not be found, were subsequently arraigned on the charges and set over for trial: [*Toronto*] *Patriot* (12 January 1859).

basis, as a form of political patronage. Cameron was a prominent Conservative, who had served as an elected politician and an influential back-room political advisor. A well-educated and gifted criminal lawyer, Cameron was highly qualified as a prosecutor. The one small fly in the ointment may have been Ellen Rogers' Franco-phone origins. Cameron was famous for his insensitivity to French-Canadian interests. Ellen Rogers' language difficulties would surface again at this trial, but Cameron would do nothing to insist upon interpretation services.³⁰

Cameron's strategy for the prosecution was to emphasize the "disreputable" backgrounds of the two women himself, hoping to blunt the edge of the defence a bit. He openly conceded that "the evidence of an abandoned female would be generally received with considerable suspicion." He then attempted to use this to his advantage, arguing that it provided a practical safe-guard against prostitutes complaining except in the very worst situations. "The very fact of the female having been of loose character would, in itself, afford some sort of guarantee that she would not make such a charge without sufficient grounds." It was an interesting gamble that Cameron took, leading with his chin as it were. Only time would tell if it would pay off.³¹

The first rape charge tried was the one against Robert Gregg, the ringleader. Passionately, clearly, and courageously Ellen Rogers and Mary Hunt testified in horrifying detail to the multiple rapes they had experienced at the hands of violent men. Unequivocally they corroborated each other's story and identified Robert Gregg, who was sitting in the dock, as the culprit.

³⁰ For details of the appointment of crown attorneys, see Romney, *supra*, note 6 at 220-30; "Cameron, John Hillyard" in D.C.B. vol. 10, *supra*, note 10 at 118-23; "Cameron, John Hillyard" in W.S. Wallace, ed., *The Macmillan Dictionary of Canadian Biography*, 2nd ed. (Toronto: MacMillan of Canada, 1945) 92.

Criminal trials were typically conducted in English even in Quebec during the 19th century. With the reception of English criminal law after the Conquest, criminal law practice came to rest almost exclusively with the English-speaking bar. Quebec juries were typically divided between six Anglophones and six Francophones, but trials were conducted in English by English-speaking barristers. The one distinction was that interpretation services were generally offered for Francophone witnesses and accused persons. See A. Morel, "La réception du droit criminel anglais (1760-1892)" (1978) 13 *Revue Juridique Themis* 449 at 534-8; D. Hay, "The Meanings of the Criminal Law in Quebec 1764-1774" in L. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfrid Laurier Press, 1981) 77.

³¹ [*Toronto*] *Leader* (14 January 1859).

James Boulton, Gregg's defence counsel, had transferred the case to Henry Eccles, Q.C., a lawyer who had articulated for him some years earlier and then gone on to surpass him in reputation. Eccles was a very imposing character, renowned for his ability to simplify issues to a jury. He chose to attack the evidence somewhat differently than his former mentor. His goal was to insinuate that the two women had attempted to bribe their assailants.³²

Eccles began by asking Ellen Rogers if she had ever sought to claim money from the accused men or their families. Ellen Rogers denied having asked for or taken any money. But she did admit that she had twice been asked to do so. In the first instance, she claimed that Mr. and Mrs. Andrew Gregg, Robert's father and mother, had come to her house offering to "settle the matter". Secondly, a man named Constable D. Jones, apparently the brother-in-law of Alexander Doig, had spoken to her and Mary Hunt in the Chief's office at the Police Station. According to Ellen Rogers, "Mr. Jones offered...to give us money if we would say Doig was not there. He also offered to convey us out of town in his buggy. If I would say that I was not positive about Doig, he would give me a sum of money, and take Mary Hunt and myself out of the city." In neither case, she stressed, had she agreed to the suggestions.³³

Under cross-examination Mary Hunt described herself as a little more favourably inclined to accept the proposals. She admitted to Eccles that she knew Jones as a constable, and that she had spoken to him and to Hellam's brother after the hearing in Police Court. "I told him and Hellam's brother that I was willing to leave town," she stated, "only I did not want to put my bailsmen in for the money." In fact running away must have seemed very tempting to Mary Hunt. Unlike Ellen Rogers, she was not deeply rooted in the Toronto community. She had spent much of the past several years working in the United States, and the prospect of returning there must have been very inviting.³⁴

Eccles next called Constable D. Jones to the stand. He testified that Mary Hunt had confided in him that the story she had told in Police Court was false. She had lied, according to Jones, as part of a "plan

³² For biographical details on Eccles, see D.C.B., vol. 9, *supra*, note 30 at 233; *Macmillan Dictionary*, *supra*, note 30 at 239.

³³ [*Toronto*] *Leader* (14 January 1858); [*Toronto*] *Globe* (14 January 1858).

³⁴ [*Toronto*] *Leader* (14 January 1858); [*Toronto*] *Globe* (14 January 1858).

to get money out of the 'boys'. Furthermore, added Jones, Ellen Rogers and her boyfriend, George Irwin, had threatened Mary Hunt with arrest "for stealing money from a man in the house" if she had not sided with them. George Hellam, John Hellam's brother, was sworn and corroborated Jones' version of the facts.³⁵

Andrew Gregg, Robert's father, also took the stand. He denied ever having spoken to Ellen Rogers. Instead, he told the court:

On the day after the alleged outrage, I went near to Rogers' house with my wife and a carpenter to see if the door had been broken. The carpenter examined the door, but neither my wife nor myself went into the house. I did not offer any money to anyone to settle the affair. [George] Irwin came up next morning, before they went to the Police Court, and asked \$300 to settle it and get the women out of town.... I refused to give them a copper.³⁶

Later, the carpenter, Thomas Coyne, would testify that he had gone to see Ellen Rogers at the request of Mrs. Andrew Gregg, Robert's mother. Apparently Mrs. Gregg had been most apologetic for her son, and had offered to repair anything that had been damaged.³⁷

Which version of the events was the accurate one will likely never be known. Constable Jones, George Hellam and Andrew Gregg were, of course, interested parties who would have had considerable motivation to falsify their evidence to protect family members. And George Irwin's involvement in this was another wild card. He may indeed have been trying to extort money from the families of the accused men. Whether he did so under the direction or control of Ellen Rogers or Mary Hunt would, significantly, have been a separate question.

It is also important to note that the prospect of receiving compensation for criminal injuries was quite an acceptable part of mid-19th century mores. Traditionally, criminal prosecutions had been initiated and pursued by private parties, most frequently by persons who had been victimized by criminal acts. There were costs involved in taking such cases to trial, costs that would typically be borne by the private prosecutor who would obtain compensation after a successful conviction. This state of affairs encouraged some extortionate prosecutors to institute proceedings in order to be bribed to drop them. Charges

³⁵ [Toronto] Leader (14 January 1858); [Toronto] Globe (14 January 1858).

³⁶ [Toronto] Globe (14 January 1858).

³⁷ [Toronto] Leader (14 January 1858).

associated with prostitution and gambling were notoriously subject to this type of abuse. Even prosecutors who began the criminal process with honest intentions sometimes succumbed to bribery, especially if they were poor, or feared that their witnesses might prove corruptible. By the mid-19th century the Crown was increasingly stepping in to conduct criminal prosecutions, but Ellen Rogers must have been familiar with the syndrome of accused persons buying off their victims.³⁸

Henry Eccles' address to the jury focused upon the disparate positions of the accusers and the accused. Brandishing a sheaf of papers in front of the jury, he claimed that Robert Gregg and his father had given him a list of more than twenty witnesses, "some of whom were to testify to the bad character of the women, and others to the good character of the prisoner and his family." Congratulating himself on his restraint, he told the jurors that he had decided to call none of them. "The women themselves admitted their degraded position", he stated, "and with respect to the prisoner, his respectable appearance and that of his father was quite sufficient for the purposes of this trial."³⁹

It could not have been clearer. This was a contest between two very different classes of people. On the one hand, there sat Ellen Rogers and Mary Hunt, with their socially-debased occupation and "sullied reputations". On the other sat Robert Gregg, backed by his male cronies and family members, all purporting to be respectable citizens. In case the jurors had missed the point, Eccles repeated:

Any man is liable to be prosecuted at any time by women of this character. They might come forward whenever they pleased, and say that they had been violated. And where was the protection in such an event? Nothing but the security of the jury!⁴⁰

³⁸ Romney, *supra*, note 6 at 218-19 describes the potential for bribery and extortion within the system of private prosecution. His discussion is most particularly of the English situation, where the system of private prosecution pertained much longer than in Canada. However he notes that the Upper Canadian situation, although not as bad as in England, was not free of such pressures.

There was always, of course, a parallel civil system permitting persons victimized by crime to sue for civil damages. While there has been no systematic analysis of these sorts of lawsuits in 19th century Canada, see, e.g., *Gross v. Brodrecht* (1897), 24 O.A.R. 687; *Bigonnesse v. Brunelle*, (1883) 6 Legal N. 270 (Que. Sup. Ct); *R. v. Riendeau* (1900), 3 C.C.C. 293 (Que. Q.B.).

³⁹ [*Toronto*] *Leader* (14 January 1858); [*Toronto*] *Globe* (14 January 1858).

⁴⁰ [*Toronto*] *Leader* (14 January 1858).

Eccles reiterated Chief Justice Robinson's rhetorical claim that all women, regardless of reputation, should be protected from rape. "Let a woman be ever so depraved, she was as well to be protected by the law as the most exemplary character," he rhymed off. "But", he added ominously, "I would urge that although she was entitled to the protection of the law, she was not entitled to credit, and no jury would convict upon the bare statement and assertions of a woman, who, while telling her story, admitted that she was of the lowest grade of character."⁴¹

Eccles' last and perhaps most telling point was that rape was punishable by death. This had been the penalty set in England, under common law and by statute, and transported to the North American colonies. In 1841 the Legislature of Upper Canada had reaffirmed this rule by enacting a statute that provided that "every person convicted of the crime of rape shall suffer death as a felon." By the mid-19th century England was experiencing a wave of reform sentiment, and political battles were raging over the large number of capital crimes. A major breakthrough would occur in 1861, when the English Parliament voted to eliminate the death penalty for many offenses. Rape would be one of the offenses included in this reform, and life imprisonment would be substituted for the death sentence.⁴²

The mood in Canada was less hospitable to sentencing reform, and the Canadian jurisdictions held onto the capital penalty for the crime of rape throughout the 19th century. In 1873, Parliament would add imprisonment, from seven years to life, as an alternate punishment, but the politicians specifically retained the death penalty as well. Not all those sentenced to execution were actually hanged, of course. Many applied for pardons, and many received them. Indeed Cameron had told the jury that in a case such as this, the death sentence "would hardly ever be carried into effect." Yet the threat loomed large.⁴³

⁴¹ [Toronto] *Leader* (14 January 1858).

⁴² For details on the common law and statutory treatment of sentences in rape, see Backhouse, *supra*, note 7. See also *An Act to Consolidate and Amend the Statute Law of England and Ireland Relating to Offenses Against the Person* (U.K.), 24 & 25 Vict., c. 100; *An Act for consolidating and amending the Statutes in this Province relative to Offenses against the person*, S. Prov. C. 1841, c. 27.

⁴³ For information regarding patterns of sentencing on rape cases in Canada, see Backhouse, *supra*, note 7. See *An Act to amend the Act respecting Offenses against the Person*, S.C. 1873, c. 50.

Cameron seemed to be on the defensive when it came time for his address to the jury. He repeated that by now well-worn statement that “violence committed on the persons of those girls came as much under the eye of the law as if perpetrated on the most chaste and virtuous persons.” Yet he almost immediately backed down and suggested to the jury that if they should decide not to find Robert Gregg guilty of rape, they might still find him guilty of the lesser and included offence of “common assault”. This was a popular 19th century tactic, to charge or convict rapists of lesser offenses such as “indecent assault,” “assault with intent to commit rape” or “common assault” in situations where it seemed unlikely that the prosecution could secure a conviction of the full crime of rape. Cameron urged the jury “for the peace of society” to convict the men of common assault at least.⁴⁴

The jurors were sent off to deliberate, and they returned in short order. The foreman announced to the packed court room that they had found Robert Gregg, (and by implication Ross, Hellam and Doig, who had been charged as his accessories), not guilty. The audience was ecstatic. Noted the *Globe*: “The announcement of the verdict was received with loud cheering and other demonstrations of pleasure by the audience. It was sometime before order was restored ...”⁴⁵

This may have been an unusual case, but it was not an atypical verdict. Prosecutions for rape in Ontario rarely resulted in convictions in the 19th century. But the facts did little to stop the outpouring of anti-female sentiment seen so frequently in the writings of Canadian lawyers. The topic of false complaints and unfounded convictions haunted the male legal community. In 1866 the editors of the *Upper Canada Law Journal* would write:

[B]ut every man is fully alive to the risk he runs from the fact that, if a woman takes it into her head to charge him with an indecent assault, the chances are ten to one that he will be found guilty, no matter how strong may be the proofs of his innocence, or how weak the evidence against him. To be accused of such an offence is to be condemned. The chivalrous male juror feels that woman, as the weaker vessel, requires special protection; and his notion of specially protecting her is to accept, in the face of all evidence, whatever charges she may like to bring against her male oppressor.⁴⁶

⁴⁴ [*Toronto*] *Leader* (14 January 1858). For details on the practice of charging and convicting for lesser offenses, see Backhouse, *supra*, note 7.

⁴⁵ [*Toronto*] *Globe* (14 January 1858).

⁴⁶ (1866) 2 U.C.L.J. (N.S.) 234. For details of the conviction rates for rape, see Backhouse, *supra*, note 7.

But the Sayer Street case was not yet over. Cameron may have failed to score a conviction for rape, but he was not ready to concede the day entirely. Digging his heels in, he directed the court officials to arraign the four men for burglary, breaking and entering. Cameron was determined to convict the men of something, and the matter of the stolen money gave him an alternate way of proceeding. Ellen Rogers was called back to the stand once more. Angered and frustrated by the earlier verdict, she exhibited enormous courage in demeanour. Speaking through tears, she yet managed to convey her pain, her outrage, and overriding everything, her strong sense of her entitlement to dignity and rightful treatment. Glimpses of this were visible in the coverage from the *Toronto Leader*:

[Ellen Rogers] came into the witness box crying; and, on being sworn, said she didn't think there was any use in her being called on to give any evidence, as lawyers and witnesses had all spoken of her as being unworthy of belief. She was very angry at this; and said she didn't care about giving any more evidence. If, she said, I am unfortunate, surely I am not to be murdered by any set of men. In conclusion she said she didn't care about saying anything at all. She was threatened with being committed to jail, but said she didn't care.

At length, by advice of Mr. Cameron, His Lordship allowed witness to make her own statement. She accordingly addressed the jury for about ten minutes, detailing the circumstances in broken English.... She spoke with excessive rapidity and a great deal of vehemence, and at the close of her address, resumed her crying.

Witness was then examined and deposed that \$4 were taken from the cupboard by the parties breaking into the house that evening. The examination having been closed, witness talked at a frightful rate for about five minutes, and then left the box.⁴⁷

Hampered by the barrier of language, jeered by an obnoxious and unruly crowd of observers, Ellen Rogers must have mustered every ounce of bravery she had to persist in standing up for herself. She equated her violent rape at the hands of drunken, insolent men with murder. “If I am unfortunate, I am not to be murdered by any set of men,” rings through all the rest of this abuse, as a true statement of Ellen Roger's perception of what was at stake. Mary Hunt had shouted out something similar that night in December: “Ellen, come help me! They are murdering me!” The enormity of the crime of rape, the devastating impact that it has on women's freedom and self-esteem, the anguish of the rape victim is all summed up in this one woman's remarkable fortitude.

⁴⁷ [*Toronto*] *Leader* (14 January 1858).

Yet few seemed to have heard her that day. The *Toronto Globe* referred to her impassioned statements as a "harangue" noting coldly "it was with the greatest difficulty that she could be made to hold her tongue." It took the jury less than ten minutes to reach another set of "not guilty" verdicts. The crowd was silent, but only because the judge had warned that he would not tolerate another outbreak of cheering. Judge McLean spoke to the prisoners before discharging them, warning them in a kindly tone to stay away from disreputable houses such as Ellen Rogers' in future. And according to the *Toronto Leader*, "the immense crowd, which had filled the gallery and body of the Court all day, mov[ed] off, apparently very well pleased with the result of the trials." As for Ellen Rogers, she apparently packed up her belongings and left town.⁴⁸

⁴⁸ [*Toronto*] *Leader* (14 January 1858); [*Toronto*] *Globe* (14 January 1858). The whereabouts of Ellen Rogers can be traced through the city directories, which were published in 1856, 1859-60, and 1861. She was listed at Edward St., West of Yonge in the 1856 *Brown's Toronto City Directory*, *supra*, note 3 at 30 & 212. The *Caverhill Toronto City Directory, 1859-60*, *supra*, note 10 has no listing of Ellen Rogers, nor has *Brown's Toronto General Directory, 1861* (Toronto: 1861).