THE EXCLUSION OF THE CLERGY FROM CRIMINAL TRIAL JURIES: AN HISTORICAL PERSPECTIVE

ROSEMARY PATTENDEN
Professor of Law, University of East Anglia

1. INTRODUCTION

Schedule 1 to the Juries Act 1974 provides that '[a] man in holy orders; a regular minister of any religious denomination [and] [a] vowed member of any religious order living in a monastery, convent or other religious community' is ineligible to serve on a criminal (and also a civil) jury. This has been the law since 1972. For the remainder of this century members of the clergy have been eligible, but not compellable, jurors. In practice they did not serve. The change effected in 1972 is a reversion to the position which probably prevailed in the Middle Ages. Aside from the occasional official report, the liability of religious functionaries to serve on juries in criminal trials has been rarely written about. The last time it happened was in 1882.[1] The object of this article is to fill the lacuna by tracing the history of the clergy's ineligibility for jury service in criminal trials and the reasons for it.

2. IN THE BEGINNING: THE THIRTEENTH CENTURY

Juries became an established part of Norman criminal justice in England during the reign of Henry II (1154–1189). The first criminal jury was the grand jury. It was used to accuse those suspected of felonies, the gravest crimes[2] which by 1215 were all punishable by death.[3] Early in the thirteenth century the petty jury was introduced to try those whom the grand jury had publicly accused. It is improbable that clerics were eligible as either petty or grand jurors. By the thirteenth century a jury had been in use to decide the most serious civil cases for a generation.[4] According to Britton, who wrote during the reign of Edward I (1272–1307), the parties to a civil dispute could object to any 'priests or clerks within holy orders'[5] among the jurors. Clerics were in the same position as *inter alia* women, those above seventy years of age, villeins and those who were not locals. It is unlikely that such persons were impanelled in the first place, except as an oversight. In criminal proceedings the list of excluded persons must have been similar.[6] Clerics were certainly not compellable jurors. Britton observes that at the presentment of offenders at the sheriff's tourn, the twice yearly court held by the sheriff in each hundred,[7] all the freemen of the hundred were obliged to appear 'except clerks, persons in religion, and women'.[8]

To understand why clerics were not jurors in criminal causes requires an appreciation of the circumstances in which the petty jury evolved. The Constitutions of Clarendon of 1164[9] and the Assize of Clarendon of 1166[10] made indictment by a

---

[1] T Erle, *The Jury Laws and Their Amendment* (London, 1882).

[2] Initially homicide, robbery, theft and concealing someone who had committed these crimes. By the reign of Edward II (1307–1327) arson, burglary, larceny and counterfeiting had been added.

[3] A Harding, *The Law Courts of Medieval England* (London, 1973), p 57.

[4] J Skayer (ed), *Dictionary of the Middle Ages*, vol ii (New York, 1986), p 183.

[5] F Nichols (ed), *Britton*, vol i (Oxford, 1865, reprinted 1983), p 347.

[6] None of the legal treatises published from 1503 onwards, which are considered below, indicates any difference in jury disqualifications for civil and criminal proceedings.

[7] The hundred was the subdivision of the county used as the unit of administration in criminal matters.

[8] Nichols (ed) *Britton*, vol i, p 178. See also the Statute of Marlbridge 1267 (52 Hen 3, c 10) (Sheriff's Turns).

[9] C Stephenson and F Marcham (ed), *Sources of English Constitutional History* (revised edn, New York, 1972), p 73.

[10] Ibid, p 77.

grand jury the normal method of initiating a criminal prosecution. The Assize of Clarendon of 1166[11] provided for those accused to be put to the ordeal, a method of proof of Germanic origin which involved an appeal to God to show by a sign whether the accused was innocent. The Assize of Clarendon prescribed ordeal by water: the accused was blessed by a priest and thrown into a pool of water; if he sank God was believed to have accepted him and therefore he was innocent, if he floated the opposite inference was drawn. In November 1215 the Fourth Lateran Council, a General Council of the Church, forbade clerical involvement in ordeals.[12] In England the papal decree was promptly implemented with the result that all felony trials ceased.[13] Officials looked for a substitute mode of trial. During the Eyre[14] of 1221–22 the grand jurors were asked to decide the accused's guilt.[15] Thereafter it was the practice to use jurors to deliver the final verdict.

The composition and size of the petty jury that replaced the ordeal remained experimental for a long time.[16] Initially its members were selected from among those entitled to be grand jurors,[17] namely knights and freemen,[18] and until 1352 the petty jury could contain actual members of the grand jury which had brought the accusation.[19] By the close of Henry III's reign (1216–1272) it was normal to use, for a conviction, the original grand jury reinforced by the grand jury of another hundred and representatives from four neighbouring settlements.[20] Bracton[21] and a writ of 1231[22] say that the four settlements were each represented by four 'lawful men', i.e. freemen, plus the reeve. No matter what their origins, clerics were in law freemen[23] and therefore, unless they were monks, whom the common law treated as dead,[24] were, *prima facie*, entitled to sit as jurors. Indeed, in an age in which jurors were expected to rely on their own knowledge the parish priest, an informed member of the community, would have been a particularly useful juror. The explanation for the non-participation of the clergy on criminal juries must be sought outside the common law.

Besides forbidding clerics from officiating at ordeals, canon 18 of the Fourth Lateran Council prohibited the clergy from association with punishments which resulted in death or mutilation. This was indeed one of the principal objections that the Church had to ordeals;[25] another was that it tempted God.[26]

---

[11] Ibid. p 77.

[12] J Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol 22 (Venice, 1778), p 1006. The text of canon 18 is to be found later in the text below.

[13] F Pollock and F Maitland, *The History of English Law before the time of Edward I* (2nd edn), vol ii (Cambridge, 1968), p 599.

[14] The Eyre was the periodic visitation of the royal justices from county to county to hear civil and criminal causes.

[15] R Groot, 'The Early-Thirteenth-Century Criminal Trial' in J Cockburn and T Green (ed), *Twelve Good Men and True* (Princeton, 1988), p 17.

[16] T Green, *Verdict According to Conscience* (Chicago, 1985), pp 13, 15.

[17] J Skayer (ed), *Dictionary of the Middle Ages*, vol ii, p 183.

[18] The Eyre of 1194 gives the composition of the grand jury as twelve knights or, if knights were wanting, twelve freemen: Stephenson and Marcham (ed), *Sources of English Constitutional History*, p 104. The Constitutions of Clarendon (1164), the Assize of Clarendon (1166) and the Assize of Northampton (1176) added four men of each settlement of the hundred: *Sources of English Constitutional History*, pp 74, 77:1, 80:1.

[19] Overlap between the grand jury and petty jury was stopped in 1352 by 25 Edward 3, stat 5, c 3 (Challenge of Jurors).

[20] J Given, *Society and Homicide in the Thirteenth Century in England* (Stanford, 1977), p 95; J Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London, 1973), p 145.

[21] Bracton *De Legibus et Consuetudinibus Angliae*, ed Woodbine, rev and tr S Thorne, vol ii (Cambridge, Mass, 1968), pp 309, 310.

[22] W Stubbs, *Selected Charters* (9th edn) (Oxford, 1913), p 354.

[23] A Poole, *Obligations of Society in the XII and XIII Centuries* (Oxford, 1946), pp 28 ff.

[24] Pollock and Maitland, *The History of English Law before the time of Edward I* (2nd edn), vol i, pp 433–438, 458.

[25] J Baldwin, 'The Intellectual Preparation for the Canon of 1215 Against Ordeals' (1961) 26 *Speculum* 613, esp at 631.

[26] Contrary to Deut 6 : 16 and Matt 4 : 7.

> '*That judgment of blood or duel is forbidden to clerics*
> Let no cleric pronounce or prefer sentence of blood nor let him exercise punishment of blood nor let him be involved when it is exercised. But if somebody at the occasion of a decision of this kind presumes to impose any punishment on clerics let him be constrained through ecclesiastical censure. Nor shall any cleric write or dictate a document intended for the punishment of blood. Consequently in the courts of princes let this concern be entrusted not to clerics but to laymen. Also let no cleric be in charge of brigands or artillrymen or this type of men of blood or shall subdeacon, deacon or priest exercise that part of surgery that leads to cautery or incision or shall anyone supply any benediction or consecration for purgation of boiling or cold water or of hot iron. Nevertheless prohibitions previously promulgated about single combat or duels are retained.'[27]

On his return from Rome, Stephen Langton, Archbishop of Canterbury, held a provincial synod at Oxford which implemented canon 18.[28] Canon 18 was no innovation.[29] Already in Constantine's day it had been forbidden for a priest or a bishop to take part in a capital charge.[30] The Constitutions of Clarendon had allowed for this by providing that '[a]rchbishops, bishops and all parsons who hold possessions of the king in chief' must 'take part with the barons in the judgments of the lord king's court, *until the judgment involves death or maiming.*'[31]

Canon 18 alone cannot fully explain the exclusion of clerics from criminal juries. In England some serving bishops and many abbots were royal justices.[32] Lip service was paid to the prohibition on participation in judgments of blood by the withdrawal of the cleric from the case before the death sentence was announced.[33] If clerics could be judges, then why not jurors? Jurors decided who was guilty, not how they were to be punished.[34] The answer lies in the existence of additional objections to cleric-jurors (some of which applied with equal force to civil proceedings):

1. In the thirteenth century the jurors were the witnesses. Jurors were expected to use their local knowledge to decide the case.[35] Were a priest to be a member of a jury, he might possess relevant information by virtue of having heard a private confession. This was information which the priest could not divulge. For him to base his decision on this information without mentioning it might still result in disclosure; inferences might be drawn from his decision. Furthermore, in this early period the justices sometimes interrogated individual jurors to find out what they knew.[36] There was thus a potential conflict between canon law and the procedures of the secular court.

2. Every juror had to take an oath on the Gospel to deliver a true verdict.[37] The Church taught that in cases of real necessity (especially in spiritual affairs) priests

---

[27] J Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol 22, p 1006 (trans by P Pattenden).

[28] Canons of the Council of Oxford, 17 April 1222. See F Powicke and C Cheney (ed) *Councils and Synods II*, Part I (1205–1265) (Oxford, 1964), Nos 12, 13.

[29] Eg Gratian *Decretum* C 23, q 8, c 29 in A Richter-Friedburg (ed), *Corpus Iuris Canonici*, vol i (Lipsiae, 1879), cols 963, 964.

[30] W Lecky, *History of European Morals* (3rd edn), vol ii (London, 1877), p 39.

[31] Stephenson and Marcham (ed), *Sources of English Constitutional History*, p 75: 11 (italics added); Stubbs, *Selected Charters*, p 166.

[32] Cheney, *From Becket to Langton* (Manchester, 1956), p 24.

[33] M Gibbs and J Lang, *Bishops and Reform 1215–1272* (London, 1932), p 167.

[34] This was how burning at the stake for heresy was justified. The Church determined who was a heretic; the secular authorities carried out the punishment.

[35] E Powell, *Kingship, Law and Society* (Oxford, 1989), p 77.

[36] J Dawson, *A History of Lay Judges* (Cambridge, Mass, 1960), pp 123–126; T Green, 'A Retrospective on the Criminal Trial Jury 1200–1800' in Cockburn and Green (ed), *Twelve Good Men and True*, p 360.

[37] Cp Nichols (ed) *Britton*, vol i, p 347.

could swear an oath, but not at the instigation of the laity.[38] '[F]or persons of great dignity to swear', Aquinas wrote, 'is unbecoming.'[39] It implied that clerics might lie. The Church was particularly against the clergy taking corporal oaths, such as that required for jury service: 'Let no one from the ecclesiastical order presume to swear anything to any layman on the holy Gospels.'[40]

3. A verdict was viewed as a moral pronouncement about the appropriateness of punishment.[41] A priest who did not distinguish sharply between crime and sin might regard an accused who had confessed to, and received absolution for, his misconduct as cleansed of his guilt[42] and would therefore be unwilling to convict.

4. A Year Book from the reign of Edward I (1272–1307) records a decision by the justices to allow a defendant who was a knight to be tried by other knights: 'Because you are a knight we wish you to be judged by your peers.'[43] The same sentiment is expressed in a work on the customary law of the Duchy of Normandy.[44] Clerics and laymen were no more peers than knights and freemen. The distinctiveness of the two estates is recognised in the special procedure for the punishment of criminous clerks.[45] If laymen were unfit to try clerics, was it appropriate for clerics to try laymen accused of major secular[46] crimes?

5. The Church was, in principle, against the active involvement of the clergy in secular affairs.[47] This implemented Christ's injunction that no one can serve two masters.[48] Canon 12 of the Third Lateran Council of 1179 directed the clergy to refrain from secular roles or be deposed from office.[49] The Church[50] tolerated its clerics holding office as royal justices and as justices of the peace[51] in the hope that they would have a civilising influence and protect the interests of the Church and the poor.[52] In Othobon's constitutions there is a special exception for royal duties.[53] Such an incentive did not exist for condoning clerical participation on juries.

3. THE FOURTEENTH TO THE EIGHTEENTH CENTURY

During the reign of Edward II (1307–1327), use of the jury was extended to non-capital crimes, known initially as trespasses and subsequently as mis-

---

[38] T Aquinas, *Summa Theologiae 2a2ae*, ed K O'Rourke (London, 1964), q 89, art 10, p 233. I am grateful for information received from the Rt Revd John Jukes and the Revd Gordon Read.

[39] Ibid.

[40] Gratian, *Decretum*, C 22, q 5, c 22, in Richter-Friedburg (ed), *Corpus Iuris Canonici*, vol i, col 889 (trans P Pattenden). J Tyler notes in *Oaths, Their Origin, Nature and History* (London, 1834), p 30, that before the French Revolution the custom of exempting clerics from taking a corporal oath prevailed in France and much of the Continent, and that in his day Spanish priests were still forbidden to swear on the Gospels.

[41] R Palmer, 'Conscience and the Law, The English Criminal Jury' (1986) 84 Mich LR 787 at 793. Repentance, reputation, reparation and recidivism were all considered relevant to the conviction decision.

[42] R Bartlett, *Trial by Fire and Water* (Oxford, 1986), pp 78–81.

[43] Year Books of 30 & 31 Edward I, ed A Horwood, RS (1863), p 531. Cp Year Books of 12 & 13 Edward III, ed L Pike, RS (1885), p 291. Freemen could, however, be tried by knights.

[44] M Tardif (ed), *Coutumiers de Normandie*, vol i (Paris, 1903), p 22.

[45] L Gabel, *Benefit of Clergy in England in the Later Middle Ages* (Northampton, 1929), p 25.

[46] Ecclesiastical courts had jurisdiction over laymen who committed ecclesiastical offences such as blasphemy and adultery.

[47] *Decretales Gregorii IX*, lib iii, tit L, in Richter-Friedburg (ed), *Corpus Iuris Canonici*, vol ii, cols 657, 658.

[48] Matt 6 : 24; Luke 16 : 3.

[49] Richter-Friedburg (ed), *Corpus Iuris Canonici*, vol ii, cap iv, col 658.

[50] Occasional attempts were made to prevent pluralism: see eg *Cal Papal Letters*, I.155, July 1236, quoted by M Gibbs and J Lang, *Bishops and Reform 1215–1272*, pp 166, 167.

[51] B Putnam (ed), *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries* (London, 1938), p lxxxi.

[52] See Gibbs and Lang, *Bishops and Reform 1215–1272*, p 165.

[53] J Johnson, *The Laws and Canons of the Church of England*, vol ii (Oxford, 1851), p 220.

demeanours.[54] Since the offences were not capital, canon 18 was not an obstacle to the inclusion of clerics on these juries. But the argument that clerics should not be active in secular affairs still applied. Indeed, it applied with greater force since the crimes were not serious; clerics could themselves be tried by secular courts for these offences.[55] From 1285 onwards jurors were required to have a holding of not less than the value of twenty shillings a year,[56] an amount raised to forty shillings in 1415.[57] This alone would have disqualified all monks and most priests.[58]

Various legal treatises written between the sixteenth and the eighteenth centuries address the question of clergy-jurors. During this period the law was still customary and the treatises are far from consistent as to what the custom was, except on one point: the type of court and the kind of proceedings did not matter. Support is to be found for all of the following propositions:

1. *The clergy had to serve on juries, but were entitled to be excused if in the service of the king.*

Fitzherbert's *Natura Brevium*, which dates from 1534, states that:

> 'clerks who have lands or tenements by descent or purchase, may be put in assises and inquests as well as other lay persons, as appeareth by the register; and it seemeth the law is such. But if such clerk be in the king's service, he shall have a special writ to discharge him . . .'[59]

An example is then given of such a writ.[60] There is a similar writ in the *Registrum Brevium*.[61] It could be that this writ was restricted to civil actions but neither the *Natura Brevium* nor the *Registrum Brevium* says so. Fitzherbert's words in *Natura Brevium* were paraphrased by Dalton in *The Office and Authoritie of Sherifs* (1623), but are followed by the remark 'but this is now out of use'.[62] The words 'it seemeth the law is such' in Fitzherbert may indicate that even in his day the clergy were never jurors.[63] If in the thirteenth century no cleric could be required (and probably was not permitted) to serve on a jury, it is more than a little surprising that in the sixteenth century propertied clergy were *prima facie compellable* jurors. Protestant reformers and the Roman Catholic Church were in agreement that the clergy should not be distracted by secular pursuits.[64] Several ecclesiastical handbooks from the late seventeenth and early eighteenth centuries even assert a common law rule that clergy could not be made to hold temporal office against their will.[65] If this is right then they could not have been conscripted as jurors.

---

[54] T Plucknett, 'Commentary on the Indictments' in Putnam (ed), *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, pp cliv ff. Presentments for trespass could be tried before the sheriff's tourn, the royal justices or justices of the peace: p civ.

[55] Pollock and Maitland, *The History of English Law before the time of Edward I* (2nd edn), vol i, pp 435, 440.

[56] 13 Edward I, st 2, c 38 (Juries).

[57] 2 Henry 5, st 2, c 3 (Jurors).

[58] But not all. It was, for example, possible for a man to be both parish priest and lord of the manor: H Richardson, 'The Parish Clergy of the Thirteenth and Fourteenth Centuries' in (1912) *Transactions of the Royal Historical Society* (3rd series), 88 at 117.

[59] Fitzherbert, *Natura Brevium*, vol ii (9th edn) (London, 1794), p 166.

[60] 'The king to the Sheriff, etc. Because master R Clerk, at this time continually abideth in our service, or in the service of the venerable father I, bishop of Ely; we command you, that him the said R by reason of the lands and tenements which he holds in the county aforesaid, you put not or cause to be put any assises, juries or recognizances, so long as he abides in the service of us, or of the same bishop, as aforesaid.'

[61] *Registrum Brevium* (4th edn) (London, 1637), p 170. The first edition appeared in 1531.

[62] Dalton, *The Office and Authoritie of Sherifs* (London, 1623), p 121.

[63] I am grateful to Professor Baker for this suggestion.

[64] See generally T Briden and B Hanson, *Moore's Introduction to English Canon Law* (3rd edn, London 1992), pp 106f. Cp Blackstone, *Commentaries on the Laws of England* (London, 1768), vol i, p 364.

[65] S Degge, *The Parson's Counsellor* (London, 1676), p 136; W Nelson, *The Rights of the Clergy in Great Britain* (London, 1709), p 170. Jury service is not mentioned in either work.

2. *Clergy were eligible to act as jurors, but were entitled to be excused as of right*

In 1577, in *Beecher's Case*, 'a gentleman of the Middle-Temple' was returned in an attaint.[66] Before the day of the return he had became 'a minister of the Church'. He objected to doing jury service 'according to the privilege of those of the ministry'. The Court of Common Pleas, nonetheless, insisted that he be sworn because at the time of his selection 'he was a lay-man'.[67] This decision implies that ministers were qualified jurors,[68] although normally they did not serve on juries. It also raises an intriguing question: was Beecher a priest or a deacon? A statute passed in 1549 decreed that a deacon should continue in that office for a whole year, unless a dispensation was granted by the bishop.[69] This provision, and the relatively short period that must have elapsed between the date of being summoned and the date of the court hearing,[70] makes it probable that Beecher was not a priest, although the fact that it was found necessary in 1603 to promulge a canon forbidding bishops from ordaining a man priest and deacon on the same day[71] indicates that dispensations were not unheard of.

Another piece of evidence that the clergy were not compellable jurors is to be found in the Toleration Act 1688. This rewarded the services of Protestant non-conformists to the Revolution by providing *inter alia* that:

> 'every teacher or preacher in holy orders, or pretended holy orders, that is a minister, preacher or teacher of a congregation, that shall take the oaths herein required, and make and subscribe the declaration aforesaid, shall be thenceforth *exempted* from serving upon any jury . . .'[72]

In 1791 'every priest, or other person in holy orders, or pretended holy orders, being a minister, teacher or preacher of any congregation of persons professing the Roman Catholic religion'[73] was similarly 'exempted' from the burden of jury duty. It is likewise stated in Giles Jacob's *Law Dictionary* (1729) that clergymen are '*exempted* by law from serving upon juries'.[74] The clergy Jacob had in mind undoubtedly included (and may have been confined to) Anglicans. Whether Jacob and the Acts of 1688 and 1791 deliberately chose the term 'exempted' to indicate technical eligibility is a matter about which one cannot be as certain. Blackstone, however, is very precise: propertied priests qualifed as jurors. He observes that besides those '*excluded*' from serving on juries because of a criminal conviction:

> 'there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is *excused*, and not *excluded*. As by statute Westm.2.13 Edw.1.c.38 sick and decrepit persons, persons not commorant in the county, and men above seventy years old; This exemption is also extended by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impanelled, must shew their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but, if they are seised of lands and tenements,

---

[66] Proceedings by attaint involved a jury of 24 determining whether a jury of 12 had given a false verdict.

[67] *Beecher's Case* (1577) 4 Leon 190. 74 E R 813.

[68] Cf H Cripps, *A Practical Treatise on the Law relating to the Church and Clergy* (5th edn) (London, 1869), p 70.

[69] 3 & 4 Edward 6, reproduced in E Gibson, *Codex Juris Ecclesiastici Anglicani* (Oxford, 1761), p 151.

[70] Juries Act 1825 (6 Geo 4, c 50), s 25, and the Juries Act 1870 (33 & 34 Vict, c 77), s 20, required, respectively, ten and six days' notice of the duty to attend court as a prospective juror.

[71] Gibson, *Codex Juris Ecclesiastici Anglicani*, p 151.

[72] Toleration Act 1688 (1 Will & Mar, c 18), s 11 (italics added). See also the Nonconformist Relief Act 1779 (19 Geo 3, c 44).

[73] Roman Catholic Relief Act 1791 (31 Geo 3, c 32), s 8. Unitarians were given the same privileges by the Doctrine of the Trinity Act 1813 (53 Geo 3, c 160).

[74] Italics added.

> they are in strictness liable to be impanelled in respect of their lay fees, unless they be in the service of the king or of some bishop.'[75]

In the passage set out above, which was published in 1768, Blackstone was concerned with civil juries. Elsewhere, however, he assumes that the same rules apply in criminal proceedings.[76]

Legal historians have noted the presence of Anglican clergymen on eighteenth-century grand juries.[77] The fact that the exemptions were the same for grand and petty jurors[78] makes it probable that the clergy were entitled to serve on both. That is not to say that they did so. Meetings of the grand jury were important social occasions:[79] service on the petty jury was a nuisance and, since it was unpaid, could be costly.[80] It was observed in *The Times* in 1788 that persons of education and property did their best to avoid petty juries.[81] It is known that in eighteenth-century Essex some constables included the clergy in the yearly lists to quarter sessions of those qualified in their parish to be jurors.[82]

3. *The right of the clergy to be excused jury service was qualified in certain circumstances*

Trials per Pais (1665) lists clerks amongst those 'exempted' by the writ *de non ponendis in Assiss* but adds that:

> 'in a Grand Assize, perambulation, attaint, and some other special cases, such men as are not exempted by reason of their dignity, shall be forced to serve, notwithstanding their exemption in other cases.'[83]

William Sheppard says the same in *An Epitome of all the Common and Statute Laws of the Nation*.[84] Under the *tales de circumstantibus* procedure[85] the sheriff was required to make up a deficient jury from persons present in court.[86] The normal juror property qualifications were relaxed for talesmen[87] and in *The Complete Juryman* (1752) it is written that '[t]he sheriff upon a tales de circumstantibus may impanel a priest or deacon, if he hath sufficient freehold of lay-fee . . .'[88] *Trials per Pais*[89] and *The Excellency and Praeheminence of the Law of England*[90] by Thomas Williams, Speaker of the House of Commons, corroborate this.

---

[75] Blackstone, *Commentaries on the Laws of England*, vol iv, p 364. For the last point he gives as his source Fitzherbert's *Natura Brevium* and the *Registrum Brevium*. The statutory reference is to the Juries Act 1285.

[76] Blackstone, *Commentaries on the Laws of England*, vol iv, p 344.

[77] J Langbein, 'The English Criminal Trial Jury on the Eve of the French Revolution' in A Schioppa (ed), *The Trial Jury in England, France, Germany 1700–1900* (Berlin, 1987), p 24; J Beattie, *Crime and the Courts in England 1660–1800* (Oxford, 1986), p 389.

[78] J Chitty, *A Practical Treatise on the Criminal Law*, vol i (London, 1816), p 502.

[79] Langbein, 'The English Criminal Trial Jury on the Eve of the French Revolution', p 24.

[80] The attitude to jury service was similar in the seventeenth century: see C Herrup, *The Common Peace* (Cambridge, 1987), pp 134, 135.

[81] *The Times*, 13 October 1788, p 3.

[82] P King, '"Illiterate Plebeians, Easily Misled": Jury Composition, Experience and Behaviour in Essex, 1735–1815' in J Cockburn and T Green (ed), *Twelve Good Men and True* (Princeton, 1988), p 259.

[83] G Duncomb, *Trials per Pais: or, The Law of England concerning Juries by Nisi Prius, etc* (8th edn), vol i (London, 1766), p 105.

[84] W Sheppard, *An Epitome of all the Common and Statute Laws of the Nation* (London, 1656), p 1049.

[85] Jurors Act 1543 (35 Hen 8, c 6).

[86] In the seventeenth century extensive use was made of talesmen: J Cockburn, *A History of English Assizes 1558–1714* (Cambridge, 1972), p 118.

[87] Blackstone, *Commentaries on the Laws of England*, vol iv, p 348.

[88] Anon, *The Complete Juryman* (London, 1752), p 97.

[89] Duncomb, *Trials per Pais*, vol i, p 84.

[90] T Williams, *The Excellency and Praeheminence of the Law of England* (London, 1680), p 160.

4. *Clergy were ineligible jurors*

Marowe, a serjeant-at-law, wrote in 1503 that presentments by grand juries including 'professed monks' and other religious men were void.[91] Lambart's *Eirenarcha or the Office of Justice of the Peace* (1601) states that 'women, infants under 14 years of age, aliens, and such as be within orders of the ministery, or clergy, cannot be empanelled amongst others'.[92] The same words appear in *The Complete Justice, A Compendium of the particulars incident to Justices of the Peace* (1638 edition).[93] Numerous eighteenth-century works[94] adopt Lambart's statement of the law. In Joshua Shaw's *Parish Law* it is written: 'But aliens, attornies, apothecaries, butchers, clergymen, counsellors, infants, persons attained for any crime may not serve on juries'[95] In *The Complete Juryman* the law is set out in more ambiguous terms: 'Clerks or persons in holy orders ought not to be returned on juries.'[96] The authorities cited are *Trials per Pais*, Dalton's *The Office and Authority of Sheriffs*, Coke's *Second Institutes*[97] and *Beecher's Case*.[98] Does the author mean that the clergy were barred from jury service, or that they could be excused and that, therefore, they were not worth summoning?

The most detailed reference to the liability of clerics to serve on juries is to be found in an early eighteenth-century priest's handbook, *The Clergyman's Vade-Mecum*, by the Revd John Johnson.[99] Had he thought the clergy were exempt, as opposed to ineligible, he would surely not have written the following:

> 'Some reckon it among the privileges of the clergy, that they are not bound to serve in juries; and 'tis certainly no very desirable thing, for clergymen to be obliged to attend temporal courts, at the summons of every bailiff. But on the other side, I am so far from thinking, that the being excluded wholly from juries is a privilege, that I think it one great instance of the hardship of the clergy, that none of their order are ever admitted to be jurymen in temporal courts.
> . . . If clergymen are part of the commonalty of the nation, why are they alone deny'd the rights of other commoners and freeholders? If they are not commoners, but a distinct order of men; why should not they have their rights tried, as others have, by some of their own rank and condition? And this is now the more necessary, since all manner of causes are, first or last, wholly or in part generally brought before a jury: the clergy had no reason to desire to be jurymen, while they had redress in the Ecclesiastical Courts.'[100]

If the clergy (unbeknown to Johnson) were eligible, but not compellable, one can deduce from his book that they did not in fact take advantage of their eligibility. This was certainly the position in Scotland. Hume wrote at the very end of the eighteenth century that in Scotland 'certain it is, that for these two centuries at least, no church-

[91] T Marowe. *De Pace Terre & Ecclesie & Conseruacione Eiusdem, Westminster Primer, Capitulo Primo*. B Putnam (ed), *Oxford Studies in Social and Legal History*, vol vii (Oxford, 1924), p 366.

[92] Lambart, *Eirenarcha or the Office of Justice of the Peace* (London, 1619), p 396. D Hume in *Commentaries on the Law of Scotland Respecting Crimes*, vol ii (Edinburgh, 1968 reprint), p 313, cites President Balfour and Lord Haddington as saying the same thing about kirkmen in Scotland.

[93] *The Complete Justice, A Compendium of the particulars incident to Justices of the Peace* (London, 1638), p 119.

[94] *The Office and Authority of a Justice of the Peace* (7th edn) (London, 1721), p 389; J Phipp, *British Liberty; or, a Sketch of the Laws in Force Relating to Court-Leets, and Petty-Juries* (London, 1739), p 11; R Burn, *The Justice of the Peace and Parish Officer* (14th edn), vol ii (London, 1789), p 580, Gentleman of the Law, *Conductor Generalis or, the Office, Duty and Authority of the Justice of the Peace* (London, 1801), p 219 (compiled from Burn).

[95] J Shaw, *Parish Law* (5th edn) (London, 1743), p 354.

[96] Anon, *The Complete Juryman* (London, 1752), p 38.

[97] E Coke, *The Second Part of the Institutes of the Laws of England*, vol i (London, 1641).

[98] *Beecher's Case* (1577) 4 Leon 190, 74 E R 813.

[99] 1662–1725, vicar of Cranbrook.

[100] J Johnson, *The Clergyman's Vade-Mecum* (2nd edn) (London, 1707), p 125. The first edition was published in the previous year.

man has been summoned to serve on any jury in a criminal case.'[101] The English jurists who treated the clergy as ineligible may have assumed that because clergymen did not in practice sit on petty juries they could not do so. This supposition does not solve the whole mystery. If a priest was entitled to be a juror, and there is considerable evidence to suggest this, when did this right come into existence? After the Restoration, in the 1660s when the influence of the ecclesiastical authorities on the courts was waning? Was it a right that was recognised in some parts of the country and not in others? The available information is too scant to provide answers.

4. THE NINETEENTH CENTURY

By 1825 anyone interested to know the law on juries had to consult over 85 statutes *and* the common law. To make jury law more accessible, Parliament passed the Juries Act 1825.[102] Section 1 sets out the qualifications for jury service. The exemption of the clergy, which for Anglicans had previously been governed by the common law, is dealt with in section 2:

> 'all clergymen in holy orders; all priests of the Roman Catholic faith who shall have duly taken and subscribed the oaths and declarations required by law; all persons who shall teach or preach in any congregation of Protestant dissenters, whose place of meeting is duly registered, and who shall follow no secular occupation except that of a schoolmaster, producing a certificate of some justice of the peace of their having taken the oath, and subscribed the declaration required by law. . . . shall be and hereby are absolutely freed and *exempted* from being returned, and from serving upon any juries or inquests whatsoever . . .'.[103]

The word 'exempted', which is used in section 2, also appears in a Scottish Act of the same year.[104] After Jewish emancipation in 1846[105] ministers of Jewish congregations who met the property qualification were added to the list (provided, like nonconformist ministers, that they followed no secular occupation other than that of teacher). The next important piece of legislation was the Juries Act 1870. The Schedule to this Act included amongst '[p]ersons exempt from serving on [j]uries':

> 'Peers, Members of Parliament, judges, clergymen, Roman Catholic priests, ministers of any congregation of Protestant dissenters and of Jews whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster.'[106]

The process by which those in exempt categories were removed from the jury book assumed liability to serve, unless the exemption was claimed.[107] From time to time exempt persons did serve on juries. In *Re Dutton*[108] it was held that the exemptions conferred by the Act of 1870 extended to coroners' juries.[109] In 1882 Erle, a Master of the Supreme Court, noted that clergymen frequently volunteered to serve on grand juries and occasionally on coroners' juries,[110] even in cap-

[101] Hume, *Commentaries on the Law of Scotland Respecting Crimes*, vol ii, p 314.

[102] Juries Act 1825 (6 Geo 4, c 50). The Act is discussed in H Cary, *A Practical Treatise on the Law of Juries and Jurors* (London, 1826).

[103] Italics added.

[104] Jurors (Scotland) Act 1825 (6 Geo 4, c 22), s 2.

[105] Religious Disabilities Act 1846 (9 & 10 Vict, c 59).

[106] Juries Act 1870 (33 & 34 Vict, c 77). See also s 9.

[107] The process is described by J King, *The Management of Private Affairs* (Oxford, 1908), pp 222, 223.

[108] *Re Dutton* [1892] 1 QB 486.

[109] This was because the exemptions were stated in the Juries Act 1870, s 9, to apply to 'any juries or inquests whatever'. Willes J said in his judgment (at 489) that before 1870 there were no exemptions from service upon coroners' juries.

[110] The Coroners Act 1887 (50 & 51 Vict, c 71), s 3, laid down that persons summoned to serve on a coroner's jury should be 'good and lawful men'.

ital cases.[111] This would not have been possible had the clergy been ineligible.

In 1872 Parliament was presented with another Bill[112] on juries which Erle had drafted. Its aim, the Commons was told, was to 'bring in as many men as possible to serve on juries and thereby to diminish the pressure of the service on each individual'[113]; 'many classes now exempted would in future be liable to serve. Clergymen of the various religious denominations would no longer be exempt . . .'[114] In place of the many specific exemptions the Bill empowered justices to remove from the jury lists:

> 'any persons having temporary or permanent duties or avocations incapable of being properly delegated to others, and of such a character and importance as that their interruption by the withdrawal of those concerned in them for service on juries would be in the opinion of such justices, the occasion of serious injury or detriment to the public interest.'[115]

The Times was 'curious to know how far the clergy, especially the non-conformist clergy, will be reconciled to a loss of their exemption by the assurance that no member of Convocation, during the session of that Assembly, shall be liable to be impressed into the jury-box.'[116] The clergy organised effective resistance; when the legislation emerged from a House of Commons Select Committee 'clergymen, Roman Catholic priests, ministers of any religious denomination . . .'[117] were once again exempt.

Erle disapproved. He wrote in a pamphlet published in 1874 that:

> '[p]arishes or congregations will suffer no material injury by the absence of their minister during a few hours of the day for three or four days at the most, and this only at long intervals. To serve on juries is not in any way unbecoming to the ministerial office; indeed, at this moment, clergymen often serve with their own entire acquiescence on grand juries in counties, and not infrequently on coroners' juries. It would be of advantage to the clergy themselves to be brought to the courts, since the experience and teaching which they would there acquire are precisely such as would be most beneficial to them as a class. Their avocations are such as to suffer less from a slight disturbance of arrangement by a transference from the day to the evening than those of men engaged in other professions or pursuits would do. And they would not be subjected, as is the case with the great majority of jurors, to a direct pecuniary loss from the interruption of their business by compulsory attendance at a court.'[118]

Subsequently in *The Jury Laws and Their Amendment*[119] he argued that abolition of the exemption could have no ill-effects: so few crimes remained capital that the bloodshed rationale for the exemption was hardly relevant; the ability of the parish to function without its vicar was demonstrated by the fact that the clergy were able to leave their parishes to attend religious meetings and events such as the Handel festival; curates were available for sudden exigencies. On the other hand, the exemption removed a sizeable group of persons who satisfied the property qualification for jury service from the pool of educated jurors.[120] The Select Committee on Special and

[111] T Erle, *The Jury Laws and Their Amendment* (London, 1882), p 85. J Jervis, *A Practical Treatise on the Office and Duties of Coroners* (2nd edn) (London, 1854), p 250, gives only 'aliens, convicts and outlaws' as unable to sit on coroners' juries.

[112] Bill 111.

[113] *Hansard*, HC, 12 May 1872, col 701.

[114] Ibid, col 702.

[115] Clause 20.

[116] *The Times*, 15 May 1872, p 9.

[117] Clause 5.

[118] T Erle, *A Complete Juries Bill* (London, 1874), pp 8, 9.

[119] T Erle, *The Jury Laws and Their Amendment* (London, 1882).

[120] Ibid, pp 84 ff.

Common Juries estimated that in 1867 there were around 20,000 Anglican clergymen.[121] Witnesses before this Committee were divided as to the wisdom of eliminating the exemption.[122] One witness thought that clergymen were unsuitable to serve because 'they more or less approach all questions with a great deal of prejudice.'[123] Another that a jury service would do them good: 'it would teach them their duty towards their neighbours, as practically as they teach us our duty towards God.'[124] Other witnesses were content with the *status quo*. Erle's endeavours to force the clergy into the jury box were supported by *The Times*. A leading article in 1873 said:

> 'We see no reason why clergymen and priests, and every man who chooses to open a chapel, and call himself a dissenting minister, should be able to escape from a public duty. If they find time to sit on the bench, they might take their turn in the jury-box with the rest of the world.'[125]

The last sentence is a reference to the considerable numbers of clergy who acted as Justices of the Peace.[126]

5. THE TWENTIETH CENTURY

The Juries Bill of 1872 made no headway, a fate shared with several later Bills.[127] In 1913 Lord Mersey's Committee on the Law and Practice of Juries[128] recommended consolidation of jury law in a single statute, but no change to most exemptions (including the clergy).[129] The Juries Act 1922 made registration as an elector the basic qualification for jury service. Those under sixty who satisfied the property qualification had a 'J' placed against their name on the annual electoral list. An exempt person had to apply to have the 'J' removed.[130] As under the Juries Act 1870, those who failed to enforce their exemption were liable to serve.[131] Only one exception was allowed: women vowed members of religious orders living in convents or religious communities could not be marked as a juror 'and shall not, although included on the jurors list, be liable to serve on any jury.'[132] This provision was introduced because women had become eligible to serve on juries as a consequence of the Sex Disqualification Removal Act 1919 and it was felt wrong that women who devoted themselves to religious work should be compelled to do jury service.[133] Monks were not accorded the same benefit. They were assumed to be protected by the exemption for ministers of religion.[134]

The issue of clergy-jurors re-surfaced in the 1965 report of the Departmental Committee on Jury Service (better known as the Morris Committee).[135] This time it

---

[121] *Report of the Select Committee on Special and Common Juries*, Parliamentary Papers 1867–8, vol xii, p 57.

[122] Ibid, pp 9, 14, 43, 51, 57, 65.

[123] Ibid, p 43.

[124] Ibid, p 14.

[125] *The Times*, 6 June 1873.

[126] T Skyme, *History of the Justices of the Peace* (Chichester, 1994), p 452, estimates that about a quarter of all justices of the peace were clergymen.

[127] The last attempt at reform was on 22 April 1874. The Bill (no 18) was withdrawn on 30 July 1874.

[128] (1913) Cd 6817.

[129] Para 270.

[130] For full details, see *Memorandum by the Home Office to the Departmental Committee on the Law and Practice Relating to Jury Service* (1963), p 13. See also *Report of the Departmental Committee on Jury Service* (1965) (Cmnd 2627), para 89. Disputes were settled by a magistrates' court: Juries Act 1922 (12 & 13 Geo 5, c 11), s 1(5).

[131] Juries Act 1922, s 2(2). The argument that this provision implied eligibility is weakened by the fact that those disqualified by a criminal conviction (Juries Act 1870, s 10) had also to serve if their name appeared in the jurors book: *R v Kelly* [1950] 2 KB 164 at 173, [1950] 1 All ER 806 at 810, (1950) 34 Cr App Rep 95 at 104, CCA.

[132] Juries Act 1922, s 8(1), (2)(b).

[133] *Hansard*, HC, 9 May 1922, cols 2103, 2104.

[134] Ibid, col 2107.

[135] (1965) Cmnd 2627.

was not suggested that clergymen should be compelled to serve; quite the reverse. As well as recommending abolition of the property qualification, the Committee said that the existing exemptions—which it recognised did not result in 'absolute exclusion'[136]—should be replaced by three new categories: ineligibility, disqualification, and an absolute right to excusal.[137] The report places religious functionaries, along with those in occupations related to the legal process, into the ineligible class. Justification for clergy ineligibility can, since the abolition of capital punishment in 1965, no longer be sought in canon 18. Instead the Morris Committee gave the following reasons:

> 'A clergyman on a jury might be in a relation of pastoral responsibility, perhaps even as a confessor, towards a parishioner who was involved in the case. There is also the consideration that it would be embarrassing for the clergy to be arbiters in criminal cases, since their calling would incline them to compassion and they might feel it difficult to consider the claims of justice alone. Monks and nuns, particularly those in enclosed orders, would almost certainly lack the necessary experience for service on a jury, and it would be wrong to require them to come out into the world for that purpose.'[138]

The Criminal Justice Act 1972, s 25, Sch 2, Part I implemented the Morris Committee's recommendation. In 1974 the law on juries was consolidated in a single Act. The Juries Act 1974 left the clergy's juror disability intact.[139] The jury liability of ministers of religion was reconsidered by the Royal Commission on Criminal Justice in 1993. The Royal Commission was unhappy that 'clergymen and members of religious orders' are not 'eligible for jury service' and suggested that they be removed from the list of the ineligible.[140] No reasons were given and the Royal Commission did not say whether it wanted a return to the pre-1972 position, or whether the clergy should be in the same position as a member of the general public, that is to say, compellable but subject to the possibility of excusal on an individual basis.[141] The Home Office's reaction was to write in February 1994 to sixteen religious organisations, including some non-Christian groups, for their views. The majority were against a change in the law. In its *Final Government Response* the Government, unsurprisingly, announced that it '[had] decided not to pursue' the Royal Commission's recommendation.[142]

6. CONCLUSION

Members of the clergy (including nuns and monks) are barred from serving on the juries which try men and women who plead 'not guilty' to a charge in the Crown Court. The only other people in this position are those in occupations connected with the legal process who are disqualified because of the specialist knowledge which they may possess; jurors are supposed to be laymen—persons ignorant of the law. Whether the clergy should be ineligible and not merely exempt, as, for example, doc-

[136] Ibid, para 89.
[137] Ibid, para 101.
[138] Ibid, para 120.
[139] The one change it made was to remove the italicised words in the following sentence: '[a] vowed member of any religious order (*whether of men or of women*) living in a monastery, convent or other religious community'.
[140] (1993) Cm 2263, para 27. See also recommendation no 216.
[141] See the Juries Act 1974, s 9, which allows a person to apply for 'good reason' to be excused jury service, and Sch 1, Pt III (amended by the Criminal Justice and Public Order Act 1994, s 42), which gives 'A practising member of a religious society or order the tenets or beliefs of which are incompatible with jury service' automatic exemption from jury service. Of itself religious belief is not a 'good reason' for the purposes of s 9: it may be a 'good reason' if the applicant's religious beliefs prevent him from performing his duty as a juror properly: *R v Guildford Crown Court, ex parte Siderfin* [1990] 1 QB 683 at 695, [1989] 3 All ER 7 at 10, DC.
[142] Lord Chancellor's Department, Home Office, Law Officer's Department, June 1996, p 47.

tors, nurses, dentists, veterinary surgeons and Members of Parliament, is open to question. In Scotland, where the Morris Committee's views had no impact, ministers of religion remain—as they were in England before 1972—persons excusable as of right.[143] There is no evidence that in Scotland exemption without ineligibility presents problems for the clergy or is against the public interest. Current English law prevents those clergy who wish to serve, and whose Church does not oppose jury service,[144] from doing so. This amounts to the denial of an important, if not widely appreciated, civic right.

[143] Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c 55), s 1(2), Sch 1, Pt III, Group E.

[144] These include the Baptist Union of Great Britain, the General Assembly of Unitarian and Free Christian Churches, the Seventh-day Adventist Church and the Congregational Federation. Reform and Liberal Rabbis would also like the option to serve on juries. On the other hand, the *Codex Iuris Canonici 1983*, canon 289, para 2, requires a Roman Catholic bishop, priest or deacon to decline jury service whenever this is possible.