Early Friends' Experience with Juries

IT is often supposed that early Friends were on the whole badly treated by the seventeenth century juries before whom they appeared, the jury who acquitted Penn and Meade in 1670 being thought of as a glorious exception. But a scrutiny of the cases does not altogether bear out this judgement. It is true that there are many instances recorded of prejudiced or subservient juries. But there are many cases also, in addition to the 1670 one, of juries acquitting Friends, or only convicting them under extreme pressure from the Bench. Besse[1] records at least thirty of such cases, and this is the more remarkable, when we remember that he and his sources were interested primarily in "sufferings," and only incidentally in avoidance of sufferings; so that there must have been a number of acquittals by juries not noted in Friends' records at all. For example, the famous case known as Wagstaffe's Case (1667), in which the fining of a jury for acquitting Quakers was the occasion of an adverse vote in Parliament, is not mentioned by Besse.

Before going on to recall some of these acquittals, it may be worth while, in further exoneration of the seventeenth-century juryman, to refer to a few of the difficulties under which he laboured.

Thomas Rudyard's "Dialogue"

There is an excellent discussion of these in the Appendix to *The Second Part of the People's Ancient and Just Liberties asserted*, which is the account by Thomas Rudyard, the Quaker lawyer, of the trial of himself and ten others at the Old Bailey in 1670: this followed immediately after the trial of Penn and Meade, so graphically described in the first part. The Appendix takes the form of a "Dialogue, in a Plain and Friendly Discourse between a Student in the Laws and Liberties of England, and a true Citizen of London;" it is written with considerable literary skill, and the writing of it must have helped to solace Rudyard during his long imprisonment in Newgate.

[1] *A collection of the Sufferings of the People called Quakers, for the testimony of a good conscience, from . . . 1650, to . . . the Act of Toleration 1689*, 2 vols., 1753.

The Dialogue opens with the true Citizen "hasting out" to find a Sheriff friend of his, who may be able to get him excused from the jury-service to which he has been summoned; the treatment of the Penn–Meade jury, which is now the talk of the town, has thoroughly alarmed him. The Student in the Laws then labours, successfully, to bring him back to a sense of his duties as a citizen, by showing him how such treatment of a jury is without justification in law or practice. It may be mentioned, in passing, that Rudyard a little over-states his case here: we, looking back, with our greater knowledge of legal history[1], can see that it was neither so unprecedented nor so wholly irrational as Penn and Rudyard thought. The truth is that ever since its inception, in the early days of the Norman kings, the jury-system had been seen to suffer from one grave disadvantage: what were you to do about an obviously wrong verdict given by a venal, or partial, or over-sympathetic jury? The remedy that evolved, in civil cases, of proceeding against a jury whose verdict was disapproved of, by way of "attaint," though still discussed in the seventeenth century, had long fallen into disuse, so much so that it was debated whether or not it had ever applied in cases of acquittal on a criminal charge. Another device, used in the case of juries who failed to bring in a unanimous verdict, of carrying them round the town in a cart, in an ignominious fashion, till they agreed, was recognized to be barbarous and uncivilized long before the date we are considering.[2] The practice therefore grew up of fining and imprisoning juries for "contumacious" verdicts, and the statement has been made that "in the reigns of Henry VII, Henry VIII, Queen Mary and the beginning of Elizabeth's reign there was scarce one term praetermitted but some grand inquest or jury was fined for acquitting felons or murderers".[3] This fining was done to some extent by the Star Chamber, but by the common law courts as well, and Holdsworth continues:

> It is not surprising that after the Restoration the common law courts should suppose that they still possessed these powers . . . But

1 See the account in Holdsworth, *History of English Law*, vol. I.

2 Though it will be remembered that the Recorder used the same threat to Penn and Meade's jury: "I will have you carted about the City, as in Edward the Third's time."

3 See Holdsworth, *loc. cit.*, p. 344.

it is clear that public opinion was beginning to come round to the view that it was only a corrupt verdict which ought to be thus punished, and that merely to find a verdict contrary to the direction of the court or contrary to the evidence ought not to expose the jury to penalties . . . It was the argument of Chief Justice Vaughan in *Bushell's Case*[1] which finally fixed the law on these lines . . . The only way in which the Crown could now exert pressure to get a favourable verdict was by exercising care in the choice of the jury—a mode of pressure which Charles II and James II freely employed. But such practices were irregular, and they came to an end at the Revolution.

After this a wrong verdict by a jury had to be accepted, until the modern system of appeal courts came into being.

The "Matter of Form" Artifice

The foregoing is only a parenthesis. As far as the parties to Rudyard's "Dialogue" are concerned, neither of them doubts that the practice of fining and imprisoning juries was a palpable infringement of the liberty of the subject, and must be strenuously resisted. But there were other, subtler, means of influencing or imposing on a jury that were equally to be deplored. The first of these is thus given by Rudyard:

> First, Observe the form wherein they draw up their indictments; that is, subtilly to place a small matter of fact, as they call it, in the midst of a whole sea of their decriminating and obnoxious terms, which they call law, that deserve severe punishments wherever they are found, viz. To do an act with force and arms, riotously, routously, tumultuously, seditiously, illegally, deceitfully, subtilly, fallaciously, in contempt of the King and his laws, to the disturbance and affrighting the King's liege people, to the evil example of others, against the King's peace, his crown, and dignity, and such like.
>
> Secondly, the fact in issue, pretended to be committed, although it be never so innocent or lawful (as standing in the street, or highway, in peaceable manner . . .) they environ with many of those foul criminations, thereby to misrepresent the fact or matter in issue, to the jury . . . Against any of which criminal terms, if the jurors object, by reason the evidence did not reach them, the Court presently stops their mouths with saying, "You have nothing to do with that, it's only matter of form or matter of law, you are only to examine the fact." Which the ignorant jurors taking for answer, bring in the prisoners guilty (as they suppose) of the fact or trespass only; but the Clerk of the Peace recording it, demands a further confirmation, saying thus: "Well then, you say A. B. is guilty of the fact or trespass, in manner and form as he

[1] *i.e.* the case brought by the imprisoned jurymen who had acquitted Penn & Mead (1670).

stands indicted, and so you say all?" To which the Foreman answers for himself and fellows, "Yes."

Whereupon the verdict is drawn up, that the jurors do say upon their oaths, That A. B. did, or committed such a fact, with force of arms—did such a seditious action—did meet such persons in a riotous, routous, manner—did such an act deceitfully, subtilly, illegally, fallaciously, in contempt of the King and his laws, to disturb or affright the King's liege people, against the King's peace, his crown and dignity . . . So by reason of the Court's subtilty on the one hand, and the juries' ignorance on the other . . . the Court with safety passes most severe judgments and censures upon such prisoners; and all because the jury have upon their oaths (as was said before) made that innocent action, or pretended fact, criminal, which the law or Court never could have done, had not they in such manner given a verdict, so many degrees worse than the fact in issue was evidenced unto them.

We can recall with pleasure that this artifice was the undoing of the prosecution in the Penn–Meade trial: the jury at first brought in Penn (though not Meade) guilty of "speaking or preaching to an assembly met together in Gracious Street"; and if the Court had accepted this "special" verdict, as some of them were inclined to do, they would no doubt have felt justified in sentencing him, on the basis that this speaking or preaching was illegality enough. But they insisted on the jury delivering their verdict in accordance with the indictment, which contained many of the "foul criminations" (with force and arms, etc.); and this the jury refused to do. When told that they must acquit or convict on the whole indictment, they eventually acquitted.

There are a number of similar cases recorded by Besse[1], which show that there were some juries who were strong-minded enough to resist this artifice. Those in Bristol appear to have been particularly resistant.

The "Unwritten Law" Artifice

On this we may quote Rudyard's lively exposition again.

Student. Sir John Howel your Recorder, and your City magistrates, have a further artifice; that is, to indict all men by the common law, and waive intermeddling with any of the statutes in force against such misdemeanours, as they pretend the persons indicted are guilty of.

Citizen. Pray, what do you suppose their drift is in that?

Student. No other than that they may as well make the law, as

[1] *e.g.* I, p. 48, p. 634, p. 730.

proportion the punishment; for when an indictment is grounded on the common law, and the prisoner desires to have the law read to the jury . . . on which such indictment is grounded, the Court answers, "It's *lex non scripta*, a law not written, therefore not to be produced." By this means the prisoner is incapacitated to make his defence, and the jury kept ignorant whether the offence charged to be done by the prisoner be innocency or guilt: and so the Bench at the Old Bailey acted last sessions, in the case of riots, routs, and unlawful assemblies. And although there be several statutes in force, which point out the persons that ought to be apprehended and punished as rioters and routers . . . yet your Recorder and magistrates pretending to proceed by the common law (non scripta) apprehended quiet and peaceable religious assemblies as riots and routs, and punished them as such . . .

And after the rate of their proceedings, by their abuse of the law, they might have framed an indictment against a man, for ("with force and arms") eating meat at his own table with his wife and children, and at last ushering in the fact committed with these obnoxious terms, as "Against the King and his laws, illegally, and in contempt of his crown and dignity etc." And a jury of their packing would have found them guilty " in manner and form."

In support of this final statement another case recorded by Besse[1] may be cited, where the Recorder told 24 London prisoners, indicted for a riotous assembly with force and arms, etc., that "the words 'force and arms' were but matter of form, and that if a neighbour's bullock broke into another man's ground, the indictment for the trespass must be laid, with force and arms."

Some Friends, for example George Whitehead,[2] attempted to parry this artifice by themselves producing legal definitions of what constituted a rout or a riot. They used mostly for this purpose the Institutes of Sir Edward Coke, or Cooke as they usually called him, James I's Chief Justice, which was the great legal text-book of the age. But Coke's Institutes, however great an authority, had not the force of law; and the Recorder of London, and others whose business it was to state the law for the instruction of the jury, did not hesitate to inform them that Coke was wrong, and that the correct legal definition was wide enough to allow what the accused had done to be brought within it. And this the jury had to accept.

Penn indeed endeavoured to maintain that the English jury was the proper judge of law as well as of fact, arguing

[1] I, p. 469.
[2] Besse, I, p. 464.

that although judges may have to *inform* juries of law, yet the juries' verdict must be as "understood, digested and judiciously made the juries', by their own free will and acceptance, upon their conviction of the truth of things reported by the Bench," and they are still therefore judges of the law.[1] This proposition is not, strictly speaking, tenable; but Penn's conclusion, that in no case can a judge positively *direct* a jury to convict, appears to be correct. Chief Justice Vaughan, in *Bushell's Case*, put it in his usual forceful manner: he is referring to the "Return," or certificate, which in Habeas Corpus cases was required to be delivered to the Court by those having custody of the prisoner, to justify his detention.

> We come now to the next part of the Return, viz. "That the jury acquitted those indicted against the direction of the Court, in matter of law openly given and declared to them in Court."
>
> The words "That the jury did acquit against the direction of the Court in matter of law," literally taken, are insignificant and not intelligible; for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence[2] ever was or can be given to a jury, of what is law or not . . .
>
> Therefore we must take off this veil and colour of words, which make a show of being something, and in truth are nothing.
>
> If the meaning of the words, "finding against the Court in matter of law," be, "That if the Judge having heard the evidence given in Court (for he knows no other) shall tell the jury, upon this evidence, the law is for the plaintiff or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do"—what use can there be for juries . . .
>
> And how the jury should in any other manner, according to the course of trials used, find against the Court in matter of law, is really not conceivable . . .
>
> Therefore always in discreet and lawful assistance of the jury the judge's direction is hypothetical and upon supposition, and not positive and upon coercion; viz, "If you find the fact thus" (leaving it to them what to find) "then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant."

This is now the procedure universally adopted.

Some Cases of Acquittal

1. Samuel Clift of Avening, in 1657. Prior to the Restoration,

[1] In *Truth rescued from Imposture*, in Penn's *Works* (the reply by Penn and Rudyard to a pamphlet criticizing the account of Penn and Mead's Trial), p. 502 of vol. I of the 1726 ed.

[2] *i.e.* "Evidence" as opposed to "direction".

under the Cromwellian system of "toleration within the bounds of reasonable behaviour," there were very few indictments of Friends. Samuel Clift was charged at Gloucester Quarter Sessions with interrupting divine Service. He was acquitted by the jury when it was shown that he had not said anything, but merely stood up.[1]

2. 34 Friends at Abingdon Quarter Sessions in 1662, indicted "for not going to the national worship." Acquitted.[2]

3. Some 50 Friends at Reading Quarter Sessions in 1664, acquitted for refusing the oath of allegiance, the jury not being satisfied that it had been properly tendered.[3]

4. 9 Friends at Hertford Assizes in 1664, indicted "for the third offence upon the Conventicle Act, the penalty of which was banishment." The Grand Jury were dissatisfied with the evidence, and at first refused to find a true bill, but the judge, Orlando Bridgman, threatened them, accusing them of making "a nose of wax of the law," and they reversed their finding.[4]

Leach's Case, 1664

5. This case was quoted both in support of and against the punishing of juries. The jury at the Old Bailey had found 16 Friends "not guilty of meeting contrary to the liturgy of the Church of England."[5] The Judges Hyde and Keeling disputed angrily with the jurymen, and induced half of them to change their minds, but the other six stood firm. Hyde thereupon bound these six over to appear at the King's Bench Bar. It was later alleged[6] that "they appeared accordingly, and the Court directed an information to be brought against them, and upon that they were fined." Rudyard however denies that they were fined[7], and his statement appears to be confirmed by this case not being cited by Vaughan, in his consideration of the precedents, in *Bushell's Case*.

1 Besse, I, p. 209.
2 *Idem*, I, p. 13.
3 *Idem*, I, p. 22.
4 *Idem*, I, p. 245. W. C. Braithwaite, *Second Period of Quakerism*, p. 42.
5 *Idem*, I, p. 401. W. C. Braithwaite, *op. cit.*, p. 45.
6 In the pamphlet criticizing the account of Penn & Mead's trial.
7 In *Truth rescued from Imposture, loc. cit.* (Penn, *Works*, 1726, i, 514). A letter preserved in the State Papers says merely that they were "charged and like to receive a trial at Guildhall." (*Extracts from State Papers*, p. 221.)

WAGSTAFFE'S CASE, 1667

6. This case was a precursor of the Penn–Meade trial and its sequel. It does not appear in Quaker records of sufferings, and we do not even know the names of the Friends involved, but it is reported in some detail in three contemporary volumes of Law Reports[1], and is referred to extensively in the 1670 "pamphlet-war."

Wagstaffe was a member of a jury at the Old Bailey which acquitted a number of Quakers charged with a "second offence" under the 1664 Conventicle Act. Although there was evidence that many more persons than five had assembled, and that they had "Bibles with them, and were suspicious persons and sectaries," the jury declared themselves as unsatisfied that they were met together "to exercise any religious worship," as the Act required.

Keeling, now Chief Justice, directed them to convict, saying that it was for the Quakers to prove that there was some other occasion for their meeting, "otherwise the new law would be elusory;" but this the jury refused to accept. They were required to give their verdicts separately, and all except three or four were for acquittal. After another direction to convict, again refused, they were fined 100 marks apiece (the Penn–Meade jury were to be fined 40 marks), and committed to Newgate until payment.

They appealed first to the Exchequer Court, under the certiorari procedure for removing cases to a higher court; but although the Chief Baron, Hale,[2] was inclined to doubt the legality of what had been done, no precedent for certiorari in such a case could be found, and after adjournment the application was refused. The jury then, like Bushell in the Penn–Meade case, appealed under the Habeas Corpus procedure. The "Return," or defence by those detaining the appellants, was, in this case also, that the jury gave their verdict "against the direction of the Court in matter of law," the defence which Chief Justice Vaughan was to treat so contemptuously three years later. But in Wagstaffe's case, after lengthy legal argument, the jury were refused relief,

[1] W. C. Braithwaite, *op. cit.* p. 45 cites 1 Keble 934 & 938 and 1 Siderfin 272, but not Hardress 409, which gives some additional material.

[2] For Sir Matthew Hale, & his sympathetic attitude to Friends, see note in *Cambridge Journal* II, p. 449.

and they were compelled to pay their fines before they were released.

This case therefore established a clear precedent for the fining and imprisonment of a jury, which might have become firmly established had not Vaughan and his colleagues been able, in spite of it, to come to a contrary decision in *Bushell's Case*. Vaughan's judgment made some attempt to distinguish between the two: "By the record it is reasonable to think the jurors [in *Wagstaffe's Case*] committed some fault besides going against their evidence, for they were unequally fined." But there is no such suggestion anywhere else, and it is likely that this attempted distinction was something of a subterfuge, to justify the contrary decision.

Rudyard indeed was able to claim[1] that the House of Commons strongly disapproved of Keeling's action, and had passed a resolution condemning it, "a resolution not inferior to the Consideratum est of the King's Bench." But such resolution had not of course the force of law.

The Penn–Meade Trial and Others

7. The events of the Penn–Meade trial (1670) itself are well known and need not be repeated here. It is clear that the Court, having obtained a verdict against Penn on the actual fact of "speaking or preaching to an assembly met together in Gracious Street," was convinced that if the jury were sufficiently bullied, they would find him guilty "in manner and form" also; but this the jury refused to do; and when pressed to the limits of their endurance, found him "not guilty" instead. This is the reason for the rather lame attempt that was made, in the subsequent controversy, to maintain that the jury were fined and imprisoned "for giving two contrary verdicts." Penn and Rudyard both deal effectively with this,[2] the latter using the conclusive argument that the "Return" of the cause of the jurors' imprisonment (in *Bushell's Case*) makes no mention of these alleged "contrary verdicts." A few months later he could have added that Chief Justice Vaughan's judgment makes no mention of them either.

[1] In *Truth rescued from Imposture, loc. cit.* See Postscript to *The People's Ancient & Just Liberties asserted* (first part) for details of the resolution.

[2] In *Truth rescued from Imposture, loc. cit.* (Penn, *Works*, 1726, i, 515).

8. The next three cases are all similar to the Penn–Meade case in the browbeating of the jury. In January 1666 Joseph Phipps was tried at Reading Quarter Sessions "for the third offence on the Act of Banishment."[1] Another Friend had just previously been acquitted; his jury was discharged, and the bailiffs were instructed to pick an "honest" jury. Nevertheless this jury, though threatened, could not agree on a conviction; until, having been "kept all night without fire or candle," some of them showed themselves willing to comply, and the foreman said "Guilty," which verdict was accepted, although four jurors had not concurred in it.

9. This was a case of two Nottinghamshire Appeals in 1676 against fines under the Second Conventicle Act.[2] The first appellant, John Sayton, was cleared by the jury, upon proof that he was 60 miles distant from the place at which the Meeting informed against had been held. The jury was abused and dismissed. The second appellant, William Hudson, could not be proved to have been at the Meeting charged against him: "though eight of the jury were picked men, known to be against the appellant, yet the other four stood out, and no verdict was agreed on till about eight at night, when one of those four being taken ill, and needing refreshment, Justice Whaley told them, 'If they did not agree, they should be kept there till they died, and as one of them died, the Court would choose another, till they were all dead.' They were overawed into a compliance, and after the Court was adjourned, privately gave in a verdict against the appellant." (It is interesting that in the Penn–Meade trial there was the same minority of four as in these last two cases. In the Penn–Meade case, however, they were sufficiently persistent to prevail.)

10. 12 Friends were indicted for a riot, at Andover Quarter Sessions in 1681. The Grand Jury, "though menaced and frowned at by the Court," would not find a true bill, even after an adjournment.[3]

11. 10 Cheshire Friends were acquitted in 1683 on an indictment: "a verdict the Court rejected twice, and sent the jury out again, but they persisted in their judgment."[4]

1 Besse, I, p. 26.
2 *Idem*, I, p. 560.
3 *Idem*, I, p. 239.
4 *Idem*, I, p. 110.

12. Sarah Casimire, a London Friend, indicted for a riot in 1685, was acquitted.[1]

Conclusion

A number of other examples might be quoted, but the above are probably enough to show that there were many cases in which a jury, or some of its members, were sufficiently sympathetic to Friends to be unwilling to convict, even where there was substantial evidence that an offence had been committed. On two matters in particular they seem to have shown Friends considerable favour. Firstly, the "Act of Banishment" was most unpopular, and loopholes were sought for and found by juries, to relieve the necessity for a conviction. Secondly, many juries seem to have disliked, as much as Rudyard's Student did, the artifice whereby a number of meaningless accusations were added "as a matter of form" to an indictment, and were expected to be included in the jury's verdict for the Crown.

We can dwell with some satisfaction on the thought that, as in more recent history, the sufferings of Friends have helped in the development of a humaner and juster legal system. Certainly, after *Bushell's Case*, though the browbeating of juries did not entirely disappear, most jurymen were aware that, in the last resort, they could maintain their desired verdict with impunity. This knowledge penetrated to all territories where English case-law held good, and we may close by recalling the retort of a juryman in New York in 1703 to a threat of fine and imprisonment:[2]

"You may hang us by the heels if you please, but if you do the matter will be carried to Westminster Hall; for juries, whether grand or petty, are not to be menaced with threats, but are to act freely."

Alfred W. Braithwaite

[1] Besse, I, p. 479.

[2] R. M. Jones, *Quakers in the American colonies*, p. 235.
The occasion was the trial of Samuel Bownas for "speaking lies and reflections against the Church of England."