Judicial Encounters with Quakers 1660–1688[1]

DURING the reigns of Charles II and James II many Quakers were subjected to the rigours of the penal laws against dissenters and Catholics. As a result, they often looked to the members of the common law judiciary for redress. Unfortunately the "twelve men in scarlet" who manned the courts of King's Bench, Common Pleas and Exchequer were not considered by contemporary observers to be independent arbiters of the law, but rather, were seen as civil servants of the Crown, "stewards of royal power charged with implementing the royal will".[2] They had indeed been long utilized by the Crown for political and administrative, as well as legal purposes, and had been discredited by their decisions favouring the royal prerogative in the last years of Charles I's "personal" rule.[3] Likewise, by 1688 they had again, for the same reason, found themselves discredited in the eyes of the victorious opposition.[4]

Although Whig accusations of judicial subservience to the Stuart kings appear influenced far more by partisan politics than by legal appreciation,[5] the judges throughout most of the reigns of Charles II and James II did hold their patents "during the king's pleasure" and dismissals

[1] In this article quotations from manuscripts have been modernized in spelling, punctuation and capitalization. Old Style dating has been retained. The term "dissenter" means one who attended a religious conventicle as defined by the Conventicle Act (16 Car. II, c.4).

[2] J. S. Cockburn, *History of English assizes, 1558–1714* (Cambridge, 1972), p. 6.

[3] *Ibid.*, pp. 235–6.

[4] Thus, seven judges were excluded from the Act of Indemnity and none of the ten judges sitting at the Revolution were continued in office or ever reappointed (Alfred F. Havighurst, "James II and the twelve men in scarlet", *Law quarterly review*, 69 (1953), p. 523).

[5] This theme is most strongly pronounced in J. Campbell, *Lives of the Chief Justices of England*, (3rd ed.; 4 vols., London, 1874); E. Foss, *The Judges of England* (9 vols., London, 1848–64); W. S. Holdsworth, *History of English law* (16 vols., London, 1922–64). Recent efforts to revise this theme have appeared, notably by J. S. Cockburn, *op. cit.*; Alfred F. Havighurst, "The Judiciary and politics in the reign of Charles II", *Law quarterly review*, 66 (1950), pp. 62–78, 229–52; and his "James II and the twelve men in scarlet", cited above; G. W. Keeton, *Lord Chancellor Jeffreys and the Stuart cause* (London, 1965).

and alterations in the Bench were frequent as the Crown made concerted efforts to find judges who sympathized with royal policies and outlook.[6] Yet the view that the judges were mere tools of the Crown in dealing with religious and political issues in this period is misleading and fails to understand the complexity of their position. In fact, in order to understand their decisions, including their encounters with Quakers, one needs to examine the conflicting pressures brought to bear on the 58 men who, at one time or another, held judgeships in this period.

In the first place, this pressure often took the form of instructions from the Crown to the judges prior to their going on assize circuit.[7] They might, and often were encouraged to enforce the laws against dissenters and Catholics and to exhort the justices of the peace to do the same, or they might be told to enforce particular laws against dissenters while disregarding other laws or to enforce the recusancy laws only against Catholics and not against dissenters.[8] However, the judges were aware that such orders were often simply royal responses to parliamentary pressure, and that privately Charles and James tended to encourage toleration towards dissenters and Catholics, particularly the latter. Therefore the judges learned to tread carefully between their official orders and their private knowledge of the king's own feelings. They knew well enough that if the political climate changed, so too might their circuit instructions. This may, in part, explain judicial deviations from circuit instructions which called for enforcement of penal statutes against dissenters and Catholics.

Yet the judges were also acutely aware of parliamentary

[6] For example, in the reign of James II, of twelve judges at his accession, only three remained when he fled. Seven had been dismissed, as well as five of the fourteen additional judges he had elevated to the Bench (Foss, *Judges*, VII, 201).

[7] Except for Northumberland, Cumberland and Westmorland (each visited once a year), the English counties were visited twice yearly by the judges on assize, normally in Lent vacation during late February and March, and in Trinity vacation during July and early August (Cockburn, *Assizes*, pp. 19, 25).

[8] For examples of such instructions, see Public Record Office, P.C. 2/65, p. 123; J. G. Muddiman, *The king's journalist, 1659–1689* (London, 1923), p. 235; Dr. Williams's Library, London, Roger Morrice MS Ent'ring Book (3 vols.), P, 263, 310, 329, 424; J. Gutch (ed.), *Collectanea curiosa* (2 vols., Oxford, 1781), I, 391–3.

pressure, particularly from the House of Commons, which, while not able to dismiss the judges, could subject them to interrogation or even to impeachment proceedings which would force the king to take action. In 1667 Chief Justice John Kelyng was called before the Commons to answer for his fining and imprisoning of juries, including members of an Old Bailey jury which, at the sessions of May 1665, had found three Quakers not guilty of being at a conventicle. The action of the jury had cost ten of its members 100 marks each and imprisonment till fines were paid.[9] Kelyng's defence of his actions in this case highlighted the primitive notions of evidence in the seventeenth century. The jury had claimed that they had not full evidence that the three Quakers had been assembled to exercise any religious worship "as the Act runs".[10] Kelyng told the Commons that he had asked the jury

> whether these three men had not been twice convicted before for the same unlawful meeting;[11] they answered yea. He asked them whether these were not the same men and known by the same names; they answered yea. He asked them whether there were not above the number allowed by the act; they answered yea. He asked them whether these men were not above the age of sixteen years; they said yea. He asked them whether the place called the "Bull and Mouth" where these persons were taken was not the usual place where Quakers met; they said yea. He asked them whether this meeting was not on a Sunday when these should have been at the church at the public worship of God; they answered yea. He asked them whether they did believe these persons were at a religious service, since it appeared by the Quakers own confession that they met to seek God in the spirit; they answered yea. He then asked them why then they did not find the bill, and caused them to go out again, which they did, and after a long stay came in again with the same verdict not guilty, and said they wanted full evidence that they were met at a religious act, whereupon he did fine some of them as aforesaid.[12]

9 Friends House Library, MS Great Book of Sufferings (44 vols.), II. London, 98 (hereinafter cited as GBS).

10 Sir Thomas Hardres, *Reports of cases . . . in the Court of Exchequer* (London, 1693), p. 409. Apparently the jury was referring to the clause in 16 Car. II, c. 4 forbidding those meetings "under colour or pretence of any exercise of religion in other manner than is allowed by the liturgy or practice of the Church of England".

11 i.e. for two prior meetings of a similar nature.

12 John Milward, *The Diary . . . September 1666 to May 1668*, ed. Caroline Robbins (Cambridge, 1938), pp. 166–7. The action of the jury also demonstrated the legal difficulty of dealing with silent meetings; see below.

Despite the fact that such actions towards juries were relatively common practice,[13] the Commons resolved that "the late proceedings and precedents in fining and imprisoning juries for giving in their verdict was illegal".[14] Yet in 1668, the Commons found itself again involved, and called on Justice Thomas Tyrrell to explain his actions involving a jury.[15] Not until 1671 did the judiciary, in Bushell's case, which arose out of the trial of William Penn and William Meade, uphold the Commons' resolution opposing the fining and imprisoning of juries.[16]

Commons pressure on the judges continued. Chief Justices Francis North and William Scroggs, Justice Thomas Jones, Baron Richard Weston, along with the Recorder of London, George Jeffreys, were attacked for their roles in the Popish Plot trials and the Exclusion crisis. Scroggs and Jeffreys were both forced out of office.[17] In 1680, the Commons ordered a bill to be drawn up to require the king to agree to the judges holding their patents "during good behaviour".[18] Had the Crown and parliament been in unanimity in this period, the role of the judiciary would certainly have been easier, but, in fact, Charles II and James II rarely saw eye-to-eye with parliament, especially in the delicate area of religion, thus placing the judges in a continuously awkward position.

This position was further complicated by the pressures applied while on assize from local officials, anxious for their prejudices and policies to be confirmed by the judges, even where such policies might diverge from those pursued at Whitehall. From the time the judges on circuit came to within several miles of an assize town, they were in close touch with the sheriff and the leading gentry, who

[13] See A. W. Braithwaite, "Early Friends' experience with juries". *JFHS*, 50 (1964), 217–27.

[14] Milward, *Diary*, p. 170.

[15] *Ibid.*, p. 243.

[16] See *Reports and arguments of . . . Sir John Vaughan Kt, late Lord Chief Justice . . . of Common Pleas* (2nd ed.; London, 1706), pp. 135–58 [and the same pages in the first edition, London, 1677. ED.]. This did not, of course, eliminate the judiciary's ability to influence juries.

[17] *Journals of the House of Commons*, IX. 641, 653, 656–8, 662, 685, 688–92, 697–702, 708 (Oct. 1680–Mar. 1681); Keeton, *Lord Chancellor Jeffreys*, pp. 142–7. Jeffreys' resignation was only a temporary setback.

[18] *Commons journals*, IX. 683 (17 Dec. 1680). A dissolution ended this effort.

informed them of the state of local affairs and no doubt interjected their feelings about government policies with which they disagreed.[19] The J.P.s would sit near the judge at the assize trials and often made their presence felt, as also did local ecclesiastical officials. Thus at the August 1675 Somerset assizes, John Anderdon, who had been informed against for speaking against the king, desired a trial before Chief Justice Francis North, but did not receive it. He was, instead, indicted for refusing the Oath of Allegiance,

> and many did account the proceedings very hard against John Anderdon, yet to gratify some bad spirits, the Bishop [Peter] Mew and several church men and others that had been persecutors being present, desiring the restraint of the said John Anderdon that he might not go abroad again a preaching (as they said) as a ringleader of the Quakers, the judge to do them a kindness as its believed, put him off to the next assizes and left him in bonds, though the judge and the court did . . . acknowledge that his declaration and expressions touching the king and his government on the tender of the Oath was the substance of what was required.[20]

Likewise, Thomas Lower writing to George Fox on 15 March 1683/4 implied that the harsh treatment accorded John Fleming, Dorothy Rogers and Mary Clement, all praemunired at Launceston assizes in Cornwall by Chief Justice George Jeffreys, was as a gratification to Sir Jonathan Trelawny, who had sent them to prison; and that Jeffreys' hard dealings with John Peters, his father and the local gaoler were due to William Ceely, J.P., who had complained that the gaoler had allowed young Peters leave from gaol to visit his father.[21]

In several letters and accounts, Francis Howgill noted the pervasive influence of Sir Philip Musgrave and Sir Daniel Fleming at his trial at Appleby in March 1663/4. They tried to incense Justice Thomas Twisden against Howgill and implied that Friends were heavily involved

[19] Cockburn, *Assizes*, p. 65.

[20] GBS, II. Somerset, 144. John Anderdon was subsequently praemunired by Justice Richard Rainsford at Taunton assize in March 1675/6 (*Ibid.*, IV. 214, 226, VI. 57). Cf. *The second part of the continued cry of the oppressed for justice* (1676), p. 40; Joseph Besse, *A collection of the sufferings* (2 vols., London, 1753), I. 611. The date given by Besse is apparently incorrect.

[21] Written from Launceston, in Friends House Library, MS Original Records of Sufferings (8 vols.), III/370.

in the recently uncovered Northern Plot. Howgill added that, despite this, Twisden acted with moderation. Yet Howgill also described the extent to which Musgrave would go to implicate the Quakers:

> by accident I saw a paper giving the account of this assize to the king which was written by Philip Musgrave which I believe will be put in the news book. The evidence was that there came two young men from Leeds to Captain Atkinson and said all was ready in Yorkshire. It was enquired by the judge and court what judgement they were of, and the witnesses said they were *strangers and sober young men*, and Philip hath put it in *Quakers*.[22]

A judicial opinion favoured by local officials might lead to letters to Whitehall praising the particular judge. The Bishop of Exeter, Anthony Sparrow, on 29 July 1668 wrote to Archbishop Sheldon:

> May it please your Grace when you see chief Justice Vaughan to take notice of the great service he hath done at Exceter. Before his comeing the Justices were spirit fal[le]n, & no man allmost durst appeare against the Factions, who had even overrun us, speaking big of the k[in]gs favour to them, and reporting that this Judge had instructions from his Ma[jes]tie to favour them, which being told him, he fully declared the laws against them & freely & heartily declared the bad consequences of permitting their Conventicles.[23]

On the other hand, complaints often flowed into Whitehall about judicial attitudes at assizes. In 1664, Sir Daniel Fleming (1633–1701), of Rydal Hall, J.P. in Westmorland, known for his anti-Quaker feelings, wrote several letters to the Secretaries of State complaining about judicial leniency. On 28 January 1663/4 he expressed his concern over the reluctance of some J.P.s to act against Quakers whom they had committed on several previous occasions. This reluctance was occasioned by the action of the judges coming on circuit, who had "either picked some hole in their mittimus and so set them at liberty, or else fined them next to nothing, whereby they cast all

[22] In a letter to Ellis Hookes, 24.i [March].1663/4, [Appleby gaol], in GBS, IV. 426. Cf. IV. 422–5; Besse, *Sufferings*, II. 11–13; Friends House Library, A. R. Barclay MSS (2 vols.), I/92. (Italics are my own.)

[23] Quoted in Allen Brockett, *Nonconformity in Exeter, 1650–1875* (Manchester, 1962), pp. 30–31.

the odium on those who committed them".[24] Again, on 21 March 1663/4 he wrote:

> I went the 10th unto Lancaster assizes there to justify the committing of George Fox and Mrs [Margaret] Fell unto prison and to acquaint the judges with the state of that county, where meeting with Mr Spencer, . . . one of the deputy-lieutenants and justices of the peace for that county, . . . and other justices, we agreed not to wait upon the judges until we heard their charge, which Judge Twisden gave the 11th, and which, though very good, yet not being so home to our Fanaticks as we expected, and meeting also with some whispers, that the judges would not proceed against any of the Quakers which we had committed, but remand them all to our sessions, we resolved to wait that afternoon upon Judge Twisden to consult with him concerning the same . . . At our first going to wait of him we found (as we had formerly heard) the judge unwilling to proceed against the Quakers in prison, but after we had acquainted him with the state of that county and had intimated unto him how much that would encourage the sectaries and discourage many justices from further acting against them, and had also showed him your letter to clear us from the aspersions of acting against the Quakers upon private piques or solely of our own heads, he was pleased to assure us to proceed against Fox and Fell to the praemunire, to make them two examples and all the rest he would leave to us.[25]

Other pressures on the judges came from what might be called the influence of tradition and from the law. The common law judges were men at the pinnacle of the legal profession. Rather than being young, ambitious careerists, most of the judges were middle-aged men of long legal experience. Many, such as Edward Atkyns and his two sons, Edward and Robert, Hugh Wyndham and his brother Wadham, Francis Bramston, William Mountagu, William Ellis and Timothy Lyttleton were members of families with a long tradition of service in the law and politics, men with solid, respectable gentry backgrounds. Between 1660 and 1688 the average age of a judge on assuming his position was 56, while the average period between his call to the bar and his elevation to the judicial Bench was 30 years. In the interim, many had established thriving legal careers, either in private practice or with the state, serving as judges on the Welsh and Chester circuits, as

[24] In a letter from Rydal to Sir Joseph Williamson, in Public Record Office, S.P. 29/91/68.

[25] In a letter from Appleby to Sir Henry Bennet, in S.P. 29/91/2.

members of the king's legal counsel or, at the local level, as recorders or deputy recorders. In addition, at least 27 judges had sat in parliament.[26] For such men to have been obsequious to the Crown would have destroyed their integrity, that of the law and of the institutions they represented. Courts can reflect the social and political principles of the faction in power without necessarily being subservient.[27]

In relation to the law, the judges, like many other seventeenth century figures, were uncertain about such concepts as Fundamental Law, the Law of Nature or the Law of God. Apparently Fundamental Law was not simply an abstract conception espoused by religious dissenters trying to justify their actions. Chief Justice Orlando Bridgeman at the trial of the regicides in 1660 declared:

> Though this is an Absolute Monarchy, yet this is so far from infringing the people's rights that the people, as to their properties, liberties and lives, have as great a privilege as the king. It is not the sharing of government that is for the liberty and benefit of the people; but it is how they may have their lives and liberties and estates safely secured under government.[28]

To what extent such feelings influenced judicial decisions is debatable, but the dilemma faced by judges involved in making legal decisions which could arbitrarily increase the power of the Crown may help explain the need for such extensive remodelling of the Bench in the later years of the Restoration. However, in more routine criminal trials, the judges tended to ignore such concepts, as well as appeals to Magna Carta. In December 1664 at Hicks Hall in London, at the trial of Martin Groshe, a Friend who was a barber, the latter claimed that the Conventicle

[26] The above figure for average age is clouded to a small degree by lack of information on the dates of birth of several judges. Other information has been utilized to arrive at approximate dates which have been incorporated in the average age. For biographical data on the judges, see Foss, *Judges*, VII; *Dictionary of national biography*; J. Campbell, *Lives of the Lord Chancellors* (4th ed.; 10 vols., London, 1856–7), and his *Lives of the Chief Justices*, cited above. Additional information can be found in biographies of individual judges, and in the records of the Inns of Court.

[27] Havighurst, "The judiciary and politics", pp. 250–1.

[28] Quoted in J. R. Western, *Monarchy and revolution* (London, 1972), p. 13, from J. W. Gough, *Fundamental law in English constitutional history* (Oxford, 1955), p. 140, which refers back to *State trials*, V. 992 (Oct. 1660).

Act on which he was being tried, was against the Law of God, to which Justice Thomas Twisden retorted, "go meddle with your scissors".[29] Likewise, it was reported to parliament in 1667 that when a certain man claimed the privilege of Magna Carta, Chief Justice John Kelyng referred to the hallowed document as "Magna Farta".[30]

In other ways the law affected the judges. The primitive procedure in criminal trials, the vagueness of the common law, whose source, Chief Justice Matthew Hale admitted, was as undiscoverable as that of the Nile,[31] and the often imprecise wording of parliamentary statutes, forced judges to adopt an extremely wide latitude in interpreting the law. This was evident in Quaker trials, particularly in relation to silent meetings. The obvious difficulty, for example, with the Conventicle Act of 1664 was in proving such meetings to be "under colour or pretence of any exercise of religion in other manner than is allowed by the liturgy or practice of the Church of England". In order to gain convictions, judges found it necessary to ignore the literal meaning of the wording and to look instead to the spirit of the statute, i.e. the ending of conventicles whether silent or no. At Hertfordshire assizes in August 1664, Francis Pryor, Nicholas Lucas and seven other Quakers were tried before Chief Justice Orlando Bridgeman on the Conventicle Act. The witnesses admitted the meeting appeared to have been silent. Consequently the grand jury brought in a verdict of Ignoramus, to which Bridgeman replied: "My masters, What do you mean? Will you make a Nose of Wax of the Law? Will you suffer the Law to be baffled? Those that think to deceive the Law, the Law will deceive them." The jury was sent out again and found the bill, "at which the Court seemed well pleased".[32] Now four of the prisoners were tried by the petty jury and Bridgeman summed up, part of which consisted of a fascinating interpretation of a Quaker meeting:

> My masters, you are not to expect a plain, punctual evidence against them for anything they said or did at their meeting, for

[29] GBS, II. London, 80.
[30] Milward, *Diary*, p. 163.
[31] Donald Veall, *The popular movement for law reform, 1640–60* (Oxford, 1970), p. 31.
[32] Besse, *Sufferings*, I. 244–5.

they may speak to one another, though not with or by auricular sound, by a cast of the eye, or a motion of the head or foot, or gesture of the body, for dumb men may speak to one another so as they may understand each other by signs. And they themselves say that the worship of God is inward, in the spirit, and that they can discern spirits and know one another in spirit, so that if you find or believe in your hearts that they were in the meeting under colour of religion in their way though they sat still only and looked upon each other, seeing they cannot say what they did there, it was an unlawful meeting, and their use and practice not according to the liturgy of the Church of England, for it allows and commands when people meet together in the church that divine service shall be read etc. And you must find the bill for you must have respect to the meaning and intent of the law which the king and parliament have in wisdom and policy made.[33]

Equally disconcerting for the judges were the efforts to prosecute Quakers on the common law offence of riot which, unlike the Conventicle Act of 1670, enabled the authorities to imprison Friends. However, juries tended to balk at the implication that the Quakers had met "riotously and tumultuously with force and arms". The prisoners themselves often countered the courts' interpretation of Friends' meetings as riots by citing the definitions of riot by such legal authorities as Sir Edward Coke, Michael Dalton, William Lambarde, William Sheppard and others, but usually to no avail. For example, in January 1683/4, at the Old Bailey trial of Francis Stamper, Jeremiah Snow, James Whitaker and John Brooks before Sir Thomas Jenner, Recorder of London, soon to become a judge of the Common Pleas, the latter provided an illustration of a riot in an effort both to deflate Friends' arguments and to convince the jury. "If a Company of People", he asserted, "should come into an House, and set up an Image and worship it, it is an unlawful Act, yet here is not *Force and Arms*, and yet it may be counted a Riot".[34] Again, at the sessions at the Guildhall in London on 8 December 1684, William Briggins, William Ingram and 22 other Quakers were tried

[33] GBS, I. 466. Cf. W. Smith, *A true, short, impartial relation containing the substance of the proceedings at the assize held . . . at the town of Hertford* (1664). The prisoners were found guilty and sentenced to be transported.

[34] Besse, *Sufferings*, I. 459–60. Cf. Original Records of Sufferings, VI/726, VII/912, 962; Friends House Library, London & Middlesex QM Sufferings Book, 1654–1753, p. 558. The prisoners were found guilty. (Italics are those of Besse.)

for a riotous assembly before the same Recorder. They demanded to know what arms they had, but Jenner insisted 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*".[35]

However, although the method of criminal trials and the vagueness of the law tended to weigh heavily against defendants, they did provide a wide latitude for judges disposed towards moderation. Defendants were also aided by another problem faced by the judges—their heavy reliance on local agencies, often incompetent, ignorant, or prejudiced, for the production of suspects, witnesses, evidence and the return and trial of indictments. "Assize judges could guarantee neither the appearance nor the conviction of criminals."[36] Also, common law "had always demanded the utmost precision in the framing of indictments",[37] and consequently numerous Quaker prisoners were able to regain their freedom by invalidating the indictment. The most notable example was George Fox, who was freed from a sentence of Praemunire by the judges of King's Bench in February 1674/5, Sir Matthew Hale presiding.[38] Likewise, Richard Vickris of Bristol, who had been convicted and imprisoned for not attending his parish church, and whose life was in jeopardy for refusing to abjure the realm, was brought by Writ of Error and by Habeas Corpus to the King's Bench Bar and discharged in Michaelmas term, 1684, Sir George Jeffreys presiding.[39]

From a Quaker point of view, the most serious pressure on the judges was fear. The judges were regarded and often saw themselves as the bulwark against subversion and revolution. This was a result of the lack of an effective police force and the inadequacies of the entire apparatus of law enforcement. In fact, the weaknesses of the law

35 Besse, *Sufferings*, I. 469. Cf. GBS, V. 417. The prisoners were found guilty. (Italics are those of Besse.)

36 Cockburn, *Assizes*, p. 132.

37 A. W. Braithwaite, " 'Errors in the indictment' and pardons: the case of Theophilus Green", *JFHS*, 49 (1959), p. 27.

38 George Fox, *Journal*, ed. John Nickalls (Cambridge, 1952), pp. 704–5.

39 GBS, III. 92–94. The same precision was also required for mittimuses (warrants of committal). For example, see the case of Griffith Jones of Bristol, in Friends House Library, MS Book of Cases (4 vols.), I, 105–6.

enforcement system led to a proliferation of informers. The encouragement of these men and women was "part of the deliberate and consistent policy of the legislature and pervaded the entire body of the criminal law".[40] Yet most people felt that the maintenance of a strong government was the only security for peace and order.[41] Therefore, important political and religious trials often took on the forbidding aspect of morality plays staged as demonstrations of government power against its enemies.[42] The judges, imbued with a crude conception of the value of evidence and often facing ignorant and prejudiced juries, tended to adopt authoritarian attitudes in the courtroom. Their presence became all-pervasive as they superseded the prosecution while bullying and leading the jury to bring in verdicts agreeable to the court. The verdict was therefore, "a corporate act by the judges as well as the jury".[43]

In government circles there was a great fear of plots, particularly in the early years of the Restoration, a not unfounded fear as thousands of former Cromwellian soldiers were re-integrated into civilian life. Informers, or as they preferred to call themselves, "intelligencers", abounded from London to Amsterdam and sent to the authorities at Whitehall a steady flow of information about religious and political dissenters. Their numerous warnings of plots were lent credence by Venner's rebellion in January 1660/1 and by the Northern Plot towards the end of 1663, both of which proved unsuccessful.[44] However, the deep distrust of the Quakers by the authorities was reinforced by J.P.s such as Sir Philip Musgrave and Sir Daniel Fleming, both of whom accused the Quakers of complicity in the Northern Plot. With his usual colourful language, Fleming warned Sir Joseph Williamson of the dangers of the Quakers, "of whom we have too many, this part of the country

[40] L. Radzinowicz, *History of English criminal law*, (1956), II. 146, as quoted in A. W. Braithwaite, "Early Friends and informers", *JFHS*, 51 (1966), p. 109.

[41] W. S. Holdsworth, *History of English law*, V. 189.

[42] J. P. Kenyon, *The popish plot* (London, 1972), p. 116.

[43] *Ibid.*, p. 117.

[44] For the numerous reports from informers at this time see *Calendars of state papers, domestic, 1660–65*; Dr. Williams's Library, G. Lyon Turner MSS (35 bundles), bundle 35, the "Spy Book" of Sir Joseph Williamson.

joining upon that part of Lancashire where George Fox and most of his cubs are, and have been for a long time kennelled".[45] The government had also been keeping a watchful eye over correspondence between Friends. Francis Howgill, writing to Richard Hickson on 16 March 1660/1, warned the latter that Friends' letters were being intercepted on all sides. Howgill's letter, now in the State Papers, was intercepted.[46]

Official fears of the Quakers were also fuelled by the latter's determination to adhere to a set of religious convictions which, when acted upon, broke numerous man-made laws. Friends were seen as dangerous political as well as religious subversives. Their persistent refusals to cease meeting, to take oaths, to give recognizances for good behaviour, to pay tithes or to remove their hats in court were all seen as tending to undermine the authority of the realm. It was this aspect of Quakerism which caused Charles II to question their motives.[47] As late as 1672, an official report to the king and council on the religious condition of London described the Quakers as "rude, saucy, unmannerly with all the ugly names that belong to an ill-bred person; it is no wrong to them to say they are mad and fitter for Bedlam than sober company".[48]

Although few judges would have agreed with the latter description of Friends, there is little doubt that many judges shared the view that Friends were potential subversives. This can be seen in numerous trials of Friends for meeting illegally or for refusing to swear. At Huntingdonshire assizes in March 1660/1, John Crook, Robert Ingram and Benjamin Thornley were called before Chief Baron Matthew Hale for refusing the Oath of Allegiance. After Crook explained that for conscience sake they could not swear, Hale responded that under that pretence, "Jesuits and others might come in and commit

45 In a letter from Kendal, 14 Nov. 1663, in S.P. 29/83/98. For Sir Philip Musgrave's attitude, see above.

46 Written from London, in S.P. 29/32/69. Cf. N. Penney (ed.), *Extracts from state papers* (London, 1913) for other examples of the interception of Friends' letters.

47 For example, see R. H[ubberthorne], *Something that lately passed in discourse between the king and R.H.* (London, 1660).

48 British Library, Stowe MSS 186, f. 16, as quoted in G. Lyon Turner MSS, bundle 9, LN82.

all manner of wickedness and under this colour will deny allegiance, and therefore the opinion of not swearing will destroy all, for there can be no discrimination of persons without it". Nonetheless, Hale asked Crook if he could subscribe to the very words of the Oath leaving out the word "swear", but when Crook asked him if he had power to take his subscription, Hale admitted he had not and then caused the Oath to be tendered.[49] On 7 September 1664, at the sessions at the Old Bailey, Chief Justice John Kelyng in a lengthy speech to the grand jury denounced the Quaker principle of refusing oaths as tending

> to subvert the Government, because without Swearing we can have no Justice done, no Law executed, you may be robbed, your Houses broke open, your goods taken away and be injured in your Persons, and no Justice or Recompense can be had, because the Fact cannot be proved . . . Whereas they pretend in their Scribbles that this Act against Conventicles doth not concern them, but such as under Pretence of worshipping God, do at their Meetings conspire against the Government. This is a Mistake: for if they should conspire, they would then be guilty of Treason, and we should try them by other Laws: But this act is against meetings, to prevent them of such Conspiracy; for they meet to consult to know their Numbers, and to hold Correspondency, that they may in a short Time be up in Arms . . . This is a merciful Law, it takes not away their Estates, it leaves them entire, only banishes them for seven Years, if they will not pay an Hundred Pounds.[50]

Nor did matters improve with the passage of time. In the 1680s came the Exclusion Crisis, the Rye House Plot and Monmouth's Rebellion, all of which led to severe reprisals upon dissenters, especially Quakers, who were also prosecuted under the recusancy laws originally designed against Catholics. Friends' meetings were still the objects of attack. At the August 1685 assizes at York, John Taylor, John Cressick and four others were indicted for a riot before Justice Thomas Walcot, who denounced their meeting as one which, under pretence of worship, was nothing less than a means of planning plots and rebellions like the one in the west under Monmouth. Quaker meetings, he exclaimed, were "devil's meetings", and he demanded the defendants

[49] GBS, I. 508–10. Cf. Besse, *Sufferings*, I. 262.

[50] Besse, *Sufferings*, I. 396–7. Cf. W.S., *The innocency and concientiousness of the Quakers asserted* (1664).

give bond for their good behaviour, which they refused to do and were, as a consequence, imprisoned.[51]

Yet there is ample evidence that even at this time, as throughout the period, the judges differed widely in their treatment of Friends. Reports to the Meeting for Sufferings from Yorkshire and from Surrey in August 1683, from Northamptonshire and from Gloucestershire in March 1683/4 and from Westmorland in July 1685, all indicated the moderation and kindness of the judges at each place.[52] It would seem that the pressures which operated on the judiciary, along with their own personal predilections had not ceased to influence their actions. The words of Bodin relating to the role of the magistrate illustrate the continuing dilemma faced by the judges of late Stuart England:

> the magistrate is many personages of different quality, bearing, appearance and mode of action in one. To fulfil his role he must know how to obey his sovereign, defer to those magistrates who are his superiors, honour his equals, command those subject to him, defend the weak, hold fast against the strong, do justice to all.[53]

In one area pertaining to Friends, the judges appear to have acted with consistency throughout the period—the question of the legality of Quaker marriages. Former judge Sir Francis Pemberton, writing in 1695 commented:

> In my observation, where it hath been in question whether such marriages are lawful or not, the judges have usually admitted it to be given in evidence that the man and the woman have lived together as man and wife, and had between them such and such children who were looked upon as their lawful issue and had generally the reputation so to be, and that the man and woman were always looked upon as sober and honest persons, and upon such evidence have left it to the jury whether the man and woman were man and wife, and whether the children so had between them were legitimate or bastards with this direction, that such cohabitation of a man and woman together as man and wife with the procreation of children between them is sufficient evidence of their lawful marriage and legitimation of their children, and upon such directions it hath been always found by the juries that such issue was legitimate,

[51] GBS, VI. 557–8; Besse, *Sufferings*, II. 165.

[52] Friends House Library, MS minutes of the Meeting for Sufferings III. 1, 17, 123, 127, IV. 137.

[53] Jean Bodin, *Six books of the commonwealth* (Oxford, 1955), pp. 84–5, as quoted in Cockburn, *Assizes*, p. 6.

and so I conceive the juries ought to find, and I never knew that upon such evidence it hath been found otherwise.[54]

In conclusion, it is virtually impossible to generalize about the actions of the judges in this period. Perhaps the comment of J. F. Stephen in relation to the treason trial of Algernon Sidney before Chief Justice George Jeffreys in 1683 can be applied to many of the Quaker encounters with the judges:

> When you have on the one side a prisoner guilty of a crime which many people regarded . . . as an act of virtue, and on the other a judge whose name is . . . steeped in infamy, and when the judge has to try the prisoner according to a law full of fiction and uncertainty, obscure in some points, and irrational in others, it is almost hopeless to do strict justice between them.[55]

CRAIG HORLE

54 Book of Cases, I. 261. Friends, of course, were still liable to prosecution for marriage in the ecclesiastical courts.

55 Sir James Stephen, *History of the criminal law of England* (3 vols., London, 1883), I. 411.