Early Tithe Prosecutions

Friends as Outlaws

IT is one of the paradoxes of early Quaker history that the worst sufferings undergone by Friends were not, as is often supposed, incurred by way of punishment for their religious meetings. Friends indeed suffered grievous, and sometimes ruinous, fines and forfeitures under the Conventicle Acts, and other measures directed against freedom of religious worship. But as regards sufferings by imprisonment, the greater part of these, and especially the long indeterminate sentences that were the hardest part of their trials, arose from their steadfast witness on two subsidiary matters: their refusal to take oaths, and their testimony against tithes.

It should be added at once that in the first case (the refusal to take oaths) the paradox is a deceptive one. The sentences of praemunire incurred by so many Friends because they would not, in terms, take the prescribed Oath of allegiance, were commonly imposed as an alternative, simpler as well as severer, to the penalties appropriate to the illegal holding of meetings. As soon as the judges found that to tender the Oath of allegiance to a troublesome Friend provided a convenient means of keeping him in custody indefinitely, they eagerly made use of it, and the original charge under the Conventicle or other Acts was allowed to remain in abeyance. Consequently, this mode of procedure deserves to be stigmatized as religious persecution as much as the sentences on account of actual meetings.

But with the tithe prosecutions, which were the cause of so many long imprisonments, the position is different. It is doubtful how far the term "persecution" is applicable at all, in the early years of Quakerism. For what else could the tithe-owner do? He could not be expected to share the general opposition of Friends to a paid ministry, which was the real substance of their testimony; nor would he accept the rather specious theological arguments which they used to support it, based on the supposed termination by Christ of the Levitical priesthood for whose benefit tithes were ordained. Moreover, even if he were prepared, out of sympathy or charity, to forgo his own claim, he could not do

so without risking the loss of his successors' right to claim the tithe in future, and for this reason canon law obliged him to prosecute his claim.[1]

The question then arises, why could he not satisfy his claim by some process of distraint, without inflicting on the defaulter a legal suit leading to imprisonment? Does not this imply a degree of vindictiveness amounting to religious persecution? The answer is that there were doubtless many cases in which a vindictive and oppressive attitude appeared; one glaring example of this will be given later. But in general it is true to say that the extreme sufferings of early Friends with regard to tithes arose much less from this cause than from the inappropriate and cumbersome nature of the 17th-century legal procedure.

What Courses were Open to the Tithe-Owner?

We have cases recorded where the tithe-owner who was denied satisfaction simply went and helped himself.[2] This, though possibly the least injurious course in the long run, was quite illegal, and one that a conscientious and law-abiding incumbent might well shrink from. There are many other cases in which he went to one of the local civil courts, usually the county or sheriff's court, and subsequently obtained a justices' order authorizing him to distrain. But there is little doubt that most of these processes were also illegal. The one exception appears to have been that under the "Statute for treble damages" (2 and 3 Ed. VI, c. 13. Sect. 1) the tithe-owner whose tithes had not been paid could obtain, from a jury at the assizes, judgment for treble their value, recoverable as a debt.[3] But this was an expensive process, and no costs could be awarded; it seems to have been little used.[4]

[1] See Phillimore, *Ecclesiastical law*, 1895, p. 1159. For the sake of simplicity I shall not distinguish between those tithes which were payable to clergy and those which were payable to lay impropriators. Friends took the view that both were equally objectionable.

[2] E.g. Besse, *Sufferings*, 1753, I, 677, 763; II, 97.

[3] P. W. Millard, *The Law relating to Tithes*, 1938, p. 7.

[4] See, for two examples, Besse I, pp. 326 and 721. During the Commonwealth and Protectorate, similar awards of treble damages were made by local justices (Fox, *Journal*, ed. Nickalls, p. 394, cf. *Extracts from State Papers*, pp. 9, 109). Awards were also made by the local commissioners appointed to eject or retain ministers. Gervase Benson regarded both these practices as without legal authority (*The Cry of the Oppressed*, 1656, pp. 25, 35). They came to an end with the Restoration.

With this exception, the local civil courts had, properly, no jurisdiction whatever in tithe cases. Friends in London were so advised by Counsel, and this advice was upheld by a decision of the King's Bench in 1668.[1] The tithe-owner could never thus be sure that his suit in a local civil court would not be rendered abortive by a demurrer against jurisdiction, or other action. It will be recalled that George Fox successfully "demurred" in a tithe case to the jurisdiction of Cartmel Wapentake Court[2] (this was the equivalent in the North of England of the hundred court[3] in the South). One incumbent adopted the subterfuge of suing in the county court for "a pretended debt of £16 15s. borrowed, and £3 5s. for tithes. The debt, a mere pretence, was dropped at the trial, but the tithe was granted by the jury."[4] But this device again could hardly be employed by a conscientious man.

There was a good deal of legal support for the proposition that not even the central civil courts had any jurisdiction in tithe cases. The central courts were prepared to assume jurisdiction, as we shall see later, and the question is therefore an academic one. But Gervase Benson, a man well versed in both civil and ecclesiastical law, was convinced that this also was illegal,[5] and in the "Book of Cases" there is a long and interesting opinion, strongly condemning the practice, and arguing that the penal statutes dealing with tithes indicated clearly that jurisdiction lay in the ecclesiastical courts only. The writers sum up their opinion as follows:

> Upon all our inquiry and search we cannot hear or know of any other ground or foundation than the pleasure of those present Lords Chancellor and Barons of the Exchequer enlarging their jurisdiction beyond the plain meaning of the Statutes.[6]

The Ecclesiastical Remedy

What then happened if the tithe-owner pursued his certainly legal remedy, of a suit in the local ecclesiastical

[1] See MS. collection of legal opinions at Friends House known as "Book of Cases" Vol. I, p. 18. The King's Bench case was that of John and Edward Corbett, of Brailes. See also Besse II., p. 18, where Richard Burrough of Arnside procured the removal by Certiorari of eight County warrants.

[2] Fox, *Journal*, ed. Ellwood, Bi-centenary edition, II, p. 355.

[3] Besse reports a demurrer by Bray D'Oyly to the jurisdiction of the hundred court (I, p. 567).

[4] Besse I, p. 662.

[5] *The Cry of the Oppressed*, 1656, pp. 36 et seq.

[6] Book of Cases," I, pp. 235 sq.

court? The court could find in his favour, and make an order for payment. If this produced no result, he could then apply to two Justices of the Peace, who could commit the defaulter to prison until the sentence of the ecclesiastical judge was obeyed. Alternatively, the ecclesiastical court might proceed to an excommunication, and the offender could then again be committed to prison indefinitely, under the procedure *de excommunicato capiendo*.[1] But all this did not produce any payment, and the justices had no power to issue any warrant for distress. The defaulter remained in prison; the tithe-owner remained unpaid; and the impasse was often only relieved by the death of one or other of the parties.

It was partly because of this deadlock that the civil courts in London (usually the Court of Exchequer) were, legally or illegally, appealed to in tithe cases. But there were other reasons also. One, no doubt, was that the ecclesiastical courts functioned with difficulty and irregularly during the Commonwealth and Protectorate. Another was that the local civil courts, even if they were willing, and were allowed, to assume jurisdiction, could not legally adjudicate on the case if the defaulter neglected to appear. In the central courts non-appearance could be dealt with as contempt, and it was therefore no disadvantage to the prosecutor that no appearance to the suit should be made; steps were indeed often taken to secure this. In one case the defendant was attached for contempt for not appearing to a subpoena "which had been served on him but one day before the expiration of its return; so that for him, a poor aged cripple, to have appeared above an hundred miles from his dwelling in that time, was impossible."[2] Again, even if the Friend did make the long journey to London, as many did, he might find himself condemned for a technical non-appearance, either because he had not engaged an attorney,[3] or because he refused to make answer on oath. In the account that appears in Besse of sufferings in Westmorland, the latter procedure, and its consequences, is thus described:

> It was the usage of that Court [*i.e.* the Court of Exchequer] not to receive any answer to Bills exhibited there, but upon oath,

[1] "For arresting an excommunicated person." See *First Publishers of Truth*, p. 362.

[2] Besse I, p. 648.

[3] E.g. Besse I, p. 552. See also George Fox's pamphlet *The Law of God and Lawyers Discovered*, 1658.

> wherefore these defendants, being principled against all swearing, were soon brought into contempt, and attachments were issued for apprehending them. Such attachments are directed to the Sheriff for him to apprehend the party, but in case the party absconds or conceals himself, the Sheriff is to make a return of *non est inventus* (*i.e.* he is not to be found) and then a Sequestration is issued to seize his effects. But through a corruption in the practice of the law, the Sheriff frequently, and on purpose, omits to take the person, and makes a false return of *non est inventus*, and so a Sequestration is obtained, as if he had fled.[1]

By this circuitous course, the tithe-owner was certain of obtaining payment.

The Outlawry Procedure

There was one other procedure open to him. If he decided to risk suing in the local civil court, and the defaulter failed to appear, the tithe-owner could then sue for an "outlawry". This is described by the text-books as the classical example of using a sledge-hammer to crack a nut, because no better nutcracker was provided by 17th-century legal procedure. The old outlawry process, designed to meet the case of a criminal who had fled from justice, had come to be employed also in civil cases, where there was a failure to appear by the defendant. The process was very complicated, and need not be set out at length; its central feature was the "Exigent," or "Exigi facias," a writ addressed to the Sheriff, commanding him that "*you cause to be exacted* A.B." (*i.e.* that his appearance be demanded) "from County Court to County Court, until he shall be outlawed according to the law and custom of England, if he shall not appear." As in the attachment procedure, legal fictions had crept into the practice of the law, and defendants were frequently outlawed whose whereabouts were perfectly well known.[2] Outlaws were liable to be imprisoned indefinitely, but the chief attraction to the tithe-owner was that he could proceed, by means of a Writ of Enquiry, to seize the outlaw's goods.[3]

[1] Besse II, p. 28. Capitals reduced.

[2] E.g. in the case of John Clark, of Greinton, Somerset, "the outlawry was obtained by a false return of *Non est inventus*, whenas he was constantly and publicly about his business near home, and at markets and fairs, frequently in sight of the priest, his next neighbour, who prosecuted him" (Besse I, p. 597).

[3] E.g. Besse I, p. 116.

There are a number of instances of Friends being "run to an Outlawry" or "sued to an Exigent and Outlawry" in this way; Besse records at least ten cases, and there were certainly others.[1]

Fortunately, the outlawry procedure was so complex, and such a meticulous observance of all the formalities was required, that it was nearly always possible to get the sentence set aside by a Writ of Error, if the Friend were so minded.[2] But the attachment procedure in the Court of Exchequer does not appear to have been so susceptible to "error;" usually the best that could be done there, after a Sequestration had been granted, was to move for a Limitation, as George Fox did: "That much defeated our adversary's design in suing out the Sequestration, for this limited the plaintiff to take no more than was proved."[3] But not all Friends were so well advised as Fox, and the sufferings from confiscation, as well as imprisonments, were very great.

As an extreme example of these we may cite the case of William Moxon, of Mardon, Wilts, "an honest, industrious husbandman, but poor," who himself experienced nearly all the forms of prosecution we have been describing, with a few more thrown in. Besse quotes in full[4] Moxon's own plain and dignified record, contained in "a paper, bearing date from Fisherton-Anger Prison the 27th of the Eleventh Month, 1684." The name of the persecuting vicar was William Gunn.[5]

William Moxon's Complaint against the Vicar of Mardon

William Gunn, being one that did turn with the times, had me before Oliver Cromwell's Commissioners, and there he demanded £3 for tithes; and I for conscience-sake refusing to pay him, he conformed to their wills, and so they granted him £8 and gave him an Order to take it from me, and he sent his son and his own two men, and horses with his cart, and broke up my barn-doors and threshed and carried away 21 sacks of corn worth near £20.

[1] It is not, however, correct to speak of Friends under sentence of praemunire as "outlaws", as is sometimes done. The word was only used for those who were outlawed under the procedure just described.

[2] It will be recalled that the outlawry of John Wilkes, 100 years later, was set aside because the Sheriff's writ, which should have read "at the County Court of Middlesex for the County of Middlesex," omitted the first "of Middlesex."

[3] *Journal*, ed. Ellwood, Bi-centenary edition, II, p. 358. For another case of "Limitation," see "Book of Cases," I, p. 196.

[4] II, p. 48.

[5] William Gunn, B.A., 1621; M.A., 1627; rector of Marden, Wilts, 1636 (Joseph Foster's *Alumni Oxonienses, 1500-1714*, ii.619).

Then in the year 1661, he carried me to prison, where he kept me two years; then he carried me to London, and had me before Judge Hide, and there he declared for £100 against me;[1] the next Assizes at Sarum it was brought to a trial before Judge Archer, and then it was brought to £5 for two years tithes, and there he was allowed before Judge Archer treble damages, but afterward the jury brought it to £14, and so he came with three bailiffs, with an execution, and with horses and carts into my barn, and carried away all the corn that was in my barn, which was worth near £30. Then afterwards he pretended that did not satisfy him, and so he got an Exigent in order to outlaw me; and I hearing of it, I went and yielded my body to the Sheriff, and the Sheriff sent me to prison, and so stopped it.

But afterward he outlawed me in another county, contrary to my knowledge, and I being a prisoner at the same time, and having liberty from the keeper to go abroad, he took me up with his Outlawry, and carried me to prison, and so I remained seven years a prisoner on that account; and then an Order came from the King, whereby some of my friends were released, and I being likely to be released also, he hearing of it, threw in a Writ against me, called a Latitat,[2] for £60, and so he kept me a prisoner until I was released by Order of Law. Then in about two or three week's time after I was released, he sued me in Chancery, and a little time after, he sued me in the Bishop's Court, because for conscience-sake I could not pay him privy-tithes, and I there appearing before the Bishop, he tendered me the oath, and I for conscience-sake refusing to swear, was excommunicated for a contempt of their Court, and by a Writ of Excommunication, through William Gunn's occasion, was by a bailiff and apparitor[3] haled to prison in William Gunn's own cart the 26th of the Fifth Month 1679, and so I have remained a prisoner to this very day.

He sued me in the Exchequer, in Chancery, at Common Law and in the Bishop's Court. He outlawed me; he excommunicated me; he took me up seven times with bailiffs and apparitors; he caused me to be brought four times to this Fisherton-Anger prison, and once he carried me a prisoner to London. First and last, and in all, I have been a prisoner on his account about two and twenty years, and only for conscience-sake. And notwithstanding my imprisonment, since the time he had an execution against me, he hath taken away my goods for tithe every year at his own will, contrary to their law.

[1] This was a *Habeas Corpus* action in the King's Bench (Besse II, p. 41); Wm. Moxon "was discharged at that time." Besse also records that the Vicar "subpoena'd" Moxon's two daughters "into the Exchequer" because they had got in their father's corn. It would appear, therefore, that Moxon's first imprisonment was under an Exchequer process, and that the daughters were alleged to be "in contempt." The judges dismissed the complaint against them.

[2] A Latitat ("he lies hid") was a writ to a Sheriff to arrest a defendant who was supposedly in hiding.

[3] An officer of the ecclesiastical court.

William Moxon's was an extreme case, and his sufferings were greatly aggravated by the vindictiveness of the incumbent; but there were numerous cases in which, as we have seen, the tithe-owner allowed the defaulter to remain in prison largely because there seemed nothing else for him to do; many tithe-owners would not know of the Exchequer procedure, or, if they did know, would not care to make the journey to London that it involved.

The 1696 Legislation

It must, therefore, have come as a relief to both sides when, in 1696, statutory sanction was at last given for the recovery by distraint of the monetary equivalent of the tithe, on the authority of two justices. A simple means was thus provided for the enforced payment of the small amounts that were usually at stake, and although the tithe-owner was still permitted to pursue his other remedies, and sometimes did so,[1] such a course became more and more disadvantageous, as the law no longer gave any encouragement to vindictive action. Proceedings in the ecclesiastical court still resulted only in the imprisonment of the defaulter; processes in the Court of Exchequer were prolonged, and by no means all the costs could be recovered from the defendant, so that the prosecutor was almost always out of pocket at the end. Joseph Davis, a Quaker conveyancer, writing in 1820, sixteen years before the Tithe Commutation Act, was able to state with satisfaction that suits of either sort had become very rare; he was clearly of the opinion that most of those who still persisted in suing—instead of applying to the justices—were actuated by ignorance rather than malice, and "in various instances, on information of the consequences attending suits in the Exchequer being given to tithe-claimants, they have desisted from their intention of instituting them."[2]

[1] The cases between 1696 and 1734 were collected by Joseph Besse for the information of Parliament, and the collection published. Besse, in his preface, while admitting that in earlier years there was no easier remedy available to tithe-owners, argues reasonably that oppressive suits could no longer be justified on this excuse, and concludes: (As things are) "Prosecutions of this kind do so nearly resemble persecutions that he who suffers by them can scarce discern wherein they differ" (Besse, *Brief Account*, 1736, p. iv).

[2] Jos. Davis, *A Digest of Legislative Enactments relating to the Society of Friends*, 1820, pp. iv and 63.

It may be mentioned, in conclusion, that in the case of certain parishes in London affected by the Great Fire, tithes had been commuted into a fixed annual sum, recoverable by distraint, as early as 1666. On the whole, therefore, London Friends in this respect suffered less severely than country Friends.

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It is hardly necessary for this *Journal* to add any further tribute to those that have already appeared on this volume, which has been to such a marked extent a labour of love to its compilers. But perhaps a few notes may be added on one or two points of historical interest.

The 677 extracts can be divided between the four centuries of Quakerism approximately as follows:

17th century—118 extracts, of which 44 are in the first chapter (Spiritual experiences of Friends).
18th century—46 extracts, of which 10 are in the first chapter.
19th century—60 extracts, of which 22 are in the first chapter.
20th century—453 extracts, of which 39 are in the first chapter.

The large preponderance of 20th-century extracts is not surprising in a book intended to represent modern Quaker thought. What is more remarkable is the number of extracts from the 17th century, compared with the number from the 18th and 19th centuries; the first 50 years of Quakerism provide as many extracts as the next 200 years together. This is an interesting commentary on the comparative nearness of outlook of modern Friends to George Fox and his contemporaries, and their comparative remoteness from Friends of the two succeeding centuries. The contrast would be still more marked if we excluded the extracts from three Friends, John Woolman, Job Scott and Thomas Story, who between them provide 30 out of the forty-six 18th-century extracts.

On the other hand, of the 19th-century extracts the great majority are from Yearly Meeting Minutes and similar documents (most of them concerned with matters of practice), and there are very few extracts from individual writers. Even Joseph John Gurney is only represented by the famous, but not typical quotation beginning, "We shall never thrive upon ignorance." It is interesting that the evangelical movement has left us this legacy, if no other.