Imprisonment upon a Praemunire
George Fox's Last Trial

THE account in Fox's *Journal* of the long drawn out legal proceedings in 1674 and 1675 which followed his arrest in Worcestershire, is not a very satisfactory one. Fox was by this time "a famous man," as one of the Justices at Worcester called him;[1] it is clear that there was something of a conflict between those who wished to apply the praemunire procedure against him in all its rigour, and those who were disposed to regard and treat him favourably. This made for intricacies in the proceedings, which it is not easy now to unravel.

A major enigma occurs at the end of the story, during Fox's habeas corpus appeal to the King's Bench. Thomas Corbett,[2] a Welsh Counsel, introduced to Fox by Richard Davies of Welshpool, and now pleading on Fox's behalf, suddenly produces the surprising argument that no one can be lawfully imprisoned on a praemunire. Before quoting the account of this in Fox's *Journal*, a minor enigma may be mentioned; what is the relation between this account and that in Richard Davies' Life,[3] which is almost word for word the same? At first sight one might suppose that Davies had copied it from the *Journal*, but it seems strange that he should have done so without any acknowledgment, and on the whole it would appear more likely that it was Davies' account which was copied, Fox having this before him, in some memorandum form, when he was dictating this part of the *Journal*; the same memorandum would then have been subsequently incorporated also in the *Account of Richard Davies*. Stylistically, the passage reads more like Davies than Fox.

The narrative in the *Journal*[4] is as follows:

> We came to London on the 8th of the Twelfth month, at the latter end of the term called Hilary Term, and on the 11th I was brought before the four judges at the King's Bench.

[1] Fox *Journal*, ed. Nickalls, p. 675.

[2] For Thos. Corbett and his helpful relations with Friends, see the *Account of Richard Davies* (first published in 1710) *passim*, and note in *Cambridge Journal*, ii, p. 450. He practised in London as well as in Wales.

[3] First edition, 1710, pp. 189ff.

[4] Ed. Nickalls, pp. 704-5.

And Counsellor Corbett pleaded and said that they could not imprison any man upon a praemunire.

And Judge Hale, the Chief Justice,[1] said, "Mr. Corbett, you should have come sooner, at the beginning of the term, with this objection". . . .

And Judge Wild[2] said, "Mr. Corbett, you go upon general terms, and if it be so, as you say, we have committed many errors in the Old Bailey and other courts, and we must have time to look in our books and consider the statutes."

And Counsellor Corbett affirmed again they could not imprison any man upon a praemunire.

But the judge said, "There is summons."

"Yes," said Corbett, "but summons is not imprisonment, for summons is in order to a trial." So it was deferred till the next day.

The next day they considered the errors of the indictment and meddled no more concerning my imprisonment. And they found errors enough to quash the sentence of praemunire against me.

The question that at once occurs to the modern reader is, How was it possible that this crucial point, as to the power to imprison, in the centuries-old praemunire law, could really be still in doubt? To answer this needs an historical excursus.

The praemunire procedure and penalties derive from certain fourteenth-century statutes, of which the most famous were those of Edward III in 1353, and of Richard II in 1392; they were designed to put a sufficient weapon in the hands of the Crown if interference by the Pope with English ecclesiastical affairs should be carried too far. This was thought especially necessary at the time, as the Papal Court had been removed to Avignon, and was very much in the pocket of the French King. Like other legal machinery in the Middle Ages, the primary object was to provide means of forcing any culprit to appear before the King and his Council: once there, there was no difficulty about dealing with him adequately.

The operation of the Statutes was at the discretion of

[1] For Sir Matthew Hale, see note in *Cambridge Journal*, ii, p. 449. Mgt. Fox's testimony to her husband, published with the *Ellwood Journal*, refers to this episode, and says, of Hale and his attitude to Fox: "A very honest tender man, and he knew they had imprisoned him but in envy." The wife of John Roberts, of Cirencester, was related to Hale.

[2] Sir William Wilde, formerly Recorder of London, was a member of the Bench at the Old Bailey who had sentenced John Crook and others to the praemunire penalties (including imprisonment) in 1662 (Besse, *Sufferings*, 1753, i, p. 372).

the Crown, and they were apparently very little used; the bringing of Appeals to the Papal Court, which was one of the principal abuses legislated against, continued; there was probably less danger involved in allowing this, after the return of the Curia to Rome. But the statutory provisions remained, and in course of time acquired a somewhat fictitious aura, being thought of as the traditional bulwark of the State in the age-long struggle against Papal pretensions, and they were astutely made use of by Henry VIII and his advisers in connection with his breach with Rome. The praemunire penalties were now attached by Statute to other actions closely or distantly related to asserting the supremacy of the Pope; for example, a dean and chapter who should refuse to elect a bishop nominated by the Crown were, and still are, liable to praemunire. The penalties listed in the old Statutes were now treated as constituting the punishment for the offender, rather than as the means of bringing him before the King's Courts. There seems to have been no case in which they were actually imposed: the threat was enough.

The Act of James I (1605) out of which the Quaker prosecutions arose, was a further development. It is headed "For the better discovering and repressing of Popish Recusants," and was enacted just after the Gunpowder Plot. One of its provisions was, that an oath of allegiance, in a prescribed form, might be tendered to any person, who would incur the praemunire penalties if he refused, after sufficient notice, to swear to it. The required form of oath, among other things, disclaimed, in set terms, the subversive doctrine that any action by the Pope could release one of the King's subjects from his allegiance.

There is no instance recorded of any Roman Catholic having been "discovered and repressed" under the Act, on any refusal to take the oath.[1] But on the Restoration of Charles II, the Oath of Allegiance was very widely tendered to those who were suspected of disaffection, and among others to Quakers. The Quakers all refused to take the Oath, not, as they were at pains to make clear, from any lack of acceptance of the subject-matter, but because their religious principles forbade them to swear. The news of this refusal

[1] See comments on this anomaly by both John Crook and Francis Howgill at their praemunire trials (Besse, i. 379, ii. 16). See also *First Publishers of Truth*, p. 355.

quickly spread among the judiciary, and almost at once it became the accepted practice for getting rid of a troublesome Quaker to tender him the Oath, in the certainty that he would refuse, on grounds of conscience alone, to take it, and so incur the penalties of a praemunire. The attitude is well expressed in a letter of Sir John Robinson to Lord Arlington's secretary in 1671:[1]

> They [the Quakers] are a besotted people, of two sorts, fools and knaves; of knaves some of them are rich men, and there's no other way to proceed against them but to indict them upon the Statute of Premunire and seize their estates and imprison them during the King's pleasure. If this rule was generally followed and kept close to, it would break them without any noise or tumult.

It was a gross perversion of justice, and there is evidence that some members of both the judiciary and the administration were not happy about it; but an exaggerated reverence[2] for the sanctity of the oath, combined with dislike of the Quakers, made it just tolerable to public opinion. There was apparently no thought whatever that the penalty of imprisonment was illegal under a praemunire. There had been little or nothing in the way of precedent, as we have seen; but Coke's *Institutes*, the great legal authority of the age, included "imprisonment at the King's pleasure" among the penalties. Few Friends employed lawyers to advise or represent them, and the correctness of this view had never been challenged. It must have come therefore as a bombshell to the crowded Court at Westminster Hall, in February, 1675, when Counsellor Corbett submitted, with complete confidence, that all praemunire imprisonments had been illegal.

Corbett's Reasons

On what did Corbett base this contrary opinion? The account in the *Journal* (and in Richard Davies) does not throw much light on this, and probably most of the Friends present had little understanding of the position. Fortunately we have Corbett's own statement of his views preserved in the

[1] *Extracts from State Papers*, p. 337 (Cal. S.P. Dom. 1671-2, p. 40).

[2] This appears especially from the wording of the "Quaker Act" of 1662, whose first-expressed purpose was to impose further penalties on those who asserted that oaths were contrary to the will of God.

first volume of the "Book of Cases" at Friends House.[1] Among a number of questions put to him by Friends, shortly after George Fox's release, was the following:

"Whether it be not illegal to imprison upon the refusing to take the oath of allegiance?"

To this Corbett replies:

> As to the second query, I answer that notwithstanding the general opinion and practice hitherunto, that judgment of imprisonment ought to be given, and hath been given, in that case; yet I conceive it is not warranted by any law or statute; for that the Statute of 3 Jas. c. 4, which enjoins the taking of that oath, states that the parties refusing shall incur the pains and penalties mentioned in the Statute of Premunire made in the 16th year of King Richard the Second Chapter the 5th, the words of which are these vizt: "To be put out of the King's protection, their lands and tenements goods and chattels forfeited to the King, and to be attached by their bodies and brought before the King and his Council to answer a Process of Premunire facias to issue against them to bring them in to answer the contempt." Note that it hath not such words as the former Statute of Premunire made 27 Ed. 3rd. Stat. 1.c.1, which says of their bodies "Shall be imprisoned and ransomed at the King's will." And this exception against such imprisonment was taken by me and assigned for one of the errors upon such a judgment, given against George Fox at Worcester Quarter Sessions in Hilary Term last in the King's Bench; and after I had given my reasons against the judgment of imprisonment the Court doubted and said they must, if we insisted thereupon, take time to consider of it. But the judgment being reversed for another error which I had assigned, there was no occasion to insist further upon the said error in giving judgment of imprisonment.

In other words, Corbett is saying that the only penalties invoked by the Statute of James I for refusal to take the Oath, are those of forfeiture of property and the loss of the King's protection,[2] and that the provision for "attachment by their bodies" is for the purpose not of permanent imprisonment, but only of arrest pending trial, or, as it was called in the account of the King's Bench proceedings already quoted, of "summons."

Corbett received many congratulations after the hearing

[1] Pp. 16 and 17. These volumes consist for the most part of MS. copies of legal opinions obtained by Friends. I do not think this opinion of Corbett has previously been printed.

[2] This is sometimes called "outlawry" by modern writers; but as outlawry proper in the 17th century arose from a quite different legal procedure, also sometimes suffered by Friends, it is best to keep the two distinct.

from his fellow-lawyers, including one of the judges, who was probably relieved that the rightness or wrongness of Corbett's submission had not had to be decided.[1] Richard Davies, who had introduced Corbett to Fox, was naturally elated, and records triumphantly in his *Account* that "that trial put an end to all the Praemunires in the nation." This can only have been true temporarily; our records do suggest that Praemunire processes ceased for some years, but there was a general lull in prosecutions at the time, and this may have no special significance. It is noteworthy, however, that Walcott, a Counsellor who had been present at the King's Bench hearing, when appointed a Judge in North Wales two years later, refrained from applying the Praemunire procedure.[2] But with the revival of persecution in the early 'eighties, the Praemunire processes were also revived, and at the time of the General Pardon following James II's accession, we have records in Besse of Friends suffering imprisonment under Praemunire in many different parts of the country.

Was Corbett Right or Wrong?

It would indeed be the crowning irony if Friends, who suffered so grievously and unjustifiably under Statutes directed against those who should assert Papal supremacy, should also prove to have suffered illegally. But I think that if they had been put to it, the Judges would have been able to over-rule Corbett on this point. Corbett does not mention the concluding words of the Statute of Richard II: after the words he quotes, it continues:

> or that process be made against them by praemunire facias, in manner as it is ordained in other statutes of provisors[3] and other which do sue in any other court in derogation of the regalty of our lord the King.

This would appear to import into the Statute of Richard II the provisions of the Statute of Edward III, and so make the penalties laid down in that Statute also, part of

[1] It looks as though the purpose of Corbett's communication, during the adjournment, to two of the judges, Hale and Wilde (see Rd. Davies *Account*), was to suggest that the other "errors in the indictment" should be considered first.

[2] Rd. Davies, op. cit., p. 196.

[3] "Provisors" were those appointed by the Pope to vacancies in English benefices; this was another potential abuse.

the praemunire penalties incurred, on the refusal of the Oath, under the Statute of James I. This must have been what Coke thought.

Any doubts expressed by the judges at Fox's trial do not seem to have been shared by the parliamentary draftsmen, for in an Act passed four years later,[1] where the praemunire penalties are again invoked, they are still imposed by reference to the Statute of Richard II only. And it should be noted that when Friends consulted another Counsel[2] in 1683, they were advised unequivocally "that on incurring penalty of a praemunire, the accused was to remain in prison during the King's pleasure," though no reasons were given for the opinion. It is therefore probable that Thomas Corbett was wrong and that Friends' imprisonments were legal, though unjustified. But there remains sufficient doubt to enable an interesting case to be made out if at some future date, for example, a dean and chapter should refuse to elect a bishop nominated by the Crown.

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[1] Habeas Corpus Act, 1679.
[2] Joseph Tily, of Lincoln's Inn (Book of Cases I, p. 127).

Recent Publication

Guide to the Nottinghamshire County Records Office. Prepared for the Records Committee by P. A. Kennedy. (Notts. County Council, 1960.)

Official records of the County Council. Quarter sessions. B. Oaths (QSO), includes 6 rolls of "Oath rolls of Dissenting Ministers, Quakers and Papists, 1737-1811."

Family and estate deposits include that of Vere-Laurie of Carlton, among the documents of title relating to Carlton, Notts. are 10 documents *re* Quaker Meeting House (1725-1802).

Family papers of Crofts of Sutton-in-Ashfield, include miscellaneous testamentary and other papers of Emlyn Crofts, a Quaker, 1855-1890 (95 docs.).

Among the small deposits and individual items is that of J. Lomax, of Woodthorpe, Nottingham (DD. 17). List of Notts. and Derbs. Society of Friends Records, 1668-1950.