"Errors in the Indictment" and Pardons

The Case of Theophilus Green

A POINT that sometimes puzzles readers of Quaker history is that early Friends, so full of troublesome scruples in other directions, seemed somewhat "unscrupulous" in their use of one method to evade conviction; —this method being the search for "errors", that is, technical flaws, in the legal documents under which they were indicted. It has surprised some readers, for example, to find George Fox's account of the long legal struggle that followed his arrest in Worcestershire, concluding with words of sober, but undisguised, satisfaction:

> So that I was set at liberty . . . upon a trial of the errors in my indictment, without receiving any pardon or coming under any obligation or engagement at all. And the Lord's everlasting power went over all to his glory and praise, and to the magnifying of his name for ever, Amen.[1]

In our eyes the acceptance of a pardon might seem less unsatisfactory than to escape by reason of technical flaws. This method of evasion may appear to us not only unworthy, but inconsistent with the Quaker testimony against attaching importance to "the letter".

I think that the severity of such a judgment will be relaxed when we consider the circumstances affecting criminal trials in the 17th century. Before doing so, however, it may be worth while to look at an example of this sort of defence, selecting for this purpose a case not readily accessible, the appeal of Theophilus Green and other Friends against sentences of praemunire.

Theophilus Green was an interesting man who would make a good subject for a biographical essay: a short narrative of his religious experiences was written by him, or at any rate published, when he was about 80.[2] He was a Thames waterman by trade, and was for some time in the employment of Cromwell: his is one of the names available to the editors of Fox's Journal to substantiate Fox's statement that (in 1655): "A great convincement there was in London,

[1] *Journal* (ed. Nickalls), p. 705.

[2] *A Narrative of some Passages of the Life of Theophilus Green from his Youth*, 1702.

and many in Oliver Protector's house and family."[1] It is noteworthy that Green's own *Narrative* makes no reference to this employment by Cromwell; and indeed the nature of his trade itself only appears incidentally, from the fact that goods taken from him by legal process included oars, poles and a barge that had cost £51—an interesting example of the way in which all mundane matters were excluded from these spiritual autobiographies.

The events leading up to Theophilus Green and nine other Friends being "run into a praemunire" in 1671, for refusal to take the oath of allegiance, are related in Green's *Narrative* (and by Sewel and Besse), but their appeal to the King's Bench is only found in the Law Reports.[2] The appeal was heard during the Michaelmas term of the same year, and was based on the following errors in the indictment:

1. That the indictment was for refusing the oath contained in a Statute of James I. But the form of oath contained in the Statute refers specifically to James I; therefore it is no offence against the Statute to refuse an Oath of allegiance to Charles II.[3]

2. That the judgment, instead of reading "that the prisoners *are* committed etc." (*committuntur*), ought to have read "that the prisoners should be committed etc." (*committantur*), the judgment itself being distinct from the execution of the judgment.

3. That the Statute was misquoted in the indictment: instead of referring to the *See* of Rome, the indictment says *Sea* of Rome, "which makes it to be no sense".[4]

4. Similarly, that "the words of the Statute are, 'I do declare in my Conscience before God', whereas the indictment is, 'I do declare in Conscience', and leaves out 'my' ".

[1] *Journal* (ed. Nickalls), p. 202. As authority for Green's employment by Cromwell, Norman Penney relied on the statement of Sewel: it does not seem to have been noted that corroboration can be found in an entry in the State Papers (Cal. S.P. (Dom.) 1655/56, p. 144), referring to Theophilus Green as "one of his Highness's" (i.e. Cromwell's) "watermen". A later passage in the State Papers mentions Green's boats as having been used "in seizing dangerous persons that passed to and fro on the river during the late rebellion" (Cal. S.P. (Dom.) 1659/60, p. 252). This was the premature rising of Sir Geo. Booth and the Royalist party in July and August, 1659.

[2] I Ventriss 171.

[3] Cf., for this argument, Besse, I, p. 373n.

[4] Even this is not so far-fetched as it appears. Holdsworth, *History of English Law*, III, p. 618, quotes a case in which the misspelling of *murdravit* as *murderavit* was fatal to an indictment.

5. That the Sheriff was ordered by the indictment to return twelve "good men and true" to act as jury, "who had no kinship either with the King or with any other party". But there is no rule of law against the King's kindred being returned, nor could they be successfully challenged; the suggestion that they could, therefore, invalidates the indictment.

Of these "errors" the Court had no difficulty in disallowing all but the last,[1] judgment on which was reserved until the following term; but that in this case also the decision was against the prisoners can be deduced from the fact that they remained in custody until released under the "Great Pardon" during the following summer.

We can now return to our question: under what circumstances was it possible for such trifling errors and quibbles to be seriously put forward as a reason for reversing a judgment, and seriously debated upon by a full bench of judges. In answering this it must be remembered that in the seventeenth century the scales were in general heavily weighted against the prisoner. We do not always realize this, because the legal forms were much the same as they are to-day, but the rules of procedure behind the forms were very different. No prisoner was entitled as of right to know what he was accused of until he appeared for trial; we read of several Friends being refused information as to the contents of their indictment.[2] Nor was a prisoner entitled as of right to obtain legal advice before his trial, or legal representation during it; he was sometimes allowed it as a favour, but it was often refused.

Again, the seventeenth century attitude to evidence was quite different from our own; in our eyes it appears absurdly credulous. There was little thought of any need for corroboration, or for weighing the credibility of a witness. The sanctity of the oath was regarded as sufficient to authenticate the most improbable statement; it is scarcely an exaggeration to define the principle as being, "If a man came and swore to anything whatever, he ought to be believed".[3] We can see, from our own Quaker examples, how this system played into the hands of the professional informer; it also shows how salutary was the steadfast Quaker opposition to the idea that

[1] One other obscure error was allowed, but held not to affect the judgment.

[2] E.g. Francis Howgill at Appleby in 1664 (Besse II, p. 15).

[3] Holdsworth, *op. cit.* IX, p. 232.

an oath gave any additional validity to a statement. When the justices swore, at Lancaster in 1664, that they had tendered the oath to George Fox according to the indictment, and he showed this to be impossible, because the dates in the indictment were wrong, he had every justification for adding:

> Is not the court here, that have sworn so against me, perjured persons, and have not you false swearing enough here, who put the oath to me that cannot swear at all because Christ forbids it?[1]

Moreover, the evidence for the prosecution could not be effectively challenged by cross-examination, because of the rule of procedure which forbade "breaking in upon the King's evidence".[2] Nor could a prisoner rebut the witnesses by giving contrary evidence himself; neither then, nor for long afterwards, was the accused an admissible witness in his own case.

Against these grievous handicaps to any successful defence, the prisoner's one effective weapon was this, that the Common Law had always demanded the utmost precision in the framing of indictments; consequently, if it could be shown that the indictment had not been correctly worded, the prisoner was entitled to be discharged. The effectiveness of this weapon was limited: as the prisoner did not normally see his indictment before the trial, he had to raise his objections extempore, and without legal assistance (unless he was granted an adjournment), or else pursue them by the cumbersome and expensive method of a habeas corpus appeal. But with all its shortcomings, the defence of "errors" was universally regarded as the fundamental means of protection against the tyranny of the law; and the art of skilled advocacy lay, not, as now, in disproving the evidence (which was usually impossible), but in invalidating the indictment by the discovery of "errors". Any attempts to whittle down this means of defence by statutory exceptions were strenuously resisted. One of the few statutes which modified the Common Law in this respect was an Act of 1605-06 providing that indictments for recusancy (i.e. non-attendance at Church services—originally directed against the "Papists") should not be invalidated for lack of form. The favoured position thus accorded to recusancy indictments may have been one

[1] *Journal* (ed. Nickalls), p. 479.

[2] See, for an example of this, the account of Thos. Rudyard's trial in *The Second Part of the People's Ancient and Just Liberties asserted*, 1670.

reason why the authorities were so loth to admit that the procedure was inapplicable in the case of Protestant dissenters.

I think that enough has been said to indicate that it would be "reading history backwards" with a vengeance to suppose that Fox and his contemporaries would regard the defence of "errors" as in any sense pettifogging or unworthy: to them it was one of the bulwarks of the "fundamental laws of England", to whose authority they were so constantly appealing. Looked at in its historical setting, there is no longer any cause for surprise in Fox's expressed attitude in 1674, when, speaking of his refusal to accept a pardon, he says:

> For I had rather have lain in prison all my days than have come out in any way dishonourable to truth; wherefore I chose to have the validity of my indictment tried before the judges.[1]

Whether, however, this attitude to pardons was a wholly reasonable one is another matter, and some brief notes may perhaps be added on this.

At the end of the Report on Theophilus Green's Case, the following passage occurs:

> "They" (the Court) "told the Prisoners, (who were Quakers and had brought a paper which they said contained their acknowledgment of the King's authority, and profession to submit to his government; and that they had no exception to the matter contained in the oath, but to the circumstances only, and that they durst not take an oath in any cause, which they prayed might be read, but could not be permitted) that their best course was to supplicate his Majesty in the meantime for his gracious pardon".

The Court here was evidently sympathetic, and endeavouring to assist the prisoners as far as it was able; similarly Charles II, when told that George Fox had scruples against a pardon "as not agreeable with the innocency of his cause", is said to have replied that "many a man that was as innocent as a child had had a pardon granted him."[2]

What then was the nature of Friends' scruples? This appears most clearly in a passage in George Whitehead's Autobiography[3] dealing with the Pardon of 1672, of which he was the prime mover. The King was persuaded, following his "Declaration of Indulgence to Dissenters", to exercise the royal prerogative of mercy in favour of 491 prisoners,

[1] *Journal* (ed. Nickalls), p. 702.
[2] *Journal* (ed. Nickalls), p. 701.
[3] *Christian Progress*, 1725, pp. 350 et seq.

mainly Friends; it was one of the most spectacular undertakings in Whitehead's long life, and is narrated by him with quiet satisfaction. Yet it almost foundered at its inception through the doubts expressed by Thomas Moore (when he and Whitehead interviewed the King and afterwards the Attorney-General) as to whether Friends could accept a pardon. The King waved the objection aside, with the same assurance that was later given in the case of George Fox: "Oh, Mr. Moore, there are persons as innocent as a child new born, that are pardoned"; but the Attorney-General was less magnanimous: "He took up Thomas somewhat short, telling him, 'Mr. Moore, if you'll not accept of his Majesty's Pardon, I'll tell him, you'll not accept thereof.' "

Whitehead, with his customary skill, was able to smooth things over until he could get Moore to himself, and his record of the ensuing discussion is illuminating.

> T.M. His scruples, or objections, against the word Pardon, or its being necessary to our suffering friends, were upon these tender points:
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> 1. That they being innocent, and no criminal persons, needed no pardon, as criminals do.
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> 2. That their testimony for Christ Jesus allowed of no pardon; neither indeed can we allow, or accept of any man's pardon in that case, singly considered; we cannot give away the cause of Christ, or our sincere obedience to him, as any offence, or crime, needing any pardon, or forgiveness from men; nor does Christ require us to ask it of him, but accepts and approves of us, in that wherein we truly obey him.

To this Whitehead replied:

> But then, on the other hand, we must reasonably allow of this distinction—that wherein we, or our friends, were judged or condemned by human laws, and the ministers thereof, unto imprisonments, fines, forfeitures, praemunires, confiscation of estates to the King (and power given him to banish us) and thereby we made debtors to him (though unduly), the King has power to remit, pardon or forgive what the Law has made a debt to him, as well as any creditor has power to forgive a debt owing him, and so to pardon and release his debtor out of prison.
>
> The case is plain, and the distinction evident.
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> Neither Pope, Priest, nor Prince, can acquit or pardon men in the sight of God, for offences against him, but the King may forgive debts owing by law to him, and release and reconvey his subjects' estates by law forfeit to him, or else he has less power than any of them.

This cogent line of reasoning convinced Thomas Moore; and the Pardon seems to have been approved and welcomed

by the main body of Friends, though it may not have been usually spoken of by that name.[1] Whether George Fox would have approved, we do not know, as he was absent in America. But it is noteworthy that in spite of his scruples in his own case 2 years later, we find him, a decade later still, taking part in the deliberations that led to the Pardon on James II's accession.[2] It may therefore be that his attitude in 1674 arose rather from special considerations, as to what would be best for the reputation of himself and Friends at the time, than from any fixed principle. This seems to be what is implied by the phrase "any way dishonourable to truth" quoted above. The extant correspondence between Fox's advisers shows clearly the "political" aspect of their deliberations, and also the modest feeling of triumph that resulted from his successful discharge under the writ of error.[3] The triumph might, however, have been a hollow one, if the oath of allegiance had been again tendered to Fox after his discharge, as some of the judges desired.

It may be mentioned, in conclusion, that neither Fox nor other Friends appear to have felt any scruple about accepting release by the King's order, as long as such release was not called a pardon—this was in fact how Fox was released from his Scarborough imprisonment in 1666. But Charles II seems later to have been advised that the royal prerogative of mercy could only constitutionally be exercised by means of a pardon. It was also pointed out to George Whitehead, by the Duke of Lauderdale, that, as regards praemunired Friends, the King's private warrant of release might be quite ineffective without a pardon, as neither their persons nor their estates would be free from further action against them. That this was so had already been demonstrated in the case of Margaret Fell, who had been re-imprisoned after such a release.

ALFRED W. BRAITHWAITE

[1] See letter from Ed. Man in *Cambridge Journal* II, p. 215, where the word used is "Release". Theophilus Green, in his *Narrative*, speaks of the "Act of Grace from the King".

[2] *Itinerary Journal*, p. 107 (quoted by W. C. Braithwaite, *S.P.Q.*, p. 119n.). Fox also records with satisfaction the Pardon granted to his wife in 1671 (*Journal*, ed. Nickalls, p. 579). He speaks of it as a "discharge", but it is clear that it took the form of a pardon (Cal. S.P. (Dom.) 1671, p. 171).

[3] See esp. letters from Thos. Lower in *J.F.H.S.* x. p. 144, *Camb. Jnl.* II, p. 307.