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WHY NOT GIVE TITUS OATES A CHANCE?

WILLIAM RENWICK RIDDELL, LL.D., F. R. Hist. Soc., Etc.^a

This is the age of Rehabilitation—Senator Beveridge in his exceedingly interesting and valuable Life of Chief Justice Marshall has cleared from stain the memory of the much-abused Aaron Burr—I have in my humble way attempted to deodorize the reputation of Dodson & Fogg, execrated for nearly a century—the virtuous Captain Kidd receives almost an annual white-washing, the most recent wielder of the brush being Ralph D. Paine in the new edition of his “The Book of Buried Treasure”—Dr. John Kitto made of Judas Iscariot, a sincere disciple and ardent lover of his Master and his Master’s Kingdom—and William Hohenzollern in his recent *Apologia pro Vitâ Suâ* has attempted to show that Willam II of Germany was not the arrogant and self-willed overlord of popular estimation but a meek and humble constitutional monarch, doing as he was told and almost hungering for things to do which he hated and knew would do him harm. It will probably be thought that he is not so successful as the Senator¹: I venture to hope that my own success is greater than William’s: Captain Kidd’s apologists make out a fairly good case: but William’s success is comparable to Dr. Kitto’s.

Why not give Titus Oates a chance?

The Dictionary of National Biography begins its account of that noted person thus: “Oates, Titus (1649-1705) perjurer.” Is that any kind of way for Thomas Secombe or any other biographer to set out?

^aJustice of the Supreme Court of Ontario.

¹I see that a learned Professor has undertaken the same task—with such success that an irreverent reviewer in the *New York Times* says: “Professor Barnes tells us who killed Cock Robin; he ‘proves’ that Germany didn’t start the War and that Mr. Raymond Poincaré did.” *The Genesis of the World War: an Introduction to the Problem of War Guilt.* By Harry Elmer Barnes. . . . Alfred A. Knopf, New York. One never knows what Professors will be up to—I was one myself, *Consule Planco*—it will be remembered that Professor Key of London gave Cataline a clean sheet and almost made us forget *Quousque tandem*, etc., etc.

Dr. Kitto’s attempt to whitewash Judas would have found little favor with old Coelius Sedulius Scotus, who in Lib. v, carm. 4, of his *Carmina*, has a strong *Invectio in Judam*, and describes him as “. . . cruenta, ferox, audax. insane, rebellis, Perfide, crudelis, fallax, venalis, inique, Traditor immitis, fere proditor, impie latro”—bloody, fierce, reckless, insane, rebellious, Perfidious, cruel, lying, venal, wicked, Pitiless traitor, brutal betrayer, impious thief. (Andrew Anderson’s edition, Edinburgh, 1701, of *Coelii Sedulii Scoti Poemata Sacra* . . .) In his *Hymnus Jambicus* . . . *de Christo*, Sedulius has “Tunc ille Judas carnifex Ausus Magistrum tradere”—Then that butcher Judas Dared to betray the Master.

Fortunately, Oates has left behind a little volume² with the story of his trial, etc., a 16 mo. of 340 pages, "*A / Display / of / Tyranny / or / Remarks / upon / The Illegal and Arbitrary Proceedings, in the Courts of Westminster / and Guild Hall London / From the year 1678, To the Abdi / cation of the late King James, / in the year 1688 / In which time the Rule was / Quod / Principi placuit, Lex esto / First Part / London, Printed, Anno Angliae Salutis / primo, 1689. / Sold by Book-Sellers in London & V Westminster.*" (Neat touch, that *Anno Angliae Salutis primo!*)

This book seems to have been written shortly after Oates' release from prison to which he had been sentenced for life after his conviction for perjury within three months after the Accession in February, 1685, of James II. His release came speedily after the landing of William of Orange who received him as a martyr early in 1689.

The work is dedicated to "the Eminently Deserving and Highly Honoured Sr. Samuel Barnardiston, Baronet" who had been Foreman of the Whig Grand Jury who ignored the Bill for Treason against Shaftesbury in 1681 and became (1672) Member of the House of Commons for Suffolk, "though opposed by the united power of Tories, Pensioners and Papists" and counted out by the Sheriff, Sir William Soame—he was an ultra-Whig and ultra-Protestant. Then follows "Remarks upon the Tryal of Dr. Titus Oates, upon an indictment for Perjury; at the King's Bench Bar at Westminster before Sr. George Jeffryes (Baron of Wem) Lord Chief Justice."

As is well known, Oates the son of a rector of some note as a "dipper" or anabaptist, "slipped into orders" in the Church of England and became a vicar: he got into trouble and escaped indictment for perjury by flight. Becoming chaplain on board a King's ship, he was in a few months expelled from the Navy: he later professed reconciliation to the Church of Rome, went to the Jesuit College at Valladolid whence he was expelled—then he joined the Seminary at St. Omer from which he was also expelled.

²In "*Anno Angliae Salutis Secundo, 1690*" was published "The Second Part / Of the / Display / of / Tyranny / or / Remarks / upon / The Illegal and Arbitrary Proceedings in the Courts of Westminster / and Guild Hall / London / from the Year 1678, to the Abdi / cation of the late King James / in the Year 1688 / In which time the Rule was / *Quod / Principi placuit, Lex esto.*" This is also attributed to Titus Oates. If he is actually the author of either, it is somewhat curious that the name is uniformly spelled "Otes." Perhaps like the coachhorse, so long as he had Otes he did not care for 'ay.

Another account of this Trial will be found in a rare 12mo. in my library: "An Exact / Abridgment / of all the / Trials / . . . Relating to the *Popish*, and pre- / tended *Protestant-Plots* . . . London, MDCXC," pp. 372, sqq. See also 10 Howell's State Trials 1079, 1227, sqq.

Coming back to England he became the sponsor for the "Popish Plot" or "Pla-a-at" as he called it—an alleged plot of the Jesuits to kill King Charles and raise the Roman Catholic James, Duke of York, to the throne.

His success was phenomenal; assisted as it was by the mysterious and to this day unexplained death of the magistrate to whom he first applied, Sir Edmund Berry Godfrey. The Privy Council, the House of Commons and the people at large were alike alarmed, a general fast day was set, popish recusants were ordered out of London and a reward offered for the apprehension of Jesuit or Catholic Priests. A number of prosecutions followed, convictions, executions—Coleman, Ireland, Grove, Pickering, Whitbread, Harcourt, Fenwick, Gaven, Turner, Langhorne—(this last a lawyer).

But Oates ventured to accuse the Queen of being privy to a plot to kill her husband—and that was too much for Charles II; good-natured as he was, easy-going as he pretended to be, he respected his Queen if he did not love her. The King turned against him when he called the Duke of York a traitor; and the Duke sued him in *scandalum magnatum*: Jeffreys, who had formerly favored him, charged against him and the jury found damages against him of £100,000—Oates had to go to prison and on James' Accession he was put on his trial for perjury, May 8, 1685, and convicted.

The trial was at bar before a court composed of Jeffreys, C. J. and the Puisnés, Sir Francis Wythens (or Withens), Sir Richard Holloway and Sir Thomas Walcot—the jury were Sir William Dodson, Sir Edmund Wiseman, Richard Aley, Thomas Fowlis, Thomas Blackmore, Peter Pickering, Robert Bedingfield, Thomas Rawlinson, Roger Reeves, Ambrose Isted, Henry Collyer and Richard Howard.

There were two charges: one of perjury in swearing at the trial of Whitebread, Ireland, Fenwick, Pickering and Grove (five Jesuits) that Oates and the three first-named were present at a "treasonable Consult at the White-Horse Tavern in the Strand, the 24th of April, 1678," &c—the other is not of importance here.

In giving his account of the trial it is wholly natural that Oates should first pay his respects to the Bench.

Of the Chief Justice, Jeffreys, he does not say worse than that the House of Commons had, in 1650, asked King Charles II to remove him from all public office for traducing and obstructing Petitioning for the sitting of the Parliament and so betraying the rights of the subject. Wythens, he said, "was advanced to a seat upon that Bench by the . . . vote of the House of Commons. October

29, 1680," that he had betrayed the undoubted rights of the subjects of England by presenting to the King an address expressing an Abhorrence to Petitioning His Majesty for a Parliament—and was expelled from the House of Commons“ for this High Crime.”

Holloway, he says, was advanced to this station for his “part in the dispatching Stephen Colledge,” the “Protestant Joiner,” who came in arms to Oxford in 1681 when the Parliament was there sitting and who after a London Grand Jury had ignored a Bill for Treason against him, was taken to Oxford and there indicted, tried and convicted before a Special Commission of four Judges, North, C. J., Jones, Raymond and Levins, JJ., Holloway being Recorder of Oxford and one of the prosecuting counsel—Colledge was executed. Mr. Justice Walcot “was the best of all the four, but as poor³ as Sr. Robert Wright and by consequence a fit tool to serve the purposes of that Juncture.” Wright, be it remembered, was “a Profligate Lawyer of *Lincoln's Inn*” and for assisting in 1678 in burning the papers of Colman, the Duke of York's Secretary, “was afterwards preferred to sit by turns in every of the courts at Westminster and at length to the place of Lord Chief Justice of England than whom

³Poor Mr. Justice Walcot does not seem to have improved his financial position before his death. At all events, the House of Commons was informed, Saturday, January 25, 1689, that he “dyed Intestate and had not left an estate sufficient to pay his Debts.” (p. 227.)

Walcot had sat, June 24, 1684, as Junior Puisné with Jeffreys, C. J., and Withens and Holloway, JJ., in the Court of King's Bench when Sir Thomas Armstrong was set to the Bar. Armstrong had been indicted for High Treason but had fled beyond the seas and been regularly outlawed for non-appearance. He had been captured and was brought before the Court of King's Bench for sentence. He claimed a Trial under the Statute of 6 Edward VI which provided that an offender outlawed when beyond the seas might within a year yield himself to the Chief Justice and offer to traverse the indictment and would thereupon be received to traverse and have a trial. He said that he yielded himself to the Chief Justice, and as the year had not expired from his outlawry, claimed the benefit of the statute. The Attorney General, Sir Robert Sawyer, ridiculed the proposition and the Chief Justice held against it. Armstrong thereupon urged that the privilege of a trial had been granted to one Holloway under the same circumstances, a short time before, April 21, 1684. The Chief Justice said that that was “the Grace and Mercy of the King, who may, if he please, extend the same to you.” Armstrong, fighting for life, still contended “that the twelve months not being past he ought to have the Law and he demanded no more. Thereupon the *Bloody Monster* in a most insolent and inhumane manner concluded thus: “That you shall have by the grace of God; see that execution be done on *Friday* next according to Law. *You shall have the full benefit of the Law.*” And executed he was.

After the Revolution, June 20, 1689, Sir Robert Sawyer was expelled from the House of Commons for his share in this outrage. Then the Attainder was reversed, and, in the following January, it was ordered that the widow and children of Sir Thomas Armstrong should be paid £5,000 by the Judges and Prosecutors (including Sawyer) “as a Recompence of the Losses they had sustained by reason of his Attainder.” Jeffreys was dead, as was Walcot—Jeffreys thereby escaping execution in all probability.

a person more scandalous and ignorant was never at any age placed there."

What chance, I ask, had the innocent before that tribunal?

Then there were no less than seven lawyers turned loose on him: the Attorney General, Sir Robert Sawyer, a vicious prosecutor who was, in 1689, expelled from the House of Commons for his conduct in another prosecution;⁴ the Solicitor General, Hon. Heneage Finch, whose characteristics were similar to those of the other Finch, the Chief Justice of the Common Pleas, who induced the Judges to sign the Opinion in the Ship Money Case which got so many of them into trouble in 1641, and who escaped punishment by fleeing the country: Jennings, the Recorder of London; Mr. North, Mr. Jones, Mr. Malloy and Mr. Hanses. This last was "L'Estrang's⁵ Assistant and Brother Burgess in Parliament for Winchester, both of them being chosen by the direction of Mr. Bernard Howard a noted Papist, Brother to Cardinal Howard."

The Prisoner had no Counsel; but it is obvious that a score of the most eminent would not have altered the result.

The charge being that he had committed Perjury by swearing that he had been at a meeting in London on April 24, 1678, the Crown, after proving that he did so swear, gave evidence of its untruth by calling "about twenty *Jesuites and students of St. Omers*, these all testified that the defendant came to St. Omer's in *December*, 1677, and went not from thence until *June*, 1678." Of course, if this was to be believed, the case was pretty well proved. The jury convicted, as they could not very well help doing on the charge made to them. And Dr. Titus Oates, the "Protestant Champion" was sentenced, *inter alia*, to be "Whipt from Aldgate to Newgate" and two days thereafter to be "Whipt from Newgate to Tyburn by the hands of the common Hangman." The House of Commons, June 11, 1689, resolved, *inter alia*, that "the verdicts . . . were corrupt, and that the judgments given thereupon were cruel and illegal."⁶ No blame can be attached to the jury—but what of the court?

"The rage of the Chief Justice and the extraordinary zeal of the King's Counsel" were such as were to be expected from the men and the times; and Oates had no more reason to complain of them than had scores of other defendants in State Trials. The same may be said of the badgering by court and counsel of the defense witnesses and their tender and courteous treatment of those for the

⁴See preceding Note (3).

⁵I. e., the well-known Sir Roger L'Estrange.

⁶P. 38: *Journal House of Commons for Martis, 11^o die Junii, 1689.*

Crown. Nor were the points of law raised by Oates of much value. They were objections to the validity of the evidence brought against him. They were formulated as follows:

(1.) "*That a Papist in a Cause of Religion is not to be received and believed as a good Witness.*" For this was cited "Bulstrode's Reports, part 2, 155,"⁷ and it was said that this "was also my Lord Coke's opinion." But the case does not support the proposition and no such opinion by Coke has ever been found. Not even the K. K. K. of K. goes so far as to say that the evidence of a "Papist" is not to be received. Of course, the weight to be attached to it is for the jury alone.

(2.) The second objection "was their education bred up in a Seminary against Law." This, again, went to credit only—and, moreover, the Seminary at St. Omers was not against the law of its *locus* and it was not and could not be subject to English law.

(3.) The statutes quoted were two in number: (a) 27 Eliz. c. 2, *An Act against Jesuits, Priests and other such like disobedient Persons* made it treason for any Jesuit or Ecclesiastick person of the church of Rome to come to England. But even if these witnesses came within the prohibition, it was only an Attaint of Treason that one was excluded from being a witness—and they were not attainted (b) 3 Car. 1, c. 2 is *nihil ad rem*. It has no bearing on evidentiary capacity.

(4.) Is objection No. 1 stated in different language.

(5.) When motions were made for leave to bring indictments of perjury against witnesses who accused Lord Shaftesbury of treason, these motions were overruled because "they would not have the King's witnesses indicted of perjury. . . ." But all that had been decided was that the Crown could not be compelled to prosecute anyone for a crime, *in invitum*. The bench was wholly justified in holding that all this "was trifling and idle;" the bench did not err in law in such a decision. There were, however, more points in the case than Oates made.

In the first place, he was refused the right of peremptory challenge.⁸ It cannot be said to be absolutely clear that such a right existed at the Common Law⁹ and accordingly I pass it over here.

⁷The case meant is *Attorney General v. Griffiths et al.*, 2 Bulstrode 155, 11 Jac. (B. R.)

⁸This appears from the Report in 10 State Trials. Oates does not even mention it in his volumes.

⁹See the discussion in 10 St. Tr. I hope to write an article on the question in the near future.

It may be of interest to note an account of this trial given by a contemporary, Sir John Bramston, K. B., son of the Chief Justice of the King's

But witnesses were called for the Crown to swear that he had sworn falsely on other occasions—the Earl of Castlemaine and Sir George Wakeman who said that “what he swore against them at their tryals was false.” That this was wholly illegal is quite beyond question, and there is no Court of Appeal which would not set the verdict aside.

To suggest that Oates had a fair trial is absurd. No State prisoner had a fair trial in those days; and Jeffreys would have laughed to scorn the idea that he had any right to a fair trial. But he had the right to a legal trial, and that he did not have. Anyone can imagine the immense damage done to his defense by men of rank swearing that he had perjured himself on two trials similar to that in which the Crown was now charging that he had committed perjury.

Why not give Titus Oates a chance?

Bench, who got into trouble for joining in the Opinion of the Judges as to the legality of Ship Money Writs in 1640, and himself an able lawyer of considerable note. In a book of extraordinary interest: *The Autobiography of Sir John Bramston, K. B.*, . . . published by the Camden Society, London, 1845, we read on p. 194:

“Oates hath binn indicted for periurie, and found guiltie in two indictments. In one the periurie assigned was for swearinge he was at a consult with seuerall Jesuites at the White Hbrse tauerne in the Strand on such a day, whereas he was not then in England, but at St. Omer's. The periurie in the other assigned was, in swearinge that Ireland (one of the Jesuites indicted and executed) was in London such a day, whereas Ireland was at that tyme in Staffordshire. He was found guilty vpon both indictments and had judgement to stand in the pillorie in seuerall places, to be whipt one day from Algate to Newgate, another day from Newgate to Tyburne; to stand in the pillorie yearly duringe his life on certain dayes (the dayes on which the periurie was assigned to be committed), fined and imprisoned duringe his life.”

We are told also, p. 318, that he was (with a few others) excluded by name from the General Pardon granted by King James II.