

AN ACCOUNT OF THE TRYALS OF CAPTAIN J. GOLDEN

An Account of the Tryals of Captain J. Golden [et al.] ... Of which 9 were Found Guilty, and Received Sentence of Death: 3 for High Treason, and 6 for Piracies and Roberys on the Seas, Under the Colour of the Late King James's Commission (London, 1694). British Library, shelfmark Cup.645.e.1.(25.).

It is impossible to guess from this wretched broadside the legal, political and naval significance of the trial it attempts to report. Although English governments of the early modern period routinely vilified rebel actions at sea as treason or piracy, they generally refrained from making hanging offences of them. Olive Anderson has shown that during the Interregnum captured Royalist privateersmen were often held for exchange of prisoners and that attempts to try them fell into a bureaucratic quagmire. She concludes that ‘nothing worse than imprisonment, followed sometimes by transportation, sometimes by release before trial, sometimes by trial and acquittal, was the usual lot of these Cavalier “pirates”’.¹ Official policy changed radically during William III’s reign, however. Motivated by a shortage of seamen during the global war with France, by the merchants’ disastrous losses to French privateers, and by the exiled James II’s move in February 1692 to grant privateering commissions, the Privy Council proposed in July to treat captured rebel seamen as criminals.² Golden and his men were to be the first terrifying example of the government’s resolve.

Before ordering their trial, however, the government routinely solicited the opinions of the legal community, ‘Whether their Majesties’ subjects serving under the late King James’ commission ought not to be prosecuted as pyrats’. The returns were overwhelmingly against the new policy. William Oldys (1636–1708), a leading advocate for the Admiralty, reported in May 1693 that ‘all the King’s Councill, both common and civill’, agreed ‘it no ways advisable’. The objection of most was that it was impractical, but Oldys himself advanced the more radical argument that the policy was wrong in law. In July 1693, the ministry decided to ignore objections to its new policy and instructed Oldys to proceed against Golden.³ When he stood by his principles and refused to do so, a meeting of the Cabinet Council was called to hear – and condemn – his reasoning.

Oldys explained that James II’s privateering commissions were, in fact, legal, because, as Grotius had acknowledged, ‘a king may be deposed of his crown but cannot lose his right [to wage war]’. ‘But what if he is abdicated’, Secretary of

State Sir John Trenchard countered testily. Oldys agreed that ‘if he did really abdicate ... then he is no other than a private person’ but contended that ‘since the abdication was never published or heard of in France’, where James II’s followers had gathered, felonious intent could not be proven against them:

the generall acknowledgment of a false authority in a forreign country, where the commissions were taken, would free them from a felonious intent in their takeing of it, and consequently from piracy, for it was clear that King James in France was owned and reputed as king, therefore in this case ’tis undoubted law *communis error facit jus*.⁴

Not surprisingly, Oldys’s motives were questioned by the Duke of Devonshire and the irate Trenchard: ‘Pray, doctor, let us deal more closely with you, for your reasons are such as amount to high treason.’⁵

The policy was somewhat more ably defended by the brilliant young lawyer Matthew Tindal,⁶ who argued from Whig principles and natural law that deposed rulers are reduced to the state of ordinary beings with no authority to wage war or dispense justice. Tindal later amplified his views in *An Essay Concerning the Law of Nations*, where, following Hugo Grotius, he drew a fine line between maritime predators without the authority of a recognized state and those with such authority, even if they had formerly been pirates.

I believe there is nothing in which Nations so unanimously agree, as in esteeming none but him that has *summum imperium* an Enemy, and all others Robbers or Pirates; and there can be no instance given, where any though at first they were Robbers, Pirates, Rebels, &c. yet when they had Dominions, and possessed *summum imperium*, were not treated as Enemies ... And the beginning of most of the great Empires were not much better: whatever any were at first, yet when they had formed themselves into Civil Societies, where Foreigners as well as Subjects might have Justice administred, then they were looked on as Nations and Civil Societies; and in their Wars with other Nations, used as Enemies.⁷

Tindal understood enemy status to be synonymous with legal authority for plundering and the concomitant immunity of prisoners-of-war from criminal prosecution. He chose not to acknowledge that during the Commonwealth period Royalist privateers were released in conventional prisoner-of-war exchanges.⁸

The issue of enemy status arose in the *Tryals of Golden* when John Gold tried to prove that he was French and hence, at the time, a bona fide enemy of England. The judge ruled this defence irrelevant, probably because the privateer was not commissioned by Louis XIV but by a deposed English king. A similar defence was made in his 1696 treason trial by Captain Thomas Vaughan, who *had* sailed under a French privateering commission. It drew the following clarification from the High Court of Admiralty:

whatever Nation a Man is, his acting by a Commission for a Sovereign Prince, prevents his being treated as a Pirate, and that he shall be deemed a Subject of that Prince under whom he acts against all others but his own natural Sovereign; and as to him, he shall be deemed a Traitor, if the Prince he acts under be an Enemy to his own Sovereign; as he shall be also, if he confederates with the subjects of another Power, in Amity with his Prince, against his own Country: But if he commits hostile Acts on others, without a Commission from some Sovereign Prince, he is a Pirate.⁹

By this dictum the distinction between the four tried for treason and the eight for piracy in the cases of Golden et al. seems arbitrary.

Although Tindal's side was outnumbered three to two among the learned witnesses before the council, his opinion prevailed. Oldys was fired and Dr Thomas Littleton, 'a compliant tool' of the Whig ministry, was given his post.¹⁰ The convictions that Littleton won for nine of the prisoners did not end the debate, however. With the exception of John Gold, they all asked the House of Lords to reject the Cabinet Council's ruling and vacate the judgement. Their petition was the work of an unnamed, learned advocate (probably Oldys), who forsook technical language and ancient precedents for common sense and current understanding of the laws of war. He began by faulting the court for not allowing the petitioners counsel on matters of law,¹¹ and for ignoring a provision of 25 Edw. III, st. 5, c. 2, that instructed justices, in 'Cases ... which may be supposed treason, but are not therein specified' to 'tarry, without going to judgment, till the cause be shewed and declared before the king and his parliament.'¹² He maintained that the court had committed a similar error of judgement in not agreeing to a *special verdict*, by which the jury in a case fraught with thorny legal issues sent its summation of the evidence to the judge who usually consulted with his entire panel before giving the final verdict.¹³

From the court's procedural flaws, the petition turned to its misreading of the law. It was not place of birth that determined one's political identity, the writer argued, but rather adherence to and dependence upon a king. The petitioners had never supported or benefited from the protection of the usurper, and hence could not be guilty of treason against him. Citing as recent precedents King William's generous treatment of Jacobite troops after their defeat in Ireland and of 'many thousands in Flanders, England, Scotland, and Ireland who have all along, and still do act promiscuously under king James', he urged that the convicted privateersmen, too, were owed the rights of enemies and prisoners-of-war. Finally, he challenged the most critical element in the Council's position – that James had, in fact, abdicated – first by reminding the House of Lords that deposed kings had the unquestioned right to try to win back their thrones, and second, by contending that the 'abdication' of 1689 was not a voluntary act but a self-interested motion of parliament with no standing in international law. 'Every such abdication or resignation by this law [of nations] must appear otherwise to

the judges of this law, than only by a vote or statute, made only by the prince and persons in possession of the kingdom of such supposed abdicated king’.

... the law of nations, to the judgment of which our case only belongs, is the great and imperial law of right and equity that judges of the rights of kings and nations, with respect to each other, and of the rights of war, and of the rights of peace; and all nations with respect to this law are considered as one great corporation, and each kingdom or nation but as a single member or part of this corporation. And therefore this law, or any rule of right, or notion of it, cannot be altered, concluded or estopped by any votes, ordinances or statutes of any particular nation or kingdom.¹⁴

While Tindal focused on powers (*summum imperium*) that, under the law of nations, flow to a prince by force of arms and control of territory, the petition looked to the same law of nations (the ‘imperial law’) for restrictions upon these powers.

The tug of war between national interests and international law was probably of little immediate interest to the nine men facing the death sentence. But while the Lords rejected their petition, a compromise of sorts was reached: only three were executed, Captain Golden for treason, Patrick Whitley (i.e. Quidley) and Darby Collins for piracy.¹⁵ The ministry had made its point, but its victory was largely symbolic: ‘No more Jacobites were brought to trial for piracy, because they ceased to sail under Jacobite colours.’¹⁶ Instead they took to sailing under the French king’s flag and commission until peace was declared in 1697.

After dismissal from the Admiralty, William Oldys enjoyed a successful private law practice. Two of his most notorious clients were Captains Thomas Vaughan (1696) and William Kidd (1701), both of whom were indicted under the Offences at Sea Act of 1536. In the former case, the colloquies of Oldys and his co-counsel Mr Phipps with king’s counsel and judges regarding indictments, relevant procedure and rules of evidence¹⁷ illustrate the difficulties of applying the act in the courtroom. See the headnote and annotations for *The Arraignment, Tryal and Condemnation of Captain Kidd*, below, for Oldys’s role in shaping Kidd’s defence.¹⁸

Notes

1. O. Anderson, ‘British Governments and Rebellion at Sea’, *Historical Journal*, 3 (1960), pp. 56–84, on p. 69. I have relied on this article for material in the first two paragraphs of this headnote.
2. *Ibid.*, pp. 59–60.
3. R. G. Marsden (ed.), *Documents Relating to the Law and Custom of the Sea*, 2 vols, Navy Records Society Publications vols 49–50 ([London]: Navy Records Society, 1915–16), vol. 2, pp. 146, 148; T. B. Howell (ed.), *Complete Collection of State Trials*, 33 vols (London: R. Bagshaw, 1816–26), vol. 12, col. 1269, gives November 1692 for the date of the order to Oldys to try the privateers. I join Anderson in adopting the chronology supported by SP 44/205/35 and ADM 1/4080/484, National Archives, Kew, Surrey.

4. Marsden, *Documents Relating to the Law and Custom of the Sea*, vol. 2, pp. 143–7, on pp. 143, 144. A heavily-emended copy of this document, appearing in Howell (ed.), *State Trials*, vol. 12, cols 1269–75, is to be avoided.
5. Marsden, *Documents Relating to the Law and Custom of the Sea*, vol. 2, p. 145.
6. Tindal was later to become very controversial for his anti-clerical and deistic polemics, especially *The Rights of the Christian Church Asserted* (London, 1706) and *Christianity as Old as Creation* (London, 1731).
7. M. Tindal, *An Essay Concerning the Law of Nations, and the Rights of Sovereigns* (London, 1694), p. 17. For further elaboration of Tindal's position and its consequences for the treatment of pirates in fiction, see J. H. Baer, "'The Complicated Plot of Piracy': Aspects of English Criminal Law and the Image of the Pirate in Defoe," *The Eighteenth Century: Theory and Interpretation*, 23:1 (1982), pp. 3–26, on pp. 18–25.
8. Anderson, 'British Governments and Rebellion at Sea', p. 57.
9. T. Salmon, *A Critical Review of the State Trials* (London, 1735), p. 716.
10. 'Littleton, Sir Thomas', *ODNB*.
11. Defendants in capital cases were granted counsel on matters of law at the judge's discretion but were technically denied counsel on matters of fact until a statute of 1836 (6–7 Will. IV, c. 114). The latter restriction, however, was often lifted in practice beginning in the 1730s. Counsel on matters of law and fact in treason cases was allowed under 7–8 Will. III, c. 3, just two years after the *Tryals of Golden*.
12. 'The Humble Petition of John Golding [et al.]', in Howell (ed.), *State Trials*, vol. 12, col. 1275.
13. See J. H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), p. 303.
14. Howell (ed.), *State Trials*, vol. 12, col. 1279.
15. Anderson has found that 'Not until over two years later were the remaining four [i.e., of those convicted of piracy] pardoned, on condition of transportation to America for seven years' ('British Governments and Rebellion at Sea', p. 59). But one of the four, Richard Shewer [Shivers], became sailing master of a Rhode Island privateer the same year of his conviction. See note to p. 107, l. 5, below, p. 384.
16. Anderson, 'British Governments and Rebellion at Sea', p. 60.
17. Howell (ed.), *State Trials*, vol. 12, cols 495–500, 503–4, 507–9, 530–6.
18. This headnote also draws on 'Proceedings before the Lords of the Council and the Admiralty; in relation to the Trials of John Golding [et al.]', in Howell (ed.), *State Trials*, vol. 12, cols 1269–75; *The Manuscripts of His Grace the Duke of Portland*, Historical Manuscripts Commission, Series 29, 10 vols (London: HMSO, 1891–7), vol. 8, p. 37; J. S. Clarke (ed.), *The Life of James II ... Collected out of Memoirs Writ of his own Hand*, 2 vols (London: Longman, 1816), vol. 2, p. 527; 'The Trial of Capt. Thomas Vaughan, for High Treason ... 6 Nov. 1696', in Howell (ed.), *State Trials*, vol. 13, cols 485–538; and Report of trials of Golden et al., SP 32/6, no. 11, National Archives.

An Account of the
T R Y A L S

O F

Captain J. Golden.	Lawrence Maliene.	Const. D'Hearty.	John Ryon.
Thomas Jones.	Patrick Whitley.	Richard Shewers.	Dennis Cockram.
John Gold.	John Slaughter.	Darby Collins.	John Walsh.

At the Court of Admiralty held in the Marshalsea in Southwark, before the Right Honourable the Judges : on Monday the 25th. of Feb. 1693. Of which 9 were found Guilty, and received Sentence of Death : 3 for High Treason, and 6 for Piracies and Roberys on the Seas, under the colour of the late King James's Commission.

Licens'd Feb. 27th. 1693.

A Court of Admiralty, by Vertue rected by the Court as to matter of Fact, of a Commission from Their Ma- he was found Guilty of High-Treason. Justices being held on Monday the John Golden; or Ooldin, John Gold, 26th of this instant February, at the Lawrence Maliene, and another Person, Marshalles in Southwark, before the were Indicted for High-Treason, as the Right Honourable the Judges; the Pro- former for Engaging, and hauling the ceedings were as they related to the Pri- James Galley, one the Their Majesty's soners, herein mentioned in this manner, Frigates, or men of War, carrying their Thomas Jones was Indicted for High- Flag.

Treason, for that he being a Natural born In the Sun-Privateer belonging to Subject of Their Majesties, contrary to France, Commissioned by the late King his Duty and Allegiance, being on Board James; the King's Witnesses swore po- a Vessel, Commissioned by the late K. fitively to John Golden, who was stiled James, Assaulted by open Force and the Captain of the Sun-Privateer, be- Violence, one of Their Majesty's Men fore-mentioned; as likewise to John Gold of War; and the Evidence being plain the former of which endeavoured to ex- against him, that he was taken with o- cuse himself, as pretending to be a French- chers in the Attempt, and he making but man, or at least carried out of Ireland in- a slender defence in his behalf, excusing to Britany in France so young, that he it only that he knew not the danger of knew not his Parentage in any other such an Attempt, and did it through Ig- Nation, but that not sufficiently appear- norance, as supposing the Commission ing, he delivered a long Paper which he acted under sufficient to warrant his Read in Court, in which were cited some Illegal Proceedings; the Jury being di- Transactions of former times, which
John

he apprehended related to his Circumstances by way of Excuse; but he was in that over-ruled by the Court, who told him, it was not material to his purpose, & those that advised him to it, were not his Friends, or to the like purpose; then he prayed he might have a special Verdict, but the Court thought not fit to allow it.

John Gold pleaded little for himself, but in alledging his Ignorance in not being apprehensive of the danger he undertook when he went on Board the Privateer, supposing the Commission they had to be Authentick. Against the other two Persons indicted with them, the Evidence not being positive, they were acquitted, but the two former were brought in guilty of High-Treason, as laid in the Indictment.

Patrick Whitley, John Sangster, and Constance De Hearly were indicted for Piracy and Robbery on the Seas, and upon Evidence it appeared that they and others were found on Board an *English* Vessel, retaken by one of Their Majesties Men of War, on the *Western-Coasts*. The Evidence for the King was positive against them, That they were found on Board the Ship they had taken; and their Examinations being produced, wherein they had confessed the matter of Fact, tho excusing it in Court through ignorance upon the *Juries* going out, they were found guilty of the Piracy, Robbery and Force used upon the *English* Vessel, *Super Mare Altum*; it evidently appearing. Moreover the Persons were Their Majesties Natural Born Subjects, yet acting against them, and to the prejudice of their Liege

People, py Robberies and Depredations contrary to the Laws of Nature and Nations.

Richard Shevers, Darby Collins, John Ryon, Denis Cockram, and John Walsh were as the foregoing, urged for Piracy and Robbery, and impaired thereto as they fancy'd, by vertue of a Commission granted by the Late King *James*:

Upon Evidence it appear'd that the three first were taken on Board an *English* Vessel they had seized, and were carrying into *France*, upon it's being Retaken by their Majesties Ship the *Prince* of Orange, so that making but slender Excuses, and their Informations taken, making their former Excuses Evident, they were found Guilty; but the Evidence not being full against the two Latter, they were Acquitted.

Job Higingsbottom was Tryed for the Murder of one *Maris* alias *Marison*, upon the Evidence it appeared, that he being Master of a Vessel, it was stranded near the Isle of *Orkney*, belonging to *Scotland*; and that the Deceased, and others that were Servants on Board his Vessel, carrying away the Boat, and getting on Shore, he called him to return with the Boat, but he refusing so to do, and the Ship still bearing on the Sand-rows, in likelihood to be lost, as afterward it was, he fired at him with a Musquet and at the second time hit him on the back part of the Head, of which Wound he died: He alleged in his own Defence, that he did it only to fright him into a Return with the Boat, desigining to fire over or wide of him, but the Violent Motion of the Ship, made him unfortunately Err in his Intentions and it appearing to be done in a Distinct Kingdom, as also not upon the Main Ocean, the Jury found him not Guilty of the Indictment.

These being the Material Proceedings of the Day, the Prisoners that were found Guilty, being brought to the Barr, the Court proceeded to give Sentence upon *Thomas*, *Jones*, *John Golden*, and *John Gold*, to be drawn, hanged, and quartered, as in Cases of High Treason the Law direct's.

Patrick Whitley, John Sangster, John Ryon, Darby Collins, and Richard Shevers Received Sentence to be hanged only as Pirates &c.

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