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## TRIAL

OF JOSEPH NARCISSE CARDIN-  
AL, JOSEPH DUQUETTE,  
AND OTHERS.

We commence below the important trial of Messrs. CARDINAL and DUQUETTE, who were executed at Montreal on the 21st December last, for High Treason. In our next number we shall give the suppressed documents spoken of in the 28th number of this paper. Let the reader bear in mind the fact that these victims were in the hands of the civil authorities one day previous to the proclamation of martial law, under which they were tried, condemned, and executed. They were lodged in Montreal jail on the 4th of Nov., whereas martial law was proclaimed on the 5th, and the ordinance, constituting the court martial, was dated the 8th, when in fact the Special Council, from whence emanated the said ordinance, was called by proclamation for the 9th only. This is the manner of doing business in Canada! These are the beauties of monarchy!

Hitherto, we believe, neither the civil nor criminal code of England admitted of any man being punished for any offence by laws or ordinances made ulterior to the commission of such offence. To this subject we invite the especial attention of gentlemen of the legal profession throughout the United States. Immediately on his arrival in England Sir John Colborne will be prosecuted for these murders.

Wednesday, 28th Nov. 1838. }  
10 o'clock, A. M. }

Before a General Court Martial, convened on this day, at the Court House in the City of Montreal, in pursuance of an order and by virtue of a Warrant from His Excellency Sir John Colborne, G. C. B. and G. C. H. &c. &c.

PRESENT, THE FOLLOWING MEMBERS:  
Major General John Clitherow, *President*.  
Lieut. Col. Sir John R. Eustace, *2d Batt. Grenadier Guards*.  
Lieut. Col. Henry W. Barnard, *do. do.*  
Lieut. Col. William Grierson, *15th Regiment*.  
Lieut. Col. James Crawford, *2d Batt. Grenadier Guards*.  
Major Samuel Dilman Pritchard, *Major of Brigade*.  
Major Henry Townshend, *24th Regiment*.  
Major Arthur W. Biggs, *7th Hussars*.  
Captain William Brudenell Smith, *15th Regiment*.  
Captain Robert Marsh, *24th Regiment*.  
Captain William Thornton, *2d Battalion Grenadier Guards*.  
Captain Henry Alexander Kerr, *2d Batt. Royal Regiment*.  
Captain Augustus Cox, *2d Batt. Grenadier Guards*.  
Captain the Hon. George Cadogan, *do. do.*  
Captain Hugh A. R. Mitchell, *do. do.*  
The Hon. Dominique Mondelet, Esq., Charles Dewey Day, Esq., and Captain Edward Muller, *2d Battalion Royal Regiment*, jointly and severally Deputy Judge Advocates.

Messrs. Pierre Moreau and Lewis Thomas Drummond are employed on behalf of the Prisoners.

John Godard, Esq., Advocate, is appointed Translator, and Mr. Francis Johnson Student at Law, performs the duty of Reporter.

Serjeant John Wilson, *1st Royal Regiment*, Provost-Marshal, and two Orderly Serjeants.

The following prisoners, twelve in number, are brought to trial:—

Joseph Narcisse Cardinal, Joseph Duquette, Joseph L'Ecuyer, Jean Louis Thibert, Jean Marie Thibert, Leon Ducharme, Joseph Guimond, Louis Guerin dit Dusault, otherwise called Blanc Dusault, Edouard Therien, Antoine Cote, Francois Maurice Lepailleur and Louis Lesage, otherwise called Louis Lesage dit Lavolette.

The charges exhibited against them, are read by the Judge Advocate, in the following terms, to wit:—

"Treason against our sovereign lady the

Queen, between the first and seventh days of November, in the 2nd year of the reign of our said lady the Queen.

In this, that the said Joseph Narcisse Cardinal and others, being subjects of our said lady the Queen, on the 4th day of November, in the 2nd year of the reign of our said lady the Queen, and on divers other days, as well before as after, in the said parish of Chateauguay, and also at Caughnawaga, commonly called Sault St. Louis, in the district and province aforesaid, did meet, conspire, and agree amongst themselves, and together with divers others whose names are unknown, unlawfully and traitorously to subvert and destroy, and cause to be subverted and destroyed, the legislative rule and government now duly established in the said province of Lower Canada, and to depose and cause to be deposed our said lady the Queen, from the royal state and government of this province, and did for that purpose then and there incite and assist in a rebellion in the said province; and then and there being assembled and gathered together, and armed with guns, swords, spears, staves and other weapons, did in furtherance of the said rebellion, traitorously prepare and levy public war against our said lady the Queen, and were then and there found in open arms against her rule and government in this province, against the peace of our said lady the Queen, her Crown and dignity, and against the form of the statute in such case made and provided."

Before pleading to the charge, the prisoners submit to the Court the following exceptions, which are read by the Judge Advocate, and overruled after a deliberation of about half an hour:—

Province } The Queen,  
of } vs.  
Lower Canada } Jph. N. Cardinal et al.

"The undersigned, who have been brought forward for the purpose, as they have been informed, of being tried upon a charge or charges of treason (respectfully reserving the right of objecting to the competence of the tribunal assembled to try them;) insisting that in their case, the ordinary laws of the province cannot be repealed, nor the ordinary tribunals suspended; insisting also that the legislature, under the authority of which the present court is constituted, has been expressly restrained by the act of the imperial parliament of the 1st Victoria, cap. 9, from departing in any way from the practice of administering the criminal law of England, as introduced into this province, by the act of the imperial parliament of the 14th Geo. III. chap. 83, or any of the various legislative expositions of that statute, by different laws enacted since that period; and contending that the offence or offences with which they stand charged, are cognizable only by a jury of the country, and that by the mode of trial and the means resorted to, upon the present occasion, they might be deprived of all constitutional means of defence, in which are included the right of the accused to have a list of the jury, to give him the benefit of the challenge; the list of witnesses to enable him to detect conspiracy and to prevent perjury; a copy of the charge, at least ten days before the day of trial, to enable him to prepare himself for the awful day; sufficient time to procure the assistance of a legal adviser, to speak for an unlearned man; in fact, all the arms and means of protection, with which the humanity of the laws of England fortify the prisoners; beg leave to urge upon the attention of the court, that according to the practice of courts constituted as the present, the accused are entitled to the following safeguards:—

1st. The crime or offence must be set forth with certainty and precision, including time, place and circumstances; in all which the written accusation communicated to them, is defective.

2nd. The charge must be furnished in such time before the meeting of the court, as that the accused may have full opportunity for preparing their defence. In fact, an act of the imperial parliament of the 3rd and 4th Anne, cap. 16, has expressly provided that "persons tried by courts martial, shall have the benefit of the act for regulating trials in cases of treason and misprision of treason;" thus securing to the party charged, an interval of at least ten days, between the service of notice of trial and his arraignment; whereas the charges were only communicated to them on the 24th day of November instant, at a late hour in the evening, and their trial fixed for the 25th day of the same month, in contravention with the practice of courts-martial on that point.

3rd. The accused are entitled to a list of the witnesses to be heard against them. Such has been withheld from the prisoners.

4th. They are entitled to a list of the persons appointed to sit in judgment upon them. No such list has been furnished to the prisoners.

5th. The accused are entitled to freedom of intercourse with their relatives, connex-

ions and friends, whilst engaged in preparing for their trial. The relatives, connexions and friends of the prisoners, have been and continue to be denied all access to them. They have been treated as criminals, whose guilt had been taken by anticipation, and the restraints unjustly and illegally imposed upon them, have impaired their means of defence.

The prisoners accordingly claim the consideration of the court to the matters submitted, and request that all proceedings may be deferred, until the benefit, which the practice of courts martial constituted as the present and for the like purposes, secures to the parties accused, shall have been extended to them."

Montreal, 28th Nov., 1838.  
Signed, } JOSEPH N. CARDINAL,  
          } JOSEPH DUQUETTE, &c.

Saturday, 1st Dec. 1838.  
The evidence for the prosecution being closed, and the prisoners being called upon for their defence—"The following motion is presented on their behalf:—

Province } The Queen,  
of } vs.  
Lower Canada } Jos. N. Cardinal et al.

"The prisoners, (without waiver of any objection or exception by them heretofore made,) respectfully move that delay may be granted to them until Tuesday, the 4th day of December instant, to arrange and prepare their defence, and to procure the attendance of witnesses in support of the same.

And in the furtherance of this, their humble request, the prisoners beg leave to urge on the attention of the Court, the extreme shortness of the time allowed to them to prepare for trial, which has been, in their instance, limited to two days; for it was not until a late hour on the 25th November last, (the Sabbath day,) that they had an opportunity of conferring with Counsel; the unusual restraint imposed upon them during that brief interval, by having been forbidden all communication with their relations and personal friends, although imploringly sought for; the difficulty of obtaining the attendance of their witnesses, who, almost without exception, reside on the southern shore of the St. Lawrence, at a distance of upwards of twenty leagues from the city, at a season when communication with those parts is next to impracticable, & in times when the utmost consternation prevails among the inhabitants of that section of the country; the practice of courts martial, as laid down in "Simmon's remarks on the Constitution and Practice of Courts Martial," p. 192, (2d edition,)—in pursuance whereof, every prisoner, (though within reach of his witnesses,) is entitled to "a day or two, or more, subsequent to the closing of the prosecution," to arrange and prepare his defence.

Other considerations might be dwelt upon by the prisoners; but they consider it a work of supererogation to add any further reasons in support of a motion, upon the accordeance or refusal of which their fate may depend. A court sitting to render justice, and composed of members honourable in mind and humane in heart, most readily grant a request of such obvious and imperative justice."

After a few minutes deliberation, the delay asked for is granted, and the court is adjourned till Tuesday morning, at ten o'clock.

Tuesday, 4th Dec. 1838. }  
10 o'clock A. M. }

After calling over the Members, the prisoners are called upon their defence, and submit to the court the following protest. The Judge Advocate who reads it, is interrupted by some of the Members, when arrived at the word "incompetent." "The deed is stigmatised with the epithet of "insulting in its terms." Mr. President observes that the court hold their mandate from superior authorities, and consequently have a right of jurisdiction over the prisoners; after which the Protest is rejected, without any other form. It shall find a place here:—

Province } The Queen,  
of } vs.  
Lower Canada } Jos. N. Cardinal et al.

"The prisoners humbly, but solemnly, protest against the present tribunal, now assembled under the designation of a Court Martial, proceeding further in the said cause, or compelling the said prisoners, or any of them, to enter upon his or their defence:

Firstly, Because the said tribunal is wholly incompetent to take cognizance of the offence of High Treason, with which the prisoners stand charged, or to sit in judgement upon them for the said offence, inasmuch as they say:—

That by the Act of the Imperial Parliament of the 14th Geo. III. c. 83, it is enacted that the criminal Law of England shall continue to be administered, and shall be observed as law in the province of Quebec, as well in the description and quality of the offence, as the method of prosecution and trial, to the exclusion of every other

rule of Criminal Law, or mode of proceeding therein.

That the Statute of the Imperial Parliament of the 25th Edward III. cap. 2, commonly called the Statute of Treasons; the Statute of the same Parliament of the 7th William III. c. 3; and the Statute of the same Parliament of the 7th Anne, c. 21, and divers other Legislative Expositions of the said Statute of Edward the III., by different Laws enacted since that period, formed, and still form, part of the Criminal Law of England, introduced into the said Province of Quebec, by virtue of the said Act of the Imperial Parliament of the 14th Geo. III. c. 83, and are yet in force in the Province of Lower Canada, by virtue of the said Act.

That by virtue of the Common and Statute Law of England, having reference to criminal offences, and forming part of the laws of this province, a party charged with High Treason is entitled to be tried by a jury of his country, impanelled before the ordinary tribunals, to the exclusion of every other mode of trial; to be furnished, at least ten days before the day of trial, with a list of the jury, to give him the benefit of the challenge; with a list of witnesses for the prosecution, to enable him to detect conspiracy and to prevent perjury; in like manner, to have at least ten days previous to such trial, to procure the assistance of counsel.

That by the Act of the Imperial Parliament of the 1st Victoria, cap. 9, under the supposed authority of which an Act, (as it is said,) hath been passed by the Administrator of the Government, by and with the consent of a pretended Special Council, authorizing the trial by Courts Martial of all persons, who, since the first day of the month of November now last past, had been or then were engaged in the rebellion therein referred to, it is expressly provided: "that it shall not be lawful for the Governor and Council, to repeal, suspend or alter any provision of any Act of the Imperial Parliament of Gt. Britain, or of the Parliament of the United Kingdom, or of any Act of the Legislature of Lower Canada, as then constituted, repealing or altering any such Act of the Imperial Parliament."

That it was not, and is not competent to any local Legislature, created by the said Act of the Imperial Parliament of the 1st Victoria, c. 9, to sanction any departure from the practice of administering the Criminal Law of England, as introduced into this province by the said Act of the Imperial Parliament of the 14th Geo. III. cap. 83, or to abrogate any part of the Common or Statute Law of England, having reference to the offences of High Treason, existing and in force at the time of the passing of the last mentioned Act.

That the pretended Ordinance of the Administrator of the Government and Special Council of the 2d Victoria, c. 3, is null and illegal; not only for the reasons aforesaid, but also because the Council firstly constituted under the Act of the Imperial Parliament of the 1st Victoria, cap. 9, was lawfully dissolved by letters patent of His Excellency the Earl of Durham, the then Governor-General of the province, on or about the first day of June last; and that the said Ordinance of the 2d Victoria, cap. 2, was enacted with the sanction and advice of the persons composing the Special Council, so dissolved as aforesaid, without the said Special Council having been reconstituted; and also, inasmuch as there was no Legislature in session in the province, on the day when the said pretended Ordinance purports to have been enacted; the said pretended Ordinance of the 2d Victoria, cap. 3, purporting to have been enacted on the eighth day of November last past, whereas the pretended Special Council, by and with whose sanction the said pretended Ordinance was enacted, was convened by proclamation to meet only on the ninth day of the said month of November now last past.

That, supposing the said pretended ordinance of the 1st Vic. cap. 3, had been legally enacted, (which the prisoners, on the grounds above set forth, distinctly deny;) yet, inasmuch as the said pretended ordinance merely assumes the power of authorizing the administrator of the province, from and after the said 8th day of November last, to arrest and detain in custody all such persons as heretofore had been, or then were, engaged in the rebellion therein mentioned, and cause such persons so arrested and detained in custody to be brought to trial, in a summary manner, by courts martial; and as they, the prisoners, were not arrested after, nor on the said 8th day of November last, but had, in fact, been arrested several days previous to the 8th day of November last, the said pretended ordinance could not in any wise be construed in such manner as to render them amenable to a court martial, or to any other court established under colour of the said pretended ordinance, Victoria 1st, c. 3.

That they, the prisoners, having been arrested previous to, and being in the custody of the civil authorities, at the time

when martial law was proclaimed by the aforesaid administrator of the government of this province, on the 4th day of November last, cannot come within the scope of the said pretended ordinance, 2d Victoria, cap. 3, which is declared to be founded upon the said proclamation of martial law, inasmuch as no law or proclamation can have, or be made to produce, a retro-active effect.

Itly, Because no court martial, even though assembled to try persons amenable to a tribunal of that nature, can subject any individual to the punishment of death for any crime not expressed to be punished by the mutiny act, or by the articles of war; whereas the crime of high treason, now imputed to the prisoners, which is punishable by death and attainder, according to the laws of the land, is not specified or referred to, in the said mutiny act, or in the articles of war.

2dly, Because the proceedings before the said tribunal, designated as a court martial, have not in their instance been carried on in the manner required by the law of the land, and the practice of courts martial, in all cases over which such courts have competent jurisdiction.

3dly, Because evidence of a nature favourable to the prisoners, although given by the witnesses, was not recorded, and questions tending to elicit other evidence favourable to the prisoners, were rejected.

It cannot be contended that the prisoners have been foreclosed from thus protesting, inasmuch as the incompetency of a tribunal before which a prisoner is tried, may be urged at any stage of the proceedings. And inasmuch, moreover, as the objections, lately set forth, are founded upon the illegality of the proceedings had before the said tribunal, as well previous to, as since the opening of the trial."

Montreal, 4th December, 1838.  
Signed, } JOSEPH N. CARDINAL,  
          } JOSEPH DUQUETTE, &c.

The above protest being rejected, the prisoners beg leave respectfully to submit to the Court the following motion:—

Province } The Queen,  
of } vs.  
Lower Canada } Jph. N. Cardinal et al.

"Whereas the evidence on the part of our said lady the Queen hath been duly closed in the said cause; and whereas no legal evidence hath been adduced to establish the charges against Louis Lesage, otherwise called Louis Lesage dit Lavolette; and whereas the testimony of the said Louis Lesage, otherwise called Louis Lesage dit Lavolette, is material and necessary to the defence of the eleven other prisoners now under accusation; they, the said remaining eleven prisoners, namely: Joseph Narcisse Cardinal, Joseph Duquette, Joseph L'Ecuyer, Jean Louis Thibert, Jean Marie Thibert, Leon Ducharme, otherwise called Leandre Ducharme, Joseph Guimond, Louis Guerin dit Dusault, otherwise called Blanc Dusault, Edouard Therien, Antoine Cote, and Francois Maurice Lepailleur, having by law a right to avail themselves of such testimony, and to demand that the said Louis Lesage, otherwise called Louis Lesage dit Lavolette, be discharged forthwith (without recognizing the jurisdiction of the said court over them, or any of them, and without waiver of any objection by them heretofore signed urged or pleaded), humbly move that the court do take the case of the said Louis Lesage, otherwise called Louis Lesage dit Lavolette, into consideration *instanter*, and therefrom discharge the said Louis Lesage, otherwise called Louis Lesage dit Lavolette, from the accusation of high treason, now pending against him as aforesaid, in order that he may be, in due course of law, examined as a witness in their behalf.

And the said Louis Lesage, otherwise called Louis Lesage dit Lavolette, as well in his own behalf, as in furtherance of the above application thus preferred on the part of his fellow prisoners, prays that his case may be taken into consideration, *instanter*, and that he be forthwith discharged from the said accusation.

The prisoners found their application upon the practice universally followed in all courts of law, binding alike on all courts martial in their proceedings, when not otherwise regulated by the statute; and would humbly refer the court to all writers on the Rules of Evidence in criminal cases, and more especially to a case in point, namely, *Stafford's Case*, H. T. 1801, (K. B.) *case*, 306, which is referred to in *Bacon's Abridgment*, under the word: "Martial Law and Courts Martial, No. 580," in the following terms: "The Mutineers of the Bounty were tried by a Court Martial, at Portsmouth. There being no evidence against one of the persons accused, it was insisted, on the part of another of them, that he had a right to examine the first on his behalf. The Court, however, by

\* It will be remarked that the prisoners had already attacked the jurisdiction of the Court, by the Preliminary Exceptions which they submitted, before pleading to the charges.