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TRIAL OF JOSEPH NARCISSE CARDI- NAL, JOSEPH DUQUETTE, AND OTHERS.

Argumentative Petition of Messrs. Hart
and Drummond, Counsel for the prison-
ers, concluded.

5) Proposition:—That the said pretended Ordinance, supposing it to be legal, cannot be so construed as to extend the control of Courts Martial, or of any Military Tribunal organized in virtue thereof, to the case of the Prisoners. To support this proposition, we have only to state, that several of the Prisoners were in the custody of the civil authorities, previous to the proclamation of martial law by your Excellency, on the fourth day of November last, and that all had been arrested before the passing of the said pretended ordinance.

If, therefore, the said pretended ordinance were made to extend to them, that enactment must evidently be retroactive and retrospective, which may not be the case with a penal law. This principle stands recognized by the Jurisprudence, not only of England, but likewise of all other civilized countries. In England, the rule and law of Parliament are, that: "*Nona constitutio futuris formam debet imponere, non preteritis.*" "*La loi ne dispose que de l'avenir; elle n'a point d'effet retroactif.*" Such is the rule laid down in the second article of the *titre preliminaire de la publication des lois*, the result of the sage deliberations of the most learned French Jurisconsults. And, indeed, it would be a monstrous doctrine, that a criminal Statute should have the effect of an *ex post facto* Law. This doctrine is most strongly and pointedly upheld by a learned Barrister, (*Paca*, in his argument reported in Chalmers's opinions, to the following effect:—) "It is an established rule of law, that statutes have no retrospect; they look forward only, and prescribe for the time to come; for, upon no principle of national justice, can a man's actions fall within the cognizance of a law made and enacted *ex post facto.*" The following authorities are equally conclusive on this point:—And not only is it the doctrine of the English law, that a statute is not to have a retrospective effect; but it is also founded upon the principles of general Jurisprudence. A retroactive statute would partake, in its character, of all the mischiefs of an *ex post facto* law, as to all crimes and penalties, and in matters relating to contracts or property, would violate every sound principle. No act or omission done or made before the promulgation of the law which forbids it, can be punished as an offence.

"If an act or omission be made an offence by one law, and the penalty be altered by another, no breach of the law, committed before the promulgation of the second, can be punished by inflicting the penalty of the latter."

The pretended Ordinance, known as the 2d Vic. c. 3, appears to have been drawn up much in the words of the Act of 1798, passed in Ireland, and is, in most places, copied almost *verbatim et literalim* from the latter with the former, and we find that the Act of 1798 is as strictly prospective, as the pretended ordinance is retroactive. Its provisions clearly extend only to those who should be arrested and taken, subsequent to the passing of the statute. So, likewise, is the Imperial Act of the 1st and 2d William IV., (commonly called "the Irish Coercion Bill,") purely prospective, as will be found on reference to its provisions.

The ordinance of the 2d Vic. c. 3, even supposing it to have been legally passed, being one restraining the common law, must be construed most strictly, and restricted wherever it encroaches upon the rights and liberties of the subject. In support of this doctrine, we beg respectfully to quote the following authorities:—"Every statute which is penal, and which goes in derogation of the common law, must be construed strictly; and this is a common saying."—*Viver's Abridgment, verbo statute*, No. 96, page 521. Keilwer, 96, p. 6 c. 22. Heary I: "Acts of parliament which take away the trial by jury, and abridge the liberty of the subject, ought to receive the strictest construction."—*Dwarris on statutes*, p. 749. *Bing, Looker vs. Halcombe*. We also find an *ex post facto* law, which can never be penal, cannot even be strained to prevent a party from obtaining the benefit of a contract to which he was entitled, at the time the contract was made: how much more careful must we be

to prevent a law being so construed, as to deprive a person of the rights and liberties to which he was entitled previous to the passing of the law? We would also remind your Excellency of the words used by Sir William Follett, who introduced the restrictive proviso into the act 1st Vic. c. 9: "As to the power of setting aside the courts of justice and the ordinary administration of the criminal law, it cannot be supposed that any such monstrous power was conferred by any part of the act. Yet, if the ordinance be declared or considered to affect the prisoners, they will have been deprived of the trial, by jury, and of the mode of trial granted to them by the statute to which they were entitled, previous to the passing of the ordinance."—See also Lord Raynold's Reports, 2d vol. 1852, 10 East. *Wilkinson vs. Meyer*.

Your Excellency's attention must be directed to the words in the preamble of the ordinance, which induces the necessity of providing a speedy trial of persons offending, as therein set forth, after stating the fact, that your Excellency had promulgated a proclamation of martial law, which shows that the intention had in view, in passing the ordinance 2d Vic. c. 3, was merely to facilitate the action of that law already proclaimed. It would, therefore, be monstrous to suppose for a moment, that any persons could be affected by that act, who were not contemplated by the proclamation which forms its basis.

Before concluding our enquiry into the important questions which engage our attention, we would beg to submit, in reference to 2d Vic. chap. 5, purporting to be an ordinance passed to define the period when the rebellion shall be taken and held to cease, whether it be competent for the administrator of the government in time of peace, and when the ordinary courts of justice are open, to take from them that jurisdiction conferred upon them by statute. The recognition of such a principle would at once place in the hands of the administrator, a plenitude of authority unknown, and repugnant to the spirit of the English constitution. Yet, strange to say, such is the effect of the enactment lastly referred to. The two supposed ordinances of 2d Vic. c. 3 and 5, have been drawn out in a mode somewhat similar to the Irish statute of 1798; but were they, (although, in some parts, evidently copied from that act), similarly enacted, or as legal in their intent, effect, or operation?—By no means: the statute of 1798 was passed by a competent legislature, and is drawn up in such a manner as most jealously to preserve the rights of the subject inviolate. It states distinctly the cause of enacting the statute, the great necessity of conferring the extraordinary powers therein bestowed, the urgent demand for instant and the most summary and speedy proceedings. It is in no way to be construed as retroactive; it regards merely what shall be done during the continuance of such rebellion, from and after the passing of that act, with any persons acting, aiding, or assisting in the rebellion, and permits the taking and detaining, &c. It concerns the future, not the past. The act of 1798 was the offspring of the most urgent necessity, and was passed (though reluctantly) by the Lords spiritual and temporal, and Commons then in Parliament assembled. But, notwithstanding the then actually existing rebellion, we do not find that the Irish Parliament enacted any statute, empowering the viceroy to define at what time the rebellion should be deemed to have ceased, and we will conclude by asking: Have the courts of justice been suspended?—Is the province now in a state of insurrection?—Has not peace been so far restored, that the courts of justice might, without interruption, take cognizance of the offences with which the prisoners stand charged?

The irregularities which may be re-argued in the proceedings preparatory to, and during the trial, tending, as they did, so materially to impair, if not wholly to destroy, the means of defence which the prisoners, even before a court martial, were by law entitled to avail themselves of, should alone, we humbly conceive, even though all other objections were overlooked, have sufficient weight to induce your Excellency to refuse your Excellency's sanction to any judgment which may have been, or hereafter may be given by the said court, in reference to this trial. A few of the many legal objections to the proceedings in question, we beg leave to submit to your Excellency:—

1stly. The jurisdiction of the members of a court martial is confined to a *single matter and a single prisoner*. This principle, founded on the articles of war and the oath of the members, is supported by the highest authorities; amongst others, *Hale*, in his history of the common law, and by the practice generally observed by courts martial. Yet, in this instance, the prisoners, *twelve in number*, have been arraigned and tried collectively, and have been thereby deprived of the time necessary for preparing and arranging their argu-

ments and other means of defence. A few hours only (from Wednesday the 5th inst. at four in the afternoon, until the following morning at eleven), a space of time insufficient to enable even one of their number to prepare a suitable defence, was allowed them to analyse the immense volume of evidence, indiscriminately recorded for and against them, and to prepare such a defence as the importance of the matter would have seemed to demand.

2dly. In cases of high treason, when taken cognizance of by the court martial, the accused must be furnished, ten days before trial with a copy of the charges, a list of the witnesses to be produced, and of the officers who are to sit in judgment upon them; whereas, in this case, the prisoners were not notified of their approaching trial, until Saturday, the twenty-fifth day of November last, at a late hour, in the evening, when a copy of the charges alone was furnished them.

That a list of the witnesses and of the members of the court should be so furnished in all cases, is laid down as an axiom by *Tytler*; and although other writers on the constitution and practice of courts martial, deny the correctness of the doctrine in its fullest extension, yet are they all unanimous in declaring that, in cases of high treason, these advantages must be extended to the accused. In fact, the Statute passed by the Imperial Parliament, in the 5d and 4th years of the reign of Queen Anne, chap. 16, expressly provides, that persons tried by court martial shall have the benefit of the Act for regulating trials in cases of treason and misprison of treason; the Statute therein alluded to, being the 7th Anne, chap. 21, which provides, that all persons indicted for high treason, or misprison of treason, shall have, not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to them ten days before the trial, and in the presence of two witnesses, the better to prepare them to make their challenges and defence.

Not only were the prisoners kept in total ignorance of their approaching trial, until three days previous to their arraignment; but no list of the witnesses to be produced; no intimation of the names or qualifications of those who were called to decide upon their fate, was ever communicated to them.

These restrictions were, in their case, peculiarly oppressive, inasmuch as being all, with one single exception, inhabitants of the parish of Chateaugay, situate on the southern shore of the Saint Lawrence, and the day following that on the evening of which they were notified for trial, being the Sabbath day, they could scarcely communicate with any of their relatives, before the awful hour of arraignment had arrived. If struggling against such disadvantages, they succeeded in convicting the principal witness produced against them, of the most glaring perjury, and in impeaching the testimony of another, might they not, we humbly ask, (had the privileges which, by law, they were entitled to, been extended to them,) have found means to impeach all the witnesses of the Crown, with equal success, and set at naught the whole of the evidence adduced against them? We ask if it was not possible?—From information obtained since the trial, we deem it more than probable, that such possibility had been the result. The mere possibility of success, had a list of witnesses been furnished, renders the withholding of such list, we do not say illegal, (for it is so in all cases,) but, in this instance, highly unjust.

The prisoners have a complaint equally grievous to make, on the ground of no list of the Members of the court having been furnished to them, inasmuch as they have been thereby stripped of a privilege which is never denied to the meanest soldier in the ranks, how trivial soever may be the offence he is arraigned for: we mean the right of challenging the individuals who may be called upon to judge him.

3dly. During the course of the trial, several members of the Court absented themselves, on various occasions, during the examination of witnesses, and on returning, resumed their seats. These facts are established by the affidavits herewith produced, and respectively marked: A, B, C, D. The circumstances of the members alluded to having so absented themselves, although each withdrew but for a short period of time, is, of itself, sufficient to annul the whole proceedings; and, in support of this position, we respectfully beg to quote the following passage from *Simon's constitution and practice of courts martial*, page 175, Ed. 1835:—"As it is essentially necessary that the examination of witnesses should take place in the presence of all the members of the court; and as, in fact, no act performed by a part of the court can be legal, the unavoidable absence of any member, by sickness or otherwise, at any period, necessarily prevents his resuming his seat." The validity of

this custom, which has ever prevailed, so far as the author can ascertain, in the British army, has recently been marked by the concurrence of General Lord Viscount Combermere." His Lordship, in an order dated: "*Simla*, 17th Sept. 1828," remarking on the proceedings of a general court martial held at Denapore, on Lieutenant E. Kelly, of His Majesty's 13th Light Infantry, says: "It appears that, on the court assembling on the 6th day, one of the members was taken ill, and obliged to withdraw. A sufficient number remaining, the court proceeded in the hearing of evidence for the defence; on the next day of assembling, the member who had withdrawn, was allowed to resume his seat. This proceeding is so directly at variance with the practice of courts martial, and the principles of justice, that it may be held to affect the legality of the judgment of the court." His Lordship, after commenting on the finding, commences his concluding remarks by stating, that the irregularity before observed, has rendered nugatory the sentence of the court martial. It can scarcely be necessary to remark, that the occasional withdrawing of a member for any time, however limited, must suspend the examination of a witness. That which is in itself unjust and irregular must be so, if tolerated in any degree.

4thly. At the opening of the court, on Tuesday the 4th inst. before entering upon their defence, the prisoners respectfully submitted a protest, setting forth certain reasons why they should not enter upon their defence. The Judge-Advocate, after having read aloud a few lines of that document, was interrupted by one or more of the members of the court, who declared that the paper now alluded to was insulting in its terms, and, therefore, it was rejected. The counsel for the prisoners respectfully suggested that it should be registered; but the court peremptorily refused to take any cognizance of it; yet, that protest was couched in the most respectful language, and tended merely to put the court upon its guard against proceeding to peril, by their deliberations, the lives of twelve men over whom it was contended, as we still humbly maintain, that tribunal had no jurisdiction. An attested copy of the protest now referred to being herewith annexed, under the letter E, (1) your Excellency will have an opportunity of judging of its merits, and of considering how far the court authorized in refusing it a place on the record of the trial.

5thly. On the same day, the prisoners, before proceeding to adduce evidence in their behalf, moved for the immediate discharge of Louis Lesiege, otherwise called Lesage dit Lavoilette, on the ground that no legal evidence having been adduced against him, the eleven remaining prisoners were, in law, entitled to the benefit of his testimony, which they alleged to be material to them in their defence. The motion (2) which was read, and appears on record in the cause, was not granted, although the legality thereof was supported by a precedent so precisely in point, that we deem it advisable to quote it at full length:—*Petersdorff's Abridgment, verbo Martial Law and Courts Martial*, 2, *Stafford's case*, H. T. 1801, K. B. 1 east, 306:—"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 the advice of the judge advocate, refused to let him be examined, saying the practice of courts martial had always been against it; and the prisoner was condemned to death; but, upon the sentence being reported to the King, execution was respited till the opinion of the judges was taken, who all reported against the legality of the sentence, on the ground of the rejection of legal evidence; and the party was afterwards discharged." The imperative justice of granting such applications is so evident, that it would be idle in us to dwell on the subject; suffice it to say, that the practice of courts of law, founded on reason, have ever been ready to grant motions of that nature, in order that the prosecutor may in no case be allowed to deprive a party accused of his witnesses, by indicting them conjointly with him. The only reason offered by one of the learned judge advocates, in support of the decision of the court, respecting this motion, was that there appeared on record the testimony of one witness, tending to implicate Lesiege; while, in *Stafford's case*, cited by the prisoners as a precedent, no evidence has been adduced against the individual whose discharge had been demanded. But, it is indisputable, that, in a matter of this nature, where the evidence of two credible witnesses is required to convict the accused, the maxim

of the civil law, "*unus testis, nullus testis*," must apply, and that the statement of one witness, even when unimpeached, (and the testimony of the witness now referred to was, in many respects, so palpably false, as to elicit against him severe animadversions from the same learned judge advocate,) cannot be regarded otherwise than as a complete nullity. Moreover, in the case of *Muspratt* and others, referred to by *Simmons*, in the work above cited, p. 480, the sentence passed upon *Muspratt* by the naval court martial, before which he was arraigned, with nine others, for mutiny, was set aside, in consequence of the court having refused to discharge two of their number, *Byrne* and *Norman*, in order that *Muspratt* might call them as witnesses; although the evidence for the prosecution had affected *Byrne* and *Norman* to a certain extent, but not materially; and in declaring the illegality of the sentence, in so far as it concerned *Muspratt*, the twelve judges of England were unanimous, as well as in *Stafford's case*.

6thly. In trials of court martial, it is necessary that every question, whether originating with the prosecutor, the prisoner, or a member of the court, should be entered by the judge-advocate on the record of the proceedings. (*Vide Simmons*, p. 189.) This practice was departed from throughout the whole course of the trial of the prisoners; and thus, many questions which tended to elicit answers favourable to them, were rejected without any formal deliberation; and the strenuous efforts made by their counsel to procure the registration of such questions, proved unavailing. Had such questions been recorded on a revision of the proceedings, it would have been obvious whether their rejection was justifiable, or not.

That such was the illegal practice followed during the trial, is established by affidavits to the Counsel who assisted the prisoners. It would be too tedious to insert, in a document like this, all the questions so proposed and rejected; but the undersigned Counsel, if required, can produce the greater part of them. We might dwell upon the illegality of the proceedings in various other instances, such as deliberations held and judgments rendered by the Court, subsequent to the hour of four in the afternoon, in direct contradiction of the Statute, the fact of the examination of one of the witnesses of the Crown having been carried on in a whisper, between the witness and the interpreter, through whose medium alone the answers of the former were conveyed to the prisoners; but we feel confident that the statements which we have already fairly and conscientiously made on the subject, are more than sufficient to convince your Excellency of the correctness of our last proposition. It will, doubtless, be urged, by the learned gentlemen who have superintended the proceedings upon this trial, that the court by which the prisoners were tried, is not an ordinary court martial, but a tribunal character, the mere creature of the ordinance, arbitrary in its proceedings, and wholly untrammelled, either by the articles of war, or the common law of the land.

It must appear strange that we should anticipate, from those learned gentlemen, an argument so monstrous in its nature, so disastrous in its tendency, founded, as it is, upon a denial of the first principle of legal liberty, that offence, and trial, and punishment should be fixed; and strange it would be, passing strange! had we not heard it urged sufficiently often to obviate all possibility of misconception on our part.

We have now concluded this tedious examination of the trial of the prisoners, a task which we have imposed upon ourselves, not only from a sense of the imperative duty we owe our clients, whose lives may depend upon our exertions, but also from a deep and heartfelt conviction that, in fulfilling that duty, we would be vindicating, at the same time, the majesty of the law, which has been trampled upon, and asserting the rights of the subjects, which have been perilled by the dangerous precedent established in this case. In the performance of that task, we have abstained from exercising the ingenuity of the advocate, and have taken an impartial view of the matter, guided solely, as we have been, by the unquenchable light of reason; for the broad principles of law we have invoked, cannot be said to rest on any other foundation than on those feelings of justice and humanity, which the supreme ruler of nations has implanted in the breasts of all men.

We trust, that under the guidance of these rights, we have succeeded in convincing your excellency of the correctness of the propositions we set out with, and in establishing, beyond a shadow of doubt, that the proceedings had in reference to the prisoners, have been illegal, unconstitutional and unjust. If so, our object is attained.

(Signed,) { A. P. HART,
L. T. DRUMMOND, Attys.
Montreal, 20th Dec. 1839.

(1) This Protest is literally the same as that which the reader had an opportunity of seeing in the course of this report. It would be, therefore, useless to repeat it.

(2) See the Trial.