

## A Q. C. OF 1837.

JUDGE JONES' CHARGE TO THE GRAND JURY AT THE LATE COURT OF OYER AND TERMINER, HELD AT NIAGARA.

From the Niagara Chronicle and Advertiser, Wednesday, August 22, 1838.

"MR. FOREMAN AND GENTLEMEN,

THE Commission under which you are now assembled has been issued in consequence of the invasion of the district by a number of armed men, whose lawless acts, in defiance of the authority, both civil and military, with their capture, are occurrences of so recent and notorious a character that it is unnecessary for me to enlarge upon them.

Your enquiries will not, however, be restricted to the outrages to which I have adverted, for the jurisdiction of the court extends to all offences committed within the district. The gaol will, therefore, be delivered of all prisoners who may at present be detained in it upon any criminal charge of an ordinary nature, as well as those for the offences growing out of this invasion.

I observe from the sheriff's calendar that the offences other than treason are limited to two or three cases of larceny and assault. Your long experience as grand jurors renders any remarks upon these offences unnecessary. As regards the persons captured upon the occasion referred to, you will enquire whether they resorted to arms for the purpose of subverting the Government or bringing about any change in our political institutions, or for effecting any object of a general and public nature by force which would constitute the crime of treason: or whether their object was purely of a private nature, such as enriching themselves by the plunder of the Queen's subjects, or for the purpose of gratifying their malice against individuals; in which latter case their offences would not amount to treason, but they would be subject to punishment for such felonies as they may be found to have committed.

High treason has of late been so frequently and so minutely explained that I do not think it necessary to occupy your time in stating the principles which apply to this branch of our law.

The using armed force or assembling in arms for the public purposes which I have before mentioned would constitute an act of treason of the plainest description, as it would amount to a direct levying of war against Her Majesty, and whenever this is proved to your reasonable satisfaction by the testimony of two witnesses to any overt act charged, or by the testimony of one witness to one overt act and another witness to another of the same nature, it will become your duty to put the offender upon his trial by finding a bill of indictment against him. Another species of treason is adhering to the Queen's enemies, and if it shall be proven to you that any number of foreigners, owing no allegiance to our sovereign, have invaded this province in a hostile manner, being by such co-enemies of the Queen, although war have not been declared or sanctioned by their government, and that any subject of Her Majesty was joined with them in such hostility, or aided them in any manner by furnishing arms, provisions or information, he would be guilty of treason under that branch of the law. Such acts of adherence to rebels could not be treason in adhering to the Queen's enemies, for they do not come under the definition of public enemies; but they would be clear acts of treason in levying war, because in treason, as in misdemeanor, there are no accessories—all are principals—and to incur the guilt of treason it is not necessary actually to bear arms, but any active concurrence in the design, or even assent and countenance afforded, is sufficient. The different cases which may be brought under your consideration may be affected by the political characters of the persons charged. You are, of course, aware that natural born subjects owe perpetual allegiance to the Crown, under all circumstances. Acts of hostility such as I have described, committed by them, will therefore unquestionably subject them to the charge of treason. So also a foreigner residing in this province, under the protection of our law, on removing from it after such residence, leaving his family and effects here, and again returning to it in hostility, or committing such acts as in a natural born subject would render him liable to punishment for treason, would incur the like penalties; for when protection is afforded, allegiance is due. In the former case it is denominated natural allegiance; in the latter, local. If, however, among these lawless invaders there were any *truly* foreigners, owing to the Crown of Great Britain no allegiance either from birth or residence, their entry into the province being wholly in hostility, for the purpose of subverting the Government, though in a time of peace between their country and ours, they could not be guilty of treason. But it must not be supposed that they could thus act with impunity on account of this legal distinction. According to the acknowledged principles of the laws of nations they are liable to be treated as public robbers and to be summarily dealt with by the law martial—as enemies, or subjects by birth, or foreigners owing a local allegiance, adhering to them, are liable to be tried for treason. That excellent and learned jurist, Sir Matthew Hale, in his "Pleas of the Crown," says, "Suppose we that the King of England and the King of France be in league, and no breach thereof between the two kings, yet if a subject born of the King of France (war) upon the King of England, a subject of the King of England adhering to him

is (a traitor) within this law, and yet the Frenchman who made this law is not a traitor, but an enemy by martial law, if taken. So that an enemy extends further than a king or state in enmity; namely, an alien coming into England in enmity." Moreover, in the extraordinary circumstances in which this province had been placed by the hostile conduct of American citizens on the frontier of this district, the Legislature at its last session thought proper to afford additional protection to the lives and properties of its inhabitants by an express enactment intended to meet the exigencies of the case.

By this statute you will observe that if any subject of a foreign State at peace with Great Britain, having joined himself to any subjects of Her Majesty, being traitorously in arms, shall so continue within this Province, or shall commit any act of hostility therein, then such persons may be brought to trial before a Militia General Court Martial, and on conviction sentenced to death or such other punishment as the Court may award, or may be prosecuted and tried for felony before any Court of Oyer and Terminer or General Jail Delivery, and upon conviction shall suffer death, as in cases of felony. At the time this statute was passed, a portion of this district had been actually taken possession of by an army of American citizens in conjunction with traitors who had fled from this Province. They were inviting others to join their ranks by publicly offering the lands of this country to the adherents; and it was thought necessary to deter these foreign outlaws from pursuing their iniquitous course by holding out to them in the event of their capture the prospect of capital punishment, not indeed by a proceeding as summary as they were already liable to, but by a process more certain to be resorted to, because less violent in appearance. By the same statute the subjects of Her Majesty, guilty of joining with foreigners in these acts of hostility, are also subjected to a trial by a Military Court Martial; but when this power of summary punishment is not resorted to against them, they may be prosecuted in the manner in which they were always liable to be proceeded against, before the ordinary tribunal, for the crime of high treason, which is their offence.

If therefore it shall appear that there was that association of foreigners and subjects in these acts of hostility which is clearly necessary to bring the case under the late statute, then the course against those foreigners will be plain. If it were otherwise, and if the invasion had been made by foreigners only, then the statute would not apply, and it would become necessary for the public prosecutor, acting under his sense of duty and under the instruction of the Executive Government, to take such course as the circumstances might appear to warrant; and if through the intervention of the public prosecutor, or by any other proceeding, a case of this description should be brought before the court for trial, it would then become my duty to give such direction to the jury empanelled to try the case as the law and facts might require.

I was lately called on to preside at a court in the Western District, where certain prisoners, the subjects of a foreign country, were in military custody (not in the gaol or civil custody), having been taken in arms, engaged in a hostile invasion of our territory. From the course taken by the public prosecutor on that occasion, I infer that they were not liable to be proceeded against under the recent statute, by reason of its being incapable of proof that they had joined themselves to any subjects of Her Majesty traitorously in arms in this Province, and not being liable under that statute, nor subject to be tried for treason, it appears to have been thought at least questionable with the Government, whether they were the proper objects of municipal jurisdiction upon any other charge, and whether it would be prudent to transfer them from the military custody in which they were securely detained, awaiting the pleasure of Her Majesty's Government, as enemies or public robbers taken in the act of unauthorized hostility against her Crown. I forbear here entering into the considerations of the important legal questions which might arise upon a trial of these prisoners upon a charge of murder or other felony. This will of necessity be done when any such question may come judicially before myself, or any of my brother judges. I am only desirous of taking this public occasion of affording a short explanation upon these points, namely, that it never was or could be for a moment doubted that the subject of a foreign country, coming in time of peace to this country to commit murder, theft, or any other crime, would be accountable for such offence to our laws, precisely as an inhabitant of this Province would, and so would any number of such persons acting in the perpetration of such crime and having that object and no other in view. It has not been uncommon to see the citizens of the United States brought to trial and punished in this Province for offences committed under such circumstances. Any discriminating mind will at once perceive that the facts of the case to which I allude were essentially different from these. When the case shall come under judicial examination, it being a purely legal question, the judges must decide it as they do other questions, without regard to any considerations except such as the law itself raises, and wholly uninfluenced by the feelings which are entertained by an excited community. I wish, in the next place, to be understood, that most certainly not in the breast of the court, nor, so far as I can be allowed to judge, of the Government or the public prosecutor on that occasion, was the course taken with respect to those prisoners in the slightest degree influenced by a motive of forbearance towards them. They continue as they have been from

the time of their capture, at the mercy of the Crown; but the utmost abhorrence of their outrageous conduct could neither have justified the Government nor authorized the court to set aside legal considerations, by which alone it is reasonable to suppose the course of the Government, whether in itself right or wrong, was solely actuated. And I beg it to be distinctly understood that whatever were the reasons which guided the discretion of the Government, their instructions were confined to the proper law officer of the Crown, who is subject to control. When the course which he intended to pursue was announced the public knew all that was known to me, as presiding judge, and the Crown officer acted under a sense of his responsibility to the Executive, and of the duties of his official station. The Grand Jury were no otherwise controlled in the exercise of their functions. I say this that it may not be imagined that anything in the nature of an order or direction to the court emanated from the Government. There was no communication whatever from the Government to me upon the subject. My official connection with the administration of justice has not been long; but I have for more than five and twenty years been engaged in the practice of the profession, and I am convinced that I should be safe in asserting that on no occasion could it be said with truth that the Executive Government of this Province ever attempted such an interference with the administration of justice. The principles which regulate this most important department of the public service are too well settled and understood to admit of this, and if from an inadvertence which could not happen when there has been the least experience in the duty of Government, such a course should be adopted, there is perhaps no occasion in which a judge could be less perplexed in the discharge of his office than in his decided and open disregard of such interference. I cannot, however, make even this remark without repeating that such a surmise in the instance alluded to has been utterly without foundation. As on ordinary occasions, you will doubtless feel it your duty to inspect the gaol and make such representations regarding it or any other subject brought under your consideration, as circumstances may warrant, and in the discharge of the arduous duties to which you will now be called upon to fulfil, the court will be ready at all times to afford its counsel to aid you in your deliberations."

A remark made by my kind and learned friend, D. B. Read, Q.C., author of "The Lives of the Judges of Upper Canada and Ontario from 1791 to the Present" (1888), to the effect that the "Remains" of Judge Jones were fewer than of any other member of the Bar leads me to think that the above "charge" will be valued by the late judge's descendants and friends, and be valuable to all who think upon the laws under which they are governed. To my own mind, the charge contains a very clear statement of what constitutes treason, and in that particular alone deserves careful reading. Treason to the Crown means more than treason to a monarch or a Government; it means treason to the country which is governed, treason to the sovereign people, and in so much as this is understood, inasmuch as the safeguard of the people's welfare strengthened; and therefore it becomes all good citizens to inform themselves of the details included in those general principles which govern national well-being.

It will be observed that the latter part of Judge Jones' charge deals with certain rumours of undue influence upon the judiciary brought to bear by the Government. The occasion of such rumours I am not able to state, but it is worthy of remark that the learned gentleman was not only sensitive to any attack on the dignity of the ermine, but sensible that the people, as represented by the Grand Jury, ought to know the truth; he is, therefore, prompt in defence of the honour of the judiciary, and asserts its spotlessness in terms which, at the same time, are a defence of the Government from attacks of a kind more calculated than any other to sap its authority, and therefore its reason of being.

I may also quote here with propriety some remarks in a recent *Orillia Packet*, taken from the *Newmarket Era*, with regard to Grand Juries, which throw light upon the circumstance of Judge Jones' inclusion of the matter of these defamatory rumours in his charge. The Hon. Senator Gowan, who "has made a profound study of the existing jury system," says, while condemning the continuance of the Grand Jury as a useless expense to the country under present conditions: "At one time Grand Juries served an excellent purpose as a safe-guard to the liberty of the people against the tyranny and oppression of state-craft, and were also necessary, in the absence of police, in bringing offenders to justice; but, as Mr. Justice Gwynne observes, these reasons are now of too mediæval a character to justify receiving consideration, as they no longer exist. No perils can nowadays arise from the interference of the Crown in the administration of justice."

The following slight sketch of Judge Jones, for which permission has been courteously given by the author of "The Lives of the Judges," will be of interest to the general reader:—

"The family of Jones is a very large one in Upper Canada," observes Mr. Read, probably with as strong a hint of that dry humour which distinguishes him as with the intention of stating what is also an undoubted fact. "The particular branch of this large family, to which the Honourable Jonas Jones (the subject of this sketch) belonged, is not buried in obscurity. . . . In the early days of the Province, when its principal inhabitants were United Empire Loyalists, the Joneses in the county of