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REX v. LORD HAW-HAW

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On January 3, 1946, William Joyce, "Lord Haw-haw," was hanged in England for high treason, pursuant to trial, conviction and sentence by an English court. Yet Joyce was never a British subject and his activities charged as treasonable were all outside of British territory.

Joyce was born in Brooklyn, New York, in 1906, of parents who were then citizens of the United States. His family moved in 1909 to Ireland and from there in 1922 to England, where Joyce continued to reside until 1939; during the first World War the family were required to register as aliens. In 1922 William joined the Officers Training Corps of London University; in his application he stated that he had been born in America but of British parents, that he "dearly loved" Britain, and that he aspired to become an officer of the regular British army. In 1933 he obtained a British passport, declaring himself a British subject born in Ireland. In August, 1939, he secured an extension of this passport to July 1, 1940, asserting again that he was a British subject by birth. Before the end of August he went with his wife to Germany. On September 3, 1939, Great Britain declared war on Germany. Fifteen days later Joyce entered the employ of German Radio Company, Berlin, as "Announcer of English News." In September of 1940 he became a German by naturalization. In May, 1945, he was captured in Germany, near the Danish frontier, by officers of the British army, one of whom shot him in the leg. In September, 1945, he was brought to trial in the Central Criminal Court, London, before Mr. Justice Tucker and a jury.

The indictment charged in three counts: "High Treason, by adhering to the King's enemies elsewhere than in the King's Realm, to-wit, in the German Realm, contrary to the Treason Act (of) 1351." The first two counts were predicated upon the supposed British nationality of the accused. The first count specified as treasonable conduct that from 1939 to 1945 Joyce gave aid and comfort to the enemy "by broadcasting to the subjects of our lord the King propaganda on behalf of the said enemies." The second count specified the German naturalization in 1940. The third count was predicated on a special allegiance supposed to arise from the passport, and specified as treasonable acts the broadcasting of German propaganda between September 18, 1939 (when Joyce entered the German radio service), and July 2, 1940 (when the extended term of the passport had expired).

After the defense had presented what the judge called "really overwhelming" evidence that Joyce had never been a British subject, the prosecution abandoned the first two counts and the jury, so instructed, acquitted on

those counts. The conviction, sentence and execution rest entirely on the third count.

No tears need be shed for Joyce. If legally he owed no allegiance to the Crown while he was serving the enemy, nevertheless there was a moral obligation, an obligation of decency. He had lived most of his life in Britain, declaring publicly his loyalty to the King and his devotion to the country, professing to be a British subject, and claiming and enjoying the protection and privileges of British nationality. But a reading of the record must leave us with serious misgivings about the functioning of British justice in the trial, misgivings apparently entertained by many Englishmen.

The record is available in a volume of the Notable British Trials Series: *Trial of William Joyce*, edited by J. W. Hall, M.A., B.C.L. (Oxon), Barrister-at-Law, and published by William Hodge & Co., Ltd., London. At the close of an interesting "Introduction," Hall says:

"I have found, with a universal reprobation of Joyce's conduct, an almost equally universal feeling, shared by lawyers and laymen, servicemen and civilians, that (with the utmost respect to the eight out of nine learned judges) the decision was all wrong, and that an unmeritorious case has made bad law. . . . It is, I think, fair to say that the conviction and execution of Joyce have caused more disquiet than satisfaction in the minds of the public."

And, after narrating the incident of Joyce's arrest, Hall remarks: "I trust it does not sound cynical to say that if the officer had aimed higher much trouble would have been saved."

Appeal was taken from the conviction to the Court of Criminal Appeal and thence, upon certification by the Attorney-General of the "public importance" of the case, to the House of Lords. In all the courts, after the alien status of Joyce was established and conceded, the crucial questions of law were: (1) Whether a British court had jurisdiction to try an alien for an offense against British law committed in a foreign country; and (2) whether the granting of a British passport on Joyce's application entailed, during the term of the passport, such duty of allegiance on his part as to make treasonable his actions performed abroad in aid of the enemy.

The diligence of counsel and judges produced no helpful precedent. Roger Casement had been convicted of treason for his acts in foreign territory, but he was a British subject. There were reported cases of aliens convicted for treason and other crimes, but the offenses had invariably occurred within the Realm. No case was cited in which an alien had been convicted for a crime (other than piracy) committed abroad. The defense offered pronouncements of eminent commentators, including Blackstone, that the special allegiance of aliens arising from British residence endured only as

long as did such residence. The prosecution found some support in a "rule" or resolution of a conference of judges in 1707, apparently not an adjudication but rather an advisory opinion. The original is lost but, according to commentators, one in 1762 and one in 1803, the Judges' Rule held that an alien resident who goes abroad and there adheres to the enemy may, if he has left family and effects under the protection of the King, owe such allegiance that he may be held a traitor. There was no evidence that Joyce, who had no child and whose wife accompanied him to Germany, left any family or effects in England. But the Attorney-General and the judges invoked the authority of the Rule of the Judges by way of analogy, likening the supposed protection of Joyce by the King's passport to the protection of an absent alien's family and goods by the King's laws.

Prosecutor and judges also found comfort in an ancient maxim, "*Protectio trahit subjectionem et subjectio protectionem*," and argued therefrom that for the King's duty of protection, promised by his passport, there must be a correlative duty of allegiance on the part of Joyce. There was no evidence that Joyce ever made use of the passport or sought to do so or even kept it; for all that appears, he may have lost or destroyed it before he entered Germany. Moreover it would seem that the passport, obtained by misrepresentation and issued by mistake to an alien, in fact imposed no obligation of protection on the King.

Mr. Justice Tucker was at pains to advise the jury, "There is no such thing known to our law as crime by estoppel; you cannot become a traitor by estoppel, as it is called." But the learned judge nevertheless recounted with emphasis Joyce's false assertions of British nationality and his professions of loyalty, matters immaterial unless upon some theory so like estoppel that one can find no other name for it.

In the absence of any precedent to the contrary, it was doubtless competent for the courts to declare, as a new doctrine, that the holder of a British passport, though an alien, *ipso facto* owes such allegiance to the British Crown as will support a charge of treason. The common law has been built up that way. But the consequences may be troublesome; Editor Hall has an interesting comment:

"Suppose that Joyce, instead of being American, had been German by birth, but had lived here and honestly believed himself British, and went abroad with a British passport. On the outbreak of war he is claimed as a German subject, liable to military service. If he obeys he is (under the decision) liable to be hanged by the British; if he refuses he will certainly be shot by the Germans."

In the House of Lords Lord Porter dissented, holding that, whatever allegiance Joyce may have assumed by renewing his passport, the question

of the continuance of such allegiance depended on the circumstances of the case and was a matter for the jury, and that a jury properly directed might well have found that the allegiance had terminated before Joyce did anything alleged as treasonable.

To reach their verdict of guilty on the third count the jury must have been satisfied—and the judge so instructed them—that the evidence presented under that count proved “beyond all reasonable doubt” that Joyce did, as the indictment charges, “adhere to and aid and comfort” the enemies, *before July 2, 1940*, “by broadcasting . . . propaganda on behalf of the said enemies.” But the evidence pertinent to the third count is so obviously flimsy and inadequate that the verdict is shocking; one must suspect that the jury forgot or misunderstood the judge’s proper admonition that they must disregard the evidence adduced under the abandoned counts—damning evidence of Joyce’s pro-German activities at a time when admittedly he owed no allegiance whatever to Great Britain.

Mr. Justice Tucker was apologetic about the evidence in his summing-up. He said to the jury that it was “not so full as one could wish,” and that “it is perhaps to be regretted that you may not have had a little fuller information.” Actually there were just two items of evidence that the jury was entitled to consider: (1) The testimony of Detective Inspector Hunt; and (2) A “workbook” belonging to Joyce which contained a record of his employments in Germany.

Inspector Hunt testified that he was stationed in Folkestone when, sometime in September or October of 1939, he was “just tuning in my receiver round the wave lengths” and from some unidentified station heard the words, “Folkestone and Dover have been destroyed,” and something else which he did not remember. He said he recognized the voice as that of Joyce, whom he had never met and never talked with; he had heard him speak at public meetings. There was no corroboration of the inspector and no evidence that at the time he took any notes, made any report, or mentioned the incident or his recognition of the voice.

Hunt agreed that what he had heard was “fantastic”; he knew then, as everybody in England knew, that Folkestone and Dover were untouched; in fact no enemy bomb fell on England until about a year later. Joyce, however misguided, was not stupid; it seems very unlikely that he would have thought to gain credence for a transparent lie. What Hunt heard was a fragment without remembered context or known origin; it is not extravagant to guess that some patriot with a voice mistakable for Joyce’s may have been anticipating Churchill by saying:

“We will resist invasion at the beaches, and if *Folkestone and Dover have been destroyed*, we will fight . . .”

The workbook showed that on September 18, 1939, Joyce entered the employ of German Radio Company, Berlin, as "Announcer of English news," nothing more. If Hunt had fixed the time of the Folkestone incident at later than September 18th (but he did not), the workbook would be some evidence that Joyce *might* have been the broadcaster the inspector heard.

Even assuming that Joyce did broadcast the false statement that the English coast towns had been destroyed, it must be remembered that he could not be convicted for broadcasting "English news," true or false, unless it constituted "propaganda in behalf of said enemies." Did it tend to aid the German cause or to impair British morale to give the King's loyal subjects a hearty laugh? Should a man be hanged for such a triviality?

In this connection it is noteworthy that from 1695 until after the arrest of Joyce the law of England required for proof of treason the testimony of at least two witnesses, either to the same overt act or to overt acts of the same kind. (Compare art. III, sec. 3, of the U. S. Constitution.) There was no witness but Hunt to any overt act of Joyce, to any broadcast of propaganda by him, within the period of the third count of the indictment. Between the day of the arrest and the day of Joyce's arraignment Parliament repealed that safeguard. If this *ex post facto* legislation was not intended to facilitate the conviction of Joyce, the coincidence is remarkable. Editor Hall says:

"When Joyce was arrested on 28th May, 1945, and it became apparent that it would be necessary to bring him to trial, he was deliberately kept on the Continent . . . while Parliament quickly passed the Treason Act, 1945, a statute nominally purely procedural. . . . So the protection afforded to the accused by sec. 2 of the Act of 1695 is taken away. . . . The Treason Act, 1945, having received the Royal assent on 15th June, 1945, Joyce was brought to England next day, and on 18th June he was charged before the Chief Magistrate."

Of course, Parliament is supreme and, by virtue of the new statute, there was no legal error in submitting the case to the jury on the unimpressive testimony of the single witness. But is it cricket?

The tactics of the prosecution make another sorry showing for British justice. Chief counsel for the Crown was the Attorney-General Sir Hartley Shawcross, K.C., M.P., assisted by junior counsel, and "instructed by the Director of Public Prosecutions." Sir Hartley is a great lawyer, renowned especially for his distinguished service in the Nuremberg trials as chief British prosecutor. But the course pursued by the prosecution in the trial of Joyce was clearly unfair and prejudicial to the accused, and the inference is hardly avoidable that it was intentionally unfair.

We must believe that the able and experienced officers of the Crown had diligently and thoroughly prepared themselves for the trial, and so

we can have scant doubt that Crown counsel well knew before the trial that Joyce was never a British subject. There must have been official inquiry about his nationality as soon as Lord Haw-haw was identified as William Joyce in 1940. On May 31, 1945, three days after his arrest, Joyce gave Captain Scarden of the British Intelligence Service a signed statement in which he set out correctly the place and date of his birth, his parentage, and other relevant facts; the officer already had a copy of the Brooklyn birth certificate. In July, 1945, the case was adjourned to the September session on the representation of defense counsel that the time was required for assembling documentary and other evidence, "absolutely vital" on the question of nationality and available in the United States. It would be insult to Sir Hartley Shawcross and his associates to suggest that they, informed by Joyce's statement, with diplomatic and consular staffs available for investigation in the United States, and with every facility for inquiry in England and Ireland, had any doubt on the eve of the trial of Joyce's alien status.

That the "really overwhelming" evidence of Joyce's American citizenship was no surprise to Crown counsel is apparent from their failure to challenge it or to cross-examine any of the witnesses, an attitude which, as the trial judge stated to the jury, indicated acceptance of the evidence. When the defense rested the judge asked the Attorney-General whether he intended to "invite the jury to come to the conclusion that this man was a British subject." Sir Hartley replied: "No, my lord. I indicated as far as I properly could in opening that I was not going to press that point, and I certainly do not consider it my duty to invite them to say so."

If the Attorney-General intended "in opening" not to urge the point of British nationality, why did he not then move the elimination of the first two counts of the indictment? His only purpose in preserving them must have been to enable him to get before the jury the abundant and provocative evidence of Joyce's pro-German activities after July 1, 1940—evidence which would not have been admissible under the third count, on which alone there was conviction.

Whether or not it was so planned, the admission of evidence not relevant to the third count was most unfortunate for Joyce—it was probably fatal. It is true that Mr. Justice Tucker instructed the jury to disregard that evidence, but that was asking a good deal of twelve indignant and patriotic Britons, untrained in the law.

Those good citizens of London must have been puzzled by all the scholarly argument about the passport, with the Latin maxims and references to ancient authorities as far back as Coke's Institutes and the case of *Perkin*

Warbeck in 1500. They probably attributed Joyce's obligation toward England rather to his professions of loyalty and British nationality than to fine-spun inferences and theories about the effect of an illegal passport. Anyhow, his Lordship had settled it that Joyce was British enough to be hanged for a traitor if he was helping the Jerries in 1939. That story of Inspector Hunt's was pretty thin, as his lordship said—they wouldn't have a dog hanged on no more than that—but it stood to reason that Joyce was pro-German all through the war. To be sure, his lordship had said they were to disregard the evidence about what Joyce did later, and so they were disregarding it and acquitting him on those first two counts; the chap wasn't being convicted for what he did in 1943, but what he did then made it sure enough that he was doing much the same in 1939 and Hunt was right about what he heard.

So William Joyce was hanged for high treason on the dubious proof that he was responsible for a few innocuous words. He should have had six months in the county jail for falsifying his passport application and then have been deported to Germany as an undesirable alien.