ANDERSON'S CASE—AN EARLY EXTRADITION CONTROVERSY

BY THE HONOURABLE WILLIAM RENWICK RIDDELL

In the year 1853 there was in Missouri a Negro slave called Jack, sometimes known as Jack Burton, from his master, Moses Burton of Howard County. Burton in 1853 "transferred" the Negro to one McDonald of Salina County, Missouri. The Negro seems not to have liked the transfer; for he made up his mind to run away and become free. He had a wife, who lived at some distance from him, and he thought of arranging a joint flight. Unfortunately, this meant going more than twenty miles from his master's place; and he was seen by Seneca T. P. Diggs of Howard County, who, upon finding that the Negro had no pass, tried to take him into custody. Diggs, by the laws of Missouri, had every legal right to do this—in fact it was regarded almost as a legal duty. By the Missouri Revised Statutes of 1845 anyone might apprehend any Negro or mulatto being or suspected of being a runaway slave, and any slave found more than twenty miles from his home was declared to be a runaway.

Jack tried to escape from Diggs, who called upon his own Negroes to catch Jack, and himself made the attempt to do so. Jack, to escape, stabbed Diggs, who died therefrom a few days afterwards. The fugitive evaded his pursuers and made his way to Upper Canada, settling near Brantford and taking the name, John Anderson. It becoming known, how it does not appear, that the Negro was in this vicinity, Howard County engaged a man, Baker by name, to come after him, and if possible, to bring him back to Missouri to suffer for his deed.

On crossing the international line, Jack had become free, the legislation of Upper Canada since 1793 having that effect. It was not sought—ostensibly at least—to return him to Missouri because he was a slave, but because he had slain a man.

There is no obligation in International Law upon any country to deliver up to another anyone charged with crime. However, in 1842 the two great English-speaking nations had made a treaty, generally called the Ashburton Treaty, which *inter alia* provided

for the delivery up of those charged with certain crimes, upon proper demand. The exact wording follows:

> "Article X. It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other."[1]

Canada, being still a colony, was governed by this agreement. Legislation in pursuance thereof passed at Westminster being considered insufficient, the Parliament of Canada also legislated that the treaty might become wholly effective.[2]

Baker, the messenger from Howard County, on September 28, 1860, laid an information before two Upper Canadian Justices of the Peace at Brantford: "for that he, the said John Anderson, did, in Howard County, in the state of Missouri on the 28th day of September, 1853, wilfully, maliciously, and feloniously stab and kill one Seneca T. P. Diggs of Howard County." The magistrates took evidence which clearly proved the facts and the law of Missouri, and issued a warrant to the keeper of the common gaol at Brantford, commanding: "you, the said keeper of the common gaol, to receive the said John Anderson into your custody, in the said common gaol, and there safely keep until he be thence delivered by the due course of law."

A writ of *habeas corpus* was at once sued out from the Court of Queen's Bench, and the matter came before the full Court of Queen's Bench in Michaelmas Term, 1860. The case had excited much attention both in Canada and in England, and the proceedings were watched with eager interest.

No more competent or respected court could be found in Canada, or, indeed, elsewhere. The Chief Justice was Sir John Beverly Robinson, Bart. Of United Empire Loyalist stock, his father had done all in his power to reintroduce Nego slavery into the

[1] Treaties and Conventions concluded between the United States of America and other powers, since July 4, 1776 (1889) p. 437. Washington, D. C.: Government Printing Office.

[2] (1849) 12 Vict. cap. 19 (Canada).

Province, but the son could not be charged with any feeling in that regard. The Chief Justice was thoroughly versed in the law of the Province and in that of England, and was a painstaking and conscientious jurist. The Senior Puisne Justice was Archibald McLean, of Scottish descent, a man experienced in public affairs, who died a Chief Justice in 1865. The Junior Puisne was Robert Easton Burns, also of Scottish descent but born in Upper Canada, an able and experienced judge.

The ablest members of the Bar took part in the argument.[3] For Anderson the main contention was that to be extradictable the crime alleged must be a crime in the local law as well as in the *locus* of the crime itself. Since it was not a crime in the law of the Province to resist—and if necessary resist to the extent of killing—any attempt to drag one into slavery, the case presented, it was contended, should not be considered one for the application of the Ashburton Treaty. The prosecution admitted that slavery was indeed contrary to the spirit of every law of England and of Canada, but asserted that in applying the Treaty, the law of the *locus* of the crime alone was to be considered.

The court went into the evidence at great length, canvassing every circumstance with the utmost care. The Chief Justice said:

> ". . . we must conform to what the law requires and are not at liberty to act upon considerations of policy or even of compassion. . . . To use the words of a great Judge in dealing with a case in which slavery and its consequences were discussed: 'We cannot in these points direct the law; the law must rule us.' "

It was with much reluctance, accordingly, that the Chief Justice held in favor of extradition. Mr. Justice McLean disagreed with the Chief Justice:

> "In administering the laws of a British Province, I can never feel bound to recognize as law any enactment which can convert into chattel a very large number of the human race. . . . Can . . . the law of slavery in Missouri be recognized by us to such an extent as to make it murder in Missouri while it is justifiable in this Province to do precisely the same act?"

The Junior Puisne, Mr. Justice Brown saying: "However much I deplore the necessity of being called on to give any opinion, and

[3] 20 Q. B. 124.

however much I may detest and abominate the doctrine that any one portion of the human race has a right to deprive another portion of its liberty . . ." nevertheless felt bound in law to decide against the Negro.

Accordingly, a rule was made: "that . . . the said John Anderson be recommitted to the custody of the keeper of the gaol of the said County of Brant, upon the warrant under which he hath been by him detained, to remain in the common gaol of the said County of Brant until a warrant shall issue upon the requisition of the proper authorities of the United States of America or of the State of Missouri, for the surrender of the said John Anderson, to be tried in that State for the murder of one Seneca T. P. Diggs."

The decision occasioned great feeling both in Canada and in England, and a writ of *habeas corpus* was, with considerable hesitation obtained in England.[4] It was found, however, unnecessary to proceed with this writ because of the decision of the Court of Common Pleas at Toronto. Discontinuance of the English writ was probably fortunate; as the jurisdiction of the Courts at Westminster, even then, was more than doubtful.[5]

One of the two Superior Courts of Common Law in the Province having decided against the Negro, a writ of *habeas corpus* was sued out of the other, the Court of Common Pleas and came on for argument, Hilary Term, 1861.[6] The Chief Justice of that court was William Henry Draper, C. B., an Englishman by birth, who had come to Canada in his twentieth year, and who had been Solicitor-General and Attorney-General of the Province. An exceedingly careful lawyer, his judgment in this case is very illuminating. He held that the omission of the word "murder" in the warrant of commitment was fatal (it will be noticed that in the Queen's Bench the recommitment was on the original warrant). "Murder" and "with malice aforethought" were essential in describing the offense. Another defect in the warrant of commitment was that the gaoler was instructed to keep the prisoner until he was delivered "by due course of law"; whereas it should have

[4] 3 L. T. Rep. (N. S.) 622.

[5] Now, of course, since Canada has no longer colonial status and is an independent Nation in the British Commonwealth of Nations, no attempt of that kind could possibly be made.

[6] 11 U. C. C. P. 9.

been until warrant on the requisition of the United States or the State of Missouri. The Chief Justice declared that since the warrant of commitment had been defective, the court of Queen's Bench had had no right to remand the prisoner to custody.

The above judgment was concurred in by the Puisnes, William Buell Richards, afterwards the first Chief Justice of Canada, and John Hawkins Hagerty, afterwards Chief Justice of the Court of Queen's Bench and then Chief Justice of Ontario, both excellent lawyers.

Chief Justice Draper was "reluctant on the one hand . . . to declare that each individual of the assumed number of 4,000,000 of slaves in the Southern States may commit assassination in aid of escape on any part of his route to this Province . . . reluctant on the other hand to admit that Great Britain has entered into treaty obligations to surrender a fugitive slave . . ." and he rejoiced that he was under no necessity to do either.

The prisoner was discharged—and not recaptured.