Railroading the Train Robbers: Extradition in the Shadow of Annexation

*Dale & Lee Gibson**

I. INTRODUCTION

IN 1868 WINDSOR, ONTARIO, WAS A ROUGH PLACE; one writer has described it as "a border Dodge City."[1] A major reason for this was that Windsor's location, a short boat pull across the river from Detroit, offered a tempting haven for fugitives from American justice. Gilbert McMicken, whose operational base as co-Commissioner of the newly-created Dominion Police Force was in Windsor, reported to Prime Minister John A. Macdonald that: "We are always annoyed at this point with a lot of fugitive vagabonds from the U.S. and sometimes fairly inundated with them."[2] The occasion for McMicken's remark was his involvement with an especially vicious group of American desperados: members of the notorious Reno gang of train robbers from Indiana.

The story began about 11:00 p.m. on the night of May 22, 1868, as a train, made up of a locomotive and tender, an express car, a baggage car, and two passenger coaches, stopped to take on water in the town

* Dale Gibson teaches in the Faculty of Law, University of Manitoba. His major fields of interest include Constitutional Law and Canadian legal history. His publications in the latter area include *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (with Lee Gibson), *Attorney for the Frontier: Emos Stutaman* (with Lee Gibson and Cameron Harvey), and periodical articles. He was the first Director of the Canadian Legal History Project at the University of Manitoba. Lee Gibson is a freelance historian specializing in Canadian legal history. She is the co-author of *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (with Dale Gibson), *Attorney for the Frontier: Emos Stutaman* (with Dale Gibson and Cameron Harvey) and several articles. She is a contributor to the *Dictionary of Canadian Biography* and the *Canadian Encyclopedia*, and has recently completed a book-length history of one of Western Canada's oldest law firms. The research assistance of Scott Gibson is gratefully acknowledged.

[1] J.D. Horan, *The Pinkertons: The Detective Dynasty That Made History* (New York: Crown Publishers, 1968) 169.

[2] Letter from McMicken to Macdonald (23 September 1868) P.A.C., Macdonald Papers, vol. 241 at 107547-8.

of Marshfield, Indiana.[3] As soon as the conductor and train crew disembarked from the train, several men materialized from the shadows near the water tower. Some headed for the engine, others for the express car. One man uncoupled the engine, tender and express car from the rest of the train, and another disconnected the bell-rope. When the conductor noticed what was happening he shouted, and was promptly shot at. The bullet passed through his coat, but missed his body. The locomotive, tender and express car then pulled away with one of the criminals at the throttle, leaving the other coaches standing at the station. The conductor fired three futile shots at the disappearing train, and was answered by a volley from the rear of the express car.

The hijackers then broke into the locked express car, beat the clerk unconscious, and flung him from the hurtling train. He was not found until the next morning, and did not regain consciousness for almost two days. The principal object of the robbery was a large sum of money, estimated at $96,000, in the express car safe. After the gang broke open the safe and purloined the money they abandoned the train and dispersed, knowing they had probably been recognized.

II. THE RENO GANG

THE ADAMS EXPRESS COMPANY, whose safe had been robbed, engaged the Pinkerton Detective Agency, headed by the already legendary Alan Pinkerton, to capture the bandits. To be more accurate, the Pinkertons were requested to continue their ongoing efforts to find and arrest the Reno gang, of Seymour, Indiana, who were already being sought for previous depredations. The Renos had been identified by the conductor and the express clerk as the men responsible for the Marshfield robbery.

The brothers John, Frank, William, and Simeon Reno had been marauding the states of Indiana, Iowa, Ohio and Missouri, assisted by assorted underlings, for the past two or three years. In October 1866, John and Simeon had been responsible, together with a third man, for one of the earliest train robberies in the United States, a daring raid

---

[3] The following account is based on evidence presented at the extradition hearing before Magistrate McMicken and included in the report of a subsequent *habeas cirpus* hearing: *R.* v. *Reno & Anderson* (1868), IV Pr. Rep. 281 (Q.B.). A more lurid version, inaccurate in some details, will be found in Horan, *supra*, note 1 at 166ff. The ensuing descriptions of Alan Pinkerton's investigative efforts, and of the Reno family, are based primarily on Horan's account.

carried out near their home town of Seymour, Indiana. The Pinkerton organization had managed to apprehend John Reno on that occasion, and had secured his conviction and imprisonment for that crime. Frank Reno had then assumed leadership of the gang, and the outrages had continued. Following a safe-cracking at a county treasury office in Iowa, the Pinkertons had captured Frank Reno and some of his associates, but they had broken out of jail before they could be tried. That was in April, 1868. The Marshfield express robbery occurred the following month.

Three members of the Reno gang, including the man alleged to have operated the locomotive at Marshfield, were arrested in Illinois in July, but as Pinkerton agents were escorting them back to Indiana for trial, they were set upon by a vigilante mob - a masked group calling themselves "Regulators," consisting, probably, of railroad and express employees and other outraged citizens - and peremptorily hanged. A short time later, William and Simeon Reno were also captured. Would-be lynchers tried to get to them too, but the authorities in Indiana were able to fend off the crowd and lodge the brothers in the New Albany, Indiana, jail pending trial.

Meanwhile, Frank Reno, in company with an accomplice called Charlie Anderson and others, had fled across the international border to Windsor, Canada. Pinkerton detectives found them there, and in early August they were arrested and Stipendiary Magistrate Gilbert McMicken was requested to authorize their extradition. The Toronto Telegraph for August 18, 1868, reported that Reno and Anderson were being held in jail at Sandwich, near Windsor, awaiting extradition.

III. Magistrate McMicken[4]

Gilbert McMicken was no run-of-the-mill magistrate. He had emigrated from Scotland to the Niagara region as a young man in 1832, and after a roller-coaster career in transportation, banking, real estate, and politics (among other things), he had been commissioned by the government of the United Canadas during the American Civil War to establish a frontier police force.

The purpose of the frontier force was originally to restrain both Confederate military incursions into the northern United States from Canadian territory, and illegal recruiting efforts within Canada by the northern army. Although the war ended before they could accomplish much, McMicken's frontier police were then assigned a task they

[4] See generally D. & L. Gibson, "Who Was Gilbert McMicken ...?" (1986) [unpublished].

carried out with notable success: investigating the activities of the Irish-American Fenian Brotherhood, and helping to frustrate that organization's para-military raids into Canada. By infiltrating the Fenian organization with high-level secret agents, McMicken's operatives had been able to predict the time, place and strength of the raids with remarkable accuracy.[5] Other tasks, such as suppressing rowdyism in the vicinity of Niagara Falls, were also carried out efficaciously. In 1868, following the assassination of cabinet minister D'Arcy McGee on an Ottawa street, the force was reorganized, strengthened, and re-named the Dominion Police Force.[6] McMicken was named co-Commissioner of the force, jointly with a Montreal-based magistrate. As an adjunct to his police responsibilities McMicken was appointed Stipendiary Magistrate, with jurisdiction extending throughout Ontario.

Although McMicken's lack of legal training seldom impaired his judicial competence, some of his actions in *Reno & Anderson*, and in a related extradition case, were legally questionable. It might even be said, in retrospect, that the train robbers were railroaded. But McMicken was upheld by higher courts, and it must be acknowledged that the extradition legislation (very recently revised)[7] posed difficult questions of interpretation - questions which had to be answered with the knowledge that answers unsatisfactory to American authorities might provoke serious retaliatory action against Canada.

IV. LEGAL ANTECEDENTS

ALTHOUGH THIS IS NOT AN APPROPRIATE OCCASION to examine at length the history of Canadian-American extradition experience prior to 1868,[8] it is important to an understanding of the pressures felt by Canadian authorities in the *Reno & Anderson* case to know that several extradition *causes célèbres* earlier in the decade had angered public opinion in the United States, thereby strengthening the hands

---

[5] See generally J.A. Cole, *Prince of Spies - Henri Le Caron* (1984).

[6] *An Act Respecting Police of Canada*, S.C. 1868, c. 73, s. 4.

[7] *An Act Respecting the Treaty between Her Majesty and the United States of America, for the apprehension and surrender of certain offenders*, S.C. 1867-8, c. 94 (proclaimed 8 August 1868).

[8] See D. Gibson, "Free Trade in Criminals: Canadian-American Extradition Before 1890" [forthcoming].

of those Americans who favoured the annexation of British North America. The first case, involving a fugitive slave from Missouri named John Anderson, had been largely expunged from memory by the North's victory in the Civil War,[9] but two others were still well remembered. In one, Canadian courts had refused to extradite a group of Confederate soldiers responsible for an audacious raid from Canadian territory on the Vermont town of St. Albans.[10] That decision, and in particular the initial magistrate's ruling releasing the raiders, had come close to precipitating an American invasion of Canada. In the other case, a different military party from the South, again operating from Canada, had pirated an American ship on Lake Erie in an unsuccessful bid to release prisoners from a prisoner of war camp on an island in the lake. The latter group had eventually been extradited, but only by dint of a highly questionable ruling on the part of a Canadian court.[11] The hard feelings generated south of the 49th parallel by these cases and related events were welcomed by those who supported U.S. Secretary of State William Seward's 1861 pronouncement that it was his country's "manifest destiny" to expand,[12] and believed that this destiny extended to territory north of the international border. Magistrate McMicken and others responsible for the *Reno & Anderson* case had good reason, therefore, to be aware that the manner in which they applied the extradition legislation in this notorious affair could have a serious impact on relations between the new Dominion and its rambunctious neighbour.

Although the legislation appeared to call upon him to exercise independent judgment, awareness of the calumny that the *St. Albans* case magistrate had brought down upon himself by deigning to play an autonomous judicial role in a sensitive extradition situation could not have failed to affect McMicken's view of his proper function when the accused train robbers Frank Reno and Charlie Anderson were first

---

[9] The case is exhaustively examined in P. Brode, *The Odyssey of John Anderson* (Toronto: The Osgoode Society, 1989) and is described in more summary fashion in Gibson, *ibid.*.

[10] See Gibson, *supra*, note 8; L.N. Benjamin, *St. Alban's Raid* (1865); R.W. Winks, *Canada and the United States: Civil War Years* (Baltimore: Johns Hopkins Press, 1960) at 295ff.

[11] See Gibson, *supra*, note 8; Winks, *ibid.* at 287ff; *In Re Burley* (1865), 1 U.C.L.J. (N.S.) 34 (Q.B.).

[12] *St. Paul Daily Times* (22 September 1861).

apprehended in Windsor in August 1868. In his subsequent report to Prime Minister Macdonald McMicken remarked that he had done what he thought "you would have wished me to do," and expressed the hope that "I brought it to a conclusion at once right and satisfactory to you."[13]

V. RENO HEARING BEFORE MCMICKEN

THE FIRST THING MCMICKEN DID was to assert jurisdiction over the case, displacing a Police Magistrate before whom Reno and Anderson had first been arraigned. As he explained in his report to Macdonald:

> I observed an extraordinary current of sympathy working through various classes in favor of these fellows when proceedings were first initiated against them and as soon as an opening presented itself I took up the case.[14]

Taking responsibility for the case involved more than mere adjudicative involvement. The security of incarceration arrangements had also to be looked to:

> I had representations made to me of there being a probability that an escape or rescue would be attempted and I at once placed four good men of my force at the aid of the jailor, and they have been on guard day and night ever since. ... On the Saturday evening previous to my rendering my decision on the case there were no less than 40 ... (fugitive vagabonds from the U.S.) ... congregated together. They were threatening some disturbance and did actually cause some cases of assault to occur. On receiving intelligence of it I went at once down to the place where they were and took steps to prevent any outrage. All has been quiet since.[15]

Nor were the threats to the equilibrium of the scales of justice altogether physical. A few days before McMicken opened the extradition hearing, a New Albany newspaper reported that the magistrate's son had been approached with an offer of $6000 in gold in return for influencing his father to release the prisoners.[16]

---

[13] Letter from McMicken to Macdonald (23 September 1868) P.A.C. Macdonald papers, vol. 241 at 107547-8.

[14] *Ibid.*

[15] *Ibid.*

[16] *New Albany Independent Weekly Ledger* (26 August 1868). Quoted in Horan, *supra*, note 1 at 172.

Neither intimidation nor bribery deterred Gilbert McMicken, however, and he found at the conclusion of a lengthy hearing that the prosecution's evidence justified the issuing of a warrant of commitment for extradition. The extensive evidence had included strong alibi evidence by deponents for the defence, but McMicken concluded that it was for the American courts, not for him, to decide which of the conflicting witnesses to believe. He ordered the prisoners held for extradtion.

VI. Reno Habeas Corpus Application

Before McMicken's commitment warrant could be acted upon, Reno and Anderson brought an application for habeas corpus before the Court of Queen's Bench. That court sat in Toronto, which created a practical problem for the jailor, since the prisoners were being held in Sandwich, many miles away. The jailor described his dilemma in the return he sent back to the court after being served with the writ of habeas corpus:

> I ... do humbly certify that I hold and detain ... and ... am ready to produce the bodies of the said Charles Anderson and Frank Reno as I am ... commanded, but I am unable to convey them to the City of Toronto, as ... commanded, because I have no means whereby to pay the expenses of such conveyance. ...[17]

He went on to explain that he had applied unsuccessfully for financial support from the prisoners and their counsel, as well as from the Treasurer of the County of Essex, in which the jail was situated. "[T]herefore" he concluded "I most respectfully submit to this honorable Court that I am unable to obey the command of the said writ."[18] The court refused to accept a refusal to comply with its writ, however politely the refusal might be couched, and ordered the unsatisfactory return to be removed from the court records, and the prisoners to be produced forthwith. As the court later pointed out in its reasons for judgment, and no doubt explained to the embarrassed jailer before then, the *Habeas Corpus Act* contained a provision for reimbursement of expenses.[19]

---

[17] *R.* v. *Reno & Anderson*, *supra*, note 3 at 282-3.

[18] *Ibid.* at 283.

[19] *Ibid.* at 291. See D.A.C. Harvey, *The Law of Habeas Corpus in Canada* (1974) at 90.

It is not known whether Magistrate McMicken had advised the Sandwich jailer to respond as he did to the writ of habeas corpus. It is clear, however, that McMicken took advantage of the delay in complying with the writ to make what he considered to be an improvement in the warrant of commitment for extradition. Someone must have brought to his attention the fact that while both the information and his warrant referred to a charge that the prisoners "did feloniously *shoot at*" the conductor of the train "with intent ... feloniously, wilfully and of their malice aforethought, to kill and murder...",[20] the relevant parts of the treaty and statute covered only "*assault* with intent to commit murder."[21] In an attempt to remedy this discrepancy, McMicken issued a second warrant of commitment, phrased to conform to the language of the treaty and statute, after the writ of habeas corpus was served on the jailor.

VII. THE MORTON AND THOMPSON CASE INTRUDES

MCMICKEN WAS IN TORONTO, along with the prisoners and their jailor, when he signed the amended extradition warrant. A writ of *certiorari*, issued in aid of the *habeas corpus* application, had ordered him to produce for the higher court the evidence upon which his determination had been based. While in Toronto McMicken became suddenly seized of a second controversial train-robber extradition.

The same day he put his signature to the second *Reno & Anderson* extradition warrant, lawyers prosecuting another American railway express robbery came to him in great haste requesting that he issue a warrant to arrest the alleged perpetrators of that crime, who had just been released by a Toronto magistrate.

The second robbery had occurred in White Plains, New York, several months previously. Two men had boarded a train, bound and gagged the express company's clerk, broken open a safe, and made off with a large quantity of cash and securities. Pinkerton detectives had traced the suspected culprits, Ike Morton and "Piano Charlie" Thompson, to Toronto, where they had been arrested and brought before a Police Magistrate named McNabb for extradition.

Counsel for the accused had presented Magistrate McNabb with a rather startling defence. One of the prisoners had taken the stand, and had brazenly admitted that he and his partner had taken the

---

[20] *Supra*, note 17 at 284 and 287 (emphasis added).

[21] (Emphasis added).

valuables from the train. However, he claimed, the express clerk had willingly collaborated in the crime. Defence counsel contended that this converted the offence from robbery, which was covered by the extradition treaty, to embezzlement, which was not. The argument made sense to Magistrate McNabb, who released the prisoners.

Newspapers registered outrage at this turn of events. The *Toronto Globe*, for example, wrote:

> The easy, jaunty assurance with which all this was advanced is indescribable. ... (T)he Magistrate in the presence of a company of as great rascals as ever swung at Tyburn found himself powerless.[22]

In the Globe's opinion the fault did not lie with Magistrate McNabb but rather with the undesirably narrow extradition treaty:

> We do not at all blame our Police Magistrate for the decision he has given. ... (H)owever much to be regretted, such a decision was inevitable, according to the plain meaning of the law.[23]

It did not seem inevitable to Gilbert McMicken, however. He quickly granted the request for a new arrest warrant, making it returnable before him at Sandwich, where he expected to be, and was, by the time Morton and Thompson were found and re-arrested. This initiative was not at all popular with Toronto authorities, who were annoyed that an itinerant magistrate from a rough little place like Windsor should dare to overrule a well respected Toronto justice. There was also some concern expressed about unduly friendly relations between Magistrate McMicken and the Pinkerton operatives.

While the latter concern might have been misplaced, it was understandable. Alan Pinkerton, the magnetic individual who had founded the fabled detective agency and still directed its operations, had taken a personal interest in the express robberies, and appears to have led the team that arrested Reno and Anderson in Windsor.[24] He was present in Toronto when Morton and Thompson were released, and it was he who caused McMicken to be approached for a new arrest

---

[22] (2 October 1868).

[23] *Ibid.*

[24] Horan, *supra*, note 1 at 171.

warrant.[25] He would almost certainly have come into contact with McMicken while the *Reno & Anderson* case was being prepared and tried at Sandwich. It is clear, in any event, that cordial social relations would soon exist between the two men, both expatriate Scots, and close in age.

When McMicken encountered an uncooperative attitude on the part of certain Toronto police officers, he complained to the Toronto Police Commissioners, who conducted an inquiry into the behavior of a certain Detective Sheehan. Sheehan had apparently said he would never deliver a prisoner to McMicken and his men "to be smuggled over to Detroit." Sheehan was acquitted of dereliction of duty,[26] but the investigation may well have paved the way to greater cooperation between the city police and McMicken's frontier police in the future.

VIII. HABEAS CORPUS DENIED TO RENO AND ANDERSON

ALTHOUGH MCMICKEN MIGHT NOT HAVE BEEN HAPPY to see his charges against Sheehan dropped, he would have been altogether satisfied with the outcome of the *Reno & Anderson habeas corpus* hearing, which concluded the following day. The hearing was held before Chief Justice Draper of the Court of Queen's Bench. Defence counsel's most plausible arguments were based on the alleged irregularity of McMicken's second extradition warrant (the amended one) and the discrepancy that had prompted its issuance. Their other arguments - that McMicken lacked jurisdiction because his pre-Confederation appointment as Magistrate had not been renewed since Confederation, when criminal law became a constitutional responsibility of the Parliament of Canada; and that he ought to have treated the alibi evidence as negativing the prosecution's case - were easily rejected. "Administration of justice" remained a responsibility of the provinces after Confederation, the court pointed out, and pre-Confederation judicial appointments remained in force until rescinded. The respective weights of the prosecution and defence evidence was held, as McMicken had found, to be a question for determination by an American trial court, not by the extradition tribunal:

---

[25] "The Express Thieves - Letter From Alan Pinkerton" *Toronto Telegraph* (1 October 1868).

[26] *Toronto Telegraph* (5 October 1868).

If the Magistrate discharges the accused because he thinks their witnesses are entitled to more credit than those for the prosecution, he goes ... beyond the true meaning of the Act, which only confers authority on him to enquire whether the evidence of criminality is .. sufficient to sustain the charge. If he discharges because the evidence *pro* and *con* is equally strong, and he cannot tell which side is telling the truth, he is ... equally in error, because he is assuming the functions of the tribunal to which belongs the trial of the prisoner's guilt.[27]

As to the validity of the information and the extradition warrants, Chief Justice Draper also ruled in favour of the prosecution. In the first place, he found the information and the first warrant to be sufficient, despite the variation between their wording and that of the treaty and statute. Moreover, he seemed to hold, any problem caused by the variation had been remedied by McMicken's second warrant:

It certainly would have been the more prudent course to have followed the precise description of the offence given by the statute; but if the charge, as laid by the information, involved an assault with intent to commit murder, and the evidence sustains the charge of assault with that intent, and after the evidence taken the accused are committed on a charge following the very words of the treaty and statute, I think it would be discreditable to the administration of justice if the verbal variance between the information and the statute were allowed to prevail.

That shooting at a man with intent to murder him involves an assault, cannot be denied. ... Here, the particular mode in which it was endeavoured to execute that intent, a mode which includes assault, is expressed - it limits the charge to one particular mode of assaulting, but it is not the less a charge of assault with felonious intent .... I think, therefore, that the first warrant might be upheld.

As to the second warrant, there is no such difficulty.[28]

While Chief Justice Draper's reasoning may have been supportable so far as the first warrant was concerned, his reliance on the second warrant as fall-back authority for the detention is difficult to understand. Even if McMicken was not *functus officio* after issuing the first warrant, surely any defect the information might have contained could not be expunged by altering the language of the committal warrant.

One senses in Chief Justice Draper's not always compelling reasons for judgment the same determination to extradite the desperados at all costs that had marked his rulings in the Lake Erie piracy case

---

[27] *R.* v. *Reno & Anderson*, *supra*, note 3 at 298-9.

[28] *Ibid.* at 296.

during the American Civil War.[29] Considerable distaste for the task is also evident; he clearly felt that the ultimate decision in such matters should be left to politicians, and described the judicial warrant for extradition as:

> a commitment for *safe custody only* until the Governor, on a requisition made by the United States, shall, by his warrant, order the persons committed to be delivered to the person authorized by the United States to receive them to be tried for the crime charged. ... The question of extradition or discharge is therefore vested exclusively in the Governor General, whose decision may possibly be influenced by considerations which a court could not entertain.[30]

"Indeed," he added, perhaps with more yearning than conviction:

> I have not been free from doubt whether it was not the intention of the Legislature ... to transfer to the Governor General *exclusively* the consideration of all the evidence, that he may determine whether the accused should be delivered up.[31]

IX. EXTRA-LEGAL EXCITEMENT

AT ABOUT THE SAME TIME Reno and Anderson lost their bid for judicial release, Morton and Thompson were re-captured. The *Toronto Telegraph* for October 8 reported that both pairs of desperados had been lodged in the Sandwich jail the previous morning. The same story related that Mrs. Morton had arrived in town to provide moral support for her husband (Mrs. Reno was also on the scene, having followed her husband from Sandwich to Toronto and back). Reno and Anderson were reported to be dispirited and worried that vigilantes would visit upon them the same summary treatment that other members of the gang had received.

The fate of Reno and Anderson now depended entirely on politicians. As each day passed with no word from Ottawa, speculation grew that the Canadian government was seeking assurances from American authorities that the fugitives would be protected from vigilante action, and would receive a fair trial in the United States if extradited. A Chicago newspaper claimed that this was the reason for the delay, and although the Toronto Globe was skeptical (and critical

---

[29] *In Re Burley*, *supra*, note 11 at 34.

[30] *Ibid.* at 295 (emphasis in the original).

[31] *Ibid.* at 298 (emphasis added).

if the speculation were true),[32] subsequent events would support the rumours.[33]

Meanwhile, more spectacular events were unfolding. On the morning of October 15 Reno and Anderson resorted to desperate measures. The following day's *Toronto Telegraph* revealed that they had failed in:

> an attempt to break jail ... by cutting a hole in the floor of the prison. They lifted a piece of flooring six feet long and eighteen inches wide. Fortunately, a guard of the Frontier Police had been placed as a watch on the jail, and the attempt proved abortive.

Later that same morning Gilbert McMicken and his son Hamilton witnessed an apparent attempt to assassinate Alan Pinkerton. There had been a brief hearing in the *Morton & Thompson* matter at Sandwich, where the prisoners were being held. After the hearing had adjourned, the two McMickens rode back to Windsor with Pinkerton in a hack. Their vehicle was overtaken by a buggy carrying several people, including a mysterious "George Johnson," and as the buggy drew abreast the hack Hamilton McMicken yelled that Johnson seemed to be drawing a revolver from his pocket.

Young McMicken's warning seemed to deter Johnson, and nothing further happened at that point. Later that afternoon, however, after Pinkerton had crossed the river to Detroit, Johnson stepped from behind a saloon door and aimed a revolver at Pinkerton's ear. The Detroit Free Press described what then ensued:

> Quick as thought, Pinkerton seizes the pistol and, holding it high in the air, closes with him, at the same time calling for assistance. John Kurt, rushing forward, snatches the pistol, while Arthur Gore seizes Johnson and hurls him to the floor. After a brief but furious struggle the desperado is overpowered by Pinkerton and others.[34]

Whether the attack by Johnson, who was apparently unbalanced, was connected to either of the express robbery cases was never determined. The incident did establish two things, however: that Gilbert McMicken maintained closer personal relations with Pinkerton than was advisable between prosecutor and judge; and that the administration of justice could be a hazardous occupation.

---

[32] *Toronto Globe* (22 October 1868).

[33] See *Toronto Telegraph* (27 October 1868); *New York Times* (13 December 1868).

[34] Reprinted in *Toronto Telegraph* (19 October 1868).

On October 24, the Governor-General's extradition warrant having finally arrived at Sandwich, Reno and Anderson were delivered to American authorities. Even that was a far from routine event. Pinkerton, who was in charge of the delivery arrangements, was fearful that attempts to seize the prisoners might be made by persons sympathetic to them, or by lynchers. To avoid both possibilities, it was planned to convey Reno and Anderson, aboard a specially hired steamer, to a destination other than that which was unofficially announced. The plan went seriously, almost fatally, awry. The *Toronto Telegraph* told its readers the story on October 27. After describing the threats posed by both friends and enemies of the prisoners, the *Telegraph* continued:

> In the midst of all these threatened interferences with the ends of justice, it became necessary that the greatest secrecy should be observed in the transportation of the prisoners to the scene of their trial, Floyd County, Indiana. The steam tug Senaca was chartered to convey the prisoners to Cleveland, where they were to be placed in a special train conveyed to Cincinnati and then taken down river by steamer. Preparations were made at Sandwich to deliver them safely aboard the tug. Magistrate McMicken's Dominion police were present, as also a special guard detailed by the United States authorities, for the protection of the prisoners. Saturday night was deemed the most suitable time to receive the prisoners, since pursuit would not be possible for several hours at least. Accordingly, the tug steamed down to Sandwich dock shortly after dark on Saturday evening, having on board Mr. L.C. Wier who was to receive the prisoners on behalf of the United States authorities, and a guard of eight persons besides the officers and crew of the boat. With the usual formalities, the Sheriff of Essex County turned over Reno and Anderson to Mr. Pinkerton, who conveyed them on board and delivered them to Mr. Wier. No effort was made to rescue them while they were being conveyed to dock, although there were an assemblage from probably fifty of their friends.
>
> For the purpose of secrecy it had been planned that the tug should first steam up into Lake St. Clair, to convey the impression that she had gone around the lakes to Michigan City in Indiana. But ... when the steamer had reached the head of Belle Isle ... she was to turn about, and steam down the American channel past the city, and thus on her way to Cleveland without landing or allowing anyone to board her.

After doubling back and passing again between Windsor and Detroit, the Senaca met an oncoming ship, which she signalled to pass. Then something went wrong:

> (B)y some unaccountable blunder the wheelsman of the Senaca put his wheel hard to port when it should have been to starboard. The two boats collided, the (other) striking the Senaca squarely about midway from stem to stern, and cutting her in two. The Senaca went to the bottom in less than a minute.

Both Reno and Anderson were in chains, and when the ship went down they were therefore in peril of drowning. The *Telegraph* reported

that the crew of the other ship rescued everyone aboard the Senaca. Pinkerton's biographer claims that he and his operatives kept the prisoners afloat until they could be rescued.[35] All present would have agreed with the *Telegraph's* comment that "it seems almost a marvel that no lives were lost." Although it would not be unreasonable to suspect that the collision had been arranged by friends or enemies of the prisoners, Alan Pinkerton always maintained that it was a pure accident.[36]

After dry clothing had been found for both captors and captives, Pinkerton and U.S. authorities succeeded in delivering their charges to a jail in New Albany, Indiana where two other survivors of the gang, Simeon and William Reno, were still lodged. There they all remained, awaiting trial, for the next six weeks.

X. LYNCHING

BUT THE TRIAL WOULD NEVER OCCUR. On December 12, 1868, between 3:00 and 4:00 in the morning, a specially chartered train arrived at New Albany from the direction of Seymour, Indiana. Seymour was the Renos' home town, and was not far from Marshfield, the site of the express robbery.[37] The two towns were about 30 miles apart. Some 60 or 70 masked and armed men, more of the "Regulator" vigilantes, emerged quietly from the train and proceeded to the vicinity of the jail. One of them cut the town's telegraph line, while an advance party overpowered the outdoor guard and entered the jail building, and the others took up strategic positions nearby. The inside group made prisoners of another guard and the sleeping Sheriff (who was wounded in the process), and used the latter's keys to gain access to Anderson and the three Reno brothers.

The prisoners put up a stout resistance. Frank Reno, in particular, was said to have "fought with the strength of a lion," and to have succeeded in hurling three of his assailants to the ground. But they were hopelessly outnumbered, and were soon subdued. Frank Reno was "knocked senseless" and beaten until "the blood and brains

---

[35] Horan, *supra*, note 1 at 174-5.

[36] *Ibid.* at 175.

[37] The following description is taken from an account in the *Ottawa Citizen* (18 December 1868), reprinted from the *Toronto Telegraph*, which quoted a report from correspondent in Indianapolis, Indiana, written the day of the event.

streamed down his face." The prisoners were then taken outside and hanged from the railing above the jail porch.

Their grisly work done, the Regulators locked the Sheriff and guards in the jail and returned to their train, now pointing back toward Seymour. Some of them paused at the home of a County Commissioner, whom they took into temporary custody. As the locomotive sighed into motion, the vigilantes handed the jail keys to the Commissioner, and set him free. Most of the townsfolk were still asleep. Although he probably didn't have a hand in the affair, Alan Pinkerton couldn't have handled it more efficiently.

Back in Canada, much disgust was expressed about the inability of the American justice system to ensure a fair trial for the extradited men. Official reaction appears to have been relatively restrained, however. The *Toronto Telegraph* reported on December 17 that while U.S. authorities, concerned about Canadian opinion, were offering assurances that they would do everything they could to deal with the outrage, Canada's representative in Washington pointed out that it was now really too late to do anything useful.

The *Toronto Globe* published an editorial entitled "Lynch Law and the Express Robbers" on December 15 which probably epitomized the prevailing Canadian attitude. "We have no sympathy with Judge Lynch or his admirers ..." it began. "Lynch Law is no law at all. It is a proclamation to the effect that the reign of law is over ..." The article boasted that "We under British rule have always had much reason to congratulate ourselves ..." because "(w)ith very rare and slight exceptions, the reign of law throughout the British Empire is supreme," and it regretted that, by contrast, lynch law was "still too much in favour" on "the other side." The hanging of the Reno gang was a "disgrace," the editorial proclaimed, because although "(t)hey may have been as great blackguards as could be found on the continent ... (t)hey were untried and uncondemned." Nevertheless, the *Globe* cautioned, this unfortunate incident should not be permitted to affect the way Canada responded to future extradition requests:

> It does not follow from all this, however, ... that henceforth we should be more careful about fulfilling our part of the extradition treaty, and should ask questions before we let suspected parties out of our hands.

To do so "(b)ecause justice may not be done in one case out of a thousand" would be an "absurdity":

No, No, it is a pity that Reno and Anderson have been hanged. It is a disgrace to the authorities and people of Indiana; but were a similar demand to be made upon us tomorrow ... we should have no alternative but to deliver him up, without proviso.

There can be little doubt that the Government of Canada saw things the same way.

XI. McMicken Visits Chicago

THERE IS AN ENIGMATIC EPILOGUE to the *Reno & Anderson* extradition story. On April 3, 1869, not quite four months after the lynching, Gilbert McMicken was in Chicago, where the Pinkerton organization was based. McMicken's journal entry for that day recorded that although the business which took him to Chicago - to make contact with one of his Fenian spies - had been unsuccessful, he had paid a visit to Pinkerton's "marvellous" establishment.[38] Whether Pinkerton's hospitality on that occasion included a visit to his palatial home "The Larches," is not known, but McMicken noted that Pinkerton had offered to get him an invitation to travel with the official party on the opening of the new Pacific Railway. Also of interest was the fact that McMicken's son Hamilton was now in Chicago working for Pinkerton. Most intriguing of all is McMicken's final journal entry for that day:

Leave for Detroit at 4:30 - Hamilton comes with me - *Sent to look after Mrs. Reno.*[39]

There is nothing further in McMicken's journal, or in any other documents that have come to light, about the nature of Hamilton's (or Gilbert's?) mission to Frank Reno's widow. To "look after" Mrs. Reno can hardly have had sinister connotations if a Stipendiary Magistrate was kept informed, or perhaps even involved; yet it seems improbable that the lady was in need of financial assistance, which is the most plausible alternative explanation. William Pinkerton later recalled that Frank's widow (whom he described as "good looking, ... small in stature," and "respectable," though fully aware of how her husband made his living, and loyal to him) was hardly likely to have been left impoverished, considering the fact that very little of the loot from the

[38] McMicken Diary (3 April 1869) P.A.C., Macdonald Papers, *supra*, note 2 at 100774.

[39] *Ibid.* (emphasis added).

express robbery or other Reno heists was ever recovered.[40] What else Hamilton McMicken or his father could have done to "look after" Mrs. Reno is difficult to conceive.

What motives underpinned the favours that Alan Pinkerton seemed anxious to bestow on Gilbert McMicken and his son? Simple friendship between two hardy and hearty expatriate Scots? Pinkerton's admiration of McMicken's courage in standing up to the prisoners' supporters? His gratitude for giving the prosecution as much assistance as possible? All of the above? While there is too little evidence to permit firm conclusions, it would not be unduly conjectural to entertain at least the possibility that in addition to the blatant bribe of gold McMicken was alleged to have rejected from the defence, he had also been subjected to more subtle and insidious pressures by the other side.

XII. MORTON AND THOMPSON EXTRADITED

THE VERY DAY THAT RENO AND ANDERSON WERE DELIVERED to Pinkerton and the U.S. authorities, Magistrate McMicken issued a warrant for the extradition of Morton and Thompson.

McMicken's warrant was then challenged in *habeas corpus* proceedings before the Court of Common Pleas. Chief Justice Hagarty and Justices Wilson and Gwynne heard lengthy arguments on behalf of the prisoners, but ultimately rejected them all and supported McMicken's decision to commit for extradition.[41] The first objection raised by the defence was that once an extradition hearing has resulted in a release of the accused persons, as the McNabb hearing did, no other judge may re-institute proceedings. Chief Justice Hagarty and his colleagues held that the law's protection against double jeopardy does not apply to extradition proceedings, since they do not involve findings of guilt or innocence. To the contention that Stipendiary Magistrate McMicken had no jurisdiction to issue arrest warrants in Toronto, where the writs of local judges ran, the court responded that McMicken's jurisdiction extended throughout Ontario, and that while local magistrates might have exclusive jurisdiction concerning crimes occurring within their areas, no such restriction could be applied to extradition for crimes committed outside the country. Short shrift was

---

[40] Letter from W.A. Pinkerton to F.J. Holton (21 June 1920) Hiram Walker Museum Collection, Archives of Ontario, 20-115, Box 7.

[41] *R.* v. *Morton & Thompson* (1868), 19 U.C.C.P. 9.

given to an objection based on the fact that McMicken had accepted depositions as well as viva voce testimony in support of the case for extradition.

Interestingly, no direct reference was made in the reasons for judgment of the Court of Common Pleas to the argument that had won the prisoner's release from Magistrate McNabb: that because of the express clerk's connivance the offense had not been robbery, but had instead constituted some non-extraditable crime such as embezzlement or inducing breach of trust. Perhaps the court was of the opinion that a decision as to the credibility of the evidence concerning the clerk's participation should be made by the trial court rather than by the extradition tribunal. Chief Justice Hagarty remarked at one point that:

> All this country is asked to do is to send the prisoners to the place where they must be face to face with all the witnesses against them, on whose testimony they may or may not be committed for trial. They are not so committed on this side of the boundary line.[42]

This, of course, was the approach that had been taken by Chief Justice Draper in *Reno & Anderson* with respect to assessing the credibility of the alibi evidence tendered by the defence.[43]

Was there not a difference between the two situations, however? The alibi evidence in the *Reno* case concerned the *guilt or innocence of* the accused, while the clerk's alleged collaboration with Morton and Thompson was a matter that affected their *extraditability*. If the clerk had really been in cahoots with the express bandits it would be difficult to characterize their crime as "robbery," the only applicable extraditable offence. And if the determination of that key question were left to the trial court after extradition it would be too late. While evidentiary conflicts relating to the substance of a criminal charge should certainly be relegated to the ultimate trier of guilt, logic requires that those which relate to the applicability of the extradition treaty must be dealt with by the extradition tribunal.

The reason this distinction was not recognized by the Court of Common Pleas in *Morton & Thompson* may have been the judges' undisguised concern about the narrow range of offences for which extradition was available. It was a concern felt by many Canadians. Not long before the *Morton & Thompson* hearing, for example, the

---

[42] *Ibid.* at 18.

[43] *Supra*, note 27.

London Free Press had published an editorial, reprinted in at least one other Canadian newspaper, lamenting the fact that:

> Canada is ... becoming the recognized refuge for rogues. ... (W)e have to harbor and support other peoples' rogues as well as our own. .. (T)he existing state of the law .. proclaims a man a villain on the south side of the lines and sets the dogs of justice at his heels; while incoming to this side he is ... encouraged to walk our streets, hoist his legs in our hotels, expectorate profusely on our floors, and wear an unlimited amount of gold chain over his waistcoat. Let us have a little reciprocity for the benefit of morality ... (and) the protection of our homes ..., as well as in hay and oats.[44]

The Common Pleas judges expressed similar sentiments. Chief Justice Hagarty complained that:

> The present law of extradition is unfortunately powerless to reach the class of felonies most common in occurrence, to the vast injury of the peace and good order of both the countries interested; and the almost complete impunity enjoyed by fugitive criminals on either side of the lines is a matter of such dangerous significance as probably soon to force itself on the attention of both governments.[45]

Wilson J. added:

> I have but to express the hope that the time will soon come when other offences may safely come within the provisions of a more liberal treaty.[46]

In the absence of "a more liberal treaty" the judges were apparently prepared to stretch existing arrangements to serve what they considered to be the public good. Chief Justice Hagarty acknowledged that:

> I have always felt disposed to give the fairest and most liberal interpretation to the provisions of an arrangement like this Extradition Treaty, entered into by two nations professing a common civilization, with a thousand miles of coterminous boundary. They properly agree that their respective territories shall not be the asylum for those who commit crimes abhorrent to the laws of both communities.[47]

In response to concerns expressed by the prisoner's counsel, or perhaps by the judges' own consciences, the reasons for judgment

---

[44] Reprinted in *Ottawa Citizen* (25 September 1868).

[45] *Supra*, note 41 at 20-1.

[46] *Ibid.* at 25.

[47] *Ibid.* at 20.

minimized the risk of vigilante lawlessness. Wilson J. acknowledged that there had once been (he did not say when) a "terribly dense cloud ... under the dark shadow of which, it was felt, it would not be safe to surrender persons accused of larceny."[48] However, he asserted, that cloud "has been swept away," and:

> I have never had occasion to hesitate for a moment in committing for extradition from any fear that the parties charged would not have a fair trial. We are not to overlook or forget for an instant that we are dealing with a highly civilized people, most tenacious of their liberty, whose laws are similar to our own.[49]

The Chief Justice was content to disclaim any responsibility for what might happen to the prisoners south of the border:

> I have neither the right nor the desire to doubt that, when surrendered, they will be legally and fairly dealt with.[50]

These assurances and disclaimers were uttered just a fortnight before the Reno brothers and Charlie Anderson were lynched at the New Albany jail.

Fortunately, Morton and Thompson did not meet the same fate. According to Alan Pinkerton's son William, who had much to do with them in subsequent years, they were jailed in White Plains, New York, but later escaped. They surfaced next in Boston, where they and others successfully tunnelled into the Boylston Bank, getting away with almost half a million dollars. They then sailed to Europe, and proceeded to spent their loot in a conspicuous fashion. "Piano Charlie" Thompson (or Bullard, which Pinkerton said was his real name) used part of his wealth to establish what Pinkerton described as "the first American bar" in Paris, at #4 Rue Scribe. It was, he claimed, "a beautiful place containing valuable paintings and very artistically furnished and arranged." In the course of tracing other culprits to Paris William Pinkerton discovered "Piano Charlie" and warned European officials about his background. His warning may have played a part in Charlie's subsequent arrest and imprisonment for robbing a Belgian bank. After serving his European sentence Charlie

---

[48] *Ibid.* at 25. The word "larceny" is revealing, given that only robbery was subject to extradition.

[49] *Ibid.*

[50] *Ibid.* at 20.

Thompson/Bullard came back to Canada, was convicted of jewel theft in Montreal, and died in prison there. Morton (sometimes known as Marsh according to Pinkerton) also ended his days in prison, while serving a long sentence for a Pennsylvania bank robbery.[51]

XIII. CONCLUSION

WHAT DOES THIS GLIMPSE of extradition law and practice in the second year of Canada's existence reveal? It does illustrate several aspects of 19th century Canadian justice: that border towns were rowdy places in those days; that lynch law was still in evidence; that magistrates were not free from physical hazards; and that friendly relations sometimes existed between the bench and prosecuting authorities. Does it tell us anything beyond those commonplaces? We think it does.

Probably the most noteworthy feature of the *Reno & Anderson* and *Morton & Thompson* cases was the almost indecent determination of both Magistrate McMicken and the superior court judges who reviewed his rulings to ensure that the prisoners were extradited. Whether a result of still fresh memories of how close an exercise of judicial independence in the 1864 *St. Alban's* case had brought the country to war, or the product of a wish to rid Canada of undesirables, this determination was unmistakable. Five of the six judges involved in the two cases were prepared to disregard strong legal arguments in the prisoners' favour rather than disappoint the American authorities who sought their extradition. This was not the first instance of the law's inability to ensure impartial adjudication in circumstances where political elites or the community generally have a strong interest in a particular outcome. It certainly would not be the last.

---

[51] *Supra*, note 40.