

C. L. Cham.]

REG. v. RENO AND ANDERSON.

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the other part of the train on the track. Two other shots were fired from the end of the express car, one by the man who pulled out the coupling pin, the other by the man who had fired the first shot. Some of these shots were from a revolver. The conductor was, as he thought, about eight feet distant when the first shot was fired, fifteen feet at the second, and thirty feet at the last. He fired three shots in return. He recognized the first man who fired as one Simeon Reno, a brother of the prisoner Frank, whom he pointed out at this examination. The family residence of the Renos was near the village of Seymour, which is about eighteen miles north of Marshfield. Shortly after the engine and the express car had moved off the door at the rear of the latter was burst open. Harkins, the express messenger, states that three men entered at once, and immediately afterwards he lost consciousness—the last he could remember was the flash of a pistol, or ball of fire, before his eyes. He gave no other explanation, and added that on the Sunday following (the 22nd of May was on Friday) he recovered consciousness. By other testimony it appears that both front and rear doors of the express car were burst open, and pieces of paper and broken packages were scattered round in the car. The conductor telegraphed to various places, and an engine was sent to him, with which he took on the residue of his train to Seymour, where he found the express car and the engine which had been taken away.

Harkins was found about 250 yards from where the engine and express car had been taken, lying between two trucks, "doubled up." He was insensible, and had a cut on the back of his head. From the place where he seemed to have first struck the ground he appeared to have slipped about ten feet. In the opinion of the conductor, the engine taken away must, at the place where Harkins was found, have been going at the rate of thirty miles an hour.

Harkins states that he did not know either of the three men who burst into the car, but that the two prisoners are two of them: that he recognized them in the Dominion Saloon at Windsor, and there pointed them out to Mr. Weir. On cross-examination he gave a description of the light on the car, viz.: a lamp placed about five feet high on the left hand side, entering from the rear, and behind him as he looked towards the men entering. He stated that he has since seen Simeon Reno, and had recognized him also.

*McMichael* and *O'Connor* for the prisoners, contended:

1. As to the matters of fact that there are inconsistencies, and strong improbabilities in the depositions (particularly in those of the express messenger), which render it unjust, or at least indiscreet to rely and act upon them; and that they are proved to be untrue by the mass of testimony adduced to prove, and which does prove an *alibi*.

2. As to the matters of law, they insisted that as there is no direct proof that either of these prisoners actually did shoot at the conductor, although they went in company with the man who did shoot, and with others to steal, there is no reason whatever for inferring that they went intending to commit murder: that the act of shooting at the conductor with intent to murder,

being no part of the original design, and being a distinct felony according to our law, was an act for which only the actual agent or agents were responsible, and that there was no proof that the prisoners concurred in that act, or in the intent with which it is charged to have been done; that the intent may just as well have been to maim, disable, or do grievous bodily harm to the conductor as to murder him, and therefore would not sustain the charge stated in the committal, *i. e.*, shooting at, with intent to murder, which is the only intent contained in the treaty: that the first warrant does not contain a description of an offence as designated in the treaty, by the words, "Assault with intent to commit murder:" that the second return made by the gaoler was null, as he had made one return already to which the first commitment was annexed; that the second warrant of commitment was void, being made after the writ of *habeas corpus* was issued, and this first return had been made and had been received and marked filed by Mr. Dalton, the Clerk of the Crown and Pleas for the Court of Queen's Bench (the Court under whose seal the *habeas corpus* issued), to whom the gaoler had transmitted the writ and return by post: that this second warrant was also informal—the venue in the margin being in the County of York—and at the end, the commitment being stated to be "Given," &c., at the City of Toronto, in the County of York," where, for all that is shewn, this Police Magistrate had no jurisdiction.

*DRAPER, C. J.*—The case for the prosecution may be thus condensed. The express car of a railway train which was passing through the county of Scott, in the State of Indiana, one of the United States of America, was broken into and plundered by a party of five or six and probably more men; two or three of whom fired at the conductor of the train, who endeavoured to stop them as they were moving off with the engine and this car. The first shot was fired when the conductor was about eight feet from the man who fired, and the ball passed through the conductor's coat near his body. The conductor knew the man who fired it, he being a brother of the prisoner Reno. The two prisoners are positively sworn to by the express messenger as having broken into the express car, with a third, whom he afterwards saw in custody and identified, and who was the man that fired the first shot at the conductor.

It is better in the first place to dispose of the merely formal objections. First, as to the first (so-called) return. It is in truth no return, but contains matter of excuse only for not obeying the writ. The second section of the Habeas Corpus Act (31 Car. II.) provides how the charges for bringing up the body are to be paid or secured, and a return which amounts to no more than a statement that such charges were not provided for, and that therefore the writ was not executed, is useless and nugatory. Further, I apprehend that on a writ of *habeas corpus* returnable before a judge in Chambers, the return must have been brought to and read before him, before any officer of the Court could file it. I do not think that what was done in this case amounted to filing of the return. If it had, I should have had no difficulty in ordering it to be taken off the files in order that a proper return