

York, 24 September 1833

May it please Your Excellency,

We have the honor to report to Your Excellency that we have deliberated upon the reference made to us by Your Excellency Command on the 17th of September (?) in respect to an application addressed to Your Excellency by the Government of the Territory of Michigan requesting that certain persons now inhabiting their Province may be apprehended and sent to that county to answer to a charge preferred against them for assaulting and beating the sheriff of the county of Wayne, and rescuing a prisoner from his custody.

We observe that the recent act of the Legislature of this Province instituted “An Act to provide for the apprehending of fugitive offenders from foreign countries and delivering them up to Justice.” (A copy of which we annex to this report) gives discretion to the Governor and Council in carrying into effects its provisions declaring in express terms that “it shall not be encumberent upon them to deliver up any person charged if for any reason they shall deem it inexpedient so to do.” We take it for granted, however, notwithstanding the generous terms in which the reference is made to us that we are not expected to express our opinion upon what would or would not be a proper exercise of this discretion. It does not, indeed occur to us that any question of political expediency is presented by the case, and if any were we should abstain from offering an opinion upon it. It is to the legal considerations connected with the case that we have confined ourselves; and in this view of it we beg respectfully to state that these prisoners having been once already apprehended and in custody in this province upon this same charge and liberated by the decision of the governor and council, after consideration of the case,

upon an application made by the Government of Michigan. We should not think it fit that the Governor and Council should authorize a second apprehension of the parties and exercise a second time the power and discretion given by the Act. This course, we think, could not be approved of unless in the case of some atrocious offender, new and strong evidence should be discovered, which it was not in the power of the Foreign Government to produce upon a previous application and for the want for which the prisoner were upon such first application discharged; or perhaps in a case where some official or legal formality had by mere accident been overlooked on the first occasion.

Independently stated it not within it. Looking upon the act of pointing or presenting the pistol as one for which all the rioters were equally responsible it forms an aggravation of their riot and assault, but it does not change the legal character of their crime. It would probably lead to a higher fine or a longer imprisonment, but not to a punishment of another kind.

The riot, as it is described, was an outrageous one, and the battery of the sheriffs appears to have been violent and cruel. The direct object and intent, however, seems to have been the rescue of the prisoner rather than to take the life of the Sheriff - and even supposing that the facts would well support a conviction for an assault on the sheriff with intent to murder him, still by our law such intent would be merely an aggravation of the riot and assault: it would not alter the technical character of the crime or the description of punishment, however much it might enhance the fine or lead to increasing the term of imprisonment.

The conclusion, therefore, which we have come to is that these parties are not charged with any of the offences enumerated in the statute annexed; and consequently

that the lieutenant Governor and Council are not authorized by its provisions to send them out of the Province.

It has not escaped our attention as a (?) feature in this case, that two of the persons whom the Government of the Province is requested to deliver up are persons recognized by the government of Michigan as slaves and that it appears upon these documents that if they should be delivered up, they would by the laws of the United States be exposed to be forced into a state of slavery, from which they had escaped two years ago, when they fled from Kentucky to Detroit; that if they should be sent to Michigan, and upon trial be convicted of the riot and punished, they would after undergoing their punishment, be subject to be taken by their masters and confined in a state of slavery for life; and that on the other hand if they should never be prosecuted , or if they should be tried and acquitted, this consequence would equally follow. Among the documents before us, we perceive there are papers which have been delivered to the Government in behalf of the alleged rioters in which this inevitable consequence is urged as a reason against their being sent back to Michigan and in which it is intimated that to place the slaves again within the power of their masters is the principal object and that the Government of Michigan in making application for each other than the law for each will allow. We express no opinion except in reference to the statute recently passed here for regulating this particular matter. We consider the Legislature to have declared in that Statute their will in what cases fugitives from foreign countries should be surrendered, and we have therefore, considered whether the persons in question, as they are not charged with murder, forgery, or larceny could upon the facts before us be convicted of any other offence punishable in this province by whipping or pillory or by confinement at hard

labor. We apprehend they could not be, but that the offence for which they might be convicted would be punishable by fine and imprisonment merely without adding hard labor to the sentence. Riot or battery of the Sheriff in the execution of his duty, and the rescue of a person legally in his custody but not charged with felony or other crime, are the offences with which upon the statements before us they are liable to be charged: and all these are offences which in the known and ordinary administration of the law in this province would be punished in no other manner than by fine and mere imprisonment. Instances we doubt not may be brought from distant times in which one or the other of the above offenses has been punished in England by pillory or whipping or by other unusual and disgraceful punishments; and we do not say that these cases although they may be old are so dividedly void of all authority, that a judgment, which should now be passed in conformity to them would certainly be held to be erroneous and bad.

But we conceive that in England such punishments have long ceased to be assigned to the offences in question; that in this province they have never been assigned to them; and that recent statutes which have been passed in England lend strongly to show that Parliament did not regard these punishments, which in either fines could be properly attached to such offences without express Legislative sanction.

We observe that there is evidence of one of the persons charged having pointed a loaded pistol at the sheriff. If it had been further stated that he had pulled the trigger or otherwise attempted to discharged the pistol, the act would have been one which in English is felony, having been first made so by Lord Ellenborough's act passed in 1803 – but that act does not extend to this Province and was never adopted or enforced here; and if it were otherwise, still this case upon the facts stated to the degree of the crime for

which he was convicted – And this prisoner being convicted for no crime and certainly not for any felony his rescue would according to our law be a misdemeanor only and a misdemeanor of that kind that the persons convicted of it would be punished by fine and imprisonment or either of them, and not by any other description of punishment.

The Statute referred to provides in explicit terms that the persons subject to be delivered up under it to the justice of a Foreign Country are those only who shall be charged “with murder, forgery, larceny, or other crimes committed within the jurisdiction of this Province which crimes if committed within this Province would by the laws thereof be punishable by death, corporal punishment by pillory or whipping or by confinement at hard labor.” We are not aware whether the laws of the Territory of Michigan do or do not authorize the giving up offenders charged with crimes not embraced in the above very comprehensive description; but however that may be, it is evident that the conduct of this and of other Governments in respect to the delivering up of offenders can be no farther reciprocal towards each.

Independently of the consideration that this case has been already acted upon by the government, the documents before us place it in this light. The prisoners with the exception of Blackburn and his wife are charged with assaulting and beating the Sheriff of Wayne, and rescuing a prisoner from his custody. Blackburn, being the prisoner alluded to, is charged with joining in the riot and battery of the sheriff and with unlawfully rescuing himself. The wife of Blackburn we cannot find to be sufficiently charged with any offence known to our laws which do not acknowledge a state of slavery; for the (?) – of conspiring with the rioters and contriving the rescue is supported by no evidence, and seems to rest on conjectures.

The prisoners Blackburn, it appears from the documents before us was not convicted for felony, nor for any crime, nor imprisoned for any cause, which by our laws could be recognized as justification of imprisonment. We mention this not from any doubt that the prisoner was in legal custody according to the laws of Michigan, but because the rescue of a prisoner constituted by our law a greater or less offense according to for them is rather influenced by the interest and wishes of the slave owner than by any desire to bring the parties to trial for the alleged riot.

No consideration of this kind has had any weight with us; for in the first place as regards the indication against the motives of the Government of Michigan, if we had any thing to do with them, we should consider as no doubt this Government would consider in any similar case that courtesy towards the Government of a Foreign Country requires us always to assume that it has no motive or design on these occasions which is not just and fair and in short none but such as is openly avowed.

And in the next case, as to the consequence of – If it would follow in course from the laws of the United States it is not probably that the Executive Government there could prevent the slave transfers from asserting their rights under those laws, and it is therefore reasonable to suppose that the consequence may really follow, which the parties concerned have represented. Still, if in this case the black people, whose arrest is applied for, had been shown to have fled from a charge for any such offence as would clearly come within our statute, we do not conceive that we could on that account have advised a course to be pursued in regard to them different from that which should be pursued with respect to free white persons under the same circumstances.

When we say this, we should desire it to be understood that we are as clearly of opinion, on the other hand, that the withdrawing from a state of slavery in a foreign country could not here be treated as an offence with reference to our statute already alluded to, so that any person could be surrendered up under that statute upon such a ground merely.

We be of a leave to express to Your Excellency our regret for the delay that has occurred in answering the reference which Your Excellency and the Honorable Executive Council have sought fit to make to us. Among other courses which have led to it was a doubt at first entertained among us, whether we could property give an opinion in this manner, upon a matter which under possible circumstances might give rise to a judicial proceeding in which the same question would come before us or some one of us for decision. An examination of the subject has removed this doubt, and we now submit our opinion to Your Excellency with such explanations as seemed to us to be material.

We have the honor to be Good,

J.B. Robinson C.J.

L.P. Sherwood J

J.B. Macaulay J