

C. L. Ch.]

In re BENNET G. BURLEY.

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made between my Sovereign and her ally in a liberal and just spirit, not laboring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect.

We are to regard its avowed object—the allowing of each country to bring to trial all prisoners charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial, or to shield a possible offender.

If the position of the case were reversed, and the prisoner had done the acts complained of in this country, and claimed to be a belligerent as against our Sovereign, I think any Canadian judge or magistrate would commit him to trial for robbery, leaving him to plead his belligerent position at his trial for what it was worth.

I have neither the desire nor the right to assume that he will not be fairly tried in the United States. The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction.

I think the prisoner should be remanded on the Recorder's warrant, which I think is not open to any valid exception. Had I differed from the result arrived at by the Recorder, I should then have to consider a doubt more than once expressed whether any judge can review his decision.

JOHN WILSON, J. — The prisoner is charged with robbery, which is "the felonious taking of money or goods of any value from the person of another against his will, by violence or putting him in fear of purpose to steal the same." That he is guilty *prima facie* has not been denied; and being here, his counsel says, 1st. He is a British subject, and cannot be sent beyond the kingdom for trial against his will, and the treaty is not broad enough to include a subject of the Queen. 2ndly. He says he is a belligerent, and claims his right as such; 1st, because he holds a warrant as acting-master in the navy of the Confederate States of America; 2nd, because the seizure of the steam vessel, the *Philo Parsons*, was an act of war undertaken with the intent to liberate certain Confederate prisoners of war, confined on Johnson's Island, near Sandusky, on Lake Erie; 3rd, because the act of robbery charged is at most an excess, and at all events is merged in the higher belligerent act; 4th, because he says that, although he can show no order directing what he did, he has a manifesto signed by the President of the Confederate States assuming the act by these States, and therefore he is not subject to committal for extradition under the treaty and the provisions of the 24th Vic. cap 6; and lastly, he says the warrant of commitment contains no adjudication that the evidence sustains the charge.

The learned Recorder had equal jurisdiction with the judges of the superior courts of law to commit the prisoner for surrender under the treaty, according to the provisions of our statute to carry it into effect. Strictly speaking, the present application might have been disposed of, by simply examining the warrant under which the prisoner had been committed, to see whether on its face it contained a sufficient charge of crime to justify his detention for extradition.

All the proceedings in this matter are now before us on a writ of *certiorari*, issued irregularly perhaps, but at the instance of the prisoner. It is proper that a case of grave importance should be heard at length, so that all doubt should be removed, and it has been thus heard.

It has been urged that the prisoner, being a British subject, cannot be sent from the Province against his consent for trial in a foreign country, and that the language of the treaty ought not to be so construed as to give this power. In Vattel, book 2, ch. 6, s. 76, it is said, "that since the Sovereign ought not to suffer his subjects to molest the subjects of other States or do them an injury, much less to give open audacious offence to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment, or finally, according to the nature and circumstances of the case, to deliver him up to the offended State, to be there brought to justice. This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries and robbers, are seized everywhere at the desire of the Sovereign in whose territories the crime was committed, and are delivered up to his justice." But the words of the treaty are "all persons" who shall be charged with any of the crimes mentioned therein shall be surrendered. There can be no doubt but that the words of the treaty include British subjects, for it was made in accordance with the comity of nations, as Vattel shows. A British subject ought to know that when acting contrary to his duty as a loyal subject, in violation of the Queen's proclamation, and against the Foreign Enlistment Act, he is not to be favoured in setting up the commission of any State, far less a State not recognized as a nation, to give him the rights of a belligerent in his own country, to escape the consequences of crime committed in the United States. The evidence returned to us shows *prima facie* that the prisoner committed a robbery in the State of Ohio, one of the United States. But it is answered, first, that he held a commission as acting master in the navy of the Confederate States. The holding of this or any other commission does not authorise him, under an order or *mero motu*, to wage war from a neutral territory on the unfriendly and non-belligerent subjects of the country at war with the confederacy whose commission, he holds. The evidence, however, does not prove such a commission, for he fails to show his compliance with its conditions. He says he seized the *Philo Parsons* as an act of war, with intent to liberate the prisoners on Johnson's Island, but for this act he produces no order of any superior officer, and the evidence does not show that he had any such order. He says this robbery was at worst an excess of a belligerent right, which was merged in the principal act. Now, what was the principal act of war performed? Under the pretence of being a passenger, he went on board a freight and passenger steamboat at Detroit. As a favor, he requested the master to touch at Sandwich, a British port, to take in three persons as passengers, which was done. The boat proceeded on its regular voyage to Amherstburg, a town in this Province, near the