

C. L. Ch.]

In re BENNET G. BURLEY.

[C. L. Ch.]

say that there is no evidence legally warranting such action.

On the merits the defence is that the alleged robbery was simply an exercise of a belligerent right in taking money from a prisoner of war—that it was a mere subordinate incident in a lawful act of hostility, viz: the capture of an enemy's vessel on an expedition for the further capture of a war-ship and the release of Confederate prisoners.

In considering this plea I will assume that the documents from Richmond given in evidence are genuine. It becomes most important to consider whether the prisoner when he took Ashley's money was in good faith proceeding on the warlike enterprise in question, or was using it as a pretext to cover vulgar robbery. No act was done nor any attempt made on the United States steamer or the island, nor any reason apparent on the evidence why the alleged design was abandoned. It is consistent with all that appears that the warlike enterprise was a mere pretext and plunder the actual object. On the other hand it may be true that the prisoner was in good faith engaged on the alleged attempt. But would any judge or magistrate hesitate to say to a prisoner urging such a defence under such unprecedented circumstances, "Your defence may, perhaps, ultimately be established. I am not trying you, or deciding finally on your guilt or innocence. A *prima facie* crime is proved against you, and I must send you for trial; you can thus try to rebut the presumption arising from your acts." If we decide that this is not enough to warrant his commitment for trial, we assume, I think, a most serious responsibility of holding that the facts in evidence do not disclose any offence—that all the prisoner's conduct was a legitimate act of open war—that the money in the pocket of an unarmed purser of a Lake Erie commercial steamboat was lawful prize of war to twenty or thirty men coming on board in the guise of ordinary passengers at American and Canadian ports, with hundreds of miles intervening between them and the nearest spot where their alleged country's flag was flying, or a fellow soldier in arms.

No writer of repute seems to distinguish with a firm hand the point where war ends and murder begins—between lawful prize and petty larceny. Many jurists tell us how they think war should be waged in the light of improved civilization, but seem to shrink from the definition of settled principles governing its conduct. We are not referred to any case at all resembling that before us; it must, therefore, be judged on its peculiar facts.

I hesitate not to state my own opinion that such conduct as the prisoner's, under such circumstances, rebuts any clear conclusion that this was an act of war, and as such protected from the operation of the criminal law, so that the investigating judge should hold that a *prima facie* case was not established fully warranting the placing of the accused on his trial, and then leaving him to his defence, if he can maintain it. I consider the avowal or adoption of the alleged enterprise by the Confederate President as not affecting the duty of the Recorder in dealing with the case. The prisoner can have, I presume, the full benefit of that document on his

trial. The alleged assumption of responsibility for his acts by his superiors, is rather a matter between them and the United States than between the latter and us. It might be a dangerous course for a neutral to accept as conclusive from a belligerent power, with whom it has no diplomatic relations, an avowal of acts so very equivocal as those of this prisoner, and so opposed to the ordinary ideas of modern warfare. It was in no way necessary, nor as far as the evidence indicates, conducive to the success of the alleged enterprise, for the prisoner and his friend to take the purser's money. I do not feel pressed by the suggestion of counsel that the United States can equally demand the extradition as a murderer of a Confederate officer or soldier killing a Federal in battle. The mere statement of this case, and the fact that a state of war is admitted to exist, would answer the demand. Either belligerent flying from the pursuit of the other is safe within our border, and no argument can torture his acts done in ordinary warfare (as it is well understood by the common sense of every man, but not so easily defined by reference to international law) into those of a criminal within the Ashburton Treaty.

Had this prisoner been arrested on the wharf in Detroit, as he stepped on board the *Philo Parsons* and avowed and proved his character of a Confederate officer, he would have been in imminent danger of the martial rule applicable to a disguised enemy. Had he been secretly joined there by twenty or thirty persons starting over from the neutral shores of Canada, and then by a sudden assault destroyed some national property, or seized a vessel lying at the wharf and taken the money from the unarmed crew, I think they would, if captured in the act, have great difficulty in maintaining their right to be treated as prisoners of war, with no further responsibility.

In the Russian war I think we should hardly have allowed such a mild character to a like number of Russians coming over stealthily from the friendly shores of Detroit to burn, slay and plunder in Windsor.

All the prisoner's conduct, while within our jurisdiction during this affair, repels the idea of legitimate warfare. A British subject, without the Queen's license and against her proclamation in the service of one of the belligerents, acting in concert with persons leaving her ports on the false pretence of peaceful passengers, to wage war on a friendly power—no act of his raises any presumption in his favor of his being in good faith a soldier or sailor waging war with his enemy.

I think the only just course open to a Canadian court is to decline accepting either the prisoner's statement or his alleged employer's avowal of his acts as conclusive of the proposition that his conduct was war and not robbery—it should accept the evidence offered as establishing a *prima facie* case of guilt sufficient to place the prisoner on his trial and to call for his defence.

The whole burden of proving that the transferring of the money from Ashley's pocket to that of the prisoner and his friend does not bear the complexion, that men of plain understanding must, under the circumstances, attribute to it, must be thrown upon the prisoner.

I think I am bound to construe a treaty so