190 U.S. 40 (1903)

WRIGHT
v.
HENKEL.

No. 661.

Supreme Court of United States.

Argued April 28, 29, 1903.
Decided June 1, 1903.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

49 *49 *Mr. Samuel Untermyer* and *Mr. Louis Marshall* for appellant.

Mr. Charles Fox for His Britannic Majesty's consul general at New York, appellee.

Mr. Solicitor Genl. Hoyt, with whom *Mr. Assistant Attorney Genl. Purdy* was on the brief, on behalf of the United States.

57 *57 MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

The writ of *habeas corpus* cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings, *Ornelas* v. *Ruiz,* 161 U.S. 502; *Terlinden* v. *Ames,* 184 U.S. 270; and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offence within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offence was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the States.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin* v. *Shine,* 187 U.S. 181; *Tucker* v. *Alexandroff,* 183 U.S. 424.

58 *58 The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 embodies that principle in terms. The offence must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offence under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other States agree with that of New York on this subject; and that sections 73 and 74 of the act of Congress to define and punish crimes in the District of Alaska, 30 Stat. 1253, c. 429, and section 5209 of the Revised Statutes, in respect of the officers of National Banks, are largely to the same effect as the English statute.

59 As the State of New York was the place where the accused was found and in legal effect the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of *59 both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States,

and not the enactments of Congress, must be looked to for the definition of the offence. There are no common law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson* v. *McMahon,* 127 U.S. 457.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases as they occur necessarily depend upon the laws of the several States in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French mission: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the State or place where the criminal may be found." Moore on Extradition, § 344; *United States* v. *Warr,* 28 Fed. Cas. 411.

So Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That in every treaty of extradition the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offences defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure as well with respect to the definition of crimes, as to the mode of procedure against criminals, and the manner and extent of punishment." Moore on Extradition, § 337 *n.*

In *Muller's* case, 5 Phila. 289, 292, the definition of the offence in the State where the fugitive was found was applied by the District Court for the Eastern District of Pennsylvania, and Judge Cadwalader said:

60 *60 "In the series of treaties which have been mentioned, certain offences, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question — though generically forgery wherever criminal — might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon Government had, therefore, been made out.

"There is no jurisprudence or common law of the government of the United States. . . . No legislation of their government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offence here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed as it was by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, as to the slave trade, though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if
61 the particular variety was *61 criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin* v. *Shine* we applied the definition of embezzlement given by the laws of California, but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York; extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress.

It is true that in the case of *Windsor,* 6 B. & S. 522, (1865,) a contrary view was expressed, but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offence of forgery in the third degree could not properly be regarded as extending the force of the

treaty to offences not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offences made such only by the legislation of particular States of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the Circuit Court erred in denying the application to be let to bail.

By section 1015 of the Revised Statutes it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offence is not punishable by death; and in such cases it may be taken by any of the persons authorized by the
62 preceding section *62 to arrest and imprison offenders." But this must be read with section 1014, the preceding section, and that is confined to crimes or offences against the United States. *Rice* v. *Ames,* 180 U.S. 371, 377. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. p. 91, c. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised Statutes is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And section 5273 provides that when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

The subject was considered by the District Court of Colorado in the case of *Carrier,* 57 Fed. Rep. 578, and Hallett, J., held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in such cases had on several occasions
63 *63 been made to the Circuit Court, and that they had been uniformly denied.

In *Queen* v. *Spilsbury,* 2 Q.B. Div. (1898) 615, it was held that the Queen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act, and the distinction, existing ordinarily, between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the power to admit to bail existed, held that as matter of judicial discretion it ought not to be exercised in that case.

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding government to withdraw the proceeding first initiated and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

Order affirmed.