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*Nov.* 10, 11.

*Criminal Law—Extradition—Offence of a Political Character—Jurisdiction to review Decision of Magistrate—Extradition Act*, 1870 (33 & 34 *Vict.* c. 52), *s.* 3 (1).

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."

*Held*, that the true meaning of this expression is that suggested in Sir James Stephen's History of the Criminal Law, vol. ii., p. 71, and therefore that to bring an offence within the meaning of the words "of a political character," it must be incidental to and form part of political disturbances.

A number of the citizens of one of the cantons of the Swiss Republic, being dissatisfied with the administration of the government of the canton, rose against the Government, arrested several members of the Government, seized the arsenal, from which they provided themselves with arms, attacked, broke open, and took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some members of the Government, and established a provisional government. On entering the municipal palace the prisoner, who had taken an active part in the disturbance throughout, shot with a revolver and killed a member of the Government. He escaped to England, where he was arrested and committed for extradition on a charge of murder.

On a motion for habeas corpus:—

*Held*, that the offence which the prisoner had committed was incidental to and formed a part of political disturbances, and therefore was an offence of a political character within the meaning of the statute, and the prisoner could not be surrendered, but was entitled to be discharged from custody.

The decision of a magistrate, who commits a prisoner for extradition, that the offence charged is not of a political character, is subject to review by the Court on an application for habeas corpus.

APPLICATION for habeas corpus.

The motion was made on behalf of Angelo Castioni, for an order nisi calling upon the Solicitor to the Treasury, Franklin Lushington, Esq., a metropolitan police magistrate, and the consul-general of Switzerland, as representative of the Swiss Republic, to shew cause why a writ of habeas corpus should not issue to bring up the body of Castioni in order that he might be discharged from custody.

The prisoner Castioni had been arrested in England on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him

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committed to prison for the purpose of extradition, on a charge of wilful murder alleged to have been committed in Switzerland.

The facts, which were contained in depositions sent from Switzerland, in the depositions taken before the magistrate at Bow Street, and in affidavits used on the hearing of the motion, were shortly as follows (1):—

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the Government for a revision of the constitution of the canton, under art. 15 of the constitution, which provides that "The constitution of the canton may be revised wholly or partially . . . . (*b*) at the request of 7000 citizens presented with the legal formalities. In this case the Council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, prescribes the course to be adopted for the execution of letter (*b*) of art. 15. The Government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested, and bound or handcuffed, several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to

(1) Another document was before the Court, viz., a message from the Federal Council of the Republic of Switzerland to the Federal Assembly, after the disturbances had been put an end to, but was used only as being material to the question whether the offence charged was an offence of a political character, and was not accepted as evidence of the facts therein stated (see the judgment of Denman, J., post, p. 158).

the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in s. 3 of the Extradition Act, 1870 (1) did not exist, and committed Castioni to prison.

(1) 33 & 34 Vict. c. 52, s. 3: "The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

"9. When a fugitive criminal is brought before the police magistrate the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

"The police magistrate shall receive

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*Sir Charles Russell, Q.C.* (*J. P. Grain* and *Eldridge*, with him), for the prisoner. Looking at all the facts now before the Court, it is clear that the offence with which the prisoner is charged is an offence of a political character within the meaning of s. 3 of the statute (33 & 34 Vict. c. 52) and article 11 of the treaty. On the evidence two conclusions are irresistible—first, that there was a political rising; and secondly, that the shot which caused the death of Councillor Rossi was fired at a moment when the tumult occasioned by that rising was at its height; and further, assuming for the purpose of argument that the shot was fired by Castioni, the evidence shews conclusively that he was taking an active part in the rising. It seems doubtful whether there ever

any evidence which may be tendered to shew that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

"10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

"Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly."

By s. 26: "The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act."

The first schedule includes murder and manslaughter.

By the extradition treaty with Switzerland, dated November 26, 1880, article 11: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character."

Article 2 includes murder and manslaughter.

was such a thing as extradition at common law. The more correct view seems to be that the right of asylum was absolute: *Reg.* v. *Bernard* (1), per Lord Campbell, C.J. If this is so, the right to extradition is created by and depends on the statutes 33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60; and if it is shewn that the case comes within the exception introduced by the words, "an offence of a political character," in s. 3 of the earlier Act, no right to extradition can exist. The burden of proof is on those who demand extradition, and there is no evidence to shew that the act was an act of private revenge or prompted by personal malice. On the contrary, the whole of the evidence points the other way.

The expression "of a political character" is, no doubt, vague, and probably intentionally so. It seems as if the legislature had purposely abstained from attempting to give an exhaustive definition, leaving it to the Court to decide in each case as it arose whether the exception applied. This view is supported by the extract from Lord Stanley's speech in the House of Commons, of August 3, 1866, cited in Clarke on Extradition, 3rd edition, Appendix, pp. cclix., cclx., to which it may be admissible to refer for the purpose of illustration; and on the same occasion Mr. J. S. Mill suggested the following definition: "Any offence committed in the course of or furthering of civil war, insurrection, or political commotion." (2) If this definition is correct, it certainly includes the present case. In Mr. Justice Stephen's History of the Criminal Law, after dealing with and illustrating the question, the author suggests the following definition: "I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances." (3) This Court is not bound by the decision of the magistrate. *Ex parte Huguet* (4) and *Reg.* v. *Maurer* (5) are

(1) Annual Register for 1858, p. 328.
(2) Clarke on Extradition, 3rd edition, Appendix, p. cclx.
(3) Sir J. F. Stephen's History of the Criminal Law, vol. ii., p. 71.
(4) 29 L. T. (N.S.) 41.
(5) 10 Q. B. D. 513.

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distinguishable, because here the Court has materials which were not before the magistrate.

[DENMAN, J., referred to *In re Counhaye.* (1)]

The *Attorney-General* (*Sir Richard Webster, Q.C.*) (*R. S. Wright* with him), for the Crown, and the *Solicitor-General* (*Sir Edward Clarke, Q.C.*), and *Robert Woodfall*, for the Federal Government of the Republic of Switzerland (2), by arrangement, shewed cause in the first instance.

The magistrate has rightly found that the offence was not of a political character, and his finding ought not to be overruled. The definition suggested by Mr. Mill is incorrect. The effect of adopting it would be to introduce a dangerous doctrine; for it would give immunity from extradition to persons who, without any political object in view, joined in a rising for the sole purpose of gratifying personal malice, or for the sake of plunder. The definition in Mr. Justice Stephen's History of the Criminal Law is more accurate, and would not include the present case. The burden of proof is on the party seeking to bring the case within the exception. The fact that Castioni had been absent from Ticino for so many years is against him rather than in his favour, for it is inconsistent with the view that he took any real interest in the political affairs of the canton. The admission by Bruni, who himself took a leading part in the disturbance, that "the death of Rossi was a misfortune, and not necessary for the rising," is strong evidence against the proposition that the act of Castioni was "incidental to and formed a part of political disturbances," within the meaning of Mr. Justice Stephen's definition already referred to. [They also cited *Re Woodall* (3); *In re Guerin* (4); Billot, Traité de l'Extradition, p. 102; Phillimore's International Law, vol. i., c. xxi., pp. 437–462, in 2nd edition.]

*Sir Charles Russell, Q.C.*, replied.

(1) Law Rep. 8 Q. B. 410.

(2) By article 9 of the Extradition Treaty: "In cases where it may be necessary the Swiss Government shall be represented at the English Courts by the law officers of the Crown, and the English Government in the Swiss Courts by the competent Swiss authorities."

(3) 16 Cox, C. C. 478.

(4) 58 L. J. (M.C.) 42.

DENMAN, J. Looking at the extreme importance of this case I should have been disposed, if I had felt any serious doubt as to the course we ought to pursue, to have taken time, not so much to consider what our judgment should be, as to take care to put it in the best possible shape, or even to reduce it to writing. But there are many considerations which apply to cases of this sort. One is, that here is a man in custody who has been in custody for a considerable time, and no greater delay than is reasonably necessary ought to be interposed if our decision should be one to the effect that he ought not to be in custody any longer. I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged.

There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light has been thrown upon the possible and probable meaning of the words by the arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities, and in one case by a most learned philosopher. I think it has been useful in such a case as this that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother whose assistance we have on this occasion in deciding the present case. I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be

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legally applied to the words used in the Act of Parliament. Sir Charles Russell suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is equivalent to "in the course of." I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act.

Sir Charles Russell has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that if there be an extraditable offence, the onus is upon the person seeking the benefit of those words to shew a case in which extradition can be avoided. I do not myself think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as on whom is the onus. I do not think it is intended that a scrap of a primâ facie case on the one side should have the effect of throwing upon the other side the onus of proving or disproving his position. I look at the words of the Act themselves, and I think that they are against any such narrow technical mode of dealing with the case. The words of s. 3, subs. 1, are: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." The section itself begins: "The following restrictions shall be observed with respect to the surrender of fugitive criminals." There is nothing said as to upon whom is the onus probandi, or that it shall be made to appear by one side or the other in such a case. It is a restriction upon the

surrender of a fugitive criminal, and however it appears, if it does appear, that the act was in the judgment of the Court an offence which would otherwise be an offence according to the laws of this country, but an offence of a political character, then, wholly irrespective of any doctrine of onus on the one side or the other, that is within the restriction, and he cannot be surrendered. It was at first contended, in opposition to the application for a habeas corpus, that if the magistrate upon this question once made up his mind, the Court had no jurisdiction to deal with it. It appears to me that this proposition cannot be maintained on the very face of the Act itself, which requires by s. 11 that the magistrate shall inform the prisoner that he may apply for a habeas corpus, and if he is entitled to apply for a habeas corpus I think it follows that this Court must have power to go into the whole matter, and in some cases, certainly if there be fresh evidence, or perhaps upon the same evidence, might take a different view of the matter from that taken by the magistrate.

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to shew that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly shew that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one

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member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and in the attack against the Government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case.

Before dealing with the evidence, I will say one thing about the message which was objected to and which was read after a slight discussion, upon the understanding that we were not going to use that document as evidence of any particular fact, but that it would be only used as an important document shewing that the Government of the country had themselves looked upon this as a serious political rising, and a serious state of violence by a very large body of the people against the Government. I mean so to use it, and have never thought of using it in any other way. I think that was the understanding upon which we allowed it to be read, and I feel that I am not justified in using it for any other purpose. Then it is reduced to the question of whether, upon the depositions sent over and upon the depositions before the magistrate and upon the fresh facts, if there be any, which are brought before us on the affidavits, we think that this was an act done, not only in the course of a political rising, but as part of a political rising. Here I must say at once that I assent entirely to the observation that we cannot decide that question merely by considering whether the act done at the moment at which it was done was a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of the words of the statute if we were to attempt so to limit it. I mean, I do not think it would be right to limit it in the way suggested by the cross-examination of Bruni, namely, by considering whether it was necessary at

that time that the act should be done. The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part. Now, the only shadow of a suggestion of evidence to the contrary, I think, is the suggestion which appears on the face of some of the documents that he said something about his brother having been assassinated some years before. It was said in the message, which I have already said I do not rely upon as a statement of fact, that he did at the time he fired use the expression, "My brother's death cries for vengeance!" That is in the document, and is a statement of fact which I do not rely upon, and I do not think that I am justified in relying upon it, though, if I commented on that, I should certainly say it was quite as capable of the construction put upon it by Sir Charles Russell that he was not intending to murder Rossi, of whom he knew nothing, and of whose connection with any injury towards his brother there is not the slightest particle of evidence, as that it means anything of the kind suggested. Then it amounts to very little, and it comes to a discussion as to the facts of the case, and as to what was taking place at the exact moment at which the shot was fired. I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot—that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have

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supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J. I am of the same opinion. The prisoner is asked to be given up on a charge of that which undoubtedly is an extradition crime under this treaty—that is, for the crime of murder, and undoubtedly he ought to be so given up, provided there is primâ facie evidence of the crime of murder having been committed, unless, indeed, it is shewn that the offence of murder in respect of which his surrender is asked, is one which was a political offence. Now, the question whether there is primâ facie evidence that Castioni committed an extradition crime—that is, the crime of murder—is one which I may dispose of in a very few words. Nobody can doubt that Rossi was shot by a revolver fired by Castioni; about that there seems to be no real question. Under what circumstances he shot him, and when, possibly would be matters which would be capable of argument before the tribunal before whom he might be tried. Of course, if it could be established before the Court that he had deliberately taken a pistol, and that he had aimed it at Rossi without any justification of any sort or kind, and had caused the death of Rossi, there would have been an abundant case—a case on which he ought to have been tried according to our law for the crime of murder, and punished in respect of that crime; but it is said—

and said, I think, rightly—that he ought not to be given up upon this ground—that the offence of which he was guilty, if he was guilty of that offence, was of a political character. That is, the murder with which he is charged was in itself of a political character. Now, the matter has been before the magistrate, and the magistrate, acting upon the information and the evidence before him, has come to the conclusion that two things exist: first of all, that there is abundance of evidence to justify him in committing the man to be tried for murder—that is to say, there would have been had his crime been committed in this country; and secondly, he has come to the conclusion, rightly or wrongly, on which I shall have a word or two to say, that the offence was not of a political character, and that therefore he ought to be given up. The matter now comes before us—I will not say to review the whole of his decision—but to ask ourselves as to whether or not, having regard to the whole of the circumstances which are now brought to our attention, and which are proved by the depositions and other evidence in the case, we come to the same conclusion as the magistrate, or whether we deliberately arrive at an opposite conclusion.

Now, it seems to me to be impossible to say, for the reasons which were stated in the course of the argument, that if the man has a right to move for a habeas corpus in order that the case may be reviewed, or for the purpose of getting his discharge, he might not enter into matters which shewed that he had been guilty of no offence at all; and I should have said that by no means was the matter concluded by the magistrate's decision that he be committed for trial, because the magistrate does not sit, when he is committing for trial, as a magistrate sitting finally to dispose of the case and to give judgment upon it; but he states his opinion that there is a primâ facie case, and on that ground he signs his warrant of committal. Again, with reference to the question of whether the magistrate has a right to deal with a man and to deal with his objection to being committed for trial for an extradition crime, I entertain no doubt that the magistrate has no right and no jurisdiction to find finally, as against the prisoner, whether or not he has committed that crime which he is charged with having committed, or whether that

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crime is one of a political character. I desire to call attention to certain provisions in the Extradition Act. First, by s. 3, a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, such as treason, or other matters, or if he proves to the satisfaction of the police magistrate that the requisition for his surrender has in fact been made with a view to try him for an offence of a political character. These latter words undoubtedly tend to shew that Sir Charles Russell was wrong in the view that he took that the onus is upon those who seek for the extradition to shew that the offence committed is not of a political character, because it must be upon the person who seeks to be discharged on the ground that his surrender is, in fact, asked for with the view to punish him for an offence of a political character; the onus of establishing that is upon the alleged criminal himself. Now s. 9 and s. 10 seem to me to have some bearing on the question as to whether or not the offence with which a man is charged is of a political character. First of all, the 9th section enacts that, "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." If he were charged before the magistrate with an indictable offence committed in England, the question of whether or not the offence for which he was indicted were of a political character or not would make no differance. But, under this section the magistrate is to deal with him as though the offence charged were an indictable offence committed in England. Then the section goes on to say: "The police magistrate shall" not adjudge that the offence is of a political character, but he "shall receive any evidence which may be tendered to shew that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime." It seems to me that the language of this part of the 9th section in itself shews that the onus is on the person who seeks to absolve himself or exonerate himself from the liability to be handed over to the Government of the territory within which

the crime was committed. I find here in furtherance of what I am about to say about this question of the jurisdiction of the magistrate, s. 10, which is, to my mind, by no means unimportant: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." It does not seem to give the magistrate himself the power of dealing with the matter other than this: he is to consider whether the crime is one which, if committed in England, would have made it imperative upon him in discharging his duty to commit the man to prison. If so, he is to commit him to prison; but he is, as I have already shewn, by s. 9, obliged to receive any evidence which may be tendered to shew that the crime is of a political character, and that is analogous to the provisions in Russell Gurney's Act (30 & 31 Vict. c. 35), which make it the duty of a magistrate, if a prisoner wishes to call evidence in support of a defence which he intends to set up when he comes to be indicted, to take that evidence and hand it over to the tribunal before whom the prisoner is ultimately to appear. In furtherance of this view that I take, I read the 11th section: "If a police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus," which may very well mean this: "I have power to commit you to prison because I am satisfied that you have been guilty of a crime to which the extradition law and treaty apply; you have a right to have any evidence taken on your behalf to shew that you are a criminal who ought not to be sent out, because your offence, even if committed, was of a political character. I will take the evidence for you. You have fifteen days to make application for your release if you think fit to move for a habeas corpus." What follows afterwards shews that it is not the magistrate who is to determine these matters, but it is the Home Secretary who is

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to determine whether or not ultimately the prisoner is to be sent abroad, because the second part of the 11th section goes on to say: "Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal." These are the provisions of the Act, and they are quite sufficient to satisfy me that the magistrate's decision is by no means binding, either in point of law or in point of fact, and that when these matters come to be considered upon the habeas corpus, if the judges have to consider the case they must consider the case as it is before them at the time the rule is discussed; and I think that in considering the matter, though we pay respect to the magistrate's view, we are not bound to follow it at the expense of the criminal, if upon the whole state of things before us, we come to the conclusion either that the crime has not been committed, and that there is no primâ facie evidence of it, or that the criminal ought not to be sent out to his own Government for the purpose of being dealt with by reason of his offence being, though a crime, a crime of a political character. I do not myself mean to travel through the facts, which seem to me to be simple enough. There can be no doubt at all that there was evidence of a crime, and I concede that if it were not of a political character the man ought to be sent out under the warrant of the Secretary of State; but that brings me to the question whether upon the present occasion, even assuming there to be the most cogent evidence of the crime of murder, he ought to be sent out, having regard to that provision which says that he shall not be so sent out if the offence with which he is charged is one of a political character.

Now, I entirely dissent, and I think all reasonable persons would dissent, from the proposition that any act done in the course of a political rising, or in the course of any insurrection, is necessarily of a political character. Everybody would agree, I

think, with this—that it is not everything done during the period during which a political rising exists that could be said to be of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he were engaged in a political rising, if he were deliberately, for a matter of private revenge or for the purpose of doing injury to another, to shoot an unoffending man, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of the crime of murder, because that offence so committed by him could not be said to have any relation at all to a political crime, namely, a crime which in law ought to be punished with the punishment awarded for such a crime.

Now, what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, "political character"; but I adopt his definition absolutely. "The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying

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on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act.

Now, was this act done by Castioni of a political character? That there was a general rising of one party there can be no doubt. They were as it were levying war against the Government. That they anticipated violence or violent resistance there can be little doubt. The very fact that five men of the opposite party were bound and put in front of those who were making the attack shews the object. "We expect an attack to be made upon us; we expect personal violence; and these five persons are the most likely if they are put in front to deter those who would offer violence to us from doing so." I think it is immaterial whether or not one gate was broken open, or whether the gates had been burst open or not. The question really is whether or not this was an act done by this prisoner in his character of a political insurgent at that time, and I do not think it signifies whether or not he had come into Bellinzona on the day before, or in the morning of the day on which this occurrence took place. If he was a citizen of the place, taking his part in a movement of a political character, which he chose to join in because he thought it was for the benefit of the political side to which he desired to attach himself, I cannot come to the conclusion that he is to be deprived of the privilege of the refuge afforded to him simply because, even after the palace was broken into, having a revolver in his hand, he did make use of

it in a way which is very much indeed to be deplored, because I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or any one of the community had ever personally done to him. When it is said that he took aim at Rossi, there is not a particle of evidence that Rossi was even known to him by name. I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over. For the reasons I have expressed, I am of opinion that this rule ought to be made absolute, and that the prisoner ought to be discharged.

STEPHEN, J. I am of the same opinion. I published some years ago a book which has been considerably quoted to-day, and in the passage in which I stated my views upon this subject. I gave what appeared to me to be the true interpretation of the expression "political character." It is very easy to give it too wide an explanation. I think that my late friend Mr. Mill made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to

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misunderstand it. Having given my view upon that subject, I shall say no more with regard to the interpretation of the Act of Parliament.

I will say only with respect to the facts, that it is obvious to my mind that the shooting on this occasion took place in a scene of very great tumult, at a moment when, if a man decided to use deadly violence, he had very little time to consider what was happening and to see what he ought to do, and that, therefore, he was committing an act greatly to be regretted. I feel no doubt that the habeas corpus ought to go, and that the prisoner ought to be set at liberty.

*Rule absolute.*

Solicitor for the Crown and for the Swiss Government: *The Solicitor to the Treasury.*

Solicitor for the prisoner: *W. H. Phelan.*

P. B. H.

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C. A.

*Oct.* 30, 31; *Nov.* 1.

[IN THE COURT OF APPEAL.]

## THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SALFORD *v.* LEVER.

*Principal and Agent—Fraud—Bribe paid to Agent by Third Person contracting to supply Goods to Principal—Amount of Bribe added to Price of Goods—Remedies of Principal against Agent and Third Person.*

Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first.

The plaintiffs were proprietors of gasworks, and it was the duty of their manager to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, a coal merchant, submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders, and with the view of procuring the manager's recommendation of them, the defendant corruptly agreed to pay to the manager a secret commission or bribe of 1*s.* per ton, and, in order to recoup himself for the commission so promised, he inserted in the tenders prices which were in excess by 1*s.* per ton of the prices which he would