

The Jurist

No. 173, NEW SERIES.-Vol. IV.

No. 1112, OLD SERIES. -Vol. XXII

MAY 1, 1858

PRICE 18.

THE CASE OF THE CAGLIARI

THE JURIST [May 1, 1858]

THE CASE OF THE CAGLIARI

THE official correspondence relative to The Cagliari has been published. It is of great length, and contains every letter that has passed between the three Governments (of England, Sardinia, and Naples) on the subject.

The late Attorney-General, Sir Richard Bethell, gave the following opinion

“The vessel and crew, having been engaged in landing a body of armed rebels on the Neapolitan territory, might be lawfully pursued and seized, and if the arrest took place within Neapolitan waters, the crew might be lawfully tried in a Neapolitan court of justice; but if the capture and arrest took place out of Neapolitan waters, then, although the seizure was justifiable, the Neapolitan tribunals would have no jurisdiction to try, nor the King of Naples any authority to punish, the persona arrested, who, being the subjects of a friendly power, must, on requisition, be given up to that power, in whose courts the trial must be had and justice administered.

“If, therefore, it were clear that The Cagliari was forcibly captured when on the high seas, out of Neapolitan waters, the British Government might lawfully demand the delivery up of the two engineers]; but we are not satisfied that such was clearly the case, and the responsibility of making a demand which, if refused, must be followed by hostilities is most serious.

“It seems to us to have been rather a case of voluntary surrender by the captain and crew than of forcible capture.

“When the captain regained possession of his vessel he assembled the crew, and it was determined to steam to Naples, there to report what had occurred; and if this had been done, it is clear that at Naples the captain and crew might have been lawfully arrested and tried by the Neapolitan authorities, until it was ascertained whether they had been voluntary or involuntary agents. On their course to Naples they fall in with two

Neapolitan frigates, and the captain, directing his course towards them, lowers a boat, and, having gone on board the frigate, seems to have made a voluntary statement and surrender of himself and his vessel. The crew are then put in irons, and taken as prisoners to Salerno.

“Assuming this to have taken place on the high seas, out of Neapolitan waters, we are unable to say that it was clearly a seizure, by force and violence, of the ship and crew; and unless this be beyond doubt we cannot advise that her Majesty’s Government would be justified in contending that the proceedings adopted towards the two engineers are not warranted by International law.

“The Government may justly protest against any unnecessary cruelty in the treatment of the prisoners, and has a right to interfere to see that their trial is fair and just. “R. B.”

The opinion of the Queen’s Advocate and the late Solicitor-General differs from the part within brackets, inasmuch as it considers that if the seizure was justifiable on the high seas, then the Neapolitan Government had jurisdiction.

In answer to questions from Lord Clarendon as to whether Watt and Park could be bound by the voluntary surrender of the captain, the Queen’s Advocate and the late Solicitor-General reply:—

“1. That it appears from the abstract of the depositions of F. Badino, stoker, (inclosure No. 3 in Sir J. Hudson’s despatch of the 12th December), that ‘when the captain recovered the command of his vessel at Sapri he assembled us, and told us that he was going to Naples to report what had occurred’. It does not appear that any objection was made either by Park or Watt, or by any other person on board, to the course which the captain thus stated he was about voluntarily to adopt, and the entry in Watt’s log-book is— 28th. Arrived at Policastro eight p. m., disembarked all hands of them, and left eleven p.m. for Naples. Therefore, under these circumstances, we fear that Park and Watt must be considered as ‘consenting parties to such an arrangement.’

“2? We are of opinion that a seaman voluntarily embarking and serving in a foreign vessel is (at all events *prima facie*) bound by the lawful act of the master, done in the exercise of his reasonable discretion and authority in that capacity, especially when, having an opportunity of so doing, he does not dissent from or protest against it. Assuming, therefore, that the master voluntarily determined to go from Sapri to Naples, and that the engineers Park and Watt knew of this determination, and did not object, we are of opinion that they must be considered to be bound by this act of the master, and that they are not

legally entitled to contend that “the Sardinian captain and his crew had no right whatever to take two English subjects to Naples, and hand them over to the Neapolitan Government.’ Neither is the British Government, in our opinion, legally entitled to contend that ‘the surrender of the captain, on the high seas, to the two Neapolitan frigates, after they had fired to bring him to, could not be binding on the two English engineers.’

“We are further of opinion that the Neapolitan ships of war had, under the particular circumstances of this case, a right to pursue The Cagliari and to capture her beyond the territorial jurisdiction of Naples; and if she had been a British vessel her Majesty’s Government could not have legally demanded her release without any judicial inquiry or legal investigation or proceeding. It might be open to doubt whether the vessel herself was legally liable to confiscation under the circumstances suggested, but this would be a question for discussion before the proper court at Naples; and had The Cagliari been a British vessel her Majesty could not legally have insisted on her being given up at once, and without any such discussion.

“Lastly, we are of opinion that The Cagliari being a Sardinian merchant vessel, and no British subject, as we presume, having any share or interest in her, her Majesty’s Government cannot object to her seizure if the Sardinian Government does not; and that the Sardinian Government cannot complain of the seizure if the master voluntarily gave up the vessel, by which we understand, not that he merely submitted to necessity, but that of his own free will he assented to, or acquiesced in, her being taken possession of by the frigates, in order that she might be conducted to Naples for the purpose of legal investigation being there instituted into all the circumstances. His original and voluntary intention was to surrender her, in effect, at Naples to the action of the authorities, and it must be presumed that he adhered to this intention on meeting the frigates.”

The opinions of the present law officers of the Crown on the same subject have also been just published, and are as follow

(No. 1).

*The Law Officers of the Crown to the Earl of
Malmesbury,*

“Doctors’ Commons, April 12.

“My Lord,—We are honoured with your Lordship’s commands, signified in Mr. Hammond’s letter of the 25th March ult., stating that he was directed to request that we would report to your Lordship our opinion whether, under the circumstances of the case as set forth in the

correspondence respecting the capture of *The Cagliari* now submitted to us, her Majesty's Government would be justified in making any, and what, demand upon the Neapolitan Government in respect to the conduct of that Government towards the British subjects, Park and Watt.

"In obedience to your Lordship's commands we have the honour to report—

"That we are of opinion, that, under the circumstances of the case, her Majesty's Government would be justified in making a demand upon the Neapolitan Government for compensation to be awarded to the British engineers, Park and Watt, in respect of the conduct of that Government towards those persons.

"It appears to us that Park and Watt acted throughout within the strict line of their duty, and took no part whatsoever in any illegal or criminal design or act.

"There is not, as far as we are aware, to be found, even at this late period, throughout these voluminous papers, a particle of evidence of misconduct or impropriety against either of them.

"In order to justify the Neapolitan Government for its continued imprisonment of these men, and for putting them on their trial for their lives, there should have been at least *prima facie* evidence of their participation in some of the offences committed by some of those on board *The Cagliari*.

"The Neapolitan Government has, in effect, admitted that mere presence on board was not of itself a sufficient ground for the institution of criminal proceedings, inasmuch as it set at liberty seven of the passengers on the 28th August, 1857, and eleven of the crew on the 28th October, 1857.

"The Neapolitan Government must therefore seek its justification for its conduct towards Park and Watt in the acts charged against them in the *atto di accusa*.

"These, apparently, are the following:—

"1. That they were without regular passports, (*ricapiti*). To this it may be sufficient to observe, that it appears not to be unusual for engineers of Sardinian steam-vessels leaving Genoa to be without passports; their names were on the ship's muster-roll, and they were in the regular employment of the owners of *The Cagliari*; but, at all events, the Neapolitan Government cannot infer any serious guilt from the mere want of passports.

"2. The note found upon Park, alleged to have been written by Mrs. White at Genoa. This note, upon the face of it, purports to be addressed,

not to an accomplice, but rather to a person who was to be forced to act under constraint; it is neither signed nor addressed; it was only presented to Park when the vessel was forcibly seized by some of the passengers; and the circumstance, that Park preserved and transcribed it into his log-book as his justification, is a proof, not of his guilt, but of his innocence in relation to it.

“3. That Watt, as chief engineer, ought to have directed the vessel’s course to Tunis, and not to Ponza. This charge, proceeding as it does from total ignorance of the construction and navigation of steam-vessels, is not worthy of serious refutation.

“4. Of participation in various specified acts at Ponza and at Sapri. Of these it is sufficient to observe, that even if they were of such a nature as to render Park and Watt amenable to a Neapolitan tribunal in respect of their commission, (which we can by no means admit), we are unable to discover that any evidence has ever been forthcoming to prove that Park and Watt committed any of them. Indeed, as to the most of them, their innocence must have been obvious, it being admitted in the *atto di accusa* that they remained on board throughout, whereas these acts are charged to have been committed on shore.

“For these reasons we are of opinion that there is no ground whatever which justifies the Neapolitan Government in having subjected Park and Watt to this prosecution, or in having inflicted upon them, as malefactors of the worst class, a long and inhuman imprisonment.

“The Neapolitan Government, upon the capture of *The Cagliari*, and the arrest of all those who had ever been on board her, with their papers, was in possession of the fullest information as to the guilt or innocence of each individual; and we are of opinion that thereupon Park and Watt became entitled as of right to immediate liberation.

“We have &c.,

“J. D. HARDING.

“FITZROY KELLY.

“H. M. CAIRNS.”

(No. 2).

The Advocate and Solicitor General to the Earl of Malmesbury,

“Doctors’ Commons, April 13.

“My Lord,—We are honoured with your Lordship’s commands, signified in Mr. Hammond’s letter of the 25th March ult., stating that he was directed to transmit to us the correspondence respecting the capture, imprisonment, and trial, by the Neapolitan Government, of two British subjects, serving as engineers on board the Sardinian merchant steamer

Cagliari, together with a copy of the indictment preferred against them, and a volume intitled *Sulla Preda del Cagliari*, published by the Neapolitan Government, and a further volume intitled '*Difesa del Cagliari*', published by the owners of the vessel; he also stated that the proceedings in the Admiralty Court at Naples would be sent as soon as printed.

“Mr. Hammond was also pleased to request that we would take these papers into our immediate consideration, and report to your Lordship our opinion whether the capture of *The Cagliari* was legal.

“In obedience to your Lordship’s commands we have taken these papers into consideration, and have the honour to report—

“That we have carefully perused these voluminous papers, and have considered them in consultation with the Attorney-General; but that, as we are unable to concur entirely in the conclusion at which we believe he has arrived, we have thought it best to express to your Lordship our opinion in the following report:—

“In sealing with this question we have confined our attention to the capture of *The Cagliari* exclusively, and independently both of the legal proceedings against that vessel, which ended in her condemnation as a prize, and of the treatment of those on board her.

“We would, in the first place, invite your Lordship’s attention to the facts preceding this capture.

“The *Cagliari*, a Sardinian merchant steamer, running between Genoa and Tunis, (touching at Cagliari, in Sardinia), left Genoa, on one of her regular voyages, on the 25th June, 1867, with apparently thirty-three passengers and a crew consisting of thirty-two, and a cargo partly consisting of fire-arms. While on the high seas, on the same evening, about twenty-five of her passengers suddenly produced concealed arms, took forcible possession of the ship, without any opposition being offered, broke bulk, and plundered arms on board, deprived the master of his authority, and placed him and some of the other passengers and crew under restraint, and forced (as is alleged) one of the passengers (Daneri, a merchant captain by profession) to navigate the vessel as master. The *Cagliari* passed what was supposed to be a squadron of British ships of war, when the passengers and crew under restraint were more closely watched, and kept out of sight. On the 27th June *The Cagliari* arrived at the island of Ponza, which appears to be a fortress and prison of the Neapolitan Government; the Sardinian colours were kept flying, and the pilot and captain of the port were seized on their coming on board; the boats were landed, an armed disembarkation took place, an

attack was made on the island, one Neapolitan officer of the garrison killed, another wounded, the garrison overpowered, upwards of 300 prisoners liberated and armed; arms, ammunition, and money were taken from the fortress; a royal Neapolitan cutter or cruiser, lying in the harbour of Ponza, was boarded, plundered, and sunk; and other crimes and excesses were committed. Some of the crew appear to have landed. Lorenzo Acquarone, whose name is on the ship's muster-roll as a waiter or steward, and Cesare Cori, a passenger, seem to have been wounded on shore, and brought back to the steamer.

“With this additional armed force, and with the plunder, The Cagliari proceeded, on the night of the 27th, to the Gulf of Policastro. Those passengers who had originally seized the ship, together with the prisoners liberated and embarked at Ponza, landed in arms at Sapri early in the morning of the 28th, and committed various acts of outrage and hostility on shore, where they were soon afterwards all killed or taken by the Neapolitan troops and inhabitants.

“The crew, acting probably under compulsion, appear to have rowed the boats in which the landing at 'onza and that at Sapri were effected.

“After the landing at Sapri, the master (Sitzia) appears, after the disembarkation, and on the night of the 28th, to have resumed his authority, and, with the assent of the crew and eleven remaining passengers, (among whom was Daneri), to have got under way, and taken a course as for Naples, where, as he stated, it was his intention to make a detailed relation of what had occurred to the Neapolitan Government.

“During these occurrences the Neapolitan Government, which had early intelligence of the attack on Ponza, took measures not only to check the aggression, but to pursue and capture all those engaged in it. Some steam frigates were sent from Naples to Gaeta to embark troops, and two cruisers, (The Tancredi and Ettore Fieramosca), sailing in company, and in search of The Cagliari, (of which vessel's appearance and course, when last seen, the commanding officer had previously received a description), fell in with her on the morning of the 29th June on the high seas, apparently about twelve miles west of Capri. The Cagliari was, when first seen, steering towards them; and on the vessel approaching, The Tancredi fired a shot, which brought her to; the master (Sitzia) was ordered on board The Tancredi with his papers; and The Cagliari was then boarded and taken possession of by an armed boat from The Tancredi, and towed by The Ettore Fieramosca in company, first to Salerno, and thence to Naples.

“When The Cagliari was brought to, it appear that she was not taking that which it is alleged would have been her most direct and shortest course to Naples, viz. the straits between Capri and the mainland, (piccole bocche di Capri). Three wounded men were on board, viz. Acquarone and Cori, already mentioned, and Amilcare Buonomo, a passenger, wounded at Sapri, as he alleges, by those who landed, on his refusal to land; bulk was broken, and part of the cargo (arms) missing; arms were also found, loaded, on board; twenty-five passengers were missing. It was known to the captors that she had been recently employed in acts of piracy and unauthorised hostility, and the explanations offered by the captain were, at all events, not such as to command implicit and immediate credence. We must also remark that some important ship’s papers, among which were the certificate of ownership and the maritime passport, were wanting; and although this would not justify the capture, it would add to the other grounds of suspicion presenting themselves to the captors. Giuseppe Mercurio, who was on the ship’s muster-roll, (a steward or waiter), appears to have landed and been wounded, and taken in arms on shore at Sapri; if so, he must have been missing at the capture.

“Under these circumstances, and hearing in mind the whole of the facts, we are of opinion that the Neapolitan commanding officer was justified in taking possession of The Cagliari, and in taking her into Naples, (where she was in fact going), in order to secure a full investigation of what really had occurred on board. The only alternative, her immediate liberation on the high seas, might have allowed the real criminals to escape without detection, and even to commit fresh acts of piracy and unauthorised hostility with impunity.

“That the vessel had been recently employed in committing acts of this nature was undisputed, and the question of the guilt or innocence of all or any of those persona then on board was, in our opinion, to all appearance involved in so much doubt that the captors could not be fairly expected to liberate the ship and those on board without further inquiry.

“By the acts which had been committed by those on board of The Cagliari her Sardinian national character had been lost or suspended; at all events, while the wrongdoers, whoever they might be, retained estual possession and control of her; and the circumstance that the master, and those on board at the time of the capture, might ultimately tura out to be innocent, would not, in our opinion, render the capture illegal hy international law.

“We forbear from enlarging upon the serious consequences which would, in our opinion, result to every maritime state, and to none more than Great Britain, from it being held that nothing short of complete legal proof of guilt or the actual commission of crime, at the moment of capture, will justify a national ship of war in capturing a vessel under such circumstances as those in which The Cagliari was captured by The Tancredi. If such a doctrine is to prevail, pirates need only obtain possession of a vessel entitled to a flag and papers in order to secure perfect impunity; the high seas, in place of being the secure highway of nations, will become the asylum of wrongdoers, and the flag and papers of any nation may be wrongfully used to the irremediable injury of every other.

“Great Britain can put forward no claim and can make no demand in this case which she is not prepared to concede to Naples, or to any other recognised Government, however weak or barbarous; and we are of opinion that had the British, instead of the Neapolitan coast, been the scene of the occurrences now in question, any British naval officer, placed in the same position as the Neapolitan officer commanding The Tancredi, would not have exceeded his duty, or been guilty of an International offence, by capturing and bringing into port a vessel found under the same circumstances as The Cagliari.

“We are, therefore, of opinion that the capture of The Cagliari was legal.

“We must, however, add, that we are unable to see any ground whatever upon which the condemnation of The Cagliari as prize can be supported.

“We have, &c.,

“J. D. HARDING.

“H. M. CAIRNS.”

(No. 3).

The Attorney-General to the Earl of Malmesbury.

“Temple, April 17.

“My Lord,—I was favoured with your Lordship’s commands, signified in Mr. Hammond’s letter of the 25th March ult., in which he stated that he was directed by your Lordship to transmit therewith the correspondence respecting the capture, imprisonment, and trial by the Neapolitan Government of two British subjects serving as engineers on board the Sardinian merchant steamer Cagliari, together with a copy of the indictment preferred against them, and a volume intitled *Sulla Preda del*

Cagliari/ published by the Neapolitan Government, and a further volume intitled *Difesa del Cagliari* published by the owners of the vessel.

“Mr. Hammond also stated that he was to request that I would, together with the Queen’s Advocate and the Solicitor-General, take the *papera* into consideration, and report to your Lordship my opinion whether the capture of *The Cagliari* was legal.

“In obedience to your Lordship’s commands I have taken the *papera* into consideration, and have the honour to report—

“That, lamenting the difference which exists between myself and the other law officers of the Crown, my clear and decided opinion is, that the capture of *The Cagliari* was contrary to the law of nations.

“Circumstances invest this case with extraordinary importance, but it does-not appear to me that they present any peculiar difficulty as to the facts, or as to the law upon which the question now submitted arises.

“The printed *papera* of the Neapolitan Government before me are, indeed, voluminous; but though they overlay, they cannot effectually disguise, much less alter, the simplicity of the issue to be determined.

“It appears that in the case of *The Cagliari* the main facts are undisputed; and the proposition of international law which applies to them is elementary, and has been hitherto uncontroverted. The main facts are—

“1. That at the time of the capture of *The Cagliari* pacific relations subsisted between Sardinia and the Two Sicilies.

“2. That *The Cagliari* was a private merchant vessel, well known to the capture as belonging, on account of her occupations, in a marked and special manner, to the commercial marine of Sardinia.

“3. That under force and duress she had been compelled to land convicts and rebels upon the Neapolitan coast.

“4. That at the time of her capture she was neither *de facto* nor *de jure* piratically employed.

“5. That she was seized upon the high seas, within no territorial jurisdiction, after a display of force, and the menace of a shot fired at her by a ship of war belonging to the kingdom of the Two Sicilies.

“I have said that these facts are uncontroverted, and such is in truth their character; but it may be well to notice in this place a suggestion—it is scarcely more— that *The Cagliari* voluntarily surrendered herself. It is in the first place clear that the international right of a state cannot be abrogated by the act of an individual subject. But in the second place, the notion of a voluntary surrender on the part of a merchant vessel because she obeyed the orders of a ship of war which had fired at her and taken

her in tow, as in the present instance, by an armed boat, is really unworthy of any serious comment. It is, to borrow the expression of the late Secretary of State for Foreign Affairs, (page 68, No. 79, of Papers laid before Parliament), a rockery.

“Taking, then, these main facts as incontrovertible, and practically uncontroverted, it remains to state the principles of international law by which they are governed; and it is expedient to observe, that no question arises as to what might be the principles of this law—whether they could be precisely the same, or in any or what degree modified, or wholly different, in the case of a vessel seized after a pursuit, beginning in territorial waters, and from which pursuit so begun the pursued vessel had escaped, or in the case of a vessel seized within territorial waters of the captor.

“Having reference, then, to the facts of the present case, the propositions of international law applicable to them appear to me the following:—

“1. That the merchant vessels of every state on the high seas are subject to the jurisdiction of the state to which they belong.

“All nations says Lord Stowell (1), being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals.’

“2. That the right of search is, as a general rule, strictly belligerent in its character, and cannot be exercised in time of peace.

“3. That the only exception is the case of professed pirates, that exception being founded on the fact that pirates are always enemies of every state, and therefore are equally subject to the jurisdiction of every state.

“4. That a merchant vessel regularly incorporated in the marine of a state does not become a pirate by having been itself forcibly seized by pirates; nor does she, when having escaped from pirates, and forthwith-returning to her lawful occupations, from which by force of arms she had been temporarily diverted, become liable to be seized as prize upon the high seas.

(1) *Le Louis*, (2 Dods. 243)

“6. That under circumstances of vehement suspicion of piracy, the usage of states has allowed, though with the most jealous reluctance, the right of approach, for the purpose of ascertaining the national character of the vessel.

“That if that character be clearly commercial, if the state to which she belongs be undoubted, if her employment at the time of so ascertaining her nationality be lawful, then a suspicion of past unlawful conduct does not justify seizure in time of peace, but does justify application for inquiry to the proper authority and jurisdiction of the state to which she belongs.

“Tried by these tests, the forcible capture of *The Cagliari* was clearly illegal.

“If that capture was illegal, the jurisdiction of the Court of the Two Sicilies was never founded; the proceedings before them were therefore null and void.

“The argument, that though the capture was illegal, the jurisdiction over the ship, howsoever obtained, might be well founded, appears to me to labour under two capital errors:—

“1. It builds the right of a state upon a wrongful act of that state. 2. It confounds two distinct things— the municipal relations of a court to the government of the state to which it belongs, and the mutual international relations of two States.

“It remains to observe upon the practice of States, as well as upon the law.

“The practice appears to me to confirm the law in this instance.

“First, as to *The Carlo Alberto*, cited in the Neapolitan proceedings.

“The *Carlo Alberto*, after having landed on the southern coast of France the Duchess of Berry and several of her adherents, with a view of exciting civil war in that country, put into a French port; but even then, though persons admitted to be conspirators were taken out of the vessel, she being then in the French territory, and, unlike *The Cagliari*, being originally employed upon a hostile, if not a piratical, expedition, was nevertheless not condemned by the French Courts, but was remitted to the jurisdiction of her own country —Sardinia.

“In the case decided in England, *Lo Louis*, where a French vessel had been seized by English cruisers for carrying on the African slave trade after that trade had been abolished by the internal laws of France, and by the treaty between Great Britain and France, the sentence condemning her was reversed, and Lord Stowell said, It is pressed as a difficulty, what is to be done if a French ship laden with slaves for a French port is;

brought in? I answer without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own country.’

“The same law has been laid down by the United States.

“In the case of the affair of *The Terceira*, in 1829, in which Portuguese refugees, in contravention of British law, fitted out armed vessels in British territorial waters, and were pursued by a British ship of war off *Terceira*, they were merely prevented from landing on that island the armed force so illegally collected in British waters, and no jurisdiction was attempted to be exercised over the ships themselves; and even this amount of interference was considered by high authorities at the time to have been an excess of power on the part of Great Britain.

“The conclusion, therefore, to which I am irresistibly led, both from international law and practice, is, that the capture of *The Cagliari* was illegal.

“Both Sardinia and England are indeed bound to afford redress, if wrong has been done-by their respective subjects, and to entertain any complaint which the Two Sicilies may have to urge against them by reason of the acts of their subjects; but to use towards that state the judicial language of Lord Stowell, already referred to, and say, Rescind the illegal act done by your subjects, and leave the foreigner to the justice of his own country.

“I have &c.,

(Signed) “FITZROY KELLY.”