M.R.O. 1—23,000—16-10-20.

MADRAS RECORD OFFICE.

Government of Madras.

Political DEPARTMENT.

G.O. No. 573 Press ~~His.~~

Dated 16 - 11 - 1861

Not to be folded or roughly handled

No. 45. Read the following letter from W. GREY, Esq., for Officiating Secretary to the Government of India; to the Chief Secretary to Government, Fort Saint George, dated Fort William, the 22nd October 1861, No. 66.

Foreign Dept. Political. In reply to your letter, No. 172A, dated 28th March last, forwarding a letter from the Magistrate of Malabar, relative to the claim of Monsieur De Bellemare, Consular Agent for France, to exercise Magisterial powers over French Sailors in the British Settlement and Port of Cochin, I am directed by the Governor General in Council to forward, for the information of the Honorable the Governor in Council, a copy of a letter, and of its enclosure, from the Advocate General, dated 6th June last, on the subject, and to state that His Excellency in Council concurs in the opinion of the Government of Madras, as expressed in your letter under acknowledgment.

From W. RITCHIE, Esq., Advocate General; to C. U. AITCHISON, Esq., Under Secretary to the Government of India, Foreign Department, dated the 6th June 1861.

In reply to your letter, No. 2,060, dated the 27th April last, I have the honor to state, that I quite concur with the Advocate General for Madras, that Monsieur A. De Bellemare, as Consular Agent of France in the British Settlement of Cochin, has not, by the Municipal Law of Her Majesty's Dominions, the right to exercise any of the powers of Criminal jurisdiction over French Sailors which he has assumed to exercise.

2. There is no Treaty with France, and no understanding between the British and French Governments that French Consular Officers should exercise such powers. The British Magistrate of Cochin should in all cases, brought before him on the complaint of the French Consul or the Master of a French Ship, proceed according to the ordinary course of procedure established in his Court, and not otherwise.

3. A somewhat similar claim was made by the French Consul in Calcutta in the course of last year, which fully confirms Mr. Sydney Smyth's views on the subject. A French Sailor had been kept in irons, under the order of the French Consul, for a breach of discipline on board the Ship which the Consul had judicially investigated. He obtained a writ of *habeas corpus* from the Supreme Court under which he was discharged. And the Master who has kept the man in irons, under the order of the French Consul, was, in default of appearance, fined by the Magistrate of Calcutta.

4. My opinion was taken by the Government on the whole case, and as I have therein stated fully my view of the Law applicable to such cases, I send a copy of that Opinion. The Government adopted the course then advised by me, and I have reason to think that the French Consul, M. Lombard, upon my opinion as to the state of the Law being communicated to him, was quite satisfied with the course adopted.

I return the original enclosures.

OPINION.

1. The French Consul bases his protest against the decision of the Magistrate upon the principle which he lays down in the 3rd paragraph of his letter, wherein he says he takes his stand upon the "fiction of exterritoriality." The principle, as broadly stated by him, is one which, in my opinion, neither the Law of England nor the Law of Nations, as understood by English Jurists, recognises. But I am not surprised that M. Lombard asserts the principle, as broadly and clearly as he does, as the Law and practice of the French Municipal Courts, as well as the interpretation put by French Jurists upon the Law of Nations, fully adopt the principle.

2. In this conflict of the Laws of the two Nations, and in the absence of Treaty, the British Government can only maintain the Law in force in the Courts, and adopted by the Jurists of Great Britain. Any inquiry into the question, whether the view taken by the English or by the French Jurists, as to the requirements of international Law, be theoretically the more correct or practically the more beneficial would be out of place, unless the matters in discussion were the expediency of a change of Law, by the one country or by the other for the future.

3. According to the view adopted in the French Courts, acts of mere discipline of a Merchant Vessel, or even offences or crimes committed by one of her Officers or Crew against another of her Officers or Crew on board a Foreign Merchant Vessel in a French Port, are not cognizable by the French Municipal Tribunals, except in aid and at the request of the Power to whom the Merchant Vessel belongs, and to whom the punishment of such offences is left, when the peace of the Port is not disturbed or endangered by the act done or offence committed. The French Law deals with such acts and offences when committed on board a Foreign Merchant Ship in the same way as the English Law and the Law of Nations, as generally understood in Europe, deals with similar acts and offences when committed upon a public Ship of War of a Foreign State.

See the cases of the Newton and the Sally, stated in Wheaton's Elements (6 Book. Edition 1857, pp. 155-156.)

4. But the English and American Laws, in the absence of any Treaty, do not admit this fiction of exterritoriality as M. Lombard aptly calls it, as applicable to a Foreign Merchant Vessel, but hold that such a Vessel admitted into the Port of a State is of right, subject to the general Laws and Police Regulations of that Port, that its Crew are amenable to the Tribunals of the country for offences of whatever kind committed on board of it, that its Master and Officers are in the same manner amenable to those Tribunals for any offence or injury done to any of their Crew while in Port, and that the ordinary local jurisdiction attaches in all such cases.

See Wheaton's Elements, p. 156, and Notes.

1. Kent's Commentaries 159 and 160, and Notes (8th Edition, 1854.)

5. Upon the complaint, therefore, of a Seaman, whether a French subject or not, that he had been "illegally and without justifiable cause imprisoned in irons and kept without bread and water within the Port," the Magistrate had, according to the Law which he was bound to administer, no option but to summon the Commander of the Vessel (being a Merchantman) who was charged with the imprisonment. The imprisonment is, by the Law of England, *primâ facie* an offence over which the Magistrate has jurisdiction under the Police Act for Calcutta, the charge may have been greatly exaggerated: it may have been wholly false and vexatious, or the imprisonment charged may have been fully justified. In other words the Captain may have had a complete defence upon the merits. But it is clear that the Magistrate had jurisdiction over the subject matter of the charge, and until some answer were given to the *primâ facie* case deposed to by the complainant, he would not have been justified in dismissing the case. The Captain, adopting very naturally the view of the Law taken by the Consul, objected wholly to the jurisdiction of the Court, and declined to produce the complainant or to go into the case upon the merits. Under these circumstances I think the Magistrate was perfectly justified in holding that, in the absence of a Treaty or special Law, the mere authority of the Consul to the punishment, however valid according to French Law, could not oust the jurisdiction of the English Court or the right of the complainant to have his case heard; and as the defendant did not meet the case in the merits but admitted the imprisonment, I do not see how the Magistrate could have abstained from convicting the Captain.

6. If the Seaman had been allowed to appear, and his story of cruel treatment had been negatived, while it had been shown that the punishment was not at all an excessive one, even if a strict justification in point of Law had failed, I should have thought that the fine of Rupees 50, imposed by the Magistrate, was an excessive one, and that the Magistrate would have exercised a better discretion in imposing merely a nominal fine. But if, as seems to have been the case, the seaman was not allowed to appear as a witness in support of his charge (probably under a mistaken notion that the Commander could not assert his objection to the jurisdiction if the man was produced), then although it might have been more regular to have insisted on the man being produced, in order to enable him to give his evidence, and to have warned the Commander of the consequences of not allowing him to attend, I do not think the Magistrate acted wrongly in imposing the fine of Rupees 50.

7. I am far from thinking, however, that the mere circumstances that a French Seaman is put in irons by the Master of a French Vessel on board that Vessel for a moderate time, with the sanction of the French Consul in a British Port, by way of punishment for a breach of discipline, such as desertion or insubordination, without any excessive severity, will expose the Master to conviction or punishment before a British Court. The Law of England, and the general Maritime Law which it adopts, recognise the right of the Captain to inflict moderate chastisement on his Seaman for the preservation of discipline, on the same footing as a Master is justified in correcting an Apprentice. It is true that while in a British Port such right is generally in abeyance, in consequence of the remedies before the Magistrates of the Port prescribed by the Law for the infraction of discipline while in Port. But those Regulations of Municipal Law apply generally to British Ships alone; and as the Magistrates have no power of granting redress for mere breaches of discipline upon a Foreign Ship not amounting to offences against the Law of the State or the Port such as desertion, there seems no reason why the power, which exists in the Commander at Sea, should not be exercised by him while in a Foreign Port. In such cases the Local Tribunal would always have jurisdiction to enquire into the reasonableness of the punishment. But where there is nothing excessive or repugnant to English or general usage in similar cases at Sea in the nature of such punishment, and were the punishment has been inflicted for an offence against the discipline of the Ship calling for summary and immediate repression, after the accused has an opportunity of defence (which it is not quite clear that the Sailor had, in the present case, according to M. Lombard's statement), and where such punishment has been inflicted under the sanction of the Consul of the State to which the Ship and the Sailor belong, I do not think that the Master could properly be convicted merely for the application of such punishment to one of his Crew.

8. The order of the Consul will not, indeed of itself, protect the Captain or form any bar to a full investigation of the case. But it will be of importance in showing that the Captain acted with proper caution and deliberation, and according to the course prescribed by his own Law.

9. Under all the circumstances of the case, considering that this is the first instance in which a Foreign Commander has been held liable for a punishment awarded according to the Law of his own country by his own Consul, that both the Commander and Consul were justified by the decision of the Courts of their own country in believing that a similar punishment, if awarded by a British Consul in a French Port against the Seamen of a British Vessel for a similar offence, would have been upheld as valid, and that they might themselves reasonably have believed, as I doubt not they did believe, that the punishment was valid in a British Port. That the French Captain, on whom the fine was imposed, can scarcely have been expected to have acted otherwise than he did in seeking the protection of his Consul, and following the course which the Consul pronounced legal, that the Consul denies the circumstances of aggravation stated by the Seaman, and alleges that the punishment was one justified by French Marine Ordinance. That the failure to produce the Seaman before the Magistrate was probably caused by an apprehension that to produce him would be to admit the right of the Magistrate to interfere, and that no excessive severity seems to have been used. I think it will be advisable for the Government to remit the fine of Rupees 50 and to restore it to the Captain, or, if he has sailed, to the Consul on his part. But at the same time the grounds of remission should be stated, and the validity of the conviction upheld.

10. If any portion of the fine has been awarded to the Seaman by way of amends (which however does not appear upon the conviction to have been the case), that portion should not be remitted, but the residue only should be paid back.

11. A case somewhat similar in which the late French Consul* claimed the delivery up of a French Sailor who had stabbed another on board a French Ship in Dock at Howrah, with a view to the offender being tried in French Court arose in 1858. I then examined the Authorities and gave my opinion (which was adverse to the claim) at length to the Foreign Office in a letter dated the 6th February 1858. I suggested that a communication should be made to Her Majesty's Home Government, with a view to ascertain whether, in their opinion, the Rule generally laid down by English and American Jurists, as opposed to that of the French Tribunals, should be relaxed in the Ports of India in favor of the Vessels of France or of those countries which adopt the French Rule.

* M. Boileau.

Proceedings of the Madras Government, Political Department,
16th November 1861.

A reference was accordingly made to the Home Government, and the opinion of the Law Officers* of the Crown was taken. They entirely concurred in the view I had taken of the Law as it exists, but did not suggest any alteration for the future.

* Sir F. Thesiger and Sir Fitzroy Kelly.

(Signed) W. RITCHIE,
Advocate General.

The 21st August 1860.

(True Copy.)

(Signed) W. GREY,
For Officiating Secretary to the Government of India.

No. 46. ORDER THEREON, 16th November 1861, No. 513.

Ordered to be communicated to the Magistrate of Malabar in reference to the Resolution of Government, dated 28th March last, No. 172.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. F. Cartledge.

Order thereon. 16 November 1861 – No. 513.

Ordered to be communicated to the Magistrate of Malabar in reference to the Resolution of Govt dated 28th March last No 172.

To the Magt of Malabar dispd. 18th.

Political 1861 Dep't

From
The Offg Secy to the Govt of India. Fort Dt 6.

D/ 22nd Oct 1861
R/ 5th Novr 1861.

Encl 1.

No 546

In reply to the letter hence No 172 A.D./28 to March last, I wording a letter from the Magistrate of Malabar relative to the claim of the Consular Agent for France to exercise Magisterial powers over French Soldiers in the British Settlement & Port of Pochin forwards for information copy of a letter from the Advocate Genl on the subject & states that the Govt of India concur in the opinion of this Govt as expressed in the above letter from this Office.

With an Order