

IS COTTON CONTRABAND?

So much and such violent opposition has arisen in the cotton growing section of the United States, to the British treatment of cargoes of cotton shipped to ports adjacent to Germany and Austria, that it is fitting we inquire seriously into the justification or lack of justification for the policy pursued by the British government with respect to this commodity. As spokesman of the jingo element in the South, Senator Hoke Smith of Georgia, insists, with clenched fists, that any further interference by the British navy with shipments of cotton to neutral ports should be considered by the United States as an unfriendly act, and that an ultimatum to this effect be sent at once to the British government.

Before considering the legal phases of the question, it is interesting to note the extent to which economic interests may at times bias people's views as to purely legal questions; also what strange bed-fellows are created by economic as well as by political interests. While the law is no respecter of persons, persons are frequently no respecters of the law, provided it conflicts with their economic interests.

During our civil war, the United States declared cotton contraband. The South was at that time extremely pro-English in its views. In fact it was then as much Anglophile as it is now Anglophobe. And the federal government, which is now protesting the policy of the British government in treating cotton as contraband, was at that time using the guns of its navy to emphasize its insistence that cotton was contraband. As the British did not resort to the same form of emphasis in their insistence that cotton was not contraband, the view of the federal government prevailed. Now the British government is insisting that cotton *is* contraband and enforcing their view by a resort to the same form of emphasis which carried conviction during the civil war. It would appear that our federal government was wrong then *or* now and whether it was wrong then *and* now is a question of law which we will now proceed to examine.

With respect to their character as contraband, Grotius divides goods into three classes, 1. Goods used mainly in war. 2. Goods used only in peace. 3. Goods of use in peace and in war. The latter he terms *incipitis usus*, or of a double-headed use. The goods of the first class are absolute contraband. Those of the second class never contraband; and those of the third class are conditional contraband, i. e., are contraband if destined

for the use of the enemy's army or navy. This classification has not been improved upon and was cited with approval by the Supreme Court of the United States in the case of *The Peterhoff*, 5 Wallace 28.

Of these classes little difficulty is found with regard to the first or second. Articles manufactured for and used primarily in war, such as artillery, are universally conceded to belong in the list of absolute contraband. Articles of the second class, such as works of art, are never considered contraband. But articles used in peace as well as in war and becoming contraband only according to circumstances, as foodstuffs, occasion no end of difficulty. It is by the addition of such articles to the list of contraband that friction frequently arises between the belligerent and neutrals. The interests of belligerent and neutral are on this point antagonistic, as the expansion of the list is manifestly an advantage to the belligerent, and, as it interferes with his trade, it is a corresponding disadvantage to the neutral. Out of this antagonism of interests, more than out of the inherent difficulty from a legal standpoint, has come the inconsistency and confusion in regard to the subject of contraband. So hopeless was the last conference at The Hague of being able to harmonize the conflicting views that the delegates refused to make the attempt.

Since cotton has come to be so largely used in the manufacture of high explosives it would seem clearly enough to belong in the class of absolute contraband. The importance of cotton as a factor in military operations will be better appreciated after reference to the July number of the *Scientific American* in which it is estimated that 730,000 bales of cotton a year is necessary for the manufacture of the explosives used by the German artillery alone. This is about half of the normal importation of cotton into Germany annually. When we remember that the above estimate does not take into account the amount necessary in the manufacture of explosives for small arms and the navy and clothing for the soldiers, the military importance to the allies of cutting off the importations of cotton into Germany grows upon us. As Germany does not produce cotton she is dependent upon importations direct or through neutral territory.

When wood charcoal was the carbonizer in gun powder, it was generally conceded to belong in the list of absolute contraband. Now that cotton takes the place of it and sulphur in the great bulk of explosives used in war, there is no convincing reason why

it should not be placed in the list of absolute contraband, since it is its possibilities for direct military use which determines in which of the above classes an article shall be put. The fact that in its raw state it is not used mainly in war, does not exempt it from the list of absolute contraband, if by a process of combination it becomes an explosive of decided use in military operations. Saltpeter, charcoal and sulphur, not in combination are harmless and used extensively in the arts of peace, but this does not prevent a recognition of the fact that in the hands of an enemy they have great possibilities of harm and there is no breath of protest, even by the South, against placing them in the list of absolute contraband. Yet it might readily be different, if their production and exportation, like cotton, were the great industry of the South. The logic of the pocket-book is frequently more powerful than the logic of the law.

The reasons for placing cotton in the list of absolute contraband now are certainly more convincing than those given during the civil war. The contention of the federal government at that time rested solely upon the grounds of military necessity. The contention of the British government at the present time rests upon the same general principle which applies to all other commodities in determining in what list they shall be put. It will, however, be difficult for the present Democratic administration to insist upon adherence to legal principles as against a combination of political and economic exigencies.

If, legally, the British government is warranted in placing cotton in the list of absolute contraband and it seems abundantly clear that it is, the British navy may lawfully interfere with shipments of it to German ports, even apart from the blockade it is maintaining against said ports. But may it lawfully seize and preëempt or confiscate shipments from American ports to neutral ports adjacent to Germany? To the exercise of such right the United States cannot consistently object. For not only has it insisted with all the eloquence of its whole navy, and to the great cost of one of the leading British industries, that cotton is contraband, but it has with like eloquence, reinforced by the logic of its highest court, maintained the principle that in the case of absolute contraband, the real rather than the nominal destination determines the rights which the belligerent may exercise over neutral commerce. This view is necessary not only to protect the legitimate interests of the belligerent against fraud, but to protect the honest shipper against his dishonest competitor.

The doctrine of continuous voyage, in cases where goods that are absolute contraband are involved, has been too thoroughly established by the decisions of the Supreme Court of the United States for our government to now insist that the nominal destination must determine the legality of the voyage. Speaking for said Court, in the case of *The Bermuda*, 3 Wallace 514, Chief Justice Chase said: "It makes no difference whether the destination to the rebel port was ulterior or direct, nor could the question of transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene." This was the case of a neutral ship going from Liverpool, a neutral port, to Nassau, another neutral port, but its very probable ulterior destination was Charleston, or some other Confederate port. Both vessel and cargo were confiscated. In this case as in the case of *The Hart*, *The Springbok*, and *The Peterhoff*, the evidence of ulterior destination consisted in the fact that a considerable part of the cargo was contraband for which the most probable market was the Confederate ports.

In deciding what constitutes sufficient evidence of ulterior destination the naval commanders and the courts of the captor may err, but irreparable injury is not likely to result, as provision can be made by diplomatic negotiation for a review in order to determine the fact and the extent of injury caused and the form and amount of reparation. This is a justiciable question which can be settled far better by arbitration than by an appeal to the ordeal of battle. Fortunately, the two nations have far too much good sense to entertain seriously any other than a peaceable settlement of the dispute. The fire-eaters may furnish or consume such pyrotechnics as their climate or system requires, but the decision will be made by those having a broader conception of duty and a more just respect for the legal rights of others.

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