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OUR DUTY TO SPAIN.

The complaints which the Spanish Ministry is said to have made to our government, of its laxness in preventing filibustering expeditions, have called out from the Secretary of the Navy an interesting rejoinder. The statement of Mr. Long attempts to show on the part of the United States a diligence in preserving its neutrality, that is not only "due" but even unusual under the circumstances. This correspondence is not yet published. The mere fact of its existence and probable tenor, is known. We cannot scrutinize the assertions of fact and law and precedent therein contained. Nevertheless, perhaps we may use the incident to advantage as a peg upon which to hang two inquiries, the one relating to fact, the other to law; the one recalling a bitter national controversy, long since settled; the other concerning the duties of a State in view of an insurrection against a friendly power, an insurrection which cannot well be recognized as belligerent.

What a faint and far-away memory that phrase "due diligence" suggests! And yet in the Alabama Claims Arbitration, a quarter century ago, national responsibility and millions of dollars in damages, rested upon its interpretation.

The military engines which the Southern Confederacy bought in neutral England prolonged the war, destroyed or drove to other flags the commerce of the North, and gave rise to the most serious complaints. Just so to-day, those military supplies which Cuba buys from the manufacturers of the United States, are prolonging the insurrection, may make independence possible, and do much to disturb our friendly relations with Spain. They likewise may serve as a basis for claims for damages, in no very distant future. There is an apparent parallelism between the two cases. Is it a real one?

The salient features of our relations with neutral powers during the Civil War, were these: the recognition of Southern belligerency by the States whose interests were affected, which thereby declared their neutrality; the application of the rules of maritime capture to them, by both sides in the war thus recognized; the sale of military supplies to the Confederates by neutral merchants, the onus of preventing their delivery resting upon the shoulders of the Northern government; finally, the despatch of armed expeditions from British soil, coupled with their illegal armament and enlistment of men, in British colonial ports, with great damage to American commerce resulting. There was an European sympathy for the Southern cause also, which was galling to the North, but it is the unneutral act, not the unneighborly sentiment, that international law takes cognizance of.

Turn now to our relations with Cuba.

As the Cuban ports of importance are all in Spanish hands, our shipping interests have not been so affected as to make the recognition of Cuban belligerency necessary. Therefore, there has been no blockade, no right to capture contraband on the high seas, no right of search of American ships except within Spanish jurisdiction. As in Great Britain in our Civil War, there has been free sale of military supplies in our markets to the Cubans, but with the assumption that the burden of preventing them from reaching their destination rested upon Spain; and lastly, armed expeditions, that is, the combination of munitions of war with men enlisted to use them, have been checked and in large measure prevented by our Government, at great cost and with much trouble, by many arrests, several trials and a few convictions, so that it can honestly say, as Secretary Long does say, that it has exercised diligence in this regard.

American sympathy for the Cuban cause exists. It is natural, even inevitable. It is galling to Spain. But we say again that expressions of sympathy are not within the cognizance of the law.

Reviewing the two cases, we see that they are not parallel, but in strong contrast.

The one was war, with neutral duties and belligerent rights. The other is an insurrection, involving no neutral obligations, strictly speaking, and no belligerent rights. The one put the duty of preventing contraband articles from reaching their destination where it belonged. In the other Spain appears to shirk this duty; to try and place it upon the wrong shoulders. Negli-

gence in the Alabama, Florida and Shenandoah cases, made Great Britain liable for the damage they caused, while no such scandal in connection with Cuba can be brought home to the United States. Its seaboard is long and intricate, the Cuban coast near, absolute prevention of hostile expeditions well-nigh impossible. But by the use of both navy and revenue service the coast has been so efficiently policed as to make the despatching of such expeditions very hazardous and very uncertain. Due diligence has been observed. Can more be demanded?

And now for the second inquiry.

What is the law to govern a State in its relations to a mere insurrection in a friendly country?

Is a State's own statutory law the sum and measure of its duty in the case?

How far does the character of lawful commerce attach to trade with the insurgents in military supplies?

Such questions as these have forced themselves upon both executive and judicial departments in the United States within the past three years. But there must naturally be a difference in their point of view. The executive is guided by the general principles of international law, and by its conviction of national policy; while the courts, though also applying international law, must be specifically bound to employ and interpret the statutes enacted for the enforcement of that law. Violation of the rights of another power by the executive calls for redress. So, too, insufficiency of the statute, as interpreted, founds a valid claim for damages. But an unpalatable interpretation of a statute is not a ground for complaint, unless bad faith can be proven. Where an insurrection breaks out in another state it is to be remarked that one's own political relations with that state are necessarily affected, for it involves the commerce and the property rights of our citizens. If of a character to warrant it, the insurrection will be recognized as belligerent. We are presupposing, however, that for one reason or another this course is inadmissible. There results no recognized war. There can, therefore, be no neutrality (since neutrality implies war), nor any neutral duties. We have so-called neutrality acts, which operate without war, it is true, but the "neutrality" is here merely a convenient name, and not a proof of status. The same thing in England is called a Foreign Enlistment Act.

But though there may be no neutral duties and rights, technically speaking, there are nevertheless the duties which every

state owes to every other; there are the rights of commercial freedom which every state enjoys, and there is the right of self-defense, the duty of maintaining its own integrity, which the insurgents sovereign possesses.

These fundamental rights do not depend for their operation upon any formal recognition of belligerency. Nor can I see that they are called into being or changed in any way, by the new-fangled recognition of insurgency—a phrase ascribed to the late Dr. Wharton. When an internal disturbance in a friendly state is serious enough to affect another state's interests, the executive consciousness of that fact finds expression. In our own case, the form of expression will usually be a reference in some message of the President to give notice of the facts and warn us to obey our own statutes. This is what is meant by the term, recognition of insurgency.

Now as to the private trade in war material. It is certain that such trade with an insurgent body is at least as lawful and unrestricted as with a recognized belligerent. The usage in the latter case is unquestioned. Private trade in contraband is permitted. Even where carrying contraband is forbidden by executive order, as is sometimes done,¹ this simply means, in actual practice, that the trade is liable to the penalty of confiscation, if the offender is caught by the injured belligerent. The neutral is never held responsible for the traffic in contraband so long as it is purely a commercial transaction. Accordingly, a body of law has grown up to govern such cases. States define contraband by treaty. Such goods may be seized unless the treaty substitutes preëemption for confiscation. They may be seized on the high sea even, if their hostile destination is clear. In certain cases the ship is liable also. But the burden of prevention is not saddled upon the neutral. The law and usage are the resultant of two principles, the freedom of neutral trade, and the belligerents' right of self-defense.

In the case of insurgency rather than belligerency, the only question is whether the freedom of trade in war material is not enlarged, whether the right of seizure is not restricted to the coast sea of the insurgents sovereign. In the case of an armed expedition like the *Virginius* there is authority and reason for believing that search and seizure on the high seas are warranted on the ground of self-defense. A similar claim to prevent the trade in war material would probably not be submitted

¹ *E. g.*, by both British and Spanish proclamations of neutrality at the outset of our Civil War.

to. However, for our present purposes, it is not necessary to discuss this point. It is enough to emphasize the general law, that no government can be held accountable for its citizens' traffic in military supplies, not furnished to a visiting man-of-war, nor in the hands of an expeditionary force. Its duty is fulfilled when its subjects are warned of the risk of loss which they incur by engaging in it.

The distinction already referred to, between contraband goods which are mere commodities, and the same goods it may be, with an organized body of men to use them, is a perfectly reasonable one. It is the distinction between trade and an armed expedition—between peace and war.

An insurrection breaks out in one of two states which are at peace. The other is bound to prevent all persons within its jurisdiction from assisting to wage war against its friend. Where a ship is armed or men enlisted and an expedition set on foot, with intent to assist the insurgent cause, that is waging war. If such acts are made possible through the negligence of the authorities, through lack of appropriate legislation, or through a judicial breakdown involving more than an unpalatable interpretation of the law, they are unfriendly and a ground for damages.

This, then, in its simplest terms, is the sum of the rights and duties which obtain between the United States and Spain at the present time; to carry on trade with the Cubans even in war material, subject to the Spanish right of seizure within their own coast sea; to prevent our soil from being made a base from which Cuban sympathizers wage war against Spain. These two are the cardinal points, under the general principles of the law of nations.² Such general principles in a vital matter like this should and do find expression and sanction in local legislation, and such statutes are interpreted and enforced by the courts. Neither insufficiency of the law, nor difficulty in enforcing it, will excuse a government. As our diplomatists kept urging upon England in the Alabama discussion, "If the law is insufficient, amend it; if sufficient, enforce it."

² The simplicity of the rule may be complicated by actions which involve a violation or evasion of our revenue laws. Thus a ship with contraband and a commercial crew, may clear for Havana, whereas, her real destination is inferred to be some landing place, not a port of entry, on the Cuban coast. In this connection the *Itata* case at San Diego may be recalled, which ship took French leave of the authorities, and failed to comply with the port regulations, yet the court acquitted her of the charge of violating the neutrality statute.

Our next inquiry thus relates to the adequacy of our own statutes, and to the good faith and effectiveness of their interpretation and enforcement.

The statutes applicable to such aid as Cuba has sought, are two, Sections 5283 and 5286 of the Revised Statutes of the United States.

The first is aimed at "every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures * * * etc., or is concerned in * * * etc., with the intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state or of any colony, district or people, with whom the United States are at peace. * * *"

Here the offense is to be committed by means of a vessel and that vessel must be armed. On this ground some prosecutions have failed. Another point is, that the vessel is to be "employed in the service of any foreign prince or state, or of any *colony, district or people.*" Do the Cuban insurgents correspond to this latter description?

Mr. Justice Brown, in the *Carondelet* (37 Fed. Rep. 799), seems to hold to the contrary, and Judge Locke, in the *Three Friends*,³ last year, took the same view. Justice Brown said: "A vessel could hardly be said to enter the service 'of a foreign prince or state or of a colony, district or people' unless our government had recognized Hippolyte's faction as at least constituting a belligerent," but the decision turned on another point. The contrary view was taken by Mr. Wharton and Attorney-General Hoar, who believed this statute applicable to, and intended for just such an insurgent body as the Cubans form. In contrast to this indefiniteness in the American statute, compare the wording of the British Foreign Enlistment Act. This forbids similar aid given to "any foreign prince, colony, province, a part of any province or people, or any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province, or part of any province or people." In the English case, *The Salvador*, the lower court held like Judge Locke, that the statute did not apply to unrecognized insurgents in Cuba. But this decision was overruled by the Judicial Committee of the Privy Council (*The*

³ See YALE LAW JOURNAL, Vol. VI., No. 5, p. 283.

Salvador, L. R., 3 P. C. 218). In view of the judicial interpretation of our statute, it would seem that it is inferior in comprehensiveness to the English Act. But that it is so faulty as to ground a claim for damages for unneutral conduct against the United States, is very improbable. For it is sufficiently doubtful, to warrant a trial if not a conviction, to detain the ship although it may not forfeit it, and, besides this, Section 5286 is comprehensive enough to forbid such an armed expedition as would be obnoxious to the general principles of international law already laid down. This reads as follows: "Every person who, within the territory of the United States, begins or sets on foot, or prepares the means for, any military expedition or enterprise, to be carried on from thence, against the territory or dominions of any foreign prince or state, or of any colony district or people, with whom the United States are at peace, shall be deemed guilty," etc. Plainly, this statute is operative without any recognition of belligerency and abundantly satisfies the requirements of international law which forbid one state to permit any hostile expedition to be prepared within its jurisdiction against another state, its friend.

This, then, is the answer to the questions which we asked at the outset: that trade in military material is lawful to the individual; that the duty of a state is measured not by its statutes but by the requirements of international law; that if those statutes, as interpreted by its courts, are insufficient to lay down its international duties and prevent their violation, that state is liable; and that in the case of Spain and Cuba our statutes are not strikingly faulty, although one could certainly be made clearer and more comprehensive.

This Cuban insurrection, like the one in the seventies, has put the United States into a difficult position. Its trade has been cut off; its resources taxed to preserve its neutrality. But as several convictions show, and as the records of the navy and revenue service testify, it has performed its international duties with fidelity, with patience and with success.

Theodore S. Woolsey.

YALE UNIVERSITY, December 1, 1897.