

YALE LAW JOURNAL

VOL. XIV.

MARCH, 1905

No. 5

WIRELESS TELEGRAPHY IN WAR.

It has often happened that a belligerent in war has been forced to notice, and define the character of, some new invention which bears upon hostilities. Thus the list of contraband has grown during war beyond the limitations of treaty. Thus the balloon in warfare has been attacked. Thus new and deadly explosives have been denounced. But naturally the belligerent will regard a new engine or weapon or device, which is to work him harm, with a certain prejudice, and his view of its legality will be colored accordingly. It is the outsider who can preserve the judicial attitude, not the combatant, in the heat of battle. It may happen therefore that the opinion of the belligerent must be revised in calmer mood, as when the Hague Code declared balloonists not to be spies, in opposition to Bismark's threat to treat them as such during the siege of Paris.

In a similar way we may be sure the Russians' threat to treat as spies those private individuals who make use of the wireless for purposes of war correspondence, will be objected to, for the one thing certain is that such persons are not spies, and if not, they should not be treated as such. Perhaps the new Hague Conference to which Mr. Roosevelt is asking the powers, will take up this question of the status of the wireless in war. Meanwhile, we can at least briefly study the points which will need decision--perhaps find some guiding principle.

Wireless telegraphy in the present war in the East, so far as appears, has been used in two ways which are of questionable legality—to maintain intercourse between beleaguered Port Arthur and Russia, and to send war news to a London paper rapidly, and independent of military control, by the paper's own steamer rigged for the purpose. As for the use of wireless

methods by the belligerents to maintain their own connections or intercept one another's messages, of course there is no question whatever. It is only when the neutral is involved that difficulty arises.

Take the first of these. Apparently by erecting a mast at Chefoo, on the neutral soil of China, news has passed from Port Arthur pretty regularly, and has been transmitted by telegraph thence to Russia. Is the toleration of this practice by China an unneutral act?

Precedent or analogy and reason are the lights to guide us in such an inquiry as this. Now the closest analogy is to be found in the international status, during war, of the world's submarine cable system. This, in great part, is equally out of a belligerent's reach; too deep in the sea to be grappled, it equally binds belligerent and neutral together. There is an international agreement concerning submarine cables, but this provides only for their protection in normal times. Article XV reads: "It is understood that the stipulations of this Convention shall in no wise affect the liberty of action of belligerents." What liberty of action does the belligerent claim? Here the only question in dispute relates to the right to cut a neutral-owned cable running between hostile and neutral points, beyond the three-mile limit of the neutral state. But this does not bear upon the problem of the wireless, for the new method has no tangible apparatus except at the terminal points, which are by our supposition, the one hostile, the other neutral. As for the cable end in neutral waters or landed on neutral soil, it is absolutely beyond the reach of the belligerent. Though not subject to force, is it not subject to be sealed on demand of a belligerent on the ground of neutral obligation? In other words, is the neutral state bound to prevent one belligerent from using freely for all purposes a cable landed within the former's jurisdiction and which the other belligerent is unable to interrupt.

There seems to be a disposition to impose this burden upon the neutral. Yet to do so is surely at variance with the entire theory of neutral obligation hitherto recognized. To carry hostile dispatches, to serve as a belligerent transport, for instance, are unneutral services on the part of the neutral individual, punished by confiscation of the vehicle of offense. But it is the belligerent, not the neutral, by existing usage, who bears the onus of prevention. The neutral *is* bound to prevent the use of his territory as a base of operations, to forbid the fitting out of enemy ships of war in his ports, but not to

restrain enemy's dispatches, or diplomatic agents or financial agents, all having it may be a very direct influence upon the conduct of the war. The distinction is between direct military preparation on neutral soil, like an armed expedition, and military news or orders, a difference as wide as the poles. Moreover, if the neutral is held bound to prevent a belligerent's use of a submarine cable between the two—already in established use—or to allow it only under censorship, is he not equally bound to limit the belligerent's use of a land telegraph line establishing similar communication, and would not neutral censorship of belligerent mails be a duty also? If the established and safe principle be abandoned, that neutral commerce and communications are to be as little interfered with as the needs of war allow, with a presumption in favor of greater rather than less exemption, are we not launched on a path of neutral obligation which speedily and necessarily leads us to an absurd and impossible standard.

Suppose a cable to have joined Spain and Great Britain during our Spanish War, or China and Great Britain during the war between China and Japan; would the sealing or censorship of that cable by Great Britain in either case have been a neutral duty? I cannot believe it such. The prime object for which such cable was laid was a commercial one. War comes, and the same cable may have a military value. But this is an incident only. It is one of those cases where the interests of neutral trade are paramount to belligerent considerations, at least until we have a series of clear precedents to the contrary. The only approach to such a precedent is the action of Brazil in our Spanish War. Article V of Brazil's Proclamation of Neutrality, according to Professor Wilson,* forbids "citizens or aliens residing in Brazil to announce by telegraph the departure or near arrival of ship, merchant or war, of the belligerents, or to give to them any orders, instructions or writings with the purpose of prejudicing the enemy." This did not forbid Spain, for example, to order an agent in Brazil to prepare coals and provisions for the Spanish fleet. It was a very limited form of such neutrality enforcement as we have been discussing. It may be explicable by some peculiar circumstance. Yet, as it stands and so far as it goes, it certainly runs counter to the principle towards which I have leaned. By analogy with that principle, it would seem that wireless telegraphy, set up on neutral soil,

* *Submarine Telegraph Cables in Their International Relations*, 1901, p. 34.

even if used to maintain intercourse between portions of the belligerent territory *vis à vis* the neutral, is beyond the reach of war, and in no way a violation of neutrality.

But here comes in a qualifying consideration. Suppose the cable not to have been in ordinary commercial use before the war, but to have been laid or sought to be laid during war, by one of the belligerents, as an aid to the prosecution thereof. Would this be permitted, or is the sufferance of it to be considered an unneutral act? It was during our war with Spain that this question actually arose. Professor Lawrence, in his little book, "War and Neutrality in the Far East," page 219, describes the incident:

"During the war between America and Spain in 1898, the British authorities refused a request from the United States for permission to land at Hong Kong a cable which the American authorities proposed to lay from Manila, then in their military occupation, and to use for the purposes of their operations against Spanish territory. The refusal was based upon the ground that to grant such facilities would be a breach of neutrality. The Government of Washington acquiesced in the decision, which was given on the advice of the law officers of the Crown, and was followed by their own Attorney General in 1899."

Only writers of very recent date have discussed this question. I can cite only two. Hannis Taylor, in his *International Law*, page 754, published in 1901, classifies, under unlawful neutral service, the "transmission of signals or messages for a belligerent" between two portions of a fleet, and adds, "The same principle extends to signaling or bearing of messages between a land force and a fleet, or to the laying of a cable to be used chiefly or exclusively for hostile purposes."

Again, Professor G. G. Wilson, in a course of lectures before the Naval War College at Newport in 1901, upon submarine cables in their international relations, touches upon the incident already cited from the pages of Professor Lawrence, and justifies the action of Great Britain:

"During these negotiations with the company, the United States had been engaged in the attempt to obtain the consent of the British Government to land at Hong Kong a United States cable from Manila. The British authorities gave courteous consideration to this request. Lord Salisbury replied: 'I have consulted the Lord Chancellor and the Attorney and Solicitor General in respect to your Excellency's communication, and regret to inform you that I am advised Her Majesty's Government is not at liberty to comply with the proposal of the Government of the United States'."

Hence the author concludes, "That a neutral government cannot grant a landing place in the time of war to a cable of either of the belligerents without danger of violation of neutrality."

In this opinion, I think we may heartily concur. The distinction between making use of means of communication already existing, and establishing new ones during war and for war purposes, is the same in kind as the distinction between the use of the regular mails and hiring a dispatch boat. A case can hardly be imagined where the privilege would be valuable to both belligerents alike. Being within neutral jurisdiction, the other belligerent has no power of prevention. No commercial interests are affected. To suffer it, is an unneutral act or service.

If this conclusion is sound, does it not furnish a perfectly fair analogy in determining the status of the wireless at Chefoo? If set up and in commercial use before the war, it would be very hard to stop its use—as being an unneutral service—after Port Arthur was beleaguered. But it was not so set up. On the contrary, the wireless connection was devised as the only available means of enabling Port Arthur to communicate with St. Petersburg. By it news was sent out and orders returned. It had especial military value, and no other value. Professor Lawrence states that the wireless service was abolished by China in August, but this, I am informed, is an error. Russia nearly to the end was able to impose her will, in this as in some other particulars, upon the Chinese authorities. Nevertheless, in the light of reason and by the force of analogy, China should have forbidden this use of her soil to the belligerents from the first. By permitting it, she has committed a breach of neutrality to the detriment of Japan.

The other inquiry proposed is of a different kind. It relates not to "unneutral service," but to belligerent control of neutral communications. The London *Times* had equipped a press boat to gather and forward military news in cipher. To shorten its runs from the Korean to the Chinese coast, wireless communication was set up at Wei-Hai-Wei and messages so received were forwarded by telegraph. At first no objection seems to have been made, although the ship was visited by cruisers of both belligerents. In April, 1904, however, came a Russian circular to the neutral powers, to the following purport: that all correspondents found to be communicating news to the enemy within the zone of Russian naval operations, by means of improved apparatus not provided for in existing con-

ventions, would thenceforth be considered and treated as spies and their vessels confiscated. The Russian zone of operations was speedily narrowed so that this threat could not be enforced, but the circular should have our consideration. The natural comment upon it is, that although wireless correspondents may properly be restricted, at least they are not spies, and to penalize them as such would be official murder. They are not spies because they lack at least two of the three characteristics of the spy—they use no disguise or other false pretense, and they do not gather news with intent to communicate to one of the belligerents. Nor, properly speaking, do they penetrate the enemy's lines in search of news. At worst, they perform the duty of a dispatch boat and might deserve confiscation therefor. And this only when gathering news with intent to convey it from one belligerent locality to another, enabling scattered portions of his fleet, for instance, to keep up their communications.

The Hague Code to govern land warfare, Section II, Article 29, has this pertinent rule:

"The following are not considered spies; soldiers or civilians carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong, likewise, individuals sent in balloons to deliver dispatches and generally to maintain communication between the various parts of an army or a territory."

The Russian threat was futile, but presently the Japanese Government also tried to restrain the wireless correspondent, though in gentler fashion. The London *Times* of May 16th contains a wireless-cable dispatch from its agent on the Haimun, stating that the Japanese military authorities, through the British minister at Tokio, had requested him not to operate north of a line drawn from Chemulpo to Chefoo until further notice. Thus confined to waters some eighty miles south of Port Arthur, the correspondent protested vigorously, but without result, save the indefinite promise that the limitation would be removed when military exigencies permitted.

As the poor correspondent cabled: "The position was difficult in the extreme. I was threatened with capital punishment by one belligerent, and warned off the high seas and neutral waters by the other." He disclaimed giving advance news of military movements, used cipher and asserted his discretion. For some time he seems to have kept out of the forbidden waters, but on May 26th he wired important news as to Japanese

landings north of Port Arthur, from the neighborhood of Niu-Chwang and June 3d was off Kiau Chau Bay to pick up the latest information from the attack upon Nanshan hill. A few days later, without explanation in the *Times*, the service was discontinued. Judging from appearances only and without positive knowledge, it would seem that, in his thirst for news, their correspondent had sought prohibited waters and in consequence his license had been withdrawn by the Japanese.

Here was no blind, brutal threat to hang a newspaper correspondent using the wireless, but a claim to restrict his field of operations. Thus, as with his brethren on land, if allowed, it must be under such stringent conditions, as humanly speaking, to prevent his gathering news at first hand altogether.

One remark should be made here: No correspondent, however discreet, can tell what items of the news which he forwards may affect the operations of war. If the news sent is a mere repetition of what has been received from other sources, it will not warrant the cost; if new, it will speedily filter back in a dozen ways to the other belligerent. And many correspondents are not discreet. The glory of one *coup* would far outweigh all other considerations. So that control on sea as well as on land is reasonable and customary. Our only question here, as it seems to me, should be as to the nature of this control. It might be prohibition; it might be censorship; it might be restriction as to locality; it might be a license system. But that control of some sort is proper, I believe is beyond question.

Suppose aerial navigation to be so perfected as to make it physically possible for correspondents to hover over the forces of belligerents, observe their every movement, retire to neutral soil and send their information to a neutral journal. The fact that news thus gathered was impartially given to the world, or that the balloonists were discreet could hardly weigh against the prohibition of the practice.

And such news-gathering could be prohibited doubtless, for if the correspondent could use aerial locomotion, so could the belligerents.

Is the wandering correspondent, in his own steamer, roving free along belligerent shores, hovering about belligerent fleets, combining the war correspondent and the dispatch bearer, with the new wireless at his disposal to hasten his dispatches, in a position essentially unlike that just imagined? The *Times'* agent on the Haimun admits that he once caught on his apparatus a wireless message from one war ship to another, but

without understanding it. Such capacity is clearly dangerous.

If we are right in thinking that control of the wireless correspondent is proper and necessary, as of the submarine cable from an enemy's coast, or as of a neutral correspondent with one's own forces, it must be control of a nature adapted to the kind of communication employed. Take censorship, for instance. To be complete, it would require the joint residence on board ship of an officer of each belligerent, with a several right of veto. For if the censorship were not joint, the interest of one party only would be looked out for, while forbidden news or false news of the other would be probable. That is, the wireless, under a single censor, would presently drift into unneutral service. That joint censorship on board could not be a feasible status, or conducive to news-gathering or satisfactory to journal or belligerents must be apparent to everyone.

Nor would a license system promise better. For one cannot conceive of a correspondent so approving himself to both belligerents as to hold a license from both; but if he is licensed by but one he will be held inevitably to take on that one's character.

A restriction as to the locality within which the wireless system of gathering news might operate must also be mutually agreed on by the belligerents, to be of value, unless control of the sea lies absolutely in the hands of one of them. In any case, if respected, this restriction would make it impossible to get anything of value. While if not respected—and could flesh and blood withstand the temptation—there comes about friction, coercion, the need of constant surveillance, leakage of dangerous information.

By process of exclusion, we reason, therefore, that news-gathering by sea, with the aid of the wireless, is of such a nature as to be inadmissible in warfare, and to require entire prohibition under penalty of confiscation. It is a service bearing an analogy to the dispatch boat, the submarine cable and the war correspondent, in peculiar combination. The dispatch boat is guilty of unneutral service in behalf of one combatant and can be confiscated by the other; the submarine cable can be cut or worked at the belligerent end under censorship; the war correspondent, by universal usage, is only allowed to accompany an army subject to strict regulations. The wireless news-gatherer, combining the dangerous qualities of all three, should not be permitted at all.

T. S. Woolsey.