

THE CONSEQUENCES OF CUBAN BELLIGERENCY.

Some weeks since there appeared in a leading New York paper this statement: "Señor Palma, now delegate of the Cuban Revolutionary party in the United States, will be the accredited minister of the new republic at Washington, if President Cleveland acknowledges the belligerency of Cuba." It is hardly probable that any members of the Law School would be deceived by so palpable a blunder as this. The recognition of belligerency, when accorded to a people trying to fight their way up to statehood, carries with it no right of diplomatic intercourse. If it did, it would be barely distinguishable from a recognition of independence. But there are various consequences—positive and negative—which *do* flow from the recognized belligerent status, which may not be so clear, and I have thought it might be of interest to the readers of this JOURNAL to see them briefly set forth.

Not that a recognition of the Cuban belligerents is at once necessary, or proper. That is not a matter to be decided by sentiment. If one State takes the part of an insurgent body in another, through sympathy with its wrongs, and desires to aid it, that is intervention, not recognition. The recognition of Cuban belligerency should be governed by the interests of this country which are involved; by the ascertained existence of a civil and military organization, responsible for its acts and conforming to the rules of war; and by the gravity and character of the contest. Or, to put it more specifically, if the United States finds its trade considerably affected by the acts of war of a new *de facto* State, possessing a definite territory where the old sovereign no longer controls, it recognizes that new body as a belligerent, and holds him responsible for his conduct for its own sake.

In regard to these essential facts in Cuba it is rather difficult to find out the truth. Until the Cubans possess some of the ports of the island and carry on war by sea, our shipping interests cannot be much involved. On the other hand, there must be losses of sugar and tobacco property in the interior belonging

to Americans, the responsibility for which will need determination.

However, it is not the expediency of a recognition of Cuban belligerency, but the legal consequences flowing from such recognition that I would here discuss. Perhaps a consideration of the latter will aid in deciding the former. As between the parent State and the insurgent body, the relations are not changed by an outside recognition of the latter's belligerency. In theory the insurgents may be considered traitors and be dealt with in accordance with municipal law. But in point of fact, the executive branch of the State will probably accord them the rights of belligerents, being guided first by the dictates of humanity, and second by the danger of retaliation.¹

But as between the insurgent body and other powers, a new relation is introduced, that of neutrality. The revolutionary flag will be recognized, so that ships bearing it, in spite of the lack of ordinary clearance papers, will be received at foreign ports as having a definite standing. Thus, early in our Civil War, the *Sumter* put in at Curaçao, Holland having recognized the belligerency of the Confederacy. The commission of the *Sumter's* captain was accepted as granted by a lawful belligerent and the ship admitted on the same footing with ships of the North, though Mr. Seward tried to fasten a piratical character upon her. A better standing will be gained for the borrowing of money—an act which is based upon future expectations—because the recognition is a stamp of success up to a certain point, and therefore encourages those expectations.

The insurgent men-of-war will be entitled to the same hospitalities as well as limited by the same restrictions in neutral ports as the ships of the parent State, except so far as these may be modified by previous treaty. For not having acquired statehood and the right of negotiation, the revolutionary body can have made no treaties. Neutrality thus becomes a real and practical thing, and its machinery—neutrality laws, foreign enlistment acts, or whatever other name such regulations may bear—is put into operation. If a "recognized" insurgent blockades a port after due notification, the neutral submits to such blockade. It admits his right to search for and seize contraband articles belonging to its subjects and destined for his enemy's use, on the high seas. The insurgent thus gains considerably from recognition of his belligerency. He gains in *caste*; he gains in

¹ Case of the *Amy Warwick*, 2 Black. 635.

rights; he gains in the facilities for carrying on war. But his enemy, the parent State, gains as well and as much, also with reference to third parties.

A state of war is declared to exist. As a lawful belligerent it may blockade and search and capture for carrying contraband, and exercise all the rights of war and insist upon all the neutral duties, which during an unrecognized insurrection would not come into being.

Thus during the Civil War of 1861-65, the blockade of the Southern ports, a powerful and unmatched weapon in the hands of the North, was a belligerent right, its observance a neutral duty, which foreign recognition of Southern belligerency made possible. For blockade is a war right solely. When President Lincoln laid the blockade he virtually recognized the belligerency of the Confederate States himself. During war, too, the neutral State is responsible for the conduct of its subjects; it is held to a stricter and more exact accountability than it can be as a mere friend regarding the internal disorders of a fellow State, with very possible complacency.

There is another and most valuable consequence of the recognition of belligerency which the parent State enjoys, it is no longer responsible for the acts of the insurgents. They may injure the person or destroy the property of neutral subjects by land or by sea, and their *de facto* government is alone responsible. This is a tremendous weight off the shoulders of the existing State; if the insurgent body dissolves, its responsibility for such damage vanishes. The neutral who is injured it is that suffers without redress.

Yet that neutral has a certain interest as well as the other two bodies, in the results of this recognition. A state of war is declared to exist between two friendly belligerent bodies. For such a state of things its neutrality laws provide. Its citizens can be told just what they can deal in without seizure as contraband. Certain seaports are either open, or closed by blockade. It knows just what its duties are. The air is cleared. A State jealously watching over the welfare of its subjects and their commerce, desires most of all to know exactly the conditions which apply to them. And it may have a certain sympathy for a struggling, perhaps a long suffering community, which finds expression in this way.

There are thus three sets of interests which are affected and altered by recognition of belligerency, those of the insurgent as regards neutrals, of the parent State as regards neutrals, and of

the neutrals as affected by a state of war. Let us try to apply these principles to the case of Cuba. The insurgents would have a better chance of selling bonds, a flag recognized by other States, and war rights against neutral commerce.

Spain would hold the United States government to a stricter accountability in the prevention of filibustering expeditions and the detention of ships capable of being used for war. For all such breaches of neutrality, the United States would be responsible in damages unless it could prove that it had exercised reasonable care and diligence. Its municipal statutes would no longer be the measure of its duties in this regard.

Spain also would possess the rights of a belligerent against United States commerce, which is not the case at present. Thus if the Cubans succeeded in capturing some or all of the seaport towns of the island, Spain having control of the sea with her navy, could and probably would shut out all neutral trade from them, through blockade. She would have the right of capturing all war material shipped from this country to Cuba for the use of the insurgents, whatever the ownership, even on the high seas. In enforcing these rights her gunboats could stop, visit and search any commercial vessel of the United States. The *Alliança* incident would often be repeated, but on the high seas, while remonstrance or resistance would be unlawful.

Again, Spain would be relieved of responsibility for all damage done by the insurgents to the property of neutral subjects in Cuba, while at present in such case, it is probable that she could be held liable.

The United States in turn, confronted by a war between two lawful belligerents, must duly respect their war rights. Its merchantmen must keep away from blockaded ports, must submit to exasperating search, can carry on trade in contraband only under penalty of the loss of the goods and often of the ships as well, if caught in the act. Its citizens owning property in Cuba would find it indistinguishable from belligerent property and subject to all the casualties of war. Its citizens who evaded our laws and sought service in the revolutionary army would lose their right of protection and must expect the same treatment that the insurgents met with. And its trade with the island in certain contingencies, would be entirely cut off, so that the interchange of breadstuffs and manufactures for sugar and tobacco would be as dead as the cotton trade between England and the South during our Civil War, kept alive only by a few cargoes which ran successfully the risks of blockade. The treaty

made with Spain one hundred and one years ago, except those articles which are obsolete, has also a bearing on our subject, for its specific provisions must be added to the general rules of International Law. Thus the list of articles which shall be considered contraband is there laid down, and Article XIV. forbids the subjects of either State to accept letters of marque from an enemy of the other, under penalty of being punished as pirates. So that no United States citizen could fit out a privateer in the Cuban interest. He would be violating treaty obligation and our own statutes as well.

Bearing these legal consequences in mind, it is probable that our recognition of Cuban belligerency would help Spain first and most, the Cuban cause secondarily, and would be decidedly injurious to the interests of the United States. Recognizing this, one of the profound jurists in the Senate advocates a recognition of independence rather than of belligerency. That of course would be a recognition of a fact which is non-existent, and must be avowedly a war measure aimed at Spain. France did this in 1778, by way of expressing her hostility to England, and war with England resulted as a matter of course. What the senator's cause of war with Spain is, he does not divulge. It is a source of wonder that no one has yet invoked the Monroe Doctrine in the matter.

Thus it would seem to be for the interest of the United States to let the present status in Cuba continue, rather than to recognize the insurgents' belligerency, an act which would be quite at variance with our own precedents. If recognition should be determined upon, however, Spain, though she might feel aggrieved, would not really be injured; she would not be put in a relatively worse position for coercing Cuba. But to couple with this recognition, a request to Spain to grant the independence of Cuba, is a slap in the face.

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