



1900

THE BEGINNING OF A WAR

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

THE BEGINNING OF A WAR, 9 *YALE L.J.* (1900).

Available at: <https://digitalcommons.law.yale.edu/ylj/vol9/iss4/1>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

YALE LAW JOURNAL

Vol. IX.

FEBRUARY, 1900.

No. 4

THE BEGINNING OF A WAR.

In land warfare, actual conflict between states must involve the invasion of one of them. There is thus the crossing of a boundary, the use of force within a foreign jurisdiction, to mark the changed relations and to date them from.

But the high seas are subject to no state's sovereignty. Upon their levels lie no boundaries to be crossed; within their confines, no status of occupation to be defined.

The early events in the wars of naval powers, therefore, are likely to involve violence done to enemy's property, rather than violence done to enemy's territory and jurisdiction. It becomes important, when captures so made are to be substantiated, to determine the exact moment at which war legally begins. For upon this question of date may depend the legality of a capture. In both our own war with Spain and in the Japanese war with China this point was of importance, though as it proved, there were other considerations in the early captures which were paramount. On the other hand, in the Boer war now in progress, waged solely on land, the question of date is entirely a question of fact, and not of construction or declaration.

If the old fashioned declaration of war, before striking a blow, were still *de rigueur*, there could be no difficulty. There is, however, a general agreement amongst the text writers, in which the prize courts share, that though a formal declaration of war is good form, it is not in any sense essential to the beginning of legal warfare. (The *Eliza Ann*, 1 Dods. 244), (The *Amy Warwick*, 2 Sprague 123.) By declaration is meant the announcement of hostilities to the object of them, not the customary notice to the belligerent's own subjects or to the neutral. Let us dwell upon this

distinction for a moment. When a state goes to war it involves the trade of a portion of its subjects in certain risks and lays upon it certain disabilities. The risks are of capture as enemy's property. The disabilities are suspension of trade with an enemy; dissolution of partnership and other contracts with him; inability to collect debts due from him, and such like.

In order to protect its subjects from such damage incurred through ignorance, the state announces the change of relations to them, either by specific proclamation or through such legislative action as will furnish constructive notice. Thus in the United States, where Congress, not the President, has the right to declare war, a joint resolution, approved by the President, declaring the existence of war is notice enough.

So, too, notice of the new condition of things is given to the neutral. This will usually state the rules of maritime warfare, which are to govern. Thus, at the outbreak of our recent war with Spain, President McKinley announced that the neutral flag should cover enemy's goods; that the enemy's flag should *not* make neutral goods under it liable to confiscation; that blockades to be binding must be effective; that the United States would not employ privateers, and that mail steamers would not be interfered with, except upon clear suspicion of their having violated the law of contraband and a blockade.

The manifesto to the neutral also commonly states the cause of war from that belligerent's standpoint, justifies his action and throws the blame for this interference with neutral trade upon his opponent. Until this official notice of war reaches the neutral, his obligation to respect the belligerent's war rights does not become operative. And this is fair, for so serious an interruption of the neutral's trade requires justification, wide notoriety and exact definition of its scope and character. We thus reach the recognized rule that belligerent rights date from the outbreak of war, while neutral duties date from the official notification of it. This notification is a governmental act, officially dated, constructively known after a certain lapse of time to all shippers and carriers. Moreover, neutral ships are allowed by custom a certain number of days to unload and clear from ports under blockade in which they chanced to lie. All uncertainties of date, then, relate to the beginnings of war as affecting the belligerent, not as affecting the neutral.

To return now to the question of a declaration.

Not only is it not essential to a lawful war, but even when made it does not necessarily set the date of its commencement. Snow's Manual for our Naval War College (p. 79, 2d ed.) states this in so

many words: "When there is no declaration, war dates from the first act of hostilities, and even if there should be a subsequent declaration, the beginning of hostilities still remains the date of the beginning of the war." So also Hall (*Internal Law*, 2d ed., p. 349). "If the above views are correct, the moment at which war begins is fixed as between belligerents by direct notice given by one to the other, when such notice is given before any acts of hostility are done, and when notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative." And Owen, in his "Declaration of War," says, p. 12, "War having once been commenced, a formal declaration to the enemy can, it would seem, be formulated and communicated at leisure, if it so please the aggressor," citing the fact that "in 1877 the Russian declaration of war against Turkey was preceded by some hours by the entry of the Russian forces into Turkey." A similar priority of armed conflict to legal declaration occurred in our own war with Mexico, the battles of Palo Alto and Resaca de la Palma having been fought before Congress recognized by Act a state of war as existing, and many similar instances can be found, as in the late war between China and Japan.

It is the fact of violence, then, and not the declaration of a status, upon which we must really fix our eyes, if we would ask when war begins. And this introduces the main inquiry of this article. Of what nature must that act of violence be which, so to speak, originates a war, which is paramount in the eye of the law to an announcement by proper authority that war began on a certain date?

Here we are on uncertain ground.

There must naturally be some official warrant to a ship of war for aggressive action, or a clear case of self-defense, else its making war may be disavowed. Even with this, as Professor Takahashi has said, preparation for war is not war *de facto* itself. It is also true that there may be acts of violence, yet no war, as was the case between the United States and France at the end of the last century. But with conflict a fact, and legislative or executive sanction not wanting, the moment of conflict is the date from which war is reckoned, not the moment of sanction or the moment when orders for violent action were given. The question thus relates not so much to the date of a certain event as to the character of that event. If two ships of war meet and fight, and their action is not disavowed, that constitutes the beginning of war. But suppose that one of these ships of war meets a mere merchantman of the other nationality, can the war be begun by her capture as legitimately as by battle with the armed ship?

The argument certainly sounds rather paradoxical. The capture is valid because war exists; war exists because the capture has taken place. And yet so far as reason goes, this is a logical position. For preying upon enemy's commerce, as the law is, is as legitimate a part of warfare as the capture of his ships of war would be. Moreover, the attack on his property cannot open and legitimate the war, cannot make subsequent capture legal, and yet itself be illegal. But logic is not all, or even the major part, of a rule in International Law. The common law-bred mind wants precedent as well. What warrant is there for believing that hostilities can legally be opened by the seizure of private property? This point was raised, though not settled, in the well known Kow-Shing affair, at the outbreak of the recent Chinese war, the issue turning on another fact. The Kow-Shing was an English steamer hired to convey troops to Corea, by the Chinese government, and actually having 1,100 officers and soldiers on board, with much military material. She was sighted at 8.30 a. m., July 25, 1894, by the Japanese fleet. One of the ships composing it hove the Kow-Shing to, inspected her loading and ordered that she should follow her. The British captain agreed, but the Chinese on board threatened his life if he did so, and he signalled this fact to the Naniwa. After a considerable interval, during which the Japanese ordered him to leave his ship, which the Chinese prevented his doing, Captain Galsworthy and several others jumped overboard, their passengers firing upon them in the water. Then the Naniwa put a shot into the Kow-Shing and the latter went down. If war had begun, the merchantman, carrying Chinese troops, was a Chinese transport, no matter what her nationality might be, and as was afterwards made clear, war had begun that same morning at an earlier hour, by combat between this same Japanese fleet and two Chinese men-of-war. But this did not at once appear and the question was argued in England on other grounds. Could the attack on the Kow-Shing in itself begin the war, thus making her an enemy's transport, and legalizing the destruction of neutral property thus impressed with a hostile character? Two English jurists expressed themselves on this point. Professor Holland wrote to the *Times*: "If the visiting and eventual sinking of the Kow-Shing occurred in time of peace, or in time of war before she had notice that war had broken out, a gross outrage has taken place. But the facts are otherwise. In the first place a state of war existed. It is trite knowledge, and has been over and over affirmed by courts, both English and American, that a war may legally commence with a hostile act on one side, not preceded by declaration. * * * Whether or not hostilities

had previously occurred upon the mainland, I hold that the acts of the Japanese commander in boarding the Kow-Shing and threatening her with violence in case of disobedience to his orders, were acts of war.

In the second place, the Kow-Shing had notice of the existence of a war, at any rate, from the moment when she received the orders of the Japanese commander."

This opinion, reiterated after the author was in full possession of the facts, would seem to consider the stoppage of the transport a lawful beginning of the war.

But another writer, Professor Wheatlake, does not go so far as this. "It is true," he wrote, also to the *London Times*, "that the commencement of war *de facto* is only valid in International Law as between the parties to the war so commenced, neutrals being entitled to notice before they can be made liable to the peculiar responsibilities which a state of war imposes on them. But the Kow-Shing was not acting as a neutral breaking a blockade or carrying contraband of war. She was a transport in Chinese service, and therefore a belligerent, if China was a belligerent. But the Japanese could not make the Kow-Shing a belligerent by attacking her," and he argues that the attack could be justified only on the ground of military necessity, or the occurrence of acts of hostility prior to it. On the point under inquiry, then, these two opinions differ absolutely. They are cited in an interesting work on those questions in International Law which arose during the Chino-Japanese war of 1894, by Professor Takahashi, who was himself detailed to accompany the fleet as adviser in such matters. He does not attempt to decide between these views, having safer ground to stand on, because there was proof of an earlier conflict. "Whether a war can be commenced by an act of search or whether it must be commenced beforehand by some acts of hostility committed elsewhere, is a difficult legal question, and I think there is no necessity to decide it in the present case."

Upon this point, it is proper to make this comment: that every "act of hostility committed elsewhere" on sea except a collision between ships of war under their own flags, involves visitation and search as a preliminary to capture; that this in turn would require some earlier "act of hostility elsewhere" to legalize it; and that thus we are brought face to face with something very like absurdity. It is like the jam yesterday, and jam to-morrow, but never jam to-day, which tried Alice so solely.

We turn now to the early hours of our own war with Spain. The official steps leading up to it were, first, the joint resolution of

Congress of April 20, 1898, approved by the President on the same date; second, the order of the Navy Department to blockade certain parts of Cuba, issued on April 21; third, the necessary proclamation of this blockade by the President on April 22; fourth, an act of Congress, approved April 25, declaring the existence of war, "and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain." Lastly, on April 26, the President gave notice of the rules which should govern the navy in the matter of capture.

The first shot fired in the war was across the bows of the Spanish steamer Buena Ventura, off the Florida coast, on April 22. The first action in the war was the bombardment of the defences of Matanzas on April 27. Which of these various events, executive, legislative or military, began the war?

Clearly we cannot date it from the joint resolution of Congress declaring the people of Cuba of right independent, and warning Spain to withdraw her forces from the island, because if Spain had complied that would have been the end of it. An ultimatum is not war, though it usually leads to it.

Nor were the order of the Navy Department establishing blockade, and the President's proclamation legalizing it by the proper notification, events from which we can date, because, although war measures, they were war measures in preparation, not in being, and could not be made effective until some hours or perhaps days after their issue. In point of fact the Buena Ventura was captured before blockade was a fact.

There remains to be considered the declaration of war issued on the 25th of April, and in terms making the 21st the first day of war. For many purposes this date would be held authoritative, and yet it may not be conclusive. Suppose that Spain also issued a declaration or its equivalent, and on a different date from that of the United States, which should govern? She did in fact, on the 23d of April, declare her treaties with us terminated by the "state of war existing." We are thus thrown back on the rule noticed earlier in this article, that even if subsequently a declaration of war be made, nevertheless war dates from the beginning of hostilities, and ask whether the capture of the Buena Ventura may be included in this category. This prize case, condemned by the District Judge of the Southern District of Florida, has recently been reviewed in the Supreme Court of the United States. The decision of the lower Court was reversed—three justices dissenting—but on this ground. On April 26 President McKinley had issued a proclamation exempting from seizure Spanish merchantmen which were not en-

gaged in the naval service of their country in any way, and which were in any United States ports or prosecuting a voyage from any such ports, the exemption to run until the 21st day of May. In point of fact the Buena Ventura had commenced her voyage from a United States port upon April 19, seven days before the exemption granted by the President was proclaimed. Did this exemption date from its issue only, or should it be held to cover ships sailing under the same conditions earlier than the proclamation. Here the Court put a liberal construction upon the President's language and probable intention. To quote the decision itself, the Court put upon the words of the proclamation "the most liberal and extensive interpretation of which they are capable," believing that the vessel was of a "class which this Government has always desired to treat with great liberality." Its arguments was as follows: "The omission of any date in this clause (fourth clause of President's proclamation) upon which the vessel must be in a port of the United States, and prior to which the exemption would not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified." One further sentence is necessary to my narrative. "Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar." This is a pity, for one of these other grounds exactly touches the subject of our inquiry. The counsel for the Buena Ventura in their very able brief had argued that whether the capture was in violation of the President's proclamation or not, it must be held illegal because at the moment of its occurrence no war existed. "The capture was premature, and out of accord with recent practice. At the time the Buena Ventura was seized there had been no declaration of war, nor had any acts of violence occurred between the armed or naval forces of the different nations. No hostilities, which in International Law are deemed to constitute a beginning of war without a declaration, had taken place. Without a declaration, it seems that war does not begin until some blow is struck or some shot fired. * * * Nothing was done by the United States necessarily constituting an act of war, at least until the fleet reached the Cuban

shore and actually established a blockade. It was while the fleet was leaving the Key West harbor, bound for the blockading stations, that this capture was made. * * * It was not in accordance with international usage to make the Buena Ventura hostile by firing upon her."

Upon this argument, unfortunately for our purposes, the Supreme Court does not comment.

In refusing to saddle costs upon the claimants, it *does* use this language, however: "In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy property." But even if this were true, the Court does not declare whether in its judgment, barring the proclamation, the ship would have been good prize because war was begun by its visitation, search and seizure, or because war was declared to date from the day before its seizure by a subsequent Act of Congress.

So that upon the point raised in this inquiry, we are still in the dark, so far as any judicial practice goes. Perhaps we may go, however, as far as this. If no exemption is ordered, and no declaration of war is issued, and before any conflict of arms has taken place, though this presently occurs and a war ensues, the visitation of an enemy merchant ship involving notice to her of the commencement of hostilities, is such an act of violence as to make her condemnation as prize, on the ground that war had thereby been begun, very probable.

THEODORE S. WOOLSEY.