

WHEN DID THE WAR BEGIN?

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The Circuit Court of Appeals, Tenth Circuit, recently had occasion to decide a life insurance case, *New York Life Insurance Co. v. Bennion*,¹ the determination of which involved the interesting question, "When did the war begin for the United States?"

Mrs. Louise Bennion sued the New York Life Insurance Company for the double indemnity of \$10,000 due her in the event of the death of her husband by "accident." Her husband, Captain Bennion, was killed when his ship was sunk at Pearl Harbor in the Japanese attack December 7, 1941. The company duly paid the principal sum due under the policy, \$10,000. However, the policy excepted from the liability for double indemnity an accident which occurred in "war or an act incident thereto," so that if Pearl Harbor involved "war," double indemnity was not due. The issue turned on the question whether this country was at war when Pearl Harbor was attacked, or only got into war when Congress declared war, December 8, 1941, 4:10 p.m., *i.e.*, whether the Pearl Harbor attack occurred in time of peace, as Mrs. Bennion, the plaintiff, contended, or whether the attack was itself an act of war. The company had no difficulty in proving that every one regarded the attack as an act of war, and in holding for the insurance company, the court stated that it is commonly known that Pearl Harbor "commenced" the war.²

Reaching this result would have presented no difficulty but for the fact that in every other state and federal case which had involved deaths occurring at Pearl Harbor, the court had found against the insurance company. These cases were four in number: *Savage v. Sun Life Assurance Co.*,³ *Pang v. Sun Life Assurance Co.*,⁴ *Rosenau v. Idaho Mutual Benefit Association*,⁵ and *West v. Palmetto State Life Insurance Co.*⁶ These opinions are to be explained perhaps as motivated by the war hysteria, partly on the ground that they were based upon the stipulation that the declaration of war by Congress, December 8, 1941, at 4:10 p.m. was the first act of war of the political department,⁷ and partly as the result of the prejudice against insurance companies prevailing in certain courts. Whatever the explanation may be, these courts decided

1. 158 F. 2d 260 (C. C. A. 10th 1946), *cert. denied*, 15 U. S. L. WEEK 3402 (April 28, 1947), *petition for rehearing denied*, 15 U. S. L. WEEK 3461 (June 9, 1947).

2. *Id.* at 262.

3. 57 F. Supp. 620 (W. D. La. 1944).

4. 37 Hawaii 208 (1945).

5. 65 Idaho 408, 145 P. 2d 227 (1944).

6. 202 S. C. 422, 25 S. E. 2d 475 (1943).

7. *E.g.*, *Rosenau v. Idaho Mut. Benefit Ass'n*, 65 Idaho 408, 145 P. 2d 227 (1944); *Pang v. Sun Life Assur. Co.*, 37 Hawaii 208 (1945).

that judicial notice could not be taken of the fact that war had commenced until the declaration of war by Congress December 8, 1941, at 4:10 p.m.

There have been eight investigations of responsibility for Pearl Harbor, all of which assume that the Pearl Harbor attack was an act of war. The reports of the Army Board and of the Naval Court of Inquiry stated that the attack of December 7, 1941, was regarded by those bodies as "ushering in," "initiating," "starting," "precipitating," "commencing" or "inaugurating" a state of war.⁸

It will be recalled that President Roosevelt, in asking Congress to declare war, stated that "hostilities exist," and he ended his appeal by the statement, "I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire."⁹ The whole address shows that the President construed the Japanese attack as irrevocable and as warlike in the highest degree. He used such words as "offensive," "onslaught," "premeditated invasion," "victory," "defend," "hostilities exist," and "state of war," words which can only be associated with a full-fledged war beginning with the first attack.

It appears that under American law war or peace are the only political conditions recognized. If there is no war, a state of peace exists. If Pearl Harbor was not an act of war it must have been a friendly gesture—a peculiar act in view of the hostile conduct of the parties beginning at least with the Atlantic Conference and President Roosevelt's note to Japan of August 17, 1941.

How can it be determined whether a particular status is that of a state of war or a state of peace? The courts correctly decide that this is determined by the political department, although the courts may take judicial notice of historical facts. Collating the evidence from the political department, we begin with President Roosevelt's message to Congress, December 8, 1941. In that message he stated that the state of war began "since the unprovoked and dastardly attack by Japan on Sunday, December 7 [1941]." It was at first asserted by the plaintiff that this meant that the state of war began after the attack, according to the President's own words. Also it will be recalled that Commissioner Fly testified before the Senate Investigating Committee that peace prevailed before the attack but not thereafter.¹⁰

Apart from the President's message and the declaration of war which, notwithstanding the appellate opinion in the *Pang* case,¹¹ was *not* contrary

8. WAR DEF'T, REPORT OF ARMY PEARL HARBOR BOARD (1945); NAVY DEF'T, NAVY COURT OF INQUIRY: FINDINGS OF FACT (1945).

9. 87 CONG. REC. 9504-9505 (1941).

10. SEN. DOC. No. 244, 79th Cong., 2d Sess. 150 (1946).

11. 37 Hawaii 208, 217-218 (1945).

to the President's request, the Congressional declaration showed that war had existed since the attack by Japan December 7. Congress has considered that the casualties of Pearl Harbor were incurred during World War II as evidenced by the wording of numerous statutes.¹² There was also in existence a presidential determination that war had begun: President Roosevelt had in an Executive Order of December 7 proclaimed the Japanese to be "alien enemies," in view of the fact that the United States had been invaded that day.¹³ Evidence was also available that the Department of State regarded the war as having begun December 7, 1941.¹⁴ The statements made by Congressmen on December 8 before the declaration of war all had assumed that war was in existence,¹⁵ and a subsequent Executive Order¹⁶ had assumed that World War II extended from December 7, 1941, to a date to be determined by the treaty of peace. In addition, there were in existence the "war warnings" issued November 27, 1941, which contemplated an attack such as actually took place, although no such devastation was expected.¹⁷ Besides, President Roosevelt during the campaign of 1940, while promising peace, had also promised that aggression would be repelled and that peace would be kept "except in case of attack."¹⁸

The Supreme Court itself would seem to have indicated that, in its opinion, the Pearl Harbor attack meant war by the reasoning in *Duncan v. Kahanamoku*.¹⁹ All four opinions rendered in that case assume that the attack of Dec. 7, 1941 transformed the Hawaiian Islands into a center of active war.²⁰ Furthermore, the Navy Department had stated: "events in the war which began on Sunday, December 7, 1941,"²¹ and "In one flash, the attack on Pearl Harbor had settled all that, and the war was on."²²

Judge Tillman Johnson, of the United States district court, had stated in his opinion in the *Bennion* case that he did not know whether the parties to the contract of insurance had had in mind "constitutional war" or "war in

12. 58 STAT. 811 (1944), 34 U. S. C. § 945 (Supp. 1946); 57 STAT. 556 (1943), 38 U.S.C. § 730 (Supp. 1946); 57 STAT. 81 (1943), 50 U. S. C. APP. § 753 (Supp. 1946); 57 STAT. 43 (1943), 38 U. S. C. § 701 (Supp. 1946); 56 STAT. 1028, 1033 (1942), 42 U. S. C. § 1711 (Supp. 1946); 56 STAT. 1012 (1942), 36 U. S. C. § 45 (Supp. 1946).

13. Proclamation No. 2525, 55 STAT. 1700, 6 FED. REG. 6321 (1941).

14. 13 DEP'T STATE BULL. 230 (1945).

15. 87 CONG. REC. 9519 *et seq.* (1941).

16. Exec. Order No. 9265, 7 FED. REG. 9106 (1942).

17. Brief for Appellant, p. 20, *New York Life Ins. Co. v. Bennion*, 158 F. 2d 260 (1946).

18. *Id.* at 14.

19. 327 U. S. 304 (1946).

20. *Id.* at 311 (opinion of the Court), 329-330 (concurring opinion of Mr. Justice Murphy), 336 (concurring opinion of Mr. Chief Justice Stone), 340 (dissenting opinion of Mr. Justice Burton).

21. SEN. DOC. NO. 107, 78th Cong., 1st Sess. 1 (1943).

22. *Id.* at 3.

fact."²³ Actually, that reasoning, logically followed, would decide the case in favor of the insurance company because in other cases it had been established that the clause "war or an act incident thereto" covered any kind of war. Judge Johnson doubtless meant by "constitutional war" a war declared by Congress. However, war in this country can also exist by act of invasion and no act of Congress is required. The president alone has power to repel an invasion of the United States, and there is evidence that President Roosevelt so assumed. To be sure, it is not always easy to determine that a particular act of war creates a state of war. But there can be no doubt that the Pearl Harbor attack was the first act in a state of war, the hostilities in which did not end until August, 1945. Contrary to Circuit Judge Huxman's dissenting view,²⁴ the word "war" is unambiguous, even though it may be difficult to tell whether a particular engagement involves war or not. In this instance we had two declarations of war by the Japanese, one two hours and forty minutes after the commencement of the attack, and one that night, which indicate that Japan interpreted its act as one of war. We also have an acceptance of the Japanese challenge by Congress on December 8, 4:10 p.m. Thus the question naturally arises: Why were these declarations of war made? The answer is that no declaration of war was necessary either on the Japanese side or on the American. The Supreme Court had stated in the *Prize Cases*,

"If a war is made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but he is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or states organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*'. . . . However long may have been its previous conception, it nevertheless sprung forth from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."²⁵

Article I, Section 10, of the Constitution of the United States provides that "no state shall without the consent of Congress . . . engage in war unless actually invaded or in such imminent danger as will not admit of delay." This provision shows that the framers of the Constitution recognized that a state may be compelled to engage in war by reason of invasion, without any action whatever by Congress. It is common knowledge that war may exist without a declaration thereof; in fact, many instances could be produced to

23. Transcript of Record, p. 28, *New York Life Ins. Co. v. Bennion*, 158 F. 2d 260 (C. C. A. 10th 1946).

24. See *New York Life Ins. Co. v. Bennion*, 158 F. 2d 260, 266, 267 (C. C. A. 10th 1946).

25. 2 Black 635, 668-9 (U. S. 1863).

show that a failure to declare war is not exceptional. It has been stated in the case of *Dole v. Merchants Mutual Marine Insurance Co.*:

"War is an existing fact, and not a legislative decree. Congress alone may have power to declare it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is any declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican war, declare its *previous* existence. In either case it is the fact that makes 'enemies,' and not any legislative Act."²⁶

Judge Huxman was not fortunate in the illustrations he cited to support his contention that the word "war" was ambiguous and that it therefore might mean a "declared" war. Even assuming that "war or an act incident thereto" could mean either act of war or state of war, it could not by any stretch of the imagination mean "declared war." One could not import such a meaning into a contract which was plain on its face.²⁷

The four cases previously mentioned which had decided in favor of the widow and against the insurance company emphasizing the commencement of war by "declaration," disregarded the proposition that war may be commenced by "determination" and that there was plenty of evidence that the President had determined that the war began December 7, 1941.²⁸

Judge Huxman had thought that the invasion of Vera Cruz did not involve war. John Bassett Moore, in handing the prize of the American Philosophical Society to Quincy Wright for a study on the "Control of American Foreign Relations," ridiculed the notion that 300 persons could be killed in hostilities in the absence of war. Mr. Moore on that occasion stated:

"In reality the word 'war' comprehends two meanings. It denotes (1) acts of war, and (2) the international condition of things called a 'state of war.' Acts of war do not always or necessarily develop into the general international condition of things called a state of war, but they are nevertheless war and involve the 'making' of war in a legal sense. The fact is notorious that in many instances hostilities or war *de facto* have long preceded the formal declaration of war, and that when the declaration was made it was regarded as relating back to the time when hostilities began. As was shown by Lieutenant Colonel Maurice, of the British War Office, in his *Hostilities Without Declaration of War*, published in London in 1883, there were less than ten clear instances in the hundred and seventy-one years from 1700 to 1870, inclusive, where a declaration of war preceded hostilities or the actual making of war. This served to kill the project then pending for the building of a tunnel under the English Channel between Great Britain and France.

". . . I will take the specific case which the author of the essay mentions of the

26. 51 Me. 465, 470 (1863).

27. See *e.g.*, *Williams v. Union Central Life Ins. Co.*, 291 U. S. 170 (1934); *Berg-holm v. Peoria Life Ins. Co.*, 284 U. S. 489 (1932).

28. See *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 427, 25 S. E. 2d 475, 477 (1943), quoting 67 C. J. 336: "Courts are bound by a declaration or determination by the proper department of government that a war exists, while until there has been such a declaration or determination the Courts cannot take judicial notice of the existence of a war by their government."

capture and occupation of Vera Cruz in April, 1914; by the forces of the United States. The author discusses the question whether this was to be considered as an act of war or as 'making war.' Sometimes it is helpful to visualize a question by bringing it home to ourselves. Let us suppose that some foreign power, for instance, Great Britain, or France, or Germany, feeling dissatisfied with the form of apology tendered by us for a temporary interference the week before with the movements of one of its consular or naval officers in the United States, should by military force attack and seize the port and city of Philadelphia, take control of Broad Street station and the Pennsylvania railroad, set up a military administration at the City Hall, and, using as a seat of customs the historic edifice (Independence Hall) in which we are now assembled, proceed to collect national duties and local revenues. How would this strike us? Should we gently dream that the power committing these acts of hostility was exemplifying the arts and processes of peace? In reality an affirmative answer would confound all our conceptions, moral as well as legal. Such acts would necessarily strike a Frenchman, a German, a Japanese, a Mexican, or any other human being, lawyer or layman, learned or unlearned, at home, in the same way, as acts of war, and he would not be wrong. The Greytown incident, which has often been cited to prove that such a proceeding would not be war or an act of war, can not properly be invoked as a precedent, since Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground. It should also be superfluous to remark that the fact that the government of the United States, although it had continued to maintain diplomatic intercourse with the Huerta government, had not formally recognized it, is altogether irrelevant. One nation can not divest another of its rights and immunities as an independent state by withholding formal recognition from its government."²⁹

Moreover, the Boxer Rebellion,³⁰ the Filipino Insurrection,³¹ and the Pershing expedition,³² were all found by American courts to have involved a state of war. In England, when the Executive refused to declare himself, it was held that the hostilities between China and Japan after 1937 involved a state of war.³³ In addition, in American history we find that two battles, Palo Alto and Resaca de la Palma, were fought in the Mexican War before there was any declaration of war by Congress, and it appears that the casualties of those engagements were later regarded by Congress as victims of the war.³⁴ It is usual in this country for Congress to declare that a state of war exists, implying that the state of war commenced some time prior to the declaration. In the Spanish-American War the declaration was expressly dated back four days,³⁵ and in the Pearl Harbor case, while the declaration was not dated back to a particular day, it was dated back to a particular event which occurred on a day certain. Also hostilities may be unilateral only, and may indicate the war-

29. 5 JOHN BASSETT MOORE, COLLECTED PAPERS, 195-7 (1944).

30. *Hamilton v. McClaughry*, 136 Fed. 445 (C. C. D. Kan. 1905).

31. *La Rue v. Kansas Mutual Life Ins. Co.*, 68 Kan. 539, 75 Pac. 494 (1904).

32. *Arce v. State*, 83 Tex. Crim. App. 292, 202 S. W. 951 (1918).

33. *Kawasaki Kisen Kabushiki Kaisha v. Bantam S. S. Co.*, [1939] 2 K. B. 544.

34. *See Prize Cases*, 2 Black 635, 669 (U. S. 1863).

35. *The Pedro*, 175 U. S. 354 (1899).

like intent with which they were conducted. Furthermore, it had been held before December 7, in previous litigation concerning the war clauses of insurance policies, that the war need not involve the deceased's nation and another, but a war involving third countries only to which the insured's death is attributable will bring the clauses into operation.³⁶

It thus appears that war may be deduced from the circumstances as a fact and may exist independently of a declaration of war by Congress. The declaration, as in the Pearl Harbor attack, may serve the political purpose of uniting a disunited people, or it may be only necessary to authorize the commencement of hostilities against another country where that other country has done little to justify hostilities by the United States. The *Panay* case involved a disavowal of hostile intent by Japan, duly accepted by this country, and the declaration of war against Germany April 6, 1917, involved a response to equivocal acts which might or might not be acts of war. The Pearl Harbor attack can without equivocation be assumed to have been intentional, and to have started a war which all parties understood and acted upon.

36. *Vanderbilt v. Travelers Ins. Co.*, 112 Misc. 248, 184 N. Y. S. 54 (Sup. Ct. 1920), *aff'd*, 235 N. Y. 514, 139 N. E. 715 (1923) (the *Lusitania*); *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. 2d 687 (1942) (involving a sailor on the U. S. S. *Reuben James*).