lem, with resulting uniformity of policy and practice, is unquestionably a much-to-be-desired goal. It is to be hoped that an attempt will not be made to conceal a real absence of agreement behind generalizations which can be the subject of multiple interpretations or behind the authorization of comprehensive studies which cannot be adequately conducted and whose recommendations have no real prospect of being carried out. The twin causes of international organization and international law can perhaps be best served by pursuing limited but attainable objectives.

JOHN E. LOCKWOOD

WHEN DID THE WAR BEGIN?

Captain Bennion, in command of the battleship *West Virginia,* was killed at Pearl Harbor on December 7, 1941, in the Japanese attack on the ship and the harbor. The New York Life Insurance Company paid the principal sum of $10,000 due under the policy he had taken out in 1925 but refused to pay the $10,000 demanded as a double indemnity in case of death by accident. The reason for this refusal was the fact that the policy excluded an accident which occurred in "war or an act incident thereto."

Mrs. Bennion sued for the double indemnity in the State Court of Utah from which the case was removed by the company on the ground of diversity of citizenship to the United States District Court. The District Judge, Honorable Tillman Johnson, directed a verdict in favor of the plaintiff, a judgment which was reversed on appeal by the Circuit Court of Appeals, Judge Murrah for the majority holding that the attack on Pearl Harbor "commenced" a war with Japan.[1] *Certiorari* was refused by the Supreme Court and a petition for rehearing was also denied.

Thus the opinion of Judge Murrah in the C.C.A. is the final judicial utterance in the case. It would be easy to agree with this opinion but for the fact that four cases in lower courts [2] have decided against the insurance company and in favor of the plaintiff.

It was the contention of some of the justices writing the opinions in these cases that war did not begin until Congress declared war on December 8, 1941, at 4:10 P.M. Hostilities, however, had begun on the morning of December 7, and the Japanese had issued a declaration of war two hours and forty minutes after the attack began. It may be asked why a declaration of war by the United States was issued at all, since most wars have commenced without a declaration of war. The answer is that the President

[1] *Louise C. Bennion v. New York Life Insurance Company,* No. 3308, CCA, 10th, 1946; cert. denied by the Supreme Court April 28, 1947. For text of decision see p. 680, below.

[2] *Savage v. Sun Life Ins. Co.,* 57 E. Supp. 620 (W.D. La.). *Pang v. Sun Life Assur. Co.,* Circuit Court, 1st Judicial Circuit, Territory of Hawaii, dated Aug. 2, 1944, appeal 37, Hawaii 208 (1945). *Rosenau v. Idaho Mut. Benefit Assoc.* (Idaho) 145 Pac. (2d) 227. *West v. Palmetto State Life Ins. Co.,* 202 S.C 422, 25 S.E. (2d) 475, 145 A.L. R. 1461.

desired to have the support of a unified country and obtained it by the declaration of war. All the congressmen who spoke before 4:10 P.M. on December 8 assumed that war was in existence and the request of the President had read "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." A mass of evidence was introduced to show that Congress and the Departments considered war to have begun on December 7, so that Judge Murrah felt obliged to decide the case in line with some previous cases.[3] When a foreign country invades the United States the President does not have to wait for a declaration by Congress in order to begin hostilities. The Acts of 1795 and 1802 prescribed that course.

It thus appears that a declaration of war by Congress was in this case unnecessary to create a state of war. War is a fact which may begin by the invasion of another power, a fact which the Court can determine either by accepting the determination of the political department of the government, in this case the President, or by taking account for itself of historical facts.

EDWIN BORCHARD

NATIONALITY AND OPTION CLAUSES IN THE ITALIAN PEACE TREATY OF 1947

Although general international law, in order to delimit the spheres of validity of individual national legal systems, delegates in principle to the sovereign states the power to determine the rules for the acquisition and loss of their nationality by their own municipal law, so that the matter of nationality is, likewise in principle, within the exclusive jurisdiction of the states,[1] these states can, of course, conclude treaties on the sub-

[3] *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 springs 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."

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."

[1] But not wholly; for the freedom of the states is limited by a superior norm of general international law, prescribing that individuals, on which the states confer their nationality, must have qualified points of contact with the state in question. Nationality Draft of the Harvard Research in International Law (in this JOURNAL, Vol. 23 (1929), Special Supplement); Convention on the Conflict of Nationality Laws, 1930,