

THE LAW OF REPRISALS AS AFFECTED BY THE LEAGUE TREATY.

The Italian Occupation of Corfu.

(Concluded.)

BY THOS. H. BLACK, M.A., LL.B.

Professor of Roman Law and Jurisprudence, and one of the Examiners in International Law in the University of Toronto.

Those principles which lead to the conclusion that warlike reprisals constitute a "resort to war" within the meaning of the League Treaty, as they are more numerous than the maxims opposed to them, so they have found a more extensive place in jurisprudence. That they are decisive, and that therefore the reprisals are, when begun within the time prescribed for peaceful inquiry, an act of war upon all members of the League, can hardly be doubted.

The first canon in the construction of an enacted law is that words must be given their customary meaning, the meaning that they carried at the time of the enactment. We have seen that, until the last century, a military reprisal of the sort we are considering was counted as plain war. We have seen that, in the commonest language of international law in the last century, violent reprisals are acts of war. The language of practice is the same as the language of the books. In three cases of blockade, statesmen speaking for the nations that executed the reprisals have avowed their measures as being measures of war. Guizot, in the case of the first blockade of the Plate, declared in 1841: *Ce n'est pas la guerre complète, la guerre déclarée.*¹ Palmerston held it necessary to close the later River Plate operations by a formal convention of peace.² In the matter of the reprisals against Venezuela in 1902, Mr. Balfour, being then Prime Minister, declared that

¹ Calvo, *Droit International*, vol. iii, § 1859.

² Calvo, *loc. cit.*; or Hall, p. 386.

"evidently a blockade does involve a state of war."² But let us assume the widest difference that has been allowed, in any source of authority in international law, between war and reprisals. This difference has been set forth in our two fundamental rules of the former law. Firstly, reprisals are distinguished from war in general law. Secondly, the distinction vanishes in the case of reprisals executed by means of the public armament, if the defending nation elects to treat the reprisals as war. The outbreak of war, in such a case, dates from the resort to reprisals. Therefore, in the case stated for consideration—the case of a war resulting from reprisals resisted by a League member willing to abide by the League's decision of the dispute—there is no difference between reprisals and open war. There is no question whatever—in any authority of any sort—of denying a nation's right to fight when its territory or commerce is assailed. It is the nation resorting to reprisals that has resorted to war.

It is plain that the rule of the customary meaning of terms used in an enactment has in reason exactly the same application to international law as it has to the law of a state. This is not necessarily true for the principles now to be examined. But as the rules are identical in the Civil Law and in the Common Law, being founded in obvious reason, there is a presumption in favour of their validity.

The great Third Title of the Digest, the Title *De Legibus*, covers our question by several of its rules. Celsus in the Digest, i. 3.24, quoted with approval for international law by Vattel,⁴ and Coke in the Lincoln College case,⁵ both lay down the principle that a whole statute must be inspected in interpreting any part of it. Now, the whole Covenant of the League is designed to secure a certain interval, during the solution of any dispute, for arriving at a decision unaffected by the

² Moore, Digest, vol. vii, p. 141; Cf. Hyde, International Law, vol. ii, p. 181, note 2.

⁴ Droit des Gens, ii, § 285.

⁵ 3 Coke Rep., 59 b.

force of parties; and in particular, by Article 8, every member of the League recognizes that it is by common action that the enforcement of international obligations is to be effected. What it is intended to forbid, then, under the equivocal phrase "resort to war," is war as it is characterized by the early lawyers—in the definition of Vattel, "that state of affairs in which a nation seeks its rights by force." Next, the English rule started in *Heydon's case*,⁶ against subtle inventions and evasions for the continuance of that mischief which is to be ended by the enactment, is the same as the Roman rule against circumvention or frustration of a law, *fraus legi facta*.⁷ If military reprisals be allowed, a way of evasion is laid wide open to a nation in any case that may arise. Finally, there is the principle of the Civil Law, which stretches the application of statutes *ad similia*, beyond cases literally covered, or which supplies *cetera quae tendunt ad eundem utilitatem*. Julian and Ulpian are the Roman authorities;⁸ Voet,⁹ though finding some slight dissent, establishes approval in modern Civil Law. This principle goes beyond the Common Law rules. Coke, it is true, and other authorities of his time, have a rule identical with that of the civilians. Coke gives the same scope to the rule as does Ulpian; and gives the same reason for it as does Julian: that "the law-makers could not possibly set down all cases in express terms."¹⁰ Modern Common Law, however, will not extend statutes beyond their "natural meaning"; and the probable reason is, that the modern law-maker attempts what Coke and Julian call impossible, and professes to, "set down all cases in express terms." There is here perhaps too little unanimity for a confident reliance upon the principle for our present purpose.

But all this artillery is much heavier than is needed

⁶ 3 Coke Rep., 7 b.

⁷ D. i. 3. 29 and 30.

⁸ D. i. 3. 12 and 13.

⁹ Comment. i. 3. 44.

¹⁰ 1 Inst. 24b.

for our affirmative. The sole principle required is that a law shall not be construed so as to be worthless. It would not have been surprising if so obvious a principle had failed to find an explicit assertion. The rule is, however, plainly stated in authorities of both Civil and Common Law. Affirmed by Grotius, elaborated by Vattel, it has been explicit in international law at all periods.—The civilian doctrine is found in Voet. There must be excluded any interpretation *quae legem redderet inutilem, nullis casibus accommodatam, atque ita omni destitutam effectu*.¹¹ The rule of the Common Law is, "Judges are to make such exposition of laws and statutes as suffer them not to be elusory."¹² Grotius¹³ and Vattel, expounding the law of treaties, affirm the principle that any interpretation which leads to an absurdity must be rejected. Vattel¹⁴ elaborates the principle and establishes the following particular application: "The document must be construed in such a manner as to produce its effect and not prove meaningless and void." Now, the League rules against resort to war either prohibit warlike reprisals or they effectually prohibit nothing. Let reprisals be allowed; resistance also is lawful; resistance means war; and here is a resort to war which is held to be no resort to war. Here then is an interpretation which leads to an absurdity. But this is not all. Reprisals and pacific intervention have in practice included blockade, military occupation, bombardment, the sinking of a fleet; and one campaign of the very first moment, the campaign of Waterloo, failed to produce a state of war.¹⁵ Anything short of complete war is in principle permissible as reprisals. Jefferson indeed suggested, as a regular substitute for declaration of war, an edict of general reprisals.¹⁶ It is evident that, military reprisals being once held to be no resort to war,

¹¹ Comment. i. 3. 20.

¹² Moore v. Hussey, Hob. 97; Bacon's Abridg., Statute, I. 10 improves the grammar.

¹³ ii. 16. 6.

¹⁴ ii. §§ 282-3.

¹⁵ Westlake, International Law, vol. ii, p. 29.

¹⁶ Westlake, ii. p. 11; or Moore, vii. p. 123.

the obligation to refrain from resorting to war is meaningless and void. Of the alternative meanings that can be borne by the words "resort to war," that one must be chosen which alone will save the prohibition from absurdity and nullity. Resort to war includes resort to warlike reprisals or intervention.

The principles that support the opposite opinion furnish out a formidable argument. Firstly, it is a reasonable rule of interpretation that a perfectly notorious practice will, if it is to be forbidden at all, be forbidden in plain terms. A Scottish case shows the application of the principle in practice. A statute had struck at betting in a "house, office, room, or other place." Lord Young and the Lord Justice-Clerk reasoned as follows: "The members of the Legislature in 1853 knew enough of life, I suppose, to be aware that betting went on in race-courses," and had they intended to strike at the practice, "I have difficulty in conceiving how the language selected for that purpose should be 'house, office, room, or other place.' " The Legislature "would, I do not doubt, have used language that would have left its intention beyond question."¹⁷ To paraphrase: the covenanting nations in 1919 knew enough of affairs, it may be supposed, to be aware that reprisals went on in cases of international dispute. If they had intended to strike at the practice, it is difficult to conceive how the language selected for that purpose should be "resort to war." They would, it is not to be doubted, have used language that would have left their intention beyond question. The reasoning of the Judges is clearly of elementary soundness. It is equally cogent in any legal sphere. And the parallel between the two cases, in respect of the application of this principle, is evidently exact. But the essential difference between the two cases is equally evident: the line between houses and race-courses is quite distinct, and there was no chance that, under the cover of race-course betting, the whole law could have been defeated.

¹⁷ *Henretty v. Hart* (1885), 13 *Rettie*, J.C., pp. 14 and 17.

A certain force might also be drawn, in a doubtful decision, from the principle that obscure expressions are to be interpreted in the light of earlier legislation.¹⁸ The sole example of any value for this purpose is found in the Second Hague Convention of 1907. In that treaty the nations, agreeing to a delay before making reprisals or war upon a claim for payment of a contract-debt, make use of the phrase "resort to armed force." There is, then, some presumption that the different phrase "resort to war" has a different meaning.

In all the authorities that have been adduced, Civil Law, Common Law, Scottish Law, lawyers of the first eminence have gone down to foundations, and have decided upon principle. Reasons being laid bare, the applicability of the several rules to an international law-making treaty may be properly estimated. It is only in this way that a solution to the mere legal problem can be arrived at. A comparison of the work of Hall, Westlake, and Oppenheim on the interpretation of treaties serves only to show the unsatisfactory situation of the subject. Moreover, the League Treaty has a double character: it is contract, and it is legislation. In questions of its interpretation only rock-bottom principle has any real value.

If due weight be given to all these considerations of principle, the reasonable rule must be, that the treaty obligation not to resort to war is violated as soon as a nation commits one act of warlike reprisals. There is reason that may well justify contrary action by an interested party acting as its own judge. But such a claim could not stand, if an Equity court had to decide the matter, or, what is the same thing, if the judgment could be given with no regard to the power of interested parties. This, then, may be held to be the law established in 1920, and existing for at least some time thereafter. And so the law is expounded in the recorded opinions, published before any rupture

¹⁸ Vattel, ii. § 234; D. i. 3. 26-28; and plentiful authority in the Common Law.

between League members could come into sight, of a great civilian and a great common lawyer. Sir Frederick Pollock gives a short comment on Article 12. Any attempt, he says, at "sudden occupation of strategic points or of disputed territory" would put a nation "in a state of hostility with the whole League."¹⁹ General Smuts gave in 1918²⁰ a brief explanation of the effect of his own proposal,²¹ which is identical in essentials with the terms of the Covenant. "When the law-breaker proceeds to hostilities, (he says), boycott follows automatically from the obligation of the League." If the seizure of territory or the proceeding to hostilities is in all cases a violation of the treaty, then it follows of necessity that warlike reprisals and intervention are forbidden.

It has so far been taken for granted that, if a military reprisal is a wrong, the date of the wrong, and therefore the date of the remedial liability, is the date of the first acts of force. But Sir Herbert Stephen, in a letter to the *Times* of the 13th October, holds otherwise. Seizing upon an explanation of the law of nations by Sir Frederick Pollock, who stated the plain fact that an act of war may require some challenge by the defender in order to establish a state of war, he continues thus:—Italy did not violate the League Treaty. If one shot had been fired from the Greek batteries at the Italian ships, Italy would have violated the Covenant, and Britain would have been under obligation to inflict immediate blockade upon Italy.—Here is a new and curious legal right to be analysed. We have heard of a legal obligation not to do some defined external act. We have heard of a legal obligation not to do an act with some defined intention. But here is an obligation of a legal person, an obligation not to do an external act which produces some defined reply from some other person. Sir Herbert Stephen, it may be imagined, was being deliberately perverse. His

¹⁹ The League of Nations (1920), Chap. VII.

²⁰ The League of Nations, a Practical Suggestion.

²¹ Art. 19.

object was to demonstrate the wisdom of a British withdrawal from the League at the earliest possible moment. And nothing could better serve that purpose than to prove that so grotesque an obligation rests upon a member of the League. Let the Italian precedent be allowed to stand; and let exactly the same case arise in the future: exactly the same circumstances, exactly the same reprisals, taken with exactly the same intention, but the defender dares to resist. Shall it be explained to the future aggressor that his action leads in law to a universal blockade, while Italy's action lawfully led to nothing, unless it be to the gain of Italy's claim? The only fit answer is to be found either in Horace, *Solventur risu tabulae*, or in Mansfield's judgment upon slavery: "Nothing can be suffered to support it, but positive law."²²

III. THE PRESENT LAW.

International law, by its very nature, can rarely be determined without any regard to the power of interested parties. Unchallenged practice makes law. And nothing more exact can be affirmed of the present law of reprisals, than that two principal alternatives lie before it.

The first alternative is that of a negative answer to the Council's question, previously quoted. Measures of coercion, it would be held, do not violate the League obligation, when not intended as acts of war. If this rule be established, Article 16 will be virtually worthless. No nation will run the risk of the active hostility of all the League members, however slight that risk may be, if there exists a simple way of avoiding it. Jefferson's suggestion, that an edict of general reprisals may be preferred to a formal declaration of war, still finds a place in the books.²³ Something like it will find a place, in the event we are now supposing, in the regular practice of nations. Any nation desiring to start a war before the time prescribed in

²² Somerset's case. Lofft. p. 19; or 20 State Trials, p. 79.

²³ Westlake, ii. p. 11; and Moore, vii. p. 123.

the League Treaty will assuredly start it by measures of reprisal. In theory, Article 16 would still apply, if it were first determined that the intention behind the reprisals was an intention to make war. But a rule that purports to set up an *ipso facto* state of war and blockade must be an explicit rule of immediate application to the facts of a particular case, or it clearly cannot be followed. Moreover, it has been held impossible in the former law—and Hall²⁴ affirms this principle as fundamental—not merely to make an immediate decision, but to reach any decision at all, on what is in substance this very question of intention—on the question which party is the aggressor in a war. In the first alternative, then, the duty not to resort to war will be nugatory.

The other principal alternative is that of an affirmative answer to the question of the Council. The mere act of warlike reprisals will, in this event, constitute a breach of the Covenant and *ipso facto* an act of war against fifty nations, which nations are immediately to proceed to the most complete blockade of the offending nation. It has been submitted that, in reason, this is the rule set up in 1920. The rule will exist as authority, not merely authority plus reason, for a future case. Thus, in all ordinary cases, the necessary condition for the practical application of Article 16 will be established. Article 16, the law of immediate blockade and boycott, is a rule of action. Courts can apply reason as well as authority; a rule of action must rest completely on authority. And the alternative now under examination, making the exercise of force the sole test in resolving whether a violation is committed or not, is the only alternative that will satisfy this condition. A blockade, the occupation of territory, or the seizure of ships at sea, whatever be the intention professed, would bring immediate blockade in return. On the other hand, such reprisals as the delay of a money payment, or disregard of a treaty giving commercial rights to an opponent, though pos-

²⁴ International Law, p. 345.

sibly unlawful if made without an attempt at mediation through the League, on the ground that all channels of settlement must be tried before reprisals, would nevertheless not be an offence for which the remedy is the immediate active hostility of every member of the League. Future practice might produce narrow cases; but the great mass of cases would present no difficulty in the application of the rule, if the will to apply it existed.

It would seem, then, to be no exaggeration, but an affirmation of simple fact, to assert, as was done at the beginning of this paper, that the point at issue is the whole fate of the obligation in Article 16. The question is, shall that obligation be virtually no obligation at all, or shall it be a real duty of fifty nations to prevent by force an outbreak of individual war during the time prescribed for inquiry?
