BELGIUM UNDER THE GERMAN OCCUPATION.

A PERSONAL NARRATIVE **1**

Chapter **LXIII**. Bâtonnier Théodor.

THE Governor-General issued a decree changing the manner of fixing damages sustained by individuals in riots and tumults. There was an old and salutary law in Belgium that gave to those who in such circumstances had been injured in person or in property an action against the commune where the disorder occurred, and the damages were fixed, in the usual way, by experts testifying before the courts of Belgium. But the Germans ordained another method. Instead of leaving ta the jury the assessing of damages they were to be fixed by a board of arbitration, one member of which was to be appointed by the Governor General in Belgium, another by the German Governor of Brussels, and the third by the municipality involved. The abject was at once apparent ; there were Germans in Belgium who asserted that in the first days of the war they had been set upon by Belgian crowds and injured, and now they would claim vindictive damages under a method that was very much like loading the dice. Belgian lawyers were forbidden to appear before these arbitration boards. The indignity to the Belgian bench and the Belgian Bar was not allowed to pass unnoticed, and it was Maître Théodor who courageously resented it. If the change wrought by the decree of the Governor-General of February 3, 1915, was noted at all by the people, they saw in it only another evidence either of the *naïveté* or of the cynicism of the invader. A week later another decree — that of February 10, I915 — created boards of arbitration composed of justices, of the peace flanked by two unsworn assistants as "*assessors*", to determine disputes in matters of rent and to hear and determine what we would call, in our law, cases of forcible entry and detainer. This decree excited little, if any, comment ; it was very long and very complicated : I doubt, indeed, if it — or the other, for that matter — was ever posted on the walls. Materially and practically it was, perhaps, of little consequence. But Maître Théodor at once recognized the two measures as ominous precedents ; he saw in them not only a rather clumsily concealed device for despoiling Belgian communes, not only an affront for the profession he represented and defended with an ardent feeling, but the first blows in an effort to undermine the independence of the Belgian judiciary and to destroy the nation itself. Most people, no doubt, in and out of Belgium, saw in the tragic calamity that overwhelmed the little land only the brutal deeds of the German army, and their imaginations were struck only by the physical resistance to it and to individual deeds that were done by those who came creeping in its wake. Distinctions, and refinements on the distinctions, tobe made in the relations of "*occupying Power*" and "*occupied territory*" meant little to them ; Hague Conventions to the most were what they seemed to be to the Germans, when they referred to embarrassing treaties as scraps of paper. They did not know that, under conventions signed at The Hague by the principalities and governments of the world, the powers which a Von der Goltz or a Von Bissing might exercise in Belgium were defined and limited ; that the laws of the occupied country were still in force, and were net te be changed except in case of an imperative necessity arising out of the exigencies of war. But Maître Théodor saw, and when these two decrees were issued he tried to move the courts of Belgium, as the one representative of Belgian sovereignty intact in the nation, to oppose a resistance. I have said that there was nothing to strike the imagination, nothing of the theatrical, in

Maître Théodor's defiance of the German power, nothing that could be used in the cinema, but there was a fitting stage for the drama, and the scene was set with judges and lawyers in black silken robes there in the Palais de Justice on the hill dominating Brussels, while German sentinels were tramping up and down before the door of the chamber where the court was sitting and the German flag was flying from the dome. The argument in which Maître Théodor showed the two decrees to be *ultra vires*, beyond the power of an occupant, was made on March 18, 1915, before a bench of three judges in the first chamber of the Tribunal of First Instance. The case was that of Piron v. de Ridder, and it came on for hearing before the Justices Benoidt, Leclercq, and Oliviers, Judge Benoidt presiding. M. Holvoet, the Procureur du Roi, was there to represent *l'ordre public ;* Maître Bihin represented the plaintiff, and Maître de Vadder the defendant. The action was one in which it was sought to recover 1.200 francs, rent for a house in the Chaussée de Wavre, to which demand the defendant demurred to the jurisdiction, pleading the decree of the Governor-General of February 10 and claiming the right to have the case referred to the tribunal set up by the decree. In the space behind the bench there were seated nearly all the judges of the Tribunals of First Instance, many judges of the Court of Appeal, and some of the Court of Cassation. The entire chamber was filled with lawyers in their black robes, their toques, their white *rabats,* among them several former bâtonniers of the Order. When the slender, alert Bâtonnier with the white hair and the brilliant eyes approached the bar he was accompanied by Maître Bia, the Bâtonnier of Liège, who, by reason of his years and services, was the dean of the bâtonniers of all Belgium. With Bâtonnier Théodor there appeared also the Council of the Order — an imposing representation intended to show the patriotic solidarity of the lawyers of Belgium.

The judges and the lawyers, in the consciousness that they were present at a scene which had its historical interest, sat in that silent intensity which marks such moments. The case at bar was, in its immediate effect, of small importance, involving as it did a mere question of the occupancy of premises, and the immediate issues were simple, but when Maître Théodor approached the bar and began his argument it was to show that it raised an issue in which the destinies of the nation were involved.

"*I present myself at the bar*", he said, "*escorted by the Council of the Order, surrounded by the sympathy and the confidence of all my confrères of Brussels, and, I may add, of, all the Bar in the country. The Bars of Liège, Ghent, Antwerp, Mons, Louvain, Charleroi, Namur, have sent to that of Brussels the expression of their professional solidarity, and have declared their adherence to the resolutions taken by the Council of the Order of the capital.*

"*The question raised is grave : it is the breaking out, in its critical stage, of the conflict that has existed since the beginning of the occupation between the occupying Power and the judicial power of the occupied country. This conflict we have neither created nor desired. Leaders of the Bench and of the Bar have done all, in the measure of legal possibility and within the limits of their dignity, to live in peace with the occupying Power. The German decrees of February 3 and 10, 1915, have put an end to all hope of a definite understanding. They are no longer legislative acts ; they already mark certain intentions as to the nature of which it is no longer possible to have any illusions. They are the first stroke of the spade that would sap our judicial institutions ; they are the first steps toward the seizure by the occupying Power of the Belgian judicial power ; they touch the very depths of our rights and our prerogatives ; they have wounded us to the heart. To keep silent and to let this be done would be abdication on our part and treason ta our country ; more, it would be to break our oath.*

"*It is this conflict that is to be decided before you. I shall discuss the validity of the decrees: I shall do it with the decorum due to so grave a question. I shall have a constant regard for the respect I owe to a Power legally established. I shall be careful, above all, not to lack deference toward the man of high value who represents the German civil government on our soil. But I shall speak freely. My words will be the echo of my conscience. I shall not shrink from the expression of any of my convictions. My words may sometimes seem harsh. My thoughts will never be offensive. I wish his Excellency M. von Sandt to know from me all about this hearing. He has the right to the truth. I shall cause him to know it. Perhaps he will judge, after having read me, that he has not always been well informed in regard to us. I take up the argument*."

I shall not follow Maître Théodor, interesting as it would be to do so, through the more technical portions of his long and closely reasoned legal argument. Its interest is professional, legal. His contention was that the decrees were judicially inexistent ; that the source of the power of the Government of Occupation, so far as legislation was concerned, was in the Convention of The Hague, and that the Convention, far from conferring the power to issue the decree in question, formally forbade it, because there was no absolute military necessity for innovation. The Convention of The Hague regulated the rights of the occupying Power ; it limited them in the interest of the occupied country. Article 43 of the Convention says :

> *The authority of the legitimate Power having passed de facto into the hands of the occupant, the latter shall take all the measures in his power to restore and to ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

He traced the growth and progress, in international law, of that theory which had substituted, in modern times, the notion of occupation for that of the ancient right of conquest. Under the empire of the ancient notion the invaded territory fell under the absolute sovereignty of the invader ; it changed masters. Under the empire of the new doctrine of military occupation the political regime of the occupied territory subsists, it is not annulled or modified ; the exercise of the existing political power only is suspended and passes into the hands of the occupant. It was this new conception, this modern doctrine rising slowly into being, which the Convention of The Hague finally acknowledged, ratified, and consolidated into treaties signed by all the Powers — Germany among them. The Bâtonnier's argument was exhaustive, legally and historically, and his contentions might have been maintained by his citations from German international lawyers alone.*

The Bâtonnier closed his long argument by a moving appeal. "*To recognize the situation that is presented to us simply because it is imposed upon us*", he said, "*would be to accept annexation before it had even been declared. We are not annexed. We are not conquered. We are not even beaten. Our army fights. Our colours float beside the French colours, the English colours, the Russian colours. The nation lives. She is simply unfortunate. More than ever we owe her our devotion, body and soul. To defend her rights, that is also to fight for her.*

"*Messieurs !*

"*We are living the most tragic hours that any people ever knew. All about us are destruction and ruin. Everywhere are signs of mourning. Our army has lost half of its effectives. Its percentage of dead and wounded will not be equalled by the belligerents. There remains to us only a bit of land down there close by the sea. There the Yser rolls its waters across an immense plain dotted with tombs. They call it the Belgian*

cemetery. There by thousands our children lie. There they sleep their last sleep. There the struggle continues, bitter and without mercy. Your sons, Mr. President, are at the front ; my son is there also. For months we have lived our days in the anxiety of what the morrow may bring forth. Why all these sacrifices, why all these woes ? Belgium could have avoided these disasters ; she could have saved her existence, her riches, and the lives of her own. She preferred honour. Shall we do less than our children ? In defending our secular institutions do we not defend, we also, our national honour ?

"*When the decree of the Governor-General in Belgium, Baron von der Goltz, appeared on November 20, 1914, relating to the revocation of cases and the reduction in rents, I was asked by one of my colleagues of the Belgian Bar if the Bar of Brussels did not intend to protest. My response was that the Bar of Brussels would not protest. It was not that the question of the legality of the decree could not at that moment be raised. We thought that there was no primordial interest in doing so, no essential principle of our laws having been affected. In that moment we were conciliatory, and in fact we have never assumed towards the occupying Power a hostile or a combative attitude. After the decree of February 10, to refrain from protestation, even passively, was no longer possible. To accept that decree would have been to accept our downfall. Called to choose between risking what remained to us of our prerogatives or to sustain a humiliation, the Bar decided that it would not be humiliated. In your turn you have to assume an attitude. You will do it in the independence of your conscience. You will pronounce the law. When the supreme decision of justice shall have been rendered, stating the law, whatever may be that decision you will find the Bar at your side. Between you and us there will be no separation. Sons of the same soil and of the same nation we shall not present the spectacle of disunion. Our national device is :* ***L'union fait la force****. It has not always been respected in the happy times of our history. To-day when the nation is gasping under the load of its misfortunes, yet living all the same, with hope in its heart, union becomes a sacred duty. To violate it would be a crime that the Bar will not commit.*"

Brand WITHLOCK

London ; William HEINEMANN ; 1919.

* When he came to apply these principles which he had so clearly brought to the case at bar, he said :

"By this decree of February 3, the occupying Power has taken out of the jurisdiction of our tribunals all cases arising under the law of Vendémiaire, relating to pillages committed against Germans in the month of August 1914. It is an act of defiance to our magistrature. To believe a Belgian magistrate, called upon to judge a German soldier, capable of acting from motives other than those of his own conscience and of justice is to believe him unworthy to sit at all. The decree of February 3 offers him this affront."

But the decree had also forbidden lawyers to appear before the courts of arbitration it created, and this touched the corporation of lawyers on a sensitive point.

"*The decree of February 10 is inspired by the same hostile thought, but it is the Bar which it attacks", he said. "They might have taken radical measures against it, they preférred to mutilate in trying to diminish it. Vain effort! You do not diminish an institution to which have appertained such men as Paul janson, Bara, Charles Graux, Charles Duvivier, Beernaert, Demot, Jules Le Jeune, Dupont of Liège, Neujean, to recall among the dead only those of whom the memory is so near to us — Edmond Picard, to cite only him among the living. They cannôt overturn that which is the work of time. The Bar has come up as a necessity out of our history and out of our national customs. A lawyer is not only a professional competent to represent the interests of parties before justice and to defend in a courteous and honourable struggle the interests of the client ; he is a necessary auxiliary of the judge, to whom he brings his learning, his probity, and his labour. To accomplish his task he sustains a long and costly preparation. For three years he must practise gratuitously for the indigent. During three years he is initiated into the virtues of delicacy and of honour that will render him worthy to wear the robe. The Bar bas extended into the political field. In this domain also it counts its illustrious representatives. It cames there not only its aptitude but its love of independence and of liberty. It keeps and develops*

in its breast tins ideal of men and of peoples. When the image of liberty is deformed without, in the fierce struggle of politics it rectifies it and restores to it the purity of its eternally beautiful features. It is this need of independence and of liberty which despite itself pushes it on in hours of danger, which makes it speak when peoples, bowed under the iron hand of a master, find themselves dumb and discouraged. It is this which helps the lawyer to draw himself up in his pride when he feels the menace come and the storm growl. They may not love that institution, but they owe it respect.

"*And now I ask you*", said Bâtonnier Théodor, "*where is the absolute necessity for an innovation ? What is the menaced public interest that requires this modification of our old laws as to the competence and organization of the judiciary ? Will there be found one Belgian magistrate to believe it ? Will there be found a single one to decide that it is absolutely necessary to have that bizarre institution composed of a judge and two chance assessors not under oath, but with a deliberative voice ? Will there be found one te judge it indispensable to the public interest that the right of defence be suppressed to provoke a renewal of the regime of brokers ? Will there be found a single one willing to associate himself with the combinations, I was going to say with the complicities, to which the decree of February to owes its birth ?*

As to the need of judges to pass on legal questions and to decide disputes, Maître Théodor said :

"*The functions that he exercises are delicate. To be a good judge it is necessary to know the law, not only a part of the law, but all the law. It is necessary to le acquainted with the interpretations of the law given by the courts and tribunats. It is necessary to be capable to interpret a convention. It is necessary to know how to dose Law with equity there where the law permits the judge to depart from the rigour of principles. It is necessary to know how to untangle the facts of an inquiry, to appreciate the value of the testimony, to penetrate into the soul of a pleader or of a witness. All that is delicate, difficult, and sometimes troubling for the conscience of him who is called upon to decide. When it is a question of an assessor nothing of the sort is necessary. The most ignorant of men, the least competent to judge, perhaps the moment he owns a piece of ground, with or without a building on it, or when he has put his name at the bottom of a lease, is considered worthy to put on the robes of a judge.* ***Dignus intrare.*** *Oh, if only Molière were living !*"

The issue between Maître Théodor and Governor-General von Bissing was that the laws in force in Belgium, as the Germans indeed had recognized, could not, under The Hague Convention, be changed unless there was some absolute obstacle to their application, created by the conditions of war, and he contended that the occupying Power alone was not the sole judge of the necessity of innovation.

"*Now in what text*", asked Maître Théodor, "*in what possible judicial interpretation does the occupant draw this unilateral faculty of judging of the case of necessity ? By what title does the occupant claim this pre-eminence ? The Convention of The Hague makes no difference in treatment between the co-contractants. The signature of His Majesty the King of the Belgians is the equal of that of His Majesty the German Emperor. The Convention makes no distinction in the juridical situation between the occupying Power and the occupied country. It stipulates no subordination on the part of one to the other. Both have an equal right to arm themselves with the Convention, to invoke it, and to profit by it. The tendency which consists in attributing to the occupant the predominant situation is only an instinctive return to the ancient conception of the right of conquest and an unmerited and superannuated homage to the predominance of force over law. That is my first plea.*

"*Here is the second : To give to the occupying Power the right to interpret the Convention as it understands it, is to submit in advance the occupied country to the good pleasure of the occupying Power. It is to concede to it the faculty and the right not to observe it or to violate it. It is to make even the existence of the Convention depend on the will of the occupant. Our civil, law, the expression of reason, in accord with that of all legislations, German law included, declares that such a condition would render the Convention null and void. It is called the potestative condition.*

"*If the Convention of The Hague admitted such an interpretation it would merit only a shrug of the shoulders; It would be no more than a diplomatic fiction, an illusion and a sbam for the occupied country. Such was not the intention of any of the contracting Powers. Neither the German Emperor nor the King of the Belgians could have wished by his signature to cover a sham Convention. They wished that Convention to be a living reality. If, in spite of all, the occupying Power arrogates to itself the right to interpret and to apply the Convention in its own fashion, and consequently to legislate in a manner contrary to the conditions laid down by the Convention, what will be the situation for the occupied country ?*

"*If it is a question of measures to be applied unilaterally by the occupant, the occupied country will have nothing to do but to bow before it ; the occupying Power being the stronger is then the master. But if for the application of measures edicted by it the occupying Power solicits the concourse of the occupied country it will belong to the latter to determine whether the Convention has been violated or not, and if in the affirmative to refuse it.*

"*In the case at bar the occupying Power solicits the aid of the Belgian judiciary power to carry into effect its edict of February 10. The Belgian judicial power will examine in all conscience the question as to whether the Convention of The Hague has been observed, that is to say, if the case of necessity exists. If it is convinced to the contrary not only it may, but it must, refuse to apply the law, and the occupying Power has no legal or legitimate means to compel it to do so.*

"*Has the Belgian judiciary power really this right ? In accordance with Belgian law the judiciary power is one of the three powers established by the Constitution. These powers are the legislâtive power, the executive power, and the judiciary power. Together they represent the national sovereignty. These powers are independent one in respect of the other in the sphere of their action 'and in the limits traced by the Constitution. The Constitution gives the right to the judicial power to judge of the legality of royal decrees, but the Constitution does not recognize its right to judge of the constitutionality of the laws. Such are the relations, regulated by the Constitution, between the judicial power and the legislative power. The legislative power exercices its right to legislate to the fullest degree without any possible intervention from the judicial power. In the matter that we are considering it is not a question of a Belgian law. It is a question of a law emanating from a foreign Power, a Power* ***de facto****, provisional, in no way substituted in its sovereignty to the Belgian legislative power, neither drawing its right to legislate from our Constitution nor from itself, but holding it from an international Convention concluded between Belgium and Germany. It is that Convention and not our Constitution which determines the nature and the limits of its action ; it is that Convention and nnt our Constitution which regulates the relations of the Belgian judicial power with the occupying Power. In relation to this foreign Power the Belgian judicial power does not represent one part of Belgian sovereignty only, it represents ail the sovereignty, it represents the nation, it treats as an equal with the occupying Power. To act otherwise would be to abdicate the rights of the Belgian people and to place them in the hands of the occupant, to invalidate the royal signature put at the bottom of a treaty, to suppress by a stroke of the pen the guarantees stipulated in favour of the occupied country, the end and aim of the Convention ; to enforce instead of to limit the powers of the occupant, to put irremediably the occupied country at the mercy and under the power of the occupant. Such is the judicial verity.*"