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WAR CLAIMS AGAINST THE UNITED STATES.

(Continued from p. 284.)

CHAPTER III.

OF DAMAGES DONE BY THE ENEMY.

WHEN private property is destroyed by the unlawful acts of individuals, governments seek to give redress by civil action or to punish for acts which are criminal. But they do not indemnify the parties who may lose by such depredations.

If a loss is sustained by arson, burglary, theft, robbery, or by an act which constitutes only a trespass, governments do not make good the loss. And this is so whether the illegal acts are done by one or many persons.

Nations apply the same rule when their citizens suffer losses by a foreign or domestic enemy. They are no more bound to repair the losses of citizens by the ravages of war than to indemnify them against losses by arson or other individual crimes or the destruction of flocks by wolves.

In a report made by Alexander Hamilton, Secretary of the Treasury, to the House of Representatives, November 19th 1792, he stated the rule of law to be—

“That according to the laws and usages of nations a state is not obliged to make compensation for damages done to its citizens by an enemy or wantonly or unauthorized by its own troops.”<sup>53</sup>

This was declared to be the law as to property destroyed in bat-

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<sup>53</sup> American State Papers, class ix., vol. 1 of Claims, p. 55; *Pitcher v. United States*, 1 Court Claims R. 9; *Mitchell v. Harmony*, 13 How. 115; Res. of Continental Congress June 3d 1784, Journal, vol. 4, p. 443.

tle, and not controverted, in the Senate of the United States on the 4th of January, 1871.<sup>54</sup>

Vattel says:—

“There are damages caused by inevitable necessity; as for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents. They are misfortunes, which chance deals out to the proprietors on whom they happen to fall.

“No action lies against the state for misfortunes of this nature—for losses which she has occasioned, not wilfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself.”<sup>55</sup>

The same rule of law was adopted in England when, during the American Revolution, the property of British loyalists in the colonies was destroyed.

Mr. Pitt said in Parliament:—

“The American loyalists could not call upon the House to make compensation for their losses as a matter of strict justice; but they most undoubtedly have strong claims on their generosity and compassion.”<sup>56</sup>

<sup>54</sup> Senator Davis, January 4th 1871, 82 Globe, p. 297.

<sup>55</sup> Vattel, book 3, chap. xv., § 232, p. 403.

<sup>56</sup> Hansard's Parliamentary History, vol. 27, p. 610-618, June 3d 1788; Sumner's Speech, January 12th 1869, 71 Globe 301. He shows that the British loyalists, at the close of the war, appealed to Parliament. The number of their claims was 5072; the amount claimed 8,026,045*l.*, of which commissioners appointed allowed not quite half.

This subject was discussed before the American-British Claims Commission, under the twelfth article of the treaty of May 8th 1871, between the United States and Great Britain, and the doctrine of the text applied. The authorities cited in opposition to it were the treaties of 1815 and 1827 between the United States and Great Britain (8 Stat., p. 228, art. 1; *Id.* 361, art. 1); Phillimore, vol. 1, pp. 86, 94, 139; Wheaton 77; Constitution of the United States, art. 1, sec. 10; Works of Daniel Webster, vol. 3, p. 321; *Id.*, vol. 6, pp. 209, 253, 265; U. S. Att.-Gen. Op.; vol. 1, p. 392; *United States v. Palmer*, 3 Wheat. 210; *The Collector v. Day*, 11 *Id.* 113, 124-126; *The Prize Cases*, 2 Black 635; the treaty between the United States and Great Britain of August 9th 1842 (8 Stat. 575, art. 5); and the Acts of Congress of December 22d 1869 (16 Stat. 59, 60), and of April 20th 1871 (17 *Id.* 13-15).

The National Assembly of France by the law of September 6th 1871 indemnified

Nations sometimes do grant relief even for ravages of war, not as a matter of strict right by principles of international law, but as a gratuitous act of benignity.

the sufferers in some measure for losses in Franco-Prussian War. See Howe's Rep. Senate, No. 412, 3d sess. 42d Cong., February 7th 1873.

By the Act of March 30th 1802, 2 Stat. 143, the United States, subject to certain limitations, "guarantee to the party injured an eventual indemnification in respect to" certain property "taken, stolen, or destroyed" by Indians, under certain circumstances. The Act of June 30th 1834, 4 Stat. 731, does the same. But these look to reclamation from Indian tribes.

And see Act February 28th 1859, sec. 8, 11 Stat. 401; Joint Resolution June 25th 1860, 12 Stat. 120; Act July 15th 1870, sec. 4, 16 Stat. 360; Act May 29th 1872, sec. 7, 17 Stat. 190.

Certain other statutes secure compensation for damage done by the enemy: Act April 9th 1816, 3 Stat. 263, sec. 9. (See as to this American State Papers, Claims 486, Report Dec. 17th 1816.) Act March 3d 1817, 3 Stat. 397, sec. 1, injury to military deposits. Act March 3d 1849, ch. 129, sec. 2, 9 Stat. 414, loss or destruction of property in service by contract or impressment.

Act June 25th 1864, 13 Stat. 182, horses of military persons surrendered by order of superior officers. See Senate Rep. 137, 1st sess. 34th Cong., April 18th 1856, in favor of paying for personal property destroyed by the enemy in the war of 1812. The committee held that where property was used by the government, and the enemy destroyed it in consequence of that use, it should be paid for. Congress did not pass the bill recommended by the committee.

The legislature of Ohio, by Act of March 30th 1864 (61 Ohio Laws 85), provided for a commission "to examine claims of citizens of this state for property taken, destroyed or injured by rebels or Union forces within this state during the Morgan raid in 1864."

On the 15th December 1864, the commissioners made their report to the governor, showing claims made, \$678,915.03, on which was allowed \$577,225. This consisted of "damages by the rebels," \$428,168; "damages by Union forces under command of United States officers," \$141,855; and "damages by Union forces not under command of United States officers," \$6202.

The Act of April 27th 1872 (69 Laws 176), authorized a re-examination of these claims.

The Act of May 5th 1873 appropriates \$11,539.56 to pay claims under class three, as classified under the Act of April 27th 1872 (70 Laws 260). The same act (p. 265) requires the Governor to appoint a commissioner to proceed to Washington to urge upon the proper officers of the government or Congress the payment of all just claims of the people of Ohio growing out of the Morgan raid.

The legislature of Pennsylvania also made provision for indemnifying citizens of Chambersburg for property destroyed by the rebel invasion.

See Act approved April 9th 1868, No. 39, Laws of 1868, p. 74. This act provides for the appointment of commissioners to investigate claims of citizens in counties invaded by rebel forces "for the amount of their losses in the late war."

The preamble to this act recites that "during the late war to suppress the rebellion several of the southern counties of this state were several times invaded by the rebels in great force," and that "there was occasioned great destruction, devastation

## CHAPTER IV.

PROPERTY DESTROYED OR DAMAGED IN BATTLE BY THE GOVERNMENT FORCES, OR WANTONLY, OR UNAUTHORIZED BY ITS OWN TROOPS.

THE American rule of international law was early adopted that the government was under no obligation to compensate its citizens for property destroyed or damages done in battle or by necessary military operations in repelling an invading enemy.<sup>57</sup>

To this rule Alexander Hamilton added that:—

“According to the laws and usages of nations a state is not obliged to make compensation for damages done to its citizens \* \* wantonly or unauthorized by its own troops.”<sup>58</sup>

This is the general rule which is recognised now.<sup>59</sup>

It has been said, again, that—

“No government, but for a special favor, has ever paid for property even of its own citizens, destroyed in its own country, on attacking or defending itself against a common public enemy, much less is any government obliged to pay for property belonging to

tion, and loss of property of citizens,” and “these losses were sustained in the common cause, and for the general welfare of the whole people of this Commonwealth, and it is *reasonable and proper* that citizens who have thus suffered should receive *generous consideration* and active relief from this great Commonwealth,” &c.

|   |                |
|---|----------------|
| The damages amounted to . . . . .         | \$3,450,909.85 |
| The State of Pennsylvania paid :          |                |
| Under Act of August 20th 1864 . . . . .   | \$100,000.00   |
| Under Act of February 15th 1866 . . . . . | 500,000.00     |
| Under Act of May 27th 1871 . . . . .      | 300,000.00     |

Commission to re-examine and re-adjudicate was raised under Act of May 22d 1871 (P. L. 1871, p. 272).

It will be seen that this Act does not put the claims upon the ground of a *legal right* to demand compensation, but on the *ground of generosity*.

<sup>57</sup> American State Papers, Claims 199, February 15th 1797 :

The committee say : “The loss of houses and other sufferings by the general ravages of war have never been compensated by this or any other government. In the history of our Revolution sundry decisions of Congress against claims of this nature may be found. Government has not adopted a general rule to compensate individuals who have suffered in a similar manner.”

<sup>58</sup> Report to Congress, November 19th 1792 ; American State Papers, Claims 55.

<sup>59</sup> In the report made November 30th 1873, by Hon. Robert S. Hale, counsel of the United States before the commission of claims under the 12th article of treaty of 8th May 1871, between the United States and Great Britain.

neutrals domiciled in the country of its enemy which may possibly be destroyed by its forces in their operations against such enemy."<sup>60</sup>

Mr. Seward, Secretary of State, said, in relation to a claim made upon the United States by a French subject for property destroyed by the bombardment of Greytown, in July 1854, that—

“The British government, upon the advice of the law-officers of the crown, declared to Parliament its inability to prosecute similar claims.” (See note in Lawrence’s *Wheaton*, p. 145.)

The governments of Austria and Russia have applied the doctrine involved in the Greytown case to the claims of British subjects injured by belligerent operations in Italy in 1849 and 1850. (See note, p. 49, vol. 2, of *Vattel*, Guilaumin & Co.’s edition, 1863.)<sup>61</sup>

This is the rule recognised by *Vattel*.<sup>62</sup>

These principles are generally recognised, and any departure from them rests on mere gratuity or other exceptional reasons.

#### CHAPTER V.

TEMPORARY OCCUPATION OF, INJURIES TO, AND DESTRUCTION OF, PROPERTY CAUSED BY ACTUAL AND NECESSARY GOVERNMENT MILITARY OPERATIONS TO REPEL A THREATENED ATTACK OF, OR IN ADVANCING TO MEET, AN ENEMY IN FLAGRANT WAR.

By the principles of universal law recognised anterior to the Constitution, in force when it was adopted, and never abrogated, every civilized nation is in duty bound to pay for army supplies taken from its loyal citizens, and for all property voluntarily taken for or devoted to “public use.”

But there is a class of cases in which property, real or personal, of loyal citizens may be temporarily occupied or injured, or even destroyed, on the theatre of and by military operations, either in a loyal state or in enemy’s country, in time of war, as a military necessity. The advance or retreat of an army may necessarily destroy roads, bridges, fences and growing crops.

In self-defence an army may, of necessity, erect forts, construct

<sup>60</sup> *Perron v. U. S.*, 4 Court Claims 547.

<sup>61</sup> Letter to Sumner Feb. 26th 1868 : 4 Court Claims R. 548.

<sup>62</sup> *Vattel*, book 3, ch. xv., sec. 232, p. 403. See Hale’s Report to Secretary of State, Nov. 30th 1873, for exceptional case in claim No. 329 of Watkins & Donnelly.

embankments, and seize cotton-bales, timber or stone, to make barricades.

In battle or immediately after, and when it may be impossible to procure property in any regular mode by contract or impressment, self-preservation and humanity may require the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, and for necessary military operations which admit of neither choice nor delay.

In these and similar cases the question arises whether there is a deliberate voluntary taking of property for public use requiring compensation, or whether these acts arise from and are governed by the law of overruling military necessity—mere accidents of war inevitably and unavoidably incidental to its operations—and which by international law impose no obligation to make recompense. It seems quite clear that they are of this latter class.

This is so upon reason, authority and the usage of nations.

Most of the considerations applicable to the destruction of property in battle, or to prevent it from falling into the hands of the enemy, are equally appropriate here. And if property may be so destroyed without incurring liability, why may not property be temporarily occupied or even damaged, when the purpose is the same to prevent it from being useful to the enemy? The greater includes the less. These cases rest on principles entirely distinct from those which relate to and govern ordinary army supplies. There is no reason why one citizen should furnish quartermaster's or commissary supplies rather than another. The government can, as to these, exercise a discretion; it can buy from any who may have to sell, or select those from whom it will impress. Here is a deliberate voluntary taking for public use.

But an army advancing to meet an enemy has no discretion in selecting its route. The public safety compels it to pursue that which is most practicable.

If crops stand in the way, their destruction by the march may be inevitable and unavoidable, a mere accident and incident of military operations, as much so as the destruction caused by battle.

On principle, the government cannot be liable to make restitution for the damage, unless it has assumed to do so by an implied contract or has been guilty of a wrong.

There is in such case no contract, for this implies consent, deliberation, choice. It implies that what is done is not done as

of right or by lawful authority, but by consent of all parties in interest. "If a man is assaulted, he may (lawfully) fly through another's close," and he does not thereby become a party to a contract to pay any damage he does,<sup>63</sup> because his act is lawful.

So a nation, on the same principle, makes no implied promise to pay when its army retreats from a pursuing enemy or advances to prevent his blow.

Nor is a nation in such case liable as a trespasser or wrong-doer. "A trespass \* \* from the very nature of the term *transgressio*, imports to go beyond what is right."<sup>64</sup> An army in its march performs an imperative duty—justified by the law of nations—required by the public safety.

The rule has been thus stated by the late solicitor of the War Department:—

"If one of our armies marches across a corn-field, and so destroys a growing crop, or fires a building which conceals or protects the enemy, or cuts down timber to open a passage for troops through a forest, the owner of such property has no legal claim to have his losses made up to him by the United States." (Whiting's War-Powers, 43d ed., 1871, p. 340.)

Damages done by the erection of forts, the seizure of timber or materials for barricades, under pressure of military necessity, give no legal right to compensation.

"In time of war," said the Supreme Court of Pennsylvania, "bulwarks may be built on private ground and the reason assigned is \* \* because it is for the public safety."<sup>65</sup>

It is a lawful act, imposing no liability on the government, which is guilty of no wrong, and which makes no promise by the act.

In principle it can make no difference whether a forest or cotton-bales are destroyed by cannonading in battle, in case an army seeks shelter behind them, or seizes them in advance to throw up breast-

<sup>63</sup> 5 Bacon Abr. 173; *Respublica v. Sparhawk*, 1 Dallas (Pa.) 362.

<sup>64</sup> 5 Bacon Abr. 150; *Respublica v. Sparhawk*, 1 Dallas 362.

In *Perrin v. United States*, 4 C. of Cls. R. 547, where a French subject made a claim against the government for property destroyed by the bombardment of Greytown, the court said:—

"The claimant's case must necessarily rest upon the assumption that the bombardment and destruction of Greytown was illegal, and not justified by the law of nations."

<sup>65</sup> *Respublica v. Sparhawk*, 1 Dallas 362; Dyer 8; Brook's Trespass 213; 5 Bacon Abr. 175; 20 Viner Abr., (*Trespass*), B. a, sec. 4, fo. 476.

works for safety.<sup>66</sup> Yet all writers agree that a nation is not bound to make compensation in such case.

The same position has been judicially assumed. The Supreme Court of Georgia has said :

“ It is not to be doubted but that there are cases in which private property may be taken without the consent of the owner, and without compensation. In such cases the injured individual has no redress at law—those who seize the property are not trespassers—for example, the pulling down of houses and raising bulwarks for the defence of the state against an enemy, seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton-bags, as General Jackson did at New Orleans, to build ramparts against an invading foe.”<sup>67</sup>

The Government has always paid loyal citizens for the use and occupation of buildings and grounds in loyal states when used for officers' quarters, regular recruiting camps, and in cases where the occupation was voluntary and the result of choice superinduced by no overruling military necessity, and for this the law provides.<sup>68</sup>

But a temporary occupancy of real estate imposed by overruling necessity—an occupancy continued during the actual existence of such impending necessity—or the application of materials to purposes of defence in an emergency, has not, by the usage of the Government, been regarded as giving any claim for compensation.

This has been the uniform usage of the War Department, founded on the opinion not only of the Solicitor, but also of the Judge-Advocate General.<sup>69</sup>

<sup>66</sup> The report of Hon. R. S. Hale to the Secretary of State, November 30th 1873, shows that claims of this character were unanimously rejected : p. 49.

<sup>67</sup> *Parham v. The Justices, &c.*, 9 Georgia 341. See report, November 30th 1873, of Hon. R. S. Hale, p. 44-235. So held by House Committee on Claims, Dec. 11th 1820, Am. St. Papers Claims 753.

<sup>68</sup> House Ex. Doc. No. 124, 1st sess. 43d Congress; see letter of Quartermaster-General M. C. Meigs, February 19th 1874, letter February 26th 1874, in Lawrence's Rep. on War Claims, 1st sess. 43d Cong. Act July 16th 1798, sec. 3, ch. 85; Act May 8th 1792, sec. 5; Act March 3d 1799, sec. 24, ch. 48; *United States v. Speed*, 8 Wall. 83; *Stevens v. United States*, 2 N. & H. Court Claims 101; *Crowell's Case*, Id. 501; *Mc Kenney v. United States*, 4 N. & H. Court Claims 540; *Wentworth v. United States*, 5 Court Claims 309; *Scott's Digest Military Laws*, 1873, p. 102, sec. 96, &c.

<sup>69</sup> See opinions of Judge-Advocate General, vol. 20, pp. 598-525; vol. 26, pp. 52, 242, 247; Id., 27, p. 304; *Digest of Opinions of Judge-Advocate*, 1868, pp. 97, 98.