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THE LAWS OF WAR. THE CONSTITUTION AND THE
WAR POWER. THE LIABILITY OF THE GOVERN-
MENT TO PAY WAR CLAIMS.

THE period which covers the time of the rebellion, and since, has been eventful in our judicial and constitutional history. New questions have arisen of great importance requiring solution by diplomacy, by Congress, and the courts; questions of municipal, military, constitutional and international law.

Among these are some classes which relate to *the liability of the Government upon principles of international law, to pay demands arising in various forms by the operations of war.*

Some questions have arisen out of all the wars in which the United States have been engaged, but they were few and unimportant when compared with those growing out of the recent rebellion. These are now attracting the attention of jurists and statesmen, in a form which renders a brief discussion of some classes of them appropriate. The views which follow are therefore submitted for thoughtful consideration.

CHAPTER I.

OF WAR—REBELLION—THE CLASSES OF WAR CLAIMS—GENERAL PRINCIPLES.

DURING the wars in which the United States have been engaged, many claims¹ have been from time to time made against the Gov-

¹ For claims see American State Papers, class IX., vol. 1, "Cisims." House list of private claims, vols. 1, 2 and 3, from 1st to 31st Congress, entitled "Digested Summary and Alphabetical List of Private Claims," &c. House Vol. XXII.—18 (265)

ernment, by citizens, corporations under national, or state, or foreign authority, and by aliens.²

It is now determined, by the highest court, that the recent civil war *began*, at least for some purposes and at some localities, as early as April 1861.³ By the President's proclamations of April 15th and 19th 1861, an insurrection was declared to exist in certain states. Under, and it may be correct to say by virtue of, the Act of Congress of July 13th 1861, the proclamation of in-

Mis. Doc. 109, 42d Cong. 3d sess., digested summary private claims, presented to House of Reps. from 32d to 41st Congress inclusive. See an article on "Government claims," 1 American (Boston) Law Review 653 (July 1867).

² Claims of aliens have frequently been made the subject of diplomatic arrangements. See report of Hon. R. S. Hale, November 30th 1873, to Secretary of State, of proceedings of commission under 12th article treaty of 8th May 1871, between United States and Great Britain.

See "opinions of heads of executive departments and other papers relating to expatriation, naturalization, and change of allegiance" in House Ex. Doc. 1, part 1, 1st sess. 43d Congress, Report of Secretary of State on Foreign Relations, p. 1177, part 1, vol. 2.

The Act of July 27th 1868 (15 Stat. 243, sec. 2) gave aliens a right to sue in the Court of Claims, when the government of such aliens gave a similar right to our citizens

In *Fichera v. U. S.*, 9 Court Claims R., decided in 1873, it is shown that aliens have a right to sue the Government by the modern codes in Prussia, Italy, Hanover and Bavaria, (*Brown's Case*, 5 C. Cls. R. 571;) in the republic of Switzerland, (*Lobsiger's Case*, Id. 687;) in Holland, the Netherlands, the Hanseatic Provinces, and the Free City of Hamburg, (*Brown's Case*, 6 C. Cls. R. 193;) in France, (*Dauphin's Case*, Id. 221;) in Spain, (*Molina's Case*, Id. 269;) and in Belgium, (*De Gire's Case*, 7 C. Cls. R. 517.)

In England aliens have a remedy by "petition of right," regulated by Act 23 and 24 Victoria, July 3d 1860. *U. S. v. O'Keefe*, 11 Wallace 179; *Carlisle v. U. S.*, 16 Wallace 148. See Whiting's War Powers of the President 51; *The Venus*, 8 Cranch; *The Hoop*, 1 Robinson 196; *The Amy Warwick*, 2 Sprague.

See Whiting's "War Claims," affixed to "War Powers," p. 333, ed. of 1871; *Perrin v. U. S.*, 4 Court Claims 547.

For the acts relating to debts due by or to the United States, see Brightly's Digest.

³ *The Prize Cases*, 2 Black 636. (12 Stat. 257.) See proclamations of April 15th, April 19th, and April 27th 1861, 12 Stat. pp. 1258-1260; Lawrence's Wheaton, second annotated ed., sup. 44; proclamation of July 1st 1862; Act June 7th 1862. The treaty of Washington fixes the commencement April 13th 1861. (17 Stat. p. 867, § 12.) See the diplomatic correspondence with Great Britain, April and July 1865, pp. 362, 365, 367, 388, 394, 397, 407, 421, 422, 423; proclamations May 10th 1865 (13 Stat. p. 757), May 22d 1865 (13 Stat. p. 758). See Schedule of proclamations in Appendix B. to Lawrence's Rep. on War Claims, 1st sess. 43 Cong.

urrection was extended so as to declare eleven states, with unimportant exceptions, in rebellion.⁴

Flagrant war was continued in those states until the President's proclamation of August 20th 1866,⁵ proclaimed the "insurrection at an end." A "state of war" continued beyond this time, more or less extensive in its theatre—"non flagrante bello sed nondum cessante bello."⁶

This condition of war is recognised by the law of nations.⁷

The existence of what is called "a state of war" after flagrant war has ceased is recognised on the same principle as the personal right of self-defence.⁸

⁴ *The Venice*, 2 Wallace 277. See proclamation of August 16th 1861, &c., and July 1st 1862, 12 Stat. 1260-1266. Proclamation September 22d 1862, and January 1st 1863, 12 Stat. 1267-1269. See letter of Quartermaster-General M. C. Meigs, in appendix to Lawrence's Report on War Claims and schedule of proclamations in the Report.

⁵ McPherson's History of Reconstruction 194; 13 Stat. 763. Tennessee, June 13th 1866; 14 Stat. 312, 316. Sundry States, April 2d 1866. Texas, August 20th 1866. *Fleming v. Page*, 9 Howard 615; *Cross v. Harrison*, 16 Howard 189; *United States v. Anderson*, 9 Wallace 56; *Grossmeyer v. United States*, 9 Wallace 72; Lawrence's Wheaton, 513 note; *The Protector*, 12 Wallace 700. Treaty of Washington of May 8th 1871, art. 12; 17 Stat. 867. Act March 2d 1867, § 2; 14 Stat. 428. *Grossmeyer v. United States*, 4 Court of Claims; *Martin v. Mott*, 12 Wheaton; 29 Law Reporter, July 1861, p. 148.

⁶ *Mrs. Alexander's Cotton*, 2 Wallace 419; Lawrence's Rep. on War Claims in 1st sess. 43d Congress, Secretary Fish's opinion, p. 79.

⁷ *Cross v. Harrison*, 16 Howard 164; Whiting's War Powers 55; Article 2 of Francis Leiber, rules for government of the armies, Scott's Digest Military Laws, p. 442, § 1142; *Elphinstone v. Bedreechund*, 1 Knapp's P. C. R. 300, cited in *Coolidge v. Guthrie*, by SWAYNE, J., U. S. Circuit Court, southern district of Ohio, October 1868. Appendix to Whiting's War Powers 591, edition 1871. Letter of Hon. Hamilton Fish, Appendix C. to Lawrence's Report on War Claims.

For sundry cases relating to the rebellion, see *The Prize Cases*, 2 Black 635; *Mrs. Alexander's Cotton*, 2 Wallace 404; *The Venice*, 2 Wallace 258; *The Baigorn*, 2 Wallace 474; *Munsan v. Insurance Company*, 6 Wallace 1; *The Ouachita Cotton*, 6 Wallace 52; *Hanger v. Abbott*, 6 Wallace 532; *Coppell v. Hall*, 7 Wallace 542; *McKee v. United States*, 8 Wallace 153; *United States v. Grossmeyer*, 9 Wallace 72; *Vallandigham's Case*, Appendix to Whiting's War Powers, (ed. of 1871) 524; *The Circassian*, 2 Wallace 150; *Cummings v. Missouri*, 4 Wallace 316; *Ex parte Garland*, 4 Wallace 374; *Mississippi v. Johnson*, 4 Wallace 497.

⁸ 1 Bishop Crim. Law (5th ed.), §§ 301, 305, 338, and numerous authorities cited. *Stewart v. State*, 1 Ohio State 66-71.

During some portions of the period of rebellion flagrant war existed, not only in the states proclaimed as in rebellion, but in Missouri, Kentucky, Maryland, West Virginia, and temporarily in parts of Indiana, Ohio and Pennsylvania.

The fact of flagrant war without any proclamation or declaration by Congress is a matter of history, and is judicially recognised by the courts.⁹

War, either foreign or civil, may exist where no battle has been or is being fought.¹⁰

The rights, duties and liabilities of governments in cases of foreign war or invasion are generally well defined by the laws of nations.

The usages and laws of nations, applicable in cases of war between independent nations, apply generally to civil wars, including the recent war of the rebellion, and especially when as in the states proclaimed in insurrection the lawful state governments were entirely overthrown, and the courts and civil authority of the National Government equally disregarded and powerless.

The Supreme Court of the United States decided in December 1862, that—

“The present civil war between the United States and the so-called Confederate States has such character and magnitude as to give the *United States* the same rights and powers which they might exercise in the case of a national or foreign war.”¹¹

The court determined also that the citizens in the rebel states owed “supreme allegiance to the” National Government, and that “in organizing this rebellion they have *acted as states*.”

In the prize cases it was insisted by counsel “that the President in his proclamation admits that great numbers of persons residing”

⁹ *Prize Cases*, 2 Black 636; *Ex parte Milligan*, 4 Wallace 140; Whiting's War Power of the President 140; President Grant's veto message, June 1st 1872; Id. June 7th 1872; Id. January 31st 1873; Id. February 12th 1873; Lawrence's Wheaton 513, note.

¹⁰ Const., art. 3, § 3, clause 3; *Ex parte Milligan*, 4 Wallace 127, 140, 142. *Luther v. Borden*, 7 How. 1; *Grant v. United States*, 1 Nott & Hopkins, Court Claims 41; s. c., 2 Id. 551; Whiting's War Powers 43; *Ex parte Milligan*, 4 Wall. 127. The court say to justify martial law “the necessity must be actual and present: Paschal, Annotated Const., 212, note 215; *Ex parte Bollman*, 4 Cranch 126; *United States v. Burr*, 4 Cranch 469-508; Sergeant Const., ch. 30 [32]; *People v. Lynch*, 1 Johns, 553.

¹¹ *The Prize Cases*, 2 Black 636; Vattel 425, § 294.

in the rebel states "are loyal," and the court were asked to hold "that they * * have a right to claim the protection of the Government for their persons and property, and to be treated as loyal citizens."

But the court answered this by declaring that—

"*All persons* residing within this territory where property may be used to increase the revenues of the hostile power are in this contest liable to be treated as *enemies* though not foreigners."¹²

The power of a nation over its own rebel citizens is greater in a civil war than over alien enemies, because over the former it "may exercise both belligerent and sovereign rights"¹³—that is, the belligerent rights of war, and the sovereign right to confiscate and punish for treason—while over alien enemies it can only exercise belligerent rights, and enforce the criminal laws other than those defining treason.

In the prize cases, NELSON, J., said, "This Act of Congress, [July 13th 1861,] we think, recognised a state of civil war between the Government and the Confederate States, and made it territorial." The government was at war with all the rebel states, just as much so as it was in other wars with England or Mexico. In *The Venice*, 2 Wallace 274, Chief Justice CHASE said: "Either belligerent may modify or limit its operation as to persons or territory of the other, but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application." The District of Columbia was never declared in insurrection, but martial law was proclaimed, and it was subjected to the laws of war. It was a fortified military stronghold, and all civil authority was

¹² *Prize Cases*, 2 Black 674, 678, 693; Halleck's *Laws of War* 425, 446; *Mrs. Alexander's Cotton*, 2 Wallace 419; Whiting's *War Power of the President* 58; Vattel 425, § 293; Bynkershoek, *Laws of War* 25; *United States v. Anderson*, 9 Wallace 64; Whiting's "War Claims" affixed to "War Powers," ed. of 1871, p. 335; Marcy's Letter to Jackson, January 10th 1854, House Ex. Doc. 41, 1st sess. 33d Cong.; Huberus, tom. ii., l. i, tit. 3, *De Conflictu Leg.*, § 2; *Jecker v. Montgomery*, 18 Howard 112; *The Peterhoff*, 5 Wallace 60.

¹³ *Prize Cases*, 2 Black 673; 4 Cranch 272; Whiting's *War Powers* 44-47. But see Lawrence's *Wheaton*, 8th annotated ed. sup., 23. Whiting, in his *War Powers*, says: "Rebels in civil war, if allowed the rights of belligerents, are not entitled to all the privileges usually accorded to foreign enemies," ed. of 1871, p. 331. *Ex parte Milligan*, 4 Wallace 3, 128.

President Grant's veto messages of June 1st and June 7th 1872, and February 12th 1873; Debates on Sue Murphy's claim, 71 Globe 299, 386, 86, 161, 278.

superseded so far as deemed necessary, and the civil safeguards of the Constitution withdrawn from the inhabitants.¹⁴

Grotius, referring to foreign invasion and the liability of an invaded city to make compensation, assigns as a reason why "no action (that is, no claim) may be brought against a city for damages by war," that it is "in order to make every man more careful to defend his own."¹⁵

Vattel assigns as reasons that the damages would be so great that "the public finances would soon be exhausted. * * * Besides these indemnifications would be liable to a thousand abuses, and there would be no end of the particulars. It is therefore to be presumed no such thing was ever intended."¹⁶

There is a maxim, too, the force of which cannot be overlooked: *Salus populi suprema lex.*

The fifth article of amendments to the Constitution provides that—

¹⁴ The date of the President's proclamation declaring martial law in the District of Columbia is September 15th 1863, (13 Stat. at Large, p. 734,) and the continuance thereof in the language of the proclamation was "throughout the duration of the said rebellion."

There might and probably would be a difference of opinion as to the date at which martial law ceased to exist in the district. The President's proclamation of the second of April 1866, (14 Stat. at Large, p. 811,) may without impropriety be taken to fix the limitation referred to.

See the trial of the conspirators, May 1865; Attorney-General's opinion, July 1865; 11 Opinions 297.

In Ex parte Milligan, 4 Wallace 137, CHASE, C. J., said:—

"The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

* * * * *

"We think, therefore, that the power of Congress, in the government of the land and naval forces, and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. * * * * *

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war, without the boundaries of the United States, or in time of rebellion and civil war, within states or districts occupied by rebels treated as belligerents; and a third, to be exercised in time of invasion or insurrection within the limits of the United States, or, during rebellion, within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise."

¹⁵ Book 3, ch. XX., § 8, p. 290.

¹⁶ Vattel, ch. XV., p. 403.

No person shall be * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The phrase "due process of law," in this connection means that:—

The right of the citizen to his property as well as life or liberty could only be taken away upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the laws of the land.¹⁷

If there were no other provision in the Constitution on the subject of life or property, the life of a rebel citizen could never be lawfully taken by command of the Government, even in battle, and property for army supplies, hospitals, and other military purposes, could never be taken for the public use against the owner's will, except by the tedious process of a judicial proceeding in court, in the exercise of the civil right of eminent domain.

But if it be said that on some principle recognised among nations, justified by reason and necessity, rebels forfeit all constitutional rights, yet some of the provisions of the fifth amendment still cannot apply to a state of war, because a citizen who is conscripted against his will, arrested, and carried into the army, is deprived of his "liberty" without any "process of law." The war-power in such case is operating, and the fifth amendment so far yields to it, and is not applicable to such case.¹⁸

Since war could not be carried on if all the provisions of the fifth amendment applied in time and on the theatre of war, the Constitution gives to Congress the power—

"to define and punish offences against the *law of nations*."

"to declare war;

"to raise and support armies;

"to provide for the common defence and general welfare,"

and makes other provisions relative to a state of war.¹⁹

The Constitution recognises and, *for their appropriate uses, adopts* "the law of nations," and these include the *laws of war*.

The *laws of war*, equally with the amendments to the Constitution, determine certain rights of person and property. Here,

¹⁷ Paschal, Annotated Constitution, 260, note 257; Whiting's War Powers 60.

¹⁸ In *Ex parte Milligan*, 4 Wallace 137, per Chief Justice CHASE. (See 11 Opinions 297.)

¹⁹ Whiting's War Powers 27.

then, *in the Constitution* are two systems of law, each having a purpose. By well-known legal rules of construction they are to be construed *in pari materia*; effect is to be given to each, so that neither shall fail of having an object.

Both systems of law cannot have full or exclusive force, effect and operation at the same time and place, or over the same rights of person and property.²⁰

The laws of peace, and the amendments to the Constitution for the security of life and property, apply in time of peace and in time of war where no war or state of war exists.²¹

But where war is actually flagrant, or a state of war, the laws of war prevail; and, so far as clearly necessary for all purposes of the war, they are so far exclusive that no antagonistic law or exercise of jurisdiction can be allowed.²²

It is not to be inferred from this that there is no protection for life or property. In all cases the laws²³ of nations, including the laws of war, promise protection to life and property, as clearly and as sacredly as if written in plain terms in the Constitution. The *laws of war* are, therefore, *constitutional laws*.

Loyal men residing in loyal states during the rebellion, but having property, real or personal, in states proclaimed in rebellion, held it not as enemies, but nevertheless subject to the laws of war as affecting loyal citizens in a theatre of war.²⁴

²⁰ Whiting's War Powers 51.

²¹ *Ex parte Milligan*, 4 Wallace 127. This view is taken in *Grant v. U. S.*, 1 N. and H. Court Claims 44; but that case cannot be sustained in some other respects.

²² In *Ex parte Milligan*, 4 Wallace 127, the test applied as to whether the laws of war were in force *quoad rights of person*, was whether the civil courts were open, and it was held that the court was the judge of this. And see Coke, Com. Lit., lib. 3, ch. 6. sec. 412, p. [249 b.]

Lawrence's Wheaton 526, (2 Am. ed.) Lawrence says this is the English rule, and applies to the seizure of real estate, "so as the courts were shut up, *et silent inter arma leges.*"

Grant v. U. S., 1 N. & H. Court Claims 41.

²³ There is a summary of these by Francis Lieber, p. 441 *et seq.*, in Scott's Digest of Military Laws United States, and in the appendix to report of trial assassination of President Lincoln.

²⁴ Lawrence's Wheaton 565-576; *The Gray Jacket*, 5 Wallace 342-364; Whiting's War Powers [43d ed., 1872,] p. 582; Attorney-General's opinion, November 24th 1865; 11 Opinions 405; Elliott's Claim, September 7th 1868; 12 Opinions 488; *Prize Cases*, 2 Black 674; Senator Carpenter in Cong. Rec Mch 19th 1874.

From what has been said it will be seen that the laws of war prevailed—

1. Generally in the eleven states proclaimed in rebellion.
2. In large portions of Missouri, Kentucky, Maryland and West Virginia during the state of war.
3. In the District of Columbia.
4. In a small portion of Ohio and Indiana for a few days.
5. In a small portion of Pennsylvania during the actual existence of Lee's invasion.

The citizens of the eleven seceded states, for the period of war and by strict law, can only claim those rights of property accorded by the law of nations.

Elsewhere where actual war existed the rights of person and property, so far as they were interrupted by warlike operations, are, in considering the liability of the government, to be determined by the laws of war.

The laws of war affecting rights of person and property exist independent of legislative sanction back of the Constitution itself. It does not make, but recognises them as existing and known laws. This common law of war is liable to change by treaty stipulations, by circumstances, and for all internal purposes Congress may, and during the rebellion did, materially change it.²⁵

Congress has since wisely ameliorated²⁶ its rules, or made concessions gratuitously in the interest of justice, humanity or benevolence.

But the right of military authorities to seize, use or destroy property by the laws of war, is not abridged merely because Congress has provided other modes of seizing and disposing of property. A statute which does not by negative words necessarily abolish a common-law rule leaves the latter in force.²⁷

²⁵ *United States v. Klein*, 13 Wallace 128.

²⁶ Act March 12th 1863, 12 Stat. 591; *Mrs. Alexander's Cotton*, 2 Wallace 404; Act May 18th 1872, 17 Stat. 134; Act March 3d 1871, 16 Stat. 524; Act May 11th 1872, 17 Stat. 97; Act March 3d 1873, 17 Stat. 577; House Mis. Doc. 16—2d sess. 42d Cong.; Mis. Doc. 21, Mis. Doc. 213, Mis. Doc. 218, 2d sess. 42d Cong.; Mis. Doc. 12, 3d sess. 42d Cong.; Joint Res. No. 50, 1st sess. 39th Cong., June 18th 1866; Joint Res. No. 99, 1st sess. 39th Cong., July 28th 1866; Act July 4th 1864, ch. 241, 1st sess. 38 Cong.; *United States v. Klein*, 13 Wallace 128.

²⁷ *Mrs. Alexander's Cotton*, 2 Wallace 404, held "cotton in the Southern rebel districts was a proper subject of capture by the government during the rebellion

As during and since the war rights of property were, and are affected by the laws of war and by statutes independent of them, it becomes necessary to consider rights of property as affected by both classes.

Questions may arise in several classes of cases relating to compensation for property, *real or personal*, taken, used, destroyed or damaged on land or sea :

1. By the enemy.
2. By the government military forces in battle, or wantonly or unauthorized by troops.
3. By the temporary occupation of, injuries to, and destruction of property caused by actual and necessary government military operations in flagrant war.
4. And as to property useful to the enemy, seized and destroyed, or damaged, to prevent it from falling into their hands.

Upon ordinary claims the government is not liable for interest unless by contract so providing.²⁸

on general principles of law relating to war, though private property ; and the legislation of Congress authorized such captures." See *Planters' Bank v. Union Bank*, 16 Wallace 496.

Congress has power to make rules concerning captures on land. But this does not exclude the exercise of the military right of capture by the common law of war: *Brown v. United States*, 8 Cranch 110, 228, 229.

²⁸ American Law Review, Boston, July 1867, vol. 1, p. 657, referring to *Todd's Case* in Court Claims.

Interest has always been paid upon the advances of the *states* for war purposes.

The Revolutionary War.—Acts of Congress of 5th August 1790, and May 31st 1794.

The War of 1812–15.—Message of President Monroe and accompanying papers upon the case of Virginia. (See Senate Documents, 18th Congress, 1st session, 3d vol. document 64.)

Act of March 3d 1825, (United States Laws, vol. 4, page 132.)

Maryland, United States Laws, vol. 4, page 161.

Delaware, United States Laws, vol. 4, page 175.

New York, United States Laws, vol. 4, page 192.

Pennsylvania, United States Laws, vol. 4, page 211.

South Carolina, United States Laws, vol. 4, page 499.

Act of April 2d 1830.

Indian and other Wars :—

Alabama, United States Laws, vol. 9, page 344.

Georgia, United States Laws, vol. 9, page 626.

Washington Territory, United States Laws, vol. 17, page 429.

New Hampshire, United States Laws, vol. 10, page 1.