

CHAPTER II.

OF PROPERTY TAKEN, USED, DAMAGED, OR DESTROYED IN THE STATES PROCLAIMED IN REBELLION.

As to the eleven states proclaimed in rebellion during a state of war, it may be said in general terms that the United States, by the strict rules of international law, incurred no liability for property taken, used, damaged or destroyed therein by Government authority, so far as dictated by the necessary operations of the war, nor by the operations of the enemy. This is well settled by every writer on the laws of war.

Bynkershoek says :—

“It is a question whether our friends are to be considered as enemies, when they live among the latter, say in a town which they occupy. Petrinus Bellus de R. Milit., part 2, tit. 11, note 5, thinks they are not. Zauch, de Jure Fec. part 2, § 8, q. 4, gives no opinion. I think that they must be considered as enemies. * * * The thing does not depend only on the *quo animo*; for, even among the subjects of our enemy there are some who are not hostilely inclined against us; but the matter depends upon the law, because those goods are with the enemy, and because they are of use to them for our destruction.”²⁹

Halleck says :—

“War * * * makes legal enemies of all the individual members of the hostile states; * * * *it also extends to property, and gives to one belligerent the right to deprive the other of everything which might add to his strength and enable him to carry on hostilities.*”³⁰

“A firm possession is sufficient to establish the captor’s title to personal or movable property on land, but a different rule applies

The Mexican War.—United States Laws, vol. 9, p. 236, third section of the act to refund advances, &c., for the Mexican war.

See H. Rep. No. 119, 38th Cong., 1st sess.”

Massachusetts advances, Act of July 8th 1870, (16 Stat. 197. Sumner’s Sen. Rep. No. 4, 1st sess. 41st Cong., April 1st 1869; Ela’s H. Rep. No. 76, 2d sess. 41st Cong.)

²⁹ Laws of War 25; Manning’s Law of Nations, chap. iv. p. 122; Thomas Jefferson vindicated the confiscation of property of colonists who adhered to Great Britain during the revolution on this principle: Jefferson’s Works, vol. 3, p. 369. Sumner’s Speech, Globe, vol. 71, 380.

³⁰ International Law 446; Id. 457–460; Globe, vol. 71, 300, Sumner’s Speech. January 12th 1869; *Prize Cases*, 2 Black 671–674; Lawrence’s Wheaton 596.

to immovables or real property. A belligerent who makes himself master of the provinces, towns, public lands, buildings, &c., of an enemy, *has* a perfect right to their possession and use. * * The possession * * gives a right to its *use* and its *products*."³¹

By modern usage there are, and ought to be, humane limitations on the ancient right of seizure, which restrict it to what is useful in the prosecution of the war or necessary to disable the enemy.³²

By General Order No. 100, approved by the President April 24th 1863, "instructions for the government of the armies" were issued, which were prepared by the eminent jurist, Francis Lieber, LL. D., embodying the laws of war as recognised among civilized and Christian nations, in which it is declared that—

"Churches, hospitals or other establishments of an exclusively charitable character, establishments of education, museums, &c., * * * may be taxed or *used* when the public service may require it."³³

The Supreme Court has determined that during the rebellion—

"Cotton in the Southern rebel districts—constituting as it did, the chief reliance of the rebels for means to purchase munitions of war, an element of strength to the rebellion—was a proper subject of capture by the government during the rebellion *on general principles of public law relating to war, though private property*; and the legislation of Congress during the rebellion authorized such captures."

And the court said as to cotton—

"Being enemy's property, the cotton was liable to capture. This rule, as to property on land, has received important qualifica-

³¹ Halleck 447; Wheaton, Int. Law, pt. 4, ch. 2, §§ 5-11; 1 Kent 110; Heffter, Droit International, § 130; Marten's Précis du Droit des Gens, § 280; Requielme, Derecho Pub. Int., lib. 1, tit. 1, cap. 12.

³² *United States v. Klein*, 13 Wall. 138; Whiting's War Powers 48, 52, 53; Lawrence's Wheaton 630; Dana's Wheaton, sect. 256, note 171; Halleck 448-451; Vattel, Law Nat., 365, book 3, chap. 9; Bynkershoek's Laws of War; *Brown v. United States*, 8 Cranch 122, 228; Globe, vol. 71, 383; 1 Kent 92, 93, 120; *Alexander v. Duke of Wellington*, 2 Russell and Mylne 35; 1 Kent's Com. 357; *United States v. Padelford*, 9 Wallace 531.

Coolidge v. Guthrie, United States Circuit Court, southern district Ohio, October 1868, appendix 591 to (43d ed., 1871) Whiting's War Powers.

Mrs. Alexander's Cotton, 2 Wall. 419; 1 Kent 92, 93; *United States v. Klein*, 13 Wall. 137.

³³ Scott's Digest, Military Laws, 446. See McPherson's chapter "The Church and the Rebellion," History of Rebellion, 460, &c.

tions. It may now be regarded as substantially restricted 'to special cases, dictated by the necessary operation of the war,' and as excluding, in general, the seizure of the private property of pacific persons for the sake of gain. The commanding general may determine in what special cases its *more stringent application is required by military emergencies.*"³⁴

Tobacco and other property was also an element of strength, and by the laws of war might equally with cotton, and upon the same principles, be destroyed.³⁵

³⁴ *Mrs. Alexander's Cotton*, 2 Wallace 419.

As to the liability of the Government generally, see Delano's resolution in the House of Representatives, January 30th 1866.

See *Debates in Globe*, vol. 56, pp. 509-512.

This resolution was reported from the Committee of Claims by Hon. C. Delano, now Secretary of the Interior. (See House Rep., No. 10, 1st Sess. 39 Cong., January 18th 1866.)

Mr. Delano said—

"We are not *almoners* merely for the nation, and have no just right to impose increased taxation in order to gratify our feelings of benevolence, nor to establish principles of abstract justice and equity, when there is no rule or law requiring it."

The judge-advocate general decided that cotton taken to strengthen fortifications and so destroyed has been regarded as a "loss by casualty of war." (*Digest of Opinions Judge-Advocate*, 97-8.) (See *Opinions*, vol. 26, p. 247; *Parham v. The Justices*, 9 Georgia 341.) The Act of February 9th 1867, 14 Stat. 397, indicated the sense of Congress by declaring that no payment should be made for property destroyed in the insurrectionary states.

The Act of June 1st 1870, 16 Stat. 649, authorized payment to Cutler for cotton seized by General Grant for military purposes, *Globe*, vol. 78, 3085, April 29th 1870. But Cutler had raised the cotton by contract with the Government made under the captured and abandoned property act.

The commissioners of claims allowed for cotton used for beds in hospitals. See first report, *Mis. Doc.* 16, 2d sess. 42d Cong., p. 7.

The right to seize and destroy cotton to impair the power of the enemy was considered before the commission under 12th article, treaty of May 8th 1871, between the United States and Great Britain. (See Hale's report to Secretary of State, November 30th 1873.) Authorities were cited: *Vattel*, book 3, c. 9, §§ 161, 163, 164; *Twiss*, vol. 2 (war), pp. 122-124; *Rutherford*, book 2, c. 9, § 16; *Mrs. Alexander's Cotton*, 2 Wall. 404; *The United States v. Padelford*, 9 Id. 531; *The United States v. O'Keefe*, 11 Id. 178; 1 *Kent's Com.* 92, 93.

³⁵ The commissioners of claims, under the Act of March 3d 1871, in their third annual report of December 8th 1873, *House Mis. Doc.* No. 23, 1st sess., 41st Cong. p. 3, say:—

"Tobacco was by law never made an army supply till the Act of March 3d 1865, provided that it might be furnished at cost to those who desired it, and at their expense.

"After the capture of Atlanta, in September 1864, General Sherman issued an order on the 8th of September 1864, authorizing the chief commissary of subsist-

While these are the rights which the Government *might* lawfully enforce against all the inhabitants of the seceded states during actual insurrection, yet in practice they were wisely and humanely modified by acts of Congress, and the military authorities in virtue of their general power in special cases advised departures from strict rules.⁶⁶

ence to take possession of and issue to the troops all the tobacco in Atlanta, and give certificates thereof to the owners, to be accounted for.

"Pursuant to this order, tobacco was taken, and the commissary department recommended, 'As this tobacco was taken *by order of General Sherman* and issued to the troops *in lieu of other rations*, and as the loyalty of the claimant is clearly established,' that payment should be made.

"We have strictly followed this precedent, and have not allowed for tobacco except when taken under this order:" 3d Genl. Rep. Com. of Claims, *art.* 6, p. 3.

The commission of claims, under 12th article of treaty of 8th May 1871, between the United States and Great Britain, adopted the same principle: Hale's report to the Secretary of State, November 30th 1873, page 45.

⁶⁵General Halleck's instructions of March 5th 1863, to the commanding officers in Tennessee, said:—

"The people of the country in which you are likely to operate may be divided into three classes: 'First. The truly loyal. Where it can possibly be avoided, this class of persons should not be subjected to military requisitions. It may, however, sometimes be necessary to take their property, either for our own use or to prevent its falling into the hands of the enemy. They will be paid at the time the value of such property; or, if that be impracticable, they will hereafter be fully indemnified. Receipts should be given for all property so taken without being paid for."

(Lawrence's Wheaton, *sup.* p. 40.) This related only to Tennessee, and after March 5th 1863, the general rule was prescribed, by an order of the War Department, July 22d 1862, as follows:—

"Ordered, that the military commanders within the states of Virginia, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas, in an orderly manner, seize and use any property, real or personal, which may be necessary or convenient for their several commands as supplies or for other military purposes, and while property may be destroyed for military objects, none shall be destroyed in wantonness or malice." (Lawrence's Wheaton, *note* p. 625.)

Halleck's International Law and Laws of War, p. 460, § 17, cites Mr. Marcy, Secretary of War, as giving directions to our commanding generals, during the war with Mexico, that they might obtain supplies from the enemy.

1. "By buying them in open market at such prices as the enemy might exact."
2. They might take the supplies and pay the owners *a fair price*, without regard to what they might themselves demand on account of the enhanced value resulting from the presence of a foreign army.
3. They might require contributions without paying or engaging to pay.

Halleck says: "There can be no doubt of the correctness of the rules of war as here announced by the American Secretary."

He cites many authorities, and the letters from Marcy to Scott and Taylor, &c. (See Ex. Doc. 60, House Reps., 1st sess. 30th Cong. p. 963.)

Congress has also, as a gratuity, provided for the payment

“To those citizens who remained loyal, for stores or supplies taken or furnished during the rebellion for the army and navy of the United States in states proclaimed as in insurrection, including the use and loss of vessels.”³⁷

The right to take property in the insurgent states, *by the common laws of war*, remained generally in force, but Congress also provided modes of taking property *in statutory modes*.³⁸

Loyal citizens residing in the loyal states during the rebellion, but having property, real or personal, in the states proclaimed in insurrection, can, by the strict rules of international law, claim for it no immunity. Its local *situs* imparts to it the character and *status* of enemy's property. It may be lawfully used for military purposes, or destroyed if it will be useful to the enemy.³⁹

The property situated in the enemy's country owned by corporations existing by virtue of charters granted by foreign govern-

As to cotton, &c., Act March 12th 1863, 12 Stat. 591; Act May 18th 1872, 17 Stat. 134; House Ex. Doc. 97, 39th Cong., 2d sess.; Senate Ex. Doc. 37, 2d sess. 39th Cong.; House Ex. Doc. No. 114, 2d sess. 39th Cong.; Senate Ex. Doc. No. 22, 2d sess. 40th Cong.; House Rep. No. 7, 1st sess. 40th Cong.; Senate Ex. Doc. 56, 2d sess. 40th Cong.; House Ex. Doc. 82, 3d sess. 40th Cong.; House Ex. Doc. 113, 3d sess. 41st Cong.; House Ex. Doc. No. 146, 1st sess. 43d Cong.

³⁷ Act March 3d 1871, 16 Stat. 524; May 11th 1872, 17 Stat. 97; March 3d 1873, 17 Stat. 577. See the reports of commissioners of claims, 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. 240, 1st sess. 38 Cong.

³⁸ In *United States v. Klein*, 13 Wallace 128.

It may be said, in general terms, that property in the insurgent states may be distributed into four classes: 1. That which belonged to the hostile organizations, or was employed in actual hostilities on land. 2. That which at sea became lawful subject of capture and prize. 3. That which became the subject of confiscation. 4. A peculiar description, known only in the recent war, called captured and abandoned property.

As to captured and abandoned property, including cotton, see note 36 *ante*.

Alexander's Cotton, 2 Wallace 421.

See Acts of March 12th 1863, and July 2d 1864. See a compilation of Acts of Congress and rules and regulations prescribed by the Secretary of the Treasury, concerning commercial intercourse with the states declared in insurrection, and as to captured, abandoned, and confiscable property, reprint 1872. Act May 18th 1872.

³⁹ 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 468; *Perrin v. United States*, 4 Court Claims 543; *Prize Cases*, 2 Black 674; Senator Carpenter in Senate, March 19th 1874.

ments, or loyal states, or rebel states, before or since secession, can claim no protection beyond that accorded to other enemy's property. A large part of the property in the insurrectionary states might be held by corporations, and thus be a means of strength to the rebellion.⁴⁰

As by the laws of war the lawful military authorities might destroy houses in these states to prevent them from being a means of aid and comfort to the rebellion, or to hasten its speedy overthrow, so they may much the more be used without liability to make compensation.⁴¹

The policy determined on by Congress is clearly expressed in the Act of February 21st 1867, which prohibits

"The settlement of any claim for the occupation or of injury to real estate when such claim originated during the war for the suppression of the Southern rebellion in a state or part of a state declared in insurrection."⁴²

⁴⁰ This rule is not changed by the fact that the confiscation acts do not apply to corporate property: *Planters' Bank v. Union Bank*, 16 Wallace 483.

As to Southern railroad companies, see House Report 34, 39th Cong. 2d sess., March 2d 1867; House Rep. No. 3, 2d sess. 40th Cong., Dec. 11th 1867; Ex. Doc. No. 73, 2d sess. 40th Cong., Jan. 7th 1868; House Rep. No. 15, 2d sess. 40th Cong., Feb. 7th 1868; House Rep. No. 78, 2d sess. 41st Cong., June 9th 1870.

⁴¹ See letter of Quartermaster-General M. C. Meigs of February 26th 1874, in Lawrence Rep. on War Claims No. 262, 1st sess. 43d Congress, March 26th 1874. This report discusses the several classes of War Claims, perhaps more fully than any other made to Congress.

No claim was made for use and occupation in the insurrectionary states before the commission held under twelfth article of the treaty between the United States and Great Britain of May 8th 1871, except "within the *loyal* portions of the United States, or within those portions of the insurrectionary states permanently reclaimed by the United States, and for damages resulting from such use and occupation."

In Mr. Hale's report it is said:—

"The counsel cited the letter of Earl Granville to Mr. Stewart, (No. 23 of parliamentary papers, No. 4, on the Franco-German war, 1871, British State Papers;) Professor Bernard's 'Neutrality of Great Britain,' &c., pp. 440, 454; United States Senate Documents, first and second sessions; 34th Cong., vol. 15, No. 103, pp. 169, 463; *United States v. O'Keeffe*, 11 Wallace 178; *Water's v. U. S.* (4 C. Cls. Rep. 390); *Russell* (5 Id. 120); *Filor v. United States*, 9 Wallace 45; also *Campbell's Case*, 5 C. Cls. Rep. 252, and *Provine's Case*, Id. 455; Act of July 4th, 1864, 13 Stat. 381."

See letter of Quartermaster-General M. C. Meigs, February 19th 1874, on p. 25 of Lawrence's Report on War Claims, in 1st sess. 43d Cong.; Act March 3d 1813, ch. 513, § 5; Art. 42 Revised Army Regulations of August 10th 1861; Act March 3d 1817, ch. 218, § 2; Act July 4th 1864; Act February 21st 1867.

⁴² 14 Stat. 397; 11 Opinions, Nov. 24th 1865, p. 405; 12 Opinions 486, Sept.

By the strict rules of law literary institutions are equally subject to use by the lawful military authorities. But on grounds of public policy nothing but urgent necessity could justify such use. The proper military authorities must, as a general rule, be allowed to judge of the necessity, or military operation could not be successfully carried on.⁴³

In the application of the general principles stated there are some recognised exceptions.

The Government, in honor and in law, is bound to make compensation for property of citizens used, damaged or destroyed when—

I. The commander of an army, under proper authority, or other officer duly authorized, in advance or at the time of the use, damage or destruction, distinctly *agrees* with the owner of the property that the Government shall make compensation, and when, *upon the faith of this, the promise is accepted* and the property voluntarily surrendered.⁴⁴

7th 1868, declares that "a claim for use and occupation of real estate in Tennessee by the army in January 1863, cannot be settled by the Executive Department of the government, under Act July 4th 1864, and February 21st 1867." *Filor v. United States*, 9 Wallace 45; *Provine's Case*, 5 Court of Claims 455; *Kimball's Case*, Id. 252.

⁴³ See Sumner's speech in Senate, January 12th 1869; 71 Globe, 3d Sess. 40th Congress 301.

Congress has considered the subject since the close of the rebellion. See claim of William and Mary College. Claim for destruction of buildings and property by "disorderly soldiers of the United States during the late rebellion." For House proceedings see Globe, vol. 87, 2d Sess. 42d Congress, pp. 784, 785, (February 2d 1872,) and vol. 88, pp. 934, 940, 941, 942, 943, 1190, 1191, 1192, 1193, 1194, 1195. The bill was defeated. See House Report No. 9, 2d Sess. 42d Congress, January 29th 1872.

East Tennessee University.—Claims for use and occupation of buildings by United States troops. For Senate proceedings in 42d Congress, see Globe, vol. 39, p. 2288, 2d Sess. 42d Congress (April 9th 1872). For House proceedings, see Globe, vol. 93, p. 697 (January 18th 1873). See Senate Report No. 17, 2d Sess. 42d Congress. Vetoed, January 30th 1873. See Senate Ex. Doc. 33, 3d Sess. 42d Congress. See Globe, vol. 93, p. 991, January 31st 1873.

Kentucky University.—Claim for use and occupation of buildings by United States troops. For Senate proceedings, 41st Congress, see vol. 78, p. 3145 (May 2d 1870), vol. 80, p. 5538 (July 13th 1870). For House proceedings, see Globe, vol. 82, p. 480 (January 13th 1871). Approved January 17th 1871. See Statutes at Large, vol. 16, p. 678.

⁴⁴ *Steven v. United States*, 2 Court Claims 95; *Elliott's Claim*, 12 Opinions Attorneys-General 485; *Provone v. United States*, 5 Court Claims 456; *Kimball v. United States*, Id. 253; *Waters v. United States*, 4 Court Claims 390; *Filor v. United States*, 9 Wallace 45; *Ayres v. United States*, 3 Court Claims.

But a *contract* is not necessarily created by the mere fact that the highest military authority gives instructions to subordinate officers, or issues orders *to them*, advising them that enemies "will be paid at the time," or that "they will hereafter be fully indemnified."

The Government is not bound, either, by the unauthorized promise of an officer.⁴⁵

The mere fact that a voucher or receipt is given for property taken in enemy's country by a military officer does not make the Government liable to pay for it.⁴⁶

Military officers frequently organize a "board of survey" or commission to assess the value of property taken in the enemy's country, or destroyed on loyal territory. This is done to preserve the history of military operations, to enable superior officers to hold the subordinates to a proper responsibility in the conduct of war.⁴⁷ The liability is determined *by the laws of war*.

As to unauthorized contracts see Act March 2d 1861, ch. 84, sec. 10, vol. 12, Stat. 220; Joint Res. No. 8, January 31st 1868, 15 Stat. 246; Act June 1d 1862, 12 Stat. 411; 4 Court Claims 75, 359, 549; 5 Court Claims 65; 1 Opinions Attorneys-General 326; 7 Wallace 666; 4 Court Claims 176, 401, 495; 5 Court Claims 302; 8 Wallace 7. And see sundry Acts of Congress in relation to public contracts.

⁴⁵ In *Filor v. United States*, 9 Wallace 45, the court refer to a case at Key West, of promises for the use of the quartermaster's department, and say it was not, "binding upon the Government until approved by the quartermaster-general." *Ayres v. United States*, 3 Court Claims 1.

See the acts relating to the Court of Claims; Act March 3d 1863, 12 Stat. 767, section 12, and other acts cited in the volumes of reports of that court.

"The law of agency, as applicable to the United States, is far more strict than to individuals, for the agent must have *actual authority* in order to bind the Government:" 1 Boston American Law Review, § 58.

⁴⁶ The Revised Army Regulations of 1861, as corrected to June 25th 1863, edition of 1867, p. 512, sec. 22, provides that "all property, public or private, taken from alleged enemies, must be inventoried and duly accounted for. If the property be claimed as private, receipts must be given to such claimants or their agents." But this does *not change the laws of war*, and give a liability which does not exist by such law. The laws of war are prescribed by another power, and cannot be abrogated by army regulations.

See Report of November 30th 1873, of Hon. R. S. Hale to the Secretary of State, where the claim of Kater was paid on a voucher, the order of General Sheridan having in effect promised compensation for such property to loyal citizens."

⁴⁷ Such valuation was made by order of General Jackson, after the battle of New Orleans, of certain damages to real estate: American State Papers, class

II. When, by the terms of the capitulation of a hostile city or army, there is a distinct stipulation by the proper officer commanding the Union Army that rights of person and property shall be respected, this pledge is to be respected, and a violation of it by military officers clothed with authority to act in the name of the Government would create a liability to repair any damages. But this protection only extends to such enemies as strictly observe neutrality and the terms of the capitulation, and to property the nature of which does not take it out of the condition of neutrality.⁴⁸

And it cannot be an absolute guarantee against unauthorized pillage or other damages incident to surrounding circumstances.

III. The same rule of protection is extended to persons and property where there is no capitulation, but an authorized military proclamation promising it, when a city or district of the enemy is subdued and occupied.⁴⁹ This principle will apply generally to duly authorized safeguards.⁵⁰

A passport may be given which does not amount to a safeguard. But a safeguard for the purpose of protection under a flag of truce may amount to a guarantee of the safety of persons, and of such property as may be named, or may reasonably accompany the person, excluding unnecessary valuables.⁵¹

ix., claim 752. Such boards were frequently organized during the rebellion: *Justice v. U. S.*, 8 Court Claims R. 37; *Heathfield v. U. S.*, Id. 214.

⁴⁸ *Case of Thorshaven*, Edwards 107; *Alexander's Cotton*, 2 Wallace 421; Vattel, book 3, ch. 18, § 294, p. 425; *The Venice*, 2 Wallace 258; Winthrop's Digest Opinions of Judge-Advocate-General, 1862 to 1868, p. 86 (ed. of 1868), vol. xviii., p. 511, Records of Bureau of Military Justice. *Planters' Bank v. Union Bank*, 16 Wallace 468.

The commission under the 12th article of the treaty of 8th May 1871, between the United States and Great Britain, held substantially this.

⁴⁹ And while the conditions of the proclamation are observed by the enemy, and hostilities are not renewed by them, the pledge of protection cannot be revoked by military authority: *Planters' Bank v. Union Bank*, 16 Wallace 496. See also Act July 13th 1861, § 5 (12 Stat. 257), and President's proclamation, August 16th 1861 (12 Stat. 1262).

⁵⁰ See Act February 13th 1862, § 5; Army Regulations of 1861 revised to June 25th 1863 (ed. of 1867), pp. 112, 115.

⁵¹ 1 Kent's Com. 161; Id. 417, § 270; Woolsey's International Law, p. 250; 1 Bello, p. 265; Calvo, 2d vol., p. 97, edition of 1868. In 1863 a person came under flag of truce through the Union lines to New Orleans, then under command of General Banks, bringing a trunk having, as alleged, Confederate bonds. This party was arrested, and afterwards asked reparation. The Judge-Advocate General said: "In regard to the merits of such claim, it need only be said that as far as the rebel securities are concerned the seizure was clearly authorized.