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WAR CLAIMS AGAINST THE UNITED STATES.

(Concluded from p. 345.)

CHAPTER VI.

PROPERTY WHICH MAY BE USEFUL TO THE ENEMY SEIZED AND DESTROYED OR DAMAGED TO PREVENT IT FROM FALLING INTO THEIR HANDS.

Is the government liable to make compensation for the property of a loyal citizen in a loyal state, seized and destroyed or damaged by competent military authority—flagrante bello—to prevent it from falling into the hands of the enemy, as an element of strength where warlike operations are in progress, or where the approach of the enemy is prospectively imminent? Widely conflicting views have been expressed on this question. 71

There are five modes in which the government has a right to take or use private property:

1. By taxation. 72

2. As punishment for crime under judicial sentence, or by sentence of a court-martial. 73

71 Roscoe Conkling in Senate, Dec. 14th 1870, 82 Globe 98, on claim of J. Milton Best. See President's Veto Message, June 1st 1872.

Senator Howe, January 4th 1871, 82 Globe 302.

72 Constitution, art. 1, sec. 8, clause 1.

73 Constitution, art. 3, &c. sec. 1, clause 3; amendments, art. v, vi, viii. Grotius, b. 2, ch. 14, sec. 7.
3. In virtue of the right of *eminent domain* for public use.\(^7\)

4. By the law of "*overruling necessity*," which Lord *Hale* calls the *lex temporis et loci*, and which is both a war and peace power.\(^7\)

5. By the war-power on the theatre of military operations, *flagrante bello* for military purposes.\(^7\)

The right to take property in the first, second and fourth class of cases named exists without any duty to make "just compensation" in money.

The question of the liability of the government to make compensation for property taken and damaged, or destroyed to prevent it from falling into the hands of an enemy, must, as was very well said by the Supreme Court of Pennsylvania in September 1788, in the case of *Respublica v. Sparhawk*, 1 Dallas 362, be governed—

"By reason, by the law of nations, and by precedents analogous to the subject before us."

On principles of right and propriety, a military officer, even in flagrant war, would not be justified in seizing and destroying the property of a private citizen to prevent it from falling into the hands of the enemy, unless the "danger be immediate and impending," or be reasonably certain to happen during hostile military operations; for if this be not so, the officer acting without necessity or excuse would become a trespasser, and his act would be one of lawless violence, for which he would and the nation would not be liable in damages.\(^7\)

It has been determined, also, that the officer is not the sole judge of the necessity of seizing and destroying.\(^7\)

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\(^7\) Constitution, art. v., Amendments. "*Eminent domain is a civil right:*" *Grant v. U. S.*, 1 Court Claims 45; *American Print-Works v. Lawrence*, 1 Zabriskie 258; *Grotius*, b. 2, ch. 14, sec. 7; Id. b. 3, ch. 20, sec. 7.

\(^7\) *Hale v. Lawrence*, 3 Zabriskie 728–9; *Grant v. U. S.*, 1 Court Claims 45; *Respublica v. Sparhawk*, 1 Dallas 362.

\(^7\) 13 Howard 140; Whiting's War Powers 26.


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Now, as a matter of common sense and reason, the owner of property is no more injured if it is destroyed by our own government than if by the enemy. The loss to him is the same in either case. Yet no statesman or writer on the laws of nations ever claimed that a government is bound by any principle of law to make compensation for property taken or destroyed by the enemy in time of war, nor by its own military forces in actual battle.

Where property is taken to prevent it from falling into the hands of the enemy, the position of property so situated is the owner's misfortune.

"He is not to be relieved of it at the cost of the United States, for they are not responsible to him for the circumstances that created it."

To require the government to pay where it is guilty of no wrong, in the exercise of both a right recognised by the civilized world and enjoined by the highest duty and for the common good, would be the harshest rule that could be recognised.

All writers agree that the government incurs no liability by destroying it in battle, or for destroying it in an attempt to recapture it from an enemy. Bynkershoek says of the property of loyal citizens: "Those goods may be properly taken by us, by the laws of war, if they have been before taken by our enemies."

What difference can it make to the owner whether his property is destroyed immediately in advance of a battle, or in the conflict, or in an effort to recapture? To say that a nation is not liable if it applies the match and blows up a house a moment after the enemy

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404, of Niles’s Register, March 1816; Milligan v. Hovey, 13 American Law Register N. S. 122; Stevens v. U. S., 2 Court Claims 95. See Linds v. Rodney, 2 Douglass 613; Elphinstone v. Bedreschund, 1 Knapp’s P. C. R. 300; Coolidge v. Guthrie, Swayne, J., U. S. Circ. Court, S. District Ohio, Oct. 1868, in appendix to (43d ed. 1871) Whiting’s War Powers 591. In Report No. 600, House Reps., 1 sess. 36 Congress, May 26th 1860, Mr. Stanton, of the Committee on Military Affairs, in a case similar to that of Mitchell v. Harmony, said the officer "was the proper judge." See Ex parte Milligan, 4 Wallace 2; Martin v. Mott, 12 Wheaton 19; Whiting’s War Powers 67; Luther v. Borden, 7 Howard 45.


80 Vattel, ch. xv. p. 402, and authorities heretofore cited.

81 Loring, J., dissentiente, Grant’s Case, 2 Court Claims 552; 1 Id. 41.

82 1 Laws of War, ch. v.
gets in it, but is liable for doing the same thing a moment before, would seem a very *reductio ad absurdum.*

It may be said the government should be liable for destroying a house when its seizure by the enemy might be only for the purpose of temporary occupancy, but not with a purpose to destroy it.

But if the enemy occupy a house the government may in battle destroy it to dislodge him, and in such case incur no liability. It can make no difference to the owner whether it be destroyed a moment before or a moment after the enemy enter it.

In such case, too, the reason of the rule mentioned by Grotius, which exempts a nation from liability for damage done by the enemy, may well apply, "in order to make every man more careful to defend his own."

To hold the government liable under such circumstances would furnish an inducement to owners of property in times of danger to magnify it in order to induce the government to destroy it and so become an insurer against peril; it would remove the inducement of citizens to throw obstacles in the way of the enemy's approach; it might encourage citizens rather to invite or aid it; it would diminish the motive to furnish supplies and aid to our army in advancing to anticipate or defeat the approach of the enemy, and in all these modes disregard the maxim *salus populi suprema lex.* This overpowering and relentless rule of the supreme law of public safety is one which the stern necessities of war can neither safely omit nor mitigate.

A rule which would hold the government liable might sometimes furnish an excuse for treacherous officers to omit necessary destruction of property, or induce a nation financially embarrassed to desist from the only means of preserving its existence. These considerations, so immeasurably important, should never be left to turn the hesitating scale in a moment of peril.

A nation should not be liable for property taken to prevent it from falling into the hands of an enemy, because it is impossible to establish any just measure of damages. What is the value of property liable to the imminent impending danger of being taken or destroyed by rebels? Why should the government pay when the markets of the world could not supply another purchaser?

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83 See President Grant's veto message, February 12th 1872, Senate Ex. Doc. 42, 3rd sess. 42d Cong., as to Manchester, Ky., Salt Works.
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Vattel, in assigning reasons why an invaded nation is not liable to its citizens for the ravages of war, says, "the public finances would be exhausted," and "these indemnifications would be liable to a thousand abuses."

Now, all these reasons apply with very great if not equal force to the damages now under consideration. 84

This question involves to some extent the theory and nature of government.

The preamble to the Constitution declares that it was ordained—to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty.

A government organized to insure domestic tranquillity and the common defence is *ex necessitate* clothed with the power to employ the necessary means to secure the end. The Constitution, in recognising the laws of nations and the war power, gives the government a right to employ the means which it may declare necessary, or which nations usually employ, to make the common defence. These laws give the power and create the duty to seize property.

84 See 2 Greeley's American Conflict 611; Sumner's Speech, January 12th 1869, 71 Globe 301; Alexander's Cotton, 2 Wallace 420; Senator Conkling, December 14th 1870, 82 Globe 98; Senator Chandler, December 14th 1870, 82 Globe 100; Senator Howe, January 4th 1871, 82 Globe 303; Whiting's Opinion, January 15th 1864, in Globe, May 20th 1864, vol. 52, p. 2390.

President's Annual Message, December 1873.

On the 11th March 1818, a report was made to the House of Representatives as to war-claims, under the Act of April 9th 1816, in which it is said the documents from the commissioners of claims "develop the fact that on the frontiers of New York a system of fraud, forgery, and perhaps perjury, has been in operation, which the committee believe has never been witnessed in this country."

There are now pending before the commissioners of claims, under the Act of March 3d 1871, 17,048 claims, amounting to $50,000,000.

See speech in the House of Representatives, February 7th 1874, of Mr. Lowndes.

See also House Executive Document No. 121, first session forty-third Congress; Report Quartermaster-General, page 225, of Executive Document No. 1, part 2, House Representatives, forty-second Congress, second session.

See remarks of Mr. Delano (now Secretary of the Interior) in the House of Representatives, January 30th 1866, 56 Globe 509-512; and in the report he made from the Committee of Claims, January 1866, House of Representatives No. 10, first session thirty-ninth Congress.

The war claims now before Congress, amount to near $20,000,000, and it is estimated that if this class of claims should be paid, they would reach very many millions in amount. See Lawrence's Report on War Claims, first session forty-third Congress, March 1873.
in time of war to prevent it from falling into the hands of an enemy. Where a nation exercises a lawful power in a lawful mode in the performance of an absolute duty, it would reverse every precept of reason, justice, and the whole logic of the common law to hold it liable and guilty as a trespasser or a *tortfeasor*. Nor is there any principle on which to rest an express or implied contract to pay in the class of cases under consideration. No act of Congress has created any such liability.

It cannot grow out of any obligation of the government; for no principle of law, no writer, has ever declared it an *insurer* of the safety of its citizens from the perils which exist in all wars.

There is no constitutional obligation to make compensation in this class of cases, unless it be found in the last clause of the fifth amendment to the Constitution, which, after reciting certain principles, most of which relate to rights of person and property in a *state of peace* and by civil administration, concludes by saying:

*Nor shall private property be taken for public use without just compensation.*

This can have no reference to the war seizure and destruction of property, unless—

1. This clause relates to war-measures and the exercise of military powers; nor unless—

2. The destruction indicated is a "public use."

This provision does relate to property in time of peace. It does relate to property not in the "enemy's country," and not in the immediate theatre where armies are operating or war is flagrant, and battle in progress or imminent, in loyal territory. In such cases the laws of peace prevail. By its very terms, and upon the maxim *noscitur a sociis*, this provision applies wherever the laws of peace prevail.

That it does admit the right of *eminent domain* is clear, but that it does not extend such right to the cases of property seized by military authority and destroyed in war, upon principles of *overruling military necessity* analogous to the "belligerent right of capture and destruction of enemy's property in enemy's country," has been often affirmed.

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85 Senator Carpenter, January 4th 1871, 82 Globe 300; Senator Edmunds, January 5th 1871, 82 Globe 311; *Grant v. United States*, 1 Conrr of Claims 45.

Vattel says: "No action lies against the state for losses which she has occasioned, *not wilfully*, but through necessity." (Ch. xv., p. 403.)
There is a law of "overruling necessity," entirely distinct from the right of eminent domain.

The Constitution, as originally made, contained no provision requiring just compensation for private property taken for public use. It was silent as to that. But the principle that such compensation should be made, as Story says,

"Is founded on natural equity, and is laid down by jurists as a principle of universal law." 66

This principle antedates the Constitution, existed when it was adopted, is not abrogated by it, and was therefore in force without the fifth amendment, which only affirms it, but makes no new law in this respect. So the law of overruling necessity antedated the Constitution, existed when it was adopted, is not abrogated by it, therefore admits it, and has through our whole history been recognised in courts, both under national and state authority.

It is a law, too, for peace and war, and may be exercised by civil and military authorities.

On the 11th of December 1820, the Committee of Claims of the House of Representatives made a report on a claim for use and occupation of houses, and damages thereto, by General Jackson's officers, and for hospitals, during the invasion of the British at New Orleans in 1814, in which it is said, referring to the demand as based on the fifth amendment to the Constitution, that "the taking of 'private property for public use' would seem to imply a voluntary act on the part of the government, which in the present case could hardly be alleged:" (American State Papers, class ix., Claims, vol. 1, p. 753.)

All writers agree that the destruction of property in a battle is not a taking for public use within the meaning of the Constitution. Then how is a destruction for war purposes just before a battle a use of the property? The government does not use, but destroys, to prevent the enemy from using. A destruction of property is very different from an ordinary taking for the public use. This belligerent right of destruction is distinct from and should not be confounded with the right of eminent domain. This clause of the fifth amendment recognises and affirms the right of eminent domain, a peace power—"a civil right." (Grant v. United States, 1 Court Claims 45; "is a civil right;" Halleck Int. Law. 124; 6 Cranch 145.)

Even in time of war Congress may, by law, authorize the exercise of the right of eminent domain in aid of military operations. It operates by or in pursuance of a statute. It employs judicial process.

But the war power may act without statute, and in flagrant war may seize supplies where needed. But in time of peace, or in time of war, but away from the theatre of war, the war power is as powerless as is the peace power in the conflict of battle.

And, unlike the right of eminent domain, whatever power is exercised in virtue of the law of overruling necessity, does not generally create a claim for compensation or damages on the citizens or government, rightfully using it in a case proper for its exercise. It is a law as sacred, valid, and operative as a statute or the Constitution itself.

The exercise of the right of eminent domain admits of a discretion—the choice to condemn in pursuance of a statute one or another location for a post-office, "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," roads and other works for "public use." The law of necessity, the "lex instantis," on the contrary, admits of neither delay nor choice.

The existence of those two independent rights, and the distinction between them, is fully recognised by the authorities.

Vattel recognises the law of necessity in time of war, thus:

"There are other 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."

The Supreme Court of Pennsylvania recognised this law of necessity in time of war as distinct from the civil right of eminent domain by saying:

"Many things are lawful in that season (flagrante bello) which would not be permitted in time of peace. * * * The rights of necessity form a part of our law." 87

The Supreme Court of Georgia said:

"There are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the legislature; those who seize the property are not trespassers. * * * For example, the pulling down 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.

87 Ch. xvi., p. 403. In Russell v. Mayor, 2 Denio 486, it was said: "The first case on the subject was the nitrate saltpetre case. The government asserted the arbitrary right to provide munitions of war from private property, under pretext of overruling necessity, and all the justices sustained it: 12 Co. 12."

88 Respublica v. Sparhawk, 1 Dallas 302, Sept. 1788.
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"These cases illustrate the maxim, Salus populi suprema lex. Plate-Glass Co. v. Meredith, 4 T. R. 797; Noy's Maxims, 9th ed., 36; Dyer 60 b; Broom's Maxims 1; 2 Bulst. 61; 12 Coke 18, The Prerogative Case, Id. 63; 2 Kent 338; 1 Blackst. Com. 101, n. 18, by Chitty. Extreme necessity alone can justify these cases." 89

The Supreme Court of New Jersey recognise the distinction:

"It is true that by many writers of high authority, the grounds of justification of an act done for the public good and of an act committed through necessity are not accurately distinguished. They are both spoken of as grounded on necessity, and they doubtless are so. But the one is a state the other an individual necessity, though oftentimes resulting in a public or general good. The one is a civil the other a natural right. The one is founded on property, and is an exercise of sovereignty; the other has no connection with the one or the other." 90

And again, contrasting the right of eminent domain with the law of necessity, the court say:

"They are both spoken of sometimes as grounded on necessity, and they doubtless are so. But the latter stands strongly distinguished from that urgent necessity which, for immediate preservation, imperatively demands immediate action. His case who should throw up trenches upon his neighbors' land for the protection of a town from immediate hostile attack, as regards his justification, would certainly stand on a very different footing from one who, under the authority of law, should do the same act in order to guard the town from prospective and merely possible future harm." 91

Again it has been said:

"The right arising out of extreme necessity is a natural right older than states. * * It is the right of self-defence, of self-preservation, and has no connection whatever with super-eminent right (eminent domain) of the state. The one (eminent domain) may be fettered by constitutional limitations; the other is beyond the reach of constitutions." 92

There are many cases where the law of overruling necessity has been applied in time of peace for individual benefit. 93

89 Parham v. The Justices, &c., 9 Georgia 348.
90 American Print Works v. Lawrence, 1 Zabriskie 258.
91 Hale v. Lawrence, 3 Zabriskie 605.
92 Grant v. United States, 1 Court Claims 45
93 American Print-Works v. Lawrence, 1 Zabriskie 248, 3 Zabriskie 591, 613;
One reason for bearing in mind the clear distinction between the right of *eminent domain* and the *law of necessity* is, that where property is taken by virtue of the former, "just compensation" is to be made, while under the latter, neither individuals on common-law principles, nor the government on principles of public law, incur any such liability.

The courts, elementary writers, and usage of government lead to the same result.94

During the Revolutionary war, in April 1777, the Pennsylvania board of war, acting by authority of the legislature, took possession of certain provisions owned by private individuals, in Philadelphia, to prevent them falling into the hands of the enemy, then approaching that city, but with a pledge to the owners that this was not designed to divest the property in the articles, but "that the same should be liable to the order of the owner, provided they were not exposed to be taken by the enemy." They were captured by the enemy. The statute provided for payment by the state "for

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Hale v. Lawrence, 1 Zabriskie 728; Russell v. Mayor of New York, 2 Denio 473; 82 vol. Globe 300; Respublica v. Sparkhawk, 1 Dallas 362.

All these cases conceded that at common law this law of "overruling necessity" is distinct from the right of *eminent domain*, and that the exercise of the right conferred by the former creates no liability. In New York it is held, also, that a *statute* which regulates the law of overruling necessity is not an exercise of *eminent domain*, but only a regulation of the *law of necessity*. In New Jersey it was at first held that when a *statute* authorizes the destruction of property to arrest a fire, that is an exercise of the right of *eminent domain*. But this was overruled, and the doctrine of the New York court adopted. That which is not a "public use" at common law does not become so because a statutory regulation is made as to it.

94 Respublica v. Sparkhawk, 1 Dallas 372, Sept. 1788; 9 Georgia 341; Wiggins v. U. S., 1 Nott & H. Court Claims 182; 2 Id. 345; 2 Story Const. (4th (ed.) sec. 1790, note 6, saying:

"There may be cases of extreme necessity, as the pulling down of houses and raising bulwarks for the public defence, seizing, private provisions for the army in time of war, when the owner has no redress. See 9 Georgia 341; Mitchell v. Harmony, 13 Howard S. C. 115; Wiggins v. United States, 1 Court of Claims Report 182; 2 Id. 345."

Whiting says:

"If one of our armies marches across a cornfield, 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 against the government for his losses?" War Powers, 43d ed., p. 340.

The Russian government did not compensate the owners of the buildings burned in Moscow to defeat the ipvasion by Napoleon.
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services performed, moneys advanced, or articles furnished." The proper accounting-officer refusing to pay, the owner of the property brought suit. The Supreme Court of Pennsylvania held that these were not "articles furnished"; in other words, that the taking was not for "public use;" that the articles were taken by the law of overruling necessity.

The syllabus of the case is:

"During the war of the Revolution, Congress had a right to direct the removal of any articles that were necessary to the Continental Army, or useful to the enemy, and in danger of falling into their hands; and one whose property, so removed, was afterward captured by the enemy, was held not to be entitled to compensation from the Commonwealth."

Chief-Justice McKean, in delivering the unanimous opinion of the court, said:

"The transaction, it must be remembered, happened flagrante bello; and many things are lawful in that season which would not be permitted in time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for otherwise, it would clearly have been a trespass; which, from the very nature of the term, transgressio, imports to go beyond what is right: 5 Bac. Abr. 150. It is a rule, however, that it is better to suffer a private mischief than a public inconvenience; and the rights of necessity form a part of our law.

"Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private inclosure: 2 Black. Com. 37. So, if a man is assaulted he may fly through another's close: 5 Bac. Abr. 173. In time of war, bulwarks may be built on private ground: Dyer & Brook, Trespass, 213; 5 Bac. Abr. 175. And the reason assigned is particularly applicable to the present case, because it is for the public safety: 20 Vin. Abr. Trespass, B. a, sec. 4, fo. 476. Thus, also, every man may, of common right, justify the going of his servants

95 Respublica v. Sparhawk, 1 Dallas 362.

The proclamation of emancipation was an act of "military necessity."

12 Stat. 1267-1269. It concludes thus: "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God."

See this subject fully discussed in Whiting's War Powers, and the authorities quoted.
or horses, upon the banks of navigable rivers, for towing barges, and, to whomsoever the right of the soil belongs: 1 Ld. Raymond 725; 2 Buls. 62; Cro. Jac. 321. And as the safety of the people is a law above all others, it is lawful to part affrayers in the house of another man: Keyl. 46; 5 Bac. Abr. 177; 20 Vin. Abr. fo. 407, sec. 14. Houses may be razed to prevent the spreading of fire, because for the public good: Dyer 36; Rud. L. and E. 312; see Puff., lib. 2, c. 6, sec. 8; Hutch Mor. Philos., lib. 2, c. 16. We find, indeed, a memorable instance of fully recorded in the third volume of Clarendon's History, where it is mentioned that the lord mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, and, belonging to the lawyers of the Temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt. We are clearly of opinion that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental Army or useful to the enemy and in danger of falling into their hands, for they were vested with the powers of peace and war, to which this was a natural and necessary incident. And having done it lawfully, there is nothing in the circumstances of the case which we think entitles the appellant to a compensation for the consequent loss."

This case is especially valuable. It was decided by one of the ablest courts of that period. It gives construction to what is a public use. It shows when a taking is referable to the law of necessity and when by the law of public use. It draws the line between these two laws. In view of that construction, the fifth amendment to the Constitution was afterward adopted, and with a knowledge that the destruction of private property for the purpose indicated was not a taking for public use, the Constitution made no provision for such case.

It was made in view of the known rule of international law on the subject, and of the impossibility of making payment, and of the fact that no nation had ever done so.96

96 In Senate Rep. 412, 3d sess. 42d Cong. it is said:

"The war of the Revolution was fought before we had any constitutional prohibition against taking private property for public use without compensation. The troops for that war were furnished by the several states. Congress did not assume the obligation of making compensation for property taken by the military authority; but it clearly recognised the principle that compensation should be made.
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Another case will illustrate this law of "overruling necessity" where property had been destroyed to arrest the progress of a fire.

Accordingly, in 1784, a resolution was adopted from which the following is an extract: 'That it be referred to the several states, at their own expense, to grant such relief.'

"In accordance with that resolution, when, in 1818, Mary Brower and others petitioned for compensation to be made to them for property burned and destroyed on Long Island by the American army on the advance of the British forces in August 1776, the Committee on Revolutionary Claims of the House denied the prayer, not upon the ground that compensation should not be made, but upon the express ground that the sufferers ought to have appealed to the state of New York for such compensation." American State Papers, Claims 608.

It is proper to notice this and to say:

1. There was of course no national constitutional prohibition against taking private property. But the principles of Magna Charta were in force here as fully as if adopted in the Constitution.

In Perham v. The Justices, 9 Georgia R. 349, the court so held. The authorities are collected on page 350.

And see 2 Story, Constitution (fourth edition), sections 1784, 1790. Story says the fifth amendment of our Constitution "is an affirmation of a great doctrine established by the common law."

2. The Senate report 412, above referred to, treats of the claim of J. Milton Best. This was for compensation for his house, destroyed at Paducah, Ky., March 1864, by Union military authorities, "in anticipation of another attack" from the rebels—"destroyed by order of a commanding officer to save his imperilled army." It was destroyed to prevent it from falling into the hands of the enemy to be used by them. (Senate report No. 69, Forty-first Congress, second session.)

The Senate report No. 134, above referred to, asserts that the Continental Congress by resolution of June 3d 1784 "clearly recognised the principle that compensation should be made for property taken by the military authority." That is, for property taken as was that of J. Milton Best, and under similar circumstances. It is said this "principle" is found in the resolution of 1784.

But it is clear the resolution asserts no such "principle" as law.

The journals of the Continental Congress show the following proceedings:

In Continental Congress June 3d 1784, the following proceedings were had:

"On the report of a committee," it was

"Resolved, That the commissioners make reasonable allowance for the use of stores, and other buildings hired for the use of the United States by persons having authority to contract for the same; but that rent be not allowed for buildings which, being abandoned by the owners, were occupied by the troops of the United States. That such compensation as the commissioner may think reasonable be made for wood, forage or other property of individuals taken by order of any proper officer, or applied to, or used for the benefit of the army of the United States, upon producing to him satisfactory evidence thereof, by the testimony of one or more disinterested witnesses.

"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, wantonly and unauthorized by its own troops." (See Journals of Congress, vol. 4, from 1782 to 1788, page 443.)
and it was claimed to be a taking for "the public use," within the meaning of the Constitution of New York.77

The court say:—

"But I apprehend that the assumption of the plaintiff, that this was a case of the exercise of the right of eminent domain, will prove a fallacy. The destruction of this property was authorized by the law of overruling necessity; it was the exercise of a natural right belonging to every individual; not conferred by law, but tacitly excepted from all human codes. The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection or safety of the many without subjecting the actors to personal responsibility for the damages which the owner has sustained. (See 2 Kent's Com. 4th ed. 388; 15 Vin., tit. Necessity, p. 8; Malevener v. Spink, 1 Dyer 36 b; 17 Wendell 297; 18 Id. 129; 20 Id. 144; 25 Id. 162, 168, 174; Respublica v. Sparhawk, 1 Dallas 357.)

There are some unauthoritative dicta, and perhaps a single decided case, apparently in conflict with these views.88

Now, from these proceedings of Congress it will be seen that the only principle of law asserted is that "a state is not obliged to make compensation for damage done to its citizens by an enemy, or wantonly and unauthorized by its own troops."

3. The Senate report asserts that "in accordance with that resolution" (of the Congress of 1784) the Congress of 1818 denied the claim of Mary Brower (similar to that of J. Milton Best), "not upon the ground that compensation should not be made, but upon the express ground that the sufferers ought to have appealed to the state of New York for such compensation."

The report of the committee of the House on the case of Mary Brower is in American State Papers, Claims 608, November 30th 1818. It asserts that "Congress have not made any general provision assuming to compensate and pay for claims of this description which may have originated in the Revolutionary war." It refers to the resolution of the Congress of 1784, and says the claimants "ought, if they did not, to have made application to the state of New York for such compensation."

But the resolution of 1784 expressly refers to no such case as Mary Brower's. And if it did, it only suggested that the states make compensation not as a legal duty, but because "humanity requires some relief should be granted to persons who, by such losses, are reduced to indigence and want."

The states never did make such compensation. Their usage settled the law against such claims.

77 Russell v. The Mayor, &c., 2 Denio 473.
88 House Rep. 3d sess. 42 Cong.; 13 Wend. 372; Vattel, ch. xv., p. 403; Whit-
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The Judge-Advocate General held in the case of a claim for the value of certain buildings, with their contents, burned by Union

ing's War Powers 15. In Grant v. United States, 1 N. & H. Court Claims 41, it was held that "the taking of private property for destruction by a military officer [in a state of war, to prevent it from falling into the hands of the enemy] is an exercise of the right of eminent domain." That "there is no discrimination to be made between property taken to be used and property taken to be destroyed," and that a right of action against the government as upon an implied contract arises in favor of the party whose property is destroyed.

So far as this holds that military officers by right of common military law exercised a power of eminent domain, it is contradicted in the same case, which declares that "eminent domain is a civil right," and it is contradicted by many reliable authorities.

If the seizure was in fact a military necessity in a state of war, the officer was not liable. Buron v. Denman, 2 Exch. 189; Mitchell v. Harmony, 13 How. 134.

If it was not a necessity, the act was unauthorized and the government is not liable. (Am. State Papers, Claims 55; 13 How. 115; Res. Cont. Cong., June 3d 1784, Journal, vol. 4, p. 443.)

So far as it holds the government liable it is contradicted by the authorities already cited. It is practically overruled in the same court by the learned Chief Justice Casey, and the court in Wiggins v. United States, 1 Court Claims 182.

The case of Grant v. United States, goes the extreme length of declaring that a seizure for destruction is a taking for "public use." If this be so, why is not property destroyed in a battle taken for the public use? Where is the difference in principle? Yet no writer can be found to declare that destruction by battle is a taking for public use.

Senator Davis, of Kentucky, a conceded strict constructionist, declared that property so destroyed, even by the Union military forces, was not taken for public use. (In Senate, January 4th 1871; 82 Globe 297.)

The case of Grant v. United States is in principle overruled by the able opinion of the learned Chief Justice of the Court of Claims, who in Perrin v. United States, 4 Court of Claims 546, said of a claim for compensation for property destroyed in the bombardment of Greytown: "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."

If the destruction was legal, the act was not wrong; and if not wrong, no action would lie for it. An action is only given to redress a wrong. No action lies for doing what is right. And it is remarkable that no lawyer has ever since brought a suit in that court on any one of the many cases since of a similar character.

Congress by Act of July 4th 1864, prohibited the Court of Claims from taking jurisdiction of "any claim against the United States growing out of the destruction, or appropriation of, or damage to property by the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof."

It is to be presumed Congress would not deny any claim justified by the laws of nations.

In Mitchell v. Harmony, 13 How. 134, the court said, not as authority, but on a mere obiter dictum, that—

"There are, without doubt, occasions in which private property may lawfully
troops in West Virginia, a loyal state, in January 1863, by way of a ruse to deceive and divert the enemy, a legitimate act of ordinary warfare, that the loss incurred was one of those accidents of war for which the government does not become liable to individuals.  

Grotius asserts that the government is not liable to make compensation, by saying:

"This also may be constituted by the civil law, that no action may be brought against such a city for damages by war, in order to make every man more careful to defend his own."  

Vattel admits the law of overruling necessity by saying:

"But there are other 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."

In the edition of 1872 there is a note to this, as follows:

"It is legal to take possession of these for the benefit of the community, and no action lies, that is, no claim for compensation, nor is any recoverable, unless given by Act of Parliament." (4 Term R. 382.)

be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also, where a military officer charged with a particular duty may impress private property into the public service or take it for public use. Unquestionably in such cases the government is bound to make full compensation to the owner."

Unquestionably, by the law of nations, where the private property of citizens is by common international military authority impressed into the public service, it is by virtue of the same law, generally to be paid for independently of any constitutional provision; but this is not at all so when property is lawfully taken to prevent it from falling into the hands of an enemy. That is an exercise of the law of overruling necessity, as has been shown.

In Russell v. The Mayor, &c., 2 Denio 484, it was said by one of the judges that—

"A vessel may in time of war be taken from the owner, when the interests of the public demand it, or it may be destroyed to prevent its falling into the hands of an enemy, and thereby increase its power of aggression or resistance, and the owner would be entitled upon this principle of the Constitution to be paid a just compensation. In these cases private property is taken for public use. The right of eminent domain is here asserted."

This is merely obiter, and the same remarks apply as to the cases above noticed.


100 Boök 3, ch. xx, sec. 8.

101 Ch. xv. p. 402.
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And Vattel says:—

"No action (claim for damages) lies against the state for misfortunes of this nature for losses which she has occasioned, not \textit{wilfully}, but \textit{through necessity}, and by mere accident, in the exertion of her rights."

The \textit{principle} here stated applies to the \textit{necessary destruction} of property to prevent it from falling into an enemy's hands, when his approach is imminent.

Notwithstanding anything elsewhere said by Vattel, the right to compensation finds no sanction by the usage of the government.

During the revolutionary war, property was often destroyed to prevent it from falling into the hands of the enemy.

Congress never made provision for paying any such claims.\textsuperscript{102}

The states made no such compensation.

During the war of 1812 with Great Britain, property was destroyed by the military authorities of the United States to prevent it from falling into the hands of the enemy. But no general provision was made by Act of Congress for paying for such loss.

Congress did, by Act of April 9th 1816, provide for paying for horses killed while in service, and for paying—

"Any person who sustained damage by the destruction of his or her house or building by the enemy while the same was occupied as a military deposite under the authority of an officer or agent of the United States."

So the Act of 3d March 1849 (ch. 129, sec. 2), and March 3d 1863, (ch. 78, sec. 5,) provided compensation for the loss or destruction of property in the service by impressment or contract. (Scott's Digest, Military Laws, 1873, p. 112, secs. 115, 116.) And the Act of June 25th 1864, (13 Stat. at L., p. 182,) secures compensation to any officer, non-commissioned officer, or private, during the rebellion, who surrendered horses to the enemy by order of superior officer.

But the Act of 1816 was, by Act of March 8th 1817, limited to "Houses or buildings occupied as a place of deposit for military or naval stores, or as barracks for military forces of the United States."\textsuperscript{104}

\textsuperscript{102} See American State Papers, class ix. vol. 1, Claims, passim.
\textsuperscript{103} 3 Stat. at L. 263, sec. 9; 3 Stat. at L. 397, sec. 1.
\textsuperscript{104} American State Papers, class ix, vol. 1, Claims, 590. See letter No. 150 of Secretary of War to House of Representatives, February 20th 1818, in Ex. Doc. vol. 4, for 1817-18, 1st sess. 15th Congress.
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But it was said by a committee of Congress that so far as this related to houses destroyed by the enemy it was enacted by Congress as—

"A law originating in its benignity and aimed gratuitously for the benefit of a suffering portion of the community."

They declared it—

"A law originating in the benign and charitable disposition of the government."

The original act barred all claims not exhibited within two years from its date, and Congress refused to extend the time.

But claims for compensation for property destroyed to prevent it from falling into the hands of the enemy are so rare as to show them entirely exceptional.\(^{185}\)

The usage of the government during and since the rebellion is a clear denial of all liability in this class of cases.

\(^{185}\) William H. Washington was paid for a house blown up in August 1814, by order of our military officers. (6 Stat. at L. 151; American State Papers, Claims 446.) But this was a case which came within the principle of the Act of April 9th 1816.

On February 5th 1817, a report was made to the House of Representatives recommending the payment of a precisely similar claim for damages done at Valley Forge in 1777, but Congress did not give the relief. (Claims, vol. 1, p. 522.)

So a rope-walk, destroyed September 1814, at Baltimore, to prevent it from falling into the hands of the enemy, was paid for, but this is clearly exceptional. (Am. St. Papers, Claims 444; 6 Stat. at L. p. 150.)

A report made February 14th 1816, states a liberal view, by saying "that indemnity is due to all those whose losses have arisen from the acts of our own government, or those acting under its authority, while losses produced by the conduct of the enemy are to be classed among the unavoidable calamities of war, and do not entitle the sufferers to indemnification by the government." (Claims, vol. 1, 462; Sumner's Speech, 71 Globe 301, January 12th 1869.)

But a very different rule of law was subsequently stated by a committee, December 11th 1820 (Claims 752), as to property taken at New Orleans. The report says:

"There have been thousands of instances during the late war * * * where the loss to the owners can be traced, directly or indirectly, to the acts of the government. * * * There are no known rules or established usages of the government which would seem to authorize an allowance in a case thus involved in obscurity."

Mr. Sumner, in an elaborate and masterly speech in the Senate, January 12th 1869 (71 Globe 300), gives a summary of these claims:

"On the landing of the enemy near New Orleans, the levee was cut in order to annoy him. As a consequence the plantation of the claimant was inundated, and suffered damages estimated at $19,250. But the claim was rejected on the ground that 'the injury was done in the necessary operations of war.'" American State Papers, Claims, p. 833.
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No general provision has been made for paying them. This undoubtedly would have been done if there had been any admitted liability.

On the contrary, Congress, while providing for the payment of quartermaster's and commissary supplies taken in the loyal states, by the Act of July 4th 1864, has made a provision applicable everywhere:

"That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of or damage to property by the Army or Navy, or any part of the Army or Navy engaged in the suppression of the rebellion, from the commencement to the close thereof."

Even where provision has been made for special reasons in exceptional cases, the policy of this has generally been denied by the executive branch of the government, and the broad rule of international law contained in the Act of 1864 has been reasserted by the President.¹⁰⁶

Where compensation has been made it has been for exceptional reasons.¹⁰⁷


On the 27th Nov. 1864, Gen. Sheridan issued an order, which was executed, to destroy all "forage and subsistence, burn all barns, mills, and their contents, and drive off all stock in Loudon county, Va." (See Senate report, No. 80, 2 sess. 42 Cong., Court of Claims.) The stock was used by the army, in part, and the residue driven into Pennsylvania and sold, and the proceeds paid into the treasury. The property belonged to men whose loyalty had never been questioned, many of them members of the Society of Friends. The Senate committee reported in favor of paying not only for property of loyal citizens so destroyed, but for cattle and supplies so used and sold. Congress, by Act of January 23d 1873, authorized payment to "loyal citizens of Loudon county, Va., for their live-stock, partly slaughtered and used and partly sold, and the proceeds paid into the treasury." (17 Stat. 713.) The House refused to pass any bill to pay for property destroyed.

¹⁰⁷ CLAIM OF JOSIAH O. ARMES.—Act of Jan. 31st 1867, provides for paying $9500 "in consequence of the burning of his buildings at Annandale, Fairfax county, Va., by United States troops." (See 14 Stat. 617; see also, Senate Report, No. 112, 2 sess. 39 Cong.; also, vol. 62, pp. 758, 759, 2 sess. 39 Cong.) The report shows that the house was burned "to prevent its being used by the enemy as a stronghold." For House proceedings and debates in 38th Congress, see Globe, vol. 50, pp. 313, 758, 759; vol. 51, pp. 1286, 2388. For Senate proceedings and debates, see Globe, vol. 54, p. 547; vol. 55, pp. 1273, 1274, 1275,
The rule of law as stated is that recognised by the executive branch of the government. The President, in his message of February 12th 1873, says, in relation to the Kentucky salt-works destroyed by order of Gen. Craft, commanding Union military forces:

"Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?

"This bill does not present a case where private property is taken for public use, in any sense of the Constitution. It was not taken from the owners, but from the enemy; and it was not then used by the government, but destroyed. Its destruction was one of the casualties of war; and though not happening in actual conflict, was perhaps as disastrous to the rebels as would have been a victory in battle.

"Owners of property destroyed to prevent the spread of a conflagration, as a general rule, are not entitled to compensation therefor; and, for reasons equally strong, the necessary destruction of property found in the hands of the public enemy, and constituting a part of their military supplies, does not entitle the owner to indemnity from the government for damages to him in that way." 108

Belleville, Ohio.


Senate proceedings and debates for 42d Cong. See Globe, vol. 89, pp. 2252, 2253 (April 8th 1872); vol. 91, pp. 4156, 4157 (June 1st 1872). See also, Senate Rep. No. 9, 2d sess. 42d Cong. For House proceedings and debates see Globe, vol. 91, pp. 3621–3624.