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WAR CLAIMS AGAINST THE UNITED STATES.

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CHAPTER VII.

THE LAWS OF WAR—THE LIABILITY OF THE GOVERNMENT FOR THE "RAVAGES OF WAR."

THE general liability of governments, by "the Laws of War," to pay aliens and citizens, for damages to property arising by the operations of war, has been already considered.[109]

It has been shown that for damages caused by what are technically termed "the ravages of war," no liability to make compensation as a general rule exists.[110]

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[109] See 13 American Law Register (New Series) 266–401, May and July 1874. For a general discussion of this subject see House Reports of Committee on War Claims, 2d session 43d Congress, on claim of Joseph Ballister.

[110] The importance of this subject was alluded to by Senator Sherman in a speech at Columbus, Ohio, September 2d 1874, in which he discussed *a constitutional limitation* on the power to pay war claims. He said:—

"Again I call your attention to the second clause of the fourth section of the fourteenth amendment of the Constitution. It provides that neither the United States nor any state shall assume to pay any debt or obligation in aid of the rebellion, or any claim for the loss of any slave. This provision is also in constant danger of violation. Claims have been assumed by states, * * * which grew out of aid to the rebellion.

"One of the dangers that now threaten our future is the assumption by the General Government * * * of an overwhelming mass of claims growing out of the war. Heretofore, by careful watchfulness * * * in Congress, the payment of claims in the Confederate States has been confined to supplies furnished.

Some exceptions to this general rule were stated as recognised by the *general laws of war*, and others as arising during the rebel-

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to our army, and to such claims as, by the well-defined laws of war, a belligerent ought to pay for—supplies in an enemy's country. Even these are enormous. I read you a statement recently made by Judge Lawrence, of Ohio:—

" 'Some idea of the magnitude of these claims may be had by the fact that the claims presented to the Commissioners of Claims, not yet examined by them, reach $50,033,764. Those now pending before Congress reach about $20,000,000, many of them test claims, which, if successful, will be followed by very many millions more. The judgments of the Court of Claims for the year 1873 amounted to $489,034. The claims paid under relief acts by Congress for the same year were $797,748. I cannot state the amount paid on allowance of the Departments, but it was immense, and included $1,960,679 for claims for captured and abandoned property. Senator Davis, in his speech of May 13th 1874, estimates that all *pending* war claims before the Departments, the Commissioners of Claims and Congress number 30,242, aggregating $88,547,121.' (See Lawrence's article in the Cincinnati Daily Commercial of August 4th 1874.)

"This vast volume of claims might easily be enlarged by the adoption of plausible rules, so as to include several hundred millions of dollars."

Senator Conkling, in a speech at Utica, September 23d 1874, referring to this "question * * direct in its relation to the interest of every tax-payer," said:—

"I allude to claims on the treasury for damages done in war. Claimants and claim agents, a multitude which no man can number, are swarming in the South and at Washington, with demands for the loss and destruction of cotton and other crops, of timber, buildings and other property, and for the occupation of lands by the army during the war. It is proposed to get through Congress an act refunding the war tax laid on cotton in the early years of the rebellion. An organized attempt is to be made to have the state debts of the states lately in rebellion assumed by the United States.

"These and other raids on the treasury are afoot. Who is to resist them? * *

"Southern representatives of all parties, as a rule, support every bill for southern war claims. * * * Bills have been passed, not so important for the thousands they involved, as for the precedents they set, opening a door for unnumbered others. * * *

"James Monroe said the war damages claimed after the war of 1812 amounted to a greater sum than the cost of the war itself. The Congress of that day passed a Compensation Act, guarded carefully and narrowly; but finding the treasury would be swamped, Congress quickly repealed it, and the nation sternly refused to listen to prayers for such relief. The havoc of the war of 1812 was a drop in the bucket when compared to the havoc of the war for the Union.

"There are many claims which may be paid to loyal sufferers, and paid by a humane application of the principles of public law. I do not speak of these when I say that the liability of the nation for claims to be preferred from the South is to be a serious question in the future, and one which the nation will see to and settle in time, or will repent at leisure."

In the speech of Mr. Lawrence in Congress, June 3d 1874, it is said:—

"The Tennessee legislature passed an act February 19th 1868, appointing a commission to audit and state the amount of property taken from or damages done to loyal citizens of that state by our military authorities during the rebellion,

lion on *Acts of Congress and Proclamations* of the President in pursuance thereof.[111]

These were given in such brief and general terms as to require some explanation.[112]

Thus it was said, as founded on the general laws of war, that "when, by the terms of the capitulation of a hostile city or army, there is a distinct stipulation by the proper officer commanding, * * 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."

As a question of strict right and power, a victorious commander might, especially by the earlier usages of nations, seize all property and persons in a hostile country. This right, as was said in *Mrs. Alexander's Cotton* case, "has received very important qualifications from usage, from the reasoning of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted 'to special cases, dictated by the necessary operations of war,' and as excluding, in general, the seizure of 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;* while considerations of public policy, and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies:" 2 Wall. 419.

A proclamation or other stipulation promising "protection of person and property," is a waiver of the right to apply the severe rule of the laws of war which gives "the commanding general" the authority to seize persons and property *beyond* "special cases dictated by the necessary operations of war." It is only a promise to exercise the rights of war, according to the *general* modern usage, and it only waives the right to go beyond this in those

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with a view to procure payment from Congress. These claims were presented and proof made in numerous cases. They very often included some items for 'stores or supplies taken or furnished for the use of the army,' and others for 'damages,' which latter the government is under no obligation to pay and probably never will pay."

[111] See 13th Vol. American Law Register, p. 282, May 1874.

[112] These exceptions have been fully considered in various Reports of the Committee on War Claims in the House of Representatives, 1st session 43d Congress, Reports Nos. 740, 744, 748, 777—all made June 22d 1874.

"special cases" in which the commanding general would otherwise have a right to make a more stringent application of his power.

The "Instructions for the government of the armies of the United States in the field," prepared by Francis Lieber, LL. D., promulgated under General Orders No. 100, April 24th 1863, embody the well-recognised laws of civilized warfare as universally understood and in force. These rules declare (No. 37) that:—

"The United States acknowledge *and protect* in hostile countries occupied by them, strictly private property. *This rule* does not interfere with the right of the victorious invader to tax the people, or their property, to levy forced loans, to billet soldiers, *or to appropriate property, especially houses, lands, boats,* or ships and churches, for temporary and military purposes."

If, therefore, a commanding general gives the assurance mentioned, it is done *in the sense of public law*, and with the rights which that law gives. And this is the effect of a proclamation promising "protection of persons and property." "*Protection*" implies that there shall be no *destruction*, unless imperatively required by military emergencies. It does *not* imply that military officers shall refrain from using the means necessary for their own shelter or protection, or that of the army, or those necessary for military operations.[113]

And this is all the more certain, because during all the time of the occupancy of New Orleans and other cities where there were proclamations during the rebellion promising "protection of person and property," the military authorities did seize and occupy whatever buildings were necessary for military purposes and operations, and the government has never recognised a liability to pay for them. It is not to be presumed that military officers violated pledges, and their conduct is evidence then of what was understood. It is a *contemporaneous construction*, and the highest evidence of the understanding.

It is not to be supposed any prudent commander would give any intimation or promise that he would not employ all the means to carry on military operations which duty to the government and the interests of the public required.

General Butler at New Orleans expressly limited his occupancy without compensation to the property of persons specially designated. The protection extended to property there did not rest

[113] See House Rep. No. 750, 1st session 43d Congress, June 22d 1874, Committee on War Claims.

merely on his published proclamation, but on the fact that afterward the President's proclamation of April 2d 1863, expressly excepted New Orleans from the hostile condition of insurrection. This was done in the interest of trade and commerce, and upon grounds of public policy. The omission to make any such proclamation as to other places shows that it was well understood that they were left subject to all the laws of war.

But even the protection of that highest of all proclamations as to New Orleans, upon every principle of international law, extended—

"Only to *such persons* 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.*"[114]

To the general rule that nations are not liable to make compensation for the "ravages of war," another exception, founded on Acts of Congress and Proclamations of the President in pursuance thereof, during the southern rebellion, has been thus stated:—

"During the rebellion the ordinary laws of war as to the enemy's country were, by the general policy of the government, sanctioned by Congress and the President's *proclamation of August 16th* 1861, so far modified that in such parts of the rebel states as were permanently occupied and controlled by the Union military forces, and *where rebellion had ceased and was no longer probable*, the government assumed to interfere no further with the rights of person and property of the enemy than should be *required by necessary subjection to military government.*

"But this immunity would only *extend to those who were loyal, or who ceased to engage in or aid or encourage rebellion.*"[115]

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[114] This is shown in House Rep. No. 262, March 26th 1874, Committee on War Claims, and this was decided by the mixed commission under 12th article of the treaty of 8th May 1871, between the United States and Great Britain. The report of their proceedings says: "Thus, for instance, in the case of Robert Davidson, No. 66, the claim was for gun-carriages and other artillery apparatus, manufactured by the claimant for the use of the Confederate government, and remaining in his possession at the surrender of New Orleans, together with material for use in the same manufacture, which was taken and appropriated by the Federal forces, under the orders of General Banks, some months after the capture of New Orleans. The claim was unanimously disallowed."

[115] See 13th vol. American Law Register (N. S.), p. 284, May 1874. But even where there have been no hostile military operations, it must be remembered that by the laws of nations *war*, either foreign or civil, may exist where no battle has been or is being fought: Const., Art. III., sec. 3, clause 3; *Ex parte Milligan*, 4 Wall. 121, 140, 142; *Luther* v. *Borden*, 7 How. 1; *Grant* v. *United States*, 1

This requires some explanation, lest it might be supposed that the government is liable for all damage for property taken, used or destroyed in those portions of the states in rebellion permanently occupied and controlled by the Union military forces. This is by no means true. See *ante*, n. 112.

The proclamation of August 16th 1861 excepted, in part, from the conditions of "enemy's country," and put mainly on the footing of "loyal territory" for *a limited time*, certain parts of the insurgent states permanently occupied and controlled by Union military forces where rebellion had ceased and was no longer possible.

But this is only true *so long as the proclamation of August 16th 1861 continued in force, and as to the places covered by its exceptions.*

The President's proclamation of August 16th 1861 declared the inhabitants of certain states "in a state of insurrection against the United States." (12 Stat. at Large 1262.) But *it excepted* "such parts of states as may maintain a loyal adhesion to the Union and the Constitution, or may be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents."

The proclamation of July 1st 1862 (12 Stat. 1266), declared eleven States in insurrection, and excepted only certain counties of Virginia. And it may well be maintained that this latter proclamation *withdrew the exceptions contained in the former.*

The exceptions made in the proclamation of August 16th 1861 interfered with the enforcement of the Act of July 13th 1861, regulating trade and intercourse (12 Stat. 257), and the President issued a proclamation, April 2d 1863 (13 Stat. 731), *revoking the exceptions contained in the former proclamation*, but again making or continuing certain local exceptions.

Culver v. *United States*, N. & H., Court Claims R. 418; s. c. on appeal in Supreme Court; *The Venice*, 2 Wall. 258; *Planter's Bank* v. *Union Bank*, 16 Id. 493; *Ouachita Cotton*, 6 Id. 531.

The states proclaimed by the President as in insurrection are therefore to be regarded as hostile or "enemy's country," for all purposes relating to war claims except such portions as were ex-

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Nott & Hopkins, Court Claims, 41; s. c. 2 Id. 551; Whiting's War Powers 43. The court say to justify martial law "the necessity must be actual and present;" Paschal, Annotated Const., p. 212, note 215; *Ex parte Bollman*, 4 Cranch 126; *United States* v. *Burr*, 4 Id. 469–508; Sergeant, Const., c. 30 [32]; *People* v. *Lynch*, 1 Johns. 553. * *

cepte l by the proclamations and during the time these exceptions continued.

An attempt has been made to exempt corporations and their property located in "enemy's country" from the ordinary condition of war.[116] It is understood that the confiscation acts were so drawn as not to apply to corporations, but during the rebellion the government by the general laws of war treated corporate property as other property in the enemy's country, and this without reference to the loyalty or disloyalty of stockholders.[117]

It has been urged that "a *corporation is incapable of disloyalty* to the Federal Government."[118]

This, of course, concedes the recognised doctrine that disloyalty forfeits all claim to the protection of property which can be made to aid rebellion or be used to aid the government. But if it be true that a corporation is incapable of disloyalty, this can give no claim to compensation. The *right* and *duty* of the government to seize and occupy the property of a corporation to aid in suppressing rebellion and in preserving the territorial integrity of the nation and the unity of its people, are not based on the disloyalty of the owner. Disloyalty gives strength to the right, and additional ground for refusing to make compensation. The *right* and *duty* rest on the imperative necessity to seize it—an "overruling necessity" which admits of no choice or discretion, but compels it, under penalty of imperiling the cause of the Union, or which renders it reasonably certain that such seizure is proper. It does not depend on the *animus* of the person whose property is seized—his loyalty or disloyalty.

Thus Bynkershoek says:—

"But the thing does not depend only on the *quo animo;* for, even among the subjects of our enemy, there are some, however few they may be, 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.*"

To which may be added, *because they are essential to our success.*

In a report of the Committee on War Claims in Congress it is said:—

"The property situated in the enemy's country owned by corpo-

[116] See Reports of Committee on War Claims, 1st session 43d Congress, No. 262, March 26th 1874; No. 740 and 777, made June 22d 1874.

[117] See note 52 to page 24 House Rep. No. 262, March 26th 1874, by Committee on War Claims, 1st sess. 43d Congress; Report 777, June 22d 1874, p. 9.

[118] Report 777, p. 12.

rations existing by virtue of charters granted by foreign governments, 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."[119]

It must be apparent that a rebellion cannot shield itself behind one or many corporations, and thus use property for its purposes and deny the right of seizure for loyal purposes.

And it is the *right* and *duty* of military officers to select such property as best suits the purposes of military operations, and their decision is final—necessarily so.

The Supreme Court, in *Mrs. Alexander's Cotton* case, asserted the *power* and *duty* of military officers to seize property generally, and made no exception in favor of corporations, as the passage cited sufficiently shows.

It is not at all true that "a corporation is incapable of disloyalty."

A corporation, like a tree, is known by its fruits. A corporation which encourages men to make war—to convert pruning-hooks into spears, and ploughshares into swords—is by no means loyal.

There was a time when it was held that a corporation could not commit a trespass. But that doctrine has long since been exploded. A corporation acts by its agents. Their authorized acts within the scope of the corporate authority are the acts of the corporation. The maxim applies, *qui facit per alium facit per se*. A corporation may be guilty of disloyalty.[120]

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[119] House Rep. No. 262; War Claims, 1st sess. 43d Congress, March 26th 1874.

[120] Angell and Ames on Corporations, 9th ed., sections 311, 382, 384.

Union Band v. *McDonough*, 5 La. 63; and see *Ware* v. *Barrataria Canal Company*, 15 La. 168; *Beers* v. *Housatonic Railroad Co.*, 19 Conn. 566; *Bradley* v. *Boston R.*, 2 Cush. 539; *Baltimore R. Co.* v. *Woodruff*, 4 Md. 242; *Sharrod* v. *London R. Co.*, 4 Exch. 585, 586; *Gillenwater* v. *Madison R. Co.*, 5 Ind. 939; *Marlatt* v. *Levee Steam Cotton Press Co.*, 10 La. 583; *Memphis* v. *Lasser*, 9 Humph. 757; *Duncan* v. *Surry Canal*, 3 Starkie 50; *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526, 3 Nev. & M. 771; *Rex* v. *Medley*, 6 C. & P. 292; *Maund* v. *Monmouthshire Canal Co.*, 1 Car. & M. 606, 4 Man. & G. 452, 455: *Regina* v. *Birmingham R. Co.*, 2 Gale & D. 236, 9 C. & P. 469; *Eastern Counties R.* v. *Broom*, 6 Exch. 314; *Hawkins* v. *Dutchess Steamboat Co.*, 2 Wend. 452; *Beach* v. *Fulton Bank*, 7 Cowen 485; *New York* v. *Bailey*, 2 Denio 433; *Hay* v. *Cohoes Co.*, 3 Barb. 45; *Watson* v. *Bennett*, 12 Barb. 196; *Kneass* v. *Schuylkill Bank*, 4 Wash. C. C. 106; *Lyman* v. *White River Bridge Co.*, 2 Aik. 255; *Rabassa* v. *Orleans Nav. Co.*, 3 La. 461; *Goodloe* v. *City of Cincinnati*, 4 Ohio 513; *Smith* v. *Same*, Id. 414; *McCready* v. *Guardians of the Poor*, 9 S. & R. 94; *McKim* v. *Odum*, 3 Bland Ch. 421; *Humes* v. *Knoxville*, 1 Humph. 403; *Edwards* v. *Union Bank of*

There is another question connected with Claims against the Government which deserves consideration. The practice has long prevailed of providing for the payment of claims by special acts of Congress on reports of committees based on mere *ex parte* affidavits in support of claims. It may be very questionable whether this is a legitimate exercise of *legislative power.*[121]

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Fla., 1 Fla. 136; *Bank of Kentucky* v. *Schuylkill Bank*, 1 Parsons' Sel. Cas. 251; *Whiteman* v. *Wilmington R. Co.*, 2 Harring. Del. 514; *Ten Eyck* v. *Delaware Canal Co.*, 3 Harrisson 200; *Underwood* v. *Newport Lyceum*, 5 B. Mon. 130; *Hamilton County* v. *Cincinnati T. Co.*, Wright 603; *Town of Akron* v. *McComb*, 18 Ohio 229; *Riddle* v. *Proprietors, &c.*, 7 Mass. 187; *Thayer* v. *Boston*, 19 Pick. 516, 517; *Carman* v. *Steubenville R. Co.*, 4 Ohio State 399; *Moore* v. *Fitchburg R. Corp.*, 4 Gray 465; *McDougald* v. *Bellamy*, 18 Ga. 411; Chitty on Plead. 68; *Fowle* v. *Common Council of Alexandria*, 3 Pet. 409; *Bushel* v. *Commonwealth Ins. Co.*, 15 S. & R. 173; *Chestnut Hill T. Co.* v. *Rutter*, 4 S. & R. 6. In this case much learning will be found on the subject and many references to the Year-Books, and other ancient as well as modern authorities: *First Baptist Church* v. *Schenectady R. Co.*, 5 Barb. 79; *N. Y. T. Co.* v. *Dryburg*, 35 Penna. State 298; *Yarborough* v. *Bank of England*, 16 East 6; *Smith* v. *Birmingham Gas-Light Co.*, 1 A. & E. 526; *Mayor of Lynn* v. *Turner*, Cowp. 86; *Denton* v. *Great Northern R. Co.*; 5 Ellis & B. 860; *Conger* v. *Chicago R. Co.*, 15 Ill. 366; *Keegan* v. *Western R. Co.*, 4 Seld. 175; *Lee* v. *Village of Sandy Hill*, 40 N. Y. 442; *Brown* v. *South Kennebec Ag. Soc.*, 47 Maine 275; *N. York R. Co.* v. *Schuyler*, 38 Barb. 534, 34 N. Y. 30.

[121] Mr. Lawrence of Ohio, in a Speech in Congress June 3d 1873, said:—

"It might well be urged here that it is a duty of Congress to establish a *court* with power to hear *all claims* of whatever character, and that this power to consider and pass on claims is a judicial function which cannot properly be exercised by Congress.

"The Constitution provides that—

"The judicial power shall extend to controversies to *which the United States shall be a party.*

"At the time this was adopted the "petition of right" was a recognised common-law mode of reaching the courts of England with claims against the government. It is fair to presume the Constitution was designed to give an equivalent remedy.

"It has been urged with much force that—

"The Government is composed of three co-ordinate branches: the legislative, judiciary and executive, to each one of which are delegated certain powers and duties. It is the duty of the legislative department to provide the means or remedies by which the rights of parties may be determined, but not to pass upon or determine such rights. This latter power is exclusively vested in the judiciary. It is therefore not within the power of the legislative body to pass any act of a judicial nature: *Jones* v. *Perry*, 10 Yerger 59; *Holden* v. *Jarvis*, 11 Mass. 400; *Picquet's Appeal*, 5 Pick. 65; *Lewis* v. *Webb*, 3 Greenl. 826; *Ex parte Bedford*, Jurist and Law Magazine for October, 1833, p. 301, 4 N. H. 672; *Lane* v. *Dorman*, 3 Scammon 235; *Davenport* v. *Wood*, 11 Ill. 551."

See Cooley on Const. Limitations, *passim.*