Military Government

AND

Martial Law.

BY

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REVISED.

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TO

THE MEMORY OF MY FRIEND,

LIEUTENANT-COLONEL

ROBERT NICHOLSON SCOTT,

THIRD UNITED STATES ARTILLERY,

WHOSE GENIAL NATURE CAUSED HIM EVERYWHERE TO BE BELOVED; WHOSE PROFESSIONAL LITERARY LABORS, IN WHICH HE SACRIFICED HIS LIFE, FORM AN ENDURING MONUMENT TO HIS INDUSTRY, ABILITY, AND DEVOTION TO DUTY; AND WHOSE CONFIDENCE IT WAS MY PRIVILEGE TO ENJOY,

THIS WORK IS

AFFECTIONATELY INSCRIBED.

PREFACE TO FIRST EDITION.

When, in 1886, the writer was detailed by the War Department as Acting Judge-Advocate, Department of the Columbia, he found, upon reporting for duty, that the commanding General had but recently, under the President's orders, been assisting the Governor of Washington Territory to put down an uprising against the Chinese. The more effectually to do this, the civil authorities being powerless, the Governor had deemed it necessary to proclaim martial law in the most populous city of the Territory. The writer found also that both these officials were being proceeded against in the courts for illegal violations of the rights of certain citizens on this occasion. He began to prepare himself as best he could to defend his chief, the commanding General, from civil liability. The suits were soon dropped, it being evident to even the plaintiffs that they would prove futile. Meanwhile, however, the interest of the writer having been attracted, he continued to pursue his researches after the cause which originally inspired them had ceased to be of practical importance.

It was soon seen that, under the term "martial law," two distinct branches of military jurisdiction—the foreign and the domestic—were, by most authorities, hopelessly confounded. This, perhaps, was not unnatural, for "martial law" may with no great impropriety be used to signify the sway of arms under all circumstances. Yet, because of the diverse rules of responsibility attaching to those who enforce military jurisdiction under varying conditions, it is necessary, not only to avoid confusion of thought, but to protect officers in their just rights, to attach to the term a more technical meaning.

When operating on foreign soil, the legal obligations of the dominant military are tested by one rule; when within their own territory, by a wholly different rule, having regard to the civil and property rights of the inhabitants. What may be permissible to the commander in the exercise of his authority in the former, with no responsibility other than his military superiors, might, in the latter, subject him to grave civil responsibilities. If it be attempted to throw around the officer in the latter case that immunity from civil liability which attaches to his conduct in the former, the people—his fellow-citizens—might with well-founded apprehensions view the temporary establishment over them, for even the most laudable purpose, of the rule of military force. If, how-

ever, it be understood that this cannot be done; if the principle be established that the commander who, under any circumstances whatsoever, assumes to enforce superior military power over the people and territory of his own country does so under ultimate legal responsibility for his acts, military rule is deprived of its terrors, and the law-abiding citizen sees in it nothing except the firm application for his benefit of the powerful military hand when civil institutions have ceased either wholly or at least effectively to perform their appropriate functions. Nor as to this does it signify whether temporary military supremacy results from efforts to repel invasion or to suppress insurrection. The rule of liability is the same in both cases.

It is evident, therefore, that there must be one term to express the fact of supreme military domination over the community abroad, and another for the same thing at home.

This was clearly pointed out by Attorney-General Cushing, in 1857, in an opinion conspicuous for the legal acumen which characterizes the professional writings of that distinguished jurist. But at that time the true nature and limits of military jurisdiction had not in this country received sufficiently close judicial examination to admit of demonstration upon recognized principles of municipal and international law. This it remained for the Chief-Justice of the United States to do in the dissenting views of the minority of the justices in *Ex parte* Milligan, after the experiences of the Civil War had directed attention to, and thrown a flood of light upon, the subject. The truth of this observation is wholly independent of the conflicting opinions, regarding the correct territorial limits of martial law, expressed by the justices in that celebrated case. The analysis of the Chief-Justice is masterly, and leaves nothing to those who follow him except to fill in the details of the plan, the ground-work of which he so ably laid. This has been attempted in the following pages. How imperfect soever the execution, it may result in fuller investigation into, and exposition of, the principles involved, and thus prove of benefit to the military profession—to serve which is the writer's only ambition.

WASHINGTON BARRACKS, D. C.,
November 1, 1892.

PREFACE TO SECOND (REVISED) EDITION.

Since this work was published (1892) the military authorities of the United States, and those of Great Britain, have had occasion to inaugurate and enforce military government on an extensive scale and under varied circumstances. The first mentioned did this in Cuba, Porto Rico, and the Philippine Islands; the last mentioned in the South African republics. While it is not practicable to meet and specifically to provide for every case that may arise, still the scope of the work has proved sufficiently comprehensive, it is believed, to indicate the direction in which commanders or others upon whom responsibility rests may find the true, the patriotic, the military course.

These experiences simply confirm previous ones in this,—that the true rule for him who has to enforce military government is to place his justification upon the law of belligerent rights alone without complicating the situation by appeal to civil law. By so doing he will stand on safe ground. If he depart from this rule, a law bureau will be needed to save him from the quagmires of litigation or legal contention, and such bureaus commanders rarely have at hand, nor are they desirable.

During the twelve years last past there have been several conspicuous instances of enforcing martial law within the United States. In Idaho, in 1899, the Governor declared Shoshone County to be in a state of insurrection and rebellion, and instituted martial law therein. It was officially declared that this state of insurrection had existed in that community for several years. The Governor called upon the President to assist with the national military. This request was compiled with, and these troops, acting in coöperation with the local civil authorities, suppressed the insurrection. The organized militia of the State had volunteered for the United States service and were in the Philippines.

In 1902 the condition of affairs was such in Schuylkill County, Pennsylvania, that the Governor called out the organized militia to put an end to alleged violence. No interference whatever with the militia in the performance of this duty was permitted. The Supreme Court of the State upheld the Governor in this course, the resulting state of affairs being what it styled qualified martial law, which, it remarked, government must have a right to establish on proper occasion or perish. A private soldier, posted as a sentinel, who under these conditions shot and killed one who was wrongfully coming upon his beat, was held blameless by the court.

In Colorado, by proclamations in 1903-04, the Governor declared that a state of affairs bordering on insurrection and rebellion existed in one county; in another, that practically the same condition prevailed; while in a third they had risen to a state of real insurrection and rebellion. The organized militia was put in the field, in some cases to assist, in others to act independently, if need be, of the civil authorities—at discretion of the military commanders.

In each of the cases just mentioned, wherein State authorities enforced martial law, appeal was made by the opposition to the judiciary, but unavailingly. The fact is that the judiciary, as so clearly shown by the Supreme Court of Pennsylvania, in the decision above referred to, understands that it does not suffice alone that courts be open and civil officers pursuing their functions, if in spite of this a condition of lawlessness prevails that renders such ordinary agencies powerless in fact properly to perform their functions and give society that security to life and property that government was intended to secure. This being so, the next step is inevitable—when ordinary instrumentalities do not suffice, the extraordinary, the military, must be called in, because the community will not long surrender to its lawless element.

Nor did the condition of affairs at Chicago in 1894 vary in principle from those just mentioned. The Governor of Illinois at the time would not call for the national troops, although inter-state commerce and the carrying of United States mails through that city were effectually blocked by lawless violence, leading to loss of life and destruction of property. The President ordered United States troops to the scene. The special United States attorney urged that martial law formally be declared; and although this was not done, the omission to do so was not because apparently of a belief that this would be illegal, nor did it change the state of facts, which was one of the military dominating all other authorities. The Supreme Court of the United States sustained these energetic measures in the amplest manner.

It is not an agreeable fact to reflect upon, yet it is true that the instances are not diminishing in frequency wherein the military, either national or State, are being put in requisition to preserve order when the civil authorities fail in this their first duty. The people of the United States rightly pride themselves on being law-abiding, yet official records show that more than half the Presidents have issued proclamations warning the people against the commission of illegal acts, and the number of distinct proclamations has exceeded the number of Presidents. This does not complete the view. In this there must be comprehended numerous instances of State authorities, legislative or executive, treading the same path. In some cases here referred to, martial law has been

inaugurated in distinct terms, while in all cases this has been the partial effect, more or less complete, depending upon the heed given by the lawless element to official warnings and thus modifying the necessity for the establishment of martial law in distinct terms.

Martial law was established in the rebellious or disaffected districts of Cape Colony, South Africa, in 1899, and at various times was modified as to territorial extent down to the final triumph of British arms in the Boer War. As it was instituted over districts in rebellion or contiguous to territory of an enemy with which Great Britain was conducting war, there was reason in adopting, as was done, the laws of war as the basis for enforcing martial law in this instance. It was simply placing all those who had to be fought, whether they were the enemy in line of battle, or the less easily distinguishable enemy—subjects in rebellion—as nearly as possible on the same footing. Yet they were not, in the theory of British law, placed precisely in the same category in two important respects. First, it was recognized that while certain acts of burghers—the open enemy—might be breaches of the laws of war, yet if rebel subjects did the same, they would be offenses against ordinary law, such as treason, or murder; second, that those who enforced martial law could be held civilly accountable subsequently by alleged rebel or other subjects of martial-law districts, hence it was necessary to secure an indemnity act to shield them; whereas such agents were answerable for this conduct to the open enemy only according to the laws of war. From this it will be observed that there was nothing in the circumstances of inaugurating martial law in South Africa and scarcely anything in the incidents attending its enforcement there that was at all similar to martial law viewed as a domestic fact, and as just illustrated in the case of Idaho, Pennsylvania, and Colorado. In truth the rule styled martial law in South Africa was like that denominated military government in this work, with the single exception that an act of indemnity was necessary in certain situations. The case did not arise of a community being paralyzed in its administrative parts by the lawless acts of vicious elements of society, so that the military is called in to save the State from destruction internally. When this condition of affairs occurs under the British flag, it is likely that the martial law invoked will be less signalized in execution by appealing to the laws of war than to those repressive measures that are an extension of the police powers of government, the agent for giving effect to which has become the military.

This prefatory note cannot better be concluded than by the following letter:

"WAR DEPARTMENT.

"OFFICE OF THE JUDGE-ADVOCATE GENERAL,

"WASHINGTON, February 24, 1904.

"*My dear Major Birkhimer,*—I am very glad to learn that you have it in mind to bring out a new edition of your 'Military Government and Martial Law,' in which the results of the very considerable experience which we have had since 1898 in the field of military occupation will be allowed due representation.

"The original work is the most complete treatise on the subject in the English language, and embodies the views which prevail in Anglo-Saxon countries on the subject of martial law and military occupation. I have had constant occasion to refer to it in connection with matters which have been referred to this office for opinion, and found it especially useful when the character of the operations undertaken in the Philippine Islands, with a view to suppress the insurrection against the authority of the United States, were undergoing investigation.

"I hope the revision will appear in the near future, so that the work can be used in the instruction of officers of the Army in connection with the government of occupied territory and the restoration of order in communities in which military force has been employed with a view to secure the execution of the laws; and, I remain,

"Faithfully yours, GEO. B. DAVIS,

"*Judge-Advocate General.*"

This, the first revision of the work, now is given to the profession and the world in the hope that it may be deemed to deserve and may continue to receive the favor heretofore accorded it, not only in our own, but in foreign services and in the legal profession.

SAN FRANCISCO, CALIFORNIA,
July 1, 1904.

When the manuscript for this revised edition had been placed in the hands of the publisher, the author was taken suddenly and violently ill and was confined for several months to the hospital. In this dilemma, Major Daniel H. Boughton, U. S. Army, LL.B., head of the Law Department of the Infantry and Cavalry School and Staff College, obligingly undertook the onerous task of revising and correcting the proof-sheets and preparing the index. The great merit of this labor, as executed, belongs exclusively to that painstaking and capable officer, to whom the author hereby testifies his appreciation and returns thanks for the invaluable services thus rendered.

CONTENTS.

INTRODUCTION.

Military Government.

1. Military jurisdiction divided into two branches.—2. Sphere of military government.—3. Limit of martial law.—4. Importance of the distinction.—5. Temporary allegiance.—6. Efforts to ameliorate hardships of war.—7. Instructions for United States Armies in the Field.—8. Comparison of international codes with the Instructions.—9. Continuance same subject.—10. Decisions Supreme Court of United States on war powers.—11. Practical tendency to make war more humane.—12. Duty of the militarily governed to respond favorably to this sentiment.

Martial Law.

13. Instituted in friendly territory only when military supersedes the civil power.—14. Military and civil authority may assist each other.—15. Foundation for distinct martial-law measures.—16. A necessity, met by State policies in different ways.—17. Anglo-Saxon and Continental policies.—18. When martial law invoked.—19. Danger from either within or without the State limits.—20. Experience shows cannot be dispensed with.—21. Questions preliminary to inaugurating.—22. First one considered.—23. Division of authorities on second question; discussion; right of Congress to institute.—24. Implied powers of Congress.—25. Martial law invoked as war measure.

PART I.—MILITARY GOVERNMENT.

CHAPTER 1.

Power to Declare War.

1. Scope and object military government.—2. Right to declare war.—3. Ways in which war originates.—4. Parties in public war.—5. Necessity President meeting war emergency.—6. War may exist without declaration by Congress.—7. Powers expressed carry others necessarily implied.—8. Complete war powers.—9. Law of nations recognized by Constitution

CHAPTER II.

Right to Establish Military Government.

10. Government war powers limited by laws of war.—11. Military government foreign territory.—12. Necessity placing military government on certain foundation of belligerent rights.—13. Not only a right, but a duty.—14. Power of President as Commander-in-Chief.—15. Illustrated in New Mexico, 1846.—16. Civil governments there legal.—17. Wellington's occupation south of France.—18. Characteristics military government.—19. Right to establish military government in districts dominated by rebels treated as belligerents.—20. Character government decided by dominant power.—21. Illustrated in Philippine archipelago.—22. Military occupation of districts occupied by rebels treated as belligerents.—23. Insurrection does not necessarily loosen bonds society.—24. Proclamation military government not necessary, but, if issued, the effect of.—25. Military government continues till legally supplanted.

CHAPTER III.

Temporary Allegiance of Inhabitants.

26. Allegiance and protection reciprocal.—27. Same subject.—28. Same subject.—29. This consideration basis of society.—30. Principle applicable, military government.—31. *De facto* government sufficient.—32. Military government extends no further than can defend itself and enforce mandates.

CHAPTER IV.

Territorial Extent.

33. Extent military occupation.—34. What legally constitutes.—35. Time when it becomes operative.—36. Same subject.—37. Criterion of conquest.—38. Conquest limits military government.—39. Not permanent until confirmed by treaty.—40. Policy United States establishing military government during Civil War.—41. Duty inhabitants under these conditions.—42. Similarity, blockade and military occupation.—43. Tacit submission.—44. Fundamental principle, military occupation, overpowering force.—45. Napoleon in Spain—guerillas.—46. Effect abandonment of jurisdiction by expelled State.—47. Seizure rents, Memphis, Tenn.—48. Effect capture Manila as to ousting Spanish sovereignty.

CHAPTER V.

Territory Militarily Occupied—Enemy Territory.

49. Military occupation renders, for time being, districts occupied enemy territory.—50. Authority permanently to acquire.—51. British oc-

cupation Castine, Maine.—52. Same subject.—53. Case of rebels treated as belligerents.—54. Same subject.—55. Attempts to avoid reprisal and retaliations, civil wars.—56. Principle of conquest, British government.

CHAPTER VI.

Effect of Occupation on Local Administration.

57. Important consequences, occupied territory regarded as foreign. —58. Case Upper California, war tariffs.—59. When war tariffs end.—60. Effect rule of war making belligerents enemies.—61. Only laws retained, will of conqueror.—62. Effect municipal laws.—63. Instance, occupation of Cuba.—64. Same subject.—65 Positive act conqueror necessary to suspend municipal laws.—66. Same subject.—67. Political laws cease on occupation.—68. Conqueror prescribes the laws.—69. Agent does this, usually military governor.—70. Law-making power of State may prescribe laws.—71. Political views modify powers of commander. —72. Military government in Spain.—73. Rule of military occupation in Cuba.—74. Same subject.

CHAPTER VII.

Agents for Carrying Military Government into Execution.

75. First instance, military officers enforce the occupation.—76. Policy establishing civil governments.—77. Same subject.—78. Case permanent conquest not contemplated.—79. Instructions for supply, Mexican war.—80. Foundation of policy.—81. Rule occupation, territory of rebels treated as belligerents.—82. Illustrated at New Orleans.—83. Same subject.—84. Appointment political, so-called military, governors. —85. Disadvantage two sets officials.—86. Same subject.—87. Experimental political governments.—88. Same cause friction, President and Congress.—89. Character military government in Cuba.—90. Same in Philippines.—91. Same in South Africa.

CHAPTER VIII.

All Inhabitants Enemies; Levies en Masse.

92. Universal theory, all subjects are belligerent enemies of subjects of the other.—93. Not all necessarily treated alike.—94. Proclamation King William, entering France.—95. Moderation toward conquered not obligatory.—96. Rule regarding gentler sex.—97. Responsibility rests on commander of occupation, extreme measures.—98. Rule that subjects of belligerents, mutually enemies, true if rebels are treated as belligerents. —99. Duty non-combatants.—100. Same subject, illustrated by German

practices in France.—101. Characteristics banditti.—102. Guerilla and predatory bands.—103. Guerilla warfare, Philippines and South Africa.—104. Irregular warfare cannot be legalized.—105. Authorization necessary for combatant.—106. Distinction, guerillas and *levies en masse*.—107. Part that *levies en masse* act.—108. Danger in *levies* becoming guerillas.—109. Distinguishing mark necessary, *levies en masse*.—110. State may rely on *levies* alone for fighting force.—111. Character of military, question State policy.—112. Recent discussions, *levies en masse*.

CHAPTER IX.

Laws Obligatory within Occupied Territory.

113. The law of war prevails in occupied territory.—114. Case foreign army permitted on friendly soil.—115. Three classes to be dealt with.—116. Laws affecting persons and property of conquered.—117. As to these, conqueror should lean towards mercy.—118. Instructions for American armies on this point.—119. Courts, such as conqueror elects.—120. Judicial system organized in New Mexico.—121. Gen. Scott's judicial system, Mexico.—122. Same; its advantages.—123. Local judiciary, within territory of rebels treated as belligerents, regulated by conqueror.—124. Same.—125. Gen. McClellan's orders, Peninsular Campaign.—126. War Judiciary, Memphis, Tenn.—127. Authority of military commanders, not well understood.—128. Same subject, as illustrated in Memphis.—129. Criminal court established.—130. Same subject.—131. War courts with civil jurisdiction.—132. War courts at New Orleans.—133. Principles for military government city.—134. Military commission, criminal jurisdiction.—135. Provost court, general jurisdiction.—136. Two important points decided.—137. The provost court, a war court.—138. Further vindication President's war power.—139. War courts further extended in jurisdiction.—140. Provisional court, plenary powers, court of record appointed.—141. Plenary power, appoint war courts, judicially settled.—142. Laws of occupation applicable to soldiers and citizens conquering State.—143. Soldiers and camp-followers subject to laws of war.—144. Provisions Articles of War.—145. Articles of War applicable regardless theatre operations.—146. Scope of this code.—147. Applicable unless under statutory restrictions, to all crimes and misdeeds of military and camp-followers.—148. Ex-members army not generally triable under Articles of War.—149. Tribunals of invaded country no jurisdiction over members invading army.—150. Prolonged occupation does not affect rule.—151. Case of Elphinstone *v.* Bedreechund.—152. Principle further illustrated, Coleman *v.* Tennessee.—153. Comprehensive effect preceding decisions.—154. Case of soldier, alleged murderer, in Cuba—155. Laws applicable to citizens, civilians, members of conquering

State.—156. Certain of the Articles of War set out.—157. Legal construction of these Articles of War.—158. Trials under 63d Article of War.—159. Civilians, citizens conquering State subject statutory law and laws of war.—160. When civilians triable under 63d Article of War.—161. Trial crimes under common law.—162. Same subject.—163 Laws applicable to neutrals under military occupation.—164. Principles, illustrated.—165. Same subject.—166. Trial neutrals, criminal offences.—167. Transitory actions accruing to neutrals.—168. Efficacy judgments supreme judicial tribunal deposed State, after military occupation established.

CHAPTER X.

Rights Regarding Private Property.

169. Amelioration former severe rule regarding enemy property.—170. Right to seize enemy property a perfect one.—171. Question who has right to appropriate enemy property very important.—172. Four different ways appropriating private property.—173. Confiscation a formal legal process, as distinguished from summary appropriation.—174. Views, elementary writers, as to right of confiscation.—175. Property rights, in vanquished State.—176. Right to confiscate judicially determined.—177. Right to confiscate not based on crime, but on relation of property to enemy.—178. Same rule when rebels are treated as belligerents.—179. Source Congressional power on subject.—180. No acts confiscation passed by Congress during foreign wars.—181. Those inaugurated during the Civil War.—182. This course rendered necessary, obstinacy of war.—183. Principle further extended.—184. Confiscation only upon judicial decision.—185. Confiscation laws not interfere with laws of war, but military commanders may not confiscate.—186. Illustration from decision Supreme Court.—187. Commanders untrammeled under laws of war, except by express legislation.—188. Mistaken policy hampers commanders at a distance.—189. Military government full control lands and immovable private property of enemy, even to fruits, rents, profits, but measures generally cease in legal effect with occupation.—190. Conspicuous instance of contrary ruling.—191. Import of ruling first cited.—192. Case from Franco-German War.—193. Case Dagupan Railroad, Luzon, Philippine Islands.—194. Supplies for subsisting army taken as of right.—195. Measures without political significance survive the military occupation.—196. Booty.—197. Property taken becomes property of State.—198. Instructions for taking.—199. Arguments of Hague Conference, appropriating property.—200. Distinctive rights, property captured on land and on sea.—201. Taking private property as coercive measures.—202. Instructions for Armies in the Field regarding these principles.—203. Exceptions to rule private property may not be taken.—204. Punishment of community for acts of one of its

members.—205. Hague Conference on this practice.—206. Hostages for good behavior.—207. Contributions support of destitute.—208. No distinction, real and personal property, but distinction, taken for use or for destruction.—209. Contributions as amelioration ancient right enslavement.—210. Pillage unlawful.—211. Contributions, an equitable means to support army.—212. Effect *levies en masse*, exempting property from seizure.—213. German theory contributions.—214. Private property taken on field battle.—215. Instances sacking cities, Spanish Peninsula.—216. Fourth exception rule private property may not be seized.—217. Private property destroyed as well as appropriated.—218. Instances: principles destruction of enemy property.—219. This under military government, only to punish rebellion.—220. Illustrations of patriotic devotion.—221. Kinds of property that may be seized or destroyed.—222. No confiscation Crimean War.—223. State never confiscates debts due to enemy subjects.—224. This rule extended, treaty United States, Great Britain.—225. Rules seizing enemy property on our own or on hostile territory not necessarily same.—226. Same subject.—227. Rights of military occupation, enemy property found there.—228. What vests title in movable private property, *post liminium*.—229. Rules of corporeal, same as of incorporeal rights.—230. Effect compulsory payment to conqueror, a private debt, if debt due displaced State.—231. Incorporeal rights, purely personal, not confiscable.—232. Parties compulsory absent not affected decisions war-courts—233. Case of Doroteo Cortes, Manila.—234. Military occupation, not *ipso facto*, affect immovable property.—235. Incorporeal rights attached to immovable property may be seized.—236. Documents, evidence incorporeal rights, give no right to attack latter, unless the property out of which incorporeal rights sprung are reduced to possession.—237. Purchaser immovable enemy property takes at his own risk.—238. Conqueror's title extends no further, lasts no longer, than his possession.—239. Risks, purchase immovable enemy property.—240. Immovable property, private parties, not confiscable.—241. Unless specially forbidden, private property, miltary occupation, may be alienated.—242. Acts *de facto* government, regarding property, depend for validity on result contest.—243. Illustrated: case Thorington *v.* Smith.—244. Same subject, purchases under Confederate Confiscation Acts, property in Confederacy, owned by loyal man, inhabitant loyal State.—245. Instances recent wars, United States, illustrative, States under military occupation, property both corporeal and incorporeal.

CHAPTER XI.

Rights Regarding Public Property.

246. No tenderness shown, seizure State property.—247. Seizure perfect title in conqueror to movable State property and rights attached

thereto.—248. Positive law sometimes discriminates, movable and immovable property.—249. Conqueror acquires title movable property by some positive act alone.—250. Rights conqueror extend no further than he uses paramount force to enforce them.—251. Same subject.—252. Effect payment to new government of debts due to old on question of extinguishing the debts.—253. Rights old State revert, government military occupation disappears.—254. Case Smith, Bell & Co., Manila.—255. Effect military occupation, on property enemy State of character not affecting contest.—256. Illustrated in Napoleon's wars.—257. Results at end these wars.—258. Seizure works of art allowable.—259. Wanton destruction public property not allowable under laws war, unless circumstances peculiar.—260. Such may be justified, peculiar cases.—261. Military commander should preserve records showing title to property, and of historical value.—262. Right of conqueror, immovable State property, extend no further than asserted by paramount force.—263. Ousted government cannot claim revenues derivable from property within military occupation.—264. Experiences during Philippine insurrection.—265. Right destroy property enemy State, same as to appropriate.—266. Destruction magazines, foundries, war-like stores.—267. Private property, such cases, protected from unnecessary destruction.—268. Same subject.—269. Implied obligations, conqueror, may be different, private and public property.—270. Case civil war Government determines own course.—271. Military commander may not alienate property of his government, except on ground necessity sustain army.

CHAPTER XII.

Trade with Occupied Territory.

272. Trade with territory militarily occupied illegal except under authority dominant power.—273. Same subject.—274. Same rule applies to allies.—275. Temptations to such trade.—276. Rule during Crimean War.—277. Conduct military governor, this respect, controlled by home government.—278. Power determine military policy State.—279. Expediency not affect inflexibility rule non-intercourse.—280. Same subject; review power military commander.—281. President vested by law, authority license trade.—282. Still further change policy, conducted through Treasury Department.—283. Results attempt to evade trading laws.—284. Action Supreme Court in premises.—285. Existence of war at once suspend intercourse.—286. How existence war brought home to people.—287. Commercial dealers must have fair warning war exists.—288. Warning must be of unequivocal nature.—289. Time when intercourse becomes illegal.—290. Illegality intercourse extends not only to territory proper of belligerent, but to all reduced into his military possession.—291. En-

trance into territory of military occupation, not only merchandise, but of persons regulated by dominant powers.—292. Exceptions to rule war of non-intercourse with enemy.—293. Precipitation war, not avoid existing contracts.—294. Case trade with Sulu archipelago.—295. Rule war of non-intercourse founded on public policy, and is of inflexible nature.

CHAPTER XIII.

INSURRECTION AGAINST MILITARY GOVERNMENT.

296. Abstract right to rebel conceded; question one of expediency. —297. Same subject.—298. Illustrations.—299. Inefficacy guerilla warfare against regular operations.—300. Wellington in France.—301. Germans at Strasburg.—302. Same subject; Instructions for Armies in the Field.—303. The more general the military insurrection, the severer repressive measures.—304. Policy of the United States in the Philippines.

CHAPTER XIV.

RESPONSIBILITY OF COMMANDERS—MILITARY GOVERNMENT.

305. Authority commander, military government, limited by laws war. —306. In foreign State, no necessity complications.—307. If on territory reclaimed from rebels treated as belligerents, policy a local one.—308. Army and Navy officers responsible to President.—309. States responsible, approved acts of subordinates.—310. Responsibility military commander both military and civil in nature.—311. Military responsibility considered. —312. Same subject.—313. Conqueror not responsible to subjugated people except under laws of war.—314. Legality acts those enforcing military government may be inquired into.—315. Sound policy, State sustains military officers.—316. Actions either *ex contractu* or *ex delicto*.—317. Military responsibility to neutrals, also to subjects of own State.—318. Actions *ex delicto;* case Mitchell *v.* Harmony. —319. Remedial legislation, meet hardships of war.—320. Same subject.—321. Organization Court of Claims.—322. Military commander entitled every intendent in his favor.—323. Law responsibility official vested with discretion in determining facts, and exercising judgment thereon.— 324. Military government essentially one of vigilance and prompt action.—325. Rule responsibility of subordinates.—326. Rule responsibility military commander, same as of judges on the bench.—327. Same subject.—328. Same subject.—329. Illustrations drawn from Civil War.—330. Same subject.—331. Same subject.—332. Rule of necessity, enunciated case Mitchell *v.* Harmony, examined.

CHAPTER XV.

MILITARY GOVERNMENT—TRIBUNALS.

333. War-court, as distinguished from court-martial.—334. Early instances in U. S. services, of invoking.—335. Conduct General Scott, Mexico, in this regard.—336. Absence of statutes, customs of war govern, proper cases.—337. Responsibility of commander who appoints military commission.—338. Responsibility, members war-courts.—339. Military commissions under autthority either statute or custom war.—340. Rule of responsibility, members war-court.—341. Jurisdiction war-court as to persons.—342. War-court, cognizance all proper causes, except statute has otherwise provided.—343. Experience British in South Africa.

CHAPTER XVI.

WHEN MILITARY GOVERNMENT CEASES.

344. Necessity determining when military government ceases.—345. Conqueror may be expelled, hold territory permanently, or surrender by treaty.—346. If permanently held, ceases with establishment civil government.—347. Illustration.—348. Same subject.—349. Same subject.—350. Rights people then, such as dominant government concedes.—351. Policy of the United States.—352. Case of States after Civil War.—353. Dates termination Civil War.—354. Though active hostilities cease, state of war exists till peace fully established.—355. If country be permanently held, military government ceases at pleasure of authority that instituted it.—356. Recent illustrations.

CONTENTS.

PART II.—MARTIAL LAW.

CHAPTER XVII.

MARTIAL LAW DISTINGUISHED FROM MILITARY LAW.

357. Definition of martial law.—358. Domestic and ordinarily unwritten.—359. War power, or extensive police power, depending on circumstances.—360. Erroneously confounded with military law.—361. Origin martial law in English jurisprudence.—362. Same subject.—363. Originally meant the discipline of the camp.—364. Same subject.—365. Supplements short-comings of the civil law.—366. Can now apply to soldiers and civilians alike.—367. Martial-law practice under Charles I.—368. Scope of martial law.—369. Implied powers of Executive.—370. Experiences martial law, Southern Confederacy.—371. Rights of few give way to preservation of the many.—372. Not necessary, martial-law theater that of active war.—373. Legal when civil authorities fail in functions.—374. Those who enforce martial law answerable before the courts.—375. Must be limitted to time and place of necessity.—376. Resort to martial law a common practice.—377. View of it as belligerent right.—378. Military in first instance judges of necessity.—379. Invoked, suppress local disturbance.—380. As belligerent right, based on laws of war alone.—381. Principle of civic responsibility the characteristic of domestic martial law.—382. Parliamentary martial law in Ireland.—383. The great desideratum, reconcile necessities of government with security to personal rights.—384. Instances during times of peace in United States.—385. Principles relating to the instituting and execution of martial law maintained in this treatise.

CHAPTER XVIII.

MARTIAL LAW UNDER ENGLISH JURISPRUDENCE.

386. Scope martial-law authority varies under different governments.—387. Under British government is regarded as inaugurating war conditions.—388. Experiences in Ireland.—389. Distinctive features, martial-

law statute.—390. Import of these principles.—391. British colonial experiences.—392. Prosecutions at home for martial-law acts in colonies.—393. Question, vital importance, if offences *after* active disorder ceased, to be tried by martial-law courts.—394. This experience contrasted with some in the United States.—395. Character of British martial-law tribunals.—396. Martial law not affect those subject Mutiny Act.—397. Viewed as branch of the royal prerogative.—398. Distinction, martial and military law.—399. In *theory* not part of British jurisprudence.—400. In practice has become so from necessity.—401. Notwithstanding Petition of Right, great exigencies during peace have rendered martial law necessary, and therefore legal.—402. A condition of war may exist without actual war; then martial law finds its place.—403. Instances from English history.—404. If unknown to English jurisprudence, known to English experience.—405. Idle fears, military domination.—406. True test of justification, failure civil administration.—407. Same subject.—408. Principles announced for enforcement.—409. These principles examined.—410. Same subject.—411. Same subject.—412. Same subject.—413. Same subject.—414. Who judges of necessity.—415. Remarks on civil responsibility military officer.—416. Principle same case civil official.—417. Inequality situations military and civil officers more apparent than real.—418. Courts-martial rules advisable for martial-law courts.—419. Method enforcing martial law varies with circumstances.

CHAPTER XIX.

THEORY OF MARTIAL LAW IN THE UNITED STATES.

420. Diverse experiences, caused diverse views martial law, American and British practice.—421. Attorney-General's definition martial law.—422. His view, function officer executing.—423. Remarks on these views.—424. View that abolishes all law, substituting will military commander.—425. Confounding here military government as part of law of war with martial law as domestic fact.—426. Error considering martial law as setting up irresponsible officials.—427. View of U. S. Supreme Court, martial law sometimes justifiable, therefore then legal.—428. Court decided martial law not legal when civil administration unobstructed.—429. State judge of necessity martial law within own limits, case defiance own authority.—430. Martial law legally established, acts to give it effect justifiable under legal responsibility for abuse power.—431. This the common-law rule, official responsibility.—432. Fears of early patriots of abuse of military power not confirmed by century's experience.—433. Deep-seated respect of United States military officers for civil institutions and authority.—434. Necessity martial law New Orleans, 1814–15.—435.

Universality of demand, military and civil communities, for measure.—436. Martial law here a war measure.—437. In the United States martial law is deemed an offspring of real necessity, to be exercised under legal responsibility.—438. In this view is exercise last dormant power of government.—439. Experiences in Southern Confederacy, same character as in United States.—440. Same subject.

CHAPTER XX.

Martial Law Supplements Common Law.

441. Defect in common law, presupposes always available armed force adequate preservation public peace and security.—442. Reliance on such force, some cases, illusory.—443. Led to assumptions power, preserve peace.—444. Duty every citizen help suppress lawlessness.—445. Rule responsibility case of accidental killing.—446. Same in case of attempted felony.—447. Great responsibility, case death, caused timidity in supporting lawful authorities.—448. Common law recognizes the customs of war in emergencies.—449. Martial law came to aid of the common law.—450. Fears that might be cloak for usurping authority.—451. But necessity to meet grave exigencies that common law could not meet, caused acceptance of martial law as the last resort.—452. Early prejudices in American colonies to anything savoring of military rule.—453. Declaration martial law in Boston by General Gage, 1775.—454. Same subject.—455. Circumstances amply justified resort to martial law.—456. Colonial authorities resorted to martial law as war measure.—457. Instances of all power placed in hands commander-in-chief.—458. The trust not abused.

CHAPTER XXI.

Nature of Necessity Justifying Martial Law.

459. The necessity that justifies martial law is overwhelming, the result of a failure of civil administration to perform its functions; it eschews expediency.—460. When inaugurated, the military authority is supreme.—461. New York city mobs in 1863.—462. The justifying necessity varies with circumstances.—463. Necessity may exist for instituting martial law, even though civil courts may be able to sit, if total conditions are such as to defeat ends of government.—464. Same subject.—465. Disinclination officials do duty may cause necessity as much as adverse physical force.—466. Invasion, and, in some instances, threatened invasion, may justify.—467. Same subject.—468. Necessity directing all resources country repelling invasion may warrant martial law.—469 Necessity must be instant, overwhelming.—470. Same subject.—471.

Principles upon which those who execute martial law to be the judges.—472. Terror and civil disorganization accompanying invasions may justify.—473. Secret machinations, inertness on part civil officials, may justify.—474. Illustrations.—475. Same subject.—476. Continued at New Orleans after news peace received.—477. Proximity of enemy caused it to be instituted and maintained.—478. The one overwhelming necessity was repelling invasion by every means.—479. To repel the invader at the gates overshadowed all other considerations.—480. Self-defence right of courts, legislatures, communities, States, nations, as well as of individuals.—481. Under this principle martial law is justified.—482. Doubtful loyalty large part people Louisiana justified martial law.—483. Common law not suited case rebellion.—484. Riot Act an attempt to meet this difficulty.—485. Difficulty uniting law-abiding elements renders often resort to military a necessity.—486. Instances of this, Baltimore, 1861.—487. Courts of justice sat unimpeded this case.—488. All-pervading undercurrent disloyalty called for military rule.—489. Same subject.—490. Opinion Chief Justice Taney, Merryman case, based on fallacy of assumed loyalty, whereas disloyalty poisoned all sources whence flowed local official action.—491. Wisdom of President Lincoln's course.—492. Necessary in Kentucky as a belligerent measure.—493. Same subject.—494. Same subject.—495. Wide-spread active disaffection may paralyze courts as much as exertion of physical force.—496. This was condition affairs in Kentucky, 1864.

CHAPTER XXII.

Federal Authority to Institute Martial Law.

497. Martial law may be invoked by either Federal or State government.—498. Early theories, employing military, domestic disturbance, United States.—499. When local authorities fail, President authorized by law to use military power.—500. Same subject.—501. In Federal matters, President independent State authorities.—502. Subordinates may be entrusted to enforce President's authority.—503. Commanding officer may extend his authority over environment camp, time of war.—504. Supreme Court U. S. sustains State exercising martial-law powers.—505. It met the peril of armed resistance to government.—506. Deceptive nature illustrations, early English history.—507. Important Supreme Court statement, martial law constituted a state of war.—508. In such circumstances military not subordinate to civil authorities.—509. Responsibility, arrests out of martial-law district.—510. Such arrests might be legal, certain conditions.—511. Martial law during reconstruction period following Civil War.—512. Suspension privilege writ *habeas corpus* in New Mexico.—513. Privilege of *habeas corpus* in Colorado.—514. Assumption of mili-

tary control in Arizona.—515. Martial law, State of Missouri.—516. Confirmed by the President.—517. Fallacy of doctrine that martial law can not be exercised if no physical obstacle exists to sitting of courts.—518. Same subject.—519. Martial law continued as military necessity, a belligerent measure, during continuance of war.—520. Divisions that grew up among friends of the Union in Missouri.—521. Principles enforcing martial law precisely defined.—522. Civil authorities and institutions treated with greatest respect.—523. Generous policy, misunderstood, led to more drastic measures.—524. Martial law may be justified even if no physical obstacle to courts sitting.—525. Martial law, Baltimore, 1863, on principle of belligerency.—526. Close relation power suspend privileges writ *habeas corpus* and to order martial law.—527. Martial-law measures taken, case evasion of draft.—528. Right of arrest, trial, punishment, carried to extreme.—529. Measures of President subject to Congressional discussion.—530. Proclamation President Lincoln, September 15, 1863.—531. War Department orders issued defining course of affairs.—532. The period one of necessary arbitrary acts.—533. Bill in nature indemnity act passed by Congress.—534. Thus secured officers a protection against persecutions in performance of military duty.—535. Courts inclined construe law strictly.—536. Easily carry commendable speculations too far.—537. President revokes martial-law measures, end Civil War.—538. Military control, District Columbia, during Civil War.—539. Same subject.

CHAPTER XXIII.

CONGRESSIONAL MARTIAL LAW.

540. View of Federal martial law includes power to Congress to establish.—541. Congress well-nigh omnipotent under theory United States Government.—542. Reconstruction Acts created what in fact, if not in express terms, was martial law.—543. The military administration created by the so-called Reconstruction Acts was that of martial law in rigid form. 544. Reluctance administration to acknowledge true import of acts led to more drastic military measures, thus emphasizing martial-law powers Congress.—545. Same subject.—546. Latent spirit rebellion throughout Southern States caused these military measures.—547. Legislation even pushed to questionable Congressional limits, impugning authority President.—548. Authority general of the Army greatly augmented.—549. Reconstruction Acts created a military despotism.—550. The military paid every proper regard to the civil administration.—551. This deference to civil authority part of the United States regular Army system.—552. A great measure relief for military when predominant in community to have assistance loyal civil authorities.—553. Same subject.

CHAPTER XXIV.

Martial Law in States and Territories.

554. Martial-law authority States and Territories distinct from that of Federal power.—555. Guarantee of Art. 4, Sec. 4, Constitution.—556. What constitutes republican government matter of Federal cognizance.—557. Same true when United States moves to protect State against invasion.—558. Case of domestic violence State legislature should, if practicable, apply, if necessary, for Federal protection.—559. President decides what State authorities to recognize.—560. Statutes that authorize employment of military, execution of laws, pay proper regard to civil jurisdiction, State and Federal.—561. President exercises discretion when State calls for assistance.—562. President determines under whom military sent into State shall act.—563. Same subject.—564. Same subject.—565. Limit of authority Federal jurisdiction in State.—566. President's authority enforce martial law on State's demand for protection, seems complete.—567. State executive martial-law power proper occasion of necessity; illustrations.—568. Same subject.—569. These occasions military placed above civil authorities, and sustained by State Supreme Court.—570. Confederate States exercised martial law without hesitancy cases of necessity.—571. Martial law in Territories of Union.—572. Same subject.—573. Same subject.—574. Same subject.—575. Experiences New Mexico and Arizona.—576. Apparent increasing number of occasions when military involved in civil affairs in United States.—577. Evidences of reckless spirit abroad in land.—578. Exhibition weakness civil authorities and of *posse comitatus*.—579. Failure *posse comitatus* causes resort to military.—580. Declaration martial law not necessary to institute and carry into effect.—581. The law of the camp, in so far as necessary, now extends to whole community.—582. Necessity the keynote martial-law situation.—583. English rule holding to responsibility for exercise discretionary authority in field.

CHAPTER XXV.

Administration of Martial Law.

584. Efficient system administering martial law a necessity.—585. Effect martial law regarding offences and methods of dealing with them.—586. Acts that are harmless ordinary civil conditions may be grave offences under martial law.—587. Martial law justifies necessary force to attain its ends.—588. Fact illustrated during Civil War.—589. Both President and Congress exercised power suspend writ of *habeas corpus*.—590. All who act in district to defeat martial law may be arrested.—591. Bill of rights not effective time of war, necessarily, nor cloak for license.—

592. Mr. Webster's view of martial-law authority.—593. Commander must assume authority of acting or taking initiative.—594. Authority to be exercised same, whether danger comes from open resistance to laws or secret machinations.—595. Same subject.—596. Change in judicial opinion in United States as to exercise of martial-law powers.—597. Same subject.—598. Same subject.—599. Untenable attitude of judges in Louisiana case, 1814–15.—600. Same subject.—601. Opinion of Louisiana judges not consistent in itself.—602. Attitude of courts, recent instances enforcing martial law.—603. Same subject.—604. Courts, recently, firmly setting face against lawlessness, sustain military when involved.

CHAPTER XXVI.

Martial-Law Tribunals.

605. Martial-law tribunals correspond to offences of this unusual time.—606. Disposition some to question legality martial-law tribunals.—607. All lawful authority not necessarily on statute; the duty being lawfully imposed, all necessary power to accomplish is lawful.—608. Same principle authorizes summary military tribunals.—609. Military commissions based alike on statutory law and common laws of war.—610. Commanding general authority to appoint.—611. Martial-law courts not to interfere with courts-martial.—612. Jurisdiction depends on custom, statute, orders of convening authorities.—613. Court-martial responsibility attaches to martial-law courts.—614. Theory as to territorial limits, jurisdiction of martial-law courts; correctness of these views questioned.—615. Limit jurisdiction regarding time when offence committed.—616. Procedure should follow rules of courts-martial.—617. In determining responsibility, those who exercise martial law, great weight due to customs of military service.—618. Character martial-law courts in Jamaica examined by royal commission.—619. Not same precision in charges required in civil courts, nor limit of sentences same.—620. In United States only grave cases warrant invoking martial-law tribunals.—621. Martial-law courts adjust procedure to attaining substantial justice.—622. Military authority over civil community instinctively disagreeable to military men.—623. Only on or adjacent to theatre of war is martial law initiated by military men; elsewhere by the civil officials.—624. Rules evidence before martial-law tribunals; common-law rules not necessarily applicable.—625. Ignorance as to rule of laws of evidence by military officers; not part of their business.—626. The simplest of these only followed in military courts, and at discretion of courts.—627. Same rule British service.—628. Military courts by this process arrive at substantial justice; as much so as civil courts by more elaborate system.—629. Civilians generally

but not necessarily turned over to civil courts; but this depends on circumstances.

CHAPTER XXVII.

Responsibility of Commanders—Martial Law.

630. Necessity of martial law, also conduct officials enforcing, may be inquired into by courts.—631. If official keeps within limits of discretionary authority, not responsible except maliciously abuse authority 632. Rule of justification of official more liberal than case of private citizen who assumes to act.—633. Case of Captain Wilkes, U. S. Navy.—634. Great importance of decisions supreme Federal tribunal sustaining officers in performance of duty.—635. Necessity sustaining executive officers peculiarly important.—636. Immunity flowing from customs of war equally efficacious with statute.—637. Officers entitled to every consideration due to peculiarly trying situations.—638. Rule of responsibility more generous in ancient times.—639. Instances in War of 1812. Reading of Articles of War in those cases.—640. These articles construed practically during Civil War.—641. Caution with which commanders should proceed against civilians.—642. Case of McConnell *v.* Hampton.—643. Erroneous principles involved in this decision.—644. Civil courts should remember that martial-law measures alone may have enabled them to sit.—645. McConnell *v.* Hampton not a precedent of the law at the present day.—646. Statement of law governing such cases at this time.—647. So long as officers keep within proper jurisdiction, deserve and generally receive support.—648. Officers must be governed by customs of war in absence of statute.—649. Judgments of courts in quietness may differ from decisions of executive officers in times of turbulence.—650. Protection of officers by statute.—651. Great importance of Supreme Court decision in case of *In re* Neagle.—652 United States officials triable for official acts in Federal forum.—653. Executive officers deserve consideration for difficulties that attend their situation in great emergency.—654. On such occasions the firm course is that of duty and patriotism.—655. The civil judicature must ultimately decide question whether preservation of rights of all may justify temporary sacrifice rights of few.—656. Military in suppression of disorder in manner appointed by law, rights and obligations those of war. Military duty must be done in military way.

CHAPTER XXVIII.

Responsibility of Subordinates.

657. Cheerful obedience to lawful orders of military superiors the vital principle of military system.—658. Subordinates cannot interpose, if prose-

cuted, the unlawful orders of superiors.—659. Apparent severity of this rule said to be necessary to protect community from arbitrary acts.—660. Hardships of strict rule has led to courts modifying in tenderness to subordinates.—661. Same subject.—662. As a result, the superior who orders now responsible, unless orders manifestly illegal to man of ordinary understanding.—663. If superior acted in good faith, for public good, not to be assessed exemplary damages.—664. Rule of military responsibility greatly ameliorated in modern times.—665. Rule of obedience laid down in Martin *v.* Mott.—666. The situation of subordinate as to responsibility different from that of superior who gives order.—667. Salutary character of rule justifying act of subordinate unless palpably illegal.—668. Regrettable circumstance that rule of subordinate's responsibility should be left in the least doubt.—669. Special rule of responsibility.—670. Opinion of Mr. Justice Stephen.—671. Same by Willes, J., and Mr. Dicey.—672. Rule of responsibility not absolute; but nothing excuses disobedience of legal order.—673. Responsibility of members of military tribunals same as if distinct order to individual officer.—674. Same subject.—675. If tribunal had, apparently, jurisdiction, not responsible if facts afterwards prove otherwise.—676. Jurisdiction had;' not responsible unless prove members acted maliciously.

CHAPTER XXIX.

Bills of Indemnity.

677. Bills of indemnity, after martial law, customary in English jurisprudence.—678. Under legislative martial law, such bills only indemnify for acts in cases of customary practices under martial law.—679. Colonial bills of indemnity.—680. If martial law legally instituted, and conduct proper under it, bill of indemnity adds nothing to security; only statute of repose.—681. Scope under this view bills of indemnity.—682. Policy involved in bills of indemnity.—683. Statutes nature bills of indemnity after Civil War.—684. Same subject.—685. Same subject.—686. Same subject.—687. Same subject.—688. Exercise military authority over civil community, as experience has shown, in emergencies, not cause of alarm.—689. This duty not attractive to the military.—690. Absolutely necessary that military be sustained in reasonable use of authority.

APPENDICES.

I.

General Scott's Martial-law Order, published in City of Mexico.

II.

Instructions for United States Armies in the Field, and Supplement (G. O., 100, A. G. O., 1863, and G. O., No. 3, A. G. O., 1892); together with corresponding Articles of the Hague Conference Code of 1899.

III.

The Brussels Project of an International Declaration concerning the laws and customs of war.

IV.

Proposed Code of the Laws of War adopted at session of Institut de Droit International, Oxford, September, 1880.

V.

State of Siege in France.

VI.

Instructions for the Government of the Armies of the United States in Time of War.

Military Government and Martial Law.

INTRODUCTION.

Military Government.

1. Military jurisdiction is treated in the following pages in its two branches of Military Government and Martial Law. The former is exercised over enemy territory; the latter over loyal territory of the State enforcing it.

2. The enemy territory over which military government is established may be either without the territorial boundaries of the dominant State, or comprise districts occupied by rebels treated as belligerents within those boundaries.

It has, however, been determined by numerous decisions of the Supreme Federal Tribunal that, for all war purposes, districts thus occupied by rebels are foreign. From a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory.[1] Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.

3. On the other hand, martial law as here considered is purely a domestic fact, being instituted only within districts which, in contemplation of law, are friendly.[2] However it may be brought into existence, the key-note of the situation is that martial law is, as just stated, a domestic fact.

4. The distinction is important. Military government is thus placed within the domain of international law, its rules

1. Pomeroy's Constitutional Law (Bennett's third edition), par. 712, p. 595. 2. *Ibid.*

the laws of war, while martial law is within the cognizance of municipal law. The difference between these two branches of military jurisdiction becomes most strikingly manifest through the dissimilar rules of responsibility under which officers exercise their respective powers in the two cases. With rare exceptions, the military governor of a district subdued by his arms is amenable according to the laws and customs of war only for measures he may take affecting those found there, whatever their nationality; whereas he who enforces martial law must be prepared to answer, should the legality of his acts be questioned, not only to his military superiors, but also before the civil tribunals when they have resumed their jurisdiction.

5. The theory of temporary allegiance has been adopted as most aptly descriptive of the relations borne by those in the occupied district toward the military government established over them. It has the sanction of repeated decisions of the Supreme Court of the United States with reference both to our own people temporarily subjected to foreign rule, and enemy subjects when brought under our military control. And although this theory is rejected by some respectable writers, the weight of authority and all practice favor it. Certainly in the light of the judicial decisions referred to it is entitled to great respect.

Not only does this theory give a juster conception of the relations existing between the ruler and people ruled under these circumstances than any other, but it is based upon considerations which are peculiarly advantageous to the latter. It signifies to them protection to person and property in so far as this course is compatible with a proper prosecution of the war by the dominant power. To appreciate its beneficence we have only to recall what a great relaxation this is from the strict rules of war.

Formerly adverse military occupation vested in the conqueror a right to all property found there and transferred to him the sovereignty of the subjugated territory. He appro-

priated the former without stint, nor did he hesitate to press the inhabitants into the ranks of his army. That was the rule from earliest times down through the Napoleonic period. It is true that the dissemination of learning and the advances of civilization ameliorated the condition of the conquered, yet neither Frederick the Second nor Napoleon hesitated either to lay violent hands upon enemy property regardless of military necessities, or to recruit their armies from the people of conquered provinces who were forced into the service. Wellington was more humane.

Can it be denied that, under the theory of temporary allegiance, the position of those who are subjected to military government is not more eligible than that here portrayed?

There is no mystery regarding the foundation upon which the duty of temporary allegiance rests. Upon this point the language of the Supreme Court is very emphatic. When the regular government is driven out and no longer can secure the people in those rights which government principally is instituted to maintain, their allegiance is for the time in abeyance, and, in a modified form, is transferred to that government—even though it be founded on overpowering adverse military force—which can and does, either wholly or partially, secure them in those rights.[1] Nor does it signify that the inhabitants do not by visible signs join with their military ruler in arranging the details of his government. Their covenant is implied; but it is none the less binding because it consists in silent acquiescence in the new order of things. What the conqueror does from generosity is in derogation of his strict rights. And whatever may be his motives, the result is apt to be far more beneficial to the conquered than to himself. He is dictating, they accepting, terms. Happy their lot that he is thus willing to concede to them many immunities from the hard fortunes of war. From any other than a humanitarian view it is a matter of indifference to him whether or

1. 4 Cranch, 211; 4 Wheaton, 453, 9 Howard, 603.

not they are protected in their rights of life and property; to them it is a matter of vital importance. He is there to enforce his will and is able to do it; they must accept what he offers. By remaining with their property in territory which he alone governs, they impliedly, under the laws of war, accede to his terms; and while they live under his rule and receive the benefits of that law and order which he institutes and maintains, they owe to him that transient duty of obedience which is called "temporary allegiance."

Nothing could be more disastrous to the interests of inhabitants of occupied territory than for them to be made to believe that the invader is there by sufferance, and has no rights which they are bound to respect. They are not in a position to assume such lofty ground. To do it is simply to court disaster. Of this they may rest assured: the military government, if need be, will enforce obedience. If the people—their regular government evicted—proceed toward the invader as if he were a mere intruder, whom they may treat with contumely, they will probably have cause to regret their presumption. It may cost millions of dollars, the devastation of fair provinces, the destruction of flourishing towns, and many hundred lives to bring them to a realizing sense of their error, but the experience will be theirs, and one which they will not wish repeated. What evidence the incidents of the Franco-German War of 1870–71 bear to this fact! Yet, that was the "contest of force" conducted between the most refined, enlightened nations. All this is emphasized by Russian experiences on the soil of Turkey, following immediately after a conference assembled at the solicitation of the Czar with a view to softening the inevitable hardships of war, and which, as hereafter narrated, recommended an international code for that purpose distinguished for its precepts of mercy and good-will.

Equally unfortunate in its effects, if it be acted upon, is the proposition that the vanquished State retains, with reference to inhabitants of occupied territory, the rights of sov-

ereignty in all its plenitude, and that they must obey its mandates. This is purely chimerical. They are under no obligations to recognize the authority of a State which can only command their services without the power to protect them if they obey. To do this is but to invite severest measures of repression on the part of the military governmental authorities.

It is not proposed in this treatise to sanction doctrines so fraught with melancholy results to those who are so unfortunately situated as to be for the time subjected to the enemy's arms.

6. During the last half-century there has been a great revolution in weapons of war. This has not been confined to the arms of the soldier, but extends to the armament of works, the use of mines, torpedoes, and other death-dealing inventions. While attention has been directed to this branch of the miltary art, another and agreeable spectacle has been presented in efforts of humane and learned men, soldiers and others, to reduce the laws of war to a concise code, that they may be better and more generally understood; at the same time inculcating and nurturing a sentiment favorable to reducing sufferings engendered by war as much as possible. Those who have been conspicuous in these labors have not belonged to a class who indulge Utopian dreams of general and perpetual peace. They recognize the fact that, until human nature changes, wars will be. Their efforts have been directed to the creation of an universal public opinion favorable to minimizing the evils which attend the prosecution of hostilities.

The main instrumentality through which it has been attempted thus to advance the cause of humanity has been conventions of an international character in whose deliberations delegates from a large number of States have taken part. The declaration of Paris of 1856 may be taken to have given the first impulse toward such concerted action. Then came the Geneva Conventions of 1864 and 1868, respectively, in

the proceedings of which twenty-three States signified their acquiescence, and which considered particularly the amelioration of the condition of the sick and wounded and protecting those who administer to their welfare. Next in order was the St. Petersburg Convention of 1868, participated in by seventeen States, and which resulted in an agreement not to use, as between the contracting powers, an explosive bullet below 400 grammes weight or loaded with fulminate or inflammable material. Then followed the Brussels Conference of 1874, which indirectly resulted from the efforts of certain influential persons to have some general understanding entered into which would secure prisoners of war better treatment. But the conference, brought about finally through the efforts of the Czar, went far beyond this and promulgated an "international declaration" setting forth the principles upon which wars between nations should be conducted. In 1899 the Hague Conference was convened. The proposition was initiated by the Czar. It looked in the direction of substituting arbitration where before war might have resulted from certain situations. It also succinctly and very clearly promulgated many of the laws and usages of war, which were signed by the representatives of the more important powers, and afterwards confirmed by the proper department of the latter, thus becoming obligatory.[1]

7. These codes followed the plan marked out in "Instructions for Armies in the Field," prepared by Dr. Francis Lieber and published in April, 1863, by the War Department, for the guidance of the land forces of the United States, being the first, as it has proved the most successful, effort to embrace in small compass the general principles underlying the present laws and customs of war, honoring alike the political philosopher who digested and so admirably arranged, and the military service which amidst the passions of civil war adopted, them. In a particular manner they embody the fundamental rules

1. Appendix II.

by which commanders of armies, departments, and districts are to be guided in their treatment of inhabitants subjected to military government.[1]

The "Instructions" were obligatory upon the Army of the United States only. In this respect their sphere was more circumscribed than either that of the Brussels code or of the Hague Conference, and which were international in aspiration. In another respect they were more comprehensive, for they were applicable not only to wars between independent States, but to civil wars as well, while the others referred to the former only. The circumstance of this dissimilarity is accounted for by the diverse experience of the nations promulgating the respective codes.

8. In one particular the "Instructions" have, it is believed, an advantage over all succeeding codes, which, without exception, have been based upon them. The former are wholly practical, while it is doubtful if more recent codes in all respects are. This also is easily accounted for. The "Instructions" were adopted in the midst of a great war, the result of which none could foresee. Before being adopted they were examined by a board of eminent military officers who not only understood what the laws of war were theoretically, but from experience in the field knew their applicability and how they were to be carried into execution. Moreover, they were adopted under grave official responsibility, the officers who sanctioned having to use them during the continuance of the war as their rule of conduct in dealing with the enemy. Examination will evince that they bear the deep impress of this official responsibility. The justness of this statement is not impaired by the fact that the "Instructions" were adopted precisely as submitted to the board; this circumstance only furnishes additional evidence of the thoroughness with which they had been prepared by the author. While they attempt to put into official shape the humanity of the land, they do

1. Appendix II.

not deprive a belligerent of all fair and reasonable means of successfully carrying on war. His hands are not tied by theories regarding the rights of the other party belligerent, or of the inhabitants of territory militarily occupied. Yet throughout it is inculcated that the law of war imposes many restrictions on the modes formerly adopted to injure the enemy based on principles of justice, faith, and honor. It confidently may be affirmed that the "Instructions" form a convenient and useful code of the essential laws of war on land; and, imbued as they are with the milder precepts of modern warfare, they may be expected successfully to withstand the mutations of time until at least the present moral sense of man has taken a long step in advance. The prediction here is ventured that, modified so as to conform to statutes and the agreements of international conventions, they will continue to be the rule of hostile nations when criminations and recriminations are being indulged because of infractions of these later codes. To attempt by such agreements unreasonably to restrain the actions of a belligerent regarding coercive measures to be used against the enemy is only to invite their utter disregard when nations join in deadly strife. The world has to-day a striking illustration of this. Both Japan and Russia are parties to the Hague code. Yet since the Russo-Japanese War broke out the other signatories have had their attention formally called to the disregard by one of the belligerents of the provisions of that code.

9. On the other hand, both the Brussels and the Hague codes, and also that agreed upon in 1880 by the *Institut de Droit International*, which was published to the world as the best modern thought on this subject, have the disadvantage of being adopted in times of peace, when the minds of men in dealing with military affairs turn rather to the ideal than the practical. It is not meant by this to disparage the learning, ability, and zeal of those who digested these codes. In this they stood pre-eminent before the world, and some were soldiers of great experience. The proceedings of these learned

bodies show, however, that the propositions of each State were in greater or less degree generally rejected by the others as inadmissible, and the final result was a compromise between conflicting interests. They may be expected to share the fate of compromises generally which are without a binding sanction—be broken at the convenience of the parties. The great powers at once divided upon the Brussels code. And here it may be observed that these powers alone are of real importance when an international code is to be adopted; if they do not make, they unmake them; yet in all conventions and conferences having in view the adoption of such codes, the smaller States are conspicuous by the part they take in their deliberations and published conclusions.

The most striking feature of the Brussels Conference consisted in the manner in which the smaller were arrayed against the larger continental States upon some of the most important topics brought up for discussion, such as the territorial limits of military occupation, and the right of the people to rise *en masse* either to repel or drive out an invader.

There were, besides, many questions regarding the laws of war which the conference left untouched, as it was known there could be no agreement. Great Britain instructed her delegate to take no part in discussions which seemed to bear on principles of international law not already generally accepted, and to oppose all debates on the laws of maritime warfare. That government joined hands also with the smaller continental States in opposing everything which would facilitate so-called aggressive wars or paralyze the powers of resistance of an invaded people. In truth, the Brussels Conference and the action of the British Government relative to the code it promulgated conclusively demonstrated that those nations who maintain large standing armies, and those who do not, are in many important particulars deeply interested in having different rules recognized as the laws of war. How long a code adopted under such circumstances, reluctantly acquiesced in by the really great military powers with a

knowledge that they may stretch its provisions when convenient, or of what efficacy it will prove, remains to be seen. Russia soon had a self-sought opportunity to put her alleged generous views into practice, but nothing was clearly discernible in her conduct of the war of 1877–78 which would have raised the suspicion that the Czar had proposed the Brussels Conference and applauded its results. Such, when interests of States intervene, is the difference sometimes observable between promise and fulfillment. It is an interesting circumstance that while during the last half-century successive Czars have stood forth initiators of international measures looking to either the obviation of wars or an amelioration of their effects, no other first-class power has been engaged during that period in so many wars of great magnitude as Russia.

10. In addition to the "Instructions" mentioned, and the general laws of war, United States officers have for their guidance many decisions of the Supreme Court upon the meaning and scope of those laws. The latter are regarded in all civilized countries as of great weight. Those which arose out of the incidents of the Civil War are particularly valuable, as they make clear much which formerly was obscure regarding belligerent rights and the multifarious duties of officers enforcing military government. To United States officers they are not only highly instructive, but they are of binding efficacy as well. Hence in this treatise they are frequently referred to and given prominence in keeping with their importance, intrinsic worth, and authoritative character. It were not possible, perhaps, in the decisions of any other tribunals to find the subject of the true relation of all within the sphere of military occupation treated in so copious a manner, from the elevated standpoint of judicial fairness, as in the published opinions of the United States Supreme Court. They are of special importance in an international view, and in an American work should receive every consideration.

11. He who attentively considers the past and present of the laws of war, whether prompted by curiosity, or, if a soldier,

by a desire for professional knowledge, will have his attention arrested by the agreeable fact, before adverted to, that there exists among civilized nations a widespread and steadily growing sentiment in favor of reducing to the least practicable the evils which war necessarily entails. Nowhere else is its growth healthier than in the military profession. This sentiment has a deep foundation in the kindlier feelings of human nature.

At least this feeling has crystallized itself into a well-defined proposition—that neither enemy property nor life shall be sacrificed unless thereby the military interests of the belligerent are proportionately subserved; in other words, that parties belligerent shall no longer permit the useless entailment of suffering on the people who inhabit the theatre of operations. In the abstract there is nothing new in this proposition. It has long had a place in the maxims of civilized warfare. But truth forces the confession that often it has been more honored in the breach than in the observance. That which is new about it now is the apparent determination on the part of the leading nations to make the lifeless theory a living reality. The last and highest development of this idea is in the Hague code, to which reference has been made.[1]

12. It will, however, be a great mistake to imagine that this benign rule of conduct, which in so far as it becomes actively operative detracts from the extreme rights of a belligerent in enemy country, will ever be of value if practical effect be given to the belief that the people of the occupied territory who have this leniency shown them owe the invaders nothing in return therefor. When they accept this milder treatment, they must pursue toward their temporary ruler a course which, while not impairing their permanent allegiance to the deposed sovereignty, will not prejudice the military interests of those who establish and maintain military government over them. They cannot in war serve two masters. They must choose

1. Appendix II.

between the ousted and the *de facto* government. If they elect the former, they must join and cast their fortunes with it; if the latter, they must do nothing actively to injure it. If they do, all claim to gentle treatment by their own act vanishes.

MARTIAL LAW.

13. All military is in one sense martial rule, for in its essence it is the law of arms. Still, because of the unusual relation of the military to the civil power when for the time being in friendly territory the latter gives way to the sway of the former, it is necessary to have some term by which military rule under these circumstances shall be designated. That selected is "martial law." This law is invoked as an extreme measure which pressing necessity alone can justify.

14. It is not asserted that both martial law and the municipal law *sub modo* may not be enforced over the same territory at the same time; for where martial law is instituted by legislative act there is nothing to prevent the civil administration from being retained, although the military is made predominant, the limits of each being defined. Similarly the executive officer who enforces martial law may bring the civil power to his assistance. The effect, however, of martial law is either to supersede the municipal law wholly or the latter is retained subordinate to the former.

15. There are disagreeable associations connected with the term "martial law" which, as it is now understood and used in this treatise, should not attach to it. This arises from the fact that in the earlier days of English history and down into the Stuart dynasty resort was had to irresponsible power by the sovereign, sometimes with, oftener without, justification; and this assumed prerogative, which because it was uncontrolled could not fail to be abused, was called "martial law." If its bad features were eliminated, retaining the good, none except evil-doers at whom its strong right arm was directed ever would have exclaimed against it; and this result govern-

ments, in later times, have sought to effect. This, not by denying that it ever can be enforced in free governments, when the experience of all proves the contrary to be true, but by regulating its exercise.

16. Happily peace and good order is the rule in enlightened States. But history teaches that this desirable condition of society is liable at uncertain periods to be violently disturbed. In all governments of laws, as contradistinguished from Asiatic despotisms, it is the practice to strengthen the arm of municipal authority sufficiently to suppress ordinary outbreaks or commotions. When the exigency rises to a higher point of disturbance some other power must be called in. And no government has existed for any length of time without the necessity arising for using this reserved power, which in every case is the military. In some States this force of last resort acts or is supposed to act in conjunction with or in subordination to the civil power, although the fact generally is the reverse; in others it is brought in requisition by the executive power—charged with the duty of seeing that the laws are faithfully executed—without the sanction of positive law; while in others still—when it is thought that the public weal would best be subserved thereby—the emergencies justifying martial law are anticipated and provision is made by statute for superseding on such occasions the civil by the military power. The first two cases are often illustrated in the same State; for the military acting in strict subordination to the civil administration has seldom if ever been found to be sufficiently energetic to meet great crises in municipal and governmental affairs when they took the form of grave disorder, insurrection, or rebellion; and the result generally has been that the military commander has been obliged to take the reins of authority in his own hands. Both English and American experience furnish numerous illustrations of this. On the other hand it is on the continent of Europe that martial law—there called "state of siege"—has been provided for by

laws which specify under what particular circumstances the military shall supplant the civil power.

17. Which of these two distinct policies is the wiser; whether to permit martial law to spring forth the creature of accident, as generally has been the case in Great Britain and the United States, or whether it be the part of wisdom to accept the occasional happening of that imperious necessity which alone justifies resort to martial law as an established fact based on experience and provide for its regulation by law, is for the legislature to decide. The soldier, however, is not in this instance concerned with what the law ought to be, but with what it is. He has in either case only to act when the emergency arises. He inquires only regarding his responsibilities and the duties devolving upon him; that he may assume the one, and faithfully, intelligently, and impartially perform the other.

18. Every independent State possesses the power of self-preservation. The power is inherent in the State. Neither State nor society could exist without it. If attacked, each has a right to defend itself. Nor does it signify from what direction the danger comes or the cause thereof. It is sufficient that, in fact, a necessity exists for appealing to a power stronger than the municipal to meet an emergency with which the latter can not deal. Then it is that martial law is brought into play.

19. If it be a case of internal discord, the State at such times must choose between anarchy until the public distemper has worn off, or, sacrificing temporarily certain civil rights, invoke the aid of the military to bear down opposition to good order and re-establish the majesty of the law. If the danger come from without, it is one which municipal law never was intended to meet; martial law in the threatened district then may become not a question of internal polity, but of military necessity.

On principle it can make no difference whether the danger comes from without or within. Martial law properly may be instituted to meet either.

20. It may be asked, Is not municipal authority always equal to such emergencies? We have only to point to the experience of all stable governments to show that it is not. If the civil administration alone be depended upon, its powers must be stretched beyond what was contemplated in the organization of the government. In this there is far more danger than in the alternative course of calling in military assistance, for if there be one principle above all others important to the well-being and preservation of society, it is that civil powers shall not be usurped under color of legal procedure.

It being admitted that emergencies sometimes confront the civil power with which it can not successfully contend, the interests of society are not subserved by denying that martial law ever can be exercised, but by enforcing it and then holding to accountability, according to the rule before mentioned, those who then may be entrusted with the reins of military authority.

21. That martial law lawfully may be instituted only in case of justifying necessity is conceded. The inroads then made on the rights of the people under municipal law are such that an emergency alone warrants. There are, however, two important preliminary questions involved: first, What circumstances constitute the necessity? second, Who, the necessity having arisen, has a right to invoke the martial-law power?

22. The answer to the first question will depend upon the facts of each particular case. That which would be permissible under some would not necessarily be so under other conditions. All that can be done is to lay down some general rules for the guidance of those upon whom responsibility rests. Efforts at formulating the precise circumstances under which martial law may be invoked have proved unsatisfactory for the reason that such are just the times when there should be exercised while a reasonable, yet a wide, discretion. Even the French statutes providing for the "state of siege" are general in their terms, reposing a confidence in the judgment

of the commander who has actually at any one spot to enforce martial law.[1] In Part II. of this work an effort has been made to elucidate this subject.

23. Upon the second question authorities are divided. One class denies that Congress lawfully may establish martial law; the other asserts that such authority constitutionally may be exercised. So far as the national authority is concerned, the first class maintains that the enforcement of martial law and its inauguration under any circumstances is a matter exclusively within the province of the executive branch of the government; the second, while conceding this authority to the executive, asserts that it may be matter of legislative cognizance as well. In this, as with many other matters of governmental polity, there is room for and there exists honest differences of opinion. In this work, notwithstanding the great respect felt for those who entertain the former, the latter view is maintained.

It is conceded by all that the common law is intolerant of arbitrary power. Yet it holds every act justifiable which is essential to the preservation of property and life. This is true where individuals are concerned. So much the more so is it when the country is menaced with invasion, or an attempt is made forcibly to overthrow the government or set that municipal authority at defiance on which the welfare of all depends. Force may then repel force, and everything be done which is necessary to render the use of force effectual. There is no new principle involved in this. There is an analogous use of force exercised—on a smaller scale, to be sure—every day when under what is known as the "police power" property is destroyed to stop the spread of a conflagration or to stamp out the germs of contagious disease, leaving the owner remediless as against those who interposed in behalf of the public welfare. It may be requisite by a further and still greater exercise of martial-law authority to prevent insurrection by

1. Appendix V.

the arrest of suspected individuals and holding them in custody until the enemy is repelled or the rebellion suppressed, or they may be brought to trial before a military tribunal, if the case will not admit of delay. This power can not, however, be used in an irresponsible manner. No official is so high or citizen so low that he is beyond the power or protection of the law. The exercise of this authority must not be taken against the law, but under it. On the face of things acts like those mentioned are trespasses which can only be justified by proving that the circumstances were such as to render it the duty of the officer to disregard the rights of individuals in view of the public safety. And he takes his measures, as before remarked, under a sense of possible accountability before the restored civil courts.

Thus far both those who deny and those who assert the right of Congress to institute martial law are agreed. The question at this point arises, "Who has a right to authorize the exercise of this extraordinary authority?" And here they separate.

The views of the former can not, perhaps, briefly be better expressed than by Mr. Hare in a learned treatise on constitutional law—a work of greatest worth, and from which much that has just been said regarding the nature of martial law has substantially been taken.[1] "Military action," says this author, "should be prompt, meeting the danger and overcoming it on the instant. It can not, therefore, afford to await on the deliberations of a legislative assembly. On the other hand, an act of Congress authorizing the exercise of martial law in a State or district gives the military commander a larger charter than the end in view requires or is consistent with freedom. Armed with the sanction of positive law, he need no longer consider whether his acts are justified by necessity. He may abuse the undefined power intrusted to his hands, and destroy life, liberty, and property without the shadow of an excuse,

1. Pp. 954–55. Vol. 2

on an idle report or a rumor that will not bear the light."[1] The martial-law power is essentially executive in its nature. It is not expressly given to Congress; its exercise by the latter would seem to be in derogation of those rights of life, liberty, and property secured to the citizen by the 4th, 5th, and 6th amendments to the Constitution, and therefore beyond the range of implied congressional powers.[2]

In remarking upon these objections to the exercise of martial-law powers by Congress the last can best be considered first. In making it the commentator appears to have overlooked the decision of the Supreme Court of the United States, 11 Wallace, 268. It was there held that the amendments in question interposed no obstacle to the exercise by Congress of the war powers of the government. Section 6 of the act of July 17, 1862, rendered confiscable the property of any person who, owning property in any loyal district, should give aid and comfort to the rebellion. The person might be living on his property in a state of peace. The amendments relied on by Mr. Hare afforded him no protection; such was the decision of the court; the act was declared to be constitutional.

It is difficult to perceive how Congress can have such authority, as the Supreme Court here decided it had, and yet not have constitutional power to institute martial law. The latter could not place the property of citizens more at the mercy of the government than the act of July 17, 1862, did in the cases specified. The act of March 3, 1863,[3] placed the liberty of the subject at the will of the President. This also has been treated as constitutional by the Supreme Court.[4] If the martial-law power of Congress needed vindication, it was given in these acts, in the acts amendatory to the latter,[5] and in the

1. Hare, Constitutional Law, Vol. 2, p. 968. 2 *Ibid.*, pp. 931, 963, 964. Pomeroy, *ibid.*, Sec. 714. 3. Sec. 4. 4 Hare, Vol. 2, p. 970. 5. May 11, 1866; March 2, 1867.

decisions of the Supreme Court sustaining authority exercised under all the acts.[1]

Had Congress formally proclaimed martial law, nothing thereby would have been added to powers conferred upon the Executive Department through these several laws.[2]

But it is objected that under color of a martial-law act of Congress the officer might abuse his power without liability of being held responsible.[3] The Supreme Court has decided differently. In Luther *v.* Borden this question was directly before it, and the court explicitly rejected the doctrine that an officer could wanton with authority while exercising martial-law powers,[4] and laid down the true limits within which he must act. So as to the law expounded by the English courts. There an officer was held liable who, in enforcing martial law, had heedlessly and without due inves igation punished a civilian, this although a bill of indemnity had peen passed covering all acts taken pursuant to martial law authority.[5] The bill of indemnity was not permitted to cover with the cloak of oblivion acts of needless cruelty. The opposite doctrine has never in any degree received judicial sanction, and it is believed it never will. It is contrary to reason and every principle of justice that, under color of law, officers shall be permitted to inflict punishment unrestrained, except as prompted by a depraved heart, and then escape responsibility.

The right and the duty of using force follow directly from the ideas of law and government. The Constitution has not left this matter in doubt. It states that the President "shall take care that the laws be faithfully executed."[6] Of these laws the Constitution is supreme.[7] If he have not the power in every respect, it is both the right and duty of Congress to supplement his authority by appropriate legislation.[8] In case thanı ot only individuals, but States as such or communi-

1. 11 Wallace, 268; *ibid.*, 331; 18 Wallace, 510; 95 U. S., 438; 106 *ibid.*, 315; 110 U. S., 633. 2. Hare, Vol. 2, p. 970 *et seq.* 3. Hare, *ibid.*, p. 968. 4. 7 Howard, p. 46. 5. 27 State Trials, 759. 6. Art. 2, Sec. 3. 7. Art. 6, clause 2. 8. Art. 1, Sec. 8, clause 17.

ties, rebel against the laws and Constitution, the right of the Government to use force can no longer be questioned.[1] During the Civil War the President first assumed martial-law powers. Suspending the privilege of the writ of *habeas corpus* was one of these. The legislature gradually came in this work to his assistance. The Constitution gives Congress power to pass all laws necessary and proper for carrying into execution all powers vested in the President as head of the Executive Department. The means and instrumentalities referred to as within the authority of Congress are not enumerated or defined. They are left to the discretion of the legislature, subject only to the restriction that they be not expressly prohibited, and are necessary and proper for carrying into execution the powers mentioned.[2] And as to this, "It is not to be denied," said the Supreme Court of the United States, "that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."[3]

Speaking of the act of March 3, 1863, Mr. Hare observes that it "virtually established martial law by arming the President and the officers under his command with a dictatorial power to deprive any man whom they regarded as inimical of liberty and property." Without acceding to this proposition in its entirety, we may recall the terms of praise in which the Supreme Court referred to the provisions of the law thus inveighed against. In Beard *v.* Burts the defendant had shielded himself behind the 4th section of the act and the act amendatory thereto of May 11, 1866; and in the course of its opinion, reversing the decision of the Supreme Court of Tennessee, the Supreme Court of the United States remarks: "The orders of which the acts speak are military orders, and a large portion of such orders, as is well known, are merely permissive in form. They necessarily leave much to the discretion of those to whom they are addressed. We can not doubt that Congress

1. Von Holst, Constitutional Law, p. 45; Prize Cases, 2 Black, 635. 2 Art. 1, Sec. 8, clause 17. 3. 12 Wallace, 457 *et seq.*

had such orders in view, and that its action was intended to protect against civil suits those who do acts either commanded or authorized by them."[1] In Mitchell *v.* Clarke the action of a department commander in enforcing martial law on loyal soil indirectly came up before the Supreme Federal Tribunal for consideration.[2] The defendant strove to shelter himself, partially at all events, behind the same provision of law as the defendant in the other case just cited; the case went off upon another point, but the court took occasion to refer to the acts of Congress in question in terms of highest commendation. So in Bean *v.* Beckwith, where the same section came under review, the object of the law was clearly stated, with no suggestion against the constitutionality; while in Beckwith *v.* Bean, which was a continuation of the former case, the court remarked, when reversing the action of the Vermont court, that the jury "could not well ignore the important fact that the arrest occurred at a period in the country's history when the intensest public anxiety pervaded all classes for the fate of the Union."

It is impossible to misunderstand the intention and effect of the various laws that have just been mentioned and others of similar import affecting the liberty and property of civilians passed during and just subsequent to the Civil War and the language of the Supreme Court when referring to them. They place on firmest ground the legality of the exercise of martial-law power by Congress in cases of great emergency. It has been said that they are squarely in the teeth of the supposed opinion of the Supreme Court in the celebrated case *Ex parte* Milligan.[3] That point is not here conceded; but if it were so, the decisions referred to are of a subsequent date and may be supposed to modify the majority views, in *Ex parte* Milligan, as to the exercise of martial-law power.[4]

1. 5 Otto, p. 438. 2. 110 U. S., 633. 3. 4 Wallace, 21; Hare, Constitutional Law, Vol. 2, p. 971. 4. Hare, Constitutional Law, Vol. 2, p. 970 *et seq.*

The reasoning of the Supreme Court in Luther *v.* Borden was cogent, and demonstrated the necessity of the exercise of martial law when the civil is dethroned. "The power," said the court, "is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State must determine what degree of force the crisis demands. And if the government deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority."[1] The acts of Congress before mentioned, and the decisions of the Supreme Court commending them in strongest terms, do but transfer the applicability of this language to the government of the Union and its legislature.

If Congress has not the power to institute martial law, it probably has not authority to pass an indemnity bill covering acts taken under that law when enforced by the Executive Department; for it would be difficult to derive the indemnity power from any source from which the martial-law power would not equally flow. Yet the acts of Congress in question were in nature and effect bills of indemnity; this fact the Supreme Court in numerous opinions emphasized, not in the language of disapprobation, but in eulogistic terms.

"It would seem to be conceded," it has been remarked, "that the power to suspend the writ of *habeas corpus* and that of proclaiming martial law include one another. * * The right to exercise the one power implies the right to exercise the other."[2]

In the Reconstruction Acts of 1867 Congress exercised the martial-law power. The authority was sustained by the Supreme Court in a number of decisions.[3] In Texas *v.* White it

1. 7 Howard, 45. 2. 9 Amer. Law Register, 507–8; *Ex parte* Field, 5 Blatchford, 82; Halleck, Chap. 15, Sec. 27; R. B. Curtis, "Executive Power," 1862. 3. 7 Wallace, 701; 13 Wallace, 646.

was held that this was in pursuance of the duty imposed on the general government to guarantee to every State a republican form of government.[1] But in this discussion it matters not what the object was. The question here is not what objects Congress constitutionally may have in view by its legislation. We regard here only the means it makes use of to accomplish those objects. Martial law is never, under constitutional governments, its own end; like war, of which it may be a forerunner or sequel, martial law is a mean, an instrument for the attainment of some ulterior purpose essential to civil order. Regarded in this light, we have here properly to inquire not what the Reconstruction Acts were intended to accomplish, but the means adopted through these acts for the attainment of the end in view.

Doing this, we see the military raised above the civil power, and so securely that the President even could not depose it. The sword took precedence of all else. Courts and legislatures waited the soldier's decree. If they acted, it was at his bidding or with his permission. This was martial law. We are not interested in words. If "martial law" sounds too harsh, call this rule of the sword something else. That, however, will not change the nature of the fact. If not so termed, it still remains martial law.

24. The Constitution gives to Congress power to declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not enumerated. The decision of all such questions rests wholly with those to whom the substantial powers involved are confided by the Constitution. Moreover, it is a well-recognized principle not only that it is not indispensable that the existence of any power claimed can be found in the words of the Constitution, but it need not be clearly

1. 7 Wallace, 708.

and directly traceable to a particular one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers, expressly defined, or from all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred.[1] Many substantive powers granted to Congress are not construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to declare war. The auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as certainly given as are the express powers to which they are incident. They are not catalogued, no list of them is made, but they are grouped in the last clause of Section 8 of the 1st Article, before cited, and granted in the same words in which all other powers are granted to Congress.[2]

25. It remains only to consider whether martial law can be an appropriate war measure. If so, it may be invoked by that department to which is confided the power to provide means for successfully conducting hostilities. That it may be a proper war measure does not admit of doubt. We have not had a war in which, in one form or another, martial-law powers have not time and again been exercised, nor are we singular in this regard. All nations who are called upon either to repel invasion or suppress extensive rebellion have had a similar experience.

Being thus an appropriate war power—an instrumentality which on proper occasions may be used for our own advantage and the discomfiture of the opposite party—the martial-law power must be possessed by the department of the government which not only declares war, but must provide the means for carrying it on—this, although on occasions of pressing necessity the power likewise may be assumed by the Executive Department without previous legislative sanction.

1. 11 Wallace, 506; 12 Wallace, 534. 2. 12 Wallace, 544.

PART I.

MILITARY GOVERNMENT.

CHAPTER I.

Power to Declare War.

1. Military Government is that which is established by a commander over occupied enemy territory. To entitle it to recognition it is necessary that the authority of the State to which the territory permanently belongs should have ceased there to be exercised.

The establishment of military government is considered to be, primarily, for the advantage of the invader; but this is more in appearance than reality, arising from the circumstance that the occupying army alone has the power at the time to maintain government of any kind; in fact, such government is of most advantage to the inhabitants of the territory over which it is instituted. Without it they would be left a prey to the uncertain demands of a dominant military, which, without perhaps intending it and through mere want of system, might oppress them; with it, so long as they conform to the will of their new rulers, they generally are left unmolested in ordinary domestic and business relations, and largely in municipal affairs.

2. The right of making war, of which military government is an incident, as well as that of authorizing retaliations, re-

prisals, and other forcible means of settling international disputes, belongs to the supreme power in the State.[1]

Of the absolute international rights of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end.[2] One of these, and that without which all others combined would be powerless to preserve the social state, is the right to declare and carry on war.

3. War may originate in various ways.[3] A foreign fleet may attack ours in a remote sea. Several engagements occurred between our own ships and those of France in the latter part of the eighteenth century; and but for the fact that other projects then occupied the ambitious Bonaparte, this would doubtless have resulted in war. A foreign power may send troops into our territory with hostile intent, without any formal declaration of war. The war of 1812 was formally declared by act of Congress, as was that against Spain in 1898. Civil war may break out as either a servile war, like the Sepoy revolt of 1857–8, or a rebellion, as of the Colonies in 1775, and the rebellion of 1861, without any formal declaration.[4] In 1846 it was announced to the country by act of Congress that, by the act of the Republic of Mexico, war existed between that government and the United States.[5] But this was a mere formality. The act of Congress neither authorized nor legalized the war. That had been done long before by the contending armies on the Rio Grande. Besides, many belligerent acts are resorted to sometimes which do not and scarcely are expected to lead to war.[6]

1. Woolsey, Sec. 125. 2. Dana's Wheaton, p. 89, Sec. 61. 3. See Cobbett, p. 110 *et seq.*, for illustrations. 4. Whiting, War Powers, 10th ed., 38. 5. Act May 13, 1846. 6. See "Steps Short of War," Cobbett, p. 95 *et seq.*

The insurrection in the Philippines against United States authority was regarded as a war by the National Government, but no declaration of war was issued.

The Russo-Japanese war was not formally declared. It was announced by the Japanese navy attacking the Russian ships in the harbor of Port Arthur.

4. The parties belligerent in a public war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion; but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents, the number, power, and organization of the persons who originate and carry it on. The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts can not be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."[1]

5. While the formal declaration of war can only be made by Congress, it becomes necessary sometimes to prosecute hostilities without such declaration. The President then must act, for the time being, at least, independently of Congress. The executive power is vested in the President.[2] When, therefore, the authorities of the Union are assailed, either by foreign foes, as on the Rio Grande in 1846, and in the Philippines in 1899, or by domestic ones, as in 1861, it is the duty of the President to repel force by force without waiting for any formal declaration of war. This military authority of the President is not incompatible with the war powers of Congress. Whether the President in fulfilling his duties as

1. Prize Cases, 2 Black, 666. 2. Sec. 3, Art. 2, Constitution U. S.

commander-in-chief in suppressing an insurrection has met with armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to insurgents the character of belligerents, is a question to be decided *by him*, and "This court," remarked the Supreme Court of the United States, "must be governed by the decisions and acts of the political department of the government to which the power was entrusted. The President must determine what degree of force the crisis demands."[1]

6. Nor is it necessary to the exercise of the war powers by the President in foreign more than in civil war that there should be a preceding act of Congress declaring it. There are at least two parties to a war. It is a state of things, and not necessarily an act of legislative will. If a foreign power springs a war upon us by sea or land during a recess of Congress, exercising meanwhile all belligerent rights of capture, the question is, whether the President can repel war with war, and make prisoners and prizes by the Army, Navy, and militia before Congress can meet, or whether that would be legal?

In the case of the Mexican war there was, as has been seen, only a subsequent recognition of a state of war by Congress; yet all the prior acts of the President were lawful. It is enough to state the proposition. If it were not so, there would be no protection to the State. The question is not what would be the result of a conflict between the executive and legislature during an actual invasion by a foreign enemy, the legislature refusing to declare war. That is not a supposable case. But it is as to the power of the President, before Congress shall have acted, in case of a war actually existing. It is not as to the right of the President to initiate a war, as a voluntary act of sovereignty. That power is vested only in Congress. In case of civil war the President may, in the absence of any act of Congress on the subject, meet it by the exercise of belligerent rights. The same rule governs if the attack comes from a foreign foe.

1. 2 Black, 668.

These principles have been settled by the Supreme Court of the United States. They give stability to our institutions against the assaults of enemies from both without and within.[1] The country is not left helpless to receive the assaults of the enemy. The President meets the emergency alone until Congress can act.

7. The rule of constitutional construction by which powers expressly conferred carry with them by implication all others necessary to render those conferred effective has already been adverted to. Constitutional authority is not given in vain. Hamilton said on this point: "The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations and provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means necessary to satisfy them. The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. * * * This power ought to be under the direction of the same councils which are appointed to preside over the common defense. * * * It must be admitted as a necessary consequence that there can be no limitation of that authority which is to provide for the protection and defense of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, and support of the national forces."[2] This proposition, he further says, rests on two axioms as simple as they are universal: first, the means ought to be proportionate to the ends; second, the persons from whose agency the attainment of the end is expected ought to possess the means by which it is to be attained.

1. Prize Cases, 2 Black., 635; Texas *v.* White, 7 Wallace, 700. 2. Federalist, 23, pp. 95–6.

Chief Justice Marshall, speaking for the Supreme Court, has said: "The Government, then, of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are given either expressly or by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms; and where a power is expressly given in general terms it is not to be restrained to particular cases, unless that construction grow out of the contract expressly, or by necessary implication.[1] Congress may employ such means and pass such laws as it may deem necessary to carry into execution the great powers granted by the Constitution; and *necessary* means, in the sense of the Constitution, does not import an absolute physical necessity, so strong that one can not exist without the other. It stands for any means calculated to produce the end. The word "necessary" admits of all degrees of comparison. A thing may be necessary, or very necessary, or absolutely and indispensably necessary. The word is used in various senses, and in its construction the subject, the context, the intention, are all to be taken into view. The powers of government are given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various crises in human affairs. To prescribe the specific means by which government should in all time execute its powers, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been foreseen dimly, and would deprive the legislature of the capacity to avail itself of experience, or to exercise its reason and accommodate its legislation to circumstances. If the end be legitimate and within the scope of the Constitution, all means which are appropriate and plainly adapted to

1. Martin *v.* Hunter's Lessee, 1 Wheaton, 305.

this end, and which are not prohibited by the Constitution, are lawful."[1]

Such are the views of some of the great expounders of the Constitution. That instrument was ordained and established by the people in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity. We should discredit the wisdom of those who established the government to deny that they bestowed upon the republic, created by and for themselves, the right, the duty, and the powers of self-preservation under any and all circumstances.[2] The common defense is provided for in the war powers of Congress and the President. This will be so while war remains the last argument, not of kings only, but of nations as well.

8. One of the powers expressly given Congress is to provide for the common defense and general welfare of the United States;[3] while the President is made commander-in-chief of the Army and Navy and of the militia of the several States when called into actual service.[4] These powers, together with that of Congress to declare war, to raise and support armies, complete the general war powers of the government. They may be exercised to execute the laws of the Union, suppress insurrection, and repel invasions; and on military principles invasion may be repelled, as was illustrated by our experience in the war of 1812, the Mexican war, and the war with Spain, either by awaiting the enemy here or carrying hostilities into his own country.

9. Another power given Congress is to define and punish offenses against the law of nations,[5] thus giving that law express constitutional recognition. The law of nations has been defined to be the rules of conduct regulating the intercourse of States. Hence without the express constitutional recogni-

1. McCulloch *v.* Maryland, 4 Wheaton, 316. 2. Whiting, War Powers, 10th Ed., p. 7. 3. Sec. 8, Art. 1, Constitution. 4. Sec. 2, Art. 2 Constitution. 5. Clause 9, Sec. 8, Art. 1, Constitution

tion indicated, it would be binding on the government as one of the family of nations. It modifies the relations of independent States in peace, and sets limits to their hostilities in war. When war breaks out, the rights, duties, and obligations of parties belligerent spring from and are measured by the laws of war, a branch of the law of nations. When war exists, whatever is done in accordance with the laws of war is not regarded as arbitrary, but lawful, justifiable, and indispensable to public safety. 1

1. Bluntschli, 1, Sec. 40.

CHAPTER II.

Right to Establish Military Government.

10. The Constitution has placed no limit upon the war powers of the government, but they are regulated and limited by the laws of war. One of these powers is the right to institute military governments.[1]

11. First—over conquered foreign territory.

The erection of such governments over the persons and territory of a public enemy is an act of war; is in fact the exercise of hostilities without the use of unnecessary force. It derives its authority from the customs of war, and not the municipal law.[2] It is a mode of retaining a conquest, of exercising a supervision over an unfriendly population, and of subjecting malcontent non-combatants to the will of a superior force, so as to prevent them from engaging in hostilities, or inciting insurrections or breaches of the peace, or from giving aid and comfort to the enemy. Large numbers of persons may thus be held morally and physically in subjection to a comparatively small military force. Contributions may be levied, property be appropriated, commerce may be restrained or forbidden, for the same reasons which would justify the repression of the open hostilities of the inhabitants by force of arms.[3]

12. Those who institute or enforce military government should have a care to base their exercise of authority upon the certain ground of belligerent right or its necessary incidents. Military commanders, under these circumstances, should avoid the meshes of either constitutional or civil law; first, because such complications are unnecessary; second, because

1. *Ex parte* Milligan, 4 Wallace, 142. 2. Maine, p 179 3. Whiting, 10th Ed., 272.

facilities for securing good advice on constitutional and legal matters generally are very poor amidst the clang of armies in the field. So long as military government lasts the will of the commander should be the supreme law. Constitutional and civil lawyers have their day in court after civil law has been established. By following this simple and sound principle many military commanders and some Administrations would have been saved a great deal of unnecessary trouble.[1]

13. The instituting military government in any country by the commander of a foreign army there is not only a belligerent right, but often a duty. It is incidental to the state of war, and appertains to the law of nations. "The rights of occupation," says Hall, "may be placed upon the broad foundation of simple military necessity."[2] The commander of the invading, occupying, or conquering army rules the country with supreme power, limited only by international law and the orders of his government.[3] For, by the law of nations, the *occupatio bellica* transfers the sovereign power of the enemy's country to the conqueror.[4] An army in the enemy's country may do all things allowed by the rules of civilized warfare, and its officers and soldiers will be responsible only to their own government.[5] The same rule applies to our own territory permanently occupied by the enemy. Castine, Maine, was occupied by the British September 1st, 1814, and retained by them until after the treaty of peace, February, 1815. By this conquest and military occupation the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, for the time being, of course, suspended.[6]

1. Magoon's Reports, p. 228; Neely *v.* Henkel, 180 U. S. Reports, 120; 23 Opinions Attorneys-General, p. 427. 2. Whiting, p. 430. 3. Hall, p. 430. 4. 8 Opinions Attorneys-General, p. 369. 5. Mitchell *v.* Clark, 110 U. S., 648; Coleman *v.* Tennessee, 97 U. S., p. 517. 6. U. S. *v.* Rice, 4 Wheaton, 246.

14. As commander-in-chief the President is authorized to direct the movements of the naval and military forces, and to employ them in the manner he may deem most effectual to harass, conquer, and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. When Tampico, Mexico, had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States and respect it as such. For, by the laws and usages of nations, conquest gives a valid title while the victor maintains the exclusive possession of the conquered country. The power of the President, under which this conquest was made, was that of a military commander prosecuting a war waged against a public enemy by the authority of his government.[1]

15. Upon the acquisition, in the year 1846, by the arms of the United States of the Territory of New Mexico, the officer holding possession for the United States, by virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained under the sanction and authority of the President a provisional or temporary government for the country.[2] Nor does it signify what name is given a government established by arms. Its essence is military; it is a government of force. In Cross *v.* Harrison the Supreme Court of the United States, first calling attention to the fact that California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846; that shortly afterwards the United States had military possession of all of Upper California; that early in 1847 the President, as constitutional commander-in-chief of the Army and Navy, authorized the military and naval commanders there to exercise the belligerent right of a conqueror, to form a civil government for the conquered country, and to impose duties on imports

1. Flemming *v.* Page, 9 Howard, 615; American Insurance Co. *v* Canter, 1 Peters, 542 2. Leitensdorfer *v.* Webb, 20 Howard, 177.

and tonnage as military contributions for the support of the government and of the army which had the conquest in possession; observed as to this that no one could doubt that these orders of the President, and the action of our army and navy commanders in California in conformity with them, were according to the law of arms and the right of conquest.[1]

The governments thus established in New Mexico and California were indeed styled "civil"; but they were in fact military. The milder name was a matter of state policy. The government of the United States had resolved to wrest those Territories from Mexico and annex them to the Federal domain. By the use of gentle terms the inhabitants were to be conciliated, the weight of the mailed hand rendered seemingly less oppressive, though its grasp was never relaxed.

16. The rulings of State courts are to the same effect. The Supreme Court of Tennessee, in Rutledge *v.* Fogg,[2] remarked that ordinarily the right of one belligerent nation to occupy and govern territory of the other while in its military possession is one of the incidents of the war and flows directly from the fact of conquest; that the authority for this is derived directly from the laws of war, as established by the usage of the world, confirmed by the writings of publicists and the decisions of courts; and that the constitution of political institutions of the conqueror are not, therefore, looked to directly for authority to establish a government for the territory of the enemy in his possession during his military occupation. It is a power that appertains to the fact of adverse military possession. On this ground that tribunal upheld the decisions of the military commissions convened at Memphis, Tennessee, in 1863, by the commanding general of the Union forces.[3]

17 Title by conquest is acquired and maintained by force of arms. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed,

1. 16 Howard, 190. 2. 3 Coldwell, 554. 3. Hefferman *v.* Porter, 6 Coldwell, 391; Isbell *v.* Farris, 5 Coldwell, 426

and that their condition shall remain as eligible as is compatible with the objects of the conquest.[1]

When in the House of Commons, May, 1851, it was said that martial law had been established by the British commander in 1814 in the south of France, military government, and not martial law, in the sense we use it, was meant. And so of the remarks of the Duke of Wellington, the commander referred to, in the House of Lords, April 1, 1851, in the debate on the Ceylon rebellion, when he said: "I contend that martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all. Therefore, the general who declares it, and commands that it be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out."

Plainly what the Duke of Wellington here referred to was not martial law as a domestic fact, and as the term is used in this treatise; he was speaking of his conduct in foreign territory, and the methods there pursued to establish and enforce the rule of the conqueror.

18. In Thorington *v.* Smith the Supreme Court of the United States, adverting to the fact that military governments were classed by publicists as *de facto*, observed that they more properly might be denominated governments of paramount force. Their characteristics were said to be (1) that their existence is maintained by active military power, and (2) that while they exist they must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for these acts, though not warranted by the laws of the rightful government; that actual governments of this sort are established over districts differing greatly in extent and conditions; and that they are usually administered directly by military authority, but they may be admin-

1. Johnson *v.* McIntosh, 8 Wallace, 589

istered, also, by civil authority, supported more or less directly by military force.1 By "rightful government" is here meant that to which the permanent allegiance of the people is due.

Such, then, is the authority, under the laws of war and the war powers of the government, for the establishment of military governments without the boundaries of the United States.

19. Second—within districts occupied by rebels treated as belligerents.

The constitutional power to establish such governments within States or districts occupied by rebels treated as belligerents is as clear as the right to so govern foreign territory.

The experience of the Civil War of 1861–5 frequently, indeed constantly, furnished illustrations of this branch of military government.

The object of the national government in that contest was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. In the attainment of these ends it became the duty of the Federal authorities whenever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice. The duty of the National Government, in this respect, was no other than that which, as just shown, devolves upon the government of a regular belligerent occupying, during war, the territory of another independent belligerent. It was a military duty, to be performed by the President as commander-in-chief, and entrusted as such with the direction of the military force by which the occupation was held.2 So long as the war continued it can not be denied that the President might institute temporary governments within insurgent districts occupied by

1. 8 Wallace, 9. 2. Grapeshot, 9 Wallace, 132.

the national forces.[1] In carrying them into effect he acted through his duly constituted subordinates. Although that war was not between independent nations, but between factions of the same nation, yet, having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the doctrine of international law regarding the military occupation of enemy's country was held to apply.

20. The character of government to be established over conquered territory depends entirely upon the laws of the dominant power, or the orders of the military commander.[2] Against the persons and property of rebels to whom belligerent rights have been conceded, the President may adopt any measures authorized by the laws of war, unless Congress otherwise determines. The protection of loyal citizens and their property located within the rebellious district is not a right which they can demand, but entirely a matter of expediency.

21. From the day that the military authorities obtained a firm foothold in the Philippine Islands, which may be considered as the 13th of August, 1898, when Manila was captured, the executive power unaided ruled the archipelago for upwards of two years. By act of March 2d, 1901, Congress lent the aid of its assistance. On the 4th of July, 1901, the plainly military gave way to the civil rule as announced, but the government in its essence remained a politico-military one, and, though styled civil, was upheld only by force of arms—in lesser degree, of the constabulary; in greater degree, of the nation.

22. It is well settled that where the rebels are conceded belligerent rights a civil domestic war will, during its continuance, confer all the rights and be attended by all the incidents of a contest between independent nations. One object of military government is to render the hold of the conqueror secure and enable him to set the seal on his success, and it

1. Texas *v.* White, 7 Wallace, 730. 2. Coleman *v* Tennessee, 97 U. S., 517.

must, therefore, in common with every other recognized means of war, be at the command of a legitimate government endeavoring to subdue an insurrection. As the army advances into the rebellious territory, a hostile may be replaced by a loyal magistracy, and a provisional government established to preserve order and administer justice until the courts can be reopened on the return of peace. It is true that as such a war is not prosecuted with a view to conquest, but to restore the normal condition which the rebellion interrupts, the right to employ force for the purpose indicated might be thought to cease with the suppression of the rebellion. It must still, however, be in the discretion of the legitimate government, if successful, to determine when the war is at an end; also whether the insurgents are sincere in their submission or intend to renew the contest at the first favorable opportunity, and while this uncertainty continues military government and occupation may be prolonged on the ground of necessity.[1]

23. As was remarked by the Supreme Court of the United States in Horn *v.* Lockhart,[2] "The existence of a state of insurrection and war does not loosen the bonds of society or do away with civil government, or the regular administration of the laws. Order must be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace." These considerations led to the recognition as valid of those judicial and legislative acts in the insurrectionary States touching the enumerated and kindred subjects, where they were not hostile in purpose or mode of enforcement to the authority of the National Government, or did not impair contracts entered into under the Federal Constitution. This being true of insurrectionary districts, however far removed from the scene of contest, so much the more necessary is it, when armies have overrun the country, that some govern-

1. Hare's American Constitutional Law, Vol. II., p. 949. 2. 17 Wallace, 580.

ment be instituted to protect life and property and preserve society. And as the military power alone is competent to do this, the government so established must of necessity be military government.

It is of little consequence whether it be called by that name. Its character is the same whatever it may be called. Its source of authority is the same in any case. It is imposed by the conqueror as a belligerent right, and, in so far as the inhabitants of said territory or the rest of the world are concerned, the laws of war alone determine the legality or otherwise of acts done under its authority. But the conquering State may of its own will, and independently of any provisions in either its constitution or laws, impose restrictions or confer privileges upon the inhabitants of the rebellious territory so occupied which are not recognized by the laws of war. If the government of military occupation disregard these, it is accountable to the dominant government only whose agent it is, and not to the rest of the world.

24. No proclamation on the part of the victorious commander is necessary to the lawful inauguration and enforcement of military government. That government results from the fact that the former sovereignty is ousted, and the opposing army now has control.[1] Yet the issuing such proclamation is useful as publishing to all living in the district occupied those rules of conduct which will govern the conqueror in the exercise of his authority. Wellington, indeed, as previously mentioned, said that the commander is bound to lay down distinctly the rules according to which his will is to be carried out. But the laws of war do not imperatively require this, and in very many instances it is not done. When it is not, the mere fact that the country is militarily occupied by the enemy is deemed sufficient notification to all concerned that the regular has been supplanted by a military government. In our own experience the practice has widely

1. Instructions for Armies in the Field, G. O. 100, A. G. O., 1863.

differed. Neither at Castine, Maine, in 1814, by the British, nor at Tampico, Mexico, in 1840, or in numerous cases during the Civil War when territory was wrested from the enemy, was any proclamation issued; while in other cases, as New Mexico in 1846, California in 1847, and New Orleans in 1862, proclamations were formally promulgated, announcing the principles by which the country would be governed while subject to military rule.

These proclamations may become very important, because, if approved by the government of the commanders making them, they assume in equity and perhaps in law the scope and force of contracts between the government and that people to whom they are addressed, and who in good faith accept and observe their terms. Thus when New Orleans was captured in 1862, the Federal commander, in his proclamation dated May 1st and published May 6th, that year, announced among other things that "all the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." The Supreme Court afterwards held that this was a pledge, binding the faith of the government, and that no subsequent commander had a right to seize private property within the district over which the proclamation extended as booty of war; consequently, that an order issued by a subsequent Federal commander in August, 1863, while the military occupation continued, requiring the banks of New Orleans to pay over to the quartermaster all moneys standing on their books to the credit of any corporation, association, or government in hostility to the United States, or person being an enemy of the United States, was illegal and void.[1]

25. New Mexico was not only conquered, but remained thereafter under the dominion of the United States. The provisional government established therein ordained laws and adopted a judicial system suited to the needs of the country. The Supreme Court of the United States held that these

1. 16 Wallace, 483.

laws and this system legally might remain in force after the termination of the war and until modified either by the direct legislation of Congress or by the territorial government established by its authority.[1] We have had the same experiences in Cuba, Porto Rico, and the Philippines.

1. Leitensdorfer *v.* Webb, 20 Howard, 186.

CHAPTER III.

Temporary Allegiance of Inhabitants.

26. It has been observed, and the observation has the sanction of numerous expressions emanating from the Supreme Court, that those who quietly remain in the occupied district, transacting their ordinary business, should receive the care of, and they owe temporary allegiance to, the government established over them.[1] Allegiance is a duty owing by citizens to their government, of which, so long as they enjoy its benefits, they can not divest themselves. It is the obligation they incur for the protection afforded them. It varies with, and is measured by, the character of that protection. That allegiance and protection are reciprocal obligations binding mutually upon citizens and the government is the fundamental principle upon which society rests.

Under military government this allegiance is said to be temporary only. It is not wholly different in kind, but in degree falls far short of that owing by native-born or naturalized subjects to their permanent government.[2] A consideration of the character of military as contradistinguished from regular governments will show that this distinction rests upon a proper basis. The consent of the people is the foundation-stone of governments having even a semblance of permanency. This is theoretically true at least, and generally is so practically. The proposition rests on observed facts, otherwise revolution would follow revolution and there could be no stability; but this in the more firmly established States we know is contrary to experience. Moreover, should the fac-

1. 8 Wallace, 10; 4 Wheaton, 253; 9 Howard, 615; see also Bluntschli, I., Secs. 35, 36a, 42, 64. 2. Blackstone, I., pp. 370–71; Hale, Pleas of the Crown, I., p. 68; Kent, II., p. 49.

tions, exhausted by internal discord, erect at last a regular government, it would be done only with the consent of the people.

27. The Declaration of the Independence of the United States laid it down as a political maxim that governments derived their just powers from the governed, and that it is the right of a people to alter or abolish their form of government and institute a new one, laying its foundations in such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. This doctrine, however, is no more applicable in the United States than elsewhere. The history of the world illustrates at once its antiquity and universality. When a people have become tired of their government, it has been their custom to change it. And while many governments have been built and perpetuated on force and fraud perhaps, yet even these may be considered as resting upon the tacit consent or acquiescence of the governed. Society can not exist without government, which is necessary to preserve and keep that society in order. To be effective it must be entrusted with supreme authority. This is necessary, not for the gratification of those who may be entrusted with the reins of power, but for the safety of that society, for the protection and preservation of which government is instituted. "And," says Blackstone, "this authority is placed in those hands wherein (according to the opinions of the founders of States, either expressly given or collected from their tacit approbation), the qualities requisite for supremacy, wisdom, goodness, and power are the most likely to be found."[1]

28. As government is based on the necessities of society, affording the only practicable means by which the rights of its members may be secured and their wrongs redressed, its formation is regarded as the highest privilege and most important work of man. When formed—when, after the long, proba-

1. Book I., 49.

tionary, changeful periods which usually precede the accomplished fact, governments have been instituted—they have ever been regarded as worthy the reverence, the homage, and loyal support of those for whose benefit they were brought into existence.

29. From the earliest records of established governments it has been held the first duty of those who received their protection to support and defend them. Those who rebel against their authority are regarded as deserving severest punishment. These are universal principles, based on the instincts of rational beings and the experience of mankind. Having established government, having performed that supreme act, mankind have uniformly insisted that, so long as it performed its proper functions, those subjected to its authority and who enjoy its benefits are bound, if need be, to support it to the utmost of their ability. Any other principle would sanction revolution, with its attendant misery, upon the slightest pretext; an experience characteristic, not of States which have proved to be the blessings, but the curse of mankind. Considerations like these, based upon human nature, and the demands of society, have unalterably established the principle that allegiance and protection are reciprocal duties as between subject and government.

30. In a modified degree these principles are applicable to military government, and this leads to corresponding modifications of the allegiance of the subject. And first, let it be observed, that consent of the people freely given, so far from being the basis on which military government is founded, the very opposite is true. It is the rule of force imposed on subjects by paramount military power. That primary element of stability—a confidence grounded in the mutual interests of the people and their rulers self-imposed for the benefit of all—is here wanting. Yet it is the modern practice for the government of military occupation to protect the people in their rights of persons and property. When this is not done, it is because the success of military measures renders

such a course unadvisable. Here, as elsewhere, it is found to be for the best interests of all concerned to cultivate a feeling of good-will between rulers and subjects.

31. By the English law it is high treason to compass or imagine the death of the king, his lady the queen, or their eldest son and heir.[1] The king here intended is the king in possession, without regard to his title. "For," says Blackstone, "it is held that a king *de facto* and not *de jure*, or, in other words, a usurper that hath got possession of the throne, is a king within the meaning of the statute, as there is a temporary allegiance due to him for his administration of the government and temporary protection of the public."[2] And so far was this principle carried that, though Parliament had declared the line of Lancaster to be usurpers, still, treasons committed against Henry VI. were punished under Edward IV. By a subsequent statute all persons who, in defense of the king for the time being, wage war against those who endeavor to subvert his authority by force of arms, though the latter may be aiding the lawful monarch, are relieved from penalties for treason.[3] This is declaratory of the common law.[4] Being in possession, allegiance is due to the usurper as king *de facto*.[5] To this height has the duty of allegiance to *de facto* government been carried by the English law. Another illustration, differing in its incidents, yet based on the same principle, is found in the government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as protector. It was indeed held otherwise by the judges by whom Sir Henry Vane was tried for treason in the year following the restoration. "But," as has been justly remarked, "such a judgment, in such a time, has little authority."

The principle here involved, and which is equally applicable to both regular and temporary governments, is the simple one

1. 25 Edward III. (y. 1352), Ch. 2. 2. Commentaries, IV., p. 77 3. II. Henry VII., Ch. 1. 4. 4 Blackstone, Commentaries, 77. 5. Thorington, *v.* Smith, 8 Wallace, 8; 4 Blackstone, Commentaries 78

of mutuality of allegiance and protection. In this regard military government is on the same footing with any other. To the extent that it assumes and discharges these obligations of a regular government, it is entitled to the obedience of those who are recipients of its bounty. But as military government is at best but transient, the allegiance due to it is correspondingly temporary. It becomes complete only on the confirmation of the conquest with the consent, express or implied, of the displaced government.

32. Under the modern rules of warfare between civilized nations, this temporary transfer of allegiance carries in a qualified manner the reciprocal rights and duties of government and subject respectively. If, after military government is set up over them, the people attempt to leave the district to join the enemy, they will be repressed with utmost vigor. This transfer of allegiance takes place only to the extent mentioned, and operates only on those who at the time come actually under the new dominion. Mere paper government is not a valid one. To be so it must be capable of enforcing its decrees. And this will be only as by gradual conquest the victor extends the supremacy of his arms.

Hence the untenableness of the proposition that the Spanish sovereignty was ousted from the Philippine Archipelago, and that of the United States extended over it, by the capture alone of the capital and commercial emporium, Manila. The change of temporary allegiance extended no further than effectually could be maintained by the arms of the invader: the permanent change did not take place until the ratification of the treaty of peace.[1]

1. 182 U. S. Reports, p. 1 *et seq.*

NOTE.—Mr. Hall dissents from the view that military government gives rise to the duty of temporary allegiance on the part of the people over which it is instituted. He maintains that "the only understanding which can fairly be said to be recognized on both sides amounts to an engagement on the part of the invader to treat the inhabitants of occupied territory in a milder manner than is in strictness authorized by law, on

the condition that, and so long as, they obey the commands which he imposes under the guidance of custom." He remarks that recent writers adopt the view that the acts which are permitted to a belligerent in occupied territory are merely incidents of hostilities; that the authority which he exercises is a form of the stress which he puts upon his enemy; that the rights of the expelled sovereign remain intact; and that the legal relations of the population toward the invader are unchanged. (International Law, p. 429.)

The learned writer in this connection calls attention to the significant fact that the larger powers do not accede to this doctrine, though the smaller States of the Continent unanimously support it. No circumstance could more effectually impair its binding efficacy. The large, powerful States, not the insignificant ones, determine the customs of war.

The exception here taken to the theory of temporary allegiance as indicating the relation of the inhabitants to military government, and which the language of numerous judicial decisions justifies, seems to indicate only disagreement regarding the correct use of words descriptive of that relation. The condition is one of fact. The conqueror, not the vanquished, is dictating terms. His extreme rights under the customs of war are very severe. That Mr. Hall acknowledges. Every great war of even the last quarter of a century, to say nothing of former ones, has furnished numberless instances of this. Until recently this enforcement of extreme rights was the rule. Now, as a condition running *pari passu* with the abatement on the part of the conqueror from his extreme rights under the customs of war, the people of the country impliedly covenant that they will not pursue a line of conduct or enter into military combinations prejudicial to the military interest of the conqueror whose forbearance they accept. Call this implied covenant, prayed for by the conquered and their interested advocates, "temporary allegiance," "mutual engagements," or what not, the name does not change the fact.

As for the proposition that the rights of the deposed sovereign remain intact over people and territory subjected to military government, it can, as before pointed out, only work harm to such of them as, through a feeling of loyalty, may be led to obey his injunctions. The conqueror of course treats such pronunciamentos with contempt, and simply punishes the spirited, perhaps, but misguided people who are rash enough to sacrifice themselves for a sovereignty which can only issue orders without power to enforce its mandates, or save harmless those who heed them.

Dr. Bluntschli takes, and correctly, the opposite view from Mr. Hall. See Laws of War, I., Secs. 30, 31, 89 (2).

CHAPTER IV.

TERRITORIAL EXTENT.

33. Though it is a legitimate use of military power to secure undisturbed the possession of that which has been acquired by arms, yet it is difficult, by aid of any moderate number of troops, to guard and oversee an extended conquered territory; and it is practically impossible for any army to hold and occupy all parts of it at the same moment. Therefore, if the inhabitants are to be permitted to remain in their domiciles unmolested, some mode must be adopted of controlling their movements, and of preventing their committing acts of hostility against the dominant power, or of violence against each other. The disorganization resulting from civil war requires, more than that following from any other, those restraints which the dominant military alone can impose. In countries torn by intestine commotions neighbors become enemies, all forms of lawless violence are but too apt to be common, and in the absence of military rule would be unrestrained. Hence, to ensure quiet within rebellious districts when reduced into control during a civil war, it becomes all the more necessary to establish there a rigorous government, that life and property may be rendered secure and crime be either prevented or promptly punished. Firm possession of a conquered province can be held only by establishing a government which shall control the inhabitants thereof.[1] And that there exists in the opinion of the Supreme Court of the United States no distinction as to the rights in this regard of the conqueror, whether the subjugated territory be foreign or that of rebels treated as belligerents, clearly appears from the language in the case of Tyler *v.* Defrees. "We do not be-

1. Whiting, 10th Ed., p. 262.

lieve," said the court in that case, "that the Congress of the United States, to which is confided all the great powers essential to a perpetual union, the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and sea, is deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war; when States, forgetting their constitutional obligations, make war against the nation, and confederate together for its destruction."[1]

34. The question, What legally, under the customs of war, shall constitute "military occupation"? was one of the important matters which the conference at Brussels in 1874 tried, but failed to decide.

The conference concluded that "a territory is considered as occupied when it finds itself placed in fact under the authority of the hostile army. The occupation extends only to territory where this authority is established and in condition to be exercised." The German view of occupation was that it did not always manifest itself by exterior signs, like a place blockaded; that, for instance, a town in the conquered district left without troops ought nevertheless to be considered as occupied, and all risings there should be severely repressed.

The English took a different view of the subject—that government holding, in brief, that, to be militarily occupied, a territory should be held firmly in the conqueror's grasp, and that if he did not keep a military force at any particular point, the people living there were under no obligations to remain quiet, but properly might rise against the occupying power without incurring the penalties meted out to insurgents.

It is plain that the latter (English) view would favor risings of the people *en masse* to strike at the occupying power; a right for which that government strenuously contends. It is naturally the contention of a power having a comparatively small standing army, and whose policy it is to encourage so-

1. 11 Wallace, 331, 345.

called patriotic risings of the people, to make headway against the invader. The German view, on the contrary, is favorable to the government with a large regular army. According to this idea of "military occupation," risings of the people are proscribed even if no enemy be present to keep them in subjection, the army having just passed through on its career of conquest. The foundation for this theory maintained by such a people is not difficult to understand: if the enemy have but a small regular force, and it can be made outlawry for the people to rise against the authority of even an absent foe, that enemy will not contend long against a large standing army which not only fights its antagonist in front, but *constructively* controls enemy territory that it has only traversed. This is a constructive occupation, something like the constructive blockades of the beginning of the century.

The truth must be that a territory is militarily occupied when the invader dominates it to the exclusion of the former and regular government. The true test is exclusive possession.[1]

Such was the rule established by the Hague Peace Conference, July 29, 1899, to which the United States was a party. Under Article XLII., Section 3, military occupation is limited to the district over which its authority can be asserted.[2] During the Russo-Japanese war the Russian commander gave this a broad construction in Manchuria in favor of the Czar's authority.

35. A determination of the time when military government becomes operative is important.[3] As the military dominion rests on force alone, it will receive recognition only from the time when, the original governmental authorities having been expelled, the commander of the occupying army is able to cause his authority to be respected. No presumptions exist in favor of a change from old to new government. Whatever rights are claimed for the latter must be clearly shown to belong to it.

1. Woolsey, Sec. 142; Maine, p. 178; Manual, p. 314. 2. See Appendix II. 3. American Instructions, Sec 1, clause 1.

When New Orleans was captured in 1862, the Federal general issued a proclamation announcing the fact of occupation, and setting forth the administrative principles which would regulate the United States authorities in governing the district occupied and the rules of conduct to be observed by the people. The Supreme Court of the United States, referring to this, said: "We think the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication; and that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time."[1] Firm possession of enemy's country in war suspends his power and right to exercise sovereignty over the occupied place, and gives those rights, temporarily at least, to the conqueror; rights which all nations recognize and to which all loyal citizens may submit.[2]

36. Acts of Congress take effect from date of signature unless there be something in their terms to modify the rule. In contemplation of law those are the dates of promulgation to persons interested, and rights accruing under them vest accordingly. The general rule is that retroactive construction is never favored.[3] The same principles apply when a conqueror announces by proclamation his assumption of the reigns of government; observing that, if the dates of signing and promulgation differ, the latter governs. And this is reasonable because, as this announcement on the part of the conqueror under the strict laws of war is unnecessary—the mere fact of occupation serving on the people sufficient notice that the will of the conqueror is for the time their law[4]—a proclamation setting forth in terms what that will is gives rise to mutual rights and obligations as between the conqueror and the conquered; and therefore the date of promulgation which

1. The *Venice*, 2 Wallace, 276. 2. Dana's Wheaton, Sec. 337, note 162; Manning, pp. 182–83. 3. Sedgwick, Construction of Statutory and Constitutional Law, p. 164. 4. U. S. Instructions for Armies in the Field, Sec. 1, clause 1

makes that will known is properly taken as the point of time from which rights vest and obligations are incurred.

37. "The port of Tampico," said the Supreme Court of the United States in Fleming *v.* Page, referring to the establishment of military government in Mexico, "and the Mexican State of Tamaulipas, in which it is situated, were subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy, and the country was in the firm and exclusive possession of the United States and governed by its military authorities, acting under the orders of the President." The criterion of conquest here announced is the driving out enemy authorities, or their submission to the dominant power. It is a proper test and must receive a reasonable construction. Its meaning is that from the instant the authorities surrender to the invader the duty of protecting the people in their rights of person and property, the allegiance of the latter is temporarily transferred from their former to their new rulers.

38. The territorial extent of military government can not be greater than that of conquest, and generally will be coincident with it. Its basis being overpowering force, its ability to exercise that force and the extent to which that ability is recognized by the people of the district occupied determine the limits of its authority.[1] The conqueror can not demand that temporary transfer of allegiance which is one feature of military government, unless, in return therefor, he can and does protect the people throughout the occupied district in those rights of person and property which it is binding on tovernment to secure to them.

39. Unless confirmed by treaty, such acquisitions are not considered permanent. Yet for every commercial and belligerent purpose they are considered as part of the domain

1. Maine, p. 178.

of the conqueror so long as he retains the possession and government.[1]

40. The fifth section of the Act of July 13, 1861,[2] for the collection of duties and other purposes, looking to the suppression of the then existing rebellion, provided that, under certain conditions, the President, by proclamation, might declare the inhabitants of a State or any section or part thereof to be in a state of insurrection against the United States. In pursuance of this act the President, on the 16th of August following, issued a proclamation declaring the inhabitants of certain States, excepting designated districts, as well as those "from time to time occupied and controlled by forces of the United States engaged in dispersing the insurgents," to be in a condition of rebellion. Referring to these measures, the Supreme Court of the United States said: "This legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of loyal and the inhabitants of insurgent parts of the country; but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to person and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and responsibilities of national citizenship."[3]

1. 9 Cranch, 195; Amer. Ins. Co. *v.* Canter, 1 Peters, 542. 2. 12 Statutes at Large, 257. 3. 2 Wallace, 277

41. The case here considered was one of government dealing with rebellious subjects; but it clearly sets forth the general principles of military government, under the rules of modern war, when control has become substantial, complete, if not permanent. The inhabitants pass under the government of the conqueror, and are bound by such laws, and such only, as it chooses to recognize and impose.[1]

42. In this connection the remarks of Chancellor Kent, when treating of the obligations arising out of blockades, are interesting: "A blockade must be existing in point of fact; and in order to constitute that existence, there must be a power present to enforce it. All decrees and orders declaring extensive coasts and whole countries in a state of blockade, without the presence of an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law."[2] These remarks are equally applicable to military occupation of enemy country. To extend the rights of such occupation by mere intention, implication, or proclamation, without the military power to enforce it, would be establishing a paper conquest infinitely more objectionable in its character and effects than a paper blockade. The occupation, however, of part by right of conquest, with intent and power to appropriate the whole, gives possession of the whole, if the enemy maintain military possession of no portion of the residue. But if any part hold out, so much only is possessed as is actually conquered. Forcible possession extends only so far as there is an absence of resistance.

43. It must not be inferred from what has just been said that the conqueror can have no control or government of hostile territory unless he actually occupies it with an armed force. It is deemed sufficient if it submits to him and recognizes his authority as conqueror; for conquests are, indeed, in this way extended over the territory of an enemy without actual occupation by an armed force. But so much of such

1. U. S. *v.* Rice, 4 Wheaton, 253. 2. Vol. 1, p. 144.

territory as refuses to submit or to recognize the authority of the conqueror, and is not forcibly occupied by him, can not be regarded as under his control or within the limits of his conquest; and he therefore can not pretend to govern it or to claim the temporary allegiance of its inhabitants, or in any way to divert or restrict its intercourse with neutrals. It remains as the territory of its former sovereign, hostile to the would-be conqueror as a belligerent and friendly to others as neutrals. The government of the conqueror being *de facto* and not *de jure* in character,[1] it must always rest upon the fact of possession, which is adverse to the former sovereign, and therefore can never be inferred or presumed. Not only must the possession be actually acquired, but it must be maintained. The moment possession is lost the rights of military occupation are also lost. By the laws and usages of nations conquest is a valid title only while the victor maintains the exclusive possession of the conquered country.[2]

44. The fundamental rule that to render military government legal there must be an armed force in the territory occupied capable of enforcing its "adverse possession" against all disputants seems to be stricter even than the corresponding rule with reference to blockade, concerning which it is held that a temporary absence of the squadron under certain circumstances will not impair its validity. "The occasional absence of the blockading squadron produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension and the reason of it be known; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and a mere fraud."[3]

45. There is no instance in history of a more complete and signal failure of a scheme to appropriate the sovereignty of a

1. 8 Wallace, 10. 2. Halleck, Chap. 32, Sec. 3; 9 Howard, 615. 3. Kent, Vol. 1, p. 145.

proud people than that of Napoleon I. when he placed the crown of Spain upon his brother's brow in 1808. The Spanish people repudiated the measure *en masse*, and no sacrifice seemed to be too great in manifesting their displeasure. The incidents of the ensuing war show how really formidable guerrilla tactics may become when properly utilized against the best of troops. When the people are devoted to the cause, willing at all hazards to do and die for it, this species of warfare under leaders adapted to it becomes formidable.

46. While military government can legally extend so far only as the enemy actually or impliedly surrenders control of the country, it is sufficient to that legality that there has been in fact such abandonment of jurisdiction by the expelled State, and an assumption of authority by the conqueror. If considerations of policy intervene, he or his government determines upon them. To render military government effective, the occupation must, indeed, be substantial and complete, but it need not be permanent. In the exigencies of war the latter could not be a condition precedent to its legality, because the deposed authorities might regain the territory lost by force of arms.

47. After Memphis, Tennessee, with the adjacent country, was occupied by the Union Army, who expelled therefrom the rebel forces, the lessees of absent citizens were compelled to turn their rents into the military chest of their new rulers. The Supreme Court of the United States held this to be a proper exercise of the right of war, and refused to hold them liable to their lessors for moneys thus paid to the agents of the *de facto* government. The general commanding the Union forces at Memphis was charged with the duty of suppressing rebellion by all the means which the usages of modern warfare permitted. To that end he represented for the time, and in that locality, the military power of the nation. The rents were seized *flagrante bello* in that portion of the territory of the United States the inhabitants whereof had been declared to be in insurrection. There was no such "substantial, com-

plete, and permanent military occupation and control" as has been sometimes held to draw after it a full measure of protection to persons and property at the place of military operations. No pledge had there been given by the constituted authorities of the Government which prevented the commander of the Union forces from doing all that the laws of war authorized, and that, in his judgment, under the circumstances attending his situation, was necessary or conducive to a successful prosecution of the war.[1] And although, in fact, the occupation of the district in question by the Union forces was not only complete and substantial, but proved to be permanent also, it is evident that such need not have been the case to legalize all administrative measures of their commander consistent with modern laws of war.

48. It has been remarked that the American Commission at Paris, in 1898, took the stand that the sovereignty of the United States attached to the Philippines when Manila, the capital, was captured.[2] This was not a legal claim, if put forward, as the rule of belligerent right is that the conqueror takes only what he can hold in subjection.[3] Nothing, under the actual conditions existing, could be more futile than for the United States authorities to make such a claim. As matter of fact they could not hold one foot of territory except by the sword. It is true that the United States was in a position to enforce any demand it saw fit against Spain, which was powerless to defend itself. This, however, is a very different thing from the capture of the capital city legally constituting a conquest of the Archipelago.

1. Gates *v.* Goodloe, 101 U. S., pp. 617, 618; Planters' Bank *v.* Union Bank, 16 Wallace, 495. 2. Magoon, p. 247. 3. The Hague Conference Sec. 3, Art. XLII. (G. O. 52, A. G. O. 1902.)

CHAPTER V.

TERRITORY MILITARILY OCCUPIED, ENEMY TERRITORY.

49. Military occupation does not add permanently to the public domain; nor does temporary occupancy of our own by enemy forces diminish it. If a nation be not entirely subdued, it is the usage of the world to consider the holding of conquered territory as a mere military occupation until its fate is determined by a treaty of peace.[1]

It is true that ulterior objects may cause this rule to be disregarded. As, for instance, in the invasion of New Mexico and California in 1846-47. Here, acting under instructions, the military commanders immediately upon occupation issued proclamations annexing those territories to the United States and absolving the people from their allegiance to the Mexican Government. In New Mexico, at least, the election of a delegate to Congress was authorized.

The same rule was observed by the Germans in Alsace and Lorraine in 1870–71. The permanent annexation of these provinces had been determined upon. Every movement of the occupying power was directed to the consummation of that purpose. The military government as to them differed from that established elsewhere in France principally, 1, in the determined suppression of the elements by which the transfer from one country to the other was opposed; 2, in encouraging and strengthening the elements favorable to the change; 3, in gaining over the hesitating and neutral elements by promoting and by showing consideration for their interests.[2]

50. While, under a limited monarchy such as the kingdom of Great Britain, the exercise of authority by military commanders, as in New Mexico and California, might, to a great extent,

1. Amer. Ins. Co. *v.* Canter, 1 Peters, 542. 2. Bluntschli, I., Sec. 36a.

have had the sanction of usage, this could not be the case under the Government of this Union. The latter possesses, it is true, authority to acquire territory, the Constitution conferring upon it absolutely the powers of making war and treaties.[1] But the exercise of the territory-acquiring authority rests with those departments of the Government in which these powers are vested. The Executive, acting alone, can neither add to nor take from the territory of the United States. The action of the military commanders, therefore, in New Mexico and Upper California, in so far as they assumed to annex those Territories, permanently to transfer the allegiance of the people from the Republic of Mexico to the United States and give them representation in the National Congress, was beyond their powers and void, although done in pursuance of the instructions of the Secretary of War.

General Scott understood this matter better. In his instructions to General Kearney of November 3, 1846, he said "You will erect and garrison durable defences for holding the bays of Monterey and San Francisco, together with such other important points in the same provinces as you may deem it necessary to occupy. You will not, however, formally declare the province to be annexed. Permanent incorporation of the territory must depend on the Government of the United States."

Decisions of the Supreme Federal Tribunal set at rest all doubts on this subject. During the war of 1812, a British ship, sailing from the Danish island of Santa Crux, freighted with certain products of the island, was captured by an American privateer. The owner of the plantation on which the produce [sugar] was raised was a Danish official, who withdrew to and remained in Denmark when the island surrendered to the British, leaving his estate under the management of an agent. The vessel and cargo were duly condemned as enemy property.

A claim for the sugar was put in by the Danish owner, but it was condemned with the rest of the cargo, and the sentence

1. Hall, pp, 466–67; see also Shanks *v.* Du Pont, 3 Peters. 246.

confirmed, upon appeal, by the Supreme Court of the United States. It was remarked that the island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark; that acquisitions made during war are not considered permanent until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as part of the domain of the conqueror so long as he retains the possession and government of them; that although incorporated, so far as respects his general character, with the permanent interests of Denmark, the owner was incorporated, so far as respected his plantation in Santa Crux, with the permanent interests of Santa Crux, which was at that time British; and though, as a Dane, he was at war with Great Britain and an enemy, yet as a proprietor of land in Santa Crux he was no enemy; he could ship his produce to Great Britain in perfect safety.1

51. During the period of their occupation of Castine, Maine. the British Government exercised all civil and military authority over the place; established a custom-house, and admitted imported goods under regulations prescribed by itself. Certain of these goods, so imported, remained at Castine after the enemy retired. The attempt of the United States collector of customs to collect duties thereon was resisted upon the ground that duties were not due. The question, being taken to the Supreme Court of the United States, was decided adversely to the Government. The court observed that, under these circumstances, the claim for duties could not be sustained. By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise there the fullest rights of sovereignty. The inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for

1. Thirty Hogsheads of Sugar *v* Boyle, 9. Cranch, 191.

where there is no protection or allegiance or sovereignty there can be no claim to obedience. 1

52 The case of Fleming *v.* Page illustrates the same principles. The Supreme Court there held that military occupation did not make occupied districts a part of our territory under our Constitution and laws. The United States may extend its boundaries by conquest or treaty and may demand the cession of territory as the condition of peace. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned them by the legislative power. It is true that when Tampico had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States and to respect it as such. For, by the laws and usages of nations, conquest is a valid title while the victor maintains exclusive possession of the conquered country. But yet it was not a part of the Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. The relation in which it stands to the United States depends not upon the law of nations, but upon our own Constitution and acts of Congress. The boundaries of the United States, as they existed before the war was declared, were not extended by the conquest, nor could they be regulated by the varying incidents of war

1. United States *v.* Rice, 4 Wheaton, 254; see also Shanks *v.* Du Pont, 3 Peters, 246.

and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the Government, was still foreign; nor did our laws extend over it.[1] And in Cross *v.* Harrison the court observed that although Upper California was occupied by the military forces in 1846, and a government erected therein by authority of the President, still it was not a part of the United States, but conquered territory within which belligerent rights were being exercised; nor did it become part of the United States until the ratification of the treaty of peace, May 30, 1848.[2]

53. Districts occupied by rebels treated as belligerents are, in contemplation of law, foreign. The same principles govern intercourse therewith during military occupation as though they belonged to an independent belligerent. They are enemy territory because they are held by a hostile military force. And in determining whether belligerent rights shall be conceded to rebels, with all attendant consequences, it has been decided that whether the President, in fulfilling his duties as commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and that the judicial must be governed by the decision and acts of the political department of the Government to which this power is entrusted. He must determine what degree of force the crisis demands.[3] When parties in rebellion occupy and hold in a hostile manner a portion of the territory of the country, declare their independence, cast off their allegiance, organize armies, and commence hostilities against the Government, war exists. The President is bound to recognize the fact, and meet it without waiting for the action of Congress, to which is given the constitutional power to declare war. Under

1. 9 Howard, 615–16. 2. 16 Howard, 191–92. 3. Prize Cases, 2 Black's Reports, 270.

his authority as commander-in-chief, and his constitutional obligations to see that the laws are faithfully executed, he takes the necessary measures to meet the emergency and crush the rebellion. If rebels dominate a district bounded by a line of bayonets to be crossed only by force, and the President has conceded to them, in their military capacity, belligerent rights, all the territory so dominated must be considered enemy territory and the inhabitants as enemies.[1]

54. When a rebellion has assumed the character of civil war, it is attended by the general incidents of regular warfare. The general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.[2] The United States acted in accordance with this doctrine toward the contending parties in the civil war in South America. The Supreme Court, in the case of *The Santissima Trinidad*, said: "The Government of the United States has recognized the existence of civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties and to allow to each the same rights of asylum, hospitality, and intercourse. Each party is deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights."[3]

55. Vattel points out that in a civil war the contending parties have a right to claim the enforcement of the same rules which govern the conduct of armies in wars between independent nations—rules intended to mitigate the cruelties which would attend mutual reprisal and retaliation.[4] To the same effect was the language of the Supreme Court of the United States in Coleman *v.* Tennessee. The court remarked that the doctrine of international law as to the effect of military occupation of enemy territory upon former laws is well

1. Williams *v.* Bruffy, 96 U. S., 189–90. 2. Dana's Wheaton, Sec. 296 and note. 3. 7 Wheaton, 337. 4. Law of Nations, p. 425.

understood; that though the late war [Rebellion of 1861-65] was not between independent nations, but between different portions of the same nation, yet, having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering State or the orders of its military commanders.[1]

The course pursued by the National Government during the Civil War accorded with these principles. The Government occupied, it is true, a peculiar position. It was both belligerent and constitutional sovereign. For the enforcement of its constitutional rights against armed insurrection it had all the power of the most favored belligerent.[2] From time to time the military lines of the enemy were forced back; and, as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken out of hostile possession. But, until the power of the rebellion was broken, its armies captured or dispersed, and national supremacy rendered everywhere complete, States and districts whose inhabitants had been declared to be in a state of insurrection were deemed to be and treated as foreign territory, to be conquered and governed according to the laws of war, except as modified by acts of Congress. These acts were an exercise of the war power of the Government. They were partly directed to the regulations of military government over conquered provinces, and partly to the sovereign right of recalling revolted subjects to their allegiance. All intercourse with the revolted territory was interdicted or conducted only under the laws of war, as modified by statutes enacted pursuant to the same policy.[3]

1. 97 U. S., p. 517. 2. Lamar *v.* Browne, 92 U. S., 195. 3. Proclamations, 19 April, 27 April, 10 May, 16 Aug., 1861; 12 May, 25 July, 22 Sept., 1862; 1 Jan., 1863, 12 Statutes at Large; 2 April, 23 Sept.,

Whether, therefore, war be waged against a foreign foe, or a domestic foe treated as a belligerent, territory subjugated by him or which he dominates is enemy territory in its relation to the invader.

56. The British rule as to the effect of conquest is different. No war of conquest and annexation ever prosecuted by that power was more deliberately planned or successfully executed than that of the United States against the Mexican Territories of New Mexico and Upper California. Yet had British arms, with such a purpose, subjugated those distant provinces, they would at once, without any act of the Parliament of Great Britain, have become part of the dominion of the Crown. No other act than that of conquest, when the avowed object is that of annexation, is, under English law, requisite to this end. Submission to the King's authority under such circumstances makes the inhabitants his subjects. The territory is no longer regarded as foreign or the people as aliens. Except so far as rights have been secured by terms of capitulation to the inhabitants, the power of the sovereign is absolute. The conquered are at the mercy of the conqueror. Still, although deemed to be British subjects, it is not to be supposed that they are possessed of all the political privileges of Englishmen, as the right to vote or be represented in Parliament.

If conquest be not made with a view to permanent annexation, mere military occupation adds nothing in British law to the dominions of the Crown, and but temporarily affects the allegiance of the people. The principle established by British prize adjudications is that where the question is as to the national character of a place in an enemy's country, it is not sufficient to show that possession or occupation of the place was taken, and that, at the time in question, the captor was in control. It must be shown either that the possession was given in pursuance of a capitulation, the terms of which con-

8 Dec., 1863; 18 Feb., 26 March, 5 July, 1864; April 11, 1865, 13 Statutes at Large; Acts of July 13, 1861; May 20, 1862; July 17, 1862 March 12, 1863, 12 Statutes at Large, pp. 257, 404, 589, 820.

templated a change of national character, or that the possession was subsequently confirmed by a formal cession, or by a long lapse of time.[1]

1. Blackstone, 2, p. 107; 4, pp. 414–15; Wheaton, Sec. 345, Danas' Notes, 169; 2 Wallace, 271.

CHAPTER VI.

Effect of Occupation on Local Administration.

57. Important consequences result from the rule that territory under military government is considered foreign. Imports into and exports therefrom are regulated by the military authorities acting either alone or in conjunction with the law-making power.

58. Merchandise of all kinds imported into Upper California, while that country was occupied by the United States forces, was subject to a "war tariff" established under the direction of the President, and which was exacted until official notification was received by the military governor of the ratification of the treaty of peace.[1]

59. In De Lima *v.* Bidwell[2] the Supreme Court of the United States held that goods imported from Porto Rico after the cession of the latter, under the treaty with Spain, ratified April 11, 1899, were not dutiable. It was held that territory incorporated into the Union could not be held for purposes of control, yet foreign as to customs laws. The dictum looking in that direction in Fleming *v.* Page,[3] and which was practically negatived in Cross *v.* Harrison,[4] was overruled. While war lasts, the military authorities regulate the matter of commercial duties; but when the territory becomes incorporated into that of the Union, Congress alone can do this.

60. The rule which makes, for all commercial purposes, the citizens or subjects of one belligerent enemies of the government and citizens or subjects of the other, applies equally to civil and to international wars. But either belligerent may modify or limit its operation as to persons, property, and ter-

1. 16 Howard, 189. 2. U. S. Reports, 182, p. 194. 3. 9 Howard, 615. 4 16 Howard, 190.

ritory of the other.[1] The course of the National Government during the Rebellion furnishes numerous illustrations of this. Both sovereign and belligerent rights were asserted and enforced as best suited the views of the National Government and the object of the war, which was the suppression of insurrection and restoration of the Union. The President, "pursuant to the laws of the United States, and of the laws of nations in such cases provided," issued proclamations blockading the ports of districts and States in insurrection. Congress passed an act interdicting all commercial intercourse with districts declared by the President to be in insurrection, except in the manner pointed out in the statute.[2] Duties were not imposed on merchandise coming to loyal ports from reclaimed rebel districts with which intercourse was permitted under the law. Trade therewith was considered domestic, as regarded the revenue laws of the United States. The President alone had power to license intercourse. And, as provided by the act, all intercourse was regulated strictly by the rules established therefor by the Secretary of the Treasury.[3] Further, when the President had proclaimed a State to be in insurrection, it was judicially decided that the courts must hold this condition to continue until he decided to the contrary.[4]

61. Except as restrained by the laws of nations, the will of the conqueror is the law of the conquered. By the laws of war, an invaded country may have all its laws and municipal institutions swept by the board.[5] Whatever of former laws are retained during military government depends upon the President and military commanders under him, acting either independently or pursuant to statute law. It will be found, as a rule, the part of wisdom if the commanding general be left untrammeled. It necessarily follows, when armies are operating outside the United States, that the executive department alone controls. Commanders acting under the direction

1. 2 Wallace, 274. 2. 12 Statutes at Large, 275. 3. 3 Wallace, 617; 5 Wallace, 630; 6 Wallace, 521. 4. 11 American Law Review, p. 419. 5. J. Q. Adams, House of Representatives, April 14–15, 1842.

of the President are held responsible for the conduct and success of military movements. As Congress has power to declare war and raise and support armies, it must have power to provide for carrying on war with vigor. Having taken measures to supply the necessary men and materials of all kinds, Congress does not further act unless in pursuance of some special policy. The command of the forces and the conduct of campaigns devolves alone upon the President and military officers. These matters lie wholly outside the sphere of Congressional action.[1]

62. As a rule, municipal laws of the territory under military government are continued in force by the conqueror so far as can be consistently with effective military control. If any local authority continues, however, it will only be with his permission, and with power to do nothing except what he may authorize.[2]

63. The position of the United States military authorities in Cuba, before the Spanish authorities abandoned the island in 1899, was one of military occupation, pure and simple; after that event, it was military occupation of a particular kind—namely, wherein the dominant military power exercised authority over the island as trustee for a Cuban nation not yet in existence, but the creation of which was promised and which was to have the assistance of the United States in establishing itself.

During the former period the dominant military power exercised the authority of a conqueror in all his plenitude. During the latter period the United States military authorities governed, indeed, wholly by the rights of war, yet at no time did they lose sight of the fact that they were acting in the interests of the future Cuban nation. The government might

1. 4 Wallace, 141. 2. 8 Opinions Attorney-General, 369; 9 Opinions Attorney-General, 140; Bluntschli, Laws of War, I., Secs. 35, 36.

be styled civil, but it was military for every necessary purpose; the rule was essentially that of the sword.[1]

64. In an opinion dated September 8, 1900, the Attorney-General stated that the rights of the United States authorities in Cuba, notwithstanding the pacific aspect of affairs, were based wholly on the laws of war. The effect of this was to brush out of the way all idea that the executive department of the dominant power was to be controlled in any degree against its will by the native civil authorities.[2]

65. A system of government which considers only the will of one party to the compact will be based on the convenience of that party. However merciful to the vanquished such government may be, those subjected thereto can scarcely be said to have rights in a proper sense. They have only such as are secured to them under the law of nations. Yet the modern doctrine is that laws which regulate private affairs, enforce contracts, punish crime, and regulate the transfer of property remain in full force so far as they affect the inhabitants of the country as among themselves, unless suspended or superseded by the conqueror.[3] Contracts and debts between the people and those in the dominant country are suspended, indeed, in their operation.[4] For the protection and benefit of the inhabitants, and the protection and benefit of others not in the military service of the conqueror, or, in other words, in order that the ordinary pursuits may not unnecessarily be deranged, these laws are generally allowed to continue in force and to be administered by the ordinary tribunals as before the occupation. Municipal officers can not work their fellow-citizens greater injury than by abandoning their posts at the approach of the enemy.

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1. Opinions Attorney-General, Vol. 22, pp. 384, 409, 410, 523; Vol. 23, pp. 129, 427, 226; Vol. 20, p. 656; Neely *v.* Henkle, 180 U. S. Reports, 120; Magoon, Civil Government, pp. 461, 481, 526, 584, 595, 603. 2. Magoon, Civil Government, pp. 372–73. 3. Coleman *v* Tennessee, 97 U. S., 517; Instructions, Armies in the Field, G. O. 100, A. G. O. 1863, Sec. 2 4. Cobbett, p. 108. Manning, p. 176.

The importance of this rule will appear upon the slightest reflection. The existence of war and military government does not do away with the necessity for the administration either of municipal laws or some substitute for them. The practical application of the rule relieves the commander of the onerous functions of civil government in so far as he may deem this necessary or advisable; and it tends to secure the happiness of the governed and consequently their contentment. As the commander has absolute control, the rule enables him not only to advance legitimate schemes for the prosecution of the war, but at the same time disturbs the least possible the business pursuits and social relations of the people. It is based on principles of common justice and common sense, and in modern times has received almost universal sanction.

66. During the occupation of New York city by the British army from 1776 to the end of the Revolutionary War, the operation of municipal laws was undisturbed except when it was found necessary for the military to interfere. Similar instances occurred during the occupation of New Orleans and its environments by the Union forces from May, 1862, until the end of the Rebellion; of Memphis, Tennessee, from June, 1862, until the end of war; while, in the appointment of military governors in various of the conquered States, and the determining their jurisdiction and authority, the principle was uniformly acted upon of preserving in full vigor the local laws of the districts so far as this was compatible with the objects and conduct of the war. A like course was pursued in Cuba, Porto Rico, and the Philippine Islands.

Our enemy, during the Civil War, acted upon the same principle. When the Territory of Arizona was occupied by Confederate forces in August, 1861, their commander issued a proclamation placing the country under military government. Executive and judicial departments were organized, but all municipal laws not inconsistent with the Constitution and laws of the Confederate States were continued in force.[1]

1. R. R. S., I., Vol 4, p. 20.

While, during the Mexican War, the armies of the United States occupied different provinces of that republic, the commanding general allowed, or, rather, required, the magistrates of the country, municipal or judicial, to continue to administer the laws of the country among their countrymen—in subjection always to the dominant military power, which acted summarily and according to discretion, when the belligerent interests of the Government required it.[1] So when New Mexico was taken possession of during that war and there was ordained, under the sanction of the President, a provisional government in place of the old, the commanding general announced to the people that by this substitution of a new supremacy, although their former political relations were dissolved, yet their private relations, their vested rights, or those arising from contract or usage under the displaced government, remained in full force and unchanged, except so far as in their nature and character they were found to be in conflict with the Constitution and laws of the United States, or with any regulations which the occupying authority should ordain.[2]

67. Political laws are enacted for the convenience, security, and administration of government. These, upon the military occupation of a State by an enemy, cease to have validity.[3] By that event a new government, based not upon the express, though it may be implied, consent of the people, takes the place of the old. And while municipal laws may be retained in the subjugated district, this, in the nature of things, can not be true of political laws which prescribed the reciprocal rights, duties, and obligations of government and its citizens.[4] As the State has not been able to protect its citizens, they can not afterwards be punished for having acquiesced in the authority that has gained control. If they remain quietly as non-combatants, they will be protected.[5] The commander of the occu-

1. 8 Opinions Att'y-Gen., 369. 2. 20 Howard, 177. 3. Maine, p. 179; Manning, p. 182; Hall, p. 402; Opinions Attorney-General, Vol. 22, pp. 527–28, 574; Post, Chap. 9, Sec. 116. 4. Halleck, Chap. 32, Sec. 4; Boyd's Wheaton, Sec. 346 (e). 5. 4 Wheaton, 246; 8 Wallace, 1; 96 U. S., 189.

pying forces has a right to require of the inhabitants an oath of fealty to him not inconsistent with their general and ultimate allegiance to their own State.[1] He may require them to do police service, but not to take arms against their own country.[2] Indeed, in the absence of any such formal promise, it is understood in modern times that by taking the attitude of non-combatants and submitting to the authority of the conqueror, the citizen holds himself out as one not requiring restraint, and is treated as having given an implied parole to that effect. Combatants, or persons who, by resistance, or attempts at resistance, or by refusal to submit, take the attitude of combatants, may be placed under restraint as prisoners of war. Some modern writers have gone so far as to contend that citizens who come under temporary or partial allegiance to the conqueror can not throw it off and resist the authority by force except on grounds analogous to those which justify revolution.[3] But this seems to be rather a matter of policy than law.

68. During the occupation the inhabitants become subject to such laws as the conqueror may choose to impose. In the nature of things none other can be obligatory. Where there is no protection or sovereignty there can be no claim to obedience set up by the ancient State.[4] While military government exists it must be obeyed in civil matters by citizens who by acts of obedience rendered in submission to overpowering force do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful, but now temporarily displaced government.[5] The British Government exercised all civil and military authority over Castine, Maine, when reduced by its arms. The obligations of

1. Hall, p. 437, American Instructions, Sec. 1, par. 26; but see Hague Conference, Sec. 3, Art. XLV. 2. Instructions U. S. Armies in the Field, Sec. 2, clause 3; The Hague Conference, Sec. 3, Art. XLIV. 3. Dana's Wheaton; note 169, p. 436; Halleck, Chap. 32, Sec. 19. 4. Boyd's Wheaton, p. 412; Bluntschli, I., Sec. 35. 5. Thorington v. Smith, 8 Wallace, 9.

the people of Castine as citizens of the United States were not thereby abrogated.[1] They were suspended merely by the presence, and only during the presence, of paramount hostile forces. And it became the duty of the government of occupation to provide as far as possible for the security of persons and property and the administration of justice.[2] To the extent of actual supremacy, in all matters of government within its military lines, its power could not be questioned. Therefore obedience to its authority in civil and local matters was not only a necessity, but a duty. Without such obedience, civil order would be impossible.[3] On the other hand, it owed and should have extended protection to those who submitted to its authority.

69. Ordinarily the rules by which military government is enforced are prescribed by the commander. He speaks and acts as the representative of the conqueror. Being upon the theatre of operations, and answerable to his government for the success of its arms, he has superior facilities for judging as to measures best calculated to attain the objects of military occupation and the highest motives for wishing their adoption. Unless his measures have been prescribed by higher authority, the commander will himself formulate and carry the details of military government into execution. He acts in strict subordination to the supreme executive power of the State. Yet the relation which the conquered district occupies toward the government of the conqueror depends, not upon the law of nations, but upon the constitution and laws of the conquering State.[4]

70. The right of the law-making power to enact such laws, looking to an effective military government, as will best meet the views of the dominant State in prosecuting hostilities, can not be questioned. The authority of Congress, in this

1. 4 Wheaton, 253. 2. The *Grapeshot*, 9 Wall, 132. 3. Thorington *v.* Smith, 8 Wallace, 11; Williams *v.* Bruffy, 96 U. S., 189; Bluntschli, Laws of War, I., Secs. 64, 122. 4. Flemming *v.* Page, 9 Howard, 615 Dana's Wheaton, p. 437, note 169.

regard, under its constitutional powers to declare war and raise and support armies, is complete.[1] This power would be made effective, not by laws which purport to operate directly upon the people of the conquered district, and which so long as the territory is foreign Congress has no authority to enact, but laws for the guidance of the general or other official entrusted with the details of military government. When Wellington in France and Scott and other commanders in Mexico instituted military government, it was simply an incident in the conduct of campaigns. The general, in each instance, acting under a responsibility to his superiors, adopted those measures which he deemed best for the successful carrying of military government into operation. His obligations in this respect were the same as were his obligations by every means in his power successfully to conduct the campaign against the enemy. Placed, because of confidence reposed in his ability and skill as a military chief, in a position of responsibility, he will generally, if there be no ulterior object in view beyond the simple triumph of arms, be permitted to carry on the details of military government unrestrained by orders from distant superiors or by legislative enactments.[2]

71. The political views of the conquering State may, however, be of a nature materially to modify these ordinary discretionary powers of the commander. Such was the case, as has been seen, when California and New Mexico were subjugated by the arms of the United States. As it was predetermined by the Government, not only to reduce those provinces to submission, but permanently to annex them to the territory of the Union, the instructions to military commanders, it will be remembered, were in consonance with this policy. The laws they enforced, the institutions they set up over the people occupying the subjugated districts, were not necessarily those which the commanders themselves deemed best, but such as comported with the determination of the Government re-

1. Kent, I., p. 93, note. 2. 22 Wallace, 297.

garding annexation, and orders given in pursuance thereof by the President. Instructions emanating from this source are of course equally binding, directly upon the commander enforcing, and indirectly upon the inhabitants of districts subjected to, military government. The policy pursued in the Philippines is another conspicuous instance of this.

The capture and permanent occupation of insurrectionary districts by the Union forces during the Rebellion furnish other illustrations of this principle. The military commanders had a duty to perform in conquering the rebellion, but their course regarding the government of the districts occupied was modified by the policy of the Government of the United States toward the people residing there. So far as possible consistently with the triumph of its arms, they were treated by the National Government as if their political relations had never been interrupted.[1] Accordingly, when a Federal commander assumed the reins of military government, and announced the principles by which he would be guided in its administration, promising protection to person and property subject only to the laws of the United States, it was judicially held that he thereby did but reiterate the rules established by the legislative and executive departments of the Government in respect to those portions of the States in insurrection, occupied and controlled by the forces of the Union.[2] By numerous acts of Congress, and by proclamations of the President issued either pursuant thereto or by virtue of his authority as commander-in-chief, this policy of the legislative and executive departments was made known. And thereby, to the extent indicated by that policy and the additional orders of the President issued from time to time, was modified that discretion which commanders otherwise would have exercised in parts of insurgent territory subjected to military government.

72. Napoleon established military governments in Spain, in Navarre, Catalonia, Aragon, Andalusia, and other provinces.

1. The *Venice*, 2 Wallace, pp 277–78. 2. *Ibid.*, 276–77.

One subject seems to have been the more completely to bring forth and best utilize the military resources of the country. Further, it was hoped to accustom the people to French, though military, rule, and, when the proper time came, this system could be abandoned and the government of King Joseph naturally take the place of it. The plan was of the far-reaching nature of all Napoleon's schemes of conquest. Events rendered it abortive. But, as a complete system of military government, nothing in history exceeds in instructiveness this attempt to reduce the Spaniards piecemeal into subjection with a view to the subversion of their kingdom.[1]

73. When it was seen that Spanish authority was to terminate early in 1899 in Cuba, it appeared that efforts were made by the inhabitants of Havana to secure concessions from the yet *de facto* but expiring sovereignty. The question of validity afterwards came up in some of these cases. It resolved itself into two matters of fact—first, Did the Spanish power rule there at the time of the concession? second, Was the latter granted in accordance with Spanish laws? If both could be answered in the affirmative, the concession was upheld; but if it proved that the whole transaction was merely colorable—an attempt to oust the incoming government of its rights, and which it was about to assume—the concession was regarded as void *ab initio*.[2]

It was the disposition of the military government to uphold all contracts entered into in the ordinary course of business; to avoid interfering with vested rights; but rights that partook of the nature of attributes of Spanish sovereignty disappeared with the latter.[3]

74. The relation of the United States to Cuba, resulting from the war of 1898, came up for review before the Supreme Court. An American who in Cuba was charged with crime had been arrested within one of the States of the Union, and

1. Napier, Book XI., Chap. 11, pp. 84, 85. 2. Magoon, p. 603. 3. Opinions Attorney-General, Vol. 22, pp. 527–28.

it was held that he was subject to extradition. The court remarked that, as between the United States and all foreign nations, the former held Cuba as conquered territory; as between the United States and Cuba, the latter was held by military power in trust for the Cuban people, to be delivered over on the establishment of a stable government. It was a military occupation. The military governor organized the civil government under four departments; afterwards a supreme court was established; a postal code was published; the jurisdiction of the criminal courts defined. If was, the court concluded, wholly for the political department of the Government to decide when our troops should be withdrawn from Cuba.[1]

1 Neely *v.* Henkle, 180 U. S. Reports, 120

CHAPTER VII.

AGENTS FOR CARRYING MILITARY GOVERNMENT INTO EXECUTION.

75. Among the incidents which attach to the establishment of military government is the appointment of the agents by whom, and a determination of the principles by which, it is to be administered. It is indispensable that these matters be wisely determined in order to secure the objects for which such government is established.

The selection of these agents rests entirely with the government of the occupying army.[1] From necessity they will, in the first instance, ordinarily be military officers; as, when the territory is first occupied, the officials on the spot, competent from their training and with the requisite force at hand to render military government successful, are the commander of the army and his subordinates. The home government may, from considerations of policy, adopt a course in selecting agents when military government is set up over foreign territory differing from that observed when it is established within districts occupied by rebels treated as belligerents.[2] Again, if it be intended permanently to annex foreign territory so occupied, every means probable will be made use of to allay the fears and win the confidence of the conquered people by adopting toward them a line of conduct which they can see is calculated to guard their rights and liberties, civil and religious, and render them secure in person and property.

76. In his instructions to General Kearney of June 3, 1846, Secretary of War Marcy showed the deep solicitation of the

1. Hall, p. 436. 2. The Germans, in 1870, at least in Alsace and Lorraine, appointed officials in every department of the administration and of every rank. This was a pre-determined policy, looking to the absorption of those provinces.

Government upon this point when he observed: "Should you conquer and take possession of New Mexico and Upper California, you will establish temporary civil governments therein, abolishing all arbitrary distinctions that may exist, so far as it may be done with safety. In performing this duty it would be wise and prudent to continue in their employment all such of the existing officers as are known to be friendly to the United States. * * * * You may assure the people of those provinces that it is the wish and design of the United States to provide for them a free government, with the least possible delay, similar to that which exists in our Territories. * * * * It is foreseen that what relates to the civil government will be a difficult and unpleasant part of your duty, and much must necessarily be left to your own discretion. In your whole conduct you will act in such a manner as best to conciliate the inhabitants and render them friendly." Pursuant to these instructions the so-called civil government was erected in New Mexico within one month of the entry of the forces of the United States into the capital of that Territory. The officers consisted of a governor, secretary, marshal, district attorney, treasurer, auditor, and three Supreme Court judges. Of course, nothing except the presence of superior military force enabled these officials—civilians—to perform their appropriate duties. The government was that of the sword; called by a different name to be more pleasing to the people.

77. In California essentially the same policy was pursued. On August 17, 1846, Commodore Stockton, U. S. N., styling himself commander-in-chief and governor of California, issued a proclamation announcing the annexation of the Territory to the United States and calling on the people to meet in their several towns and departments and elect civil officers to fill the places of those who refused to continue in office. Within a month thereafter a territorial form of government was announced. Yet, notwithstanding this apparent deference to civil government, the following passage in the proclamation shows how completely the country was held under military control: "All

persons are required, so long as the Territory is under martial law, to be in their houses from 10 o'clock at night until sunrise in the morning."

Commodore Stockton was succeeded by Commodore Shubrick, U. S. N. Meanwhile, General Kearney, U. S. A., leaving sufficient force behind him to maintain the authority of the United States in New Mexico, marched with the rest of his command into California. Here, March 1, 1847, these two officials issued a joint circular to the people of the conquered provinces, reciting that the President had assigned the regulation of import trade, the conditions on which all vessels should enter ports of the Territory, and the establishment of port regulations to the naval authorities; while to the military authorities were given the direction of the operations on land and the administrative functions of government over territory thus occupied by their forces. Following this, what was styled a "civil," but what in fact was a military government, was organized, the officials of which, unlike those in New Mexico, were army or navy officers. Municipal affairs were carried on the same as before occupation, by officers either chosen by the people under the authority of the conqueror, or holding over under that authority, and in accordance with local laws.

78. In those districts occupied by our forces and concerning which schemes of permanent conquest were not meditated, military commanders governed strictly in accordance with the laws of war.

79. Both Generals Scott and Taylor were at first instructed by the Secretary of War to supply their armies in Mexico by forced contributions from the enemy without paying therefor, but this policy was not adhered to; instead, when practicable, necessaries were purchased of the inhabitants and paid for at a fair price.[1]

1. Kent, 1, p. 92 (b); Autobiography of Lieut.-Gen. Scott, p. 580.

On Scott's line of operations, at least, the protection of religion, property, and industry were co-extensive with military occupation.

80. These principles of liberality in dealing with the enemy were swayed by considerations of policy resulting from the determination to render the military government set up over the conquered provinces sources of revenue to the Government of the United States. The President, with a view to impose a burden on the enemy, deprive him of the profits to be derived from trade and secure it to the United States, ordered that all the ports and places in Mexico in actual possession of the land and naval forces should be open, while the military occupation continued, to the commerce of all neutral nations, as well as of the United States, in articles not contraband of war, upon the payment of a prescribed tariff of duties and tonnage, prepared under his instructions and to be enforced by the military and naval commanders. He claimed and exercised, as being charged by the Constitution with the prosecution of the war, the belligerent right to levy military contributions and to collect and apply the same towards defraying the expenses of the war. The execution of the commercial regulations was placed under the control of the military and naval forces, and, with the policy of blockading some and opening other Mexican ports, the whole commerce for the supply of Mexico was compelled to pass under the control of the American forces, subject to the contributions, exactions, and duties so imposed.[1]

81. When military government is instituted in States or districts occupied by rebels treated as belligerents, political considerations will generally determine, even more than when armies are on foreign soil, who the agents shall be to carry it into execution. They may be either civil or military, depending upon circumstances, although the only efficient coercive power will always be the military. The right to put into operation the sterner rules of war applicable to the case is unquestioned.

1. Kent, 1, p. 92 (b); Fleming *v* Page, 9 Howard, 616.

The animosities which civil war engender are calculated to prompt to the exercise of these rules in all their rigor. On the other hand, nations do not pursue schemes of conquest, in the proper sense of the term, against revolted subjects. As against them war is waged not for conquest, but to bring them to a sense of duty, vindicate the integrity of offended law, and preserve unimpaired both the territory and institutions of the legitimate government. No war of which history furnishes record has given occasion for the application of these principles to the extent of the Civil War in the United States from 1861 to 1865. As the hostile line was driven back, military commanders exercised over the territory so reclaimed the rights of conquerors, it is true, but only to the extent that this accorded with the political policy of the National Government.

82. When New Orleans was occupied by the Union forces in 1862, the commanding general enjoined upon all the inhabitants the pursuit of their usual vocations. So long as they did this in good faith, they were protected. Disorders and disturbances of the peace, caused by combinations of citizens, and crimes of an aggravated nature interfering with the forces or laws of the United States, were referred to a military court for trial and punishment; other misdemeanors were made subject to municipal authority, and so with regard to civil causes between party and party. A censorship was instituted over the press of the city.[1] All the officials appointed by the commander to enforce the military government were officers of the army.

The same rule of conduct controlled at Memphis, Tenn., and at many other important points. In truth, throughout the Civil War the generals in command, wherever in conquered rebellious territory it was determined to establish order upon a basis which it was hoped would prove permanent, resorted to measures which are sanctioned by the laws of war applicable to armies operating in foreign territory, except as these were

1. Rebellion Records, Series I., Vol. 6, p. 717.

modified by the conciliatory policy of the Federal Government. An important feature consisted of military commissions composed of military officers only. And this summary system of judicature was supplemented, so far as practicable or the military commander deemed it advisable, by the civil authorities of the district occupied; the latter, of course, to take cognizance only of transactions affecting the inhabitants in their dealings with each other, and enforcing, as to them, the local law in its criminal and civil branches.[1]

83. But the fact that the object in suppressing rebellion is neither conquest nor subjugation, but overthrow of the insurgent organization and the re-establishment of legitimate authority,[2] prompts to the establishment of quasi-civil governments in insurgent territory permanently occupied by the national forces; and this, not because military government pure and simple is either illegal or inadequate under the circumstances, but from considerations springing out of an enlarged and enlightened public policy, which seeks to demonstrate to all concerned that the main object of the war is the maintenance of national supremacy, and that every measure is to be adopted, in the organizaton of the governments temporarily established upon secure military occupation, to facilitate the return of the people to their former position as subjects, under such conditions and limitations as may be imposed by legitimate governmental authority.

This policy was early adopted and consistently followed by the Government of the United States during the Civil War. And it was truthfully and patriotically said at the time that "to permit people so circumstanced to be governed by rules, regulations, statutes, laws, and codes of jurisprudence; to give them jurists able and willing to abide by standing laws, and thus to restore (as far as is consistent with public safety and the secure tenure of conquest) the blessings of civil liberty and a just administration of laws—most of which are made by those

1. Rebellion Records, Series I., Vol. II., Part III., p. 77; Vol. XIV., p. 334; Vol. XVI.I, Part II., p. 41; Vol. IV., p. 20. 2 The *Grapeshot*, 9 Howard, 132.

on whom they are administered—is an act of magnanimity worthy of a great people. Such a government, though founded on and administered by military power, surely tends to restore the confidence of the disloyal by giving them rights they could not otherwise enjoy, and by protecting them from unnecessary hardships and wrongs. It can not fail to encourage and support the friends of the Union in disloyal districts by demonstrating to all the forbearance and justice of those who are responsible for the conduct of the war."[1]

The same encomium could have been pronounced, and with equal justice, upon the measures taken in the Philippines by the National Government, commencing in 1899 and continuing to this time, to give the Filipinos, in spite of themselves, civil institutions, based as much as possible on the will of the people.

84. Accordingly, after the capture of Forts Henry and Donaldson and the occupation of Nashville by the Union forces, the President commissioned Andrew Johnson as military governor of Tennessee, the eastern part of which State had always been loyal to the Union. Mr. Johnson resigned his seat in the United States Senate to accept that of military governor, to legalize the powers and facilitate the performance of the duties of which it was deemed expedient to confer upon him the military rank of brigadier-general, to which he was duly nominated by the President and confirmed by the Senate.

In North Carolina, after the capture by the Union forces of nearly all the forts and important points on the coast and adjacent thereto, the Honorable Edward Stanley was appointed by the President, May 19, 1862, military governor. Similarly, on June 3, 1862, after the occupation of New Orleans and contiguous territory by the Federals, George B. Shepley was appointed military governor of the State of Louisiana, with rank of brigadier-general. To each was given authority to exercise and perform, within the limits of his State, all and singular the powers, duties, and functions pertaining to the office of military

1. Whiting, War Powers, 10th edition, p. 265.

governor (including the power to establish all necessary offices and tribunals and suspend the writ of *habeas corpus*) during the pleasure of the President, or until the loyal inhabitants of the State should organize a civil government in conformity with the Constitution of the United States. The authority given was plenary. But in the nature of things it could be exercised only over that portion of each State controlled by the Union armies. The effective authority of the military governor resulted from the fact alone that the army was at hand to enforce his mandates. Without this, his assumption of power was an empty show.

85. In no other States than those mentioned were military governors appointed until after the final surrender of the rebel armies. Nor was this done because of lack of scope, vigor, and efficiency of the military rule of commanders of occupying forces; but wholly from considerations of expediency. In one important respect the measure was positively detrimental. It necessitated two sets of officials with diverse responsibilities, when for all purposes of government the military alone were sufficient; further, the relative powers and duties of each set, undefined as they were in great degree, might, as indeed they sometimes did, lead to clashing of authority.

When this occurred in important matters army commanders as a rule carried the day, because to them was entrusted the duty of suppressing the rebellion by destroying the enemy's armies in the field; and, great as might be the desire, through the instrumentalities of civil officers, to assist in the re-establishment of Federal authority and so to provide means of protecting loyal inhabitants in their persons and property until they should be able to form civil governments for themselves, such considerations necessarily gave way to the all-important object of defeating and dispersing the armed forces of the enemy, upon which the hopes of the rebellion rested. The result of this dual system was that while in theory generals commanding had only to fight battles and *assist* military governors in the execution of undefined civil duties, yet, as a

practical fact, the ruling power remained in the hands of the generals, who alone had at their bidding the physical force necessary to cause their orders and decisions to be obeyed and respected.

86. Viewed from a military standpoint alone, the wisdom of the policy of dual governments might appear doubtful. The commanding generals with their armies had conquered and were occupying the territory, and of necessity remained there to hold it and to make it the basis of further operations. They could not be dispensed with. On the other hand, from a military standpoint, the military governors were not indispensable, and with their array of subordinate officials, principally civilians, they complicated matters in districts where the undisputed military sway was of the utmost importance. But, as before mentioned, purely military considerations did not determine the policy of the Government in this regard. A helping hand was to be given the people to return to their allegiance under acceptable civil government. Staunch friends of the administration were not indeed united in support of the measure. The President and his advisers decided, however, that this policy was necessary, and, whatever evils attended it, they were unavoidable. Unquestionably also the presence of civilian assistance to the military governors, while sometimes they embarrassed, yet they often relieved commanding generals of many harassing details which invariably attend the administration of governmental affairs over conquered territory.

87. The successes of the Federal armies during the third campaign of the war encouraged the President to attempt an improvement on the plan before adopted for weakening rebellion by the formation of State governments in rebellious districts. In pursuance of this purpose the Executive issued a proclamation on the 8th of December, 1863,[1] inviting the people there living to form loyal governments under condi-

1. 13 Statutes at Large, 738.

tions set forth in the proclamation. This, like the Emancipation Proclamation, was clearly a war measure. In Louisiana and Arkansas governments were formed accordingly early in 1864, and in Tennessee early in 1865. To the State executives thus chosen were given the powers theretofore exercised by the military governors. This was simply a development of the plan begun by the President two years previously in the appointment of these latter officials. It possessed this advanced and important additional feature of republican government as contrasted with its predecessor—namely, that the new governments were organized, the officials to carry them on appointed—apparently, at least—by the people governed, instead of by the commander-in-chief of the army. But the difference was merely apparent and nominal, not real. Each in fact rested only on the bayonet. Neither could have existed for a day if the military support of the nation had been withdrawn; and herein lay the weakness of the President's plan for establishing civil government in districts which were declared to be in insurrection.[1] In fact, the governments thus organized were never recognized by Congress, representatives and senators chosen thereunder being denied seats in the respective houses. They were, however, apparently recognized by the Supreme Court, but as *de facto* governments only, organized by the President in virtue of his authority as commander-in-chief,[2] the court remarking that the adoption of a constitution during the war, under military orders, and the election of a governor, did not affect the military occupation in the judgment of the national authorities.[3]

88. Those were the last governments organized while the war was flagrant in territory occupied by rebels treated as belligerents; and they illustrated the extreme development of a policy looking to the conciliation of conquered subjects.

1. Twenty Years in Congress, Blaine, Vol. 2, p. 174. 2. Texas *v.* White, 7 Wallace, 730. 3. Handlin *v.* Wickliff, 12 Wallace, 174.

They were the first efforts directed to a reconstruction of State governments over insurgent territories. Their organization caused the first decided antagonism between the Executive and Congress growing out of the conduct of the war; a cloud no bigger than a man's hand, but of evil portent, the precursor of a storm that well-nigh swept a succeeding President from his seat through the extraordinary measure of impeachment, and immutably determining that ultimate power under our system of government rests in the people, to be exercised through their representatives in the two houses of Congress.

89. In Cuba, after the Spanish sovereignty was extinguished in 1899, a civil administration was inaugurated, but it was a creature wholly at the will of the President, the better to subserve the policy of the United States Government. It was intended to placate the people and render easier the task of the military governor. The history of the world furnishes, perhaps, no equally signal instance of national and disinterested generosity as that here evidenced towards the embryo Cuban republic.

The military government in Porto Rico made use of civil administration only as a handmaid. This island was very soon in condition to be taken over bodily by the civil power under act of Congress.

90. It was in the Philippines that the problems growing as incidents out of the Spanish War proved most difficult to solve. The military governor early instituted local governments, endeavoring in this way to give the people object-lessons of national good-will. A judiciary was then set up; the spheres of operation of the civil administration were gradually extended. All this took place wholly by the co-operation of the military and the people of the country, mostly natives. Two years after the occupation the Civil Commission sent out from the United States began to lay the foundation for that administration which one year later (July 4, 1901) superseded the military in all except the most

turbulent districts. The solicitude of the National Government here evidenced to lay a deep foundation in the affections of the Philippine people stands without a parallel.

91. The British authorities in South Africa from 1899 to 1902 organized with great care an elaborate system for extending military jurisdiction over the country. The rebellious subjects of Cape Colony and Natal were treated as public enemies making war on the mother country and at the same time as rebel subjects. The burghers were treated as public enemies alone. Over the former, civil jurisdiction was maintained as far as practicable, but it gave way, at the first touch of conflict, to the military jurisdiction. Effort was made to anticipate every case that could arise in carrying this military jurisdiction into effect, so that the people as well as officials of every grade should understand their duty, rights, obligations—how these were to be performed and conserved, and how those in authority were to enforce that authority and thus guard public interests. In course of time there grew to be great similarity between the methods resorted to by the British here and the Americans in the Philippines, as the enemy in each case adopted finally the guerilla system of tactics. The former, however, were not so much influenced by political considerations at home as the latter, and consequently were in a position to conduct the war on more strictly military principles.[1]

1. Papers relating to martial law in South Africa, presented to Parliament by command of His Majesty, London, 1903.

CHAPTER VIII.

All Inhabitants Enemies; Levies en Masse.

92. When war exists between nations, all the subjects of one are, in contemplation of law, enemies of the subjects of the other.[1] In this particular custom and principle are in accord. Enemies continue such wherever they happen to be. The place of abode is of no consequence here. It is the political ties which determine the character. Every man is, in contemplation of law, a party to the acts of his government, which is the representative of the will of the people and acts for the whole society. This is the universal theory. It is not meant that each citizen of one attacks each subject of the other belligerent; this he may not do without governmental authorization and according to the customs of war; the most direct effect is to shut off friendly intercourse. It makes no difference as to the belligerent character impressed upon the people whether the government has duly proclaimed war, with all the formalities of medieval or more recent times, or not proclaimed it at all, or whether it be an act of self-defense simply, or result from the suppression of a rebellion.[2] The theory that war can not be lawfully carried on except it be formally proclaimed is, as before remarked, now justly exploded.

93. Although all the members of the enemy State may lawfully be treated as enemies in war, it does not follow that all may be treated alike. Some may lawfully be destroyed, but all may not be, independently of surrounding circumstances.[3] For the general rule derived from the law of Nature is still the same,—namely, that no use of force against an enemy

1. Manning, p. 166; Woolsey, Sec. 125; American Instructions, Sec. 1, clauses 21, 23; Bluntschli, I., Sec. 2. 2. Kent, 1, p. 55; 2 Black, 635. 3 Bluntschli, I., Secs. 21, 33, 38.

is lawful, unless it be necessary to accomplish the purposes of the war. As a rule, all who are simply engaged in civil pursuits are exempt from the direct effect of belligerent operations, unless they abandon their civil character and are actually taken in arms, or are guilty of some other misconduct in violation of the usages of war, whereby they forfeit their immunity. The persons of members of the municipal government, women and children, cultivators of the soil, artisans, laborers, merchants, men of science and letters, are brought within the operation of the same rule; as are in fact all those who, though technically enemies, take no part in the war, and make no resistance to our arms.[1] So long as these pay the military contributions which may be imposed upon them, and quietly submit to the military authority of the government, they are permitted to continue in the enjoyment of their property and the pursuit of their ordinary vocations.

This humane policy greatly mitigates the evils of war; and if the commander who enforces military government maintains his army in a proper state of discipline, protecting those who, for a pecuniary consideration, will supply his troops with the natural and industrial products of the country, the great problems of an efficient transportation system and an abundant commissariat will be greatly simplified, and the army be spared many of the dangers incident to a position in a hostile country.[2] It may be that this policy is not always practicable. Protracted hostilities lead, as a rule, to the enforcement of the maxim that "war must support war" as a military necessity. Yet it should not be hastily adopted, for experience has shown that when practicable the milder rule generally is the wiser.[3] "My great maxim," said Napoleon, "has always been in war, as well as in politics, that every evil action, even if legal, can

1. Wheaton, Part IV., Sec. 345; Instructions U. S. Armies in the Field, Sec. 1, clauses 23, 24, 27; Manning, p. 204. 2. Halleck, Chap. 18. Sec. 3. 3. Scott's Autobiography, p. 550; Vattel, Book III., Chap. 8, Sec. 147; Bluntschli, Laws of War, I., Sec. 59.

only be excused in case of absolute necessity; whatever goes beyond that is criminal."

94. In his proclamation of August 11, 1870, on entering France, King William said: "I wage war against French soldiers, not against French citizens. These, therefore, will continue to enjoy security for person and property so long as they do not, by committing hostile acts against the German troops, deprive me of the right of affording them protection."

This exemption from the extreme rights of war is confined to those who refrain from all acts of hostility. If those who would otherwise be considered non-combatants commit acts in violation of this milder rule of modern warfare, they subject themselves to the fate of the armed enemy, and frequently to harsher treatment. If some thus transgress, and they can not be discovered, the whole community frequently suffers for the conduct of these few. In the Franco-German War it was a common practice for the Germans to arrest and retain in custody influential inhabitants of places at or near which bridges were burned, railroads destroyed, etc., by unknown parties within occupied French territory.

95. But moderation towards non-combatants, how commendable soever it be, is not absolutely obligatory. If the commander sees fit to supersede it by a harsher rule, he can not be justly accused of violating the laws of war. He is at liberty to adopt such measures in this respect as he thinks most conducive to the success of his affairs. How important it is, therefore, on the ground of policy, even if higher moral

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NOTE.—Citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or contractors, if captured, may be made prisoners of war and detained as such. The monarch and members of the hostile reigning family, male or female, the chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army and its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war. [Instructions for Armies in the Field (G. O. 100, A. G. O., 1863).] See also Bluntschli's Laws of War, I., Sec. 3

considerations be lost sight of, that non-combatants maintain strictly their character as such. Their happy lot, amidst war's desolation, is due to the grace of the conqueror. If, therefore, he have cause to suspect the good faith of the inhabitants of any place or district, he has a right to adopt measures which will frustrate their plans and secure himself. He is responsible only to his own government.

96. The customs of modern warfare, as well as chivalric sentiments, prompt soldiers to treat women with all possible consideration. The commander who ruthlessly makes war upon the gentler sex, acting towards them with unnecessary harshness, cannot escape the stigma attaching to such conduct in the eyes of the world, and may find himself proscribed for so doing by his enemy. While, however, it is true that women are protected in the midst even of active hostilities, it is only on the implied condition that they will in every respect so conduct themselves as to merit such generous treatment. They must not forget that they owe their fortunate position to the kindness of the conqueror. But if they adopt a course plainly showing insensibility to the kindness shown them, either by overt acts or secret plottings, he is justified in treating them more rigorously. Even women and children may be held under restraint if circumstances render it necessary in order to secure the just objects of the war. If the commander has good and sufficient reasons for departing in this regard from the rules of politeness and the suggestions of pity, he may do so without being justly accused of violating military customs.

97. The success of his arms is the first object of the conqueror. He owes to his government the duty of securing that success by every means known to the laws of war. Beyond what they permit, his conduct should not be signalized by severity. Each case, as it arises, must be judged by the attending circumstances, the means employed, and the danger they were designed to guard against. The responsibility of the commander is always great. His conduct is not to be hastily condemned. His acts are often influenced

by reasons not generally known or which it would be easy or wise to explain. It is an extreme measure, but it may be sometimes justified, to starve a belligerent enemy. And if, to save his own army, the besieged drives forth non-combatants—women and children—forcing them upon the enemy's mercy, it can not be regarded as violating the laws of war.1

98. The rule that war places every individual of the one in hostility to every other individual of the other belligerent State is equally true whether it be foreign or waged against rebels treated as belligerents. The latter branch of the rule

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NOTE.—The measures taken by Suchet to force the Spaniards to surrender the citadel of the fortress of Lerida, Valencia, Spain, well illustrate the barbarities practiced under the laws of war, when commanders forget the claims of humanity. When the Spanish troops retired into the citadel, they left the inhabitants behind them in the city. "The French columns advanced from every side, in a concentric direction, upon the citadel, and, with shouts, stabs, and musketry, drove men, women, and children before them, while the guns of the castle smote friend and foe alike. Then, flying up the ascent, the shrieking and terrified crowds rushed into the fortress with the retiring garrison and crowded the summit of the rock; but all that night the French shells fell amongst the hapless multitude, and at daylight the fire was redoubled and the carnage swelled until Garcia Conde (the Spanish commander), overpowered by the cries and sufferings of the miserable people, hoisted the white flag. Thus suddenly was this powerful fortress reduced by a proceeding, politic indeed, but scarcely to be admitted within the pale of civilized warfare. For though a town taken by assault be considered the lawful prey of a licentious soldiery, this remnant of barbarism, disgracing the military profession, does not warrant the driving of unarmed, helpless people into a situation where they must perish from the fire of the enemy unless a governor fails in his duty. Suchet justifies it on the ground that he thus spared a great effusion of blood which must necessarily have attended a protracted siege, and the fact is true. But this is to spare soldiers' blood at the expense of women's and children's, and had Garcia Conde's nature been stern, he, too, might have pleaded expediency, and the victory would have fallen to him who could longest have sustained the sight of mangled infants and despairing mothers." (Napier's Peninsula War, Book 10, Chap. 3, Vol. 2, p. 56.)

1. Instructions U. S. Armies in the Field, Sec. 1, pars. 17, 18.

has been affirmed in repeated decisions of the Supreme Court of the United States, which also establish the integrity of the main proposition. "The rebellion against the Union," it was observed in one case, "is no loose, unorganized insurrection having no defined boundary or possession. It has a boundary which can be crossed only by force—south of which is enemies' territory, because it is claimed and held in possession by an organized, hostile, and belligerent power. All persons residing within this territory whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies. This court can not inquire into the personal character of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable to civil and international wars, that all the people in each State or district in insurrection against the United States must be regarded as enemies, until by the action of the Legislature and the Executive, or otherwise, that relation is thoroughly and permanently changed."[1] The decisions of the court, extending over the period of the Civil War and afterwards, definitely settled as principles of law that the district of country declared by the constituted authorities to be in insurrection against the United States was enemy territory; and that all the people residing within such district were, according to public law and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions.[2] The commander who is endeavoring to suppress a rebellion will, so far as it can wisely be done, distinguish between the loyal and the disloyal citizen. Sound policy will dictate this course to the legitimate government. It is in consonance with the preceding opinions of the Supreme

1. Prize Cases, 2 Black, 674; 2 Wallace, 419; Woolsey, Sec. 123. 2. Ford *v.* Surget, 97 U. S., 604; Williams *v.* Bruffy, 96 U. S., 176; 2 Black, 674.

Court, and the observance of the principle has been enjoined upon the United States armies in the field. "Justice and expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits. He will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government. Whether it be expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide."[1] Distinctions between the loyal and disloyal of rebellious districts will, as a rule, be regulated through the legislative action of the legitimate government. While the power to carry on war carries with it every incidental power necessary to render it effective sanctioned by the law of nations, it can not be doubted that Congress has a right, when questions of governmental policy are concerned, to prescribe regulations limiting and directing the discretion of the Executive.[2] Such regulations, in so far as they discriminate between subjects in insurgent territory, generally relate to property, appropriating that of the disloyal while so far as practicable protecting that of the loyal from the common lot of war.[3]

99. The rule that certain of the enemy's subjects are to be treated as non-combatants gives rise to the correlative duty on their part to refrain from acts of hostility.[4] This obliga-

1. Instructions for Armies in the Field, Sec. 10, clauses 7, 8. 2. Brown *v.* U. S., 8 Cranch, 149. 3. Act August 6, 1861, 12 Statutes at Large, 319; July 17, 1862, *ibid.*, 591; March 12, 1863, *ibid.*, 820. 4. Instructions U. S. Armies in the Field, Sec. 4; Bluntschli, Laws of War, I., Sec. 134.

tion is enforced with great rigor by the dominant power. Inhabitants of the country militarily occupied are not permitted to make war as they please, being soldiers one day and engaged in peaceful pursuits the next. In the instructions for United States armies such persons are called war rebels. The conduct of the Filipinos for several years subsequent to 1898 brought them within this category very largely.

100. In 1871 the German governor of Lorraine ordered, in consequence of the destruction of the bridges of Fontenoy on the east of Toul, that the district included in the governor-generalship of Lorraine should pay an extraordinary contribution of 10,000,000 francs by way of fine, and announced that the village of Fontenoy had been burned. In October, 1870, the general commanding the second German army issued a proclamation declaring that all houses or villages affording shelter to *franc-tireurs* would be burned, unless the mayor of the communes informed the nearest Prussian officer of their presence immediately on their arrival in the communes. All communes in which injury was suffered by railways, telegraphs, bridges, or canals were to pay a special contribution, notwithstanding that such injury might have been done by others than the inhabitants, and even without their knowledge.

A general order was issued in August, 1870, affecting all territory militarily occupied by the Germans, under which the communes to which any persons doing a punishable act belonged, as well as those in which the act was carried out, were to be fined for each offense in a sum equal to the yearly amount of their land-tax.[1]

101. The right of making war, as before remarked, rests with the sovereign power of the State. Subjects can not take any independent steps in the matter. They are not permitted to commit acts of hostility without either the orders or approval of their government.[2] If they assume this responsibility, they are liable to be treated as banditti.

1. Hall, p 433. 2. Woolsey 5th edition, Sec 125.

As a rule, those so authorized are given distinctive uniforms, are organized into military bodies, and pass under the designation of troops. The uniform, however, is not a necessary feature, nor is a particular organization even, that the enemy's forces shall be entitled to be considered legitimate. Many and sufficient causes may prevent the wearing any distinctive uniform. The organization of the forces may frequently change. Neither is considered a matter of prime importance, therefore, in determining whether the enemy are entitled to every consideration extended to combatants under the laws of war. But it is insisted that they shall be regularly authorized and commissioned by their government.[1] To this rule no exception is admitted. And the necessity of a special order to act is so thoroughly established that, even after a declaration of war between two nations, if peasants without governmental

1. Hague Conference, Sec. 1, Chap. 1, Art. II.

NOTE.—After the capture of the city of Atlanta, Georgia, in 1864, by the Union forces, the Federal commander removed the citizens from that city.

The reasons for this extreme step, which, however, was justified by the laws of war, were as follows:

1. All the houses were wanted for military storage and occupation.

2. To enable a contracted line of defense to be established, which would be capable of defense by a reasonable force; and this would render destruction of exterior dwelling-houses necessary beyond this proposed line.

3. The town was a fortified place, stubbornly defended, fairly captured, giving the captor extraordinary belligerent rights regarding it.

4. Keeping the people in the city would necessitate feeding them, soon thus draining the conqueror's commissariat.

5. The people within would be keeping up correspondence injurious to the Union cause with those without the city.

6. To govern the people would take too large a portion of the combatant conquering force.

Every precaution was taken to make the removal of the people as agreeable to them as possible. They were given transportation for themselves and a reasonable amount of personal baggage, and they were carefully guarded until they were placed within the protective power of the enemy's forces, which coöperated, under protest, in the proceeding. (Sherman's Memoirs, Vol. 2, p. 118.)

sanction commit hostilities the enemy shows them no mercy, but hangs them up as he would so many robbers.[1]

102. It is a well-established military principle that predatory parties and guerilla bands are not legally in arms. The military name and garb which they may have assumed cannot give exemption to the crimes which they commit.[2]

Some writers have indeed expressed views which if not attentively examined might lead to other conclusions. "An armed party," remarks Bluntschli, "which has not been empowered by any existing government to resort to arms, is nevertheless to be regarded as a belligerent when it is organized as an independent military power, and in the place of the State honorably contends for a principle of public law." But reference was here had to expeditions of certain free-corps having for their object political changes, and whose operations were like those of regularly organized armies, like the Germans under Major Schill in 1809, and the Italian free-corps with which Garibaldi invaded Sicily and Naples in the war of 1859 and Tyrol in 1866. They were no mere predatory bodies, but their numbers, organization, mode of fighting, and the honorable objects they consistently kept in view entitled them, as Dr. Bluntschli contends, to be treated as regular belligerents.[3] Yet it is well known that Napoleon treated Van Schill's party as banditti, making war without proper authorization.

It is a general principle of modern war that men or squads of men who commit hostilities, whether by fighting — inroads, whether for destruction or plunder, or by raids of any kind without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and civil avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character and

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1. Vattel, Book III., Chap. 15, Sec. 226. 2. G. O. 1, Dept. Mo., Jan. 1, 1862, R. R. S., I., Vol. 8, p. 476; Scott's Autobiography, p. 574; Woolsey, Secs. 134, 142; Sec. 13, Chap. 4, note. 3. Bluntschli's Laws of War, I., Sec. 3.

appearance of soldiers, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but are to be treated summarily.[1] That was the course enjoined upon the Union Army during the Rebellion, and conformed to the practices of modern war generally. The French pursued that course in Spain. Wellington did the same in France, while in 1870–71 the Germans adopted the same stringent measures against the French *franc-tireurs*. A notice at St. Michel declared that either *franc-tireurs* or other persons bearing arms, but not wearing uniforms, so as to distinguish them from the civil population, were, by the Prussian laws of war, punishable with death. The policy indicated in this notice was general, and was enforced with unbending severity.[2] But it led, during the last days of the unequal struggle between France and Germany in 1870–71, after the regular armies of the former were captured or nearly dispersed and irregulars were largely depended on, to melancholy results. General Chanzy, a gallant French officer, wrote to the German commander at Vendôme that he intended to fight without truce or mercy, because the fighting was no longer with legal enemies, but hordes of devastators.

Nor can any government legalize guerilla practices. A regularly granted commission can not render such lawful, but if captured the perpetrators are visited with summary punishment due their crimes. Their commissions would not shield them. Those commissions only authorize acts which are justified by military customs.

103. The experiences of the United States troops in the Philippines and the British in South Africa demonstrate how annoying, persistent, not to say really formidable guerilla warfare may become even against regular troops. The fact that renders it difficult to the latter is the impossibility of telling friends from foes, or the preventing a man extending the right

1. Instructions Armies in the Field, Sec. 4, clauses 2-4. 2. Customs of War Tovey, p. 75.

hand of friendship one moment and shooting from point of vantage the next, and so indefinitely. Concentration-camps are one effective instrumentality for handling the population, all beyond their boundaries being liable to be shot. Both in South Africa and the Philippines every practicable attention was given to the comfort of those forced to stay within the boundaries of these camps; this fact the official records show.

Besides in South Africa Lord Kitchener established effective lines of block-houses, joined by wire netting and other obstructions to free passage to confine the enemy within certain limits where the troops could get at them. It was an expensive system; required 5,000 block-houses, varying in distance apart from 500 to 3,000 yards, requiring on an average 10 men to each house, or 50,000 soldiers all together; but the result vindicated the wisdom of the scheme and the pertinacity with which it was pursued.

The extraordinary, not to say unprecedented leniency of the United States Government in dealing with the Filipinos after all semblance of regular fighting was abandoned by the latter and guerilla practices alone resorted to, must have surprised the civilized world. The chameleon character of these people just referred to—pretended friends one moment, enemies in ambush the next—placed them outside the pale of civilized warfare and justified severest measures of repression. The measure of mercy towards them was filled to overflowing.

While this was true, there were some sporadic cases of cruelty practiced upon the natives by the soldiery in violation of the laws of war, which peremptorily forbid torture. The disposition to indulge such practices arose probably out of the diverse policies of the two parties contestant, the United States pursuing one of beneficence, even in derogation of its rights under the laws of war, the Filipinos pursuing their course of treachery and unquenchable hate in utter disregard of these laws. As that which was legitimate was not availed of, to meet this course of savagery the illegitimate crept in.

104. States sometimes attempt to justify subjects who make war in an irregular manner. But the practice is inflexibly condemned by modern laws of war. Not because those so engaged are necessarily bent on crimes; on the contrary they may be actuated by the most patriotic motives; but because each party has a right to know who his enemy is, and besides, if hostilities so conducted were legalized, a too convenient cover would be furnished for all kinds of excesses. Under the customs of war, unless the troops have the authority of their State to act, their appropriating property is robbery, their taking life is murder. Nor does the civil-law maxim that subsequent ratification has a retrospective effect, and is equivalent to a prior command, have here any application. The authorization must be prior in point of time to the hostile acts, otherwise they are crimes. The irresponsible doings of unauthorized bodies can not be given the sanction of warfare regularly conducted. To do this would be to confound all distinctions between right and wrong. No nation can afford to do this unless it has resolved to revert to the practices of barbaric ages.[1]

105. In the Franco-German war of 1870–71 the German commander-in-chief issued a proclamation requiring an authorization for each individual. "Every prisoner," it was said, "who expects to be treated as a prisoner of war, must prove his character as a French soldier by an order issued by the lawful authorities and directed to him showing that he has been called out and incorporated into the ranks of a military corps organized by the French government."

106. An important distinction is made between hostile acts of guerillas and of *levies en masse*, called into the field by their government.[2] The leaders of the latter, as a rule, are regularly commissioned, and all act under proper authority. Such masses are not in the same category before the law with those

1. Halleck, Chap. 16, Sec. 8; Kent, I., pp. 94, 96; Lieber's Miscellaneous Writings, Vol. 2, "Guerilla Parties"; see also Dr. Bluntschli, Laws of War, V.; also I., Secs. 61, 61a. 2. Hall, pp. 474-477.

who, self-authorized, presume to engage in hostilities. It is true that *levies en masse* will seldom if ever be uniformed; this might be impracticable, and to expect it might be unreasonable. Their organization may, and generally will, be imperfect. Yet they have that in their favor which vitally distinguishes regulars from irregulars, namely, the previous authorization of their government to wage war by recognized methods. So long as they conduct war upon proper principles, their appearing on the field is not a just cause of complaint. On the contrary, instead of subjecting themselves to pains and penalties for nobly defending their country's rights and vindicating her honor, they will deserve and receive every consideration from a generous foe. But to become entitled to be treated thus, *levies en masse* must conduct hostilities in accordance with the laws of war. They can not be soldiers one day, the next be engaged in the peaceful pursuits of life, and the day after again be found in hostile array. Such conduct will inevitably class them as guerillas and banditti. It will forfeit the respect with which the enemy may have regarded them, and call down upon their heads a well-merited vengeance. 1

107. The part which *levies en masse* must act is full of difficulties. That they have no distinct uniform, no firmly settled organization, no system of supply, whether of provisions, clothing, arms, and ammunition, or means of transportation, renders it extremely difficult for them long successfully to keep the field. Yet it is necessary that they conform in their military operations to the well-recognized practices of modern warfare. If they do not, they are in no wise distinguishable from those irregulars who when apprehended may be summarily dealt with. And this renders it advisable before a State calls out its subjects *en masse* to consider well not only the hoped-for advantages, but also the possible evil results which may follow such a proceeding. If, as they are likely

1. Bluntschli, Laws of War, I., Sec. 6.

to do, under the pressure of sustained effort, the levies break up, disintegrate, and scatter into disorganized, illy-assorted, and feebly-commanded bands, demoralization ensues, love of plunder indifferently of friend or foe supplants the promptings of patriotism, the war becomes irregular on their part, forfeiting to them the protection due to their former character.

Considerations similar to these no doubt led the elegant and philosophic Napier, when narrating the efforts of Spain to repel invaders from her soil, to make the remark that, to raise a whole people against an invader may be easy, but to direct the energy thus aroused is a gigantic task, and, if misdirected, the result will be more injurious than advantageous. "That it was misdirected in Spain," continues he, "was the opinion of many able men of all sides, and to represent it otherwise is to make history give false lessons to posterity. Portugal was thrown completely into the hands of Lord Wellington; but that great man, instead of following the example of the supreme junta and encouraging independent bands, enforced military organization upon totally different principles. The people were, indeed, called upon and obliged to resist the enemy, but it was under a regular system by which all classes were kept in just bounds, and the whole physical and moral power of the nation rendered subservient to the plan of the general-in-chief." [1]

108. It is when *levies en masse* are scattered, as they are so apt soon to be through inherent weakness due to want of proper organization and supply system, that habits of license, violence, and disrespect for rights of property are quickly contracted, and render their members unfit for the duties of citizens. The efforts of disconnected bands avail nothing of permanent value to the State in the face of a regularly organized and well-directed enemy; while their members, subsisting by force off the resources of the country, strike far greater terror to unarmed friends than to the armed foe.

1. Peninsula War, Book IX., Chap. 1

109. The requirement that *levies en masse* or soldiers of any description shall wear some distinguishing mark of dress to show that they are combatants can never be enforced.[1] Moreover, it is not so necessary as is generally thought. This was demonstrated in the American Civil War from 1861–65. The rebels had a uniform, prescribed by their regulations, but circumstances did not permit of its being worn except by an individual here and there. The great body of the rebel armies —hundreds of thousands—were dressed in any way that was convenient. The only distinctive feature that could be said to characterize their clothing was that the general effect was a peculiar shade of brown, familiarly known as "butternut." This want of distinctive uniform was often the cause of mistakes being made by members of the opposing forces of a more or less serious nature; but as it was a recognized fact that the rebel government could not clothe its troops any better, the Federal commanders soon ceased to expect it. As a result a particular style of clothing, or special mark apparent in the soldiers' garb, was no longer a test as to whether they were entitled to be treated as combatants. If they were acting under competent authority and observed the customary laws of war, it was sufficient; to have attempted to punish them for not being distinguished by some mark of dress would only have resulted in wholesale retaliations. Nor was this want of uniform in all cases confined to the rebel armies. In some instances the Federal troops, particularly the cavalry, at the end of a campaign, with less excuse than their antagonists, presented an appearance little if any better than the latter. In many cases the original uniform would be wholly gone, and its place supplied by garments of any hue picked up at random; while nothing was more common on such occasions than to have the so-called uniform pieced out half by rebel "butternut" and half the "Union blue." This was particularly so in the western field of operations. If the enemy had been so fortunate as to raid a Union clothing depôt, they would be similarly decked

1. Bluntschli, Laws of War, I., Sec. 61.

out; when this occurred it was sometimes difficult to distinguish friend from foe.

110. There is no impropriety in a State, if it so desires, relying for its fighting force upon the precarious services of *levies en masse* rather than regularly organized armies.[1] That such State is thereby a loser is not a rational, nor is apt to be an actual, cause of complaint to its enemy. The adoption of this policy is purely a matter for each State to determine for itself. It is true that it is sometimes claimed that the employment of such levies is contrary to the laws of war. But if these assertions be examined into it will be found that those who maintain this position are actuated by no higher motive than self-interest. They are those who support large standing armies, train the entire able-bodied male population for war, and have a system of mobilization worked out practically during peace whereby the regularly organized armies, embodying the whole armed strength of the nation, can quickly be placed in the field in time of war. This is the policy of the more important States of continental Europe. With them *levies en masse* are not favored. And yet France in 1814, and again in 1871, resorted to them; as in fact every people of spirit would always do in the last extremity. On the other hand, those States will be found to maintain the right to levy such masses which have small standing armies or have not adopted the principle of universal service in the ranks. These States are far the more numerous of the two classes, and embrace all nations except those of Central Europe. It will not be denied that it is to the interest of States with small standing armies to maintain the legality of *levies en masse*. If attention be confined, therefore, to this narrow view of the subject, these States have no advantage in the argument over those who maintain the opposite opinion, for each looks no further than personal interest. But those who support the affirmative

1. Bluntschli, Laws of War, I., par. 89; Instructions Armies in Field, Sec. 3, pars. 4, 5; Hague Conference, Sec. 1, Chap. 1, Art. II (G. O. 52, A. G. O., 1902.)

of the question have, in addition to self-interest, this cogent circumstance in their favor, namely, the fact that every military nation, large and small alike, when driven to extremities, resorts to *levies en masse* to defend the homes and firesides of its people if expediency prompts the measure.

Under these circumstances no nation has hesitated to resort to levies from conscientious scruples. And on principle the right to employ *levies en masse* can not successfully be controverted. No independent State, unless it be agreeable to itself, is obliged to keep one soldier in its employ. Its military system is a matter of internal policy. Its military force may be regulars or militia, or any other the State may deem to be proper. It is true that, under the pressure of external circumstances, as for instance, considerations affecting the balance of power among nations, a State may be compelled to enter into engagements which curtail her natural freedom of action regarding the character and number of her military forces. But we speak now of her rights as an independent State among the nations of the earth. As such she has a right to determine for herself what her military force shall be. She is answerable to other nations only to this extent, that when this force takes the field it shall carry on hostilities according to the laws of war.

111. In arriving at a solution of the problem as to the character of its military force, the geographical position of the State and the military policy of its neighbors are circumstances of the greatest importance.[1] Self-preservation is the first law of nature with States as with individuals. Each State adopts those measures of self-defense which, depending upon its situation and the character of its own and of neighboring people, are best calculated to preserve its integrity unimpaired. The question is how best to secure the safety of the State; each determines the question for itself. If it choose, in the first instance, to rely upon the efforts of a small standing army, supported by militia or volunteers, and ultimately upon *levies en masse*, it is its own concern. The right to adopt this policy

1. 2 Wheaton, Part II., Sec. 63

is perfect. Its expediency is another question. In determining upon this the great difficulty of directing the fighting power of such masses with coherency and effect; the impossibility of making a prolonged effort with them; the embarrassment ever attending their supply and transportation; the danger of their melting away, becoming mere marauders at a time when they are most needed, more dangerous to friends than foes,—are considerations not to be lost sight of by a State which depends upon *levies en masse* to sustain its honor, vindicate its rights, and redress its wrongs.

112. With regard to employment of *levies en masse* it may be said, after a most interesting and intelligent discussion of the subject since 1870, particularly at various conferences of learned bodies in Europe versed in the laws of war, that general opinion there expressed tends to maintain these propositions: (1), that in order to insure treatment as belligerents irregular troops must wear some distinguishing mark; (2) that they must be commanded by officers who are commissioned by their government; (3), they must observe the laws of war.[1] Upon this point the American Instructions are as follows (Sec. 3, par. 4, 5):

"If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

"No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

"If, however, the people of a country, or any portion of the same already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection."

1. Manning, p. 207, Amos' note; Maine, pp. 168-176; Hall, pp. 474-477; Bluntschli, I., Sec. 132; Hague Conference, Sec. 1, Chap. 1, Art. I. (G. O. 52, A. G. O., 1902.)

CHAPTER IX.

LAWS OBLIGATORY WITHIN OCCUPIED TERRITORY.

113. As territory subject to military government forms no part of the national domain unless by conquest, treaty, or appropriate legislation it becomes such, it follows that the laws of the United States, of their own force and rigor, do not extend over that territory.[1] Nor, by the law of nations, is either the civil or criminal jurisdiction of the conquering State considered as extending over such territory. Jurisdiction of the vanquished power is indeed replaced by that of military occupation,[2] but it by no means follows that this new jurisdiction is the same as that of the conquering State. It is usually very different in its character and always distinct in its origin. Hence the ordinary jurisdiction of the dominant State does not extend to actions, whether civil or criminal, originating in the occupied territory. As remarked upon one occasion by the Supreme Court of the United States: What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law, the law of war, and its supremacy for the protection of the officers and soldiers of the army when in service in the field in the enemy's country is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty.[3] "In the event of a military occupation," said Maine, "the authority of the regular government is supplanted by that of the invading army. The rule imposed by the invader is the law of war. It may in its character be either civil or military, or partly one and partly the other.

1. 5 Opinions Attorneys-General, 58; 9 Opinions Attorneys-General, 140. 2. Maine, p. 179. 3. Dow *v.* Johnson, 100 U. S., p. 170.

The rule of military occupation has relation only to the inhabitants of the invaded country."[1]

114. It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place.[2] So much the more would an army invading an enemy's country be exempt from the jurisdiction of the latter.[3] On the other hand military government does not permanently oust the jurisdiction of the vanquished and *ipso facto* substitute the national jurisdiction of the occupying State. Such an effect is produced only by incorporation or definitive occupation. We refer here only to the jurisdiction of common law and the ordinary and usual cognizance of cases without in any manner diminishing the rights derived from war and the measures necessary for the government of military occupation. In this respect there is no difference between a war in which the contending parties are independent nations and a war waged against rebels treated as belligerents.[4] For when a nation becomes divided into two parties absolutely independent and no longer acknowledging a common superior, the war between the parties stands on the same ground, in every respect, as a public war between two different nations.

115. The question here arises: What laws are obligatory upon the authorities enforcing military government? Broadly, the answer must be in the language just quoted of the Supreme Court, "The laws of war." But practically the subject admits of more precise determination. The military commander, under military government, will deal with three classes of cases: First, those affecting the persons and property of the conquered, determining their rights, duties, and obligations; second, those which concern, in a similar manner, citizens of the conquering State, either soldiers or others within the district occupied; third, those which affect citizens of neutral States similarly

1. Maine, p. 179. 2. The Exchange, 7 Cranch, 139. 3. Coleman *v.* Tenn., 97 U. S., 516. 4. 97 U S., 516-17; 100 U. S., 170.

situated. The laws which control in dealing with the first and last classes are those of war, absolutely; but, as to the second, the rule, upon examination, will be found to be somewhat different.

116. As to the first class: It has been shown[1] that retention of local laws, for the adjudication of local affairs in the subjugated district, is a matter within the discretion entirely of the conqueror.[2] It is his act of grace. The rule is convenient as well. It would be productive of the greatest confusion if a community who had been governed by one law should have that law, with which they are acquainted, suddenly changed for another of which they are totally ignorant, as well as of the tribunals which are to administer justice among them. They may be permitted, therefore, to preserve their laws and institutions for the time, subject to modification at the will of the conqueror. Indeed, under the present rule, local laws remain in force until so modified.[3] This is a great amelioration of the former rule. By the severe practices of war, as carried on in ancient and indeed far down into modern times, the vanquished had no rights as against the victorious enemy. But under the softening influences of Christianity and an advancing civilization these stern laws of man in his natural and primitive state have been greatly ameliorated. These modifications are elastic and their practical application characterized by more or less severity, but in their general effect they are regarded as obligatory upon commanding generals in the exercise of belligerent rights. For their observance the generals are answerable to their government, and the latter to the family of nations.

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1. Ante, Chap. 6. 1. Kimball *v.* Taylor, Wood's Reports, 2d La. Dist.; G. O. 100, A. G. O. 1863, Sec. 2, clause 17. 3. Hague Conference, Sec. 3, Art. XLIII.; G. O. 52, A. G. O., 1902; 97 U. S. Rep., 509 *et seq.*; 100 U. S. Rep., 158 *et seq.*

NOTE.—It has been asserted that the authority of the local, civil, and judicial administration is suspended, as of course, so soon as military occupation takes place, although it is not usual for the invader to take the

Immediately upon the military occupation these laws cease that pertain to prerogatives of the former government; so also do rights vested in individuals, but which rest only on prerogatives of the former sovereign.[1]

117. Ostensibly, at least, war is entered upon either to obtain justice from an independent power or to enforce national supremacy against rebels. War existing, each belligerent has a right, as against the other, to do whatever he finds necessary to the attainment of the end he has in view. He has a right to put in practice every measure that is necessary in order to weaken the enemy, and may choose the most efficacious means to accomplish this purpose. But, while strictly pursuing this course, he should listen to the voice of mercy. The lawfulness of the end, and the right to the necessary means to attain it, do not, in the modern view, give the conqueror a right to abuse his power. Right goes hand in hand with necessity and the exigency of the case, but never outstrips them.

118. To this effect are the American Instructions: "Martial law" [military government], it is therein stated, "in a hostile country consists in the suspension, by the occupying

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whole administration into his own hands. The latter branch of the rule doubtless conforms to general experience, but the former it is believed does not. So far from the local, civil, and judicial administration being suspended, as matter of course, upon the assumption of control by the military authorities of the invader, they continue, if they so elect, in the full execution of their duties unless the conqueror by some positive act notifies them to the contrary, or in some unmistakable manner gathers the authority into his own hands. Upon this point the American Instructions provide:

"All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law [military government], unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader." (Sec. 1, par. 6.)

1. 22 Opinions Att'y-Gen., 527-28, 548, 574; 23 *Ibid.*, 226; Magoon, 497; Ante, Chap. 6, Sec. 67.

military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

"The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authorities.[1]

"On occupying a country an invader," says Hall, "at once invests himself with absolute authority, and the fact of occupations draw with it, as of course, the substitution of his will for previously existing law whenever such substitution is reasonably needed, and also the replacement of the actual civil and judicial administration by military jurisdiction. In its exercise, however, this ultimate authority is governed by the condition that the invader, having only a right to such control as is necessary for his safety and the success of his operations, must use his power within the limits defined by the fundamental notice of occupation, and with due reference to its transient character. He is therefore forbidden, as a general rule, to vary or suspend laws affecting property and private personal relations, or which regulate the moral order of the community."[2]

The word "forbidden" here used can probably only mean that the invader is under moral obligations. His superiors alone have authority to forbid his doing anything.

119. And not only the laws, but the courts for administering them are such as the conqueror may elect. They may be either the ordinary civil courts of the land, or war courts, generally styled in the United States service, military commissions and provost courts. "The most important power exercised by an invader occupying a territory," says Maine, "is that of punishing, in such manner as he thinks expedient, the inhab-

1. Sec. 1, par. 3. 2. International Law, p. 431.

itants guilty of breaking the rules laid down by him for securing the safety of the army. The right of inflicting such punishment in case of necessity is undoubted; but the interests of the invader, no less than the dictates of humanity, demand that inhabitants who have been guilty of an act which is only a crime in consequence of its being injurious to the enemy, should be treated with the greatest leniency consistent with the safety and well-being of the invading army."[1]

120. When New Mexico was occupied by United States forces in 1846, there was established a judicial system, consisting of an appellate court constituted of three judges appointed by the President, and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court in the circuits to which they should be respectively assigned.

The jurisdiction of the courts extended, first, to all criminal cases that should not otherwise be provided for by law; second, exclusive original jurisdiction in all civil cases which should not be cognizable before the prefects and alcaldes. Of the validity of these measures no question was ever raised during the period that the territory was held by the United States as conqueror. It would seem to admit of no doubt that during the period of its existence and operation this judicial system must legally have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible therewith.[2] The validity of the judgments of these courts has been sustained by the Supreme Court of the United States,[3]—the principle upon which the latter court proceeded being that an order given in accordance with the laws of war, by virtue of the conqueror's right to be obeyed, should have the effect of law as to acts done under his authority while still in force.[4]

1. Page 180. 2. 20 How., 178. 3. 16 Howard, 164. 4. Hare's Amer. Const. Law, Vol. 2, p. 945.

All United States military authorities, wherever their conquering arms have gone since the beginning of the Spanish War in 1898, have acted on this principle.

121. Wherever the armies of General Scott operated in Mexico there was not permitted the least interference with the administration of justice between native parties before the ordinary courts of the country. Trial of offences, one party being Mexican and the other American, was referred to military commissions, appointed, governed, and limited, as nearly as practicable, in accordance with the law governing courts-martial in the United States service. The proceedings were recorded, reviewed, approved, or disapproved and the sentences executed like in cases of courts-martial. But no military commission was authorized to try any case clearly cognizable under the law by local courts. Further, no sentence of a military commission was permitted to be put into execution against any individual belonging to the American army which was not, according to the nature and degree of the offence as established by evidence, in conformity with known punishments in like cases in some one of the States of the United States. In so far as inhabitants of Mexico, sojourners and travelers therein, were concerned, the other parties to the trial being American, cognizance of causes by military commissions was confined to crimes known to the municipal laws of the States of the Union and to the unlawful acquirement of United States property from members of the invading army. A certain kind of *political* offence affecting only inhabitants of the country was also made triable by military tribunals, viz.: where prosecutions had been commenced before the civil courts of Mexico against members of the community on the allegation that they had given friendly information, aid, or assistance to the American forces, their prosecutors, when they could be apprehended, were brought before military commissions.[1]

1. Appendix I.

122. The policy here adopted by the American general worked like a charm. It won over the Mexicans by appealing to their self-interest, intimidated the vicious of the several races, and, being enforced with impartial rigor, gave high moral deportment and discipline to the invading army. The penetration of that army into the heart of the enemy's country, when we consider its small numbers and the resistance it encountered due to the numerical strength of the opposing army, the great natural and artificial obstacles to be overcome, and the dictating peace from his captured capital, challenges admiration as a great military achievement. But we have the evidence of the commander himself that valor and professional science could not alone have accomplished all this with double the number of troops, in double the time, and with double the loss of life, without the adoption and carrying into execution these and other similar measures at once deterrent of crime in all classes and conciliating to the people conquered. 1

1. Scott's Autobiography, II., p. 540; Appendix III.

NOTE.—We are informed by General Scott (Autobiography, Vol. 2, p 392) that he was prompted, in the first instance to draft the afterwards famous "Martial Law" order (see Appendix) before he left Washington for the scene of hostilities, upon receipt of information from General Taylor, commanding in Mexico, that the "wild volunteers as soon as beyond the Rio Grande committed with impunity all sorts of atrocities on the persons and property of Mexicans, and that one of the former from a concealed position had even shot a Mexican as he marched out of Monterey under the capitulation." He submitted the draft of the order to the War Department as a proper one to be promulgated by the general then commanding in Mexico to meet the case of such crimes. But it was silently returned to him as "too explosive for safe handling." Since those days the United States authorities have learned a great deal as to the rights of military commanders operating in enemy country.

There was no reason why crimes occurring in Mexico in violation of the laws of war, such as perpetrated by guerillas, banditti, and other irregular bodies of the enemy, should not have been referred to military commissions for trial, except that General Scott, in enumerating the offences that commissions could take cognizance of, did not mention such crimes. To meet these cases, of frequent occurrence, after the city of Mexico was

123. Thus far reference has been made only to courts and systems of judicature organized during military occupation of territory outside the boundaries of the United States. The same rules govern within territory wrested from rebels treated as belligerents. The decisions of the Supreme Court of the United States have dispelled whatever doubts at one time existed on this subject. That they should have existed is not surprising when we recall the belief, long inculcated, that the Federal Government, however strong in conflict with a foreign foe, lay manacled by the Constitution and helpless at the feet of a domestic enemy.[1] The constitutional right of Congress and the Executive Department to adopt ordinary war measures for suppressing rebellion, under the circumstances here mentioned, was repeatedly affirmed. The war powers of the Government and its agents were pronounced equal to the emergency; and among others the power to institute courts, with both civil and criminal jurisdiction, and military commissions.[2]

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captured, and the enemy, driven from the field and almost dispersed, encouraged marauding and predatory warfare of small parties on the lines of communication and detached posts of the American army, General Scott organized what were called councils of war, composed of not less than three officers. There was no necessity for the two kinds of courts, namely, councils of war and military commissions. Each was sufficient, had the commander but invested it with requisite powers, for the trial of all cases brought before both. There was this positive disadvantage in having both, that thereby confusion resulted when the character of the offences was such as made it questionable which court probably could assume jurisdiction. This could have been avoided by having one style of war court take cognizance of all offences not triable by courts-martial or the civil courts of the land. We have profited by this experience. The council of war has dropped out of use in the United States; military commissions have since performed the duties formerly devolving on both, and, as the only recognized war court, has received on an extensive field and in a vast variety of cases the sanction not only of executive, but of legislative and judicial authority.

1. 11 Wallace, 331. 2. 100 U. S., 159; 9 Wallace, 133; 22 Wallace, 294; 20 Wallace, 393; 12 Wallace, 173; see R. R. S., I., Vol. 12, Part I., p. 52, for Gen. McDowell's stringent military commission order.

"Although," said the Supreme Court in New Orleans *v.* Steamship Company, "the city of New Orleans was conquered and taken possession of in civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that government had the same power and right in the territory held by conquest as if the territory had belonged to a foreign country, and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as may be deemed proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war." [1]

124. It were useless to record every instance illustrative of the exercise of war powers by the establishment of courts, military or civil, in conquered, rebellious districts. The great principle was first assumed and afterwards confirmed by decisions of the Supreme Federal Tribunal, that, limited only by the usages of war, the authority of the President and military commanders in the premises was complete.

125. When General McClellan, in the prosecution of the Peninsular campaign, reached the vicinity of Yorktown, Va., he on April 7, 1862, issued orders for the regulation not only of his army under certain contingencies in enemy country, but of non-combatant enemies themselves in their relations with the members of that army. In doing this he took as a model the orders previously referred to, issued by General Scott in Mexico under similar circumstances of hostility. [2]

1. 20 Wallace, 393-94; 2 Wallace, 417; 6 *Ibid.*, 1. 2. Appendix I.

Premising with the remark that the army had advanced to its then position for the purpose of compelling submisssion to the laws of the United States, and that extensive military operations were found necessary for the suppression of rebellion, the General announced that it was found absolutely necessary for the protection of the inhabitants and their property and the good order of the army to establish that unwritten code of law which civilization has provided for such exigencies. It was therefore ordered: "First, that martial law be, and the same is hereby, declared to exist in and about all places occupied by the forces of the army for any and every military purpose, and in and about all its moving columns and detachments of whatever kind. Second, that all acts committed where martial law is here declared to exist, either by officers, soldiers, or other persons connected with the army, or by inhabitants or other persons, which are commonly recognized as crimes against society, or which may be done in contravention of the established rules of war, shall be punishable by a court or military commission. Third, among the acts that are made punishable are murder, rape, malicious personal injuries, arson, robberies, theft, and wanton trespass, including also all attempts to perpetrate such acts; provided, however, that no cause already cognizable by courts-martial shall be tried by military commissions. Fourth, military commissions under this order shall be appointed, governed, and conducted, their proceedings reviewed and their sentences executed as nearly as practicable in accordance with courts-martial; provided, that all punishments under military commissions shall be of the description generally affixed throughout the United States to similar offences."[1] So far as practicable municipal laws of the district occupied and all causes between the inhabitants thereof were not interfered with. The order was intended to be and was in fact a supplemental code rendered necessary by the new position of the army in enemy country and the re-

1. G. O. 2, H. Q. Army Potomac; R. R. S., I., Vol. 11, Part III., p. 77; see also R. R. S., I., Vol. 12, Part I., p. 52.

lations of the population to the members of that army. It need hardly be pointed out that the term "martial law" as here used, and as previously used by General Scott in Mexico, had not the signification given to it in this work, but was descriptive of the state of things which always exists on the theatre of an enemy's active military operations. The order was but the announcement, by the general commanding an invading army to all those in the territory militarily occupied, of the rules by which, within the limits pointed out, the military government which existed in fact and without announcement was to be regulated.

126. The course pursued by the United States commanders at Memphis, Tennessee, furnishes another instructive example of the exercise of military authority in conquered rebel territory, but under different circumstances. Memphis was a large, and especially from a strategic point of view, an important place. Its government involved the determination of many questions, civil, criminal, military. The population was implacably hostile when the city was captured, and they remained so. It had not the commercial advantages of New Orleans, and therefore there was less to distract the attention of the people from the hardships of their surroundings and to allure them through the avenues of trade and resulting material prosperity, to a reconciliation with their conquerors. From the day of its occupation by Union forces until the end of the war the city remained, therefore, a camp, and the inhabitants liable to be subjected in every respect to summary military rule.

127. In those early days the authority of military commanders under these circumstances was not fully understood. Nor is this surprising when it is recalled that political policy, varying from day to day, went hand in hand with the military measures for the suppression of rebellion. The Government moved in its career of conquest with the olive branch in one hand and the sword in the other. This made commanders uncertain as to the extent of their powers. Consequently, we find General Grant writing from Memphis soon after its capture

to the commander of the Department of Mississippi: "As I am without instructions, I am a little in doubt as to my authority to license and limit trade, punish offences committed by citizens, and in restricting civil authority. I now have two citizens, prisoners for murder, whom I shall have tried by military commission, and submit the findings and sentence to you. * * * There is a board of trade established to regulate what goods are authorized to be received, and who are authorized to receive them. I think it will be necessary also to establish some kind of court to settle private claims."[1]

128. As the necessity for it became more apparent, the reins of government were gradually more firmly gathered into the hands of the military authorities. Orders were published re-opening trade and communication with the surrounding country, and prescribing rules in conformity with which travel in and out of the city should be conducted. As before mentioned, the rents accumulating for houses of those who had left their homes to cast their fortunes with the enemy were directed to be paid to the United States Rental Agent, appointed by the military commander. The commanding general did not assume authority to confiscate the rents nor did he seize them as booty of war; but, by his subordinates, collected and held them subject to such disposition as might be thereafter made of them by the decisions of the proper tribunals. If, in his judgment, the measure added to the security of his own army, or diminished the enemy's resources, it would be difficult to show that it was not a proper military precaution, entirely consistent with the established rules of war.[2]

129. Soon after occupation a general order was published, the object of which was to punish or restrain all disorders or crimes against the peace and dignity of the community. Provost marshals were appointed, who were constituted the guardians of the peace, having at their command a suitable provost guard and also supervision of the city civil police force. A

1. R. R. S., I., Vol. 17, Part II., p. 41. 2. Gates *v.* Goodloe, 101 U. S., 616.

military commission, composed of three army officers, was organized. Civil offences committed by civilians were referred, as usual, to civil courts. Civilians found lurking about the camps or military lines were ordered to be arrested and treated as spies. The hours during which all, both the military and civilians, were permitted out at night were regulated. The military commission was not at this early period of its existence given cognizance of civil causes. Its jurisdiction was limited to offences against the laws of war, and to all offences against military law or order not cognizable by courts-martial, whether committed by soldiers or others.[1]

130. Shortly afterwards another military commission was organized, composed of three members, to try all cases laid before it by department, district, or post commanders, the provost marshal general, or district provost marshals. Its jurisdiction was limited to criminal offences. It might sentence to fine or imprisonment, or both, or send persons outside the military lines. All incidental powers, as enforcing attendance of witnesses, eliciting evidence, and securing bodies of prisoners, were given the commission to render their authority effective. A correct record was made in each case tried, subject to review by the department commander.[2]

131. Thus far, at Memphis, no attempt had been made to adjudicate civil causes before military courts. Doubts existed as to the validity of such adjudication.[3] In 1863, however, the general commanding that city and district appointed a "civil commission," plainly from its origin a war court in the fullest sense of the term, with authority to determine causes of a civil nature that might be referred to it. The civil authority here exercised was subsequently sustained by the Supreme Court of Tennessee, and decisions of the Supreme Court of the United States leave no room for doubt that, had the decision of the State court mentioned been appealed from, it would

1 R. R. S., I., Vol. 17, Part II., p. 294. 2. R. R. S., I., Vol. 24, Part III., p. 1067. 3. 22 Wallace, p. 301 *et seq.*; Field, J., *dissentient*.

have been affirmed.[1] "The right of a military occupant to govern," the Supreme Court of Tennessee held, "implied the right to determine in what manner and through what agency such government is to be conducted. The municipal laws of the place may be left in operation or suspended, or others enforced. The administration of justice may be left in the hands of the ordinary officers of the law, or these may be suspended and others appointed in their place. Civil rights and civil remedies may be suspended, and military laws and courts, and proceedings may be substituted for them, or new legal remedies and civil proceedings may be introduced. The power to create civil courts exists by the laws of war in a place held in firm possession by a belligerent military occupant; and if their judgments and decrees are held to be binding on all parties during the period of such occupation, as the acts of a *de facto* government, no valid ground can be assigned for refusing to them a like effect, when pleaded as *res judicata* before the regular judicial tribunals of the State since the return of peace." And it was held, accordingly, that a civil cause within its cognizance having been decided by the civil commission appointed by the military commander, and, after the reinstatement of the regular civil tribunals, action having been brought before them on the same cause, plea of *res judicata* was valid and a bar to the action.[2]

132. But the most instructive instances of the establishment of courts in enemy territory was at New Orleans and in Louisiana. The courts themselves had various origins. Subsequently some of their decisions were reviewed by the Supreme Court of the United States, when the constitutional power of the President and of military commanders under him to organize war courts, as well as the right of said courts to take cognizance of all causes, military, criminal, and civil, was fully sustained.[3]

1. 22 Wallace, 276; 12 Wall, 173; 15 Wallace, 384. 2. 6 Coldwell, 391; 7 Coldwell, 341; *contra*, 12 Heiskell, 401. 3. 100 U. S., 158; 9 Wallace, 123; 22 Wallace, 276; 20 Wallace, 394; 12 Wallace, 173; 15 Wallace, 384.

133. The principles announced by the commanding general when the city was captured as those which should govern him in repressing disorder and crimes and securing the observance of law have been already mentioned.[1]

134. A military commission of not less than five officers of and above the rank of captain, with a recorder and legal adviser, was directed to be organized for the trial of all crimes and misdemeanors which by the laws of any State in the Union or the United States, or the law martial, were punishable with death or a long term of imprisonment. The sentences of such commission were to be assimilated to those provided by such laws, regard being had to necessity for severity and prompt punishment incident to crimes and disorders arising from a state of war. And recognizing that the motives of men entered so largely as an element of the crimes cognizant by the commission, the commanding general directed that the rules of evidence of the English common law might be so far relaxed as to allow the accused to be questioned before the commission to answer or not at his discretion. Charges were drawn and proceedings conducted substantially after the manner used in courts-martial. The proceedings, findings, and sentences were reviewed by the commanding general. The commission took cognizance of only the higher crimes and misdemeanors. It was without civil jurisdiction.[2] So far as known, no question arose as to the authority to appoint this commission or the validity of its proceedings.

135. But the jurisdiction of the war courts was not to be restricted to criminal matters; civil affairs were to be regulated. At the same time that the military commissions were organized an officer of the army was appointed provost judge of the city of New Orleans. This provost court took cognizance not only of criminal, but civil causes, among the latter one involving a judgment for $130,000. Objection being made that the court legally could not take jurisdiction, the case

1. Ante, Sec. 82. 2. R. R S., I., Vol. 6, Part I., p. 722.

was finally appealed to the Supreme Court of the United States, where the following objections to the jurisdiction were urged: *First*, that its establishment was a violation of that section of the Constitution which vests the judicial power of the general Government in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish;[1] *second*, conceding that there was no violation of the Constitution, yet that the commanding general had no authority to establish the court, but that the President alone had such authority; *third*, even if the court was rightly established it had no jurisdiction over civil causes.

As to the first objection the Supreme Court in its decision remarked that, in view of previous decisions,[2] it was not to be questioned that the Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during civil war in conquered portions of insurgent States; that their establishment was but the exercise of the ordinary rights of conquest. Regarding the second objection it was observed that the general who appointed the court was in command of the conquering and occupying army. It was commissioned to conduct the war in that theatre. He was, therefore, invested with all the powers of making war, except so far as they were denied to him by the commander-in-chief, and among these powers was that of establishing courts in conquered territory. It must be presumed that he acted under orders of his superior officer, the President, and that his acts in the prosecution of the war were the acts of his commander-in-chief. As to the third and last objection, it was remarked that as the Supreme Court of the United States had determined that the general commanding had power to appoint under the circumstances a court with authority to try civil cases, notwithstanding the provisions of the Constitution, it would not go on in this case and determine whether the judge actually appointed in this instance exceeded his powers. This last was not a Federal question. The State courts had found that he

1. Art. III., Sec. 1. 2. 9 Wallace, 129; 20 Howard, 176.

had not exceeded his powers. The Federal question involved in this branch of the subject was whether a commanding general could give a provost court cognizance of civil cases, and that question was decided in the affirmative.[1]

136. Two important points, vitally affecting authority of commanders in conquered territory, were for the first time here determined. One, that generals commanding, in the exercise of the ordinary rights of conquest, must be presumed to act under the orders of the President—that their acts under these circumstances are in contemplation of law the acts of the President until the contrary affirmatively appears; the other, that provost courts, established by the conqueror, are not necessarily limited to the cognizance of minor criminal offences, but may have conferred upon them power to pass upon important civil cases.

137. The appointment of this provost court was confessedly but the exercise of a war power. It was the making use of one instrumentality by the conqueror among the many at his command to enforce legitimate authority. Called by any other name it could equally well have taken cognizance of civil cases, had the power which brought it into being conferred the jurisdiction. The name made no difference. It follows, therefore, that the "civil commission" appointed by the commanding general at Memphis properly took cognizance of civil cases, and that the decision of the Supreme Court of Tennessee, before cited, correctly expounded the law as to the effect to be given to its judgments.

138. The plenary power of the President and of commanders and military governors under him in organizing courts in conquered rebel territory was yet more fully vindicated in other cases.

139. Under that clause of the proclamation formally taking possession of New Orleans, which directed that civil causes between party and party be referred to the ordinary tribunals,

1. Mechanics' Bank *v.* Union Bank, 22 Wallace, 297.

the general commanding the Union forces permitted the sixth district court of the city and parish of New Orleans to continue in existence, the judge having taken the oath of allegiance to the United States.[1] Later other local district courts were set on foot, judges being appointed in the place of those who had cast their fortunes with the enemy. But jurisdiction exercised by these courts was limited to citizens of the city and parish of New Orleans. As to other residents of the State, there was no regularly organized court in which they could be sued.[2] This judicial system it subsequently devolved on the military governor of Louisiana to regulate.[3] But it is plain that because of the limited territorial jurisdiction of the district court, many litigants were without remedy. This, if not corrected, was a grievous evil.

140. To make the system more complete and afford all suitors facilities for prosecuting their claims, the President, by executive order, dated October 20, 1862, organized a provisional court, constituting it a court of record, with all the powers incident thereto, for the State of Louisiana. Prefacing his proclamation with the statement that insurrection had temporarily swept away and subverted the civil institutions, including the judiciary and judicial authority of the Union, so that it had become necessary to hold the State in military occupation; that it was indispensably necessary that there should be some judicial tribunal existing there capable of administering justice the President instituted the provisional court and appointed a judge thereto, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly exercising all such powers and jurisdiction as belonged to the district and circuit courts of the United States, conforming his proceedings so far as possible to the course of proceedings and practice which had been cus-

1. Dow *v.* Johnson, 100 U. S., 159. 2. Rise and Fall of the Confederate Government, Vol. 2, p. 289. 3. Handlin *v.* Wicklifl, 12 Wallace, 173 Pennywit *v.* Eaton, 15 Wallace, 384.

tomary in the courts of the United States in Louisiana, his judgment to be final and conclusive.

The conferring on this provisional judge all such powers and jurisdiction as belonged to the district courts of the United States included necessarily that of a prize court. That United States district courts had prize court powers was early decided by the Supreme Court,[1] and such powers were expressly conferred by the act of June 26, 1812.[2] On the other hand, the Supreme Court of the United States, in the case of Jecker *v.* Montgomery, had decided that "neither the President nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States or of individuals in prize cases." It therefore remained to be seen whether the jurisdiction conferred upon the provisional court would be sustained. The validity of its existence was soon vehemently attacked. The power of the President to establish it was questioned on constitutional grounds. But this course was sustained by the Supreme Federal Tribunal in a manner at once masterly and conclusive,[3] and received likewise the sanction of the national legislature.[4]

The case which first brought the authority of the President to establish the provisional court judicially in question was that of the *Grapeshot*.[5] Originally the case was a libel in the district court of the United States for Louisiana on a bottomry bond, and was decided in favor of the libellants. Appeal was taken to the circuit court, where, in 1861, proceedings were interrupted by the Civil War. Subsequently, by consent of the parties, the cause was transferred to the provisional court, where a decree was again rendered in favor of the libellants.

Upon the restoration of civil authority in the State the provisional court, limited in duration according to the terms of the order constituting it, by that event ceased to exist. By

1. Glass *v.* Sloop Betsy, 3 Dallas, 6. 2. 2 Statutes at Large, 761; 1 Kent, 357; Story, Constitution, Book II, Chap. 38, Sec. 866. 3. 9 Wallace, 129; 22 Wallace, 276; 12 Wallace, 173. 4. Act July 28, 1866, Statutes at Large, 14, p. 344. 5. 9 Wallace, 129.

act of July 28, 1866, all suits, causes, and proceedings in the provisional court proper for the jurisdiction of the circuit court of the United States for the eastern district of Louisiana were directed to be transferred to the latter to be heard and determined therein; and all judgments, orders, and decrees of the provisional court in causes thus transferred to the circuit court, it was provided should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly.[1]

Article 3, Section 1, Constitution of the United States, declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish"; and the great question of constitutional law here was raised whether, consistently with this, the President could establish the court, or Congress, on the suppression of the rebellion, could, by its enactment, validate its doings, transfer its judgments, and make them judgments of the now re-established former and proper Federal courts.

After citing its previous decisions, the principles of which were applicable to the case, the Supreme Court remarked that they had no doubt that the provisional court of Louisiana was properly established by the President in the exercise of his constitutional authority during the war, or that Congress had power upon the close of the war and the dissolution of the provisional court to provide for the transfer of cases pending in that court and of its judgments and decrees to the proper courts of the United States.[2] The clause of the Constitution relating to the judicial power of the United States, it was observed, had no application to the abnormal condition of conquered territory in the occupation of the conquering army; it refers only to courts of the United States, which military courts are not; it became the duty of the National Government, whenever the insurgent power was overthrown and the territory which had

1. Chap. 310., Statutes at Large, 14, 344. 5. 9 Wallace, 133; 20 Howard, 176; 13 *Ibid.*, 498; 16 *Ibid.*, 164; 4 Wheaton, 246.

been dominated by it was occupied by the national forces, to provide, as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice; the duty of the National Government in this respect was no other than that which devolves upon a regular belligerent, occupying during war the territory of another belligerent.[1] The constitutional power of the President in the premises is found in that clause which provides that he shall be commander-in-chief of the army and navy of the United States and of the militia when called into actual service.[2]

141. Thus it has been solemnly determined that the authority of the President, and of commanders under him, for the establishment of courts in conquered territory is complete, limited only by the exigencies of service and the laws of war; that such courts, if given jurisdiction by the power bringing them into existence, properly may take cognizance of questions, military, criminal, and civil; and that there is no distinction in this regard between the cases of territory conquered from a foreign enemy or rescued from rebels treated as belligerents.

142. Let us now consider the second proposition (Ante, Sec. 115), namely, what laws and what system of judicature apply under military government to citizens, soldiers, or others of the conquering State.

143. As to members of the conquering army—soldiers and camp-followers—it will be found that they are subject only to the rules and articles of war, or, when these fail to meet the case, to the common law military, the laws of war. That they are not amenable, during military occupation, to the laws or courts of the conquered State has been judicially and finally decided.[3]

144. The statute in emphatic language declares that "the armies of the United States shall be governed by" the rules and articles of war.[4] They equally apply whether the forces be

1. 9 Wallace, 132; 22 Wallace, 295. 2. Art. II., Sec. 2, clause 1. 3. Dow *v.* Johnson, 100 U. S., 158; Coleman *v.* Tennessee, 97 U. S., 509. 4. Sec. 1342, R. S., U. S.

operating abroad or within United States territory.[1] That this should be so when the armies are without the boundaries of the Union follows from the right of the Government to wage wars of conquest; a right which both experience and judicial decisions have confirmed.[2] This rule rests upon reason; from a military view a war of conquest may be a defensive war, a fact which the history of nations abundantly shows; and as such wars necessarily carry its armies without the boundaries of the United States, it follows that either the statutory law embodied in the rules and articles of war must be held to apply there, or those armies so situated be wholly governed by the common laws of war as practiced in the civilized world. The latter alternative has not found favor with those upon whom the duty has devolved of interpreting and applying the law.

145. The Constitution empowers Congress to make rules for the government and regulation of the land and naval forces.[3] Congress, in giving effect to this constitutional provision by the enactment of certain rules and articles, has in no manner made their applicability depend upon the locality or theatre of operations. In truth, certian of the articles of war in express terms provide for contingencies happening in "foreign parts."[4] Hence it is not questioned that whether the armies be within the territorial limits of the Union, or pursuing schemes of conquest abroad, they are governed by the rules and articles of war.

146. These rules and articles take cognizance of all crimes with a single exception, and all disorders and neglects to the prejudice of good order and military discipline with which members of the military establishment are charged. Specific crimes, disorders, and neglects, capital and otherwise, are denounced therein as military offences, the method of punishment therefor is pointed out, and then, with a sweeping clause, all other crimes *not capital* and all other disorders and neglects are brought within the cognizance of courts-martial according

1. 5 Opinions Attorney-General, 58. 2. Fleming *v.* Page, 9 Howard, 615. 3. Art. I., Sec. 8, clause 13. 4. As Arts. LVI., LVII.

to the nature and degree of the offence, and made punishable at the discretion of such courts.[1]

147. A question has sometimes been raised whether, notwithstanding these provisions of law, certain heinous crimes when perpetrated by those composing the armies of United States are triable before military tribunals.[2] Reference is here made to grave offences, which subject the perpetrator to severe punishment by the ordinary criminal courts of the land. The writer of this work does not join in these doubts. No doubt is here entertained of the authority of military tribunals to take cognizance of all offences reflecting upon the service, committed by persons composing the armies of the United States, with the single exception of capital crimes not specifically mentioned in the Articles of War. On the contrary, it is believed that the sole criterion of jurisdiction, under the law, is not the name of the crime or offence, but whether or not in its effects it is prejudicial to good order and military discipline.[3]

It was this jurisdictional question which in great degree prompted General Scott, as has been mentioned, to promulgate in Mexico a code supplemental to the rules and articles of war, and which conferred upon military commissions cognizance of many crimes, whether committed by members, retainers, or followers of the United States Army, upon either the persons or property of the people of the country, or upon other members, retainers, or followers of the same army. The principle was here clearly enunciated that, so far as members of the invading army were concerned, the authority of military commanders to maintain order, punish crime, and protect property was sufficient for every contingency. Where the statutory law proved deficient, or was supposed to be so, the supplemental code drawn from the customs of war supplied the deficiency.[4] The

1. LXII. Article of War. 2. Scott's Autobiography, pp. 393, 541. 3 See Winthrop's Mil. Law, 1st Ed., Vol. 1, p. 961. 4. Appendix I.

principle has received both judicial and legislative sanction.[1] It may be laid down, therefore, as an accepted rule that crimes committed abroad by members, retainers, and followers of the army shall never go unwhipt of justice.

148. There exists no authority save in the Articles of War and the customs of war for taking cognizance of such crimes. Except in certain cases, not here considered because not relevant, United States penal statutes do not apply to crimes perpetrated outside the boundaries of the Union.[2] Not only do United States courts have no common law criminal jurisdiction, but military tribunals, save in specified crimes, of which murder is not one, cannot take cognizance of crimes perpetrated by its members who have ceased to belong to the army. (48, 60, 103, Articles of War.) This may lead and in fact has led to criminal immunity, as for instance, when Perote, Mexico, was occupied by United States troops and the place was under military government, an officer of the American army was accused of committing murder upon the person of another. The alleged murderer was arraigned before a military commission, but pending the trial escaped from the guard and returned to the United States. He was subsequently, together with the volunteer organization to which he belonged, mustered out of the service. It was held that he was not, after this event, subject to indictment and trial for the alleged crime, which, if committed at all, was either against the temporary government established under the law of nations by the rights of war, or against the rules and articles for the government of the army. If against the former, the offence and its prosecution ceased to exist when that temporary government gave way to the restored Mexican authorities. If against the latter, the alleged offender, having been legally discharged, the service was no longer amenable to the laws governing the army. The crim-

1. 100 U. S., 170; 97 U. S., 515; Act March 3, 1863, Chap. 75 [LVIII. and LIX. Arts. of War]; Halleck, Chap. 33, Sec. 6. 2. Title 70, Chap. 3, Secs. 5339, 5341, etc., R. S., U. S.; 5 Opinions Attorney-General, 55 1 Kent, Lecture, 16.

inal code prescribed by Congress had no validity within Mexican territory. The laws of the United States did not extend over conquered districts of Mexico. While the rules and articles of war accompanied the army for its government, the civil courts derived no authority from that source. 1

149. Laws of the invaded country have no validity as affecting members of the conquering army. 2 They can not properly be given jurisdictional effect. This has been frequently and authoritatively decided. One of the most instructive decisions of the Supreme Court of the United States upon this point arose out of the seizure of certain property in that part of Louisiana reduced by the Federal forces in 1862. It has already been remarked that within this district certain of the civil courts were permitted to exercise jurisdiction. The decision of the Supreme Court in question put at rest all claim that such local courts could pass upon the conduct of members of the invading army. The case arose in the following manner: Some months after the occupation of New Orleans one of the subordinate commanders was sued in one of the local courts for the seizure of twenty-five hogsheads of sugar and other property belonging to a citizen of the State. To this suit, though served with citation, the officer made no appearance. Judgment going by default, action was brought upon the judgment in one of the United States Circuit Courts, where, the judges being opposed in opinion, the case was taken to the Supreme Court of the United States. The important question was thus presented for the determination of that court whether an officer of the United States Army is liable to an action before the local tribunals for injuries resulting from acts ordered by him in his military character whilst in the service of the United States in the enemy's country.

2. Case of Capt. Foster, 5 Opinions Attorneys-General, 55; Barr, International Law, p. 700; see also case Capt. C. M. Brownell, Opinions; Attorneys-General, Vol., 24, p. 574; 97 U. S. R., 509; 100 U. S. R., 158 23 F. R., 795. 2. Post Sec. 154.

This question, the court remarked, was not at all difficult of solution when the character of the Civil War was adverted to. That war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of international wars. It was waged between people occupying different territories, separated from each other by well-defined lines. Belligerent rights were accorded to the insurgents by the Federal Government. The courts of each belligerent were closed to the citizens of the other, and its territory was to the other enemy territory. When, therefore, the Union armies marched into the enemy's country their soldiers and officers were not subject to its laws nor amenable to its tribunals for their acts. There would be something singularly absurd, the court remarked, in permitting an officer or soldier of an invading army to be tried by his enemy whose country he had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity and as little likelihood of freedom from the irritations of the war in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of the war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army.

150. Nor is the position of the invading belligerent affected or his relation to the local tribunals changed by this prolonged occupation and domination of any portion of the enemy's territory. The invaders are equally as free from local jurisdiction as though they were simply sweeping through the country. It is true that for the benefit of the inhabitants and of others not in the military service—in other words, in order that the ordinary pursuits and business of society may not necessarily be deranged—the municipal laws, that is, such as affect private rights of persons and provide for the punishment of crime, are generally allowed to continue in force and to be administered by the ordinary tribunals as before the occupation; but this

argues nothing in favor of jurisdiction over the victorious enemy who makes these concessions. It is further true that these laws are regarded as continuing in force unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the occupying army, its officers, or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government and the tribunals by which those laws are administered. If guilty of cruelty to persons, or of unnecessary spoilation of property, or of other acts not authorized by the laws of war, they may be tried and punished by military tribunals. They are amenable to none other except that of public opinion which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression. The decision of the Supreme Court was, therefore, that the district court of New Orleans, at the time and place mentioned, had not jurisdiction of the parties and cause of action to render the judgment in question.[1]

151. In the course of this opinion there was cited the analogous and instructive case of Elphinstone *v.* Bedreechund,[2] in which it likewise was decided that a local court had no jurisdiction to adjudge upon the validity of a hostile seizure of property; that is, a seizure made in the exercise of a belligerent right. In that case British forces, November 16, 1817, captured and afterward held Poonah, the capital of the powerful Mahrattas. A provisional government was established whose control afterwards was undisturbed. On the 17th of July, 1818, the members of the provisional government seized the private property of a native under the belief that it was public property entrusted to the holder by the hostile sovereign. At the time there were no hostilities in the immediate neighborhood, and the civil courts, under the favor of the conqueror, were sitting for the administration of justice. The whole country, however, was in a disturbed state. Poonah was greatly disaffected.

1. 100 U. S., p. 158 *et seq.* 2. 1 Knapp, Privy Council Reports, p. 316.

The vanquished were dispersed, but not subdued. Action being brought against the members of the provisional government for the seizure, judgment was rendered against them in the Supreme Court of Bombay upon the ground, apparently, that at the time and for some months precediug the city had been in undisturbed possession of the provisional government, and civil courts under its authority were sitting there for the administration of justice. On appeal to the privy council judgment was reversed. "We think," said Lord Tenterden, speaking for the council, "the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, place, and the person; and consequently that the municipal court had no jurisdiction to adjudge upon the subject, and that, if anything was done amiss, recourse could only be had to the government for redress."

152. The case of Coleman *v.* Tennessee goes directly to the same point. Here, while the Civil War was flagrant, Coleman, a soldier of the Union army, committed murder in Tennessee, then a district declared by proclamation of the President to be in a state of insurrection. He was tried by court-martial, found guilty, and sentenced to be hanged. Pending execution of the sentence he escaped. Nine years afterwards, the rebellion being conquered and Tennessee having resumed her position as a State in the Union, he was indicted before the criminal court of the district wherein the murder was committed, convicted of the crime, and sentenced to death. On appeal to the State Supreme Court, judgment was affirmed. The case was then taken by writ of error to the Supreme Court of the United States, where the judgment of the State Supreme Court was reversed and the defendant directed to be discharged from civil custody.[1]

It was remarked, in delivering the opinion of the court, that when the armies of the United States were in enemy country

1. 97 U. S., 509, *et seq.*; Proclamation, August 16, 1861; 12 Statutes at Large, 1262.

military tribunals had, under statutory law and the laws of war, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service; that officers and soldiers of whatever grade were not subject to the laws of the enemy or amenable to his tribunals; that they were answerable only to their own government, and only by its laws as enforced by its armies could they be punished; and that if an army marching through a friendly country would be exempt from its civil and criminal jurisdiction, as the Supreme Court had decided, so much the more would an invading army be exempt.

The fact that when the offence was committed Tennessee was in the military occupation of the United States, with a military governor at its head appointed by the President, could not alter the conclusion. Tennessee was one of the insurgent States forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's territory, and its character in this respect was not changed until long afterwards. So far as the laws of the State were continued in force it was only for the protection and benefit of its own people. As respects them the same acts which constitued offences before the military occupation constituted offences afterwards; and the same tribunals, unless superseded by order of the military commanders, continued to exercise their ordinary jurisdiction.[1]

In denying to the State courts jurisdiction in this case the correctness of the general doctrine was not questioned that the same act may, in some instances, be an offence against two governments, and that the transgressor may be liable to punishment by both or either, depending upon its character. But this did not present a case for the application of the principle. And this for the reason that the laws of Tennessee did not apply during military occupation to the defendant, a soldier of the United States, and subject to the articles of war. He was

1. Act July 13, 1861, Chap. 3, Sec. 5, Statutes at Large, 12, p. 257; Proclamation, August 16, 1861.

responsible for his conduct to the laws of his own government only as enforced by the commander of its army in that State, without whose consent he could not even go beyond its lines. Had he been caught by the forces of the enemy, after committing the offence, he might have been subjected to a summary trial and punishment by order of their commander; and there would have been no just ground of complaint, for the marauder and assassin are not protected by any usages of civilized warfare. But the courts of the State, whose regular government was superseded and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him.

153. These decisions conform to the principles of international law and give a sanction to existing practices under the laws of war. They completely negative the suggestion that the invaders are subject to the laws and are amenable either civilly or criminally before the courts of countries subjected to their arms.[1]

154. In a case of alleged homicide by a soldier of the United States upon the person of a teamster in that service, committed in Cuba subsequent to the treaty of peace with Spain, the Attorney-General gave an opinion to the effect that the soldier could not be tried therefor by either a court-martial or a military commission, but that he might, though he need not, be turned over to the local criminal courts for trial.[2] It may be remarked in this connection that in many opinions of the Attorney-General the ground was taken that all the measures of the Executive Department in Cuba, not expressly authorized by act of Congress or by treaty, were based on rights springing out of the laws of war.[3] It is believed that this position is correct; but, being so, it is not apparent why a military commission, which is a war-court, convened as an incident of belligerent rights as a rule and not because of statutory authority, could not have taken cognizance of this case. This would appear to be more in consonance with cor-

1. Wheaton, p. 437, Dana's note; Halleck, pp. 782–86. 2. Opinions Att'y-Gen., Vol. 23, p. 120. 3. *Ibid.*, Vol. 22, p. 523; Vol. 23, pp. 226, 427.

rect principles than turning one of the conquering army over to the local criminal courts for trial.

155. What laws and what system of judicature apply under military government to civilians, citizens of the conquering State? The forty-fifth, forty-sixth, and sixty-third of the rules and articles for the government of the Army, and Section thirteen hundred and forty-three, Revised Statutes of the United States, take cognizance of offences comitted by the latter class of persons.

156. The forty-fifth article declares that whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death or such other punishment as a court-martial may direct. The forty-sixth, that whosoever holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial may direct. The sixty-third provides that all retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war. The section of the Revised Statutes referred to states that all persons who, in time of war or rebellion against the supreme authority of the United States, shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, *or elsewhere*, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.

157. It is proper to remark that these statutory provisions are not limited in their purview to civilians, citizens of the conquering State, under military government; still they are applicable to such persons. For the taking cognizance, however, of all crimes committed by or against this class of civilians under military government, no laws have validity save those just mentioned and the common laws of war. The forty-fifth and forty-sixth articles are general in their terms, and have received in practice an interpretation which does not limit their

applicability as to persons. "Whosoever" is a term unlimited in its nature, and which can be limited only by "construction"—that uncertain and potent modifier of statutory law. In this instance it has been construed to mean what the language naturally imports; and that *anyone* who is guilty of the offences denounced is amenable before military courts in the manner indicated in the articles.[1] Where civil courts are sitting to which the offender may be delivered for trial, this course may be and often is pursued. These articles, being penal in their nature and derogatory of the constitutional right of trial by jury, are to be strictly construed. Wherever the civil courts without prejudice to the interests of the service can take jurisdiction this should be done. But this is not the case under military government, where such offenders must either be tried by the military or go unpunished.

158. In its terms the sixty-third article of war subjects "retainers" and others mentioned "to orders only according to the rules and discipline of war." But by universal construction given the language of the article the persons indicated have been held amenable to trial before military courts for violations of either the statutory or common-law military codes.[2]

159. For crimes for which they may be accused, civilians, citizens of the conquering State, accompanying the army, are under military government, subject only to either statutory law directly applicable to their cases or to the common laws of war, and are amenable before military courts. In the nature of things it must be so. The jurisdiction exercised over this class must be either military or civil. If the former, it can only be exercised by military commanders in accordance with military law, either statutory or common. If the latter, cognizance of crimes by civil courts must be in pursuance of the criminal laws either of the conquering or the conquered

1. O'Brien, 151; De Hart, 22; Winthrop, 1st Ed., Vol. 1, p 117 *et seq*
2. De Hart, 22, Benét, 33; Ives, 60; Digest, 48; Winthrop, Vol. 1, p. 118.

State. But criminal laws of the conquering State have no validity in territory under military government which, for belligerent purposes, is always considered foreign; while those of the conquered State are retained as an act of the conqueror's grace for the benefit of the conquered alone, and legally there can not be drawn within this jurisdiction causes affecting either members of the invading army, retainers or followers thereof, or other civilians in the service of the conquering State.[1]

160. In order that civilians may be brought within the cognizance of the sixty-third article of war, they must in some manner be connected with the army, either in government employ or otherwise voluntarily accompanying it. The article has no reference to and in no manner affects other civilians, either persons who by proper authority are in the pursuit of private enterprises, or those who are engaged in branches of government service other than the military. So long as these latter descriptions of persons pursue their proper avocations and affairs in good faith, conforming to those general rules established by the conqueror for the safety of the military interests of the government, they are left undisturbed, or are perhaps facilitated in their enterprises; it is only when they transgress and are guilty of crimes that prejudicially affect the military interests that they become amenable under the forty-fifth and forty-sixth articles, the provision of law relating to spies and to the common laws of war, which are sufficiently comprehensive in scope and energetic in action to maintain in every emergency the authority of the military commander and the interests of the conquering State.

161. By the common law crimes are local, to be prosecuted in the county where perpetrated; only in such county can the grand jury inquire of them.[2] And although this provision, like most other constitutional guarantees for the protection of alleged criminals, may be waived by them, as, for instance, by change of venue, such change can only be made with the

1. 5 Opinions Attorney-General, p. 55; 97 U. S., 509; 100 U. S., 158; Clode, Mil. and Martial Law, p. 95. 2. 4 Blackstone, 303.

consent of the defendant.[1] But it has been decided by the Supreme Court of the United States that the Federal judiciary can not exercise common law jurisdiction in criminal cases. To enable the United States courts to take criminal jurisdiction it is necessary in any particular case for Congress to make the act a crime, to affix a punishment, and designate the court to try it.[2] No law of the United States vests criminal courts with cognizance of crimes committed by persons in territory under military government. Should they assume it without legislative provision to that effect, plea to the jurisdiction would defeat prosecution.

162. It is well settled then that crimes being in their nature local, the jurisdiction of crimes also is local. And so as to actions concerning real property, the subject being fixed and immovable. But not so as to transitory actions. These embrace suits growing out of debts, contracts, and generally all matters relating to the person, including torts or to personal property. As to them Lord Mansfield said: "There is not a color of doubt but that they may be laid in any county in England, though the matter arises beyond the seas."[3] This distinction between the local and transitory actions is fully recognized by the courts of this country.[4] It leads to important consequences regarding the rights and liabilities of civilians, citizens of the conquering State, under military government; for while crimes committed either by or upon them must be tried by military tribunals in the conquered territory or not tried at all, transitory actions there accruing may be prosecuted at home in the civil courts of the dominant government. An action may be maintained in the circuit court for any district in which the defendant may be found, upon process duly served, where the citizenship of the parties give jurisdiction to a court of the United States; and,

1. Bishop, C. P., Vol. 1, Sec. 50. 2. 1 Kent, 335-341; U. S. *v.* Hudson & Goodwin, 7 Cr., 32; U. S. *v.* Bexans, 3 Wheaton, 336. 3. Mostyn *v.* Fabrigas, 1 Cowper, 161. 4. McKenna *v.* Fish, 2 Howard, 411; Gardner *v.* Thomas, 4 Johnson, 134; Glen *v.* Hodges, 9 Johnson, 67.

in other cases, jurisdiction of the parties being first had, an action may be maintained in the proper State court.[1] Whatever, therefore, may be the nature of the action, whether it be local or transitory, whether it result from crime perpetrated, contracts broken, or personal injuries suffered, the laws of war, statutory or common, or the courts of their own country, fully protect civilians, citizens of the conquering State, who may be sojourning temporarily subject to military government.

163. Thirdly:[2] neutrals residing in conquered territory are treated by the conqueror as the laws of war require, or as policy may dictate.[3]

He has a right to subject all found within that territory, both as to person and propetry, to such rules as he may find necessary to attain the objects of the war. Until this end be attained he has, strictly speaking, a right to use every proper means for its accomplishment.[4] The law of nature has not determined how far precisely an individual is allowed to make use of force, either to defend himself against a threatened injury, or to obtain reparation when refused by the aggressor, or to bring an offender to punishment. The general rule is that such use of force as is necessary for obtaining these ends is not forbidden. The same rules apply to the conduct of sovereign States while carrying on war which, theoretically at least and in contemplation of law, is an attempt to vindicate the right. No use of force is lawful or even expedient so far as necessary to attain the object in view. The custom is to exempt certain persons from the direct effects of military operations. In dealing with neutrals, residents of the conquered State, the conqueror has, in addition to humane considerations which temper his treatment of certain classes of the enemy, a motive for treating them as liberally as the laws of war permit arising out of the fact that thereby a feeling of good will is strengthened between the conquering State and the neutral States, whose subjects they are. Sound policy,

1. 13 Howard, 137. 2. Ante, Sec. 115. 3. Woolsey, Sec. 173. 4. Wheaton, International Law, Sec. 342.

therefore, as well as humanity demands that in so far as it can be done consistently with the successful prosecution of the war, the lot of neutrals so circumstanced be made as agreeable as possible. "All foreigners not naturalized and claiming allegiance to their respective government," said the commanding general in taking possession of New Orleans in 1862, "and not having made oath of allegiance to the supposed government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States."

Yet with the conqueror the success of his arms will ever be the primary consideration. His will, under military government, is law to all alike, regardless of nationality, within the territory occupied. From the operation of this first rule—the rule of necessity—neutrals are not exempt. A military governor is responsible only to his superiors. If he invades the rights of neutrals their remedy, if any they have, must be sought through their own government. Conquest being a valid title while the victor maintains exclusive possession, citizens of no other nation have a right to enter the territory without the permission of the conqueror, or hold intercourse with its inhabitants or trade with them.[1] The intercourse of foreigners with such territory is regulated by the government of military occupation. The victor may either prohibit all commercial intercourse with his conquest or place upon it such restrictions and conditions as may be deemed suitable to his purpose. To allow intercourse at all is a relaxation of the rights of war.[2]

164. The principles which govern the transactions of neutrals in territory under military government are well set forth in the opinion of the Supreme Court of the United States in the case of the ship *Essex*.[3] On the 12th of May, 1862, after the capture of New Orleans by the Union forces, the President, having become satisfied that the blockade existing against

1 9 Howard, 615. 2. Halleck, Chap. 32, Sec. 9. 3. 92 U. S., 520 (U. S. *v.* Diekelman).

that place might safely be relaxed with advantage, issued his proclamation to take effect the 1st of June following, permitting commercial intercourse therewith except as to persons, things, and information contraband of war. The ship *Essex*, owned by a citizen of a foreign government, sailed from Liverpool for New Orleans June 19, 1862, arriving August 24th following. Early in September the general commanding there was informed that large quantities of silver plate and bullion were being shipped on board the *Essex* by persons known to be hostile to the United States. He had reasonable cause to suppose that this silver was intended to pay for supplies furnished and to be furnished to the rebel government. He therefore ordered that the specified articles should be detained and their exportation not allowed until further instructions were given. They were deemed to be contraband of war; and not until they were re-landed from the ship was she granted a clearance and permitted to depart. By joint resolution of Congress, passed after the war, the claimant for damages caused by the detention of the ship by the military authorities was permitted to sue in the Court of Claims, where judgment was given in his favor; on appeal to the Supreme Court this judgment was reversed.

The court remarked that previous to June 1st the *Essex* was excluded altogether from the port by the blockade. At that date the blockade was removed, but relaxed only in the interests of commerce. The city was in fact a garrisoned city, held as an outpost of the Union army, and closely besieged by land. All this was matter of public notoriety; and the claimant ought to have known if he did not know that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that was necessary for the vigorous prosecution of the war. When he entered the port, therefore, with his vessel under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more.

Such restrictions as were placed upon citizens operated equally upon him. Citizens were governed by martial law [military government]. It was his duty to submit to the same authority. Martial law was declared by the court to be the law of military necessity in the actual presence of war. It is administered by the general of the army and is in fact his will. Of necessity it is arbitrary, but it must be obeyed.

New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. A complete system of military government had been established. The general in command was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up by sea. To this law and this government the *Essex* subjected herself when she went into port. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By availing herself of the privileges granted by the proclamation, she in effect covenanted not to take out of the port "persons, things, or information contraband of war." What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but when destined for hostile use, or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case, must be determined by some one when a necessity for action occurs. At New Orleans, where this transaction took place, this duty fell upon the general in command. Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding. Vigilance is the law of their duty. The success of their operations depends to a great extent upon their watchfulness. The commanding general found on board the vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his instructions, to see that the vessel was not cleared with these articles

on board, and he gave orders accordingly. It matters not whether the property suspected was in fact contraband or not. It is sufficient that the general had reason to believe, and did believe, that it was contraband. The vessel was not bound to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and was obliged to bear the losses that followed.

This reasoning of the Supreme Court was conclusive. It establishes upon principles not to be shaken that neutrals in conquered territory must conform to the laws of the conqueror; and it sustains with clearness, completeness, and force the authority of generals in the enforcement of military government, and conformably with the laws of nations, to resort at discretion to whatever measures are necessary to seure the objects of the war and the triumphs of their arms.

165. The case of the *Venice* further illustrates the right of neutrals under military government.[1] Cooke, a British subject, had resided in New Orleans and done business there for ten years prior to the breaking out of the rebellion, and continued to reside there until after the capture of the city. During the early part of April, 1862, he had purchased and stored there several hundred bales of cotton. Apprehending danger from the conflagration which might ensue in case the city was captured, as then seemed imminent, he purchased a vessel on which he stored the cotton and anchored it in an adjacent lake out of harm's immediate way. Here, lying quietly at rest, the vessel was seized by a United States ship of war soon after the city fell. The vessel and cargo were libelled as prize of war in the United States court at Key West, but restored to the claimant, Cooke, by its decree. The United States appealed and the decree was affirmed.

The pledge given to neutrals by the general commanding the invading army upon the establishment of military government at New Orleans in 1862 has been mentioned. The Su-

1. 2 Wallace, 258.

preme Court held that the general was fully warranted in making that pledge. It comported with the policy of the Government in suppressing the rebellion. Hence, after the pledge was given, vessels and their cargoes belonging to neutrals residing in New Orleans and not affected by any attempts to run the blockade, or by any act of hostility against the United States after the publication of the proclamation containing it, were regarded as protected by its terms. And the pledge alone saved the property. The Supreme Court treated as fallacious and without foundation in international law the contention of counsel for Cooke that simply because he was a subject of Great Britain his property had immunity from capture under all circumstances. The vessel and the cargo at the time of the purchase were enemy property. Did the transfer to Cooke change their character in this respect? He was, indeed, a British subject, but identified with the people of Louisiana by long voluntary residence and by the relations of active business. Upon the breaking out of the war he might have left the State and withdrawn his means, but he did not think fit to do so. He remained more than a year engaged in commercial transactions. Like many others, he seemed to think that, as a neutral, he could share the business of the enemies of the Nation and enjoy its profits without incurring the responsibilities of an enemy. He was mistaken. He chose his relations and had to abide their results. The ship and cargo were as liable to seizure as prize in his ownership as they would have been in that of any citizen of Louisiana residing in New Orleans and not actually engaged in active hostilities against the Union.[1]

166. Neutrals resident of conquered territory are amenable criminally before either local criminal courts maintained at the pleasure of the conqueror, or before military tribunals organized by his authority. In this respect they occupy a position similar to that of enemy subjects under the same circumstances. Yet practically there is an important difference between the

1. 2 Wallace, 275; Young *v.* U. S., 97 U. S., pp. 60, 63.

situations of these two classes, both of which owe temporary allegiance to the military government. The position of the neutral is the more eligible. Not until the laws of war are transgressed could enemy subjects, with show of reason or hope of success, appeal to the government of their permanent allegiance which can only secure an amelioration of their condition through harsh and forbidding measures of retaliation. Neutrals have more liberty of action. They, with greater assurance of relief, appeal to their own government through representations to the conquering State for justice and against wrongs, real or imaginary, suffered at the hands of the government of military occupation. Nor are neutral States, as a rule, inclined to ignore complaints of their subjects domiciled in foreign territory which has temporarily passed under the rule of a friendly power.

167. In regard to transitory actions accruing to neutrals under the circumstances here supposed, it seems that they are in the same category with civilians, citizens of the government of military occupation. Courts, as a rule, make no distinction, so far as jurisdiction is concerned, between causes in which the parties are foreigners and those in which they are subjects. A court which is competent when the parties are subjects is competent, other things being the same, when the parties are foreigners. And while it is said that the principle has been pushed too far, the practice of taking cognizance in all transitory actions in which the defendant is summoned within the jurisdiction is too deeply seated now to be shaken.[1]

168. In case the conquest is confined to the dominant State, the question becomes interesting and important as to what efficacy is to be given to judgments rendered in the supreme judicial tribunal of the now displaced government, but which the disturbed condition of affairs prevented being given effect in the country militarily occupied. This was a matter

1. Wharton, Conflict of Laws, Secs. 705, 707, 712; McKenna *v.* Fish, 1 Howard, 241; Mitchell *v.* Harmony, 13 How., 137; Wharton, International Law, Sec. 113.

demanding attention in all the territories wrested from Spain in consequence of the Spanish-American War of 1898 and its incidents. It was settled by paragraph 1, Art. II., of the treaty of peace, which provided that judgments rendered, in either civil or criminal cases, in courts of last resort of Spain, before the day of ratification of the treaty, should be regarded as final, to be executed in due form, within the territory, and by the rightful authorities. Judgments rendered after the day of ratification were of no effect. Cases pending in the courts of the territory militarily occupied were to be prosecuted to a finish, either there or in whatever courts the dominant power should substitute for them.

One of the first acts of the respective military governors was to organize a civil judiciary in the conquered provinces.

CHAPTER X.

Rights Regarding Private Property.

169. Second in importance to considerations affecting the personal relations of the enemy under military government are those concerning his property. The ancient rule forfeited alike the life and property of a captured enemy. With the progress of civilization, particularly under the influence of Christian precepts, the rigors of the rule have gradually been relaxed.[1]

170. From the moment one State is at war with another it has, strictly, even under the modern view, a right to seize all enemy property and appropriate it to its own use or to that of the captor's.[2] The only care of the State in enforcing this right is directed to seeing that neutral territory is not violated.

171. In active warfare it ever will be an important practical question as to what military officials legally, under the laws of war, may seize property of enemy subjects. The military governor should establish rules regarding this matter, so drawn as to protect first the interests of the dominant power and, as a close second to this, secure the people from illegal exactions and unnecessary hardships. If this be not done, the incidents of campaign, multifarious beyond conception, speedily will render it necessary for subordinates to adopt their own rules. If shelter be necessary and at hand, it will be utilized rather than that the troops should be exposed to the elements; if food and forage be needed, they will be seized rather than that both troops and animals should go hungry; and, on the principle of self-preservation, these de-

1. Bluntschli, I., Sec. 29; Manning, p. 179. 2. Wheaton, Part IV., Sec. 346; Bluntschli, I. Sec. 7; 8 Cranch, 279; Twiss, p. 123; Manning, p. 169; *ibid.*, p. 182.

tails will be attended to whether the commander-in-chief has or has not issued orders on the subject. The immense advantage that results from his issuing regulations arises out of the fact that thereby he keeps these important affairs in his own hands, preserves order throughout his jurisdiction upon principles that he deems best suited to the actual circumstances; gives his subordinates a rule of conduct to which they are bound to conform, and protects the helpless people in their rights.

Nor will the regulations of the commanding general be limited to shelter, food, and forage, although these are incidents to which attention most often will be directed; they will cover, at least by general rules, all the phases of military events in the territory occupied, so that subordinates will understand their rights, duties, and obligations on all occasions. The demands of active service in the field during a war of magnitude with a foe worthy of our steel are apt to be terribly exacting; and if the subordinate be not given a rule for his guidance he of necessity will adopt one for himself.

172. We will first consider the case of private enemy property. This belligerent right may be enforced either by confiscation, by summarily appropriating, taking the property as booty, or, more formally, as contributions.[1]

173. Enemy property can be confiscated only in pursuance of law, as the legislature must authorize before the Executive Department can proceed to act.[2] Confiscation in this view is a formal proceeding. The term frequently is erroneously applied to the mere military appropriation of enemy property, as for instance the taking supplies for the use of the army, or the destruction of it to prevent its falling into the enemy's hands. In proper cases such appropriation or such destruction is a rightful exercise of military power by the commander in the field without thought of previous legislative sanction being necessary. It is a proper proceeding under the laws of

1. Twiss, Law of Nations, p. 124. 2. 8 Cranch, 110.

war. It is in this view of the case that the Hague Conference announced that private property cannot be confiscated.[1] In considering the matter, therefore, of the laying violent hands on enemy property, the case of confiscation should always be carefully distinguished from that of military appropriation. The former is carried into effect under the sanction of statute. In the latter, while proper authority must be had in each instance, yet the cases may vary from the taking fodder for his horses by the non-commissioned officer in charge of a detached corporal's guard through varied gradations all the way up to the whole army living off the country under the direct orders of the commanding general; and in each instance the circumstances of the appropriation will determine whether or not it is a rightful exercise of power under the laws of war; and this, whether the taking be styled appropriation, taking as booty, or as contribution.

174. Writers on the laws of nations have given various views as to the right to confiscate enemy property. Bynkershoek maintains the right without limitation, while Vattel in important particulars denied it.[2] But upon principle the right would seem to be clear. The very object for which war is waged would apparently give a belligerent a right to deprive an enemy of his possessions or anything else which may augment his warlike strength. Each belligerent endeavors as against the enemy to accomplish this in the manner most agreeable to himself. So long as the principle that no force is to be used which does not directly contribute to the success of its arms is kept in view, why should not a belligerent at every opportunity seize on enemy property and convert it to his own use? Besides diminishing the enemy's power, he augments his own and obtains at least a partial indemnification, or equivalent, either for what constitutes the subject of the war, or for the expenses or losses incurred in its prosecution.[3] But whatever may be the views with which publicists and

1. Sec. 3, Art. XLVI., G. O. 52, A. G. O., 1902. 2. See Kent, I., 56; Vattel, Book III., Chap. 4, Sec. 63. 3 Manning, pp. 182-83.

speculative writers may please their fancy, the practice of nations is to assert and enforce the rule that confiscation is lawful. The many treaties existing between nations modifying the right as to certain persons under particular circumstances impliedly admit the integrity of the rule.[1]

175. "A conquering State," says Manning, "enters upon the rights of the sovereign of a vanquished State; national revenues pass to the victor, but the immovable property of private individuals is not liable to be seized by the rights of war. With regard to movable property the law is not so moderate in its treatment; movable property is still considered as liable to seizure. This right the invader compounds for requisitions and forced contributions; and, as long as these are supplied, all other movable property is respected by the hostile force, except in towns taken by assault or as punishment for enemy's conduct." He then points out, what experience has so often proved to be true, that requisitions regularly made in a hostile country have a great advantage over pillage; to the invader, because it supplies him regularly; and to the people, who have then to furnish only what the army reasonably requires.[2]

176. The right to confiscate enemy property has been judicially determined. In the case of Brown *v.* the United States the principle was assumed by the Supreme Court that war gave a belligerent the right to seize the persons and confiscate the property of the enemy wherever found; and while the mitigations of this rigid rule, which modern practices have introduced, might more or less affect the exercise of the right, they could not impair the right itself. That remains perfect, and when the sovereign authority shall choose to bring it into operation, the judicial department gives effect to its will. Until that shall be expressed, the judicial power of condemnation does not exist. In the opinion of the court, the power of confiscating enemy property is in the legislature, and without a legislative act authorizing confiscation it could not be judi-

1. Kent, I., p. 56, note 1. 2. Pages 182-83.

cially condemned; further, that the act of Congress of 1812, declaring war against Great Britain, was not such an act; something further was necessary. 1

The property in this case was on land, was that of a British subject, was located within the territory of the United States, and was in the custody of an American citizen. The court held that the rule for the case must be one that could be applied to all private property. Having decided that such property was subject to forfeiture by the law of nations, the only question remaining was one of municipal or constitutional law; that is, of the validity and authority of the proceedings under the Constitution of the United States. In interpreting the Constitution the court, on points of public and general interest, looked at it in the light of international law. Viewed in that light, the existence of war could not be held by its own force and vigor to transfer the title in enemy property to the United States; it only clothed the Government with the right to confiscate or not at its option.

The court divided upon the consequences of this doctrine. Judge Story, with the minority, held that the right to confiscate existing, the power to enforce confiscation in each case belonged to the Executive Department of the Government as an application of known rules of war. It was in this view of the case a part of the same power under which the Executive, on the declaration of war, establishes blockades, orders the capture of enemy property at sea, and of contraband goods. But the majority held that the Executive could not order confiscation unless the will of the nation to that effect had been expressed by the authoritative organ, which was Congress.

This decision asserted the right to confiscate private property of enemy subjects contrary to much modern practice and authority. The point that was gained over the ancient and violent rule consisted in the rendering a special act of Congress necessary to authorize confiscation. 2

1. 8 Cranch, 110. 2. Wheaton, Part IV., Sec. 304, Dana's note, 156; Kent, I., 60.

177. Confiscation of private enemy property, which is thus judicially determined the modern laws of war sanction, is not for punishment of crime. It results from the relation of the property to the opposing belligerent; a relation in which it has been brought because of its ownership. It is immaterial whether the owner be an alien or a friend or even a citizen or subject of the power that appropriates the property. A resident of a hostile country whatever his nativity or allegiance is regarded as a subject of that country, and is considered by that residence as having a hostile character impressed upon him.[1] His property is liable to confiscation under the laws of war regardless of nationality. The whole doctrine of confiscation is built upon the idea that it is a means of coercion, which, by depriving an enemy of property, whether located within his territory or outside of it, impairs his ability to resist the appropriating government, while at the same time it furnishes the latter with means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.[2]

178. Such is the rule when war is waged between independent States. The rights of confiscation are the same in the case of civil war. The general usage of nations regards such a war as entitling both the contending parties to all the rights of war each as against the other, and even as it respects neutral nations.[3] Certainly because the war is civil the legitimate government is shorn of none of those rights which belong to belligerency. It would be absurd to hold that while in a foreign war enemy property may be captured and confiscated as a means of bringing the struggle to a successful completion, in a civil war requiring quite as urgently the use of all available means to weaken those in arms against the legitimate government, the right to confiscate property which may strengthen

1. The *Venus*, 8 Cr., 279 2. Miller v. U. S., 11 Wall., pp. 305-06.
3 Wheaton, Part IV., Chap. 1, Sec. 296.

the rebels does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil.

179. The power of Congress to legislate regarding confiscation of enemy property is found in that clause of the Constitution granting the legislature power to make rules concerning captures on land and water.[1] It is a branch of what the Supreme Court of the United States has called "the war powers of the Government." Upon the exercise of these powers no restrictions are imposed. They include the power to prosecute war by all means in which it legitimately may be waged. If there were any doubt as to this, including the right to seize and confiscate all property of an enemy, it is set at rest by the express grant of the power mentioned to make rules respecting captures.[2]

180. During the foreign wars waged by the United States, under the government of the Constitution, no acts of Congress have provided for the confiscation of enemy property. That property has indeed been appropriated. But it was done under the direction of the Executive Department in conformity with the laws of war. During the Civil War, however, this power of Congress was freely and firmly exercised. Yet so benignantly was it used as to excite admiration for the magnanimous measures of government at a time when it was engaged in a desperate struggle for existence. Judicial decision advanced at equal pace with legislative action, making a clear path for the guidance of those upon whom may devolve hereafter the duty of determining the belligerent policy of the nation. "Property in insurgent States," said the Supreme Court in United States *v.* Klein,[3] "may be distributed into four classes. 1st, that which belonged to the hostile organizations or was employed in actual hostilities on land; 2d, that which at sea became lawful subject of capture and prize; 3d, that which became the subject of confiscation; 4th, a peculiar description,

1., Act I. Sec. 8, clause 10. 2. 11 Wallace, 305. 3. 13 Wallace, 136.

known only in the recent war, called captured and abandoned property. The first of these descriptions of property, like property of other similar kinds in ordinary international wars, became, wherever taken, *ipso facto*, the property of the United States. The second comprehends ships and vessels with their cargoes belonging to the insurgents or employed in aid of them; but property in these was not changed by capture alone, but by regular judicial proceeding and sentence. Almost all the property of the people in the insurgent States was included in the third description, for after sixty days from the date of the President's proclamation of July 25, 1862,[1] all the estates and property of those who did not cease to aid, countenance, and abet the rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied either specifically or in the proceeds thereof to the support of the army.[2] But it is to be observed that tribunals and proceedings were provided by which alone such property could be condemned, and without which it remained unaffected in the possession of the proprietors."

181. The first act authorizing the confiscation of property was that of August 6, 1861.[3] It provided that if, during the then existing or any future insurrection against the government, after proclamation by the President that the laws of the United States are opposed by combinations too powerful to be suppressed by the ordinary machinery of government authorized for that purpose, then all that property of whatsoever kind or description used with the consent of the owner to further the interests of the insurrection should be lawful subject of prize of capture wherever found, and it was made the duty of the President to cause the same to be seized, confiscated, and condemned. Proceedings for condemnation were to be prosecuted by the Attorney-General or District Attorneys of the United States where the property might at the time be, and before a district or circuit court of the United States having

1. 12 Statutes at Large, p. 1266. 2. Act July 17, 1862, 12 Statutes at Large, 590 3. Chap. 60, 12 Statutes at Large, 319.

jurisdiction of the amount. The act extended to all descriptions of property, real or personal, on land or on water. The Supreme Court decided that its enactment was in virtue of the war powers of the government. It defined no crime. It imposed no penalty. It declared nothing unlawful. It was not, therefore, a mere municipal regulation for the punishment of crime. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government.[1] It treated the property as the guilty subject.

The second confiscation act was that of July 17, 1862.[2] The fifth section enacted that to ensure the speedy termination of the rebellion it was made the duty of the President to cause the seizure of all the estates and property, money, stocks, credits, and effects of any person thereafter acting as an officer of the rebel army or navy, President, Vice-President, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner or counsel of the so-called Confederate States, anyone acting as governor, member of a convention or legislature, or judge of any court of any of the so-called Confederate States, or any person who, having held an office of honor, trust, or profit under the United States should thereafter hold an office in the so-called Confederate States, or any person thereafter holding office or agency under the authority of the said States or any of them, or anyone in the loyal portions of the United States who should thereafter assist and give aid and comfort to the rebellion, and to apply and use the same and the proceeds thereof for the support of the army of the United States. The sixth section provided that all persons other than those before named, within any State or Territory of the United States being engaged in armed rebellion against the government thereof, or aiding or abetting such rebellion, and not ceasing so to do and returning to his allegiance within sixty

1 11 Wallace, 308. 2. Chap. 105, Secs. 5, 6, 12 Statutes at Large, pp. 590-91

days after proclamation duly made by the President, should in like manner forfeit his property. Proceedings *in rem.* for the condemnation of such property were to be pursued before any district court of the United States, of the District of Columbia, or a Territorial court where any of the property might be found.

These two confiscation acts were carefully and elaborately considered by the Supreme Court, and pronounced constitutional.[1] In so far as they provided for the confiscation of rebel property it was remarked that they were an exercise of the war powers of the government, and not of its sovereignty or municipal power. Consequently they were not in conflict with the restrictions of the fifth and sixth amendments. Those who were engaged in acts of rebellion within the purview of these acts were enemies of the United States under the law of nations. They were therefore subject to all laws applicable to such enemies, including those for the confiscation of property. Whatever may be true in regard to a rebellion of lesser magnitude it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies. Nor were those alone enemies who were inhabitants of the rebel States. In a foreign war those who reside in enemy territory are not alone enemies. It is true that the presumption is that all such residents are enemies, even though not participants in the war and though subjects of a neutral State, or even subjects or citizens of the government prosecuting the war against the State within which they reside and when military government is established. But that does not exhaust the list of those who may be considered enemies and proceeded against accordingly. Those may be enemies under the laws of nations who are not residents of the enemy territory. They may be more potent and dangerous foes than though they were such residents. By uniting themselves to the enemy's cause they cast in their lot with his. They cannot be permitted to

1 Miller *v.* U. S., 11 Wallace, 308.

claim exemptions which the subjects of the enemy do not possess. Depriving them of their property is a blow against the hostile power quite as effective, tending as directly to weaken the belligerent with whom they act, as would be confiscating the property of a non-combatant resident. This is the established law of nations in case of a foreign war. Those are placed in the category of enemies who act with, or aid or abet or give comfort to the opposing belligerent, though they may not be residents of enemy territory. The court therefore concluded that all the classes of persons described in the preceding confiscation acts were enemies within the laws and usages of war, because the principles applicable in case of a foreign, determine likewise who are enemies in a civil war. Therefore, not only those who resided in the insurrectionary States, but those who inhabited loyal districts, yet who assisted, aided, and gave comfort to the rebellion, were enemies whose property was subject to confiscation in the manner pointed out in the acts.[1]

It is particularly worthy of notice that, in no instance, was property to be confiscated under the terms of these acts except upon the condemnation by decree of the civil courts.

182. The confiscation acts were rendered necessary by the obstinacy and magnitude of the resistance to the supremacy of the national authority. To overcome this resistance and to carry on the war successfully the entire people of the States in rebellion, as well as those in loyal States who aided the rebellion, were considered public enemies.[2] But it was well known that many persons in the rebel States whom necessity required should be treated as enemies were in fact friends, and adhered with fidelity to the national cause. Compelled to live among those who were combined to overthrow the government, those of this class who lived in insurrectionary territory were liable at all times to be stripped of their property by rebel authorities. Although technically enemies, the National Government

1. 11 Wallace, pp. 306-13. 2. See *ante*, and Miller *v.* U. S., 11 Wallace, pp. 306-13; U. S. *v.* Anderson, 9 Wallace, p. 64.

resolved in every way possible to treat them as friends.[1] No more acceptable method of doing this could be devised than one which would secure them remuneration for their property sacrificed during the progress of the war. This was done by the act of March 12, 1863, commonly known as the abandoned and captured property act.[2]

183. As the war progressed the Union forces in the field captured much property and much remained in the country when the enemy retreated without apparent ownership. It was right that all this property should be collected and disposed of. While providing for this Congress recognized the status of the loyal Southern people, and distinguished between the property owned by them and the property of the disloyal. By the act just mentioned the Government was constituted a trustee for so much of the property as belonged to the former class, and, while directing that all should be sold and the proceeds paid into the Treasury, gave to this class an opportunity, at any time within two years after the suppression of the rebellion, of bringing suit in the Court of Claims and establishing their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership.[3] This beneficent measure was indeed general in its terms, protecting alike all loyal owners of property whether residing North or South, but the moving cause prompting to it was the trying situation of loyal Southerners, who, amidst greatest difficulties, heroically adhered to the Union cause, and practically it was for their benefit alone that the law was enacted.

The property thus abandoned or captured was to be collected by special agents of the Treasury, and the only property so abandoned or captured in the insurrectionary districts not made subject to collection in this manner was that which either had been used or was intended to be used for waging or carrying on war against the United States, such as arms,

1. Instructions to U. S. Armies in the Field, Sec. 10, clauses 7, 8. 2. Chap. 120, 12 Statutes at Large, 12, 820. 3. 9 Wallace, p. 65.

ordnance, ships, steamboats, or other water-craft, and the furniture, forage, military supplies, or other munitions of war.

This last description of property upon coming into the possession of the Union authorities was at once under the laws of war forfeited to the United States. Nor did the act of March 12, 1863, apply to any lawful maritime prize by the naval forces of the United States; but all persons in the military service, without distinction, and members of the naval service upon the inland waters into whose possession such abandoned property, as cotton, sugar, rice, or tobacco should come, were required to turn the same over to the special agents of the Treasury, before mentioned. It was further provided that all property coming into loyal from insurrectionary districts, through or by any other persons than these agents or a lawful clearance by the proper Treasury official, should be confiscated to the use of the Government. While the confiscation acts were considered penal, that now under consideration has been regarded as remedial in its nature, and has universally received an interpretation by the Supreme Court of the United States in accord with the generous spirit which prompted Congress to pass the law.[1]

184. The acts of August 6, 1861, and July 17, 1862, before cited,[2] provide for confiscating private property only. In no instance were titles divested unless in pursuance of a judgment rendered after due legal proceedings. The Government recognized to the fullest extent the modern law of nations which exempts private property of non-combatant enemies from capture as booty of war. Even the right to confiscate property under these acts was sparingly exercised. The cases were few indeed in which the property of any not engaged in actual hostilities was subjected to seizure and sale.[3]

185. The duty of determining what enemy property is subject to confiscation rests exclusively with Congress; still,

1 6 Wallace, p. 56; *ibid.*, p. 531; 13 *ibid.*, p. 138. 2. Sec. 181, *ante*. 3. U. .S.*v* Klein, 13 Wallace, p. 137.

as under the laws of war, a commander has an unquestioned right to seize and appropriate to the public service the private property of enemies, as well as public property of the opposing belligerent, when emergencies demand the exercise of that power, it becomes under military government an interesting question as to where the boundary line lies between this exclusive power of Congress and the rights of the commander under the laws of war. The right to confiscate does not belong to any military commander. He has no original authority in the premises. If he confiscate property at all it will be pursuant to the provisions of statutory law, and not the laws of war.

186. The decision of the Supreme Court declaring illegal the action of the military commander at New Orleans who attempted in 1863 to confiscate certain moneys or credits held by the banks in that city for the benefit of rebels or rebel corporations, has been mentioned.[1] The decision was based upon two grounds: first, because of the pledge given by the captor in taking possession the city that rights of property of whatever kind would be held inviolate, subject only to the laws of the United States, and the order in question was a violation of that pledge; second, because it was an attempt to confiscate private property and not a seizure for the immediate use of the army, nor an attempt to seize it *flagrante bello*. The pledge mentioned did not exempt property from liability to confiscation if in truth it was enemy property; but after it was given, private property there situated was not subject to military seizure as booty of war. "But admitting as we do," said the court, "that private property remained subject to confiscation, and also that the proclamation [of the captor of the city] applied exclusively to the inhabitants of the district, it is undeniable that confiscation was possible only to the extent and in the manner provided by the acts of Congress of August 6, 1861, and July 17, 1862. No others authorized the confiscation of

1 *Ante*, Sec. 24.

private property, and they prescribed the manner in which alone confiscation could be made. They designated Government agents for seizing enemy's property, and they directed the mode of procedure for its condemnation in the courts. The system devised was necessarily exclusive. No authority was given a military commandant as such to effect any confiscation. And under neither of the acts was the property of a banking institution made confiscable."

187. Congress is authorized to make all rules concerning property of every kind captured either from individual enemies or from the opposing belligerent government. But the Executive Department, as its officers command the armies in enemy territory, must judge of the measures essential to success; and unless restrained by legislation, they have only to consider whether their measures are in accord with the acknowledged laws of war. Upon them rests responsibility for the success of the national arms, beating the enemy in the field, overrunning his territory, and destroying the sources of his power. They are indeed forbidden to confiscate enemy property unless previously authorized by law. If the legislature interposes, its mandate must be obeyed. But if this be not done commanders under the laws of war are permitted to appropriate enemy property which may come into their possession, if either the exigency of the public service demands or expediency counsels it as a means to the successful prosecution of hostilities. This is one of the fundamental powers which attaches to a commander conducting a campaign in enemy country. If aught be disapproved by the legislature, it is within their power to narrow the field within which belligerent rights shall be exercised. Until such limits be assigned, the President and military commanders under him must have every authority which the laws of war attach to their stations to be used in their sound discretion.

Without this power the Executive Department would be shorn of some of the most efficacious, even the indispensable means of successfully prosecuting hostilities; and as to that

department the nation has confided the duty of conducting all military operations, it must be given the incidental powers necessary to perform that duty with promptness and success. This conclusion flows from well-recognized principles. The whole executive power of the nation being vested in the President, who, in carrying on war, of necessity generally acts through subordinate commanders, a sound construction of the Constitution must allow to the President and these subordinates a discretion with respect to the means by which the powers it confers are to be carried into execution, and which will enable them to perform their duties in the most effective manner.[1]

The rule has the sanction of practice in war, is confirmed by the writings of publicists, and by decisions of the highest courts. In September, 1862, a subordinate military commander in Louisiana seized the private property of one of the inhabitants for the use of the troops. Suit was entered against the officer, and the cause finally coming before the Supreme Court of the United States, that tribunal in the course of its opinion remarked: "There could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property may have been, it was always subject to be appropriated when required by the necessities or convenience of the army, though the owner of the property taken in such case may have had a just claim against the government for indemnity."[2] What shall be the subject of capture, as against his enemy, is always within the control of every belligerent. Whatever he orders is a justification to his followers. He must answer in his political capacity for all his violations of the settled usages of

1. Fleming *v.* Page, 9 How., p. 615. 2. 100 U. S., p. 167.

civilized warfare. His subjects stand behind him for protection.[1]

188. Nor can a greater mistake be made than to hamper the movements of a commander by a too strict surveillance exercised from a point far removed from the seat of war. It is impossible from that distance to give due weight to the winds of suspicion, of defeat, of success that sweep only to be felt, though not seen, over the theatre of contest. On that theatre alone in a really great war are mighty matters determined, and by the wager of battle. No more dangerous experiment can be essayed than to criticise and from a distance attempt to control the measures and movements of the responsible commander. It may pave the road to defeat or mediocre results; it never can the road to victory and glory.

189. The government of military occupation has complete control of lands and immovable private property of the enemy in the occupied district. The fruits, rents, and profits issuing

1. 92 U. S., p. 195.

NOTE.—On page 300, Volume 4, of his Memoirs, Napoleon raises this question: Is a general-in-chief completely controlled by the order of a minister or prince far from the field of operations, and ill informed or uninformed of the latest posture of affairs? He argues against the proposition.

1. If he undertakes to execute a plan which he considers bad and likely to prove disastrous, he is criminal; he should make representations, insist upon a change, and resign rather than become the instrument of his men's destruction.

2. The general-in-chief who, in consequence of superior orders, fights a battle that he is certain to lose is criminal.

3. The orders of the absent minister or prince are to be followed in spirit; but they are not technically military orders to the general-in-chief demanding passive obedience.

4. Military orders do not require passive obedience unless given by a superior present at the time, knowing all attendant circumstances, listening to objections.

(The above situation described his conduct while in command in Italy 1796–97, when the Directory were writing him essays regarding his future military operations.)

therefrom and therefore under the control of that government, whose officials may lawfully claim and receive them.[1] Immovable private property is not confiscable, and although the conqueror might alienate it, the purchaser would not have a good title unless the temporary became permanent conquest.[2] It has generally been held, however, that contracts or agreements which the military authorities may make with individuals regarding such property will be valid only so long as these authorities retain control of it, and will cease on its restoration to or recovery by its former owner.[3] Without doubt this is the general rule. In the nature of things contracts entered into by the invader in territory he has overrun lose their efficacy when his dominion ceases.

190. Still, as was illustrated in the case of New Orleans *v.* Steamship Company,[4] circumstances may render such contracts valid even beyond that time. The Federal military authorities held New Orleans from May 1, 1862, until March 18, 1866, when its control was transferred to the civil city authorities. Between these dates it was subject to military government as a conquered foreign province.[5] In the exercise of his authority under the laws of war the commanding general appointed a mayor of the city and certain boards for carrying on municipal affairs. On July 8, 1865, this mayor, acting conjointly with the boards mentioned, made a lease of certain city property for the term of ten years. Though not so directly expressed, yet in fact this was, and was well understood to be, the act of the government of military occupation. When, therefore, the civil authorities resumed control this lease had yet nine years and three months to run. The city now essayed to oust the lessees. It was claimed that the government of military occupation, and therefore the military mayor and boards, its appointees, had no authority to make such a lease;

1. Halleck, Chap. 32, Sec. 4. 2. Manning, pp. 182–83. 3. Vattel, Book III., Chap. 13, Secs. 197, 198; Opinions Attorney-General, Vol. 22, p. 410. 4. 20 Wallace, p. 387. 5. *Ibid.*, p. 393; 2 Black, p. 636; 3 Wallace, 417; 6 *ibid.*, p. 1.

that whatever rights or powers they possessed ceased with the termination of military rule; and that they could no more create an interest to last beyond that time than could a tenant for years create one to last beyond his term. But the Supreme Court held that the lease was good. It was not to be disputed, the court observed, that the government of military occupation might appoint all the necessary officers under it and clothe them with necessary authority to carry on its affairs. It might prescribe the revenue to be raised and direct their disposition. It could do anything to strengthen itself and weaken the enemy. The laws and usages of war form the only limit to the powers that can be exercised in such cases. Amidst such surroundings those laws and usages took the place of the laws and Constitution of the United States as applied in times of peace.

Granting, however, that the lease of this property during the continuance of the military possession of the United States was within the scope of military authority, it was claimed by the restored city authorities that when military control terminated the lease fell with it. The Supreme Court decided otherwise. "We cannot," said that court, "take this view of the subject. The question arises whether the instrument was a fair and reasonable exercise of the authority under which it was made. A large amount of money was to be expended and was expended by the lessees. The lease was liable to be annulled if the expenditures were not made and the work it called for done within the time specified. The war might last many years, or it might at any time cease, and the State and city be restored to their normal condition. The improvements to be made were important to the welfare and prosperity of the city. The company had a right to use them only for a limited time. The company was to keep them in repair during the life of the lease, and at its termination they were all to become the property of the city. In the meantime the rental of eight thousand dollars a year was to be paid. When the military authorities retired the rent-notes were all handed over to the

city. The city took the place of the United States and succeeded to all their rights under the contract.[1] The lessees became bound to the city in all respects as it had before been found to the covenantees in the lease. The city thereafter collected one of the notes subsequently due, and it holds the fund without an offer to return it while conducting this litigation. It is also to be borne in mind that there has been no offer of adjustment touching the lasting and valuable improvements made by the company (lessees), nor is there any complaint that the company has failed in any particular to fulfill their contract. We think the lease was a fair and reasonable exercise of the power vested in the military mayor and the two boards."[2]

Unquestionably this opinion, whatever its merits in the abstract, is not strictly in accord with the generally accepted authorities regarding the time-limit of contracts entered into by military officials under military government. The court did not question the soundness of the principle contended for by these authorities, that such contracts cease with the power which creates them. But the peculiar features of the case were held to be sufficiently striking, the claims of the lessees to rest so clearly and firmly on justice and equity as to remove their cause from the operation of the general rule.

191. The laws of nations, it has been said, are based on common sense, and the laws of war are a branch thereof.[3] This opinion of the Supreme Court rests on reason. It should, therefore, be considered as establishing the rule applicable to this and similar cases whatever the nation involved and wherever the military force be employed. The laws of nations are not inflexible, like the rescripts of the Roman emperors. While possessing the stability of a recognized code, they change with circumstances, improve with time, and adapt themselves to the intellectual and material progress of peoples. When, therefore, as in this instance, the teachings of the past are at

1. U. S. *v.* McRea, 8 Law Reports, Equity Cases, p. 75. 2. 20 Wallace, pp. 394-95. 3. 2 Black p. 667.

variance with the better thought of the more enlightened present, it is not only allowable, but it is eminently proper that the former should be disregarded and the law be established upon principles in keeping with the more advanced state of society.

It happened in this instance that the court pronouncing the opinion was the supreme judicial tribunal of a State which had recently triumphed over rebellion. It was in an insurrectionary district involved in this rebellion that the military government was established, the proper limits of whose authority was involved in the questions here decided. That rebellion failed and the district thus subject to a military government was again and permanently brought under the undisputed dominion of the parent State. The vanquished had no alternative but to accept the edict of the conqueror thus judicially expressed. But the opinion rests upon better and firmer ground than this. It is founded upon principles of common honesty and public utility. It shows the necessity, even amidst the trying scenes of war, of good faith between those who confer and those who accept benefits flowing from public-spirited enterprises.[1]

192. Cobbett states that although acts done in a country by an invader cannot be nullified in so far as they have produced effects during the occupation, they became inoperative so soon as the legitimate government is restored. He instances the case in the Franco-German War of a wood contract entered into by the Germans with certain parties to cut wood in French forests. Peace found the contract incomplete. The question arose, should it be completed under the original covenant? The contractors desired to complete it, and they urged that the German government, having acted within their right in making the contract, the restored French government ought to permit it to go on to completion. The latter held that this restoration annulled the contract. They made in the supplemental convention of 11th December, 1871, a declaration to that effect,

1. Opinions Attorneys-General, Vol. 23, p. 562; *ibid.*, Vol. 22, p. 545; *ibid.*, Vol. 22, p. 410.

which was treated by the Germans as conforming to correct principles.[1]

193. An interesting case arose in Luzon, P. I., in connection with the Dagupan Railroad. It was a foreign corporation having, as alleged, $5,353,700.89 invested. The Spanish government had agreed to secure it 8 per cent on the investment, including earnings of road. On the question that the United States succeeded to the sovereignty of Spain there, the corporation wished the former to make this guarantee good, but the proposition was rejected. The United States Commissioners at Paris expressly refused to include a clause in the treaty of peace binding their Government to assume the colonial pecuniary obligations of Spain. But the Attorney-General expressed the opinion that the provinces of Luzon, through which the railroad ran and which were benefited by it, and also the permanent Philippine government, were equitably bound to meet the obligations.

During the period of the military government this railroad was seized, the government making fair compensation for its use, wear and tear.[2]

194. No restriction exists to prevent the commanding general in enemy territory from subsisting his army on supplies gathered there, or appropriating property which in any wise is useful for military purposes. The experience of every army which penetrated enemy country during the rebellion bears testimony to this fact. While property might not be confiscated—that is, seized to be sold and the proceeds turned into the national Treasury, everything that was necessary for the sustenance, transportation, clothing, and bivouacing of the troops was appropriated without question. What compensation, if any, shall be given those whose property is taken it is for the dominant power to determine.

195. Administrative acts taken by the military government having no political signification generally remain in force

1. Page 141; see also Hall, p. 549 *et seq.* 2 Opinions Att'y Gen., Vol. 23, p. 181; Magoon, p. 179.

after it has ceased. This is true of administrative acts in this narrower meaning—financial, economical, educational—as well as of judicial acts, judgments in civil and criminal proceeding. As the law of war authorizes the military government to regulate and conduct the administration, and as it is necessary to the general public interests that matters of detail should be transacted, and as finally there is no political consideration in the way, the recognition of that which has been executed is a consequence of the continuation of law and of the uninterrupted exercise of administrative functions. The annulling of all judgments rendered in the interval by courts, the personnel of which has perhaps been changed, or repudiation of decisions of the newly-filled offices of finance or police, would be a misconception of the true principle and would create numberless complications.[1]

196. In times past it was a common practice for European nations to apportion out certain of the spoils of war on land, as it is everywhere done on sea, to the soldiers as an incentive, apparently, to bravery.[2] The wars springing out of and following the French Revolution afford many illustrations. But since then public sentiment has set in strongly against the practice; and it is believed that recent wars, particularly among the Christian nations, present few examples of the soldiery being stimulated to exertions by so objectionable methods.

197. In the United States service the disposition of property taken from the enemy is regulated by statute. The Articles of War direct that all public stores so obtained shall be secured for the public service, and for neglect of this the commanding officer is answerable;[3] while death or such other punishment as a court-martial shall direct is denounced against any officer who quits his post or colors to plunder or pillage.[4] This has ever been the law as applicable to the United States Army, and being embodied in the British Articles of War, these rules were obligatory upon the colonial forces before the American

1. Bluntschli, Laws of War, I., Sec. 222. 2. Vattel, Book III., Chap. IX., Sec 164. 3. 9 Art. of War. 4. XLII., Art. of War.

Revolution. Similar rules were enforced with rigid exactness during Rome's greatest prosperity. The soldier was obliged to bring into the public stock all the booty he had taken. This the general caused to be sold, and after distributing a part among the soldiers according to rank, he consigned the residue to the public treasury.[1] It is true that the practice of dividing up booty was here legalized, but the more important principle was inflexibly enforced that all property taken from the enemy belonged primarily to the State. If any soldier partook of the spoils of war it was through the favor of the State. In this way that ruthless robbery which has disgraced some modern wars, notably in the Spanish Peninsula at the beginning of this century, when beauty and booty were deemed to belong of right to him who could first lay violent hands upon them, was avoided with all its barbarism and demoralizing influences.

198. The practices of modern times have tended to soften the severity of warlike operations on land.[2] This is illustrated in the orders of the President of the United States of July 22, 1862, directing all military commanders within certain of the States then in insurrection, in an orderly manner to seize and use any property, real or personal, which might be necessary or convenient for their several commands as supplies or for other military purposes. While such property might be destroyed in the attainment of proper military objects, this was never to be done in malice.[3]

Even this, however, was carrying the principle of appropriating enemy private property beyond what is considered by some writers as properly permissible.[4] "The general usage now is," says Kent, "not to touch private property upon land without making compensation, unless in special cases dictated by the necessary operations of war, or when captured in places carried by storm and which repelled all the overtures for a ca-

1. Vattel, Book III., Chap. 9, Sec. 164. 2. Wheaton, Sec. 355; Kent, I., pp-92 93; Woolsey, Sec. 136. 3. G. O. 109, A. G. O., 1862. 4. Kent, I., 91.

pitulation." But this question is one of expediency rather than of law.[1] The appropriating power may not have the funds to pay for supplies. It may have come to that point in its financial affairs when the rule that war must be made to sustain war is all that is left to it. The French empire was reduced to these straits during the latter part of the wars of Napoleon. So in great degree was the government of the United States, judging from the above quoted order in the early stages of the Civil War. It is a matter of common history that on every theatre of operations the rule established by that order governed the various commanding generals of the Union forces in supplying their armies, in part at least, from the resources of the enemy country. In the great cavalry raids, which have become a prominent feature of recent wars, where large mounted forces traversing extensive parts of enemy territory essay to break up his communications, destroy his sources of supply, and so to paralyze his manufacturing industries, it is essential that sustenance shall, so far as practicable, be gathered from the district comprising the field of operations. In such cases the requisite celerity of movement renders this course absolutely necessary. In the slower movements of large armies the same necessity for subsisting off the enemy's country may not exist, yet the plan may be resorted to as a matter of public policy.

199. It will be conceded by all familiar with the practice of armies in the field, as well as the views of writers of authority, that the Hague Conference of 1899 extended the principles that should govern amidst the clash of arms to the verge of safe amelioration. It had scarcely adjourned until the China Relief Expedition seemingly gave the more important signatory powers opportunity to put their humanitarian theories to the test. Unless the troops have been much maligned, the practical reality fell far below the elevated stand taken in the conference in this behalf.

1. Kent, I., 92 (b); Bluntschli, Laws of War, I., Secs. 7, 143, 144.

200. There is a distinction between the rights of property captured on sea and on land. The nice questions with regard to the right to appropriate the latter which have troubled governments and their generals have not arisen concerning sea captures. The object of maritime warfare is the destruction of the enemy's commerce and navigation. Capture and destruction of private property at sea has ever been deemed essential to that end, and it is allowed to the fullest extent by the law and practice of nations. A determined effort has been made by many eminent authorities to modify the rule as to property on land, and to some extent successfully. The manner in which the results of such efforts manifest themselves is in a gradual moulding of public and official opinion in favor of more liberal treatment of the enemy. The view is gaining ground that wanton destruction or useless appropriation of private property on land should not be permitted. While there is nothing to absolutely prevent it, the practice is universally condemned among civilized nations, and gradually is becoming obsolete. Nothing definite or inflexible is determined by this; the rule of appropriation is left to vary with circumstances, and yet the position of non-combatants and others in enemy country has been greatly ameliorated through these instrumentalities.

201. The laws of war recognize certain modes of coercion as justifiable. They may be exercised upon material objects or upon persons. The former may be a preferable mode. The taking of private property is an illustration of this. When lawfully taken it is because it is of such a character or so situated as to make its capture a proper means of coercing the opposing belligerent. If he have an interest in the property which is available to him for the purpose of war, it is *prima facie* a subject of capture. He has such an interest in all convertible and mercantile property either within his control or belonging to persons who are living under his control, and this whether it be on land or sea; for it is a subject either of taxation, contribution, appropriation, or confiscation. The

policy of modern times, as just mentioned, has been to establish the rule that on land property will not be taken if it be not liable to direct use in war.[1] Some of the reasons for this are the infinite varieties of such property—from things almost sacred to things purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the lives of the inhabitants; the unlimited range of places and objects that would be open to the military; and the moral dangers attending searches and captures in households and among non-combatants.[2]

The rule extends to cases of absolute and unqualified conquest. Even when the conquest of a country is confirmed by the unconditional relinquishment of the sovereignty of the former owner, there can be no general or partial transmutation of private property in virtue of any rights of conquest. Private rights and private property, both movable and immovable, are in general unaffected by the operations of war.

202. Such is the tenor of the instructions for the United States Armies in the field. Here it is announced that the United States acknowledges and protects in hostile countries occupied by them religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offenders against these rules are rigorously punished. But the rule does not interfere with the right of the invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats, ships and churches, for temporary and military uses. Private property, unless forfeited by crimes or by offences of the owner, is to be seized only by way of military necessity for the support or other benefit of the army. If the owner has not fled the commander will give receipts for it with a view to possible indemnity.

203. To the most generous construction of the rule that private enemy property is not to be taken without compensa-

1. Bluntschli, I., Sec. 144; Woolsey, 5th ed., Sec. 126. 2. Wheaton, Part IV., Sec. 355, Dana's note, p. 171.

tion there are certain well-established exceptions. There may be others, but certainly the following are generally recognized: *First*, seizures by way of penalty for military offences; *second*, forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order and affording protection to the conquered inhabitants; *third*, property taken on the field of battle or in storming a fortress or town.[1] To these may be added a *fourth*, namely, if the private property, like cotton during the American Civil War, forms one of the main reliances of the enemy for procuring war-like resources.[2]

204. "In the *first* place," observes Halleck, "we may seize upon private property by way of penalty for the illegal act of individuals or of the community to which they belong." Thus the property of one who offends against the laws of war is seized without hesitancy. And as before stated, if the illegal act of an individual enemy cannot with certainty be brought home to him and punishment meted out to the guilty party, the community in which he lives and which affords him an asylum must pay the penalty. This was a very common practice during the American Civil War and the Franco-German War of 1870. It is nothing more than an application under the laws of war of the common-law principle which held the hundred responsible for robberies or felonies unless the criminal was apprehended and lodged in the hands of the civil officers.[3] So if the offence attach itself to any particular community or town, all the citizens thereof are liable to punishment; their property may be seized, or, by way of penalty, a retaliatory contribution may be levied upon them. If the guilty can be secured it is more just to punish them alone. But the rule is inflexible that the community may be held responsible for the acts of its individual members. This makes

1. Halleck, Chap. 19, Sec. 13; Manning, p. 188. 2. Mrs. Alexander's cotton, 2 Wallace, 420; Lamar *v.* Browne, 92 U. S., 194; Boyd's Wheaton, p. 411. 3. Blackstone's Comm., III., p. 161; IV., pp. 246, 293.

it the interest of all to discover the offenders and deliver them up to justice.

205. It is admitted that the principles of the Hague Conference hold differently. "No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible." [1] It remains to be seen how well the parties to that conference observe the rules they adopted. Their departure from them during the China Relief Expedition has been commented upon. During the present Russo-Japanese War, between two of the parties signatory, although it has only just begun, the press of the civilized powers has been filled with complaints of the disregard shown by one of the combatants to the principles of that conference.

206. "The right of taking hostages," says Bluntschli (I., Sec. 92), "was applied in a new but questionable manner during the late war between Germany and France when influential inhabitants of French towns and villages were forcibly carried off as security against the interruption of railway communication. It is questionable, because it places peaceful inhabitants in the most serious danger, even of their lives, without any blame on their part, and without affording adequate security, inasmuch as the fanatics who tear up the rails or otherwise endanger the trains have little regard for the lives of the notabilities for whom they perhaps only entertain hate. It is only justifiable in the case of necessity on the ground of reprisal." The ground upon which the seizures are made is that security is thus obtained that such practices as interrupting or interfering with railroad traffic will be stopped. The interest which prominent citizens have in the community will, if they be taken into custody, secure either the exertions of the inhabitants to ferret out evil-doers, or increased vigilance to prevent a repetition of bridge-burning and other similar interferences with the railroads or other means of communi-

1 Sec. 3, Art. I.

cation. It is one of the common practices of war. The instances are numerous during the Civil War where commanders notified the people amongst whom they were that they or particular officers would be held responsible for war crimes of this nature.

There is another reason for this severe rule. Cowardice and crime often seek to screen themselves in the obscurity of the crowd. Collections of individuals and even communities can often in an indistinguishable mass be brought to do that which the individual members, standing on their own responsibility, would shrink from doing. The trying incidents of war offer many opportunities for the display of this trait of human weakness. The surest way to curb this is to have it well understood that the cloak of the many affords no immunity for the transgressions of the few.

207. In the fall of 1861, as large numbers of Union refugees were driven from districts of the State held by rebels into St. Louis, Missouri, the commanding general, a distinguished soldier, lawyer, and writer on international law, directed that these destitute people be maintained at the expense of those in that city who were known to be hostile to the Union cause.[1] Enforced contributions from the enemy are equally authorized whether required during the progress of the war for the sustenance and transportation of the conqueror's army, or after the conclusion thereof, as one of the terms of peace.[2]

208. The Constitution of the United States makes no distinction between real and personal property taken for public use, nor do the decisions of the Supreme Court. The same obligations apply to both. But there is a distinction to be drawn between property used for government purposes and property destroyed for the public safety. If the conditions admitted of the property being acquired by contract and of being used for the benefit of the government, the obligation to remunerate attaches, and it must be regarded as taken under

1. Halleck, Chap. 19, Sec. 14; Mitchell *v.* Clark, 110 U. S., p. 633.
2 Woolsey, Sec. 136; Twiss, Law of Nations, p. 124.

an implied contract; but if the taking, using, or occupying was in the nature of destruction for the general welfare, or incident to the inevitable ravages of war, such as the march of troops, the conflict of armies, the destruction of supplies, and whether brought about by casualty or authority, and whether on hostile or national territory, the loss, in absence of positive legislation, must be borne by him upon whom it falls.[1]

209. The ancient rule of war authorized the enslavement of all enemies and the taking all their property. It is readily seen what a great amelioration of this rule sparing the persons of non-combatants is, and levying not upon all enemy property, public and private, but only demanding such money or supplies as the army of occupation may require. That army must be subsisted somehow, either by regular supplies paid for by its own government, the pillage of the occupied territory, or by contributions levied on the people.

The first course may not always be practicable, either because the troops are too far from their sources of supply, or their government cannot afford the expense, or it be not deemed good policy.

210. Pillage is generally inexcusable in these days, and the State which would without urgent necessity authorize or sanction it would receive, as it would deserve, the condemnation of the civilized world. The inevitable consequences of pillage are generally destruction of property, violation of every right of person, no matter how sacred, and the demoralization of the troops engaged in it. The suffering people, incensed at the useless hardships imposed upon them, are converted into implacable enemies. Straggling parties of the troops are cut off and massacred often with circumstances of great barbarity, the result of that ferocious spirit which war so conducted invariably arouses. Moreover, the plan soon becomes impracticable. The peasantry, maddened by personal indignities, prefer to destroy property rather than permit it to fall into

1. Opinions Attorney-General, Vol. 21, p. 237; *ibid.*, Vol. 22, p. 515.

the hands of a ruthless foe. The army scattered for subsistence cannot always concentrate for action. And what avails it that the army has subsisted upon the occupied territory if the campaign be lost?

Pillage is not only impolitic and unjust, but is attended with so little that is good and so much that is bad that except as a last resort it has fallen into disuse among enlightened nations. It may, indeed, be justified. There may be absolutely no other way to subsist the army. In that case the general simply falls back on that ultimate rule of force which places all enemy property at his disposal. In case also of cavalry raids it may become necessary for the troops to procure their supplies wherever they may be found. But even here it will prove advantageous to proceed as regularly and justly as circumstances will permit. This was recommended by the Brussels project of an international declaration concerning the laws and customs of war.[1] And although these recommendations are without binding force they will express the prevailing drift of modern ideas on this subject. Under the terms of the recent Hague Conference it was formally prohibited.[2]

211. The remaining method of supplying an army in the enemy's country is by contributions levied upon the inhabitants, either directly or through the constituted authorities. In this case it may well happen that, instead of levying the contributions, a sum of money may be demanded in lieu thereof; for, if the money be forthcoming, it is generally an easy matter to secure all needful supplies, so far as they exist in the country, from the inhabitants. The enemy's subjects by paying the sums or contributing the supplies, have a right to expect that their property will be secure from pillage and the country preserved from devastation. The American general-in-chief, after occupying the capital of Mexico, established a system of revenue whereby he gathered into his hands most of the internal dues and taxes which, under ordinary

1. Boyd's Wheaton, pp. 476, 481; Appendix III. 2. Sec 3, Art. XLVII., G O. 52, A. G. O., 1902.

circumstances, would be owing to the Mexican Federal Government, to be used in procuring supplies for the army of occupation. In doing this he gave his adhesion to an enlightened policy. Ordinary revenues were not molested. The civil government of the various Mexican States, as well as city and municipal governments, were encouraged to remain in the discharge of their duties. It was recognized that while performing their functions they must have pecuniary support. Hence every precaution was taken that moderate and reasonable sums should be set aside for this purpose. In the capital city itself a considerable sum was collected in lieu of pillage.[1]

The magnanimity of this victorious commander in apportioning his demands on a conquered people according to their ability to meet them, and the even-handed justice with which he enforced his contributions, merits every applause. This notwithstanding the fact that a sum levied in lieu of pillage may sound like a harsh proceeding. It was merciful. It reduced suffering as much as possible consistent with efficient military control; and, by the contentment of the people thereby secured, lessened the duties imposed upon his army and in many ways enhanced the interests of the United States. And it conformed to the teachings of the sages of the law. "A general," says Vattel, "who wishes to enjoy an unsullied reputation, must be moderate in his demand of contributions and proportion them to the abilities of those upon whom they are imposed An excess in this point does not escape the reproach of cruelty and inhumanity; although there is not so great an appearance of ferocity in it as in ravage and destruction, it displays a greater degree of avarice or greediness."[2]

Those upon whom contributions are levied during the progress of war are not the armies of the enemy; if so, there would be an excuse for severity. They are, as a rule, non-combatants, peaceable citizens, and corporations, all of whom the demands of the times have thrown into financial straits. To

1. Scott's Autobiography, pp. 558, 560, 582. 2. Book III., Chap. 9, Sec. 165.

pay the contributions requires on their parts great pecuniary sacrifice at a time when they are least able to bear it. To demand contributions excessive in amount, or to collect them with unnecessary harshness, is useless oppression. They are calculated to give rise to all those evils attending pillage before pointed out, and in fact they constitute pillage under a milder name. Policy and the dictates of humanity require that in levying contributions as generous forbearance should be shown as is compatible with the unquestioned rights of the conqueror. Anything beyond this is unnecessary and can never be either wise or justifiable.

212. A government which recruits its army by conscription may bring all private persons within the list of combatants, and by a course of conduct which makes all private virtually public property may render it hostile. When this happens the property may be appropriated by the enemy upon any terms he may dictate. The reason why private property on land generally is exempt from such seizures is because many of the people are non-combatants, enemies only in name, and policy and humanity alike counsel that they be generously treated. But if the community *en masse* with their property are dedicated to belligerent purposes, the reason of the rule of exemption ceases and the rule ceases with it.

213. The following remarks of Dr. Bluntschli may be assumed to set forth the German theory on the interesting subject of contributions; we say theory, because from the accounts of German practices in France it has not in that army risen above that. Nevertheless, it is not to be contemptuously cast to one side because it is a theory; much excellent authority is in the direction for which the learned doctor contended:

"The occupying army may demand of the inhabitants such gratuitous contributions as may appear necessary for the subsistence of the troops and for their transportation, as well as that of the material of war, provided such contributions are recognized as a public duty by the customs and usages of war.

"The proclamation of the Crown Prince of Prussia, of the 20th August, 1870, when he occupied Lorraine, is worthy of notice: 'I bespeak for the sustenance of the army only such surplus of supplies as are not used for the subsistence of the French population.' From other quarters bitter complaints were made of the excessive requisitions of German commanders, and these were often abated by the commander-in-chief."

He then points out that the army of occupation has a right to demand quarters, clothing, wagon and other transportation, remarking that all such demands, according to the circumstances of the case, give rise to legal claims for indemnification.

As to this, the doctor proceeds: "It is difficult in practice to regulate and still more difficult to carry out this duty of indemnification. The enemy who requires and receives such contributions for military purposes has the strongest inducement to remunerate the communities and individuals against whom he does not wage war. But he is often without funds, and yet cannot dispense with such contributions. In many cases receipts are simply given and the payment deferred until the future. Moreover, the military authority may rely upon its undoubted right of imposing upon the enemy, together with the costs of the war, the duty of indemnifying such communities and citizens for their contributions. Payments are often refused upon this ground and the creditors referred to their own governments."

But no instance is recalled of such sufferers being indemnified by their own government when it is restored to power. It is invariably put down as an inevitable hardship for which the government is under no obligations to make compensation. It is *damnum absque injuria.*

Mr. Hall (p. 439) goes even further than Dr. Bluntschli in requiring indemnification. Admitting the rights of the invader to appropriate products of enemy-occupied country, the transportation, shelter, etc., found there for the use of his army, he thinks this does not involve the right to appropriate these things without payment therefor. The invader, this

authority contends, has a right to take only upon paying either cash or certificates which his government will honor. But this can hardly be the true doctrine. If the conqueror pays for what he gets it is an act of kindness, based probably upon considerations of expediency rather than upon any right of the conquered to demand payment.

214. The victor's right to private property taken on the field of battle cannot be questioned. The same rule applies with almost as much universality in case a fortress or town is taken by storm.[1] "Property taken on a field of battle," says the Supreme Court, "is not usually collected until resistance has ceased, but it is none the less on that account captured property. The larger the field the longer the time necessary to make the collection. By the battle the enemy has been compelled to let go his possession, and the conqueror may proceed with the collection of all hostile property thus brought within his reach so long as he holds the field."[2] But the right to private property taken on the field or after the successful storming of a place must be carefully distinguished from the right to unbridled license. It is necessary to distinguish between the title to property acquired by the laws of war and the accidental circumstances attending the acquisition. The commander who permits indiscriminate pillage fails in his duty. The taking possession of property should always be regulated by orders emanating from proper authority. It is frequently true, especially after the successful assault of the enemy's stronghold, that this is not done. Justification is never attempted among civilized nations, but the excuse is often made that the general cannot restrain his troops. To this it is sufficient answer that he who cannot control an army is not fit to command it. The plunder, October, 1860, of the Emperor of China's summer palace by the troops of France and England affords an illustration of the insensibility of the most refined nations in this regard, although this has

1. Boyd's Wheaton, p. 411; Vattel, Book III., Chap. 9, Sec. 164; Halleck, Chap. 19, Sec. 19. 2. 92 U. S., p. 193.

been explained as a justly retaliatory measure caused by the barbarous treachery of the Chinese.

215. Of modern wars that in the Spanish Peninsula furnishes the most numerous instances of the sacking of cities and the plunder of defeated armies by troops in whom the instinct of men had apparently been wholly supplanted by the ferocity of maddened beasts of prey. Nor were these scenes, disgraceful alike to rational beings and the Christianity of which they boasted, confined to any district or their perpetrators to any army

Witness Oporto, Tarragona, Ciudad-Rodrigo, Badajos! The pen of the historian of that protracted struggle has cast a luster over the events which he commemorates, but humanity turns from the contemplation of such scenes with horror, while the profession of arms repudiates with indignation such practices which tarnish the glory of the most valiant, self-sacrificing deeds and discredits the claim that civilization has nobly mitigated the severities of war.[1]

216. The fourth exception to the rule that private enemy property is not liable to seizure by a belligerent power operates to forfeit all private property which contributes directly to the strength of the enemy by enabling him to secure supplies for carrying on the war. This was preeminently the case with cotton during the Civil War. "Being enemy's property," said the Supreme Court, "cotton was liable to capture and confiscation by the adverse party." It is true that this rule as to property on land 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 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 exigencies,

1. Napier, Book VI., Chap. 6; *ibid.*, p. 13, Chap. 5; *ibid.*, p. 16, Chap. 2; *ibid.*, p. 16, Chap. 5.

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. In the case before us the capture seems to have been justified by the peculiar character of the property [cotton] and by legislation. It is well known that cotton constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. "It is matter of history that rather than permit it to come into the possession of the national troops the rebel government has everywhere devoted it, however owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. * * * The rebels regard it as one of their main sinews of war, and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain in case of the withdrawal of the Union troops an element of strength to the rebellion. And the capture was justified by legislation as well as by public policy."[1]

Cotton was a security which the insurgents offered for the payment of their debts. Upon it they relied for their influence abroad. To obtain it forced contributions were exacted from its owners. From time to time in the progress of the war it was found upon the enemy's territory occupied by the military forces of the United States. While when so found it might have been owned by non-combatant enemies, and in that sense been private property, it was in fact under the circumstances at least semi-public. If left undisturbed, and the enemy should repossess themselves of the territory, it would again be placed where it might strengthen the rebellion. Its capture was, therefore, legitimate; not for booty, but to cripple the enemy.[2]

1. 2 Wallace, pp. 419-20. 2. 22 Wallace, p. 94; 9 Wallace, p. 67; 13 Wallace, p. 137.

Nor does the exception apply to cotton alone. The principle embraces any property which, owing to its peculiar value, becomes a great resource whence the enemy draws the means of maintaining the war. In the nature of things it cannot be confined to any particular kind of property. The true test is not what particular species it may be, but its value to the enemy. If for any cause it is to an unusual degree the enemy's source of strength, it may be appropriated. It might be said that all private property adds in some measure to the enemy's strength, and so might be brought within the rule. But as before pointed out, the great mass of private property, the owners of which have not by their conduct rendered it forfeitable, is under modern practice exempted from seizure without some compensation. To property of this description the rule under discussion has no applicability. But it does embrace property of what nature soever it may be, which owing to its peculiar predicament with reference to the enemy becomes in a marked manner the foundation upon which his material strength is built, his credit established, and thence means supplied for prosecuting hostilities.

217. Not only may enemy property be appropriated, but under some circumstances it may be destroyed, regardless of the suffering thus entailed. Here, as in the other case, the modern rule is that it is not lawful to impose unnecessary hardships. What this authorizes is a matter wholly within the breast of the commander.[1]

Within the limitations of this rule the right to destroy can not be controverted. It is as well established as any other rule of war. If it be lawful to take away the property of an enemy in order to weaken or punish him, the same motives justify us in destroying what we cannot conveniently carry away. Thus we waste a country and destroy the provisions and forage that the enemy may not find a subsistence there; we sink his ships when we cannot take them or bring them

1. Bluntschli, I., par. 153; Twiss, Law of Nations, p. 125; Manning, p. 186; Hall, pp. 489-492.

off. All this tends to promote the main objects of the war, but such measures are only to be pursued with moderation, and according to the exigency of the case. This accords with universal practice. If such destruction be necessary in order to cripple the operations of the enemy or to insure our success, it is justifiable. Thus if we cannot remove captured property we may destroy it, but not in mere wantonness. We may destroy provisions and forage in order to cut off the enemy's subsistence, but we cannot destroy vines and cut down fruit trees without being looked upon as barbarians.

218. In some instances the right of an active belligerent to destroy enemy property has been carried far beyond this. Extensive territories have been ravaged, towns and villages sacked. This may be justified: *First*, as an act of retaliation, when the enemy, upon our own territory, has adopted a system of spoliation. This was illustrated in the last war between the United States and Great Britain, wherein the British military and naval forces, in revenge for alleged destruction of property by the United States Army in Upper Canada, laid waste much of the country adjoining the bays of the Atlantic coast and burned the capital and other public buildings at Washington; and though the conduct of the British commanders was stigmatized as mere wantonness because the circumstances upon which it was predicated were not such as to warrant the severe measures taken, still the principle of retaliation under proper conditions contended for by them, and which, erroneously as was claimed by the American Government, they relied upon to justify those measures, was never questioned. *Second*, when necessary to weaken the military power of a formidable foe, as illustrated by the burning of Atlanta, Georgia—an important strategic point, which could not be held—by General Sherman in 1864. And while it is true that a commander who should without necessity thus destroy property becomes the scourge of mankind, still, if that necessity exists, in order that the operations of the war may be successfully conducted, he has an undoubted right to

take such a step.[1] The rule of law is that destruction is justified only so far as it is indispensable.

219. The destruction of property in this manner cannot take place under military government except to punish a rebellion against established authority. To resort to such measures would crumble to pieces the foundation upon which such government is based. The temporary allegiance of the people is owing only on condition that they receive, in return, whatever degree of protection to liberty, persons, and property may comport with a proper military control. To destroy that property with the attendant violation of rights of person and liberty of action that would ensue, under any of the special pleas set up as excusing such conduct on the part of a belligerent operating against the enemy in the field, would at once dissolve the slender bonds uniting the government with the people. The latter would be justified in rising against conquerors who make use of their power only to despoil those whose territory they have overrun.

And herein is discernible an important distinction between the obligations of those who give temporary allegiance to a military and those who owe permanent allegiance to a regularly established government. While destruction of property and laying waste territory would release the former from transient obligations to a mere government of force, such measures, if adopted by the permanent government to thwart an invader would not justify subjects in rising in rebellion unless carried to the length of oppression. The reason of this distinction is readily seen. In the former case government is established over the people, perhaps with an implied consent, yet without that consent freely given. It is based on military force and that alone. The correlative duty between such government and its temporary subjects, as before remarked, is protection on the part of the former and, so long as that continues, quiet acquiescence on the part of the latter. Withdraw

1. Boyd's Wheaton, pp. 4 15, 421; Vattel, Book III., Chap. 9, Secs. 167-78; Manning, p. 186.

that protection, and *ipso facto* all obligations on the part of the governed disappear with it. But permanent and regularly established government, theoretically at least, rests upon the consent of the governed. Government in the latter case is the agent of the people for the protection of society and securing the happiness of its members. Every intendment, so far as the government is concerned, is in favor of the sufficiency of its authority to act. Therefore when, as was the case in Russia, first against Charles XII. and afterwards against Napoleon, extensive tracts are rendered desolate and even the capital burned, it was considered as exemplifying a noble, chaste, and self-sacrificing spirit of patriotism. Such violent measures are to be sparingly applied; only motives of transcendent importance can justify resort to them.[1] A government which should without necessity imitate the Czar's conduct would be guilty of a crime against its people. But let the necessity arise, the sacrifice be made; the people have no just cause of complaint; no covenant with them has been broken; while mankind for all ages applaud such heroic acts as giving clearest proof of indomitable courage and exalted public virtue.

220. How the conduct of the Russians in 1812, placing their all, both lives and property, at the disposition of the sovereign for defence, giving no heed to the necessary sacrifice, contrasted with that of the French people when their Emperor —he who had raised their country to the highest pitch of martial glory—was pushed back upon their native soil by a world in arms! No Moscows were found in France.

221. Having established by the concurrent authority of judicial decisions, the writings of publicists, the orders of executive departments, and the practice of military commanders that the right to seize upon or destroy enemy private property is a perfect one, modified in its application by the laws of nations as exemplified in the rules of modern warfare, we will now consider the kinds of property to which the rule applies.

1. Wheaton, Part IV. Sec. 347.

That property, whatever its nature, will be found either within or without the territorial limits of the appropriating belligerent. If in the former it is equally as in the latter predicament liable to be seized upon, destroyed, or otherwise disposed of. We have seen that the property of enemies found within the United States is liable to confiscation though its forfeiture requires an act of Congress authorizing it.[1] In this respect corporeal property and incorporeal rights, choses in action, are on the same footing. When the case of Brown *v.* the United States was before the circuit court in Massachusetts, Judge Story laid down the right to confiscate debts and enemy property found in the country as perfect under the law of nations. And Chief-Justice Marshall, in delivering the opinion of the Supreme Court in that case on appeal, observed that between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason drew no distinction, and that the right of the sovereign to confiscate debts was precisely the same with the right to confiscate other property found in the country. We are at liberty, therefore, to consider it an established principle that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy.[2] It is true that the chief-justice remarked that the enforcement of this right as to debts is contrary to universal practice, and upon this Chancellor Kent observes that it may well be considered a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.

The experience of this country, however, since that time has not sustained these views as to the softening of the older rule, This, as we have seen, was exemplified in the confiscation act of July 7, 1862.[3] In affirming the constitutionality of this act the Supreme Court remarked that the Government had the right to seize, confiscate, and dispose of all property of the

1. 8 Cranch, p. 110. 2. Kent, I., p. 65. 3. Chap. 195, Statutes at Large, 12, p. 589.

enemy subjects of every description.[1] Previously the Congress of the rebel Confederacy confiscated all property, movable, immovable, and all rights, credits, and interests held within the Confederacy by or for any alien enemy except public stocks and securities. Concerning this Earl Russell remarked that "whatever may be the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the act of the Confederate Congress in modern and more civilized times are rare, and have been so generally condemned that it may be said to have become obsolete."[2] But it will not be claimed that theories of publicists and interested protestations of statesmen regarding what should be the rule are of as much value in determining the right in this matter as are the legislative acts of the belligerent governments. The whole subject resolves itself into a question not of right, but of expediency. Granted that the rule generally observed is not to confiscate debts due the enemy from our own subjects, still, when a nation is either driven to extremities in the prosecution of a war, or for any reason it may reap an advantage by so doing, it can safely be assumed that it will be done. This country was more severely and thoroughly schooled in the laws of war during the four years of the Rebellion than had been possible through abstract speculations of scholars, statesmen, and jurists even in that many centuries.

222. During the Crimean War no attempts were made to confiscate private property of the enemy, not maritime, remaining in the country, or private debts, or to arrest private persons. The course pursued by the nations involved, and the fact that nearly all nations now have treaty stipulations allowing a certain interval of time for the removal of vessels and other property in case of war, go far towards changing the ancient practice. This circumstance lays the foundation for a change in the law of nations in this regard. This much safely can be said, private property is not now lost to the

1. 11 Wallace, p. 305. 2. Dana's Wheaton, notes 156, 157, 169.

owner unless its confiscation is specially ordered by the highest political authority of the State. Still it cannot be said that a nation, which for a cause that it may judge sufficient should seize and condemn such property, whatever its nature, had violated established law, although such a course as regards private debts due to enemy subjects would be considered as harsh in the extreme and out of harmony with the spirit of the age.[1]

223. The only exception to this rule is that debts due from the State itself to subjects of the enemy are not confiscable.[2] Everywhere in case of war funds credited to the public are exempt from confiscation and seizure. Phillimore considers the doctrine of the immunity of public debts as one which may happily be said to have no gainsayers.[3] Manning lays it down that such debts are invariably regarded as sacred during war, and considers them as entrusted to the public faith and not to be touched without its violation. To the same effect is Woolsey, who observes that "all modern authorities agree, we believe, such debts ought to be safe and inviolable. To confiscate either principal or interest would be a breach of good faith, injure the credit of a nation, and provoke retaliation on persons and all private property."[4] Amidst all the extreme measures resorted to by the respective belligerents during the wars waged between Great Britain and France under Napoleon public debts were never confiscated. "The distinction," says Dana, "seems to be that a loan to a State is in the nature of a permanent investment invited by the State itself, and the application is fairly to be made that the foreign creditor is not to lose it in case of war. The whole turns on this question, What has the foreign creditor a right to assume will be the result in case of war? The policy of a State to have its loans open to the people of all nations as investments secure against the chances of war is so obvious and paramount as not only to settle the practice, but to give coun-

1. Dana's Wheaton, note 156. 2. Bluntschli, I., Sec. 149; Manning, p. 173; Cobbett, p. 99; Ferguson, p. 285. 3. Vol. 3, p. 135. 4. Sec. 118.

tenance to the assumption of the creditor that the faith of the State was impliedly pledged to him to that effect."[1] The Confederate confiscation acts of 6th August, 1861, expressly excepted from seizure public stocks and securities held by alien enemies. Wildman says: "It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because he cannot be compelled like other men in an adverse way in a court of justice. So scrupulously did England, France, and Spain adhere to this public faith that during war they suffered no inquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in French funds and many French had money in ours."[2]

224. Article X. of the treaty of 1794 between the United States and Great Britain provided that neither debts due from the individuals of one to those of the other nation, nor shares nor moneys which they may have in the public funds or in the public or private banks, should in event of war or national difference be sequestered or confiscated. And the reason given was that it was unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other and in their respective governments should ever be destroyed or impaired by national authority on account of national differences and discontents.

225. What has thus far been said in regard to seizing and appropriating particular species of enemy property relates especially to transactions occurring within the territory of the appropriating belligerent. But military government in the sense here used is established over hostile territory alone. Hence the rules of law applicable in the former case are not

1. Dana's Wheaton, note 157; see Halleck, Chap. 15, Sec. 17 2. Vol. 2, pp. 10, 11.

necessarily those governing the appropriation of enemy property in the latter.

226. The generous spirit which now characterizes dealings with enemy property found within the territory of a belligerent power pervades not one, but all civilized nations. It is with the sole object in view of making that spirit manifest that the preceding remarks have been made. And while rules touching property so situated do not necessarily regulate practices under military government, yet they do indicate the principles which should guide commanders in dealing with enemy property in territory militarily occupied.

227. We shall now proceed to consider the rights, duties, and obligations of the commander, within a district over which military government has been established, regarding various kinds of property found therein belonging either to subjects of the enemy or the enemy State.

First, as to movable property of enemy subjects. This is not considered as transferred to the conqueror by the mere fact of belligerent occupation of the country. To work such a transfer of proprietary rights some positive and unequivocal act of appropriation is essential.[1] The invading or occupying army will take all movables which are directly or primarily capable of use in war. This is because they are in substance contraband of war.[2] Whatever military necessities may require, as live stock, provisions, and clothing, may also be taken. Whether or not compensation shall be made for movables of that description is a matter of State or belligerent policy solely.[3] The title to personal enemy property on land passes by capture.[4] Whatever of movable property or of rents and profits appertaining to immovable property he actually takes possession of he acquires good title to.[5] Moreover, property of persons residing in enemy country is deemed in law hostile because

1. Wheaton, Sec. 31; Bluntschli, I., Sec. 143; 9 Wallace, 540. 2. 13 Wall, p. 136. 3. Wheaton, Dana's note, p. 169. 4. Whiting, War Powers, p. 48; Vattel, Book III., Chap. 13, Sec. 196; Halleck, Chap. 19, Secs. 7 and 12; 92 U. S., p. 195; 9 Wallace, p. 540. 5. Manning, p. 188.

of its situation, and is subject to seizure without inquiring regarding the nationality, opinions, or predilections of the owner.[1] If for any reason it should be exempt it is for the owner, if called upon, to establish that fact.[2] The rule sometimes laid down, that to become the property of the captor firm possession of movables must be held for twenty-four hours[3] is not in accord with either the practice or the better authorities.[4] "Rights of possession in private property," says the Supreme Court of the United States, "are not disturbed by the capture of a district or country or of a city or town until the captor signifies by some declaration or act, and generally by actual seizure, his determination to regard a particular description of property as not entitled to the immunity conceded in conformity with the humane maxims of public law"; and again, 'the right of possession in private property is not changed in general by capture of the place where it happens to be, except upon actual seizure in obedience to the orders of the commanding general."[5]

228. The question as to just what is necessary to vest perfect title in the conqueror to movable private property on land becomes of practical importance in case it again comes under dominion of the now vanquished State.

By the recognized right of *post liminium*, things taken by the enemy are restored to their former status of former owners on coming again into the power of the nation to which they belonged.[6] In return for their allegiance the sovereign is bound to protect the persons and property of his subjects and to defend them against the enemy. When, therefore, a subject or any part of his property has fallen into the enemy's possession, should any fortunate event bring them again into the sover-

1. Whiting, p. 57; Vattel, Book III., Chap. 5, Sec. 75; 2 Black, p. 674; 97 U. S., p. 60; The Vrow Anna, 5, C. Rob., p. 17; 2 Wildman, Int. Law, I., p. 9. 2. Vattel, Book III., Chap. 5, Sec. 75; 2 Wallace, p. 275. 3. Kent, Vol. 1, p. 110. 4. See authorities, note 4, p. 221, *ante;* also Young *v.* U. S., 97 U. S., p. 60. 5. 9 Wallace, pp. 540-41. 6. Vattel, Book III., Chap. 14, Sec. 204; Kent, 1, p. 108.

eign's power, it is undoubtedly his duty to restore them to their former condition, to establish the persons in their rights and obligations, to give back the effects to the owners—in a word, to replace everything on its footing previous to capture.[1] But title by capture is as valid as any other; and when by the proper act title to movable property is divested out of the enemy owner and vested in the conqueror, the property becomes in law that of the conqueror. If he then alienate it the alienee, except he be a subject of the deposed sovereignty, has a perfect title against the world, and the right of *post liminium* could not apply.[2] The exception just mentioned is based on public policy; no nation recognizes the right of its subjects pecuniarily to assist the enemy by becoming purchasers of property appropriated under such circumstances—an act at variance with the plainest obligations of good citizenship.[3] If, however, the conqueror's title had not become complete, neither could that of his alienee be so; and should the property again pass under the dominion of the former sovereign, the alienee could be ousted from possession under the broad and sacred right of *post liminium*. To protect purchasers it thus becomes practically important to determine what acts vest perfect title to movable private property in the conqueror. And it is believed that the true test is that laid down by the Supreme Court before mentioned, namely—"actual seizure in obedience to the orders of the commanding general."[4]

"The actual seizure" of this rule does not mean possession merely, but possession with the ability to retain and utilize it as one's property. Upon this point it has been well observed that, supposing a foreigner come into our country, buys a portion of the booty which a party of enemies have just taken from us, our men who are in pursuit of this party may very justly seize on the booty which that foreigner was over-precipitate in buying. Apposite to this, Grotius quotes from De Thou the instance of the town of Lierre in Brabant, which hav-

1. Vattel, Book III., Chap. 14, Sec. 205. 2. Manning, p. 190. 3. Halleck, Chap. 19, Sec. 5. 4. U. S. *v.* Padelford, 9 Wallace, p. 541.

ing been captured and recaptured on the same day, the booty taken from the inhabitants was restored to them. The natural reason of the conduct adopted towards the inhabitants of Lierre was that the enemy being taken, as it were, in the fact and before they had carried off the booty, it was not looked upon as having absolutely become their property or been lost to the inhabitants.[1]

"Movables," says Kent, "are not entitled by the strict rules of the laws of nations to find the full benefit of postliminy unless retaken from the emeny promptly after capture, for then the original owner neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them. Real property is easily identified, and, therefore, more completely within the rights of postliminy; and the reason for the stricter limitation of it in respect to personal property arises from its transitory nature and the difficulty of identifying, it and the consequent presumption that the original owner had abandoned the hope of recovery."[2] From all of which we infer that seizure

1. Vattel, Book III. Chap. 13, Sec. 196. 2. I., p. 108; Vattel, Book III., Chap. 14, Sec. 209.

NOTE.—In considering the effects of *post liminium* in connection with military government, Mr. Hall reduces them to three: (1) Certain limitations to the operation of the right of *post liminium* in the case of occupied territory. (2) The effect of acts done by an invader in excess of his rights. (3) The effect of the expulsion of an invader by a power not in alliance with the occupied but vanquished State.

As to the first, *post liminium* does not, except in a very few cases, wipe out the effects of acts done by the invader which it is within his competence to do. Judicial acts under his control, when not of a political complexion; administrative acts which take effect during continuance of his control; various acts done by private persons under sanction of municipal law, remain good. Otherwise invasion would paralyze the social fabric. As between State and individuals the evil would scarcely be less. For instance, it would be hard that payment of taxes under duress should be ignored, and it would be contrary to general interests that sentences passed upon criminals should be annulled because military government had ceased. Political acts by the invader fall, of course, with his control. So do all punitive sentences for acts which were simply prejudicial

under competent military authority with a view to appropriation, together with the power to hold, and the actual retaining in possession until proprietary rights can fairly be exercised over it, passes legal title to movable enemy's property taken in territory subject to military government.

229. Thus far corporeal property has alone been treated of, but the same rules of appropriation govern as to incorporeal rights appertaining to things—they follow the fortune of the things themselves.[1] This rule, analogous to that which governs in case of incorporeal rights appurtenant and accessory to real property, is founded on reason and universal custom. Whatever of rents or profits adhere to or issue out of movable property on land must, equally with like incidents attaching to real property, be subject, under military government, to appropriation. In the ordinary course of business the former as compared with the latter will be insignificant in value; still, on that account, the right to seizure is none the less clear. On principle there exists no reason to distinguish between these two sources of revenue. Either or both may be levied upon by the conqueror to replenish his treasury, cut off the possibility of their being transmitted to the enemy, and so increase the coercive power brought to bear upon him.

X to the occupier's military interests without being crimes or offences against municipal law.

Upon the second point it is true that if the invader exceeds his legal authority when, for instance, he alienates public domain, the reinstated government may ignore his acts. The principle of *post liminium* here applies.

Upon the third point, which is of less practical importance than the others, it may be asserted, that so soon as mere military government has ceased because the invader is driven out by a third power not an ally of the deposed State, the principle of *post liminium* properly would restore the latter to its original jurisdiction. But if military has by any means become permanent government, then it would be for the third power to decide for itself whether it would admit the original State to resume its sway.—[International Law, pp. 450-53.]

1. Wheaton, Dana's note, 169, pp. 433, 439.

Of these incorporeal rights it may be remarked that they cannot in themselves be objects of possession; they are not external things on which the conqueror can lay his hand. Their existence is merely an idea and abstract contemplation, though their effects may be frequently objects of one's bodily senses. They are rights which exist in mental apprehension as connected with a given subject to which they are attached and with a material object upon which they can be exercised. It is, therefore, only by the actual possession of the corporeal thing to which the incorporeal right attaches that the conqueror may be considered as possessed of the latter, but if he have the former, the latter is considered as going with it.

230. With regard to private debts between parties the case is different.[1] "It is by no means to be admitted," said the United States Supreme Court, "that a conquering power may compel private debtors to pay their debts to itself, and that such payments extinguish the claims of the original creditor. It does indeed appear to be a principle of international law that a conquering State, after the conquest has subsided into permanent government, may exact payment from local debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns the debtor is not compelled to pay again. This is the rule stated in Phillimore on International Law.[2] But the principle has no applicability to debts not due to the conquered State. Neither Phillimore nor Bynkershoek, whom he cites, asserts that the conquering State succeeds to the rights of a private creditor.[3]

231. Incorporeal rights of a purely personal character adhering to the person do not pass to the conqueror by the mere fact of his occupying a region in which the owner of the rights resides, or even by the possession of his person. Nothing short

1. 96 U. S., p. 176; Manning, p. 188. 2. Vol. 3, Part XII., Chap. 4. 3. Planters' Bank *v.* Union Bank, 16 Wall, pp. 496-97; Halleck, Chap. 15, Sec. 18; also Chap. 32, Sec. 26; Cobbett, p. 155, mentions that debts due the deposed State are differently regarded.

of the reduction of the owner to slavery—no longer a permissible proceeding—confiscates such rights. In this class come debts and other personal obligations. 1

232. Legal proceedings in courts established by or permitted to perform their functions under military government cannot impair the rights of citizens of the occupied territory who are compulsorily yet only temporarily absent within the lines of the enemy and so out of reach of process of those courts. This principle, affirmed in Dean *v.* Nelson, 2 has been reaffirmed in numerous decisions of the United States Supreme Court. In the case mentioned, Dean, a resident of Cincinnati, Ohio, was, at the breaking out of the Civil War, owner of a large amount of capital stock in the Memphis, Tennessee, Gas Light Company. Before commercial intercourse was interdicted between loyal States, including Ohio, and those in insurrection, including Tennessee, he sold this stock to Nelson, a resident of Memphis. A note, duly executed by the latter, was given to Dean, and a mortgage upon the guarantee's interest as a stockholder was given to secure payment. The Civil War rapidly intervened; the conditions of the note could not be complied with. Memphis was in rebel enemy territory; Cincinnati in a loyal State. While war was flagrant, and Memphis remained under rebel control, Nelson transferred some of this stock to his wife and other shares to one May. On June 6, 1862, one year after the sale by Dean, Memphis was captured by the Union forces and military government established there and in the immediate vicinity. Nelson and his wife remained in the city after its capture, so long as permitted by the Union commander, but May resided permanently within the Confederate lines. In retaliation for some guerilla outrages perpetrated in the vicinity the Nelsons were expelled from the Federal lines and not allowed to return, although they requested permission. In September, 1863, Dean filed a petition before the civil court or commission instituted by the Federal commander at Memphis in April preceding for hearing

1. Dana's Wheaton, note 169, p. 439. 2. 10 Wallace, 158.

and determining complaints and suits of loyal citizens, setting forth all the facts and praying for the foreclosure of the mortgages, because of the alleged failure on the part of the mortgagor to fulfill the conditions subsequent of the note. Nelson and wife and May were made defendants; a return "not found" was entered, and publication of notice to them to appear was made in accordance with the laws of Tennessee existing prior to the Rebellion. No appearance being made, decree went for the plaintiff.

After the Rebellion was suppressed and when hostilities had ceased, the civil courts of the land resuming their accustomed sway, the defendants filed a bill in the Circuit Court of the United States for West Tennessee praying that the stock might be decreed as belonging to them, and for general relief. The Circuit Court decreed accordingly, in substance, yet taking care to cover the equities affecting all parties; but in effect it reversed the decision of the civil commission. Dean appealing to the Supreme Court, the decree of the Circuit Court, modified in important particulars, was affirmed. The proceedings before the civil commission, it was remarked, were fatally defective; the defendants in those proceedings were within the rebel lines, which it was unlawful for them to cross; two of them had by military authority been expelled the Union lines and had not returned, the other being permanently without those lines. Under such circumstances notice to them through a newspaper was a mere idle form; they could not lawfully see or obey it; therefore, as to them the court concluded that the proceedings were wholly void and inoperative.

The principle was thus established that even in time of war one could not first be rendered powerless by superior enemy force to defend himself and while in that situation be deprived by that enemy of his property under the forms of judicial proceedings.

The case of Lasere *v.* Rochereau was substantially to the same effect as the preceding. Lasere, a resident of New Orleans, was one year, after the capture of that city by the Fed-

eral forces, expelled the Union lines, and there remained until after the close of the war. During his absence certain premises of his were sold in New Orleans on process instituted to foreclose mortgages. Immediately after the cessation of hostilities Lasere sought to vacate these proceedings. His efforts resulted in an adverse judgment in the Supreme Court of Louisiana. Being taken by writ of error to the United States Supreme Court, the judgment was there reversed. "It is contrary to the plainest principles of reason and justice," said the court, "that anyone should be condemned as to person or property without an opportunity to be heard. Scant time was given the plaintiff in error to prepare for his removal within the Confederate lines. During his absence he had no legal right to appoint an agent or to transact any other business in New Orleans. Lasere doubtless knew nothing of the proceedings against him, and if he had such knowledge, he was powerless to do anything to protect his rights."[1]

Closely allied with the cases of Nelson and Lasere was that of McVeigh *v.* United States, wherein the Supreme Court, after stating the recognized rule of law, that an alien enemy, though he has not the right to sue, may be sued in the courts of the adverse belligerent, maintained that when so sued he had a right to appear and defend. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. The court could not hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.[2] The case arose in this wise: Under the provisions of the confiscation act of July 17, 1862, a libel of information was filed in the United States District Court for Virginia for the forfeiture of certain real and personal property situated in that State belonging to McVeigh, who it was alleged was a rebel and a member of the Confederate Army. At the hearing McVeigh appeared by counsel,

1. 17 Wallace, p. 437. 2. 11 Wallace, p. 267.

made a claim to the property, and filed an answer showing that at the time he was a resident of the city of Richmond within the Confederate lines. On motion of the attorney for the United States, the claim, answer, and appearance were stricken from the files, and for the reason that, being in the position of an alien enemy, he could have no *locus standi* in that forum. Decree going in favor of the United States, it was affirmed by the Circuit Court, but reversed by the Supreme Court on the ground that McVeigh had a right to defend himself wherever judicially attacked, and, therefore, that the striking from the files was error. The courts in which proceedings were instituted and carried on in this case formed, it is true, the regular judicial system of the United States. But inasmuch as the establishment of tribunals for trial or civil cases in territory subject to military government by military authority has been declared to be legal, it is believed that the same rule of justice would there apply, and that an alien enemy proceeded against in his property before such military courts would be granted the privilege of appearing and defending himself. Not only would fair dealing demand this, but we have seen that in the cases of Nelson and Lasere the proceedings were declared void because the parties defendant were prevented by the same paramount authority which organized and protected the courts from making any defence.

233. When the city of Manila was captured, August 13, 1898, by the American troops, members of the family of Doroteo Cortes made their appearance there and sought to resume possession of their property that had been arbitrarily taken from them by the Spanish authorities because of alleged disloyalty. The military governor joined in the view that the Cortes were not entitled to restitution under the circumstances, and withheld it. The Attorney-General, however, took a different view, holding that the "military authority of the United States was under no obligation to sustain or support arbitrary proceedings for confiscation of property of Spanish subjects on the ground of disloyalty, and when proceedings taken for that

purpose have resulted, either by abandonment or otherwise, in the original owners coming again into possession of their property."[1]

234. As to immovable private property in territory subject to military government the same rule applies as to movable property. The mere fact of military occupation does not affect it. If the conqueror proposes to appropriate either the property itself, or the rents, profits, or other incorporeal interests issuing out of or attached thereto, it remains for him to exercise this his undoubted right by some special act.[2] It has been asserted that the right of appropriation should extend no further than to movable property, chattels, which can be carried away. This on the ground that as war is a temporary relation of nations, the conduct of the parties thereto should be regulated accordingly; and as real property must remain after the termination of the war, and may revert to its former owners after peace, it ought not to be alienated by the conqueror so long as the war continues and until the conquest is complete.[3] The conclusiveness of this argument is not conceded. The necessity of self-preservation and the right to punish an enemy, to deprive him of the means of injuring us by converting those means to our own use against him, lie at the foundation of the rule which sanctions the appropriation of enemy property at all, and it is difficult to understand why that right should be limited to any particular kinds. The true test on principle must be this: First, is this hostile property? Second, will its appropriation strengthen us and weaken the enemy? As to the first, its mere location in territory subject to military government stamps on it the enemy character;[4] and as to the second, the fact that possession by the vanquished party, if not of the property itself, at least of rents and profits arising therefrom, may increase his pecuniary resources and so enable him to maintain the war,

1. Opinions Att'y-General, Vol. 22, p. 351. 2. Dana's Wheaton, p. 438; Halleck, Chap. 19, Secs. 2, 12, also Chap. 32, Sec. 12. 3. Manning, p. 185. 4. Whiting, p. 57; Prize Cases, 2 Black, p. 674; Vattel, Book III., Chap. 5, Sec. 75; 9 Cranch, 197.

justifies his opponent in appropriating both property and profits.[1]

235. If the territory be not completely conquered, its people subjugated, the laws of war regard its occupation, although *de facto* accomplished, yet as temporary only until its fate is determined by the treaty of peace.[2] Having possessed himself of the provinces, towns, lands, and buildings in the district from which by force of arms he has excluded the enemy, he has a perfect right to retain and use them in such manner as will best secure his interests. Incorporeal rights which adhere to or issue out of immovable private property become, when reduced into possession, personal property, and are subject to the rules already discussed regarding its disposition.

236. The mere possession of the documents by which the existence of those incorporeal rights are usually evidenced, without the manual possession of the immovable property to which they appertain, would not of itself give the belligerent authority in law to gather into his own hands the moneys which are the usual and natural fruits of such rights.[3] His receipt to the obligor under such circumstances would not release the latter from his obligation. In spite of such payment, the original obligee after the enemy had retired could proceed to recover whatever was his due. The reason for this is, that so far as private property is concerned the rights of the conqueror extend during military government no further than those things that he has physically reduced into his possession.

237. That the authorized agents of military government have a right to seize upon immovable equally with movable private property found in the territory occupied is indisputable. But it does not follow that the title to each species is the same. On the contrary, it is essentially different.[4] It has been pointed out that from considerations of public policy the vanquished power would not recognize the right of its subjects, now owing a temporary allegiance to the military government, to purchase

1. Harrison *v.* Myer, 92 U. S., 111; Twiss, Law of Nations, p. 126. 2. 1 Peters, p. 542. 3. Manning, pp. 188-89. 4. Manning, p. 185.

from agents of the latter captured movable property of fellow-subjects; but, with this exception, the purchaser of movable captured property on land acquires a perfect title so soon as the property is in the firm possession of the captor.[1] On the other hand, the purchaser of immovable private property takes it at the risk of being evicted by the original owner when the permanent government has returned to power. This upon the principle of *post liminium.*

238. As under military government the conqueror rules by virtue of the sword alone, his title extends no further and lasts no longer than his physical force excludes the enemy. While he thus rules he can do with property found in the territory as either inclination or policy dictates. That which he can seize, convert to his own use on the spot, sell to others, or carry away, he can make his own absolutely. But the rule of superior force marks the limitation of his right. When he ceases to exercise th .t force and retires from the country all rights he had acquired over immovable property at once cease.[2] The ancient owner, if it has been disposed of, now may return to claim and re-possess what of real property belongs to him. If, however, the conquest becomes permanent, the title which the conqueror has conveyed to the purchaser becomes indefeasible. It was before a good title against all except the original owner under the right of *post liminium*, which complete conquest has extinguished. The conqueror is estopped from assailing the title of his purchaser. He sold the rights which he acquired by conquest; neither a formal treaty of peace ceding the territory, nor long acquiescence of the people which sometimes is held to have the same effect as formal cession, can add to these rights; at most it can only confirm that which the conqueror already possessed. This being so, the conqueror having disposed of all his rights under conquest and acquired none since, he can not dispute the title of his alienee to immovable property; the original owner is not in a position to

1. Kirk *v.* Lynd, 106 U. S., 317; Young *v* U. S., 97 U. S., p. 60. 2. See the *Astrea*, 1 Wheaton, 125.

question the acts of the permanent government, and the result is the complete extinguishment of the ancient title.

239. In most civilized countries immovable private property is much more valuable than movable. Its sale would return larger sums into the coffers of the conqueror, adding greatly more to his warlike resources. His object in alienating property is to add to those resources and diminish those of his antagonist. As subjects of the displaced government can not, consistently with allegiance to their permanent sovereign, become purchasers of movable private property, so much the greater are their obligations to refrain from purchasing the more valuable immovable property, the direct result of which would be that they would furnish the means to enable the enemy to prosecute the war. This they may not do. The promptings of patriotism should deter them, though interest tempts them from the path of duty. But of this they may be certain: They not only risk the loss of their purchase money on the restoration of the original sovereign to his dominions, but they expose themselves to punishment for voluntarily assisting the enemy. If, however, they choose to stifle sentiments which should ever animate loyal breasts, and brave the just resentment of the government to which they owe paramount allegiance, they run no further risks; and if temporary conquest settles into established government, all the rights they have acquired will be confirmed. Subjects of the conqueror may become purchasers with no other risk than that of being ousted by the original owner on the restoration or recapture of the immovable property. The same may be said of purchase by the subjects of a neutral State. But the latter might be deemed in some cases a hostile act. The effect of it is to render pecuniary assistance to one party to the war to the prejudice of the other. It is liable, therefore, to be regarded as not within the limits of legitimate neutral conduct, and so attach to the purchaser the character of an enemy to the power adversely affected.[1]

1. Halleck, Chap. 19, Sec. 5.

240. The Roman law, often asserted with unrelenting severity, was to take all property, both personal and real, from the vanquished.[1] Nor is this matter of surprise. Wars were carried on between popular republics and communities. States possessed very little, and the quarrel was the common cause of all citizens. Such, too, was the fate of the Roman provinces subdued by the northern barbarians on the decline and fall of the western empire. Most of the lands belonging to the vanquished provinces were confiscated and partitioned out among the conquerors.

William of Normandy pursued the same policy upon the conquest of England. Blackstone, indeed, denies this, and asserts that dividing up the lands of the subjugated English resulted not from the conquest of the island, but from the forfeitures following the numerous rebellions of the English nobility.[2] But surely few of those revolutions, which both in history and in common language have been denominated conquests, appear equally violent or were attended with so sudden an alteration both of power and property. The Normans and other foreigners who followed the standard of William, having totally subdued the natives, pushed against them the right of conquest to the utmost extremity. The Britons were universally reduced to such a state of meanness and poverty that the English name became a term of reproach.

Since that period, however, among the civilized nations of Christendom, conquest, even when confirmed by treaty of peace, has been followed by no general or partial transfer of landed property.[3] It may be laid down as a principle that so far as private immovable property is concerned, the modern usage of nations which has become law would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if it were confiscated and private rights annulled.[4] The inhabitants of the territory militarily occupied change temporarily their alle-

1. Wheaton, Secs. 346, 347. 2. Commentaries, 2, p. 48. 3. Wheaton, Part IV., Sec. 346. 4. 7 Peters, pp. 86, 87.

giance. Their relation to their former sovereign is for the time being dissolved, but their relations to each other and their rights of property remain, as a rule, undisturbed.[1]

241. As the establishment of military government does not, except in pursuance of special orders to that effect, impair rights to private property, it follows that the power of the people to alienate such property exists the same as before occupation. It is a right which inheres to ownership. Unless the latter be qualified by the victor, it remains in full vigor during the military possession. In this respect a municipality or corporation has the same rights as a natural person, and transfers which they may make under such circumstances are *prima facie* as valid as if made in time of peace. Nor is the private property of a sovereign in this regard in a different situation from that of a private subject. If alienation be forbidden by the conqueror, it will be an exception to the general rule, and he who asserts it must clearly establish the fact.

242. The acts of a *de facto* revolutionary government affecting property found within territory controlled by it will depend for their validity upon the result of the contest. If successful, it will in reason confirm all acts regarding property, either private or public, adopted to strengthen it during its struggle for existence.[2] This was the course pursued by the States and the government of the Confederation during and subsequent to the War of the American Revolution.[3] On the other hand, should the rebellion be suppressed, the legitimate government will treat these and all other measures emanating from the defunct government as policy shall determine. There has never been a wider field for the exercise of this discretionary power than that offered the United States after the Civil War. Numerous causes covering in principle all varieties of property transactions undertaken by authority of the so-called Confederate Government were passed upon

1. Fifth Robinson's Reports, p. 106. 2. Chase's Decisions, p. 136. 3. 9 Wheaton, pp. 267, 284; 4 Cr., p. 415; 6 Cr., p. 286; 3 Dall, 1; 1 Wheaton, p. 300; 4 Wheaton, p. 453; 11 Wallace, p. 312.

by the Supreme Court of the United States, and the broad ground maintained by it that all acts done pursuant to that authority and in aid of the Rebellion were illegal and of no validity, nor could the power of the United States courts be successfully invoked to confirm property interests originating in such authority.

It was not meant by this that every business transaction which took place within the Confederacy would be treated as a nullity if brought finally before those courts. In some instances they were considered as if valid and upheld; nor was it an easy matter to lay down a strict rule by which would be determined what would or would not thus be sustained. Generally, acts necessary to peace and good order among citizens, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, providing remedies for injuries to person and estate, and similar acts, were sanctioned; while all those in furtherance or support of rebellion or intended to defeat the just rights of citizens of the legitimate government were pronounced illegal and void.[1]

In this view it was held that those who during the war aided and abetted in the prosecution of a citizen within the lines of the Confederacy, before a district court organized by that government, for giving assistance to the Union forces, were liable therefor, after the return of peace, to suit before a United States court. The act of the Confederate Congress creating the tribunal was declared to be void, the court a nullity and without rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted.[2] So when within the territory of the Rebellion one sold supplies knowing that they were to be used by the Confederate Government it was held that action would not lie in the national courts after the war to recover the purchase price.

1. 7 Wallace, p. 733. 2. 9 Wall, p. 201.

The guilty knowledge of the seller vitiated the transaction.[1] In another case a loyal resident of a loyal State, acting under a pressure of overwhelming necessity, left certain personal property within the insurrectionary district, where, pursuant to the confiscation acts of the rebel government, it was sold and the proceeds turned into the Confederate treasury. In an action against the purchaser, brought in the national courts after the suppression of the Rebellion, it was held that the sale was void.[2]

243. Amidst the important and far-reaching decisions of the Supreme Court of the United States relating to the validity of acts under *de facto* governments instituted during the Civil War it was occasionally necessary to make nice distinctions, but the task was performed in a manner which must ever redound to the ability, patriotism, and profound legal learning of that tribunal, and thereby were established principles which will guide future generations in their efforts to cope with insurrection and in the rehabilitation of the State.

One of the most interesting and in its effects magnanimous decisions was delivered in the case of Thorington *v.* Smith, heretofore alluded to.[3] It appeared that Thorington, in November, 1864, while Alabama was controlled by the insurgents, sold certain lands there to the defendant for $45,000. At the time there was not in circulation in that State either gold or silver or United States currency. The only money in use was treasury notes of the so-called Confederate Government, which in form and appearance resembled bank bills. In these $35,000 of the purchase money was paid. A note was given for the balance, payable by its terms in dollars, by which term these Confederate notes were designated. When the Rebellion collapsed these notes became valueless. Thorington then filed a bill to enforce a vendor's lien upon the land sold, claiming the balance of the stipulated purchase money in lawful money of the United States. The court below held that the contract

1. 12 Wall, p. 347. 2. 12 Wallace, p. 457; 111 U. S., p. 51. 3. 8 Wallace, 1.

was illegal because payment was to be made in Confederate notes. But this judgment was reversed by the Supreme Court of the United States, which held that such contracts should be enforced to the extent of their just obligation.

At first blush it might seem that this was going a long way towards encouraging rebellion. The currency, the nature of which was here involved, was issued on the authority of an insurrectionary government. For the court of last resort of the legitimate government, therefore, to uphold contracts payable in this currency might appear to be giving aid and comfort to the enemy. In examining this question the court remarked that the so-called Confederate Government was at the time in Alabama absolutely supreme in authority; that to the extent of its actual supremacy, however gained, in all matters of government within its military lines its power could not be questioned; that though this supremacy did not justify acts of hostility to the United States, it made obedience to its authority in civil and local matters not only a necessity, but a duty; that the notes in question constituted almost exclusively the currency of the insurgent States; that while the war lasted they were used as money in nearly all the business transactions of many millions of people, and, therefore, they must be regarded as a currency imposed on the community by irresistible force; that contracts stipulating for payments in this currency could not be regarded for that reason only as made in aid of domestic insurrection; they had no necessary relation to the hostile government; they relate to the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame except when proved to have been entered into with actual intent to further insurrection. In this view it was held that the Confederate currency was just as legal as that imposed by the British on the people of Castine when that place was held by the enemy in 1814, or that imposed on the population of Tampico when held by the United States forces in 1846. It is true that the domination in the latter cases originated in lawful

acts of regular warfare; in the former in acts of insurrection; but in all and equally it was the rule of irresistible force.

It is plain that this decision was based on expediency. It was unsupported by and in some degree at variance with the general doctrine of the turpitude of consideration as affecting the validity of contracts.[1] But it was deemed necessary to establish the principle involved to prevent the grossest injustice in reference to transactions of the people throughout the Confederacy for several years in duration. The principle, however, embraced only transactions between man and man in the ordinary affairs of society, and gave no protection to any which went directly to the support of the insurgent government.[2] Therefore, when one purchased of Confederate agents certain bales of cotton, in territory controlled by the insurgents, and the purchase money went to sustain the Rebellion, the buyer was not permitted to recover the value of the cotton from the United States under the captured and abandoned property act, it having been secured by the forces of the United States before he disposed of it.[3] "That any person owing allegiance to an organized government," said the court, "can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its existence, and then in a court of that government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts."

It would seem that the principles here involved cover the case of property belonging to subjects loyal to the regular government, yet who continue to live under circumstances of greater or less duress in territory dominated for the time being by the revolutionists. The question is somewhat complicated, but the underlying principle would seem to be sufficiently clear from embarrassment.

1. Story, Conflict of Laws, Sec. 253. 2. 97 U. S., p. 454; 12 Wallace, p. 347; 20 Wallace, p. 459; also p. 467; 15 Wall, p. 448; 19 Wall, p. 556; 91 U. S., p. 3. 3. 20 Wallace, p. 459; 17 Wallace, p. 570.

244. It has been decided, on the one hand, that under the laws of war all such residents are considered enemies, their property hostile without regard to the individual opinions of the persons affected;[1] and on the other hand, as we have seen, that property of loyal citizens of loyal States, the property being situated within rebel districts, could not be purchased under the Confederate confiscation acts of the rebel government and the buyer acquire valid title; yet if it be considered enemy property solely because of its location in the insurrectionary territory, why should not title pass? If for all purposes it be truly enemy property, why cannot the enemy legally dispose of it? The conclusion drawn from the decisions is that it is not regarded as enemy property for all purposes. The military forces of the regular government might properly so regard it, but in transactions affecting such property and emanating in authority assumed by the rebel government, it was permitted to go still further and inquire as to the loyalty of the owner of the property affected.[2]

If, however, loyalty to the regular government be the criterion by which is to be determined the voidability of transactions of the rebel government regarding property situated within its dominion, why should the loyal citizen whose unhappy lot it is to live there, under circumstances of complaint, perhaps, and subject to the vindictive measures of the enemy, receive less consideration as to rights of property than he whose lot is cast on loyal soil? It is true that the Supreme Court has said that it is the duty of a citizen, in case of civil war, who is a resident in the rebellious district, to leave it as soon as practicable and adhere to the regular established government.[3] Yet when we consider the difficulties surrounding one in his position—that to seek the protection of the regular government may be an act proscribed by that under which he lives and which has at its disposal his property, his life, and all those

1. 2 Black, p. 674; 92 U. S., p. 194. 2. Knox *v.* Lee, 12 Wallace, p. 457; Williams *v.* Bruffy, 96 U. S., pp. 176, 187. 3. The *William Bagalay*, 5 Wallace, p. 337.

domestic relations on which society is built, and which it is the policy of all good government to preserve inviolate—it cannot be doubted that so far as this is consistent with successful war measures great tenderness will ever be shown by the legitimate government toward such unfortunate yet faithful citizens, even though they should not brave the resentment of the temporary government by attempting to leave its domain. If their property be seized and disposed of by that government, the purchaser will be charged with notice of the illegality of the sale should the courts of the regular government subsequently pass upon the transaction. This legal knowledge—in law moral turpitude—will attaint and render void the transactions. To him who braving the frowns of rebellion has remained true to his allegiance the re-established government says, "Well done, good and faithful servant." Nor can it be doubted that its utmost power will be put forth to save him harmless in his property from the effects of malignant attacks of the temporarily dominant, but now vanquished enemy.

245. Some of the most interesting cases that came up for decision under the military government of the United States since 1898 grew out of the effect of military occupation, or property rights attaching to things corporeal or incorporeal.

The military governor in Porto Rico during the occupation ousted certain civil officials from office. The Supreme Court of the United States saw in Section 716, Revised Statutes, no authority to review the proceedings of military courts on *certiorari*, remarking that such were not courts either of law or equity within the meaning of Article III. of the Constitution.[1]

It was held that licenses granting rights on the public domain should be revocable in their nature, to continue no longer than military jurisdiction lasted and thereafter until the civil powers could make suitable disposition. The principle in-

1. U. S. Reports, Vol. 179, pp. 126-7.

volved was that only the political department of the government permanently could alienate the public domain.[1]

If military interests were sufficiently subserved, measures might be adopted that tended to render the commercial value of vested rights less, through a setting up competition against the latter.[2]

Public works and improvements might be suspended for reasons of which the military authorities would judge, even if this interfered with vested rights.[3]

The binding of Cuba or any of its municipalities to large expenditures and a continuing debt was a policy not favored except upon grounds of great and pressing necessity.[4]

1. 22 Opinions Attorneys-General, p. 548; 23 *ibid.*, pp. 226, 562; 20 Wallace, p. 387; Magoon, pp. 353, 356, 450, 497. 2. 22 Opinions Attorneys-General, p. 409; 23 *ibid.*, p. 427. 3. 22 *ibid.*, p. 523. 4. 22 *ibid.*, p. 410

CHAPTER XI.

Rights Regarding Public Property.

246. We will consider, secondly, the rules governing the seizure and appropriation of public property. And here it may be said generally, that whatever of tenderness is shown for private property under military government does not extend to that of the deposed State. The conqueror seizes upon the possessions of the State.[1]

247. It is the tendency of States in all systems of government to treat the transfer of corporeal movable property—what the common law calls chattels—so far as possible, as giving the full title to the possessor. The simple rules of war take the same direction. The belligerent occupant is treated as acquiring a complete title to all corporeal movables of the hostile State which come under his actual control. He may by leaving them behind him, and by their coming back to the possession of the former State, lose his title; but if he has perfected it by actual possession and the exercise of his right of appropriation, they are his, and the former State retakes them, if at all, as a recapture for its own benefit by a new title. All incorporeal rights in movables follow the fortunes of the movables. They pass to the conqueror, if they be rights, and if they be servitudes or liens, the conqueror takes the things purged of the servitudes or liens.[2]

248. The title to property of a vanquished enemy State may be considered by capture as immediately divested from the original owner and transferred to the captor. This general principle is modified by the positive law of nations regarding both that which is movable and what is immovable.

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1. Vattel, Book III., Chap. 13, Sec. 200; Manning, p. 182; American Instructions, Sec. 11, clause 1. 2. Dana's Wheaton, note 169.

249. First, attention will be confined to movable property, concerning which the rule is the same as regards movable private property. Military occupation, without some special act appropriating it, does not vest title in the conqueror. This is done only by taking measures to reduce the property into his firm possession and there retaining it sufficiently long to exercise fairly over it the rights of ownership. Having passed into hostile possession, if alienated by its new owners, the vanquished State can only require title through some of the regular methods of procuring property.[1] Its original claim has been completely extinguished. This is not because there is any insuperable difficulty in recovering such property under the right of *post liminium*. If the property be fully identified it is as easy to restore what is movable as what is immovable. It was the common practice of the ancients to do this. But the difficulty of recognizing things of this nature and the endless disputes that would arise between adverse claimants, now that movable property is almost infinite in variety and quantity, have been deemed motives of sufficient weight for the general establishment of a contrary practice.

Again, movables are either warlike stores—supplies for the support of his army or articles which the enemy sells to replenish his treasury. When so appropriated, neither private persons nor the State can rationally expect to recover them. The most that the former under the best circumstances can hope for is compensation, and this for the latter is wholly inadmissible. When once movable property is taken into hostile possession, the presumption is that it is lost forever to the owner. It is, therefore, with reason excepted from the right of *post liminium* if it be not retaken from the enemy immediately after capture or unless he has made no effort to appropriate it; in which case the proprietor, whether private person or the State, finds no difficulty in recognizing nor is presumed to have relinquished title to it.[2]

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1. Vattel, Book III., Chap. 13, Sec. 196 2. Vattel, Book III., Chap. 14, Sec. 209; Halleck, Chap. 19, Sec. 7; Manual, p. 310 *et seq.*

250. While the effect of complete conquest is that the conqueror succeeds to the public property of the vanquished State of whatever character, whether movable or immovable, corporeal or incorporeal, lying in possession or in right of action, the rights which follow military occupation do not extend so far as this; but to the extent that the temporarily dominant power can reduce any species of property into its possession absolutely, the rule is equally applicable.[1] Hence the commander may compel private citizens or corporations who receive the benefit of military protection to pay debts actually due to the deposed sovereignty into the coffers of the conqueror,[2] and a receipt for the same would be an acquittance of the debt; the debtor would not have to pay it again to the ancient creditor when he returns to power.[3] This is a relaxation from the strict rule of law; for, a money debt being payable in kind, the debtor is not strictly released by any act or casualty that does not exhaust the *genus* or kind.[4] To obtain the benefit of this modification in the debtor's favor it is requisite that the amount be actually due. Moreover, the debtor must be placed under *duress* by the military authorities established over him and so compelled to pay the debt; therefore, if he be not resident in the territory occupied, or without compulsion should pay it nevertheless to the conqueror, in neither case would the original obligation be cancelled. And there must be actual payment. Acquittance without payment will not avail. If to avoid forcible levy the debtor compromises or avails himself of a general proviso in the order for collection, and the transaction be *bona fide* on his part under a pressure brought to bear by the dominant authorities, he will be credited with so much of the indebtedness as he thus actually liquidates. It is a defence to a second demand to the extent of the coercion and actual payment.

251. "All rights of military occupation," says Halleck, "arise from actual possession, and not from constructive con-

1. Manning, pp. 182-83. 2. Bluntschli, I., Sec. 149. 3. Woolsey, Sec. 153. 4. 96 U. S., p. 187; Wheaton, Dana's note, p. 169.

quests; they are *de facto* and not *de jure* rights. Hence by a conquest of a part of a country the government of that country or the *State* is not in the possession of the conqueror, and he therefore can not claim the incorporeal rights which attach to the whole country as a State. But by the military possession of a part he will acquire the same claim to the incorporeal rights which attach to that part as he would by the military occupation of the whole acquire to those which attach to the whole.

"We must also distinguish with respect to the situations of the debts, or rather the localities of the debtors from whom they are owing, whether in the conquered territory, in that of the conqueror or in that of a neutral. If living in the conquered country or in that of the conqueror, there is no doubt that the conqueror may, by the rights of military occupation, enforce the collection of debts actually due to the displaced government, for the *de facto* government has in this respect all the powers of that which preceded it. But if situated in a neutral State, the power of the conqueror, being derived from force alone, does not reach them, and he cannot enforce payment. It rests with the neutral to decide whether he will or will not recognize the demand as a legal one, or, in other words, whether he will regard the government of military occupation as sufficiently permanent to be entitled to the rights of the original creditor. He owes the debt, and the only question with him is, Who is entitled to receive it? In deciding this question the particular circumstances will necessarily be decisive of the case, and will probably delay his action until all serious doubts are removed."[1] The debtor pays under such circumstances at his peril. Confessedly he is not subject to coercion, being domiciled in a neutral State. He, therefore, cannot plead overpowering force to justify his conduct. To secure credit for payment from the original creditor, should the State be restored to power, the neutral must show that the constitutional law of the State recognized the payment as valid; in other words, that it was made in good faith to the *de facto* power authorized by

1. Chap. 32, Sec. 27.

the fundamental law to receive it. And although such payments may be justified, still nothing can divest them of the *appearance* of an unfriendly if not a hostile act. The burden of proof to show that the payment was *bona fide* and in accordance with law rests upon the neutral debtor.

252. We have seen that the purchase by a neutral of immovable enemy property confiscated by a military occupant is liable to be treated as a hostile act by the temporarily vanquished State; and this for the reason that it directly furnishes the conqueror with the means of prosecuting hostilities. So does the payment of debts due the deposed State furnish the opposite party such means, and reason will seldom distinguish between the cases; both are unfriendly acts on the part of the neutral, and may well be considered hostile by the State whose interests are thereby prejudiced. This being so, should the vanquished State be restored to power, she will, of course, exhaust every resource to compel a repayment of the debt. The prudent course for the neutral debtor of the deposed government to pursue is to abide the final results of the struggle, making payment to whoever retains the sovereignty.

The principle here involved is well illustrated in the case of the electorate of Hesse Cassel, which grew out of Napoleon's wars.[1] After Jena, Napoleon held that little State about a year under military government, and then incorporated it into the kingdom of Westphalia, which was recognized by the treaties of Tilsit and Schönbrunn and the public law of Europe as a sovereignty for several years. The Elector was restored to his throne by the treaty of Vienna. While Hesse Cassel formed part of the kingdom of Westphalia, Count Von Hahn, of the duchy of Mecklenburg, among many other State debtors, compounded with the King of Westphalia for the payment of a debt owing to the electorate at the time of its absorption. The Elector carried away with him and retained in his possession the instruments containing the written acknowledgments of the debt. Nevertheless, every formality of legal payment was

1 Cobbett, p. 153, quoting Phil. Int. Law, Part XII., Chap. 6.

complied with, and the duchy of Mecklenburg declared the mortgage upon the Count's estate, given to secure the debt, to be cancelled and void. After the Count's death and the Elector's restoration, the latter instituted proceedings as a creditor against the estate. After passing before several tribunals, the claim was finally rejected on the ground that the conquest of the country had been complete, and that the return of the Elector, after having been ousted from his dominions for eight years, could not be considered a continuation of his former government. In the course of their opinions, the learned jurists who passed upon the question made a broad distinction between the acts of a transient conqueror under military government and those of one whose rights and titles had been ratified by the public acts of the State and recognized in treaties with foreign powers. If the case in point were considered as coming under the former category, it was held that the Elector could recover that part of the debt which the Count had not actually paid in the compromise he had effected with the King of Westphalia; but, considering the conquest as permanent, which view ultimately prevailed, the circumstances of the transaction could not be inquired into by the restored sovereign. Nor was importance attached to the fact that the Elector retained possession of the documents evidencing the debt.

253. The general rule is that when military government disappears, the rights of the original State and its subjects revert.

It is possible, however, as in the case just cited, that a government based on the military power may be established with some degree of permanency. If, after the lapse of years, the original State is restored, the question comes up, What efficy is to be given to the acts of the temporary government? The authorities seem agreed upon these points: (1) Changes in the original constitution become inoperative; (2) Ancient laws and administrative institutions are re-established; (3) Private rights acquired stand; (2) Dispositions of State property

made continue binding; (5) The restored State ought not to make retrospective use of its authority.

254. The Philippine insurrection against the United States broke out openly on the night of February 4-5, 1899. The treaty of peace with Spain had been concluded December 10, 1898. All the world was notified that by its terms the Philippine Archipelago was transferred to the United States. On January 23, 1899, before the treaty was confirmed, the branch located at Legaspi, Luzon, of Smith, Bell & Co., a British banking firm of Manila, sold a draft in favor of the Filipino treasurer, Mariano Trias. The money to pay for the draft was furnished by a Filipino general. At the time of the negotiation of the draft the Filipino insurrection was brewing, but had not broken out. Before, however, the paper reached the main house of Smith, Bell & Co. at Manila, whom it was intended should honor it, the war of the Filipino insurrection had become flagrant; Manila was within the lines of the United States military; but all the parties to the paper—Lucban, who furnished the funds, and Trias—were active enemies engaged in war and within the insurrecto lines.

In this state of facts the military government demanded of Smith, Bell & Co. the $100,000, and the firm paid it under protest. The party who held the draft was notified that if he attempted to use it, his goods and property would be seized and appropriated.

The conduct of the military governor in this case was entirely proper. The firm of Smith, Bell & Co. in Manila was enjoying the protection of the United States military forces. It was an act of disloyalty to the military government for it to negotiate the draft on January 23, 1899, as its branch at Legaspi did. To have consummated the transaction by honoring the draft when it arrived in Manila would have been adhering to the enemy, giving them aid and comfort. It was the merest dictate of prudence for the military authorities to prevent it.[1]

1. Magoon, p. 261.

255. The question whether property of the vanquished State, the possession or destruction of which can have no influence on the result of the conquest, properly may be either appropriated or destroyed, has received elaborate discussion. On principle it would seem that it can not. For although ancient practices were otherwise, the modern rule is that no force is lawful except so far as it is necessary. And in its application to property the limit of the rule seems to be the securing indemnity for present expenditure, obtaining the means of prosecuting hostilities, and depriving the enemy of whatever will enable him to maintain the war.[1] Hence, by the modern usage of nations, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science are exempted from the general operations of war.[2] When Frederick the Great took possession of Dresden in 1756, he respected the valuable picture gallery, cabinets, and museums of that capital, as not falling within the rights of a conqueror. In the case of the Marquis de Somereules (Stewart's Vice-Admiralty, Rep. 482) the enlightened judge of the Vice-Admiralty Court at Halifax restored to the Academy of Arts in Philadelphia paintings and prints captured by a British vessel in the War of 1812 on their passage to the United States, and he did it "in conformity to the law of nations, as practiced by all civilized countries, because the arts and sciences are admitted to form an exception to the severe rights of warfare."[3]

256. The occurrences which in modern times have given rise to the fullest examination of this subject followed the French Revolution. After his conquest of Italy in 1796, Bonaparte compelled the Italian States and princes, including the Pope, to surrender their choicest pictures and works of art to be transported to Paris. Subsequently the same line of conduct marked the career of that conqueror, as one after another

1. Wheaton, Secs. 343, 346; Vattel, Chap. 9, Sec. 161. 2. American Instructions, Sec. 2, clauses 4, 5; Bluntschli, I., Sec. 134; Hague Conference, Sec. 3, Art. LVI. 3. Kent, I., 93 (a).

most of the cities and capitals of Europe were occupied by his armies. There is no doubt that these transactions might have been legitimate.[1] It was entirely competent for the owners of works of art to dispose of them by treaty stipulations to the conqueror, and in this manner it was claimed most of those were obtained which, by the means described, were made to grace the famous museum of the Louvre. Nor would a subsequent claim that the war was unprincipled, which led to such alienations, in the least affect their sufficiency and validity, for this would put an end to all certainty as to the results of the armed conflicts of nations, as no vanquished party ever regards the cause of the enemy as other than unrighteous. But in fact very many art treasures which were thus carried to Paris from other countries were taken possession of under no other pretext than as trophies of war. At the time these transactions were generally denounced as being beyond the pale of civilized warfare, particularly by English writers, with whom, however, as a general rule, national prejudice may have had more influence than considerations of enlightened policy; yet, without entering into the question of motives, their position has had the support not only of jurists and publicists, but of military men, and has generally commended itself to the better reason of mankind.

These views are generally in accord with the provisions of the instructions for the United States forces in the field. It is here laid down that classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

But it is likewise provided that if these rare and valuable instruments or collections can be removed without injury, the conqueror may order them to be seized and removed for the benefit of the conquering State, the ultimate ownership to be

1. American Instructions, Sec. 2, clause 6.

settled by the treaty of peace. In no case, however, were they to be privately appropriated or wantonly destroyed or injured.[1]

The right of appropriation is here broadly sustained. It is a right that may be called perfect, yet general settlement is against asserting it, and it unmistakably is falling into disfavor. The modern drift of thought appears to be in favor of permitting works of genius to remain to grace the place that gave them birth.

257. The invasion of France by the allied powers in 1815 was followed by the forcible restitution of the pictures, statues, and other monuments of art collected from different conquered countries in the Louvre museum. This the congress of allied powers, assembled in Paris, was solicited to do by those States which had been despoiled. Upon what principles, it was asked, could France expect to sit down with the same extent of possessions which she held before the Revolution, and desire at the same time to retain the ornamental spoils of all other countries? Was there any possible doubt as to the issue of the contest, or of the power of the allies to effectuate what justice and policy required? If not, upon what principles could they deprive France of her late territorial acquisitions and preserve to her the spoliations consisting of objects of art, appertaining to those territories, which all modern conquerors had invariably respected as inseparable from the country to which they belonged?[2] These or similar reasons prevailed with the allies; yet even in England the measure was not universally approved. Sir Samuel Romilly, speaking in the House of Commons, said that he was by no means satisfied of the justice of the measure; that it was not true that all these trophies had been carried away as spoils of war; the most valuable of them had become the property of France by treaty stipulations; that it was no answer to say that those treaties had been made under duress, for there would be an end of all faith between nations if treaties were to be disregarded on this plea;

1. American Instructions, Sec. 2, clauses 5, 6. 2. Wheaton, Sec. 353; Twiss, Law of Nations, p. 130.

and moreover that the very States which were clamoring for a restoration of these articles were those which abetted France in waging these so-called unjust wars.

258. The rule, "Might makes right," is that which often controls in warfare. Softened in application it has been indeed through the refining influences of civilization, but its integrity is not sensibly impaired. The question what is allowable under the rules of war generally resolves itself into one of power. From the exercise of that power there is no sufficient reason for the assertion that paintings, statuary, and other art treasures belonging to the enemy State will hereafter more than heretofore invariably be held inviolate. Still the writings of publicists, the decisions of jurists, and the general practices of successful commanders, as a rule, being in derogation of such right, it is certainly falling into disrepute, the precursor, let us hope, of final abandonment of all claim to its being recognized as a right of war.[1]

259. With regard to the useless destruction of such articles there has been in modern times a decided preponderance of public opinion in a direction adverse to such practices. Structures of a civil character, public edifices devoted to civil purposes only, temples of religion, repositories of science, equally with monuments of art, are exempt from the devastations of war. In entering the City of Mexico as a conqueror in 1847, General Scott issued an order announcing that the capital, its churches and religious worship, its convents and monasteries, its inhabitants and property, were placed under the special safeguard of the faith and honor of the American Army.[2] This but confirmed his previous promises to the Mexicans that his army would respect private property of every description, and the property of the Mexican Church.[3]

This conduct was in striking contrast to that of the British commander, who, after the capture of Washington in 1814, de-

1. Manning, p. 188; Bluntschli, I., Sec. 141; Twiss, Law of Nations, p. 129. 2. Scott's Autobiography, p. 545. 3. Mansfield's Mexican War, p. 212; American Instructions, Sec. 2, clauses 1, 4.

stroyed the public buildings with their contents. This, as Sir James Mackintosh well said, was an act which gave the hearts of the American people to every enemy who might rise against England. It exasperated the people without weakening the Government or strengthening the perpetrators. It was an attack not against the strength or resources of the State, but against the national honor and public affections of the people. After twenty-four years of the fiercest warfare, in which every great capital of continental Europe had been spared, almost respected by enemies, it was reserved for England to violate all that decent courtesy toward the seats of national dignity, which in the midst of enmity manifests the respect of nations for each other, by an expedition deliberately and principally directed against places of the Government, halls of legislation, tribunals of justice, repositories of the muniments of property and of the records of history, objects among civilized nations exempt from the ravages of war and secured as far as possible even from its accidental operation, because they contribute nothing to the means of hostility, but are consecrated to the purposes of peace and minister to the common and perpetual interests of all human society.[1]

It was attempted to justify this conduct on the principle of retaliation. It had happened that at St. David's, Upper Canada, some stragglers from the American Army had wantonly burned some buildings, for not preventing which, however, the American commander there had been summarily dismissed; a similar occurrence had happened at Long Point in the same province, which was disavowed by the American Government and the conduct of the commander subjected to a military inquiry.

Finally, the village of Newark, adjoining Fort George, was destroyed for what appeared to be military reasons and sanctioned on that ground by the American officers; still this, too, was disapproved by the Government, which announced its pur-

1. Wheaton, Sec. 351.

pose to wage war in a manner most consonant to the principles of humanity and to those friendly relations which it was desirable to preserve between the two nations after the restoration of peace. It was under color of retaliation for these acts that the British government set on foot a crusade against all private property and towns situated on or adjacent to Chesapeake Bay, culminating in the destruction of public buildings at the capital. Referring to this claim, the distinguished statesman before quoted remarked that it seemed an aggravation of this atrocious measure that ministers had endeavored to justify the destruction of a distinguished capital as a retaliation for some violences of inferior American officers unauthorized and disavowed by their Government. To make such retaliation just there must always be some proof of the outrage; in general, also, sufficient evidence that the adverse government had refused to make due reparation for it; and, lastly, some proportion of the punishment to the offence. Here there was no proof of refusal to repair, and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The destruction of the Capitol, the President's House, and other public buildings could not but be considered by the whole world as a most unjustifiable departure from the laws of civilized warfare.[1]

The spectacle of the national capital being captured, pillaged, and burned by a small force of the enemy causes the blush of shame and indignation to mount to the cheek of every patriotic American. Yet the incident is not without its important lessons. Errors of the past cannot be remedied, but something may be gleaned therefrom to guide us in the future. To content ourselves with inveighing against the enemy's barbarity is the height of folly; it will only excite contempt, and, should occasion again offer, invite a repetition of the atrocities. And first it is seen how easy it is for the thoughtless or unauthorized conduct of even inferior officers to lead to consequences of

1. Hansard's Parliamentary Debates, 33, pp. 526-27; Wheaton, Sec. 351.

gravest moment, and the necessity at all times of maintaining a strict military discipline and restraining destruction of property to what is strictly justifiable under the laws of war. No doubt that the British Government in carrying the ravages of their armed forces against non-combatants, private property, and public buildings devoted to civil purposes, gave vent to a consuming and deep-seated hatred of the American people; but it should not be forgotten that the illy-considered conduct of inferior officers in seemingly unnecessarily burning property on enemy territory furnished the specious pretext for this unjustifiable conduct. Nothing more certainly stirs up an implacable spirit of revenge than inexcusable destruction of property in a country temporarily occupied by the enemy. Commanders should remember this, because immediate and temporary surroundings may lead to a false feeling of security. The occupied territory being prostrated, no resistance can be offered to these ill-judged measures. The thirst for vengeance, however, is not quenched, and, should opportunity anywhere offer, may be slaked by scenes of desolation, limited only by the destructive powers of the enemy. Another lesson to be learned from the capture and desecration of the national capital is the grave, not to say unpardonable, error of permitting that city to be so poorly defended that its seizure under circumstances similar to those formerly attending that event is possible. And yet, should war break out with an enterprising, well-equipped, thoroughly-trained enemy, backed by a powerful navy, what is to prevent a repetition of the humiliating spectacle? Does not the country owe it to itself to render that city—built up and beautified with every care and lavish expenditure of treasure, the repository of so much that is valuable and interesting in the realms of politics, science, literature, history, and art—secure from the successful attack of a predatory column of the enemy?

260. While wanton destruction of property of the classes mentioned is thus reprobated, still destruction possibly may be fully justified. The milder is the more pleasing rule; but if it

became necessary to destroy works of art, or public buildings devoted to civil purposes, or others of the classes usually exempted from such fate, in order successfully to carry on the operations of war, to advance the works in a siege, or stay the advance of the enemy, the right to take the step cannot be controverted.[1] The sovereign of the country or his general makes no scruple to destroy them under such circumstances. The governor of a besieged town sets fire to the suburbs that they may not afford a lodgment to the besiegers. Nobody blames the commander who lays waste gardens, vineyards, or orchards for the purpose of encamping on the ground, and throwing up an entrenchment. If any beautiful production of art be thereby destroyed, it is an accident, an unhappy consequence of the war; and the general will not be blamed except in those cases where, without sacrificing any military advantage, he might have pitched his camp elsewhere without the smallest inconvenience to himself. So in the bombardment of places it is difficult to spare any particular structure. Every siege gives evidence of this. To destroy a city with all it contains is indeed an extreme measure, not to be resorted to except for cogent reasons, yet it is perfectly justifiable when no other method suffices to reduce the place and this reduction becomes essential to the successful prosecution of the war.[2] These are elementary principles. The enemy is not permitted to gain an advantage, because to prevent it the destruction of objects of art or palaces of learning may thereby ensue. The wise commander inquires only what is necessary to attain success. All other considerations give way to this. The responsibility of acting rests upon him, and he cannot divest himself of it. His authority is commensurate with his obligations. The only restriction placed upon him is that he will not permit such destruction or demolition of property unless it be necessary.[3]

1. 97 U. S., pp. 606, 622; American Instructions, Sec. 2, clause 15. 2. Bluntschli, Laws of War, I., Sec. 7. 3. Instructions U. S. Armies, Sec. 2, Art. 35; Hague Conference, Sec. 2, Chap. 1, Art. 27 (G. O. 52, A. G. O., 1902).

261. The commander in territory militarily occupied should preserve from destruction or hostile conversion State papers, judicial and legal documents, and indeed all papers necessary or convenient either in the affairs of government or securing individuals in their titles to property. Historical records should have equal protection and immunity. The commander while he is in possession of a town or district has a right to hold such papers and records and to use them in carrying on his government; in fact, it is his duty to do this; but when the temporarily deposed State returns to possession, either during the war or as a condition of peace, such papers should be returned to the authorities from whom they were taken.[1] They adhere to the government of the place or territory to which they belong, and should always be transferred with it. To destroy or withhold them would be an act of vandalism. The reason of this rule is manifest. Their destruction would not operate to promote in any degree the object of the war, but on the contrary would produce an animosity and irritation which would extend beyond the war. It would inflict an unnecessary injury upon the conquered without any benefit to the conqueror. Such archives, papers, and records often constitute the basis and evidence of private property, and to make way with them would be to inflict useless hardships; in other words, it would be an injury done in war beyond what necessity requires, and, therefore, illegal, impolitic, and cruel. The same reasons apply to carrying them off and withholding them from their proper owners and legitimate use.[2]

262. Second, with regard to immovable property of the deposed State: Here no rights accrue to the belligerent occupier beyond what he can gather to himself by superior force.[3] This rule limits his proprietary rights. What he can reduce into his possession and retain is his own. But as his occupation is subject to the chances of war, so is his title to what he

1. Twiss, Law of Nations, p. 128; Manning, p. 188. 2. Halleck, Chap. 19, Sec. 9. 3. Twiss, Law of Nations, p. 126

cannot remove.[1] He therefore acquires no complete, valid, and indefeasible title to such property by virtue of military occupancy with full power of alienation.

The right of the commander, subject to superior authority and the policy adopted by his government, to alienate immovable property of the enemy State is not denied. The necessity of self-preservation, and the right to punish an enemy and to deprive him of the means of injuring us by converting those means to our own use against him, constitute the foundation on which rests the belligerent right to enemy property of any kind. Between movable and immovable property reason makes no distinction in this regard. The right to deprive the enemy of all property which adds to our warlike resources and diminishes his is perfect. It follows that by the just rules of war the conqueror has the same right to use or alienate the public domain of the conquered or displaced government that he has to use or alienate its movable property.[2] The title of the alienee, however, as before pointed out, due to the principle of *post liminium*, would be very different in the two cases.

The purchaser of immovable enemy public property takes it at the risk of being evicted by the original owner should he be restored to his possessions. Subjects of the conqueror purchase at the risk of ouster only in case of such restoration; while on the part of subjects of the temporarily displaced government such conduct is likely to be regarded by their permanent sovereign as recreancy to their true allegiance; and neutrals are liable to be considered as thereby making themselves parties to the war, and if they endeavor to retain their purchase would find themselves involved in it. Thus Frederick I., King of Prussia, cast his fortunes with the enemies of Sweden when he received Stettin from the hands of the King of Poland and the Czar under the title of sequestration.

263. No rents, taxes, or other revenues derivable from property of any description within the occupied territory can

1. New Orleans *v.* Steamship Co., 20 Wallace, p. 397. 2. Halleck, Chap. 19, Sec. 3.

be claimed by the dispossessed government as its due, nor should they ever be remitted by those charged with collecting the same for its support. To do this would be a breach of that temporary allegiance due from those who accept the protection of the military government which would subject them to severe punishment. All such revenues belong of right to the conqueror. He may demand and receive their payment to himself. He may use them as to him seems best, and generally a considerable portion will be expended in maintaining the machinery of local government, which, be it civil or otherwise, is maintained under military control. These rents and taxes are a part of the spoils of war, and the people of the captured province or town can no more pay them to the vanquished State than they can contribute funds or military munitions to assist it to prosecute the war.[1] Those who remain under military government are subject to the orders of the conqueror, and are not for the time being subject to the laws of the displaced State or to its mandates. Therefore, any attempt of the former government, now ejected from its seat of power, to make collections of money or other sinews of war from a people whom it no longer protects would be wholly unwarranted and properly be resented by them as an act of presumption—mere *brutum fulmen*—to which, even if inclined to do so, they could not consistently with their own safety pay regard. Such were the proclamations of various juntas during the war in the Spanish Peninsula when the enemy had completely prostrated their powers of successful resistance, and which had no other result than to deceive the Spanish people and sacrifice alike both them and their steadfast, faithful allies.[2]

It is true that this has sometimes been denied and the doctrine advanced that the expelled sovereignty has the right to forbid its officials to serve the invader, and order his subjects

1. American Instructions, Sec. 2, clause 1; 92 U. S., 111; 101 U. S., p. 618. 2. Napier's Peninsula War, Book III., Chap. 2.

to refuse obedience, or may excite insurrection.[1] The mere question of the rights of the vanquished sovereignty in this behalf is a theoretical abstraction that can work good to no one and harm to only loyal subjects. If they obey, the conqueror, who exercises the only government that exists over them, will apply the proper disciplinary measures.

If the deposed sovereignty forbade the conquered inhabitants to pay the public revenues to the officials who administered military government, would attention be paid to so unreasonable commands? Would the conqueror not compel payment to him? When the vanquished State recovered its power, would it compel the revenues to be again collected and paid to itself? Yet, if it have authority to command the people to refuse obedience to the conqueror, it may order them not to pay money or contribute supplies to the latter. The position in which such a doctrine places the conquered people is certainly not a happy one.

264. History nowhere records an instance of enforced taxation within the limits of military government exercised according to the mandates of a power beyond these limits equal to that presented in the Philippine Archipelago soon after the taking possession thereof by the military forces of the United States. Every person of Filipino affinities was compelled to contribute from his wages to the support of the insurrecto government. The servants in the American military governor's quarters were constrained, like all others, to pay this tribute demanded under the alternative of assassination, so often practiced as to awe all into submission. The rule extended relentlessly to all. As it was not the policy of the United States Government to join in the sanguinary contest, forbidding payment under like penalty of death, the practice was continued until the collapse of the insurrection. The Filipinos had well learned this lesson from Spanish tutors, judging from Napier's remarks, just cited. Such experiences, however, are not to be expected in civilized warfare.

1. Hall, pp. 441-42.

265. The same principles lie at the foundation of the right to destroy both movable and immovable property of the enemy State. As we have the right to deprive the enemy of his property by carrying it away, so we may in some instances destroy that which in its nature is not capable of transportation.[1] The country may be wasted if it tends to promote the ends of the war. But such measures are only to be pursued with moderation and according to the exigency of the case. All damage done to property unnecessarily, every act of hostility against the enemy which does not tend to secure the victory and bring the war to a conclusion, is unwarranted. As with respect to hostilities against the enemy's person, the laws of war prohibit those measures which are in themselves unlawful and odious—poisoning, assassinations, treachery, the massacre of an enemy who has surrendered—so the law now being considered condemns every act of hostility which of its own nature, and independently of circumstances, contributes nothing to the success of our arms and does not increase our strength or weaken that of the enemy; and on the other hand it permits or tolerates every act which in itself is naturally adapted to promote the object of the war without considering whether such act of hostility was unnecessary in that particular instance, unless there be the clearest evidence that an exception ought to have been made in the case in question.[2]

266. The destruction of public magazines, foundries, and all other warlike stores of the enemy, when in the judgment of the commander it becomes advisable, would be entirely justifiable. It might often happen that this destruction would involve that much of private as well as public property, which private property, except for its being accidentally involved in the fortune of the other, should be spared; if that be so, and the latter be destroyed, it is one of those fortuitous circumstances so common in campaigns, regrettable, to be sure, yet

1. Twiss, Law of Nations, p. 125. 2. Vattel, Book III., Chap. 9, Sec. 173.

for which no blame properly attaches to the commander ordering the destruction. All that can be asked of him is that he will take reasonable precautions to prevent the destruction of every species of property, the existence or possession of which can have no influence upon the issues of the war.

This was illustrated when, in 1864, Atlanta, Georgia, was partially destroyed by the Federal authorities. That city was of vast importance, both politically and strategically, and when after the campaign resulting in its capture the general of the Union Army decided to abandon it and establish his base of operations on the seaboard, it became necessary to render it as little valuable to the enemy as possible. To this end the extensive railroad dépôts were levelled and burned and the railroads centering thereat were, as far as possible, destroyed. Some of the buildings connected with the dépôts had been converted by the enemy into magazines, where were stored quantities of ammunition. During the burning of this property, which was strictly warranted under the laws of war, the conflagration extended to many buildings, and much property other than that which had been ordered to be destroyed.[1]

267. But the destruction of public property by the Union Army was not always accompanied by such results. Afterwards, while the troops were, pursuant to the plan adopted for a change of base, occupying Milledgeville, Georgia, the arsenal there and its contents were completely destroyed, together with such public buildings as could be easily converted to hostile uses. But little or no damage was done to private property, even some extensive mills being spared, together with several thousand bales of cotton, although these might have proved of great service to the enemy, while private property was carefully preserved from destruction. The same course was pursued by General Wilson at Selma, Alabama. That place was an important military dépôt. There were located an arsenal, a navy-yard, nitre works, and extensive foundries for artillery of all sizes, shot and shell. When the

1. Gen. Sherman's Memoirs, Vol. 2, p. 177.

Federal commander moved on, leaving the city behind him, it became necessary to destroy all these. In doing so every precaution was taken to prevent the spread of fire; a night was selected when the rain fell in torrents, and thus the spread of the flames to private and public property which was to be spared was effectually prevented.

268. It is true that these events did not happen under military government. In each case the destruction was incident to the active prosecution of a war in presence of the enemy, when to hold the immediate territory was neither contemplated nor desirable. But they occurred in enemy territory and well illustrate the principle which should control commanders enforcing military government when it becomes necessary to destroy the property of the deposed State.

269. In one important respect the implied obligations of the conqueror who has established military government are very different in regard to private and public property. This results from the reciprocal relations of temporary subject and ruler subsisting between the people and the conqueror. If he elect to set up a government over them with the understanding that the people are to remain quietly at their homes, pursuing in so far as allowable their usual peaceful vocations, he must see that his part of the agreement thus impliedly entered into shall be faithfully performed; and this embraces that measure of protection to private property which before has been indicated as due from him. On the other hand, except it be in pursuance of treaty stipulations, he is under no obligations whatever to the vanquished State. He deals with it at arm's length. He has forcibly deposed its authority. If former officials continue to perform their functions, it is because he so wills. He therefore unhesitatingly destroys the property of the State when either policy or the exigencies of the war may render such a course advisable, and of this he alone is the judge. He is restricted in his measures by the laws of war only; the deposed State has no voice in the matter.

270. If it be a civil war, policy may dictate a different course

on the part of the legitimate government towards both rebel subjects and their government, although it is competent for either party to conduct the contest on the same principles as if waged between independent States. When the war attains sufficient magnitude to prompt the parent State, from considerations of humanity, to concede belligerent rights to the rebels, all property within the revolutionary territory, as we have before pointed out, in the eye of the law is enemy property.[1] It is therefore subject to the rules governing the disposition of property in hostile territory. The revolutionists from the position they assume regard the legitimate government in no other light than an independent sovereignty with which they have no connection, and they deal with it and its loyal subjects accordingly. They have established a government of force, independent of all other governments. Having thrown down the gauge of battle, they abide the consequences. The legitimate government is to them a hostile belligerent power, to which they concede nothing, and from which, of course, they expect nothing beyond the rights of war. During the progress of the contest, should they establish military government over a portion of the territory of the parent State, they will be governed in dealing with property found therein, whether private or public, by the principles before laid down for the guidance of commanders of armies of independent powers. Such would be also the unquestioned right of the legitimate government when under such circumstances its armed forces dominate rebel territory.

This is fully illustrated by the acts of Congress bearing on the subject, passed during the Rebellion of 1861–65, and the executive action taken in pursuance thereof.

Whenever national troops re-established order and set up a government of military rule over an occupied rebel district, the rights of persons and property were, in general, respected and enforced. But to work this amelioration in the condition of

1. 2 Black, p. 674.

the people it was necessary that the occupation should have the feature of permanency as contradistinguished from the mere rules of a marching army, over-running, devastating, perhaps, and then leaving the country behind. And whatever of kindness was shown peaceful inhabitants and their property, the interest of the national Government, the success of her armies, were always regarded as paramount to all other considerations.

271. The military commander has no authority permanently to alienate property of his government that has come into his possession by virtue of military occupation. Such alienation is an act of sovereignty, only to be authorized by that department of his government which, under the Constitution, is vested with this, which is among the highest powers of prerogative. In the United States the case, in spirit at least, is covered by the ninth article of war. The inhibition applies to both real and personal property; for instance, lands or moneys; indeed, any property whatsoever. The only exception that would be allowed is the appropriation of moneys captured as booty or otherwise, and which necessity demands shall be used to procure supplies for the troops.[1]

1. Opinions Att'y-Gen., Vol. 22, p. 548; Magoon, pp. 353, 356, 450, 497, 625, 648.

CHAPTER XII.

Trade with Occupied Territory.

272. One of the most important incidents of military government is the regulation of trade with the subjugated district. The occupying State has an unquestioned right to regulate commercial intercourse with conquered territory. It may be absolutely prohibited, or permitted to be unrestricted, or such limitations may be imposed thereon as either policy or a proper attention to military measures may justify. While the victor maintains exclusive possession of the territory his title is valid. Therefore, the citizens of no other nation have a right to enter it without the permission of the dominant power.[1] Much less can they claim an unrestricted right to trade there.

273. As between parties belligerent the rule is that, except when specifically sanctioned by their respective governments, all commercial intercourse with the enemy or his allies is prohibited. "The law," said Chancellor Kent, "has put the sting of disability into every kind of voluntary communication and contact with an enemy which is made without the special permission of the government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to corrupt the allegiance of the subject and to prolong the calamities of war."[2] Nor is this restriction confined to trade in the ordinary acceptation of the term; but all communication and intercourse with the enemy are prohibited. It matters not whether the property be bought or sold or merely transported and shipped. The contamination of forfeiture is consummated the moment it becomes the object of

1. 9 Howard, p. 615; Bluntschli, I., Sec. 8; Manning, p. 167; American Instructions, Sec 5, clause 1. 2. 16 Johnson, 459, 460; 9 Wallace, p. 72.

illegal intercourse.[1] The authorities are unanimous as to the inflexibility of this rule. They emphasize the fact that there cannot at the same time, between the same people, be a war of arms and a peace of commerce. "One of the immediate consequences," says Wheaton, "of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the license of their respective governments."[2] This doctrine renders null and void all contracts with the enemy during the war;[3] it makes illegal the insurance of enemy's property; prohibits the drawing of bills of exchange by an alien enemy on the subjects of the adverse government,[4] the purchase of bills on the enemy's country, or the remission and deposit of funds there, and the remission of money or bills to subjects of the enemy.[5] But it does not necessarily abrogate all treaties, which may have been made especially with a view to a possible state of war.[6]

To this effect are repeated decisions of the Supreme Court of the United States. "War, when duly declared or recognized as such by the war-making power," said that court, "imports a prohibition to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country. Upon this principle of public law it is the established rule in all commercial nations that trading with the enemy except under a government license subjects the property to confiscation, or to capture and condemnation. Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in this case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation independent of the will or acts of the parties. Direct

1. 8 Cranch, pp. 155 and 382; Wharton, Conflict of Laws, Sec. 497. 2. International Law, Sec. 309. 3. 8 Cranch, p. 149; Wheaton, Sec. 317; Kent, I., p. 67, and note. 4. 6 Taunton, p. 237. 5. 4 Wallace, p. 542, 6. Bluntschli, I., Sec. 29.

consequence of the rule as established in those cases is that as soon as war is commenced all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law from any transactions with the enemy." [1]

This doctrine is in accordance with the best authorities on international law. That law, recognized in the Constitution, is adopted and used by the United States, and therefore in proper cases has the force of law in our courts and with our executive officers. Were it not thus recognized, adopted, and used, it would have no force, and it may be modified as the government sees fit. If the government did this so as prejudicially to affect other nations or the subjects thereof, it would of course be prepared to carry out its resolutions by military force. [2] Under this responsibility it is competent for each belligerent to establish rules of intercourse with the enemy. If this be not done, the general laws of war prevail.

Such has been the uniform course of decisions in the supreme Federal tribunal. In the case of the *Rapid* it was determined that after a declaration of war an American citizen cannot lawfully send a vessel to the enemy's country to bring away property which he had stored there. [3] This was the first case after the organization of the Supreme Court in which it was called upon to assert the laws of war against the property of a citizen. The principles succinctly stated in that opinion have been uniformly adhered to since. The inhibition extends to intercourse between persons who occupy towards each other the relation of debtor and creditor. And although a creditor may have an agent in an enemy's country to whom his debtor there may pay a debt contracted before the war, yet the agent must be one appointed before the war. He cannot be one appointed during it. [4] And if the business transaction was conducted

1. 6 Wallace, p. 535; 8 Cranch, p. 194; 15 Wallace, p. 185. 2. 92 U. S., pp. 287-88; 97 U. S., p. 60. 3. 8 Cranch, p. 155. 4. 9 Wallace, p. 75.

not directly, but through a middleman, it is equally unlawful.[1]

274. The same rule applies to allies. The relations of the subjects of an ally toward the common enemy are the same as those of the principal belligerent. There is no distinction between them, and if the courts of their own country do not enforce the rights and duties of war, those of the principal or co-belligerent may do so; for the tribunals of all have an equal right to enforce the laws of war, and to punish any infractions, whether committed by the subjects of their own government or that of an ally. A single belligerent may grant licenses to trade with the enemy and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests and object and action creates a mutual duty not to prejudice that joint interest, and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally engaged in a trade with the common enemy, and thereby affording him aid and comfort, whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such warlike confederacy that neither of the belligerents without the other's consent shall do anything to defeat the common object.[2] It follows as a corollary to this proposition, that co-belligerents, unless they mutually consent to waive their rights in the premises, should join in granting licenses to trade with the common enemy.

275. The profits derived from illegal trade successfully conducted during war are enormous. The temptations to embark in commercial enterprises of this character are correspondingly great. The boldest schemers and adventurers, undeterred by attendant risks, go forth therein with a courage and devotion worthy a better cause. It may truthfully be averred that the ingenuity of man is taxed to the utmost in

1. 9 Wallace, p. 75. 2. Kent, Vol. 1, p. 69.

devising means to carry on such illicit trade without incurring the penalty therefor. But it has been in vain; the rigor of the rule of condemnation has frustrated all such attempts.[1] No motives of compassion or indulgence prompted by the hardships of the particular case are permitted to suspend or mitigate its application.[2]

276. In the Crimean War this rule was, however, greatly relaxed. It was done by orders and proclamations issued in advance by the respective belligerents. Had this not been done, it was acknowledged, the courts and officers would have been compelled rigidly to enforce the general rule. The order in council of the 15th of April, 1854, permitted British subjects to trade freely at Russian ports not blockaded in neutral vessels and in articles not contraband, but not in British vessels. The French orders were to the same effect. The Russian declaration of the 19th of April permitted French and English goods, property of citizens of those countries, to be imported into Russia in neutral vessels. The French and Russian governments allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph. These must, however, be regarded as special relaxations of the rules of war adopted from reasons of policy by the belligerents interested. They have no binding effect in case of future hostilities.

277. It is the duty of the commander to enforce the laws of non-intercourse in territory subject to military government. He may organize a system of trade with the express or implied sanction of his military superiors. In this both he and they will be controlled by the policy adopted by the conquering State if it has modified in this particular the laws of war. And so long as the commander does not transcend the limits established by those laws or by this government policy, all rights accruing by virtue of authority so exercised will be sustained by the courts of his own country. The object which

1. Wheaton, Sec. 316; Halleck, Chap. 21, Sec. 3. 2. Duer on Insurance, Vol. 1, pp. 556-59.

he has in view is to create a revenue to be used for the prosecution of the war.

This was the course pursued by commanders of United States forces in Mexico. As previously mentioned, some of the seaports in territory militarily occupied were made ports of entry, through which commerce was carried on between Mexico and the outside world. Referring to the establishment of the custom-house at one of the ports of entry so established, the Supreme Court of the United States said: "The person who acted in the character of collector in this instance acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted and the regulations he adopted were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in the enemy's country as one of the weapons of war. It was established, not for the purpose of giving the people of Tamaulipas the benefits of commerce with the United States or with other countries, but as a measure of hostility and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view and were nothing more than contributions levied upon the enemy which the usages of war justify when an army is operating in an enemy's country."[1]

A similar course was pursued on the coast of California during the same war. Pursuant to instructions of the President, the military governor, who was also commander of the United States forces in that quarter, established custom-houses at the principal seaports for the collection of duties on imports. The tariff thus levied was merely a military contribution, authorized by the laws of war, the duty of collecting which was devolved upon army and navy officers. By the treaty of peace

1. 9 Howard, p. 616.

California was ceded to the United States. As soon as possible after the ratification of this treaty the tariff of duties for the collection of military contributions ceased, and the revenue laws and tariff of the United States were substituted in its place. But California was not, for several months after this, brought by act of Congress within a collection district under the revenue laws of the United States, and not until more than a year after the ratification of the treaty did the collector appointed pursuant to such laws enter upon the discharge of his duties. In the meantime the duties were collected by officials appointed by the military commander the same as when war was flagrant. The Supreme Court held that such duties were legally collected, not only during the war, but down to the time the regular collector entered upon his duties, more than eighteen months after the hostilities ceased.[1]

This related to duties on goods, merchandise, etc., imported from foreign countries into the ports of the newly captured countries. No question at that time came up regarding importations into said ports from other ports of the United States, or *vice versa*. Afterwards, in De Lima *v.* Bidwell,[2] it was raised, and the Supreme Court decided that after the incorporation of Porto Rico into the territory of the United States duties were not collectible on merchandise coming from ports of the former to those of the latter until Congress so determined. Prior to that time and when military government in Porto Rico was exercised on soil foreign to the United States such duties could be imposed and legally collected.

278. There is in every government some department to which, by the fundamental laws of the land is entrusted the determination of the military policy of the State. This department it is which exercises authority in licensing trade with enemy territory. In Great Britain this power rests with the crown.[3] In the United States it is vested in Congress.

1. 16 Howard, p. 164; 21 Wallace, p. 87. 2. 182 U. S. Reports, p. 194, Sec. 3, Chaps. 5 and 6, *ante*. 3. Blackstone, I., pp. 257-60; Wheaton, Sec. 310; 1 Robinson, p. 199; Manning, p. 168.

If Congress does not act in the premises, the Executive Department, to which is entrusted the command and direction of the armies, can legally authorize whatever commercial intercourse comports with the laws of war.[1] The instances just cited illustrate this fact. But when Congress has spoken, its will is supreme and must be obeyed. If military commanders authorize intercourse in derogation of the legislative will, not only do they lay themselves liable to answer to their government in their official capacities, but no valid rights arise out of such usurped authority.

The experiences of the Civil War are particularly instructive on this point. It has been seen that the act of July 13, 1861, prohibited commercial intercourse with districts declared by the President to be in a state of insurrection, with such exceptions as the President might make and under regulations established by the Secretary of the Treasury. The districts in insurrection embraced the whole cotton-producing territory of the United States. Only by rescuing it from rebel dominion could cotton be procured. Valuable as this commodity had always been, the war increased its commercial importance enormously. Every proper means was adapted by the Federal Government to secure as large a supply as possible. With the hope that it might be successfully cultivated in loyal districts, Congress, in 1862, passed an act for the purchase, under the supervision of the Secretary of the Interior, of cotton seed, stipulating that the purchase should be made from places where cotton was grown as far north as practicable.

One Hodge seems to have fancied he saw an opportunity under cover of this act to engage in a lucrative illegal trade with the enemy. Receiving from the Secretary of the Interior a permit to procure a cargo of cotton seed within the enemy's lines in Virginia, he proceeded to load his vessel with merchandise and carry it into insurrectionary territory. It was seized on the outward voyage by revenue officers of the United

1. Halleck, Sec. 2, Chap. 28; 21 Wallace, p. 87; Hall, p. 510.

States and libelled for forfeiture in the District Court of Maryland. The libel was here dismissed and the decree was confirmed on appeal to the circuit court. But upon the case being carried to the Supreme Court of the United States this decree was reversed. It was admitted that the act of Congress authorizing the purchase of the cotton seed contemplated the carrying on trade with the prohibited districts. In no other way, as was well known, could seed be procured. It was not, therefore the destination of the vessel alone which rendered the voyage illegal. The respondents claimed very plausibly that the merchandise was for the purpose of paying for the cotton seed, and that under all the circumstances it was the best and readiest medium of exchange to be had. But the Supreme Court brushed the claim aside as a mere colorable pretext. It pointed to the fact that under the act of 1861 the President only was authorized to license trade and the Secretary of the Treasury alone to establish regulations governing it; the act authorizing the purchase in question did not repeal any part of the non-intercourse act, and consequently the Secretary of the Interior was not empowered to authorize the dispatching a vessel to the prohibited districts, and properly construed his permit to procure the cargo of cotton seed as not being an attempt to exercise such unwarranted authority. Yet this permit, together with a letter of the Secretary of the Navy commanding Navy officers to respect it, was the only license the vessel had. It was trading, therefore, in violation of the act of July 13, 1861, and both vessel and cargo were declared to be forfeited. This decision shows with what strictness laws licensing trade with the enemy are construed by the Supreme Court; and an interesting feature of this particular case is the diversity of judicial opinion which characterized its determination—the district and circuit courts taking one view and the Supreme Court the opposite.[1]

So as to the case of the *Sea Lion*. On February 16, 1863, a

1. 3 Wallace, p. 617.

special agent of the Treasury Department and acting collector at New Orleans gave written permission to certain parties there resident to bring cotton from within the Confederate lines into that city and ship it thence to any port, either foreign or domestic. The entire district around the city was then under military government. The permit purported to be issued pursuant to a policy approved and directed to be carried into effect by the United States military officer commanding there, and was endorsed "approved" by the rear-admiral in command of the blockading squadron on that coast. The orders and instructions of the military commander were not set out, but it was stated that they were in the hands of the grantor of the permit. Under this authority a vessel was loaded with cotton at Mobile, within the enemy's lines, and cleared ostensibly for Havana, a neutral port. On approaching the United States blockading squadron off the coast it was fired upon, seized, and together with its cargo condemned as prize of war. The ground of forfeiture was that the so-called license under which the vessel sailed was invalid. It was not granted by the President, nor did it conform to the regulations established by the Secretary of the Treasury. It was a nullity, without warrant in law, and in no degree protected the property involved. No importance was attached to the approval of the permit by the naval commander in which the court departed from the practice of English courts under similar circumstances, and it was remarked that if the military commander assumed to license trade with districts controlled by the enemy, he transcended his authority, as under the law the President alone could license trade, and the Secretary of the Treasury alone could establish rules by which it was to be regulated.[1]

279. Nor will the plea of expediency be permitted to impair the inflexible nature of the rule of non-intercourse. During the Civil War it frequently happened that by departing from the strict construction of the law, apparent or even very obvious advantages could be gained. Military commanders

1. 5 Wallace, p 632.

under such circumstances were sometimes led to assume a licensing authority. When tested before the Supreme Court, however, this course was invariably condemned.

The case of the Ouachita cotton will illustrate this; it differed in details from the preceding, but the conclusion arrived at was the same.[1] Here three distinct parties claimed the same cotton. Each alleged that he had purchased it, under circumstances giving good title before the United States courts, either from the Confederate government or its alienees. The first, a citizen of a loyal State, found himself when the rebellion broke out in the midst of the insurgent territory. He was owner of some boats plying there in certain waters. Against all his efforts to prevent it the Confederacy took military possession of the boats, agreeing to pay a fair price for the use thereof, which it did by turning over to him through its authorized agents the cotton in question. He did not indeed take manual possession of it. It was simply stored on the plantation where it was raised until the new owner should come and claim it. At the time the cotton became his he was a resident of New Orleans, then under military government of the Union forces, while the Confederate agent was within territory dominated by the Confederacy. The transaction was, therefore, a case of dealing between inhabitants of loyal and disloyal districts. The same was true of each of the other parties claimant. Each at the time he purchased the cotton resided in New Orleans, then under the military government of the Union, while the Confederate agents with whom he negotiated were inside the enemy's lines. Such dealings were illegal unless they came within authorized exceptions to the rule of non-intercourse. Each party endeavored to show that this was true in his particular case. The claim of the first was based on assumed loyalty, and the hardship of his position, having his property violently appropriated by rebel authority when the government of his allegiance could no longer protect him; and he alleged that in justice

1 6 Wallace, p. 521.

he should be permitted to accept and hold under the actual circumstances of the case the compensation which the enemy pursuant to its pledges had given him. It could not be denied that the transaction in strictness violated one of the most unbending rules of war; but the equities of the case were relied on to relieve it from the taint of illegality.

The claim of the second party was placed on different grounds. The capture of New Orleans had surprised his alienor with a large amount of Confederate currency, which it was alleged the Confederate Government had forced upon him. It being valueless there after the capture, and its effect, if it could be put into circulation in the regions yet under rebel control, being likely to yet further lower the value of Confederate money, while if cotton could be got for it and brought into loyal regions, that would add to the resources of the United States,—the commander of the Union forces authorized the use of the currency to purchase cotton within the rebel lines. The purity of the commander's motives was not doubted. His zeal in the cause of his country was above suspicion. He here saw an opportunity to strike the enemy a blow by depreciating his credit, while the rescuing a valuable product from a rebel and placing it under loyal control would still further diminish the resources of the Confederacy and add to those of the United States. And certainly the purchase was calculated to compass, in some degree, all these desirable purposes. Granting this, it still remained a dealing with the enemy; and notwithstanding the motive that prompted it or the desirability of the objects to be gained, the question of the validity of property rights thus acquired would ultimately depend upon the authority of the commanding general to grant permission to purchase. Agreeably to this permission, purchase was made of the cotton from the Confederacy through one of its authorized agents.

The alienor of the third party claimant was a naturalized citizen of the United States, and purchased the cotton of an agent of the Confederate Government. This was a simple case

of trading with the enemy. There was nothing about the transaction to give it, when assumed rights thereby accruing were put in litigation, any standing in a United States court. But a foreign neutral having, in good faith as alleged, purchased the cotton, he now came forward to claim it, only to be told, however, that his alienor having had no valid title, he could have none.

While the cotton remained on the plantation where it was raised, the United States forces penetrated into the country, seized it, and it was condemned and sold. Neither purchaser had taken possession of it before seizure by the Government.

280. It is because of its bearing upon the question of authority of a commander under military government to license trade that this case is chiefly interesting. On this point the Supreme Court said: "Prohibition was the rule and the license to trade the exception. No such license was given by the President to either of the parties by whom the purchases of the cotton were made from the agents of the rebel government. Those given by the military authorities were nullities. They conferred no rights whatsoever. No one could give them but the President. From any other source they were void. The law-making power in its wisdom and caution confided this important authority, so liable to abuse, to the Chief Magistrate alone."

The case of Coppell *v.* Hall illustrates the same principles.[1] The regulations of the Treasury governing intercourse with the enemy and established pursuant to law[2] said: "Commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited, and no permit will be granted for the transporation of any property to any place under the control of insurgents against the United States." At the date of the issuance of these regulations, and before, New Orleans was in military occupation of the United States forces. Most of the cotton region around the city was

1. 7 Wallace, p. 542. 2. Act July 13, 1861; 12 Statutes at Large, p. 257, Sec. 5.

in military possession of the enemy. In spite, however, of the fact that the President alone was empowered to license trade with insurgent districts, which could only be conducted under the regulations of the Treasury Department, the commanding general of the military geographical department in which New Orleans was located issued orders authorizing the trade to be conducted on the Mississippi River within that department, subject to such restrictions as should be necessary to prevent a supply of provisions and munitions of war being carried to the enemy. The products of the country were authorized to be brought to New Orleans and other designated points within the military lines of the United States, and sold there by the proprietors or their factors, "for the legal currency of the United States, without restriction or confiscation." [1] In this state of orders, civil and military, Coppell, a British subject, and acting British consul at New Orleans, made a contract with a certain Hall, residing in that city, but both being at the time of the contract in rebel territory, by which the latter agreed to furnish the former a large number of bales of cotton, all of which was in districts dominated by the insurgents. By the contract Coppell agreed to cause the cotton to be "protected" and transported to New Orleans, receiving as the consideration for his services part of the profits of the sale. The "protection" guaranteed was secured by Coppell issuing certificates as British consul, stating that the cotton in question was the property of British subjects and duly registered as such at the consulate at New Orleans. Under these "protections," and escaping destruction from either government or rebels, the cotton remained undisturbed where it was until the close of the war. Hall then declined to perform the contract. Coppell thereupon brought suit to compel performance, alleging, among other things, that the contract was made under the permission expressed in the military orders before referred to. The court below held that as both parties were residents of New

1. 7 Wallace, p. 551.

Orleans, the contract was valid under the law of nations, and that the military orders then in force authorized and gave validity to the contract. Judgment going for the plaintiff, it was reversed on appeal to the Supreme Court of the United States. The contract was declared to be against public policy and void. It was remarked that the certificates, even if issued in good faith, were nullities and could give no immunity, while in fact they were intended to operate as a means of deluding and defrauding the United States. The military orders set forth in the record of the case were pronounced unwarranted and void, as the subject-matter was wholly beyond the sphere of the power and duties of the military authorities.

In the case of McKee *v.* United States,[1] it appeared that a loyal citizen, resident of New Orleans when that city and the immediately surrounding territory were under the military government of the Union, purchased of an agent of the Confederate Treasury Department in western Louisiana, then dominated by the rebels, a large quantity of cotton, the private property of the agent. Regarding the situation of all people thus subject to military government the Supreme Court had remarked that from the time this species of government was established over them they were clothed with the same rights of property and were subject to the same inhibitions and disabilities as to commercial intercourse with territory declared to be in insurrection as the inhabitants of the loyal State.[2] It was plain, therefore, that McKee's purchase was illegal and vested no property rights unless the transaction was duly authorized. There was some evidence, not satisfactory, however, tending to show that he had the authority of a treasury agent to trade in insurrectionary territory. And it was conceded that he had permission from the military commander of the forces of the United States in that department to pass through the Federal lines into the rebellious region and bring

1. 8 Wallace, p. 163. 2. 6 Wallace, p. 531; and see excepting clause, President's Proclamation, August 16, 1861, 12 Statutes at Large, p. 1262; also 2 Wallace, p. 277.

away any property that he might purchase there, and there was even evidence tending to show that these authorities had actually granted him a license to trade. The cotton, before being removed from the store-house where purchased, was seized by the United States military authorities and regularly condemned as enemy property. On appeal to the Supreme Court of the United States the decree was affirmed. The court remarked that as to any permission to trade given by Treasury agents it afforded no protection, as the agents were acting outside the limits of their authority. It was further observed that the power of the military extended no further than to protect him in going into the lines of the enemy and bringing from there any property rightfully acquired; if, as the evidence tended to show, the military authorities went further and granted him also a license to trade, such a license was void. In one feature this case differed from any previously mentioned. As the alienor of the cotton was a Confederate Treasury official, his property, under the provisions of Section 5 of the act of July 17, 1862, was on that account rendered forfeitable, and all sales, transfers, or conveyances thereof declared illegal. Therefore, at the time of the purchase, he had no capacity to dispose of it, nor could McKee acquire title to it.

281. As the war progressed the policy of the Government regarding commercial intercourse grew more restricted. From first to last trade with territory within the enemy's lines was absolutely prohibited except as otherwise provided by law. All attempts to evade the rule led when dectected to forfeiture of the property involved. At first, however, it was deemed wise to encourage private enterprise by authorizing such limited intercourse with insurrectionary districts as would not jeopardize the success of military operations. It was with this object in view that the President was given power to grant licenses to trade, as before mentioned. Responding to the liberal sentiments of Congress, the President excepted from the rule of non-intercourse districts where the loyalty of the people was pronounced. He went further. By a sweeping

clause in his proclamation he excepted all rebellious districts which from time to time were occupied and controlled by forces of the United States engaged in the dispersing of the insurgents. It was a beneficent executive act, conceived in a spirit of charity. It was too generous. The abuses which grew out of the license here given, even restricted as it was by regulations prepared by the Secretary of the Treasury, which if faithfully executed would have prevented abuse, led first to the President confining commercial intercourse to West Virginia and a very few sea-ports of the insurgent territory, and finally to additional action on the part of Congress to meet the evil.[1] These steps, so at variance with the original policy of the Government, were not taken without due cause and until after mature reflection. The radical departure from previous practices which they indicated proved that experience had taught that a wholly different rule of action in this regard was a military necessity.

282. The mischiefs attending private trading with the enemy even in those parts of the insurrectionary districts for the time within our military lines were seriously felt. The best interests of the country required that it should cease. Yet it was deemed important still to maintain some species of commercial intercourse. The Government desired to have, if it did not interfere with military operations, the products of the South, and particularly cotton, brought within the Union lines. To accomplish this end and at the same time avoid the complications and embarrassments incident to private trading, required the inauguration of a new system.

This was begun by the President[2] and completed by Congress in the act of July 2, 1864.[3] The privilege of trading with districts redeemed from the enemy was taken away from the citizens, but the Secretary of the Treasury, with the approval of the President, was allowed to purchase through agents for the United States the products of such districts. Trade therewith

1. 13 Statutes at Large, p. 731. 2. See *ibid.* 3. Chap. 255, 13 Statutes at Large, p. 375.

became a Government monopoly. But the limitations on trade did not end here; even with insurrectionary districts dominated by Union arms, all commercial intercourse of people residing or being there with one another was made subject to the restrictions of the act of July 13, 1861; that is, it could only be conducted under the license of the President, and in conformity with regulations prescribed by the Secretary of the Treasury.[1] Further, the licensing power of the President under that act, as to trade between loyal districts and others rescued from rebellion, was repealed, except so far as was necessary to supply the necessities of loyal people residing there, and except also that all the people might, under proper regulations, bring into the markets of loyal States the products of their own labor or of others employed by them. And no goods, wares, or merchandise were permitted to be taken within the lines of national military occupation of insurrectionary districts, except in such quantities and at such places as should be agreed upon in writing by the military commander of the district and the agents of the Treasury Department.[2] The prohibition of trade was extended to any part of loyal States under control of the insurgents, or in dangerous proximity to places under their control, except as prescribed by the Secretary of the Treasury with the approval of the President.

We can not misunderstand the object of this law. It was intended to put a stop to all private trade with insurrectionary districts held by the national arms, and it would have been difficult to formulate language better calculated to compass that end. As for authorizing any species of trade, whether on behalf of the Government or by private citizens, with territory inside the enemy's lines, no such proposition appears to have been dreamed of, and no regulations promulgated by the Secretary of the Treasury, either in pursuance of this law or at any other time, contemplated such intercourse.

1. Sec. 4, Chap. 255, 13 Statutes at Large. 2. Sec. 9, *ibid.*

283. As might be anticipated, attempts to evade these laws were very numerous. But the national courts were filled with loyal judges. The national judiciary sustained the other departments of Government with a steady and strong hand. This was well illustrated in the case of United States *v.* Lane.[1] Under Section 8 of the act of July 2, 1864, mentioned, the purchase of products of insurrectionary States for the United States, under proper regulations, was, as just observed, permitted at places designated by the Secretary of the Treasury. Norfolk, Virginia, was one of the places so selected. In the case mentioned it appeared that the Treasury agent at Norfolk granted permission to a citizen of a loyal State to enter the enemy's lines with a cargo of assorted merchandize, and bring thence into the Union lines at Norfolk a return cargo of cotton. The military commander of that district through which the vessel passed gave her safe-conduct. On her return voyage she was seized by the Navy, but released after a slight detention, only, however, to be seized by the same authorities before she reached her destination, Norfolk. Being brought thence to Washington, D. C., the vessel was libeled, at the instance of the United States, in the Supreme Court of the District of Columbia, sitting in admiralty; but decree with costs went against the libellant.

There could not be a clearer case of trading with the enemy for private profit than this. And yet, down to the point now reached, it had the sanction of the Treasury official directly interested, the military commander, the Navy officers in part, and the judiciary. Before the cotton was sold the price had fallen, and suit was brought in the Court of Claims against the Government for damages caused by the wrongful detention of the vessel by the Navy. Here again the ruling was against the Government, and appeal was then taken to the Supreme Court of the United States, where the judgment was reversed. The contract entered into between the Treasury agent at Norfolk

1. 8 Wallace, p. 185.

and Lane for bringing out the cotton was pronounced illegal and without any binding effect upon the Government. "At the time this contract purports to have been made," remarked the court, "this country was engaged in a war with a formidable enemy, and by a universally recognized principle of public law commercial intercourse between States at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between belligerents should cease. If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character, and in such a case the mischievous consequences that would ensue can be readily foreseen. But the rigidity of this rule can be relaxed by the sovereign, and the laws of war so far suspended as to permit trade with the enemy. Each State settles for itself its own policy and determines whether its true interests are better promoted by granting or withholding licenses to trade with the enemy. It being the rule, therefore, that business intercourse with the enemy is unlawful unless directly sanctioned, the inquiry arises whether there was any law of Congress in force at the time that sanctioned this transaction."

It has been seen that the act of July 2, 1864, Section 8, authorized the purchase, on account of the United States, of products of the insurrectionary States. Standing by itself, this language is broad enough to authorize trading of the nature indicated with the enemy. But the statute must be construed in connection with other statutes on the same subject and the legalized practices thereunder. They are *in pari materia*, and must be considered together as one system and as explanatory of each other.[1] Under preceding laws, however, such trade was absolutely prohibited. The presumption was that, unless Congress expressly provided to the contrary, this policy was to be continued. This Congress did not do, and the mere absence

1. Sedgwick on Construction, Constitutional and Statutory Laws, pp. 209–10.

of express words of limitation as to the character of trade that was authorized on Government account in the 8th section of the act was not to be construed as warranting a species of commercial intercourse which previously had been strictly prohibited. This view was strengthened by the stringent inhibitions on trade with or within districts dominated by the Union arms contained in the 4th and 9th sections of the same act. Reasoning thus, the conclusion reached by the court was that the trade with enemy territory which this so-called contract professed to authorize was illegal, and that all who had sanctioned it, including the military commander who gave the safe-conduct, had transcended their powers.

284. In Hamilton *v.* Dillin the licensing power of the President and the legal effect of Treasury regulations regarding trade with the insurrectionary districts again came up for review.[1] The revised regulations of September 11, 1863, directed that four cents per pound should be paid by those obtaining permits to purchase cotton in insurrectionary districts and bring it into loyal States. Dillin was the surveyor at the port of Nashville, Tennessee, and was the authorized Treasury agent to collect this charge from those who, under proper permits, brought out cotton through that port. Hamilton was one of these. During 1863 and 1864 he paid Dillin large sums of money on account of this charge, which he afterwards sought to recover back on the ground that the imposition of the charge was an exercise of the taxing power confided by the Constitution to Congress, and therefore not to be assumed by the Executive Department.[2] But the court held otherwise; that the imposition of the charge was an exercise of the war powers of the Government; that Congress had entrusted all licensing power to the President and this was a proper exercise of it. "By the Constitution of the United States," said the court, "the power to declare war is confided in Congress. The executive power and command of the military and naval forces is vested

1. 21 Wallace, p. 73. 2. Constitution U. S., Art. 1, Sec. 8, clause 1.

in the President. Whether in the absence of Congressional action the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject." But whatever view may be taken of the precise boundary between the legislative and executive powers in reference to the question under consideration, no doubt can be entertained that a concurrence of both affords ample foundation for any regulations on the subject.

There was another point of interest in this case. Nashville was captured by the Federal forces at an early period of the war—the spring of 1862. Both the city itself and the country immediately surrounding it were thereafter permanently held to the Union cause. Was Nashville, therefore, in 1863 and 1864, when the charge of four cents per pound on cotton was collected, enemy country? If so, trade therewith, to be legal, must be licensed; but if it were not enemy territory, commercial intercourse therewith would be free. The court held that it must be regarded at the time the moneys were paid as enemy territory. The whole State of Tennessee had been declared by the President to be in insurrection.[1] And although the permanent occupation of Nashville by the United States armies would, under the terms of the same proclamation, have authorized trade therewith, yet as to Nashville or any part of Tennessee this favorable status was taken away by subsequent executive action.[2] At the time these moneys were paid, therefore, notwithstanding large districts of Tennessee were permanently occupied by Union forces; that an eminent citizen, a civilian, was military governor of the State; yet, due to this last mentioned action of the President, the disabilities of insurrectionary and enemy territory returned and everywhere rested upon it until the close of the war.

1. Proclamation, August 16, 1861; 12 Statutes at Large, p. 1262.
2. Proclamation, April 2, 1863; 13 Statutes at Large, p. 731.

The cases cited, and which might be multiplied, make clear that commanders governing territory militarily occupied have not original authority to license trade with the enemy. It seems, in the absence of statutory inhibition, to be within the powers of the President to authorize them to do this.[1] That the concurrent action of the President and of Congress is sufficient to legalize such trade does not admit of doubt. Commanders have occasionally assumed the authority here denied them. Nor is this matter of surprise, for, as they unquestionably may authorize whatever is necessary to supply their troops partially or wholly from the products of the occupied country, and in the most convenient manner gather its resources as military contributions, which in one sense may be said to be licensing trade, it is not under all circumstances easy to define the limits of their power in this direction.[2] It is private trade, usually called commercial intercourse, that is prohibited. The sole authority of the military commander is not sufficient to vest legal title in property thus acquired. Instances of this kind which grew out of the Civil War are numerous. In the determination of the cases that came before the Supreme Court of the United States a position was uniformly taken adverse to the licensing power.

285. The rule of non-intercourse requires nothing more to bring it into operation than the existence of war. But, as before remarked, wars do not always begin in the same manner—in some cases being entered upon with great deliberation, while in others they are precipitated unexpectedly from sheer force of circumstances.[3] Nor does every unfriendly act necessarily presage hostilities. International law recognizes several measures, warlike in their nature, which may be resorted to without necessarily precipitating war, although they are generally preliminary thereto. An embargo or sequestration may be laid on the ships or goods of an offending nation; forcible possession

1. Kent, I., p. 92, note (b); 21 Wallace, p. 87; 20 Howard, p. 176; 16 Howard, p. 164. 2. Halleck, Chap. 28, Secs. 2, 3. 3. 2 Black, p. 668; Wheaton, Sec. 298.

may be taken of the thing in controversy; retaliation, vindictive or amicable, may be practiced; and reprisals may be authorized.[1] These are extreme measures; they border on the domain of belligerency; but they do not of themselves interrupt private trade.

286. The War of 1812 between the United States and Great Britain was begun by act of Congress of June 18th of that year.[2] By that act all the inhabitants of the one became technically enemies of those of the other country. Commercial intercourse thereafter between them, except under government license, was illegal. The war with Mexico presented another phase of the same subject. Not until after battles had been fought was it announced by act of Congress to the citizens of the United States that a state of war existed.[3] That hostilities had been in progress both before and at the date of the passage of that act did not, however, render illegal commercial transactions between citizens of the respective belligerents before that date, or subject property embarked therein to condemnation. The President had not, because war was flagrant, prior to Congressional recognition, indicated the principles upon which it should be conducted further than by beating the enemy's armies in the field. That he had, by virtue of his authority as commander-in-chief, full power to conduct hostilities in accordance with the laws of war is not questioned. That under this power he might have restricted trade with the enemy until Congress could act in the premises is scarcely open to doubt.[4] The date of the act of Congress, therefore, was that which marked the period when commercial intercourse between the belligerents became illegal.

287. It is thus evident that to interdict trade between nations the people must have legal warning that war exists. That knowledge is generally brought home to them by a declaration to that effect on the part of that branch of the gov-

1. Wheaton, International Law, Sec. 290. 2. Chap. 102, 2 Statutes at Large, p. 755. 3. May 13, 1846, Chap. 16, 9 Statutes at Large, p. 9. 4. 2 Black, p. 668; 21 Wallace, p. 87; 91 U. S., p. 11.

ernment which under the organic law is entrusted with the decision of the question of war or peace. This department of government may be either the executive or legislative, depending on the Constitution of the State, or the particular circumstances of the case.

288. Commercial intercourse is the rule among the peoples of the earth, unrestricted except by treaties or by municipal laws. It will not be rendered illegal by implications drawn from particular and isolated cases of hostile actions which may or may not precipitate a state of war. Reason requires that before the normal state of trade can be interrupted, and property engaged therein be rendered forfeitable, those who are interested should, in some unequivocal manner, be informed that it will no longer be permitted or be allowed only under particular conditions, and this view conforms to the practice of nations, the writings of publicists, and the decisions of jurists.

The opinion of the Supreme Court of the United States in Mathews *v.* McStea is instructive on this point.[1] In that case a bill of exchange, dated New Orleans, April 23, 1861, in favor of McStea and payable in one year, was accepted on the day of its date by the firm of which Mathews was a member. Mathews was a resident of New York and the other members of the firm were residents of New Orleans. The bill of exchange being dishonored, and suit against Mathews brought thereon, the defense was set up that before the acceptance the co-partnership was dissolved by the War of the Rebellion. This defense was not sustained by the court of common pleas for the city and county of New York, and its judgment was affirmed by the court of appeals and the judgment of the latter by the Supreme Court of the United States.

That the Civil War had an existence commencing before that date was admitted as an established fact. This, it will be remembered, was determined in the prize cases in which it was held that the President's proclamation of April 19, 1861, set-

1. 91 U. S., p. 7.

ting on foot a blockade of the ports of Louisiana among other States, was conclusive evidence that a state of war existed between the people inhabiting those States and the United States. It was conceded, as a general rule, to be one of the immediate consequences of a declaration of war, and the effect of a state of war even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful and is interdicted; further, that it dissolves commercial partnerships existing between those subjects prior to the war. In this regard it was admitted that civil war, particularly when sectional, brought with it all the consequences which attend upon and follow a state of foreign war.

Now the acceptance of the bill of exchange in question was of a date when it was conceded that a state of war existed. Moreover, the President, by a belligerent act, the issuing a proclamation of blockade, had announced to the world that war was being waged, and property captured at sea violating the blockade was condemned as prize of war. The presumption that the same executive act dissolved existing partnerships and interdicted trade certainly would not therefore seem to be a violent one. Yet the court decided that such was not the case in this instance.

The reasoning by which this conclusion was arrived at is interesting. It was observed that while the rule interdicting commerce and dissolving partnerships before laid down was general, it was not without exceptions. Trading with the enemy may be authorized by the sovereign. This is a partial suspension of the laws of war, but not of the war itself. This being so, a state of war and at the same time the maintenance of commercial intercourse being permissible under proper circumstances and authority, the question to be decided was whether such intercourse was permitted between the loyal citizens of the United States and the citizens of Louisiana until the 23d of April, 1861. In determining this the character of the war and the manner in which it was commenced ought not to be overlooked. No declaration of war was ever made.

When the President recognized its existence by the proclamation of blockade, April 19, 1861, it then became his duty as well as his right to direct how it should be carried on. "In the exercise of this right he was at liberty to allow or license intercourse, and his proclamations, if they did not license it expressly, did, in our opinion, license it by very cogent implications. It is impossible to read them without a conviction that no interdiction of commercial intercourse except through the ports of the designated States was intended."

The first was that proclamation of April 15, 1861, calling out the militia to repossess the forts, places, and property of the United States seized by the insurgents.[1] But while this was to be done it was expressly enjoined that the utmost care be observed, consistently with these objects, to avoid devastation, destruction, or interference with property, or disturbance of peaceful citizens in any part of the country. This proclamation did not proceed upon the principle that the people of the States where the unlawful combinations existed were to be treated as public enemies. The forts and public property which it was here proposed to retake had been seized by armed forces. Hostilities had commenced, and in the light of subsequent events it must be considered that a state of war then existed. Yet the proclamation was not a distinct recognition of an existing state of war. The armed force of the nation was to be used to wrest the public property from the hands of those who had formed combinations against the authority of the United States; but further than this the people were to be treated as friends. Even the blockade was instituted with a view only to the protection of the public peace and the lives and property of quiet and orderly citizens who within the insurrectionary States were pursuing their lawful occupations. Hence the court inferred that the only interference with the business relations of citizens in all parts of the country contemplated by the proclamation was such as the

1. 12 Statutes at Large, p. 1258.

blockade might cause. And in confirmation of this view the fact was cited that the mail service was continued in Louisiana and the other insurrectionary States long after the blockade was declared; a fact which, if it did not authorize business intercourse, was well fitted to deceive the public. "But," it was truthfully remarked, "in a civil more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse, for in a civil war only the government can know when the insurrection has assumed the character of war."

If, however, the proclamations considered by themselves left the question of non-intercourse in doubt, the Act of Congress of July 13, 1861, before cited, put the matter at rest. That act was passed in view of the state of the country then existing, and of the proclamations which the President had issued. It authorized the President in a case described, and which then existed, to declare by proclamation that the inhabitants of certain States were in a state of insurrection against the United States; "and *thereupon* all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue." Pursuant to the terms of the act, the proclamation of August 16, 1861, was issued, interdicting all commercial intercourse between the subjects of the parties belligerent with certain exceptions provided for in the act.[1] Both act and proclamation exhibit a clear implication that before the first was enacted and the second issued commercial intercourse was not unlawful. What need of declaring that it should cease if it had ceased, or been unlawful before? The enactment that it should not be permitted after a day then in the future must be considered an implied appreciation that up to that day it was lawful, and certainly Congress had the power to relax any of the ordinary rules of war.[2]

289. The question as to when commercial intercourse be-

1. 12 Statutes at Large, p. 256. 2. 21 Wallace, p. 97.

tween the subjects of opposing belligerents becomes illegal is reducible to a few simple principles. First, war places every individual of the respective governments, as well as the governments themselves, in a state of hostility; second, individual citizens or subjects do not determine each for himself that a state of war either shall or does exist; this exercise of sovereign power is confided to that department of government alone which under varying circumstances is entrusted with the defense of the nation or vindicating its honor; and until that determination is duly notified to the citizens or subjects, they have a right to presume that the laws and immunities of peace prevail; third, when this notification is conveyed to citizens or subjects trading with the enemy becomes illegal and property engaged therein becomes subject to condemnation; this rule is in general inflexible, but its severity may be relaxed either expressly by act of the notifying power or by inference from particular circumstances; fourth, a formal declaration of war is such a notification; fifth, when hostilities are precipitated without this formality, as is sometimes the case with foreign and always with civil wars, a proclamation or manifesto announcing the fact, issued by that department of the government upon which devolves the duty of meeting the danger and directing to that end the military forces of the nation, brings home to all the subjects thereof sufficient notification that to the extent indicated in the proclamation trade with the enemy is interdicted.

290. The unlawfulness of trade with the enemy extends not only to every place within his dominions and subject to his government, but also to all places in his possession or military occupation, even though such occupation has not ripened into a conquest or changed the national character of the inhabitants. In each case there is the same hazard to the State, and, if the hostile occupation is known when the communication is attempted, there is the same breach of duty on the part of the subject. The reasons of public policy which forbid such intercourse apply as fully in the one case as in the other. The

same rule holds even in the case of revolted territory or colony of the enemy which is known to have been for years in the hands of the insurgents. Courts of justice always regard such revolted territory as belonging to the enemy, until by some public act of their own government it is expressly recognized as an independent or friendly power.[1]

291. Not only intercourse and trade with districts wrested from the enemy, but the entrance there of all persons whomsoever, is subject strictly to regulations established by the military commander, his superiors, or his government. Such it has been uniformly held by the United States authorities is the effect of the military occupation of enemy country. All rights of the occupier rest upon superior military power. If necessary, he resorts to any measure justified by the laws of war to maintain the advantages he has gained. For the time being the conquered territory is his. The inhabitants by accepting protection to life and property, to the degree at least to which it is extended, are bound not to jeopardize his military interests. Commercial intercourse with their former fellow-subjects beyond the conquered district would clearly do this. Every objection to trading with the enemy under ordinary circumstances applies with increased force here. To permit it would weaken the power of the invader and strengthen his adversary; facilities would thus be given for conveying intelligence, maintaining correspondence forbidden by the laws of war, and would add to the warlike resources of the enemy. A course of conduct so pregnant with danger to the conquering power will not be tolerated, and the measures taken by the conqueror to place upon it the seal of his disapprobation will be correspondingly severe. It is not the practice of military commanders to deal gently with those who, while accepting the benefits of a government which in amelioration of the strict rules of war has been established over them, seek to impair

1. Halleck, Chap. 21, Sec. 20; Woolsey, 5th ed., Sec. 124; Kent, I. 68 (c); but see *The Hoop*, 1 Rob. Rep., p. 209, for exceptions cited.

its power or adhere to the enemy giving him aid and comfort. In this respect there is no difference in the situations of persons inhabiting the territory militarily occupied. Whether subjects of the vanquished State or of a neutral power, their obligations are equally strong to do nothing to prejudice the interests of the government which the conqueror establishes over them. And as to all persons who did not reside or were not found in the territory when it was occupied, whatever may be their nationality, the conqueror alone determines upon what terms if at all they shall be permitted either to enter the occupied district or to hold communication or business relations with the inhabitants thereof. Either to admit them or to permit the intercourse is a relaxation of the strict rules of war.

292. There are some exceptions to this rule of commercial non-intercourse. Halleck confines them to, *first*, the mere exercise of the rights of humanity, and, *second*, the trade sanctioned by license issued by proper authority and which has just been considered.[1] The exceptions to the rule, Wheaton remarks, far from weakening its force, confirm and strengthen it. They resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a license, or the trading was not consummated until the enemy had ceased to be such.[2] Kent mentions also the case of ransom-bills, which are contracts of necessity founded on a state of war, and from their very nature carry with them evidence of the fidelity of the parties to their respective governments.[3] The first exception mentioned by Halleck is based upon the principle laid down by Vattel, that when a subject can neither receive his sovereign's orders nor enjoy his protection he assumes his natural rights and is to provide for his own safety by any just and honorable means in his power.[4] Accordingly it was decided that where two British subjects

1. Chap. 21, Sec. 2. 2. Part IV., Sec. 315. 3. Vol. 1, p. 68 and note (a); 7 Peters, p. 593. 4. Book III., Chap. 16, Sec. 264.

were declared *prisoners* in France, and one of them drew a bill in favor of another on a third British subject, resident in England, and such payee endorsed the same in France to an alien enemy, it was held that the transaction was legal and that the alien's right of action was only suspended during the war, and that on the return of peace he might recover the amount from the acceptor; for otherwise such persons would sustain great privations during their detention, and for the same reason it was held that it is no objection to an action on such bill that it is brought as to part in trust for an alien enemy.[1] As to the exception of ransom-bills mentioned by Kent it may be said that it was formerly the general custom to redeem property, particularly that captured at sea, from the hands of the enemy by ransom. When municipal regulations do not forbid, such contracts are undoubtedly valid.

293. Although contracts entered into between enemies during war are illegal, the mere fact that war is declared between their respective governments does not render existing contracts void.[2] If they be not confiscated during the war, the right to enforce payment revives with peace.[3] And as the creditor cannot sue for his debt during the war, the statute of limitations does not run against him while the war lasts.[4] The rule of non-intercourse, unless specially so determined by the sovereign power, does not apply to transactions which are to take place entirely in the territory of one belligerent. Therefore, if the enemy creditor have an agent appointed before the war in the territory of the debtor, payment by the latter to such agent would not be unlawful.[5] It does not follow that the agent will violate the law by remitting to his principal, and if he does, he becomes responsible. "The rule," says Mr. Justice Washington, "can never apply in cases where the creditor, although a subject of the enemy,

1. 6 Taunton, p. 237; 1 Marsh Reports, p. 558, S. C.; 6 Taunton, p. 332; Wharton, Conflict of Laws, Sec. 497. 2. Bluntschli, I., Secs. 29, 30. 3. Manning, p. 176; Cobbett, p. 108. 4. 6 Wallace, p. 532; 9 Wallace, p. 678; 11 Wallace, p. 508. 5. 9 Wallace, p. 72; 7 Wallace, p. 452.

remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money."[1]

294. The ambassador of Germany at Washington represented in 1900 that German subjects had rights of trade with the Sulu Archipelago, Philippine Islands, by reason of certain protocols of date anterior to the taking possession there by the military forces of the United States, which protocols, it was claimed, created a servitude permanently attached to the Sulu Islands, and with which the military government legally could not interfere. This view was not upheld. The position taken by the military government was sustained; the principle vindicating that the regulating trade with territory subject to military government was a matter wholly within the control of the dominant power.[2]

295. The rule of non-intercourse is based on public policy, and it is as reasonable as it is inflexible. Yet we have just seen that the rule, rigorous though it be, does not under all circumstances taint with illegality all business-like deal ings between those who legally are enemies. What then is the practical limit to unlicensed trade which cannot be passed without either rendering the transactions void or rendering forfeitable property engaged therein? The answer is believed to be, that all business transactions, trade, or commercial intercourse which is inconsistent with the state of war between the parties belligerent is forbidden to their subjects. This is the general statement of the rule; and if greater particularity be required, it may be stated that it includes any act of vol-

1. 1 Peters, Circuit Court, p. 496; 106 U. S., pp. 196, 244. 2. Magoon, p. 316.

untary submission to the enemy, or receiving his protection; any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmissions of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade by or with the enemy. It was held, accordingly, that when during the Civil War a citizen and resident of Mississippi made a lease of a cotton plantation there to a citizen of Massachusetts who was then in Mississippi, the lessee taking possession, paying rent under the lease, but was afterward driven off by the Confederate cavalry, and action was brought for rent in arrear, the lease was valid. The decision was based on the consideration that the lease in question was entered into and affected property wholly within the territorial limits of one of the belligerents; that it in no manner increased the warlike resources of one or diminished those of the other belligerent; hence the reasons of public policy underlying the rule had no applicability. The rule of non-intercourse as just given was laid down as the correct one, and it was insisted that further than this it did not extend.

CHAPTER XIII.

INSURRECTION AGAINST MILITARY GOVERNMENT.

296. The experience of the world has made the question whether the conquered have a right to rise in insurrection against the government of military occupation a practically important one. The abstract right cannot be denied. It is the privilege of any people to change the existing government for sufficient cause, and of this they must ultimately be the judges. Mankind has always asserted and maintained the right to do this. Military government is as subject to the rule as any other. But, as a question disassociated from theory and abstraction, the right of insurrection is always coupled with considerations of expediency. "Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed."[1] It particularly behooves those who contemplate rising against military government to consider well the consequences. Rebellion is the highest crime against government. Its punishment has been correspondingly severe. This being true of regular governments based on the consent of the governed who, with some show of reason may claim the right under changed conditions to exercise the sovereign power of deposing what they have set up, how much more is it likely to prove true of military governments, which, so far as the conquered are concerned, are at best mere concessions by the conqueror

1. Shortridge & Co. *v.* Macon, Chase's Decisions, p. 136.

from his extreme rights under the laws of war. Exemplary punishment is dealt out to those who unsuccessfully rebel against regular governments; in the case of insurgents against military governments the results to those unsuccessfully involved are still more disastrous. The arbitrary character of the latter system of government renders summary punishment easily practicable, and the circumstances under which it is instituted renders such punishment for attempted rebellion particularly necessary. There is here little opportunity for calm judicial determination of the merits of the insurgents' cause. Prompt and unquestioned obedience on the part of those within the scope of its authority is demanded and enforced. Vigilance to detect offences, swiftness and certainty in their punishment, is the rule of the conqueror. He acts on the principle that those who accept his protection must give him support, or at least not scheme against him. Failure on the part of the people to heed this may cause the conqueror to revert to those sterner rights of belligerency which place both the persons and property of the vanquished at his mercy. "If the inhabitants of the occupied territory rise in insurrection," says Hall, "whether in small bodies or *en masse*, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or, if captured, be executed by sentence of court-martial. Sometimes the inhabitants of towns or districts in which acts of the foregoing nature have been done or where they are supposed to have originated are rendered collectively responsible and are punished by fines or by their houses being burned."

Should circumstances render rigorous measures of repression necessary, the commander has at hand the power promptly to render them effective. As a rule, however, only the leaders and instigators of a military insurrection are visited with the extreme penalty, while the common people involved are more leniently dealt with. Sometimes heavy contributions are levied by way of punishment upon the place or district of

country where insurrection occurs. This practice is justified on the ground, first, that the instigators and leaders, being usually the originators of the insurrection, should suffer the punishment due to the offence; and, second, that in war a community is justly held responsible for the unlawful acts of its members where individual offenders cannot be otherwise reached.[1]

297. The criminality or otherwise of military insurrections must ever be a matter of opinion in each particular case. As there is no legal tribunal to determine upon the justice of a war, so there is none to determine upon that of a military insurrection. If successful, the world generally will deem it to have been justifiable and patriotic; if otherwise, the reverse will be true. "Although the operations of war," says Vattel, "are by custom generally confided to regular troops, yet if the inhabitants of a place taken by the enemy have not promised or sworn submission to him, and should find a favorable opportunity of rising on the garrison and recovering the place for their sovereign, they may confidently presume that their prince will approve of this spirited enterprise. And where is the man that will dare to censure it? It is true, indeed, that if the townsmen miscarry in the attempt, they will experience very severe treatment from the enemy. But this does not prove the enterprise to be unjust or contrary to the laws of war. The enemy makes use of his right, the right of arms, which authorizes him to call in the aid of terror to a certain degree, in order that the subjects of the sovereign with whom he is at war may not be willing to venture on such bold undertakings, the success of which may prove fatal to him."[2] He then instances the case of the inhabitants of Genoa, who during the recent war suddenly took up arms and drove the Austrians from the city, remarking that the republic celebrated an annual commemoration of this happy event by which she recovered her liberty. But it cannot be conceded

1. Tovey, Martial Law and Customs of War, p. 53 (London, 1886).
2. Book III., Chap. 15, Sec. 228.

that the mere fact that the inhabitants have taken an oath under the dictation of the conqueror can impair the right to rise against him. As Vattel suggests, the oath is forced upon them, and they are under no obligations to keep it longer than self-interest suggests as advisable. They have the right to rise if they wish, but they must be prepared to abide the consequences.

298. There are many examples of military insurrections and of the punishment inflicted on the insurgents, who, as a rule, have been put down with a firm hand. After the estab-

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NOTE.—The following extract from general orders issued to the Prussian army in August, 1870, gives a connected view of the acts of the French population punished by the Germans and of the penalties attached thereto:

"Military justice is established by these presents:

"1st. It will be applicable to the whole extent of French territory occupied by German troops in engagements tending to compromise the security of those troops, do them injury, or give assistance to an enemy.

"Military jurisdiction will be regarded as in force and as proclaimed for the whole extent of a canton as soon as it is published in any one of the places belonging to it.

"2d. All persons who do not make part of the French army and who cannot establish their standing as soldiers by outward indication, and who—

"(*a*) Serve the enemy as spies;

"(*b*) Mislead German troops under pretense of guides;

"(*c*) Kill, wound, or pillage persons belonging to the German army or making part of their train;

"(*d*) Destroy bridges or canals, damage telegraph lines or railways, render roads impracticable, burn stores (ammunition), provisions, or the quarters of the troops;

"(*e*) Take arms against the German troops,—shall be punished by death.

"In every case the officer ordering the trial shall appoint a military commission intrusted with investigating the matter, and pronounce sentence. The councils of war can condemn to no other punishment but that of death. Their sentences shall be immediately executed.

"3d. The communes to which the culprits belong, as well as those communes whose territory has been the scene of the criminal action, shall be liable in every case to a fine equal to the sum total of their land tax." (Hall, International Law, pp. 433-34, note.)

lishment of a government in New Mexico by the military power of the United States, a general plan of revolt was sprung suddenly on the unsuspecting authorities, by which the civil governor and many other officials newly appointed under the authority of the United States were betrayed and murdered under circumstances of great atrocity. The inhabitants of California also rose in various places against the military government established over them, but with less sanguinary results than in New Mexico. In both instances the government of military occupation contented itself with defeating and dispersing the insurgent forces.[1] This was because the United States Government had, as before remarked, determined upon a permanent conquest of these Territories. By a policy of forbearance it was hoped ultimately to convert the people, including the insurgents, into loyal citizens of the Union. Hence those severely repressive measures usually attending the suppression of military insurrections, and the effect of which is expected to be deterrent of future disturbances, were not here resorted to.

As a rule, however, the means made use of to put down insurrections of this character and the policy pursued towards the rebels afterwards have not been conciliatory. In the campaign of 1796, as a punishment for the city of Pavia, whose inhabitants rose against the French troops, Bonaparte recaptured the place, executed the leaders of the revolt, and gave the city up to plunder. In 1797 four hundred French soldiers in the hospital of Verona were murdered by Venetian insurgents. The insurrection was immediately suppressed, its authors shot, and a heavy contribution levied on the city.

The Sepoy revolt, whether we consider the vast extent and inaccessible nature of the territory over which it was spread, the number of the people involved, and the fanaticism with which they pursued their scheme of so-called deliverance, or the atrocities which on either side characterized its progress and suppression, forms the most impressive incident in the

1. Mansfield's Mexican War, pp. 98-99.

annals of British India. The various peoples inhabiting that peninsula had, one after another, been subjugated by the arms and diplomacy of Britain. Under carefully considered limitations, many natives had been incorporated into the British East India army. A confidence mutually to the advantage of rulers and subjects was established. This feeling was encouraged by the people and relied upon by the conquerors, whose system of government, however, was essentially that of military occupation. It was against this rule of the foreigner that the insurrection—born of religious zeal—was directed. The result is a melancholy illustration of the dangers which attend such uprisings.

The struggle in the Spanish Peninsula from 1808 to 1812 affords many instances of similar insurrections. In June, 1808, the inhabitants of Cuenca, Castile, rose in arms, and being joined by a force of 7,000 or 8,000 peasants, overpowered and destroyed a French detachment left in that town. General Caulaincourt was ordered to suppress the uprising. He arrived before the town early in July, attacked and routed the insurgents from their position with great slaughter, and the place, being deserted by the inhabitants, was given up to pillage. The contagion of revolt was widespread. Scarcely had King Joseph, alarmed at some reverses of French troops, quitted Madrid when the people of Biscay prepared to rise. In August, 1808, the French general Merlin came down on the unfortunate Biscayans; Bilbao was taken, and, to use the emphatic expression of the King, "the fire of insurrection was quenched with the blood of 1,200 men."

299. Notwithstanding the fact that Joseph had been proclaimed King of Spain, Napoleon found it necessary, during the Peninsular War, as we have seen, to establish particular military governments in numerous provinces. It was believed to be essential to the success of the military operations. Against these there were popular and irregular uprisings, entailing great suffering upon the peaceful inhabitants, but doing little for Spanish deliverance. As a means of expel-

ling the invaders it was totally inefficient, and even as an auxiliary to regular operations its advantages were counterbalanced by its evils. "It is true," says Napier, "that if a whole nation will but persevere in such a system, it must in time destroy the most numerous armies. But no people will thus persevere; the aged, the sick, the timid, the helpless, are all hinderers of the bold and robust. There is also the difficulty in procuring arms. The desire of ease, natural to mankind, prevails against the suggestions of honor, and although the opportunity of covering personal ambition with the garb of patriotism may cause many attempts to throw off the yoke, the bulk of the invaded people will gradually become submissive and tranquil. To raise a whole people against an invader may be easy, but to direct the energy thus aroused is a gigantic task, and, if misdirected, the result will be more injurious than advantageous." [1]

300. Lord Wellington thought of reprisals as the only course proper toward the French, whose alleged cruelties at Santarem gave rise to loud complaints from the inhabitants. But strict inquiry revealed the fact that the people, after having submitted to the French and received their protection, took advantage of every opportunity to destroy detachments of their troops, and that the cruelties complained of were retaliations for such conduct. Wellington, instead of visiting punishment on the French for such proper measures on their part, enjoined the natives to cease from such warfare, which had been conducted on the simplest principles—namely, that neither side gave any quarter.

301. At the occupation of Strasburg by the Germans on the 28th of September, 1870, after its capitulation, a Baden soldier was shot in a by-street and another wounded. The assassin was captured and shot on the spot. General Werder on hearing of this ordered the city to pay a contribution of one million francs, but this was afterwards remitted. The

1. Book IX., Chap. 1.

next day the following order was issued: "A state of siege still continues; crimes and offences will be punished by martial law. All weapons are immediately to be given up. All newspapers and publications are forbidden until further orders. Public houses to be closed at 9 P. M.; after that hour every civilian must carry a lantern. The municipal authorities have to provide quarters with food, for all men directed to be thus supplied." 1

302. Upon the subject of good faith owing by the inhabitants of occupied territory to the military government, the American Instructions contain the following:

A traitor under the law of war, or a war traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

The war traitor is always severely punished. If his offence consist in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

If the citizen or subject of a country or place invaded or conquered gives information to his own government from which he is separated by the hostile army, or to the army of his government, he is a war traitor, and death is the penalty of his offence. (Sec. 5, pars. 5, 6, 7.)

303. If the inhabitants, instead of acting singly or in isolated small groups, were to rise generally, it cannot be supposed that the military government will stop short of using the most effective measures to put down the insurrection. Such times are perhaps as much characterized by sanguinary scenes as any in human experience. The worst passions are given full vent, or it is apt to be so, and whichever party is successful, the other is exterminated.

304. When impartial history portrays the implacable spirit of revolt that signalized the Philippine insurrection

1. Bluntschli, I., Sec. 91, clause 2.

against United States authority and contrasts it with the magnanimous spirit with which it was met, a new lustre will be thrown upon its pages. But it will be a lustre of sombre hue, as the light on those events shines through the blood of so many of America's bravest and fairest youth, whose sacrifice was necessary in order that this generous policy of the Government might triumph. For years it was enough that a native join with the Americans in an effort to save something from the all-pervading wreck and rehabilitate society and business for him to be constantly menaced by the assassin's knife and often to fall under its concealed blow. And yet such was the long-suffering of the National Government that neither the constant and boastful violations of the laws of war by the Filipinos, nor the course of assassination toward friendly natives for deterrent effect, could distract attention for one moment from the pole-star upon which those distant islands were being steered—and which was to secure to their people a political system in which self-government would be enjoyed to the greatest degree they were capable of exercising

CHAPTER XIV.

RESPONSIBILITY OF COMMANDERS—MILITARY GOVERNMENT.

305. The powers of commanders enforcing military government are derived from and are limited by the laws of war. In this regard it matters not whether the territory governed be foreign or that of rebels treated as belligerents. In the exercise of his authority under the laws of war, however, the commander is subject to the control of his military superiors, while both he and they are amenable to and governed by the supreme power in the State. In case of civil war the course of the legitimate government will be determined by considerations of policy. It is not bound to treat the rebels as though they were subjects of a foreign power—in other words, concede them belligerent rights. Still, in modern times, it is the usual practice in civilized governments, attacked by organized and formidable rebellion, to exercise and concede those rights.[1]

306. If the military occupation be of foreign territory, there will, as a rule, be no reason for complicating the governmental machinery there with powers or functions which are not purely military. The times are turbulent; war lays its hand heavily on all within the field of operations. Society amidst such scenes is quickly reduced to its fundamental elements—a people asking only to be governed and protected in person and property, and a ruling power of sufficient vigor and strength to afford that protection. For such a condition of society the indispensable elements of government are, or should be, swiftness of action, impartiality in meting out justice how stern soever it be, and overwhelming force. These qualities attach peculiarly to a government of military power conducted alone by military officers. Whatever of civil government is maintained is authoi-

1. Chase's Decisions, p. 141.

ized and controlled by the military power; nor does it extend at the utmost further than conducting the affairs of society in its ordinary every-day transactions.

307. If the military occupation be of territory reclaimed from rebels, treated as belligerents, the policy of the legitimate government may extend beyond mere military control. The people are still subjects of the conquering power, although temporarily alienated from the path of duty. It may be the part of wisdom, therefore, to endeavor through conciliatory measures to recall them to their allegiance, and such, in modern times, has generally been the practice of the sovereign State. One of the most effective measures to this end would be gradually to restore the people to the enjoyment of civil and religious liberty in so far as this is compatible with the paramount object of conquering a peace. As the rebellious territory is held by force alone, whatever is done must be done under the protection of the military. Without this no civil government set up by the dominant State would stand its ground an hour. The power behind the throne is the same as when dominion is exercised over foreign territory, but the throne preferably is filled by another and milder personage than the military conqueror—one whose mission is to hold out the olive branch, while the sword appears in the background, grimly suggestive, it is true, yet to be used only in case other measures fail.

308. In the United States all military and naval officers are subject to the orders of the President. In him is vested the executive power of the Nation. They are his agents appointed on his nomination to make that power effectual for all the warlike purposes of government. This embraces the control of conquered enemy territory,[1] which is directly entrusted to these officers. They remain subject to superior military control, but aside from this their authority is limited only by the laws of war. "When the armies of the United States are in enemy's country, officers and soldiers are answerable only to

1. Kent, I., 92 (b); 20 Wallace, p. 394.

their own government, and only by its laws as enforced by its armies can they be punished."[1] "The commanding general determines under such circumstances," says the Supreme Court, "what measures are necessary, unless restrained by the orders of his government, which alone is his superior."[2] And speaking of the seizure of private property found in territory subject to military government, it remarked that if the property were taken by an officer, when by the laws of war or the proclamation of the commanding general it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution or sent the offending party before a military tribunal as circumstances required, or he could have had recourse to the government for redress.[3]

309. The question has sometimes arisen how far the hostile act of a subordinate officer, as, for instance, the governor of a province, is to be regarded as the act of his sovereign or State, and how far the officer is to be held individually responsible. The most approved and reasonable doctrine is that if the act be ratified by his government, or rather is not disclaimed, the State is responsible; otherwise it becomes an individual act and the guilty party should be surrendered up for punishment. The general is not responsible to other governments than his own. His government deals with others upon terms of equality,

1. 97 U. S., p. 515; 100 U. S., pp. 165-66; 101 U. S., pp. 17, 18. 2. 97 U. S., p. 60. 3. 100 U. S., p. 167; 2 Exchequer Reports, p. 188.

NOTE.—An instance somewhat of this kind occurred in the Peninsular campaign in 1810-11. The Spanish general, Mendizabel, committed many excesses in Portugal, and the disputes between Spanish troops and Portuguese people were pushed so far that the former pillaged the town of Fernando; while the Portuguese government, in reprisal, meant to seize the Spanish fortress of Olivenza, which had formerly belonged to them. The Spanish regency publicly disavowed General Mendizabel's conduct, while nothing short of the strenuous exertions of the common ally, the English, prevented Portugal declaring war against Spain because of the conduct of the Spanish commander (Napier's History of the Peninsula War, Book XII., Chap 5.)

for neither acknowledges any superior; he stands behind his own for protection.

It may be considered as established by the authorities, *first*, that the commander administering military government is responsible to his superiors and to his government for the manner in which he performs that duty; *second*, his government may disavow his actions, and, strictly, this would render him personally responsible for violations of the laws of war; but, in general, while reprobating his conduct, it will itself seek to make suitable reparation to the opposing belligerent and deal directly with its servant, the commander, as the facts of the case may warrant; *third*, if the government assume responsibility for his conduct, as in any case it may do, the opposing belligerent can then look only to that government for any redress to which it may deem itself entitled because of alleged crimes or irregularities perpetrated by the military commander. Nor in general will it be a matter of indifference to the commander whether he be held personally or officially responsible. If the former, he is at once stripped of any immunity due to his official position and becomes answerable, like any other citizen, to the municipal laws for his actions; if the latter, his conduct is brought to the test of the laws and customs of war and by that standard will it be judged. In the one case a taking of property and human life which possibly would be looked upon as robbery and murder might in the other, when judged by military rules, be fully justified as a lawful exercise of belligerent rights.[1]

310. We come now to treat more particularly of the responsibility to individuals of officers upon whom devolves the duty of instituting military government and carrying it into execution. And certainly no part of this subject possesses more interest than this, nor is any more important. Contrary to a very general belief, it will be found, when attentively considered, that military government, arbitrary though it be in

1. Halleck, Chap. 14, Sec. 31; 97 U. S., p. 623

its essential features, is far from being the mere will of the commanding general to be enforced by him without responsibility, either directly or through the medium of subordinates who themselves are answerable only to that commander. His responsibility is both military and civil; the former complete, the latter qualified by circumstances.

311. First, the responsibility to military superiors extends wherever commanders may go. How extensive soever may be their operations, how far soever conducted from the territory of their own government, they, and of course their subordinates as well, are never independent of that authority which sent them forth. In monarchical governments the king or emperor is the fountain of military honor, the source of military power, the dispenser of military justice. "The king," says Blackstone, "is considered as the generalissimo, or the first in military command within the kingdom. The great need of society is to protect the weakness of individuals by the united strength of the community, and the principal use of government is to direct that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose. It follows, therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince."[1] Without joining in this eulogium of a system of government to which the great common-law commentator was naturally so partial, it may be observed with truth and candor that the repository of military command, emolument or preferment is, under all permanent governments, equally as with the monarchical, in the hands of the chief executive.

312. In republics, of which the United States may be taken as a representative, the president, as commander-in-chief of the military forces of the nation, is the director of its military power on land and sea. Upon him devolves the duty of conducting campaigns. To do this successfully he must

1 Book I., p. 262

have the cheerful support of all subordinate military commanders. In his hands must be entrusted the necessary coercive power to command that support, even though this involves the adoption of summary measures. In him is vested authority to call all officers to account, whether they be directing armies, or presiding over territory wrested from the enemy, or their duties are a combination of these. If this were not so, they might defy him on the most critical occasions. This, however, they may not do. Governments republican in form no more than monarchies are so weak that the assembling of armies and the holding in subjection conquered territory will throw their vital members out of joint. It is at such times less than any other that the authority of the executive may be brought into contempt. Accordingly, in time of war the president is vested with the power of summary dismissal of officers, than which no more effectual instrumentality could be devised for the maintenance of proper discipline. From the president downwards the chain of subordination extends unbroken to the extremities of the military system, binding the parts thereof into a homogeneous, compact whole. It is this alone which renders the success of military measures practicable. This is discipline, which is equally indispensable, whether invoked amidst the clash of arms or the quieter yet onerous task of governing firmly yet equitably under the laws of war a district subjected to the rule of a conqueror.

313. It is true that to the subjugated people the conqueror is not under legal responsibility for his conduct. He is, however, under obligations to keep inviolate the implied covenant with them that, so long as they do not take sides either openly or covertly with his enemy, he will protect them so far as the exigencies of the military service will permit in their rights of person and property.

314. Although members of the invading army are not and cannot be made answerable before either the courts or other local authorities, the legality of their acts may become matter for judicial determination as between citizens, residents of the

territory, who are affected by these acts. If the conqueror, or members of his army during military occupation alienate the property of a citizen, for instance, and it comes into the possession of another, the question might arise before the local tribunal whether or not such alienation were legal, and consequently passed title. This was frequently the case during the Civil War and subsequently in States which had been declared to be in a state of insurrection. As was to be expected under such circumstances, the decisions of courts were diverse. But as the war progressed and the principles which govern in civilized warfare became better understood, the test generally applied was this: Was the original alienation or appropriation done agreeably to the laws of war? If so, the person into whose possession the property passes holds by an indefeasible title; if otherwise, it is not rightfully his.

In Lewis *v.* McGuire, for instance, the court remarked: "Neither the right of imprisonment nor the right to exact military contributions belongs to every petty officer, but must come from the commander of the district or country, or a post, or an army, and not from every straggling squad which may be under the command of some inferior officer of low grade. Nor, indeed, will either the commission or capacity in which an officer professes to act fix his status, but the manner of his conduct, for even a regularly-commissioned officer in the regular military service of a belligerent may be guilty of such a line of conduct as to show that he in reality belonged to an irregular, irresponsible, plundering service, which cannot be shielded by a regular commission."[1] This language was cited approvingly in Brauner *v.* Felkner,[2] which involved the case of a private soldier appropriating the horse of a citizen, which was afterwards found in the possession of another citizen of the occupied territory. The court decided that the original owner was entitled to reclaim his property, as under the laws of war even a private soldier without orders from competent authority

1. 3 Bush (Ky.), pp. 203-4. 2. 1 Heiskell (S. C., Tenn.).

cannot rightfully appropriate enemy property. In Bowles *v.* Lewis,[1] a provost marshal of the United States seized and sold a horse of a citizen of that part of the State of Missouri which was under military control. The horse was afterwards found in possession of the defendant, and the owner was permitted to recover possession. The court remarked: "In order to protect a sale under such circumstances, by a provost marshal, under color of military authority, the claimant under such sale must show that the property was sold under some valid condemnation or judgment, or that its seizure and sale was authorized by the usages of war; otherwise, the action of the provost marshal was a mere trespass."

315. Every nation determines for itself how it will regard the acts of its military officers. Unquestionably the general rule is to sustain them. In no other way can they be brought to act boldly for the State. The few exceptions make more clear the generality of this rule, founded as it is on the soundest policy. The soldier who is to strike effectively against his country's foes must not dread an enemy at the rear more dangerous to his fame and success than the braver one in front. Governments appreciate this fact, and therefore generally sustain the commanders of their forces in all their belligerent measures.

On the other hand, nothing is more common or more natural, perhaps, than for the enemy to distort even necessary and recognized measures of regular warfare, when executed rigorously, into infractions of its rules. War cannot be carried on successfully without a sacrifice of life and property. It often brings misery to all alike, combatant and non-combatant, the innocent and the guilty, within the sphere of its operations. It is not surprising that those who feel the effects of measures necessarily harsh, brought home to them in their own persons, should loudly inveigh against the cruelty of the authors of

1. 48 Mo., p. 32; see Dana's Wheaton, Sec. 359; see Vattel, Book III., Chap. 9, Sec. 161.

their discomfort. Nevertheless, it is a dangerous proceeding to proclaim that the enemy has violated the laws of war and then attempt to visit upon him that summary punishment which, granting this to be true, he may deserve.

The case of bandits, guerillas, and irregular partisans, who are apparently peaceful citizens one hour and stealthy assassins the next, who have no distinctive uniform and whose acts partake of the character of murder and robbery rather than of warfare regularly waged, is not here considered; their proper treatment when captured has been referred to elsewhere.[1] What is referred to here is the attempt, sometimes made by a belligerent, to stamp the acts of an opposing general with the seal of lawlessness unworthy a civilized commander, and then exhort its subjects to visit vengeance upon him or his army at the first opportunity. Such was the proclamation of the President of the so-called Confederate States of America, dated December 23, 1862, denouncing the punishment of death by hanging against a general commanding one of the Union armies, and further declaring that all commissioned officers belonging to that army should, when captured, be reserved for execution.[2] No attempt was made to carry the injunctions of this sanguinary instrument into execution. To have done so would have served no good purpose. Retaliation, with all its deplorable results, would inevitably have been the consequence.

316. Most personal actions are transitory and may be tried in any country at the option of the plaintiff, provided that jurisdiction of the parties be secured. Blackstone divides personal actions into two classes, *ex contractu* and *ex delicto;* the former are founded on contracts, and embrace all actions on debts or promises; the latter upon torts or wrongs, such as trespasses, nuisances, assaults, defamatory words, and the like.[3]

317. From what has before been observed as to liability in transitory actions, it results from this classification that to

1. *Ante*, Secs. 101, 102. 2. R. R. S., I., Vol. 15, pp. 906-7. 3. Commentaries, 3, p. 117.

both *bona fide* neutrals who preserved this character scrupulously and also subjects of the dominant State residing by its authority in territory under military government, military commanders in the occupied district may be held responsible before the civil tribunals of their own country for breaches of contract and also for torts. As to contracts, the well-known distinction between public and private agents in the matter of personal responsibility will not be lost sight of. If an agent on behalf of government make a contract and describe himself as such, he is not personally bound, even if the terms of the contract be such as might in a case of a private nature involve him in a personal obligation. The reason of the distinction is that it is not to be presumed that a public agent meant to bind himself individually for the government; and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express agreement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given?[1] As to actions *ex contractu*, therefore, it may be assumed that the naked right will seldom if ever find practical illustration. Government agents are not likely to be so neglectful of their own interests as to engage in transactions on behalf of the public which will involve them in personal liabilities.

318. With regard to actions *ex delicto* the case is different. The liability to incur legal responsibility of this nature by the military is much greater. The conditions under which military government is enforced are not those best calculated to secure a nice adjustment of private rights. Public interests must first be attended to. Nothing which places in jeopardy the success of military operations is tolerated. The prosecution of the war to a happy issue is the object of paramount importance. All

1. Kent, 2, p. 633; 5 Barnewall and Alderson's Rep., p. 34; Bouvier, Dictionary, Vol. 1, p. 137.

other interests give way to that consideration. These are familiar principles. Yet they do not mean license; which means the reckless disregard of the rights of private parties who, pursuant to governmental authority, and therefore in a proper manner, are found together with their property in enemy territory, under military government.

The law as laid down in Mitchell *v.* Harmony by the Supreme Court of the United States is decisive as to the responsibility of military officers for torts committed in enemy territory against the persons and property of subjects either permanently living or temporarily there under proper authority.[1] To properly understand this case it is necessary that all the circumstances under which it arose should be taken account of. When war had been determined on with Mexico, the United States Government resolved to penetrate the enemy's country by three lines. On the left, General Taylor was to move from the lower Rio Grande; in the center, General Wool to move into the State of Chihuahua, Mexico, from San Antonio, Texas; while on the right, General Kearney invaded California by way of New Mexico. Having reached Santa Fé and received the submission of New Mexico, the latter general detached a column under command of Colonel Doniphan, First Missouri Volunteers, to penetrate into the State of Chihuahua in such a manner as to make a diversion in Wool's favor. Accompanying Doniphan's command was the 2d Missouri Volunteers, commanded by Lieutenant-Colonel Mitchell, the same who was subsequently the plaintiff in error in the case before the Supreme Court. The enemy was met on the way, but defeated December 21, 1846, and finally Doniphan reached and took possession of Fort San Eleasario at El Paso del Norte on the upper Rio Grande. Here the commander of the expedition first heard of the failure of the center column to reach Chihuahua. It became then a grave question what course should be pursued. In every direction was enemy country, and either

1. 13 Howard, p. 115 *et seq.*

to advance, retreat, or stand still seemed extremely perilous. The bold resolution was taken, however, of penetrating to the city of Chihuahua, which was successfully accomplished, although enemies vastly more numerous had first to be met and vanquished. This accomplished, the column turning to the left joined General Taylor, thus terminating a daring exploit, which could but do honor to the arms which accomplished it.

While the column was at Fort San Eleasario the most alarming events happened in its rear. In pursuance of a plot formed and successfully carried into execution, nearly all the officials of the temporary government which General Kearney had established over New Mexico were murdered by Mexicans, who, ostensibly, had submitted to the authority of the United States. The result of this act of perfidy no one could foresee, but it apparently deprived the expedition of even a semblance of a base of operations. It was then resolved, as before mentioned, to advance.

It was when starting from San Eleasario and thence during the progress to Chihuahua that Lieutenant-Colonel Mitchell committed the tort for which the Supreme Court afterwards held him liable in damages. There was present with the command a Mr. Harmony, a citizen of New York, who, in the capacity of trader, and before he knew that there was to be a war, had left Independence, Missouri, for Santa Fé with a large train laden with goods and merchandise destined for New Mexico. Ventures of this nature were then encouraged by the United States Government. The train was overtaken by General Kearney's army of invasion, but was permitted to accompany one of its columns to Santa Fé, and Harmony was given permission to dispose of his wares to natives and others in the regular course of such business. When Doniphan's expedition was fitted out in New Mexico, Harmony sought and obtained permission to accompany it. He did this not to add to the security of the column, which his presence really weakened, but for purposes of trade. He was present with the entire approbation of the United States authorities on the spot.

He was there to make money by selling the products of the United States to the people of the country, and it accorded with the policy of his Government that such commercial intercourse should be fostered. He had full authority for being there, and for the purpose that brought him there.

But he did not wish to accompany the army beyond San Eleasario. He saw an opportunity to dispose of his wares in that vicinity, or if not, he imagined he saw in the perils of the journey to Chihuahua under the existing circumstances greater danger to his pecuniary interests than were likely to result from his remaining behind in the midst of Mexicans, with whom, however, he was on excellent terms, and whose language he perfectly understood. It was claimed afterwards on the trial that he was at this time meditating schemes which were hostile to the cause of his country, and through the agency of what he claimed was legitimate traffic with the Mexicans he was really giving the enemy aid and comfort. But the Supreme Court in its final decision said that there was no substantial proof that he was actuated by these motives; it treated this surmise as a vague suspicion, which could not even under circumstances then existing be legally made the foundation of action inimical to Harmony's interests.

Colonel Doniphan gave orders that Harmony should accompany the command in its further career of conquest. The attending to the details of securing this was entrusted to Lieutenant-Colonel Mitchell, who afterwards claimed, no doubt truthfully, that he had acted under Doniphan's orders in the premises, but whom the court found had moved with a degree of zeal in the matter considerably in excess of what a plain matter-of-fact obedience of orders would have necessitated. The lieutenant-colonel gave to Harmony a memorandum stating the reasons for this action, which were: First, that it was desired to make use of the wagons and bales of goods to form a field-work in the event of the troops being attacked by an overwhelming force of the enemy; second, it was desired to make use of the services of the American teamsters, whom the com-

mander of the forces had armed and organized as an infantry battalion numbering nearly three hundred men; third, it was desirable to prevent the large amount of property in Harmony's wagons from falling into the hands of the enemy, because it would have aided him in paying and equipping his troops.

There is no doubt that, so organized, the trader's train and employés formed an important element of strength when, *en route* from San Eleasario to Chihuahua, the American troops met and, February 28, 1847, decisively defeated a vastly superior force of Mexicans at Sacramento; the result of the conflict being the opening up an uninterrupted path to Chihuahua, the capital of the hostile State of that name, and which was the objective point of the expedition.

The city being reached, permission was given Harmony to sell the goods and merchandise, but the people were hostile and he could not do it. Much of his property, especially wagons and animals, had been either rendered unserviceable or totally destroyed. He declined to accept what was left when the American commander offered to turn it over to him, preferring to abandon the whole to those who had taken forcible possession of it and seek whatever redress might be available to him through the agency of the law. First, he attempted to secure reimbursement through an act of Congress; but the bill for that purpose, in the usual course having been referred to the Secretary of War, the Honorable William L. Marcy, for an opinion upon its merits, was returned with an adverse report which sealed its fate in that direction, for the time being at least, and left the civil courts the only means of relief.

The cause came on for a hearing before the Circuit Court of the United States, Nelson, J., presiding, for the October term, 1850, at New York city.[1] The defences set up were four: First, that at the time of the seizure Harmony was engaged in an unlawful trade with the public enemy; second, the seizure was to prevent the property from falling into the hands of the enemy; third, the property was taken for the public use;

1. Harmony v. Mitchell, 1 Blatchford, p. 549.

fourth, that the plaintiff was estopped from claiming damages for the seizure because he had subsequent to this received back the property from the military officers. It may be well to remark that the Government supported Mitchell's views of the case, the United States district attorney defending him.

The trial was before a jury whose province, as explained by the court, was the determination of the facts, while the court expounded and applied the law. Nearly all the defences were rejected with emphasis, while those for which it was conceded there was color of reason were pronounced too insufficiently supported to relieve the defendant from liability in damages.

It was held, *first*, that the goods of a trader, who, encouraged by the governmental authorities to carry on a particular kind of commercial intercourse with the enemy, had penetrated a subjugated country, were not liable to seizure on the ground that such trading was unlawful. It would be setting a snare for the unwary; an act not to be attributed to the Government or the Executive Department without the most convincing proof; *second*, to justify the seizure of property so situated on the ground that such seizure was necessary to prevent its falling into the enemy's hands as booty of war, the danger must be imminent and urgent, not contingent or remote. It was for the jury to say, after duly weighing all the facts of the case, whether the danger was of this pressing nature; *third*, while a military officer is justified in a case of extreme necessity, when danger is impending, when the safety of the Government or the Army requires it, in taking private property for the public service, without being liable as a trespasser, it is necessary that these circumstances should conspire to relieve him from responsibility for the act. When this is so, the owner of the property must look to the Government for indemnity. On the other hand, if private property be thus appropriated, not on account of impending danger at the time or for use to repel an immediate assault of the enemy which might endanger the safety of the Army, but for the strengthening the Army and aiding in an expedition against the enemy two hundred miles distant, the mili-

tary officer would be a trespasser, and the liability would attach at the instant of seizure; *fourth*, if the superior officer who gives the order for seizure is not justified, the subordinate who executes it will not be.

In delivering the decision of the court Mr. Justice Nelson said: "I have no doubt of the right of a military officer in case of extreme necessity, for the safety of the Government and of the Army, to take private property for public use. The officer in command of an army upon its march, if it were in danger from a public enemy, would have the right to seize the property of a citizen and use it to fortify himself against assault, while the danger existed and was impending, and ordinarily the seizer would not be a trespasser. The safety of the country is paramount, and the rights of individuals must yield in case of necessity. * * * There was no evidence here of an impending peril to be met and overcome by the public force, but the goods were taken for a different purpose."

On appeal to the Supreme Court of the United States the judgment of the circuit court was affirmed, the decision being delivered by the chief justice.[1] There are, it was observed, without doubt occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the enemy, and also where a military officer charged with a public duty may impress private property into the public service, or take it for public use. The court were clearly of opinion that in all these cases the danger must be immediate or the necessity urgent for the public service, such as did not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion called for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend upon its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can

1. Mitchell *v.* Harmony, 13 Howard, p. 115.

be justified. In deciding upon this necessity, however, the state of the facts as they appeared to the officer at the time he acted must govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if with such information as he had a right to rely upon there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment and took the property to promote the public service; he must show by proof the nature and character of the emergency such as he had reasonable grounds to suppose it to be, and it is then for the jury to say whether it was so pressing as not to admit of delay and the occasion such, according to the information on which he acted, that private rights must for the time give way to the common and public good.

In the particular case before the court the question was whether the law permits private property to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And the court was very clear that the law did not permit it. It was remarked that if the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law his order would have justified his subordinate, the defendant in the original suit, even if the commander had abused his power or acted upon improper motives.

This decision was based doubtless upon what was and is the common law. The doctrine of Mitchell *v.* Harmony was referred to with approbation by the Supreme Court of the United States in an important case growing out of the Civil War.[1] Under the circumstances which were assumed to have surrounded Lieutenant-Colonel Mitchell, that doctrine now may

1. Dow *v.* Johnson, 100 U. S., p. 166.

be considered the law of the land except as modified by statutory enactment.

It is important that the import of this doctrine be clearly understood. It is this: Military commanders even in enemy country seize upon the private property of their fellow-subjects at their peril. Stripped of embellishments, this decision of the court warns such commanders that measures affecting the private property of citizens of the commanders' own country, undertaken to insure the success of enterprises upon which they are engaged, may be reviewed by a jury sitting years after the event, thousands of miles from the theatre of that strife which gave rise to those measures. Further, that the commanders may be mulcted in damages if the jury does not view the attending circumstances as giving rise to the same necessity for action that they, the commanders, did when on the spot and compelled to act. All the explanations which the court make and the limitations they think fit to impose do not impair in the least the force and cogency of the main idea, namely, that under the conditions mentioned, a jury sitting in another country may be the ultimate judge of the necessity of military measures. It may be that this is necessary; that the property rights of the citizens are so sacred that if a jury in its wisdom so wills, they must be vindicated even at the sacrifice of its armies in foreign lands. As it is the law, all good soldiers bow before the decree.

When, sixteen years after Doniphan's expedition, General Grant made his flank march which resulted in the isolation and capture of the rebel army at Vicksburg, severing the Confederacy and dealing a mortal stroke to rebellion in the West, his army was accompanied by civilian traders who were there by governmental authority with their wares and merchandise, as certainly private property as were those of Harmony in the instance just mentioned. As is well known, parts of this army were at various times straitened for supplies. Suppose the commanding general, having Lieutenant-Colonel Mitchell's experience in mind, had hesitated to take them when the occa-

sion in his opinion demanded the appropriating these stores to the use of his troops, because on some future day at some distant spot, when the war existed only in memory, a jury should disagree from him as to the necessity that existed for his action, and a United States court sentence him to pay the full value of the property thus taken, with interest from date of seizure,—what might have been the termination of that historic campaign—what the fate of its great projector and sagacious executor? What would have been thought of such halting conduct? He might have adopted this course in view of Mitchell's fate, and a timid general probably would have done it. Yet if in his judgment the taking was rendered necessary by the exigencies of service, not to have seized the goods and supplies would have been deemed an unpardonable sin by the Executive Department of the Government and the country; while if he could not justify the act to a jury sitting in judgment on the case under such circumstances as to give them at best but an imperfect appreciation of the facts as they appeared to the commanding general, he would be judicially condemned. Hard indeed may be the lot of the commander placed thus under two independent masters, antagonistic in their constitution, universally so in their views, perhaps in his case in their demands, and either of which can crush him at will. Still under our Constitution and laws such responsibility seems to be necessary. Not to hold commanders to such accountability might lead to reckless disregard of private rights, totally subversive of the due protection of the citizen under a free government.

It being conceded, therefore, on the one hand, that such dual responsibility is necessary to the security of the citizen, and on the other that its too rigid enforcement is calculated to deter commanders from executing bold enterprises, which, happily consummated, will be of lasting benefit to the cause they are intended to serve, it is apparent that the rights of private persons are not alone to be considered, but that commanders called upon to act in emergencies are to receive in the discharge of

delicate and onerous duties every protection which comports with a due regard for both private rights and the public weal.

There is no difficulty regarding the principle of responsibility here involved, which is clearly stated in the language of the chief justice before quoted; the difficulty arises in the application of the principle. If the emergency of immediate and impending danger, such as will not admit of delay, is shown to have existed, the taking is justified; the state of facts as they appear to the commander must govern the decision, and if he had reasonable grounds for his belief it is sufficient; the discovery afterwards that the grounds of such belief were erroneous does not affect his liability.[1] Thus far the theory of the law is reasonable, even liberal, towards the officer. It is through the other branch, which places in the breasts of a jury the determination of the sufficiency of the emergency arising out of the facts established in evidence, that the binding force of the rule is brought home to him.

There are two primary difficulties in the application of the principle, both of which militate against the commander. The first is the almost impossibility of implanting in the minds of the jury a correct knowledge of all the facts and circumstances which prompted him to take the action he did; the second is that conceding these faithfully reproduced, the jury being civilians unused to weighing the various considerations including sometimes mere suspicions which determined that action, can at best, and even with every desire to do what is right and just in the premises, but imperfectly appreciate the environments of the commander at the time. If they have not that knowledge or if they do not understand its bearings in a military point of view, there may be a miscarriage of justice.

With due respect it is believed that the case of Mitchell *v.* Harmony furnishes a notable illustration of this. "The question here is," say the court, "whether the law permits private property to be taken to insure the success of any enterprise

1. Mitchell *v.* Harmony, 13 Howard, p. 115; Hare, Constitutional Law, Vol. 2, p. 917.

against a public enemy which the commanding officer may deem it advisable to undertake."[1] This assumes that the expedition to Chihuahua was originated by Colonel Doniphan and pursued upon his own authority. This does not accord with the facts. The conquest of Chihuahua was a prominent part of the governmental plan for the invasion of Mexico. Colonel Doniphan's expedition was sent into the enemy's country by General Kearney, the commander of one of the main forces of invasion, for the purpose of facilitating the success of the deliberately adopted policy of the government for the prosecution of the war. The general here discharged not only a military, but a patriotic duty. Colonel Doniphan was at San Eleasario in pursuance of proper orders issued by his superior officer. The expedition which carried him there and which conducted him thence to Chihuahua was set on foot by that superior officer. It was Doniphan's duty to obey his instructions. When at San Eleasario he learned of the failure of General Wool's column to penetrate the enemy's territory by the line originally assigned it, the gravity of his position became apparent and he fully appreciated it. With a sanguinary rebellion in his rear, trackless and unknown deserts of apparently boundless extent on either hand, and an enemy superior in force in front, the stoutest heart might have quailed at the prospect. The situation was such that it was impossible for Colonel Doniphan to receive instructions from his superiors.

In the new condition of things resulting from the failure of Wool's column to advance on the line assigned it, the uprising in New Mexico, the full extent of which was not understood, but concerning which the worst might well be feared, it was incumbent upon him to determine what course to pursue. Upon well-recognized principles he was vested, under such circumstances, with a military discretion. He was to decide; no other could do it for him. Happily for the credit of his country's arms, though unfortunately for him and his subordi-

1. 13 Howard, p. 134.

nates, his courage was equal to the emergency. He resolved the perplexing difficulties which beset his path by adopting the boldest, and as events proved at the same time the safest, course. He pushed forward to the objective point contemplated in his original instructions although deprived of that assistance from other quarters upon which those instructions were predicated. The fact that no enemy in overwhelming force was in the immediate vicinity did not relieve the situation of the character of a pressing emergency which in a preëminent degree it was. For hundreds of miles in every direction, friends there were none; while the country, but little known, was inhospitable, barren, and but sparsely settled. A few small towns here and there dotted the streams, but their inhabitants were implaca le enemies with whom the assassin's stilletto was a more favorite and successful weapon of warfare than the sword. The rebellion and assassinations in New Mexico presented the inhabitants of the entire hostile territory in a new and unfavorable light, namely, that of conspirators whose promises to the face are fair, but made only to lull their conquerors into a state of fancied security and then stab them in the back. Trade with them, which before this event might properly have been encouraged, could now well be interdicted until it was certainly known how far the disaffection had spread its baleful influence. It was for Colonel Doniphan to judge regarding this in his own immediate vicinity. The danger that beset and compassed his command was imminent, the exigency was urgent, and to meet the occasion promptly and effectively was a pressing duty. If the actual state of facts surrounding Colonel Doniphan at the time did not authorize the forcible employment of every means at hand, the pressing into service whatever contributed to the security of the troops, or which would serve to extricate them from surrounding perils, it is difficult to conceive of circumstances which would justify that course.

Such was the state of facts existing when Harmony's wagons and teams were taken, his goods seized upon, his employés drafted into the military service, and he himself compelled, or

unwillingly constrained to accompany the troops. And it was for aiding, abetting, and being the active instrumentality in enforcing the invasion of private rights that Lieutenant-Colonel Mitchell was subsequently assessed in damages to an amount exceeding one hundred thousand dollars. This, notwithstanding the defence set up which the foregoing narrative shows was not colorable, but truthful. Nor should it be forgotten that the seizing officer in this instance had, throughout this controversy, both the moral and legal support of the Executive Department of the Government. Harmony's claim to remuneration was rejected as inadmissible by the greatest jurist, perhaps, who has occupied the position of Secretary of War; while, as before mentioned, the United States attorney defended and justified the seizure before the courts.

In delivering the opinion the chief justice cited the case of Captain Gambier of the Royal Navy, who, acting under the admiral's orders, and because the owners carried on an annoying liquor traffic with the sailors of the fleet, destroyed a number of shanties on the coast of Nova Scotia, for which act, being sued in the courts of England, he was severely mulcted in damages. But the cases in their essential and determining features are not analogous. The captain proceeded on the principle of convenience summarily to abate a nuisance; there was no pressing necessity, no imminent peril, no great exigency that had to be met without delay. Whatever inconvenience resulted from the acts of these evil-disposed citizens could easily have been remedied by restraining the sailors who misbehaved, a minor incident of discipline which occurs frequently in military life. For some reason such measures did not seem sufficiently severe to Captain Gambier, who preferred to cut up the evil by the roots by extirpating the nefarious business. But in so doing he clearly invaded private rights. The measures requisite to the maintenance of a proper discipline in their forces are placed by law in the hands of military officers, and they have no more right than civilians to go beyond the limits of their authority to destroy the property of subjects because it might tend to the

preservation of better order among the troops. That was what Captain Gambier did; that the mistake he made; but it is apprehended that the unprejudiced will see but little similarity between that case and the case of Lieutenant-Colonel Mitchell.

It is clear that Harmony's private property was taken for public use. It does not impair the potency of this fact that all the wagons, animals, and goods were not worn out in the military service; they were lost to him through the acts of the military officers; therefore he was, unless moral turpitude tainted his acts and impaired his rights, entitled to just compensation.[1] Conspiracy with the enemy, or even strongly suspicious circumstances indicating it, if proved, defeat all claims to consideration. It is not known, however, that this was seriously alleged, though something of the kind was hinted at on the trial. It is not known on what grounds Harmony's claim to compensation was opposed by the War Department. Justice and fair dealing would seem to counsel that the Government having had the benefit of the property, the owner, unless criminal conduct impaired his rights, was entitled to be paid for it.

The principle of responsibility involved in this case is identical with that of the Messrs. Porter set forth in the opinion of Attorney-General Bates, April 25, 1861.[2] Here the property of traders who were *en route* from the States to Salt Lake, Utah, the theatre of the Mormon rebellion, and consisting of wagons, animals and merchandise, was appropriated for or pressed into the service of the United States by General A. S. Johnson, commanding the army. If there was any distinction between the cases the necessity which impelled Colonel Doniphan to act was the more pressing—the circumstances of peril being far greater than those surrounding General Johnson. That the Porters should not have been permitted to trade with the rebellious Mormons is evident; but that any paramount military necessity existed for appropriating the property to further the plans of government was a different question. This, however,

1. 5th Amendment, Constitution U. S. 2. 10 Opinions, p. 21.

was done, only in this instance the military officer was not considered a trespasser. "It is not denied," says the Attorney-General, "by anybody that the facts make out a strong case against the Government for compensation for these losses, for it is evident that the order of General Johnson and the military control established and maintained by him over this train, which we have seen was the cause of this loss, were the wise and proper precautions of an officer to protect his own force and prevent his enemy from being strengthened." 1

319. Without remedial legislation the position of both property-owners and military officers in these and all similar cases was one of great hardship, calculated to work injustice. The former had either to seek redress in damages through the courts or turn to Congress for compensation—the first involving all the delays and expenses incident to making out a case of trespass under the strict rules of law; the second, the at least equal delay and expense attendant upon securing legislative aid. To the officer it meant the annoyance and expense of a civil suit, and ultimately, perhaps, being held liable, because at the trial he could not justify measures taken in the field by those technical rules which were intended only for a forum erected for determining causes arising under widely different circumstances.

320. Section 2 of the act of March 3, 1849, remedied this difficulty, at least partially. The provisions of this law extended in application to horses, mules, oxen, wagons, carts, boats, sleighs, or harness belonging to private citizens, and provided for compensation to the owners; (1), where the property was captured or destroyed by the enemy; (2), where abandoned or destroyed by order of the commander; (3), where the loss resulted from the failure of the Government to furnish forage, and (4), where the loss resulted from unavoidable accident; but in all these cases it was essential that the property should have been in the military service of the United States either by im-

1. 10 Opinions, pp. 22, 23.

pressment or contract; that the loss should have occurred by no fault of the owner, and that it should have occurred while the property was actually employed in the service. Claims to compensation so arising were to be adjusted by the third auditor of the Treasury, under rules prescribed by the Secretary of War under the direction or with the assent of the President of the United States, and the certificate of the auditor was sufficient warrant for payment at the Treasury. The law, being remedial in its nature, was so construed as to advance the remedy. Consequently the adjustment of the claims of those coming within its rather narrow terms was simplified and greatly expedited. If the property was impressed into the service, it was necessary to furnish the evidence of the officer by whom the impressment was made, showing when and where it was done, by what authority and under whose order, the reasons therefor, and whether at the time it was lost or destroyed it was actually employed in the service of the United States. By Section 5, Act of March 3, 1863, the provisions of the act of 1849 quoted were made applicable to steamboats and other vessels and railroad engines and cars when destroyed or lost under the circumstances described in the last mentioned act.[1]

321. By act approved February 24, 1855,[2] the Court of Claims was established. It was for the triple purpose of relieving Congress from the burden of examining into the merits of individual claims for compensation, of protecting the Government by regular investigation, and of benefiting private parties by affording a certain mode for having their private demands adjusted. The court was required to hear and determine upon claims founded upon any law of Congress or upon any regulation of an executive department, or upon any contract express or implied with the Government of the United States.[3] And while under the rulings of the Court of Claims the Government is liable for refusing to receive and pay for what it has agreed

1. Chap. 78. 2. 10 Statutes at Large, p. 12. 3. 13 Wallace, p. 136.

to receive and purchase, it is *not* liable on implied assumpsit for the torts of its officers committed while in the service and apparently for its benefit.[1] The act of July 2, 1864, provided that the jurisdiction of the Court of Claims should not extend to any demand 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.[2]

The policy, founded on wisdom and necessity, of exempting the Government from liability for wrongs done to individuals by officers has been extended to injuries committed by such officers while serving the Government, in the belief that their acts were for the public good. Hence the law excepts actions sounding in tort from the jurisdiction of the court. Such cases are reserved for the special action of Congress.

322. In the exercise of his power to institute and carry military government into execution the commander is entitled to greatest consideration, both when judging of the motives which prompted him to act and the necessity which existed for the measures which he adopted. The presumption is that he has properly made use of his authority. His is a position in which swiftness of action may be the only safety. He cannot always wait for legal evidence before taking his measures. An honest exercise of discretion in the performance of his military duty will not render him liable to be treated as a trespasser.[3] In the first instance he alone must decide upon all questions arising; he alone has the needful knowledge of facts, and he is bound to exercise his judgment upon them. No officer who is given a discretion in the performance of his public duties is punishable because his judgment differs from that of others. The question is, Did he use the discretion reasonably, and honestly intend to do his duty? If so, and the subject-matter for determination be within his discretion, he cannot be held responsible because in the light of subsequent events that judgment was at fault.

1. 8 Wallace, p. 269. 2. Chap. 225. 3. 18 Howard, p. 123; 12 Howard, p. 390.

323. "Wherever," said the Supreme Court of Massachusetts, "the law vests in an officer or magistrate a right of judgment and gives him a discretion to determine the facts on which such judgment is to be based, he necessarily exercises within the limits of his jurisdiction a judicial authority. So long as he acts within the fair scope of his authority he is clothed with all the rights and immunities which appertain to judicial tribunals in the discharge of their appropriate functions. Of these none is better settled than the wise and salutary rule of law by which all magistrates and officers, even when exercising a special and limited jurisdiction, are exempt from liability for their judgments, or acts done in pursuance of them, if they do not exceed their authority, although the conclusions to which they arrive are false and erroneous. The grounds of their judgments cannot be inquired into, nor can they be held responsible therefor in a civil action.[1] This protection and immunity are essential in order that the administration of justice and the discharge of important public duties may be impartial, independent, and uninfluenced by fear of consequences. And they are the necessary result of the nature of judicial power. It would be most unreasonable and unjust to hold a magistrate liable for the lawful and honest exercise of that judgment and discretion with which the law invests him, and which he was bound to use in the discharge of his official duties. Nor would there be any safeguard or security to the magistrate or other officer against liability, however careful and discreet he may be in exercising his authority, if his judgments were to be examined into and revised in ulterior proceedings against him in the light of subsequent events, upon new evidence, and with different means of forming conclusions from those upon which he was required to act in the performance of his duty. Such an *ex post facto* judgment might be more sound and wise, but it would not be a just or proper standard by which to try the opinions and conduct of an officer acting at a different time and

1. 2 Gray, pp. 120, 410; 12 Howard, p. 390; 7 Howard, p. 89; 1 Abbott, pp. 212–245; 12 Wheaton, p. 19; 12 Peters, p. 516.

under other circumstances. Especially is this true where a public officer is compelled to act promptly and in a pressing emergency."[1]

In its application to military men this principle is equally well established, whether the authority for this action be found in the statute or the common law of war. In proper cases within its scope the latter is equally as potent as the former. Its agents are equally protected in the discharge of their duties. It is proper that it be so. The officer, civil or military, who acts under the authority of statutory law generally has time for reflection, and opportunity more or less extensive to examine into the necessity, propriety, and bearing of measures which he may be called upon to adopt. If, therefore, he is protected while acting within the sphere of his authority, in the manner before indicated, so much the more should be the commander who on the theatre of active military operations must take measures regarding matters which arise upon the instant and which do not admit of delay.

324. It is true that all matters arising under military government may not be of this urgent nature. The system of administration is determined upon after mature deliberation. Yet unquestioned recognition by all within its domain of the supremacy of military rule will ever be insisted upon. The duty of cheerful submission thereto cannot be abated, and the necessity that exists for prompt example in case of offenders will ever be present. Any other principle might jeopardize the success of campaigns, the issues of the war. The situation of the commander, therefore, is one requiring the exercise of a wise discretion and high order of ability. And immunity from accountability, except to his military superiors, so long as he has reasonable cause to deem his measures justified by events as they appear to him, is his safeguard in the discharge of delicate, responsible, and onerous duties.

The situation depicted by Lord Mansfield, in Johnson *v.*

1. 5 Gray (Mass.), p. 121 *et seq.*

Sutton, is applicable here: "Commanders, in a day of battle, must act upon delicate suspicions, upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience." "But," he adds, "what position will a commander be in if, upon the exercising of his authority, he is liable to be tried by a common-law judicature? Not knowing the law or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them." The intensity of the situation of the commander enforcing military government may be less than in the case here described. But it is a difference in degree only, not in kind. In both situations the necessity exists for prompt and independent judgment upon the condition of things as viewed by the responsible officer. In each a wide field is given for the exercise of discretion. In each, moments may arise when a determination must be come to of far-reaching consequences, with nothing to govern in arriving at a decision except the judgment of him upon whom rests the responsibility of acting. In the ordinary affairs of military government, however, he will have opportunity for greater deliberation. He will then have as guides to aid his judgment, not only the apparent merits of the case in hand, but the surrounding circumstances, the demands of the military situation, his obligations to his own government, and the laws of war.

But it will not be forgotten that he must often act upon the limited evidences of his own senses, or the reports of others, and that promptly. The cause of the government may depend upon his firmness, wariness, and apparently arbitrary acts. The very atmosphere may be fraught with danger which others do not discern, but yet be apparent to him whose duty it is to keep thoroughly informed, and to whom is entrusted the honor of an army, the success of a distant expedition. Nor are his sources of information always above suspicion. The inhabitants of the occupied territory are inimical to his cause. Every success of his enemies is hailed by them with ill-concealed delight. Vigilance is his rule of conduct, vigor marks his actions. Otherwise

he would prove unworthy of the confidence reposed in him. And as the responsibility he is under to his military superiors and his government is great, so in corresponding degree should be the powers with which he is vested. Nor is it a legitimate objection to its existence that some may abuse this power. Wherever power is lodged it may be abused, but this forms no solid objection against its exercise. Confidence must be reposed somewhere. And in whom, may we ask, is it more rationally reposed than in military officers in the midst of enemies, where specific instructions to meet the varying phases of events cannot be obtained from superiors, and where, even if this were attempted, they might be inapplicable to the actual situation of affairs, and, if followed, would jeopardize the cause they were intended to subserve? His is peculiarly the case where judgment is required, and therefore he must be vested with discretion.

325. As for subordinates, the rule is established that if they receive orders from their lawfully constituted superiors which do not expressly show on their face or in the body thereof their own illegality, they would be bound to obey such orders which would be a protection to them.[1] "It is a general and sound principle," say the court in Vanderheyden *v.* Young, "that whenever the law vests one with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is vested with discretion and is, *quoad hoc*, a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents, and it is not their business or duty to investigate the facts thus referred to their superior and to re-judge his determination. In a military point of view the contrary doctrine would be subversive of all discipline."[2] To the same effect are the remarks of Mr. Justice Curtis in Despan *v.* Olney, where

1. Riggs *v.* State, 3 Coldwell, p. 85. 2. 11 Johnson, N. Y

a general officer, acting under authority of law for sufficient cause known to him, had directed a subordinate to arrest the plaintiff. "I do not think the defendant was bound to go behind the order, thus apparently lawful, and satisfy himself by inquiry that his commanding officer proceeded upon sufficient grounds. To require this would be destructive of military discipline and of the necessary promptness and efficiency of the service."[1]

326. The principle that commanders in enemy territory subject to military occupation are peculiarly entitled to and must from considerations of public policy and even-handed justice receive every protection while exercising discretionary authority within their respective spheres of duty, is not without analogies drawn from other branches of government. It is particularly true of judges on the bench. "It is a general principle of the highest importance," said the Supreme Court, "to the proper administration of justice, that a judicial officer in exercising the authority invested in him shall be free to act upon his own convictions without apprehensions of personal consequences to himself. 'It has,' as Chancellor Kent observes, 'a deep root in the common law.' Nor can this exemption of judges from civil liability be affected by the motive which prompts them to their judicial acts."[2] A distinction was made between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. In the latter case the authority exercised is usurped and when known to the judge no excuse is permissible.

327. When jurisdiction is vested by law in the judge or in the court which he holds, the mode in which it shall be exercised is generally as much a question for his determination as any other in the case, although upon the correctness of his determination in this particular the validity of his judgments may depend. Against the consequences of the erroneous or irregular action of judges, from whatever motive proceeding, the law has

1. 1 Curtis (C. C.), p. 306. 2. 13 Wallace, p. 335.

provided for private parties numerous remedies, and to these they must resort. But for malice or corruption in their actions whilst exercising their judicial functions within the general scope of their jurisdiction, judges can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.[1] Commenting on the subject, Lord Coke quaintly said: "And the reason and cause why a judge, for anything done by him as judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice), shall not be drawn in question before any other judge, for any surmise of corruption, except before the King himself in this: the King himself is *de jure* to determine justice to all his subjects, and for this that he himself cannot do it for all persons, he delegates his power to his judges, who have the custody and guard of the King's oath. And for inasmuch as this concerns the honor and conscience of the King, there is great reason why the King himself shall take account of it, and none other."[2]

This immunity of judges from prosecution for acts within their jurisdiction is not so much for their benefit as for the benefit of the suitors themselves. Yet it is a wise and beneficent provision of the law. The impartial administration of justice demands that judges shall be uninfluenced by considerations personal to themselves. If it were not so, they would soon be found consulting their own interests, for they are but men, and human nature long and severely tested will always assert itself.

Do not similar considerations of public policy require the mantle of obscurity to be thrown over military commanders who are called upon in time of pressing necessity when great exigencies confront them to act for the public weal? After having served the State in some signal manner, is their conduct to be tested by rules of law inapplicable to the times and circumstances which then surrounded them? If so, can it be supposed

1. 13 Wallace, p. 335. 2. Floyd *v.* Barker, 12 Coke, p. 23.

that they will be unmindful of the fact? Will its tendency not be to make commanders timid at the very time they should act promptly and boldly? Why will it not be? Are commanders less than judges, human beings? Have feelings of patriotism, the promptings of virtue, and spirit of self-sacrifice driven from their hearts and minds all feelings of self-interest? To some extent this is true; the career of arms, as is well known, is not the path of emolument. But soldiers instinctively dread the meshes of the civil law whose sinuosities they are not accustomed to, do not understand, and to become involved in which it is likely to prove disastrous to them. The feeling that they may be called civilly to account for their actions must in the nature of things have a deterrent effect upon them; and while this may operate beneficially in some instances by protecting the citizen, it may, on the other hand, be the cause of sacrificing great governmental interests, those in which not only the rights of individuals, but the well-being of society itself is involved, because under such liabilities to civil suits officers may hesitate to assume the responsibility of acting a decisive part on pressing and important occasions.

328. It is not contended that military officers enforcing military government should be absolutely irresponsible before the civil court of their own country for their conduct toward subjects and neutrals, and answerable only to their military superiors; even judges are subject to impeachment; but what is contended for is this, that the principle being recognized that public policy is subserved by granting immunity from prosecution for their official acts to certain governmental functionaries, notably the members of the judiciary, the same or similar considerations prompt to a liberal rule regarding civil liability of military officers under the circumstances mentioned. A slight attention to the surroundings of the two classes of officers, judges and military, will make this plain. The former attend to their duties amidst scenes of peace, and only when they are driven from their seats by violence which the civil power can not control are the military called upon to act in their stead;

the civil functionaries have all necessary time for deliberation, and at hand every means for ascertaining the law and precedents governing the case; and if any new feature of law or phase of human action arises not familiar to them, their opinions, if they be judges, are reserved until a thorough investigation can be made, all pertinent authorities examined, and the judicial mind, assisted and enlightened by arguments of learned counsel, brought calmly and carefully to bear upon the point involved. Almost the reverse of all this is true of the officer under military government who must oftentimes act upon the instant without time for consulting aught except what appears to be public necessity, amidst scènes which absolutely preclude the receipt and examination of legal evidence; and even though the exigency should not be of this sudden character, the pressure of long-accumulating events, the carrying out a predetermined governmental policy may cause him to adopt the most apparently arbitrary measures to guard vital public interests entrusted to his care. And reason indicates that if from public policy judges should be accorded immunity from prosecution, which is nowhere denied to them or none would deprive them of, then that military officers in the discharge of what appears to be their duty under the circumstances mentioned are entitled to have their acts generously construed, and to receive the most liberal consideration consistent with the preservation of those ultimate and inviolable rights of the subject which cannot be sacrificed without a complete subversion of the social fabric.

329. The Civil War was fruitful in experiences of this nature. Frequent causes of action arose and the principles of civil responsibility involved often became the subject of judicial decision. In many respects these were often conflicting in greater or less degree. This was but natural because of the diversity of interests involved and local prejudices, of which even judges could not divest themselves. But as the war progressed, as the necessity for sustaining military commanders became more apparent, as judges, instructed by the logic of events, began to interpret the law by the aid of practical facts, as military neces-

sity passed from the domain of speculation to a momentous condition of facts which had to be met and determined in the presence of war, the decisions of courts became more liberal toward military officers. And the more exalted the court, the greater the learning, dignity, and responsibility of the judges, the more carefully were the principles underlying the maintenance of military government unfolded, amplified, and made plain for the protection of officers concerned and the guidance of those to come hereafter.

In Taylor *v.* Nashville and Chattanooga Railroad, the Supreme Court of Tennessee observed that the rights of the State to impress and take private property for the use of the army in the field, on the actual theatre of military operations, was perfect, and without it a nation could not exist.[1] It must be exercised by military officers. They must use a discretion, and that discretion, unless shown to have been wantonly and in bad faith abused, cannot be revised in civil courts. "The necessity is not of that overwhelming character which admits of no alternative. If the interest at stake may probably be promoted by the appropriation of the property it is the right and duty of the officer, upon whom rests the obligation to omit no useful precaution, to take and appropriate it. It is true a military commander has no right to take private property without a necessity exists for doing so. But the law, while active military operations are being carried on, makes him the judge of the necessity and he cannot be held responsible in a civil tribunal for mere errors of judgment. Were it otherwise, were a military commander required to be prepared to prove at any subsequent time, the inevitable necessity for marching an army across a citizen's farm, or fighting a battle around his house, or consuming his produce, our officers would be in greater danger from their friends than from their enemies. A commander under such circumstances may and ought to take such property as in his judgment is necessary, or may possibly contribute to

1. 6 Coldwell, p. 646.

save the lives of his soldiers and insure the success of his campaign; and if in good faith he deems the taking necessary he cannot be required to weigh nicely in the balances against these great objects, the value of a load of wood or of a bushel of corn. The responsibility and the discretion rest with the commander, and when he in good faith assumes the one and exercises the other, a civil court cannot reverse his decisions, but must presume that the discretion was properly exercised."

It is true that the plaintiff in this case was, when this seizure was made, a citizen of Tennessee—at the time in a state of insurrection—and he was therefore technically in the position of a public enemy; but at the time of the suit he was a citizen of the United States, clothed with all his rights as such, and the court was administering the law under the Constitution of the United States. The decision was intended to and did formulate the law, as understood by the court, applicable to military officers under the circumstances assumed, and bespeaks an enlarged discretion amidst such surroundings.

330. The decision heretofore referred to of the Supreme Court of the United States, reaffirming that of the supreme judicial tribunal of Mississippi in the case of Ford *v.* Surget, confirms in substance the principles set forth in the Tennessee Supreme Court decision just cited.[1] The act of the Confederate Government, March 6, 1862, made it the duty of military commanders to destroy all cotton, tobacco, or other property whenever, in their judgment, it should be about to fall into the hands of the enemy. The Supreme Court said that this act conferred upon Confederate military officers no authority other than, consistently with the laws and usages of war, they might have exercised without such previous sanction. They had the right, as an act of war, to destroy private property within the lines of insurrection belonging to those who were directly or indirectly coöperating therein against the authority of the United States if such destruction *seemed* to be required by impending necessity for the purpose of retarding the advance or

1. 97 U. S., p. 596

crippling the military operations of the Federal forces. The burning of the cotton or other property which would add to the warlike resources of the Union was, under these circumstances, an act of war merely, and the plain duty of the commander or other official responsible in the premises, which would relieve him from civil responsibility.

The importance of this decision arises from the fact that it vests in the commander an absolute discretion in front of the enemy and in presence of impending danger—lodging in his breast the determination of the question whether or not the necessity has arisen justifying the destruction of private property. If it seems to him that the peril is great, the necessity imperious, it is sufficient; it then becomes his right, may be his duty, to act. Language could not be chosen which more certainly would place the whole subject in the judgment of the military commander. And it is a universal rule that where the law gives a public officer a discretion whether he will act or not, he cannot be held answerable civilly for the exercise of that discretion, unless it can be shown that he acted corruptly, with a bad heart, and abused wickedly the confidence thus reposed.[1]

Furthermore, the liberality of this decision, when contrasted with those of some State courts, especially border States during the Civil War, is particularly noteworthy. The Government of the United States found it desirable to concede the rebels belligerent rights. This was in the interests of humanity, accorded with sound policy, and the fact furnishes the foundation on which rests the decision of the Supreme Court in Ford *v.* Surgit. To burn the cotton was a belligerent right; the Confederate commander had those rights; hence, the burning was justified.

331. It is a monstrous proposition that after the war-making power has invested an enemy with belligerent rights the judiciary can strip him of the protection with which those rights

1. Drewy *v.* Coulton, 1 East 56, notes; Ela *v.* Smith, 5 Gray (Mass.), p. 121; Piper *v.* Pearson, 2 Gray, p. 120; Clarke *v.* May, 2 Gray, p. 410.

clothe him. Yet that was the predicament in which numerous Confederate officers found themselves when after their surrender they returned to districts which they had visited during the war only to find themselves assailed by civil suits for clearly justifiable belligerent acts. In many instances the judges held them to the strict rule of Mitchell *v.* Harmony, before referred to, though wholly inapplicable to their cases; in others the rules held to apply were still more exacting, being, in fact, nothing but the civil law of trespass.[1] As they had not acted by virtue of civil authority, but in defiance of it, and as belligerents, they could not of course justify, and were held liable in damages. Could they have appealed to the highest courts, the opinions previously quoted show that the decisions of the local tribunals would, in some cases at least, have been reversed; but litigation is tedious, expensive, uncertain as to results, and frequently, under the rules of court, appeal is impossible. It resulted that this class of defendants were, with few exceptions, condemned to have their acts warranted by the laws of war tested by the more exact rules of civil conduct, and were found wanting accordingly.

332. One branch of the rule of military responsibility enunciated in the decision of the Supreme Court in the case of Mitchell *v.* Harmony was, that the necessity for seizure must be so pressing that the civil authorities cannot act in the premises, and this has been reiterated in the decisions of numerous courts since. Its relevancy in the original decision mentioned is not apparent, because there was no civil authority within hundreds of miles to which the military could appeal, or which would have been under any obligations to assist them. It need scarcely to be mentioned that this principle has no applicability under military government. Whatever of the civil authorities are permitted to perform their functions, it is, as has been pointed out, for the benefit of the conquered as an act of grace

1. 72 N. C., p. 218; 64 N. C., p. 141; 5 Coldwell, p. 149; 3 Coldwell, p. 85; 4 Coldwell, p. 205; 1 Heiskell, 44; 2 Bush, p. 453.

on the part of the conqueror, and at most for his convenience; as to him they have no legal force, nor can he properly invoke their interposition if by doing so he recognizes them otherwise than mere creatures of his will. He may not legally send his soldiers or others associated with his army as followers for trial before the local tribunals, which as to such persons are wholly without jurisdiction. 1

2. 100 U. S., p. 163; 97 U. S., p. 517; Halleck, Chap. 32, Sec. 6

CHAPTER XV.

MILITARY GOVERNMENT—TRIBUNALS.

333. Although not known in the United States service by the name "military commission" prior to the promulgation of General Scott's orders in Mexico,[1] before referred to, the war court, originally based on the common law of war, has always been recognized in the service. The most notable instance of its being resorted to during the Revolutionary War was in the case of Major André, which because of the prominence of all therewith connected was treated with every solemnity and dignity that the extraordinary occasion warranted. A "board"—"military commission" of the present day—composed of six major-generals and eight brigadier-generals with a judge advocate, duly assembled by the commander-in-chief, and proceeding not under the statutory law, but the common law of war, sentenced the unfortunate André to suffer death by hanging, the penalty of his rash act—playing the part of a spy. The validity of the proceedings, findings, and sentence of that commission has not been and cannot successfully be impeached. The trial of Joshua Hett Smith was another conspicuous instance of the exercise of like jurisdiction during that period.

334. The first and a memorable instance of the convening a war court in a foreign country by a commander of United States troops occurred in 1818, in Florida, then a territory of Spain. For some years previous to that the Seminole Indians had made the western part of Florida not only a place of permanent abode, but of retreat when returning from hostile incursions into the Georgia and Alabama territory within the United States. Under Article 5 of the treaty of 1795 with Spain, that government covenanted to restrain by force these acts of ruth-

1. See Appendix I.

less savage warfare, but did not do it.[1] It was claimed by the Spanish commanders in that quarter, and was probably true, that the weakness of their forces precluded the possibility of their redeeming the pledges of their Government in this behalf. To chastise these hostiles, consisting of Seminole Indians, negroes, and renegade whites, to protect the inhabitants of that exposed frontier and insure future peace on the borders, the President of the United States ordered General Jackson, commanding the Division of the South, to take the field. If necessary to accomplish these objects, the General was instructed to pass the boundary line between the territories of the United States and Florida, and conduct the war on Spanish soil. This was a measure of necessity. In carrying it out the General necessarily judged of the means to be made use of. Having penetrated into the interior of Florida, in pursuance of this plan, and taken possession of the Spanish fort, St. Mark's, he issued at that point, on April 26, 1818, a general order detailing a "special court," composed of a president, twelve members, and a recorder, for the purpose of investigating certain allegations against civilians captured in the Indian country, to the effect that they were or had been stirring up the savages against the people of the United States, aiding, abetting, and comforting them, and supplying them with means of carrying on the war. The court was directed to make a record of all the documents and testimony in the several cases, of their opinion as to the guilt or innocence of the prisoners, and what punishment, if any, should be inflicted. Both persons tried before this court were British subjects. Both were found guilty of the crimes alleged against them, with certain exceptions. Arbuthnot was sentenced to be hanged, and Ambrister to be shot to death; but the court reconsidered the latter sentence and changed it to fifty lashes. The proceedings and findings and first sentences were approved; the second sentence in Ambrister's case was disapproved. Both prisoners suffered the death penalty.[2]

1. 8 Statutes at Large, p. 140. 2. American State Papers, Military Affairs, Vol. 1, p. 734.

This transaction gave rise to much controversy. The authority of the commanding general to convene the court, and particularly his authority under the circumstances to carry into execution the first sentence imposed in the case of Ambrister, was questioned.

It is not perceived how these objections can be maintained. As to the first, it is to be observed that the officer convening the court was at the time engaged in carrying on war. In invading Spanish territory he was acting under and pursuant to the orders of the President. That Spain might have deemed this a just cause of war may be conceded; but no exception rightly can be taken to the actions of the commander in carrying out those orders. The Government of the United States alone was responsible for this invasion of the soil of a friendly power. In carrying into execution the views of the Government the American general in effect conquered the whole of west Florida. This was necessary in order that citizens of the United States might be protected against savages and their allies who had made that territory a place of arms, whence they issued on their incursions of desolation, and to which they had been accustomed to retreat as a secure place of refuge before the American forces. Although war had not formally been declared against Spain, a state of war against her dependency in fact existed. The President, acting within his constitutional powers, had determined how it should be conducted.[1] General Jackson, it is conceived, was empowered to exercise all the belligerent rights of a commander operating in a foreign country. Among these is the right to execute summarily those persons who have been guilty of a violation of the laws of war; or if he deems it advisable, to convene a war court for the trial of such cases. This authority the General exercised. The "special court" for the trial of Arbuthnot and Ambrister was a war court, such as would now be known as a military commission. The General did not find his authority to convene it in the statutory law, but in the laws of war.

1. 2 Black, p. 670.

As to the second objection: Premising that the commanding general had authority summarily to execute persons who were guilty, on the theatre of war, of the crimes which Arbuthnot and Ambrister had perpetrated; that the "special court" was asked for its *opinion* only both as to guilt and adequate punishment, General Jackson maintained that this "opinion" could not divest him of his original authority to proceed summarily, which in effect he did by directing that Ambrister be executed. Grant the premises, and the conclusion follows. Has, then, a military commander, conducting a campaign in enemy country, authority, under the laws of war and without the interposition of a court, summarily to punish those who, making peaceable foreign territory a point of support, send forth Indians and more savage negroes to make war upon peaceable citizens of the United States? Such acts are those of freebooters, and the actors, when apprehended, can expect no quarter. Arbuthnot and Ambrister were caught on foreign soil, red-handed from their nefarious work. It is submitted that the American general had the power summarily to execute them. It should be cautiously exercised, but this consideration does not impair the power itself. The law of April 10, 1806, by rendering the interposition of a court-martial necessary in the case of spies, to that extent only limited a previously existing plenary power.[1] Nor is it believed that either the old or the existing statute has any application to savages, their aiders or abettors.[2] Be that as it may, no statute existed at the time General Jackson exercised this authority which impaired his powers under the laws of war, except as to spies, when he was operating in enemy country. It is believed, therefore, that in directing the execution of Ambrister he did not transcend those powers.[3]

335. The action of General Scott in Mexico, and of various commanders in districts recovered from rebels during the Civil War, in appointing military commissions, was but an exercise

1. (Section 2) Vol. 2, p. 371, Statutes at Large. 2. Sec. 1343, R. S. 3. American Instructions, Sec. 4, clauses 2 and 4.

of authority in enemy country similar to that of which General Jackson's conduct furnishes an illustration. That the last mentioned exercise of authority was accompanied by incidents which, aside from the merits of the case, rendered it a subject of acrimonious political discussion, indulged in by those who were secure from the terrorizing circumstances which gave rise to the measures adopted, in no wise affects the principles involved.

336. The rule that in the absence of statutes the customs of war are to govern where they are applicable, is clearly stated in the opinion of the Supreme Court in the case of Martin *v.* Mott.[1] Commenting on the fact that the act of February 28, 1795,[2] authorizing the President to call forth militia in certain exigencies, did not render obligatory for their trial when in service those articles of war for the Government of the United States Army that related to courts-martial, it was remarked by Justice Story that if resort was to be had to those articles in the court-martial of militiamen, it could only be to guide the discretion of the officer ordering the court, and not as a matter of positive institution. And if it be asked in what manner militia courts-martial are to be appointed, in the absence of provisions of law directly bearing on the subject, the answer is, according to the general usage of the military service, or what may not unfitly be called the customary military law. It is that law by which courts-martial, when duly organized, are bound to execute their duties, and regulate their mode of proceeding in the absence of positive enactments. Upon any other principle courts-martial would be left without any adequate means to exercise the authority confided to them, for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them. Of questions not depending upon the construction of statutes, but upon unwritten military law or usage, military officers, from their training and experi-

1. 12 Howard, pp. 36-7 2 1 Statutes at Large, p. 424

ence in the service, are more competent judges than common-law courts.[1]

337. The commander who appoints military commissions does so in every case under a responsibility to his own government. He may be held answerable in certain cases likewise to those whom he sends before such tribunals in cases giving rise to transitory actions. It is true that members of an invading army are, as respects the conquered people, subject to the laws of war, and are responsible only to their own government and the tribunals by which those laws are administered.[2] But, as before pointed out, it is not doubted that transitory actions accruing to others than the conquered are not necessarily defeated by the fact that the cause which originated them arose under military government.

338. Members of commissions or other military government tribunals are not civilly liable (if the convening order was authorized either by statute or the laws of war), if the person and subject-matter rightfully be within their jurisdiction and the sentence or decree one which under the same laws is authorized. It is true that such tribunals do not exercise any portion of the judicial power of the United States. But it does not follow that the authority exercised by them is not in its nature judicial. There are many other courts exercising authority under Federal laws which form no part of the Federal judiciary. Referring to the judges of the superior courts of the Territory of Florida, the Supreme Court of the United States remarked: "They hold their offices for four years; these courts then are not constitutional courts in which the judicial power conferred by the Constitution on the general Government can be deposited. They are incapable of receiving it. They are legislative courts created in virtue of the general right of sovereignty which exists in the Government."[3] Yet such courts exercise judicial authority. They are as much judicial tribunals as any in the

1. 116 U. S., p. 178. 2. 100 U. S., p. 166; 97 U. S., pp. 60-63; American Instructions, Sec. 2, clause 17. 3. 1 Peters, p. 546.

land. Similarly the authority exercised by military tribunals under military government is judicial in the nature, though not in the sense in which judicial power is granted to the courts of the United States. It is a special authority involving discretion to examine, to decide, and to sentence.[1]

339. Military commissions may be appointed either under provisions of law in certain instances,[2] or under that clause of the Constitution vesting the power of commander-in-chief in the President, who may exercise it either directly or through subordinate commanders.[3] Now it is a principle that no one, even though commanded, is bound to do that which is unlawful. This applies to soldiers as well as to others.[4] The soldier, however, who assumes to question the order of his commander does so at his peril. This rule lies at the foundation of military discipline. It leads to unquestioned obedience, without which the military system could not exist, the army become a rabble dangerous to society in proportion to its numbers.

340. An order convening a military commission or other tribunal which does not expressly show on its face or in the body thereof its own illegality, members of the army would be bound to obey, and such an order would be a protection to them.[5] A military person is justified by an order from the commander within the scope of his authority. If the superior has secretly abused his power, he, and not the subordinate who executed the order, is answerable.[6] It is no affair of the subordinate that the superior has acted from unworthy motives. And when legally convened the members would in no instance be liable civilly if jurisdiction of the cause and authority existed for passing the sentence, unless malice or corruption be proved. The English case of Scott *v.* Stanfield goes beyond this. A judge of a county court was sued for slander; plea of

1. 1 Wallace, p. 253. 2. Act March 3, 1863, Chap. 75, Sec. 30; July 2, 1864, Chap. 215, Sec. 1; Acts March 2, July 19, 1867. 3. Art. 2, Sec. 2, cl. 1, Constitution. 4. See 2d and 21st Articles of War. 5. 3 Coldwell (Tenn.), p. 85; 1 Abbott, p. 212 (Scott's Digest, p. 428). 6. 1 Curtis (C. C.), p. 306; 7 Howard, p. 1.

language used in his capacity of judge; replication that the words were spoken falsely and maliciously and without probable cause; defendant demurred and the Court of Exchequer held the demurrer well taken. The chief baron said: "The question arises for the first time, perhaps, with reference to a county court judge, but a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner, and *to a court-martial*, which is not a court of record. It is essential to all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the benefit of the judges, but the public."

If jurisdiction be rightly had of the person and the subject-matter and the court come to an erroneous conclusion, although the person prejudiced thereby would by reason of this error be entitled to have the sentence or judgment set aside, and to be restored to his former rights, yet the members of the court are not liable in damages, as they would be if the court had proceeded without jurisdiction.

There is nothing new in the principle which protects members of military commissions, acting within the sphere of their authority, from prosecution for mere errors of judgment. It has been recognized by the English courts for many years as applicable to naval officers making captures at sea. Naval forces ought not to make capture of anything not lawful prize; but if they do, and the captured property be restored to the owner by the prize court, the captors are not liable to suit at common law for the trespass. The prize courts alone have jurisdiction for the redress of such wrongs. This was decided as early as 1781 in Le Caux *v.* Eden.[1] The opinion of Buller,

1. 2 Douglass, p. 594.

J., in this case reviews all the authorities and precedents, and Lord Mansfield gave his assent to all it contained. Subsequently Lord Mansfield himself delivered an opinion upon the same question, in which he asserted the same doctrine with renewed emphasis.[1] The authority of these cases has never been doubted.[2] "Military forces," said the Supreme Court, "act in the field according to the laws of war, upon appearances, not upon testimony; they occupy on land the same position that naval forces do at sea."[3]

341. The jurisdiction of military commissions, as to persons, extends to all within territory under military government. The principle of exterritoriality, which absolves foreign ministers from responsibility before local tribunals, has there no application.[4] This follows from the nature of the occupation. The country is held by right of conquest, under which circumstances the laws of war give the commander or his government the absolute right to prescribe the terms upon which all persons whomsoever shall either go from or enter the conquered district.[5]

342. Military tribunals, convened under the laws of war in territory subject to military government, may, at the pleasure of the convening authority, be given cognizance of all causes not brought within the jurisdiction of a particular tribunal by some statute of the conquering State.[6] The name by which the tribunals may be designated cannot affect their jurisdiction. The trial of causes concerning inhabitants of the conquered district before the local tribunals is matter wholly of comity or convenience, not obligatory on the conqueror. Should he permit it, this fact does not deprive him of the right to recur at will to the sterner rules of conquest. Subject to the statutory lim-

1. Linds *v.* Rodney, note to Le Caux *v.* Eden, p. 612. 2. 92 U. S., p 197. 3. *Ibid.*, p. 196. 4. Halleck, Chap. 9, Sec. 12; American Instructions, Sec. 5, clause 2; 92 U. S., p. 520; 9 How., p. 615. 5. See authorities last cited; 2 Wallace, p. 275. 6. 22 Wallace, p. 297; 20 Wallace, p. 387; 97 U. S., p. 509; 20 Howard, p. 178; Act March 3, 1863, Chap. 75; Scott's Autobiography, pp. 541, 575.

itations just mentioned, he has full authority to have all cases, civil or criminal, affecting all persons, arising in the conquered district, determined before tribunals convened by his authority. And so if criminals escaped from districts beyond are found within the jurisdiction of military government, their cases, if proper for the adjudication of the military court, may be tried there. The military commander will not permit territory subdued by his arms to be made a place of refuge for escaped criminals.

This authority is co-extensive with the demands of society, the business relations of the subjugated inhabitants, and the necessity for efficient military control. Whether the offences be violations of the laws of war, or crimes punishable by the ordinary laws of civilized nations, or civil causes between party and party in the district, the jurisdiction of military courts convened by authority of the commander is complete, to be invoked at the commander's discretion.

343. During the war in South Africa recently the British authorities established martial law over their own rebellious subjects in Cape Colony and Natal and over the Orange Free State and South African Republic when these gradually were occupied. Within Cape Colony and other districts similarly situated, and the hostile inhabitants of which were designated rebels, the civil courts were used on proper occasions; courts-martial tried those who belonged to the military establishment and were subject to the Army Act; while military courts, which corresponded to military commissions in the American service, took cognizance of offences under the laws of war of those who were not subject to the Army Act. Under the government of military occupation there were but two courts—the court-martial and the military court, the jurisdiction of each being the same as that mentioned above.[1]

1. Papers relating to martial law in South Africa, presented to Parliament by command of His Majesty, London, 1903; Vol. 1, p. 54 (Army Order No 1, November 19, 1900).

CHAPTER XVI.

When Military Government Ceases.

344. Such being the nature, the scope, and incidents of military government, the question as to when it ceases becomes important. And as this affects all concerned, conquerors and conquered alike, it is necessary that it be certainly determined.

345. The time when military government is discontinued, as well as the attending incidents thereof, depends on circumstances. The conqueror may be expelled, he may permanently hold the territory, or he may surrender it under terms embodied in treaty stipulations. In the first case the restored government will, upon resuming control, instantly re-establish the former order of things, at least so far as this may be found practicable amidst warlike operations. The rule of the conqueror would cease directly upon his expulsion, and the people at once resume their original relations to the government of their permanent allegiance. Still, when the conqueror ruled, his government, though founded on military force, was a *de facto* government. To it those who received its protection gave their obedience, and whatever measures were taken under its authority pursuant to the laws of war, affecting the people in either their rights of person or property, should receive the sanction of the old and now rehabilitated government.[1]

346. Should the conqueror permanently acquire the country, military rule would of necessity be maintained until such time as the civil could be established upon principles which comported with the interests and inclinations of the dominant power. When war ceases the laws of war no longer govern, for the same reasons that they did before—namely, that a state of war has its own laws; and now as peace has returned, the laws of

1. 4 Wheaton, p. 253; 92 U. S., p. 193; Bluntschli, I., Secs. 199, 210.

peace should prevail; yet it may be necessary to maintain the laws of war in operation after active resistance in the field has ceased, as a means of protecting life and property, building up society, and restoring civil government. During this period of transition authority wielded by the military may differ but little from that exercised during war itself. The measures taken are adapted to the occasion. Disorder is abroad in the land; the bad elements of society are to be held in check, and well-regulated government brought out of that chaotic state of affairs which follows almost invariably in the wake of a violent change of rulers. Amidst such surroundings, those in power must act promptly and decisively, for order must be maintained. If they were not permitted to do this, anarchy would soon run riot. Everywhere government of some kind is a necessity; if the civil cannot rule, the military must be maintained; and the situation of a conquered province until regularly incorporated into the subjugating State and given the benefits of its laws is one demanding in a peculiar manner the prompt action vigilant care, and powerful arm of military control. As was said by Lord Hale: "In matters civil for which there is no remedy by the common law, the military jurisdiction continues as well after the war as during the time of it."[1]

347. The condition of affairs here described is that which in the language of the Supreme Court is characterized as "a state of war," as distinguished from one of active hostilities.[2] And so when referring to California immediately subsequent to the treaty of peace with Mexico, and before that State was admitted into the Union, Mr. Buchanan, Secretary of State, said: "By the conclusion of the treaty of peace the military government has ceased to derive its authority from the laws of war. But the termination of the war left an existing government, a government *de facto* in full operation, and this will continue with the presumed consent of the people until Congress shall provide for them a territorial government. The great law

1. Army of the Deccan, 2 Knapp's Rep., pp. 149-51. 2. 92 U. S., p. 193.

of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy beyond the protection of all laws and reduce them to the unhappy necessity of submitting to the dominion of the strongest."

348. The question as to when military government in California terminated afterwards came up for discussion before the Supreme Court of the United States.[1] The court remarked that this government had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the Territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both was that it was meant to be continued until it was legislatively changed. No presumption of a contrary intention could be made. Whatever may have been the causes of delay, it was to be presumed that the delay was consistent with the true policy of the Government; and the more so, as it was continued until the people of the Territory met in convention to form a State government, which was subsequently recognized by Congress under its power to admit new States into the Union. The court concluded, therefore, that the so-called civil but really military government of California, organized as it was as a right of conquest, did not cease or become defunct in consequence of the signature of the treaty of peace with Mexico or from its ratification; and that it was continued over a ceded conquest without any violation of the Constitution or laws of the United States.

1. 16 Howard, p. 190.

349. The war tariff, imposed on imports into that Territory, was continued until the military governor received notification of the ratification of the treaty of peace. He then, August 7, 1848, discontinued it and substituted in its place the general tariff laws of the United States, although not until March 3, 1849, was the act of Congress passed extending those laws to California, and not until November 15, 1849, did the collector for the port of San Francisco, appointed thereunder, enter upon the performance of his duties. In fact, the military governments in California and New Mexico, both of which Territories were ceded to the United States, continued until September 9, 1850, when the former was admitted as a State and the latter organized under a territorial government pursuant to act of Congress. In Leitensdorfer *v.* Webb,[1] it was said of the judicial system established in New Mexico by the military governor, that it remained with functions unimpaired after the return of peace, until modified either by Congressional legislation directly or by that of the territorial government in the exercise of powers delegated by Congress.

Referring to this subject, Halleck says: "There can be no doubt that when war ceases the inhabitants of the ceded conquered territory cease to be governed by the code of war. Although the government of military occupation may continue, the rules of its authority are essentially changed. It no longer administers the laws of war, but only those of peace. The governed are no longer subject to the severity of the military code, but are remitted to their rights, privileges, and immunities under the code civil. Hence any laws, rules, or regulations introduced by the government of military occupation during the war which infringe upon the civil rights of the inhabitants necessarily cease with the war in which they had their origin and from which they derived their force."[2]

If the distinguished publicist meant here to abridge the absolute right of the conqueror to institute over territory he has permanently won by the sword such government as he sees fit,

1. 20 Howard, p. 177. 2. Chap. 33, Sec 18.

unless by treaty stipulation he has pledged his faith to a different course, the history of the world will not sustain the assertion. A subjugated people must abide by the will of those who have reduced them to submission. Policy, the promptings of humanity, or perhaps measures of necessity, determine the conqueror's conduct towards them. That of right they enjoy the privileges and immunities which were theirs under the former but now displaced government cannot be maintained, unless the conqueror has conceded this. The course pursued by the Government of the United States towards the provinces wrested from Mexico would, if considered alone, perhaps warrant the assertions of the author quoted. That, however, would be entirely too narrow a view to take of the subject. It was the policy of the United States to win over those inhabiting the subjugated districts in every possible manner. They were comparatively few in number, and while their conduct had been signalized by some conspicuous acts of perfidy, they were not actuated by a formidable spirit of resistance, and kindness toward them seemed both safe and politic. Repressive measures of a severe character were not found to be generally necessary under such circumstances, and haste was made after the war to restore the people to all their ancient civil rights which were found to be compatible with the institutions of the government of their new and permanent allegiance.

350. Without recalling instances from history to establish the proposition, almost axiomatic, that a conquered people retain only those rights which accord with the policy of the conqueror to concede, very recent times furnish two conspicuous illustrations of its truthfulness. They are the suppression of the Rebellion in the United States in 1865, and the conquest of Alsace-Lorraine in 1870-71. The vigor of the military rule established in the latter instance and the remodeling of ancient institutions, that thereby might permanently be secured to Germany what her arms had won, do but evince the earnestness of purpose with which these measures were adopted, and emphasize the severe nature of the laws of con-

quest. Dissertations on the abstract rights of the conquered would have little availed the people of these provinces. The government, even the municipal laws so far as deemed desirable, was recast in the iron mould of their traditional, warlike enemy, now become their masters. And yet who will assert that all this was not necessary if the subjugated territory was to remain to the conquerors?

351. It has been the policy of the United States to give the conquered—whom it has also been its policy to incorporate into the Union—civil government as speedily as possible and in as great measure as the circumstances warranted. It is a fact that in every instance the territories involved at one time were dominated by Spain, and their civilization and civil polity had the peculiar stamp of that monarchy, where the Church was the most powerful element in the State.

In New Mexico, in 1846, a civil government was organized almost as soon as the army took possession; in California the military government was of longer duration; in Cuba, Porto Rico, and the Philippine Archipelago military governments were maintained until it was deemed that they wisely could be replaced by the civil. The only real difficulty was in New Mexico and the Philippines, and due to the same cause—namely, the intense hatred of the natives to the dominant power of the United States, prompting them to indulge their natural taste for rebellion.

352. With regard to the course pursued by the United States authorities in 1865, and subsequently towards citizens of States in which rebellion had recently been suppressed, it is to be remarked that when the Civil War ended military government was continued over the rebel territory with a suspension of the privilege of the writ of *habeas corpus* until the civil authority of the Republic could be fully restored. An entire political and civil restitution was not completed until the civil tribunals of the Government could exercise their authority peacefully within the limits of each State and the functions of that Government be fully discharged. This required, by the

free system of the United States, a loyal coöperation of the people who exercised political power within each State, since they must hold many of the offices and compose the juries for the trial of all offences. It was also necessary that the State governments should be in active operation in conformity with and subordination to the Constitution of the United States, not only for the administration of the internal affairs of each State, but to enable the people of the State to have their share in the administration of the affairs of the Republic. Until these results were reached, the regions of country then recently in rebellion, with their inhabitants, were held under the forcible or military rule of the Republic so far as was necessary, though it was exercised to a great extent by civil officers and civil methods.[1]

353. It was judicially determined that the Civil War did not begin or terminate at the same time in all the insurrectionary States.[2] Its commencement in certain States was referred to the President's proclamation of blockade embracing them, dated April 19, 1861, and as to others his second blockade proclamation embracing them, dated April 27, 1861; while its termination as to certain States was referred to the proclamation of April 2, 1866, declaring that the war had closed in those States; and as to Texas, to the proclamation of 20th August, 1866, declaring it had closed in that State also.

354. The last rebel army surrendered in May, 1865. Thus a year elapsed after all resistance in the field had ceased before the President announced that the war had terminated as to any portion of the conquered territory, which during this time was occupied and in effect governed by the national forces. The status of affairs existing during this time was well described by the chief justice in delivering the opinion of the Supreme Court in the case of Lamar *v.* Browne. Active hostilities in Georgia terminated about April, 1865. In August of that year some cotton stored at Thomasville in that State was seized by the

1. Wheaton, Dana's note, p. 32. 2. 12 Wallace, p. 700; 15 Wallace, p. 177.

United States military officers and turned over by them to the Treasury Department. In the action (trover) brought to recover the value of the property, the position was taken by plaintiff that as armed resistance had long since ceased, the cotton at the time it was taken possession of was not liable to hostile seizure. "It is true," said the chief justice, "as claimed, that when the seizure was made active hostilities in Georgia had entirely ceased. The last organized army of the Rebellion east of the Mississippi had surrendered almost two months before, and a very large portion of the national forces had been disbanded. The blockade had been raised, and trade and commercial intercourse in that part of the insurgent territory again authorized; but still, in fact, *a state of war existed*," [1] and therefore the military forces were clearly acting within the general scope of their powers in taking possession of property used to aid the Rebellion. [2]

355. The experience of the United States Government, therefore, but adds to the evidence derivable almost universally from the history of other nations, that military government ceases at the pleasure of him who instituted it upon such conditions as he elects to impose, and that its termination is not in point of time coincident, either necessarily or generally, with the cessation of hostilities between the contending belligerents.

356. Of course, if the government of military occupation be expelled, it ceases with that fact. This was the case with those established by the French marshals in Spain from 1808 to 1812. The case of permanent conquest has been considered in preceding sections of this chapter. If the territory be surrendered in pursuance of treaty stipulations, their terms will decide the matter. This subject has had various illustrations since 1898. In Cuba, the military government only ceased when it was deemed by the United States that a satisfactory organization had been given the Cuban State. In Porto Rico, a government provided by act of Congress superseded

1. 92 U. S., p. 193. 2. 1 Knapp, P. C., p. 316.

that of military occupation. In the Philippines, a civil government, organized by the Executive under authority of Congress, succeeded the military. In South Africa, British military rule ceased over the annexed republics when a satisfactory condition of affairs looking to civil rule was established there.

PART II.

MARTIAL LAW.

CHAPTER XVII.

MARTIAL LAW DISTINGUISHED FROM MILITARY LAW.

357. Martial law is that rule which is established when civil authority in the community is made subordinate to military, either in repelling invasion or when the ordinary administration of the laws fail to secure the proper objects of government.

358. It is at once both a domestic and ordinarily an unwritten law. It is exercised over districts of that country only whose military authorities enforce it, and the limits prescribed for that exercise are not often the subject of statutory regulation. When armies operate in enemy territory, the enforcement of corresponding authority is, as we have seen, correctly designated Military Government.

359. Martial law has its foundation in reason. It is but a development of the principles of the common law,[1] which latter, however, contemplating as it does the maintenance of order and the preservation of society by unaided civil authority, or, at most, such authority aided by strictly subordinate military forces, is not suited to the more trying and turbulent times of invasion, rebellion, or other occasion of overpowering social disorder.

When martial law is invoked in face of invasion or rebellion that rises to proportions of belligerency, it is a war power

1. Hare's American Constitutional Law, Vol. 2, pp. 954-55.

pure and simple; when established as incident to the governor proclaiming a part of the State to be in insurrection or rebellion, it carries many military features growing out of the fact that the condition of affairs in the community is greatly assimilated to that of war; when brought into existence because of a local reign of lawlessness and violence which has dethroned or paralyzed the civil administration, it may be regarded as an extension and development of the police power. Its characteristics at any one time may be a combination of these.

360. The term is sometimes, though erroneously, used as synonymous with military law. While martial law, however, usually is unwritten, the military law of the land is found in the statute-books and the customs of the service.

361. It is from England that the United States derived both of these terms, as it has the common law, and the fundamental principes of its jurisprudence. In the former country the term "martial law" has, in the progress of time, changed its signification. From earliest periods of which we have authentic record the sovereigns of England, when engaged in wars, found regulations for the government of their troops necessary. These regulations were what the kings chose to make them. They constituted the "martial law" of those early days, and were properly applicable only to soldiers while embodied as such, and to retainers of the camp; just as in the United States the militia of the several States, when called into the service of the general Government, are subject to the rules and articles of war, but are not so at other times.

362. During this period of her history England had no standing army. Every freeman was a soldier. Each warlike occasion brought the knights and their retainers to the field, 60,000 of the former being bound by free-hold tenures to respond for forty days each year to the sovereign's call to arms. It was of the rules for the government of these forces that Hale in his history of the common law remarks: "The kings of the realm, preparatory to an actual war, were used to impose

rules and orders for the due order of their soldiers, together with certain penalties on the offenders, and this was called martial law. But touching martial law, it is to be observed that in truth and reality it is not a law, but something indulged rather than allowed as law; the necessity of good order and discipline in an army is that only which gives these laws a countenance."

363. The term "martial law," as here used, was not inappropriate. It meant the rule of the military as distinguished from that of the civil authorities. It signified the discipline of the camp, where the laws of peace were inadequate either to maintain order among the soldiers themselves, or to protect the community against their rude violence. It was applicable only to those in martial array or their attendants.

364. To martial law, as here restricted by the common-law historian, objection could not fairly be urged; it was a necessity, without which neither invasion could be driven back nor insurrection suppressed. But years wrought the beforementioned change in the signification of the term. The lines drawn between classes of the people in England were at once marked and profound. The rise, progress, and finally, to a considerable extent, the obliteration of these deeply implanted distinctions form one of the most interesting and instructive chapters in the history of that nation. The serfs and villeins often rose in rebellion, not by preconcerted movement, but urged on by a common and intense hatred of the classes above them. There was no civil power in the land capable of suppressing these uprisings. As just mentioned, the sovereign had not at command the strong right arm of a regularly organized military force. On such occasions the need of a regular army was severely felt. The large number of the turbulent and discontented rendered it impracticable for the ordinary officers of government to overthrow and bring to justice open, defiant disturbers of the peace.

365. In these emergencies resort was had to what was termed martial law to supplement the inadequate powers of

civil government. But it now no longer meant, as in former periods, those rules adopted for the control of the army when actually brought into the field; martial law was now being applied to a different portion of the community, and in this new sense the term was simply descriptive of that mode of procedure resorted to by the sovereign during the suppression of a rebellion too formidable for the civil authorities to put down.[1]

366. Whenever there was any insurrection or public disorder, the crown employed martial law in this new sense, and it was exercised not only over soldiers, but the whole people. Anyone might be punished under it as a rebel or an aider or abettor of rebellion whom the provost marshal or lieutenant of a county or their deputies pleased to suspect. Lord Bacon said that the trial at common law granted to Essex and his fellow-conspirators was a favor, for that the case would have borne and required the severity of martial law.[2]

367. But it was the acts of Charles I. which at once carried the exercise of this undefined power to its limit and led to its restriction by Parliament. The want of respect for the laws of the land, arising doubtless from the suffering and attendant discontent of the people which characterized the reign of that fated monarch, seemingly rendered resort by him to stringent measures of repression necessary. Accordingly commissions were issued to certain trusted servants of the crown, empowering them to inflict the death penalty upon soldiers or other dissolute persons who should commit robberies and similar crimes according to the summary practices of martial law. Times, measures, and men, however, had changed, and whatever the people might have been willing to put up with from the iron hand of a Tudor, they were not prepared quietly to acquiesce in this stretch of royal authority when attempted by a Stuart in the person of the insincere, vacillating, and tyrannical Charles. The Petition of Right followed quickly, by which at

1. See Opinions Attorney-General, 23, p. 123. 2. Hume, History of England, Vol. 5, Appendix III., p. 402.

one blow was struck down then, and apparently for all time, every pretense of authority for invoking martial law within the realm in time of peace.

It was here declared, in what has been truly designated one of the landmarks of English liberty, that no man ought to be judged to death but by the laws established either by custom or acts of Parliament. The circumstance was then narrated of the appointment of the commissions under the royal seal to proceed against such soldiers, mariners, and dissolute persons joining them as should commit murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever, by such summary course and order as was agreeable to martial law and was used in armies in time of war. This was declared to be illegal, and it was prayed that these commissions might be revoked and annulled, and that thereafter none of like nature might be issued. By the favorable action of the King, the Petition of Right became (1627) the law of the land; and subsequently the exercise of martial law, according to the technical meaning of that term in time of peace within the realm, has been interdicted.[1]

368. "What," said a profound lawyer and jurist,[2] "is martial law? It is the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends. But, under the Constitution of the United States, over whom does this law extend?

* * * * * * * * * *

"In time of war a military commander, whether he be the commander-in-chief or one of his subordinates, must possess and exercise powers both over the persons and property of citizens which do not exist in time of peace. But he possesses and exercises such powers, not in spite of the Constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordina-

1. Manual, pp. 5, 6, 787. 2. Ex-Associate Justice of the Supreme Court of the United States, R. B. Curtis.

tion thereto. The general who moves his army over private property in the course of his operations in the field, or who impresses into the public service means of transportation or subsistence to enable him to act against the enemy, or who seizes persons within his lines as spies, or destroys supplies in immediate danger of falling into the hands of the enemy, uses authority unknown to the Constitution and laws of the United States in times of peace, but not unknown to the Constitution and those laws in time of war. The power to declare war includes the power to use the customary and necessary means effectively to carry it on. As Congress may institute a state of war, it may legislate into existence and place under executive control the means for its prosecution. And in time of war, without any special legislation, not the commander-in-chief only, but every commander of an expedition or of a military post is lawfully empowered by the Constitution and laws of the United States to do whatever is necessary and is sanctioned by the laws of war to accomplish the lawful objects of his command.

"But it is obvious that this implied authority must find early limit somewhere. If it were admitted that the commanding general in the field might do whatever, in his discretion, might be necessary to subdue the enemy, he could levy contributions to pay his soldiers; he could force conscripts into his service; he could drive out of the entire community all persons not desirous to aid him; in short, he could be the absolute master of the country for the time being. No one has ever supposed, no one will now undertake to maintain, that the commander-in-chief, in time of war, has any such lawful authority as this. What, then, is his authority over the persons and property of citizens? I answer that over all persons enlisted in his forces he has military power and command; that over all persons and property within the sphere of his actual operations in the field he may lawfully exercise such constraint and control as the successful prosecution of his particular military enterprise may, in his honest judgment,

absolutely require; and upon such persons as have committed offenses against any article of war he may, through appropriate military tribunals, inflict the punishment prescribed by law. And there his lawful authority ends.

"The military power over citizens and their property is a power to act, not a power to prescribe rules for future action. It springs from present pressing emergencies, and is limited by them. It cannot assume the functions of the statesman or legislator, and make provisions for future or distant arrangements by which persons and property may be made subservient to military uses. It is the physical power of an army in the field, and may control whatever is so near as to be actually reached by that force in order to remove obstructions to its exercise.

"But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. Those laws may be made actually operative; obedience to them may be enforced by military power; their purpose and effect may be solely to support or recruit his armies, or to weaken the power of the enemy with whom he is contending. But he is a legislator still; and whether his edicts are clothed in the form of proclamations, or of military orders, by whatever names they may be called, they are laws. If he have the legislative power conferred on him by the people, it is well. If not, he usurps it. He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edict, than he has to hold all the property of the country subject to his military requisitions. He is not the military commander of the citizens of the United States, but of its soldiers."[1]

This was written at a time when the United States was in the midst of civil war. The Executive had frequently resorted to

1. "Executive Power," published October, 1862.

martial law where the unaided civil authorities apparently could not overcome the difficulties which encompassed them, thereby rendering necessary the prompt action of military power in order that an effective blow might be struck at the machinations, both open and secret, of those who were aiding and abetting rebellion. The constitutional principle here enunciated, that "power to declare war includes the power to use the customary and necessary means effectively to carry it on," is that upon which rests the right to invoke martial law as a war measure. But a mere statement of the principle, the truth of which is perhaps denied by none, is of little value in determining when and where martial law legally may be enforced. The real difficulty lies not in formulating, but in applying the principle. The latter is the pivotal point upon which turns the legality of the proclamation of martial law or its enforcement without this formality.

369. The power of the Executive to prosecute a war precipitated upon the country carries with it by necessary implication the incidental power to make use of the customary and necessary means of carrying it on successfully. If he deem the placing any district under martial law a proper measure, it is difficult logically to deny him the right to do it. Someone must judge of the necessity; the determination of some authority must be final. And where, with reason, can be lodged this discretionary power with greater safety than with that branch of the Government to which is entrusted the conduct of the war, and which is held responsible for its successful prosecution?

370. The Southern Confederacy during its brief existence had an extensive martial-law experience. As a result the principles underlying the lawful exercise of this unusual authority received careful examination and exposition by jurists of acknowledged ability. In a letter to a military commander from the Confederate Assistant Secretary of War, an ex-associate justice of the Supreme Court of the United States, it was remarked that the proclamation of martial law in a locality im-

plies that the district is the seat of war or rebellion, or that it has fallen, or soon might fall, within the lines of military operations or communication. It implies that a more vigorous policy has become necessary to preserve the efficiency of the army and to maintain its discipline, to secure in all its fullness its energy and vigor for use against the enemy, or it might imply that such an emergency has arisen as to require an extraordinary application of the resources of the population for their defense. The system of measures and administration which is introduced in such extraordinary and transitory exigencies involving the public safety varies according to circumstances; the measures and administration are occasional and transient in their operation as to time and limited as to locality, seldom proceeding from the supreme power of the State, or affecting the constitution of the body politic, not often necessarily impeding municipal administration. Continuing, it was observed, that a city, the capital of a State or nation, the depository of its government and archives, the site of its workshops, arsenals, hospitals, magazines, and munitions, with an insufficient army for its defense, and a wavering population beleagured by a powerful and bitter enemy, who would make its goods a booty and its houses a desolation, surely must be subject to conditions as to government and police dissimilar from that of a city sheltered against danger from any quarter.

These regulations not existing in ordinary times, but called for by extraordinary circumstances, it was held, would find their authority in the power of the Executive to use the military forces of the nation to repel invasions, and to adopt the measures requisite to employ those forces with the utmost advantage to that end. In the fulfilment of this office he might not make unreasonable or vexatious searches or seizures, nor unduly restrain liberty or take life, but the same act might be reasonable at one time and under one class of circumstances, and vexatious and wrongful under another. In all his proceedings he and his agents are responsible for acts not justified in the scope of his public duty.

"In the war in which we are engaged," observed the same official at another time, "circumstances are assembled which have scarcely ever been seen before together. The entire military population has been appropriated by law for the public defense, and before another year expires probably all will be called into service. Our enemy is seeking to find an ally in those in our own household and to add a servile to the horrors of a civil war. Civil administration is everywhere relaxed and has lost much of its energy, and our entire Confederacy is like a city in a state of siege, cut off from all intercourse with foreign nations, and invaded by superior force at every available point. Military administration at such places as are within the scope of military operations and supplies and upon the lines of military communication, in the very nature of the situation, must have a liberal extent. In so far as it affects citizens who do not belong to the army, it should be marked with sobriety, discretion, and deference for personal rights. No advantage should be taken by the exigencies of the time to inflict any injustice. In respect to the city of Atlanta there can be but little difficulty in proceeding upon the principles here laid down. The object of the proclamation [of martial law] there was to secure the safety of the hospitals, public stores, railroad communications, the discipline of the troops *in transitu*, and to collect deserters and absentees along railroads and guard against espionage on the part of the enemy. The provost guard was placed there to enable the officer to accomplish these objects, and the regulations to be adopted must be suitable to these ends. In accomplishing them some regulation of that unlimited freedom of intercourse and traffic which exists in time of peace has been found to be proper, and some expropriation of private property for public use essential; but it has been the anxious desire of this department that no substantial invasion of the great principles of constitutional liberty should occur; that no injustice should be

suffered, and that as little of personal inconvenience endured as circumstances would permit."[1]

371. These views regarding the enforcement of martial law as an incident to the prosecution of hostilities are particularly valuable. They are not the vagaries of the theorist, but deliberately formed opinions, given under official responsibility when circumstances rendered martial law a practical, however unwelcome, necessity. No people ever were more jealous of their constitutional rights than were those of the Southern Confederacy. But, as here evidenced, there arose occasions when, even with them, it was acknowledged that the rights of the few must sometimes give way to the preservation of the whole, and that military power properly may be invoked when civil authority cannot meet the ends of government.

372. It is worthy of special notice that the city of Atlanta, at the time referred to, when martial law there was declared and here justified, was not the immediate theatre of military operations, or immediately adjacent thereto, although, being a great center of military communication, it was an important strategic point. The evidence of this distinguished judge, whose predilections were all in favor of the supremacy of the civil power, is therefore contradictory of the principle insisted upon by some, that to justify martial law the district affected must actually be resounding with the clash of arms.

In the nature of things the limitation of martial law to such districts cannot be correct. As will more fully appear hereafter, *necessity* alone justifies resort to this extreme measure. It is the test by which those responsible for its enforcement must be judged. Look at the matter which way we will, it comes to that at last. While this necessity will almost inevitably arise in districts occupied by contending armies, it by no means follows that it will be confined to such districts.

373. When instituted because of civil commotion, martial law is confined to the disturbed district. But in this case,

1. October 27, 1862. (R. R. S., I., Vol. 16, Part II., p. 979 *et seq.*)

equally as when a war measure, the true test of justification being necessity, it follows logically that martial law is legal, whenever the civil authorities, acting either alone or with the assistance of a subordinate military force, cannot properly perform the functions of government. Not to resort to this law under such circumstances would be criminal, as without it life and property would be placed at the mercy of the lawless.

374. If it be asked what security exists against abuse of this summary military authority, the answer, as before pointed out, is in the amenability of those exercising it not only to military superiors, but also before the civil tribunals of the country when peace and order again resume their sway. This, it will be noticed, is carefully laid down by the authority just quoted.

375. Martial law imports a departure from the usual order of things. It does not mean the administration of the ordinary law in a summary way, but it is a totally different law. It has been used by all governments and in all countries, and is as necessary to the sovereignty of a State as the power to declare and make war. The right to declare, apply, and enforce martial law is one of the sovereign powers, and resides in the

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NOTE.—Among the manuscripts of the late Dr. Francis Lieber was found, after his death, one on the subject of martial law, written in the form of a note to the fifth and sixth articles of "The Instructions for the Government of the Armies of the United States in the Field" (G. O. 100, 1863). After distinguishing between martial law in hostile countries and domestic martial law, he says:

"As to martial law at home, which may become necessary in cases of foreign invasion, as well as in cases of domestic troubles, it has full sway in the immediate neighborhood of actual hostilities. The military power may demolish or seize property or may arrest persons, if indispensable for the support of the army or the attaining of the military objects in view. This arises out of the immediate and direct physical necessity, as much so as the law of trespass is inoperative against those who forcibly enter a house in case of a conflagration. This operation of martial law is not exclusive or exceptional. Any immediate physical danger, and paramount necessity arising from it, dispenses with the forms of law most salutary in a state of peace.

governing authority of the State, and it depends upon the Constitution of the State whether restrictions and rules are to be legislatively adopted for its application, or whether it is to be exercised by the Executive and on his initiative according to the exigencies which call it into existence. But even when left unrestrained by constitutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice; and as paramount necessity alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require; and, moreover, it must governed by the rules of general public law, as applied to a state of war; It, therefore, cannot be despotically or arbitrarily exercised any more than any other belligerent right can be so exercised. 1

"The subject of the greatest difficulty connected with martial law is its existence in a country distant from the scene of military action or in districts which are not in a state of insurrection. How far may it extend in point of geographical limits? How far may it extend in intrinsic action? Can it be dispensed with under all circumstances? How can people devoted to liberty limit its action so that it may not become a means of military despotism?

"It cannot be dispensed with under all circumstances, and if there were a law prohibiting it, it would break through the law in cases of direct and absolute necessity. The salvation of a country is like the saving of an individual life. It is paramount to all else. * * *

"It has been denied that the Government has any right to proclaim martial law or to act according to its principles in districts distant from the field of action, or to declare it in larger districts than either cities or counties. This is fallacious. The only justification of martial law is the danger to which the country is exposed, and as far as the positive danger extends, so far extends its justification." (Ives' Military Law, p. 13, note.)

Regarding the last point here touched upon, Whiting (War Powers, 10th edition, p. 169) says: "Nothing in the Constitution or laws can define the possible extent of any military danger. Nothing, therefore, in either of them can fix or define the extent of power necessary to meet the emergency. Hence it is worse than idle to attempt to lay down rules defining what must be the territorial limits of martial law."

1. Halleck, Chap. 17, Sec. 25; see also O'Brien, American Military Law, p. 28.

Reference here is made to martial law considered solely as a war measure, hence the reference to the exercise of belligerent rights. Martial law to meet civil commotion was not adverted to. The laws of different countries with respect to this last power vary. In France, and in most other States of continental Europe, three conditions of society are carefully provided for: the state of peace, where all are governed by civil or military authority, depending upon the class to which they belong; the state of war, where the law and authority depend upon the particular condition of the place and circumstances of the case, the civil authority sometimes acting in concert with, and sometimes in subordination to, the military; the state of siege, where the civil law is suspended for the time being, or at least is made subordinate to the military, and the place is under martial law, or under the authority of the military power. The latter may result from the presence of a foreign enemy, or by reason of a domestic insurrection, and the rule applies to a district of country as well as to a fortress or city. The state of siege corresponds to martial law in England and the United States.[1] There is, however, this important distinction: What lawfully may be done under a state of siege is fixed by statute, while martial law—subject to individual responsibility for its enforcement, as before mentioned—is a rule unto itself, its existence and rules of action being seldom the subject of legislative enactment.

376. The histories of both England and the United States afford many illustrations of resort being had with both legislative and judicial sanction to martial law when the civil authorities were unable to preserve order, secure the liberty of the subject, and protect him in his life and property. "For," as observed by an English writer,[2] "no judicial decisions can alter the fact that the application of military government, under the law of necessity, commonly called martial law, must always exist, although it is difficult to exactly define it further

1. Appendix V. 2. Pratt's Military Law, p. 214.

than as being the authority exercised by a military commander over all persons, whether civil or military, within the precincts of his command in places where there is either no civil judicature or this has ceased to exist."

377. Regarded as a belligerent right, to be exercised under the customs of war in repelling invasion, martial law is that military rule and authority which exists in relation to persons and things under and within the scope of active military operations, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war—the party who exercises it being liable in an action for any abuse of the authority thus conferred. It is the instituting over our own people the government of force, extending to persons and property, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action. Founded upon the necessities of war, and limited by them, its existence does not necessarily suspend all civil proceedings. Contracts may still be made and be valid so long as they do not interfere with or affect military operations. The civil courts are not necessarily closed, for all actions relating merely to the private affairs of individuals may still be entertained without detriment to the public service; but it closes the consideration there of any action, suit, or proceeding in which the civil process would impair the efficiency of the military force.[1]

This describes with greatest precision the conduct of affairs when martial law was proclaimed in the British colonies in South Africa in 1899. It was as a war measure that the British authorities availed themselves of this power. The incidents attending enforcement of martial law under such circumstances are wider in scope than when martial law is inaugurated

1. Professor Parker, *North American Review*, October, 1861.

to put down a local insurrection, in this, at least, that in the latter case no military commissions would be invoked, whereas in the midst of war's alarms they would be utilized without hesitancy.[1]

378. The military authorities where martial law is instituted must in any case judge in the first instance of its necessity. Still, the power they wield is restricted to the scope of the necessity which it has been determined exists; so that if an arbitrary force be used, having no connection with the exigency, or not within its possible scope, the party responsible may be held civilly to account for his acts. If the commander should go beyond what is necessary, to commit a private wrong disconnected from military operations, the existence of martial law would not excuse him from accountability afterwards before a judicial tribunal.

379. Turning now to the case when martial law is invoked to suppress revolt against municipal authority, the remarks of the judge-advocate general before the House of Commons committee in the Ceylon investigation are instructive. He there declared that martial law, properly so called, is not written, but unwritten law; it arises from necessity to be judged of by the executive; it comprises all persons, civil or military, and is to be executed by those who have to execute it, and faithfully, with as much humanity as the occasion allows, and according to their sense and conscience. The proclamation of martial law is a notice to all those to whom it is addressed that there is another measure of law and another mode of proceeding than there was before, and when martial law is proclaimed there is no rule or law by which the officers executing it are to be bound. It is more extensive than ordinary military law, and overrules all other law and is entirely arbitrary. There is no regular practice laid down in any work on military law as to how courts-martial are to be conducted or powers exercised under martial law, but, as a rule,

1. Papers relating to martial law in South Africa, presented to Parliament by command of His Majesty, London, 1903.

he would say that it should approximate as near as possible to the regular forms and course of justice and the usages of the military service.[1]

This opinion was a carefully considered statement of the judge-advocate general's view of the subject then under consideration. Yet the assertion that the power exercised under martial law is entirely arbitrary is liable to mislead. It cannot be meant by this that the authority there exercised by the military is despotic and irresponsible, nor even that responsibility is limited to accountability to military superiors alone. And herein lies the safety of the community.

380. It is true that some expressions of military commanders and recognized authorities on the law, detached from their context and hence in great degree misapplied, give color to the view that officers are not legally responsible for their acts under these circumstances; for instance, the statement of the Duke of Wellington, that "martial law is the will of the commander-in-chief"; of Lord Hale, that "it was in truth and fact no law at all, but something indulged rather than law"; of Blackstone, that "it is built upon no settled principles, but is entirely arbitrary in its decisions"; or that "it is an arbitrary kind of law or rule sometimes established in a place or district occupied or controlled by an armed force, by which the civil authority and the ordinary administration of the law are either wholly suspended or subjected to military power."[2]

381. None of these authorities gives countenance to the proposition that those who enforce martial law over our own people and territory are legally irresponsible for what they do. The Duke of Wellington was speaking of military government —the power of a conqueror on foreign soil—as illustrated by his own experience in France; while, as we have seen, Lord Hale referred to rules adopted by the sovereign for the gov-

1. Finlason, Repression of Riot and Rebellion, pp. 135-36, 195.
2. Burrill's Law Dictionary.

ernment of his irregular army when it was called into active service. Neither one, therefore, had in mind martial law considered as a domestic fact. And if Blackstone meant that for those who carry martial law into effect there is either no amenability, or none except to military superiors for oppressive use of power over the civil community, not only can martial law have no place in the judicial system of England, but it never would be tolerated in any country of laws or freedom, nor anywhere except under a despotism. With such a scope it cannot exist in the United States consistently with the Constitution, which, for the time being, it would subvert. Neither the President nor Congress constitutionally could authorize the exercise of such a power, nor can it exist by the general principles of the law.

382. Yet martial law in Ireland has time and again been established by act of Parliament;[1] while the supreme federal tribunal of the United States has decided that, under certain disturbed conditions of the civil power, martial law is permissible not only in the States of the Union, but under the general Government.[2] Nowhere, however, will be found either legislative or judicial sanction of the doctrine that martial law is the turning loose on the community a horde of irresponsible officials wielding a limitless, because an undefined, power.

383. The great problem is to reconcile the necessities of government with security to personal rights. And as before remarked, this, it is conceived, is most nearly attained by upholding to the utmost those upon whom, under trying circumstances, is devolved the duty of putting in execution this great law of necessity, while at the same time holding them to a strict reckoning for abuse of authority thus temporarily placed in their hands.

1. 29 George III., Chap. 11 (1799), Irish Parliament; 43 George III., Chap. 117 (1803); 3 and 4 William IV., Chap. 4 (1833). 2. 7 Howard, p. 1; 4 Wallace, p. 2.

The safeguards against martial law are not found in the denial of its protection, but in the amenability of the President to impeachment; of military officers to the civil and criminal laws and to military law; in the frequent change of public officers, the dependence of the army upon the pleasure of Congress, and the good sense of the troops.[1]

384. Omitting cases that have occurred during active warfare, and therefore as an incident of belligerency, there have been numerous instances of martial law having in terms been declared by governors and military commanders of high rank. The occasions have all resulted from the entire backdown of civil administration and failure to perform its appropriate functions in the governmental system. They are not growing less frequent within the limits of the United States, but rather the reverse.[2] Martial law, to meet and overcome domestic violence, appears to be invoked more frequently within those limits than under any other of the first-class powers. There must be some deep-seated reason for this; doubtless many reasons. One of the most potent, perhaps, is the elective character of local officials, who in consequence feel acutely a personal interest in the cultivation of friendly terms with those in the community who, in subordinate capacities, have much to do with popular elections and who not infrequently are the prime-movers in civil disturbances that necessitate invoking the interposition of the military power. Another reason is the confusion in the minds of many people leading them to interpret liberty as being license; the safeguards to personal rights secured by the amendments to the Constitution as an immunity to them in invading the same

1. Whiting, War Powers, 10th edition, pp. 163, 170. 2. Without attempting to enumerate all, the following instances are cited: General Andrew Jackson, New Orleans, 1814; Rhode Island Legislature, 1842; Commanding General, New Orleans, 1866; Governor of Arkansas, 1868; Governor of Tennessee, 1869; Governor of Arkansas, 1874; Governor of Washington Territory, 1886; Governor of Pennsylvania, 1892; Governor of Idaho, 1892; Governor of Idaho, 1899; Governor of Pennsylvania, 1902; Governor of Colorado, 1903–04.

rights of others. "The rioters in Chicago at the Haymarket massacre," observed the Colorado judge in dismissing a case against militia officers for false imprisonment, "quoted in hand-bills declarations of Thomas Jefferson on liberty, and bespoke the author of the Declaration of Independence in justification of their acts of bloodshed and rioting. Liberty is not unbridled license. While the courts must protect the personal liberty of the citizen, liberty in this sense does not mean a right to impose upon the rights of another citizen, nor to incite to breaches of the peace, rioting, and destruction of property."

385. In this treatise the following principles relating to the instituting and execution of martial law are maintained:

First. That no government worthy of the name will permit itself to be overturned, the object for which it was instituted to be defeated, by the turbulent element in its midst, simply because the civil administration fails, whether culpable or otherwise, to perform the function prescribed by the written law; but, in such case, it is the right and duty of government, in self-defense, to resort to a higher and unwritten law to meet the exigency.

Second. That the force called into active operation in this exigency is of necessity the military and martial law is its rule of conduct.

Third. That martial law thus may be invoked either by the executive or the law-making power, although the former generally will be the case.

Fourth. A proclamation establishing martial law, while convenient as notifying to all the true conditions, is not necessary; but the placing the military in control, by proper authority, carries its own proclamation that martial law there prevails.

Fifth. In the exercise of this power the military may, if convenient to all authorities, utilize the civil administration; but this to the extent only that the military may deem such course desirable.

Sixth. In the enforcement of martial law the military may not wanton with power and use it tyrannically or for the oppression of the community; and should this be done, the perpetrators, after law has resumed its proper sway, may be brought before the civil courts, where such acts may be inquired into; the question for the court to determine in such case being how the heart stood when such alleged unlawful acts were perpetrated.

CHAPTER XVIII.

MARTIAL LAW UNDER ENGLISH JURISPRUDENCE.

386. Theories regarding martial law, its nature, the scope of authority exercisable thereunder, and the responsibility of those enforcing it; what state of facts brings into existence the necessity which justifies resort to this unusual power, as well as the extent of territory over which it legally may be enforced, will depend in great degree upon the experience of that government whose officers are called upon to carry it into effect, and whose courts may pass upon the legality of their acts. These theories will be reflected in the writings of its historians and commentaries on its laws, the practices of its generals, the decisions of its courts. What may be true regarding one government and under one combination of circumstances may not, and, except to a limited extent, probably will not, be true under another government and different surroundings. It is necessary to remember this, that too much weight be not attached to authorities who may have arrived at conclusions drawn from facts which are not of general applicability.

387. In the United States it is natural to turn to English precedents. Not only is the foundation of the judicial systems the same, but likewise the great bulwarks of society found in the common law, whereby security is given to life, liberty, and property. In martial-law experiences, however, the fortunes of the two governments in many respects have been dissimilar, a fact which has given rise to diverse views. In England the question has been one of dealing with rebellion, not, except to a very limited extent, in the island of Great Britain itself, but in Ireland and in distant colonies. Foreign

invasion or rebellion so extensive as to secure to the rebels belligerent rights has, happily, since the days of Cromwell, never confronted the British Government. In the United States, on the other hand, martial law has been resorted to under all the circumstances mentioned. As the experience of the latter Government has been more varied and extensive in dealing with martial law as a domestic fact especially, so the views entertained by its authorities may be expected to be, as they are, more comprehensive. They have examined the subject, if not more carefully, still with the aid of light drawn from a wider experience and the advantage of having many more points of observation. It will not, therefore, be surprising if the conclusions at which they have arrived are not in all respects similar to those drawn by others differently situated; but from the important fact that their experience has been more varied as well as more extensive, we may with some degree of confidence rely upon the correctness of those conclusions.

388. And first, as to English experiences. In 1803 parts of Ireland were in a state of rebellion. The civil authorities could not, acting either alone or aided by a subordinate military, enforce the laws of the land. Resort was had, therefore, to more efficacious measures. By act of Parliament[1] passed to meet the emergency it was enacted that it should be lawful for the lord lieutenant or other chief governor of Ireland, from time to time during the continuance of the rebellion, and whether the ordinary courts of justice should or should not be open, to issue his orders to all officers commanding the forces to take the most vigorous and effectual measures for suppressing the rebellion which should appear to be necessary for the public safety and the persons and property of loyal subjects; to punish all persons acting, aiding, or in any manner assisting the rebellion, according to martial law, either by death or otherwise, as to them seemed expedient for the punishment and suppression of all rebels in their districts, and to

1. 43 George III., Chap. 117.

arrest and detain in custody all persons engaged in such rebellion or suspected thereof, and to cause all persons so arrested to be brought to trial in a summary way, by court-martial, for all offences committed in furtherance of the rebellion, whether such persons were taken in open arms against His Majesty, or otherwise concerned in the rebellion, or in aiding or in any manner assisting the same, and to execute the sentences of all such courts-martial, whether by death or otherwise. Finally, and as if in anticipation that this parliamentary declaration of martial law might possibly be construed in some way as a precedent to detract from the common-law power of the sovereign, it was further enacted that nothing in the act should be construed to take away, abridge, or diminish the acknowledged prerogative of the crown for the public safety, to resort to the exercise of martial law against open enemies and traitors. Language could not more clearly and forcibly set forth the full scope of martial-law power in time of insurrection or rebellion.

389. Two features of this law are worthy of particular attention: first, the careful reservation of the right of the crown by prerogative to resort to martial law, thus refuting the claim sometimes made that Parliament alone has authority to put into operation this power, and establishing beyond question that the crown legally could resort to martial law in the contingencies mentioned, where the expression "open enemies or traitors" would seem, as in reason it should, to provide against invasion as well as rebellion; second, the provision that the summary course of martial law should have full effect equally, whether the ordinary courts of justice were or were not open; and the reason for this was as interesting as the provision itself was important—namely, that the course of the common law would be taken advantage of by guilty parties as a means of escape from the punishment due to their crimes. This is the more important from the fact that one of the most familiar rules for the determination of the necessity which alone justifies martial law is whether or not courts of justice

in the district affected can sit and perform their functions. But the act cited, while recognizing the fact that courts of justice might be open for the administration of justice, provided specifically that whether they were or were not made no difference; martial law was to be strictly enforced, and the ordinary courts, though they might sit undisturbed, were not to be permitted to be made a cloak to shield the guilty from the legal consequences of their acts.

390. It may be assumed that in a country of laws and which deserves to be called free nothing in governmental affairs rises superior in dignity and authority to a constitutional act of the national legislature. This is pre-eminently so in the United Kingdom, where Parliament—king, lords, and commons acting together—is absolute, and may change even the constitution at will. Yet we find here two principles enunciated by that supreme power: first, that the crown by virtue of prerogative may in certain cases legally enforce martial law; second, the fact that courts of justice may be sitting is not the infallible criterion by which the necessity that justifies martial law is to be tested—principles which, singularly enough, receive but the reluctant assent of many writers and even judges of that country.

In this is discernible the difference between the conduct of a department or governmental agency whose duty it is to meet a great public emergency, and which proceeds, with every practicable regard for the rights of the citizen, to the performance of that duty in the most direct and effective manner, and the speculations of those, replete with wisdom after the fact, who come upon the stage when all danger is passed and dilate upon the various phases of what may have been a governmental crisis, weaving finest theories regarding what can and what cannot constitutionally be done under such circumstances. With entire candor it may be said, however, that the former is entitled to the more respectful consideration. The governmental department, whatever it be, acts under a responsibility with which those who criticise its measures have not been

honored. The former has to do; the latter, as a rule, but to enjoy the pleasures of contemplation while indulging their fancies regarding what ought to have been done.

391. To the same effect was British colonial experience. In a case growing out of the Jamaica rebellion of 1865, in which it was alleged that under color of martial law murder had been committed, the colonial judge, who had been a witness to the terrors of the servile insurrection, truthfully observed: "It is manifest that every government must, in the interest of those under its care, possess the power of resorting to force in the last extremity. The want of such a power would place the very existence of the State at the mercy of organized conspiracy. The public safety, therefore, which is the ultimate cause, confides to the supreme authority in every country the power to declare when the emergency has arisen. But martial law, while it dispenses with the forms and delays which appertain to ordinary criminal jurisdiction, does not, therefore, authorize or sanction every deed assumed to be done in its name. It stops far short of that. For if it did not, lawless men, under color and pretense of authority, might commit acts abhorrent to humanity, and might gratify malice and revenge, hatred and ill-will. No greater error exists than to suppose that the subjecting a district to military power authorizes excess on the part of those who exercise that power. Deeply, therefore, is it in the interest of the public welfare that it should be understood what martial law sanctions and what it does not. It allows, in one word, everything that is necessary towards putting down resistance to lawful authority. It requires that the acts of its members should be honest and *bona fide*. And it further fastens as a condition upon its agents that their acts should be deemed to be necessary in the judgment of moderate and reasonable men. Reason and common sense must approve the particular act. It is not sufficient that the party should unaffectedly believe such and such an act to be called for; the belief must be reasonably entertained and such as a person of ordinary understanding would not repudi-

ate. If these conditions are not fulfilled, the act becomes unlawful, with all the consequences attaching to illegality. It then takes rank with those acts to which the privilege and protection of martial law are not extended. The vindictive passions are prohibited as absolutely during military rule as in the most orderly and tranquil condition of human affairs. Excess and wantonness, cruelty and unscrupulous contempt of human life, meet with no sanction from martial law any more than from ordinary law. No amount of personal provocation will justify or excuse vindictive retaliation. Were it otherwise, an institution which, though stern, is beneficial, would degenerate into an instrument of mere private malice and revenge."[1]

These views, delivered from the bench and in the very presence as it were of insurrection, will present the two aspects under which martial law appears: first, a necessity arising from particular circumstances and justifying what in good faith, honestly and with reasonable discretion, may be done under it to protect and defend life and property and preserve society; second, a rule of law holding to strict accountability those who seek under cover of its exercise to gratify personal and unworthy ambition, or to tyrannize over those whom misfortune for the time being has placed in their power.

392. This rebellion and the measures taken to suppress it gave rise to heated discussions in England on the subject of martial law; the officers who had declared and enforced it were subjected—but without ultimate serious legal consequences—to the annoyance of prosecutions in the mother country, which assumed very much the appearance of persecutions. The home government, while not justifying all that had been done, sustained the energetic measures of its officers, and grand juries could not be brought, even under the seemingly biased instructions of judges, to bring in true bills against them. One of the most notable and valuable incidents of this public agitation was the delivering an opinion—non-judicial—on the nature and scope of martial law, by Mr. Edward-James

1. Finlason, Repression of Riot and Rebellion, pp. 168-69.

and Sir James Fitz-James Stephen, called forth at the instance of the government authorities. This opinion, as we are informed in the "History of the Criminal Law of England,"[1] was drawn by Mr. Stephen, and it is worthy of particular notice, both on account of the learning and probity of its author and its historical and legal value.

It was observed that "the whole doctrine of martial law was discussed at great length before a committee of the House of Commons which sat in the year 1849 to inquire into certain transactions that had taken place in Ceylon. Sir David Dundas, the judge-advocate general, explained his view at length, and was closely examined upon it by Sir Robert Peel, Mr. Gladstone, and others. The following answers amongst others throw much light on the subject: '5459. If a governor fairly and fully believes that the civil and military power which is with him, and such assistance as he might derive from the sound-hearted part of the Queen's subjects, is not enough to save the life of the community and to suppress disorder, it is his duty to suppress it by martial law or any other means. 5476. (Sir Robert Peel) A wise and courageous governor, responsible for a colony, would take the law into his own hands and make a law for the occasion rather than submit to anarchy? A. I think that a wise and courageous governor would, if necessary, make a law to his own hands, but he would much rather take a law which is already made; and I believe that the law of England is that a governor, like the crown, has vested in him the right, where the necessity arises, of judging of it and being responsible for his work afterwards, so to deal with the laws as to supersede them all and to proclaim martial law for the safety of the colony. 5477. (In answer to Mr. Gladstone) I say he is responsible just as I am responsible for shooting a man on the king's highway who comes to rob me. If I mistake my man, and have not, in the opinion of the judge and jury who try me, an answer to give, I am responsible. 5506. My notion

1. Vol. 1, p. 207.

is that martial law is a rule of necessity, and that when it is exercised by men who are empowered to do so, and they act honestly, vigorously, and with as much humanity as the case will permit in discharge of their duty, they have done that which every good citizen is bound to do. Martial law has, accordingly, been proclaimed in several colonies—viz., at the Cape of Good Hope, in Ceylon, Jamaica, and in Demerara.'

"The views thus expressed appear to be substantially correct. According to them, the words 'martial law,' as used in the expression 'proclaiming martial law,' might be defined as the assumption for a certain time by the officers of the crown of absolute power exercised by military force for the purpose of suppressing an insurrection or resisting an invasion. The proclamation of martial law in this sense would only be a notice to all whom it might concern that such a course was about to be taken.

"It is scarcely possible to distinguish martial law, as thus described and explained, from the common-law duty which is incumbent upon every man, and especially upon every magistrate, to use any degree of physical force that may be required for the suppression of a violent insurrection, and which is incumbent as well on soldiers as on civilians, the soldiers retaining during such service their special military obligations. Thus for instance, it is apprehended that if martial law had been proclaimed in London in 1780, such a proclamation would have made no difference whatever in the duties of the troops or the liabilities of the rioters. Without any proclamation the troops were entitled and bound to destroy life and property to any extent which might be necessary to restore order. It is difficult to see what further power they would have had, except that of punishing the offenders afterwards, and this is expressly forbidden by the Petition of Right."

Sir James Fitz-James Stephen summed up his views of martial law in general in the following propositions: First, martial law is the assumption, by officers of the crown, of absolute power exercised by military force for the suppression of an in-

surrection and the restoration of order and lawful authority. The officers of the crown are justified in any exertion of physical force extending to the destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and unusual means, but are liable civilly and criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed and after the ordinary courts of justice are reopened. The principle by which their responsibility is measured is well expressed in the case of Wright *v.* Fitz-Gerald.[1] Wright was a French school-teacher who, after the suppression of the Irish rebellion of 1798, brought an action against Mr. Fitz-Gerald, the sheriff of Tipperary, for having cruelly flogged him without due inquiry. Martial law was in full force at that time and an act of indemnity had afterwards been passed to excuse all breaches of the law committed in the suppression of the rebellion. In summing up, Mr. Justice Chamberlain, with whom Lord Yelverton agreed, remarked that the jury were not to imagine that the legislature, by enabling magistrates to justify under the Indemnity Bill, had released them from the feelings of humanity or permitted them wantonly to exercise power, even though it were to put down rebellion. No; it expected that in all cases there should be a grave and serious examination into the conduct of the supposed criminal, and every act should show an intent to discover guilt, not to inflict torture. By examination or trial he did not mean that sort of examination and trial which they were then engaged in, but such the best the nature of the case and existing circumstances would allow of. That this must have been the intention of the legislature was manifest from the expression "magistrates and all other persons," which proved that as every man, whether magistrate or not, was authorized to suppress rebellion, and was to be justified by the Indemnity Bill for his acts, it is required that he should not exceed the necessity

1. 27 State Trials, p. 759 (*ante*, Sec. 11, Introduction).

which gave him the power, and that he should show in his justification that he had used every possible means to ascertain the guilt which he had punished; and, above all, no deviation from the common principles of humanity should appear in his conduct.

Second, the courts-martial, as they are called, by which martial law in this sense of the word is administered, are not, properly speaking, courts-martial at all. They are merely committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government. On the one hand, they are not obliged to proceed in the manner pointed out by the Mutiny Act and the Articles of War. On the other, if they do so proceed, they are not protected by them as the members of a court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing with any forms and in any manner whatever is necessary to suppress insurrection and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and the Articles of War.

393. This opinion is deemed of sufficient importance to be quoted at length. It will be observed, however, that the learned counsel who delivered it had only under consideration the case of rebellion, riot, or insurrection, an uprising so small in its proportions as not to warrant dignifying the resulting contest for its suppression by the name of war; nor such as would secure to the rebels belligerent rights; nor does the situation of a community disordered by invasion receive any except a passing allusion, with no examination as to what the necessities growing out of such a state of affairs legally would justify. Attention at the time it was delivered was being earnestly directed to the incidents attending the recent enforcement of martial law in the distant island of Jamaica; and the burning question of the hour was whether *after* the suppression of active resistance alleged criminals legally could be proceeded against

before military tribunals erected under the authority of martial law, or whether they should be turned over for trial to the civil tribunals. Upon this point the opinion is clear that the latter is the proper course under the English law.

At the present time what are styled above as committees are designated, under English martial-law jurisprudence, military courts; they reach the cases of all those within the proclaimed district not triable by courts-martial or by the civil courts that may have been retained; the causes triable before them must have arisen subsequent to the inauguration of martial law and within the proclaimed district.[1]

The reference made to the disturbances of 1780—Lord George Gordon riots—shows that the opinion did not extend in its scope beyond the case of a formidable uprising such as those riots were, where the military acted in aid of and in subordination to the civil authorities; but in point of fact acted thus very inefficiently compared to what they might have done, due to the vacillation and want of firmness on the part of the civil magistrates, who first hesitated to call upon, and when called out, to direct the military where and how to act.[2] As to the powers and responsibilities of the military when so acting, the views of the opinion are in consonance with those heretofore expressed in this treatise as attaching to officers under martial law.

394. A case for the legal declaration of martial law, or its enforcement perhaps without declaration, like that which arose at New Orleans in 1814, at Atlanta and other places in the Confederacy, or in Missouri, Kansas, and elsewhere within the Federal lines during the Civil War, receive no consideration from the writer of the opinion just cited. Yet these are experiences in our own history fraught with vastly more important consequences to society and good government than are the incidents attending rebellion in a small semi-civilized

1. Papers relating to martial law in South Africa, presented to Parliament by command of His Majesty, London, 1903. 2. Finlason, Repression of Riot and Rebellion, p. 7 *et seq.*

island, where the energetic use of a few soldiers for a brief period sufficed to stamp out effectually all resistance to lawful authority.

395. As, therefore, the experiences of Great Britain and the United States as to the occurrences which called forth martial law have been so dissimilar, it is not to be wondered at if the views of the authorities of the two countries—executive, legal, and judicial as to its nature, and the powers, duties, and responsibilities of those who are called upon to put it into execution—should, as before pointed out, to some extent be found to differ. It would be strange were it not so. Yet careful examination will evince that want of concurrence is not so marked as might have been anticipated considering the unlike standpoints occupied by those whose duty it has been to give the subject closest attention. And whatever view may be taken in England of the military courts which may sit under martial law, whether they be considered mere committees or courts proper, their nature is not an open question in the United States, where military commissions are as well known and within their proper sphere as well recognized as courts-martial themselves. 1

396. "The declaration of marshal law, or, as modern usage prefers to write it, of martial law," says Simmons, 2 "extends its operations to persons not within the provisions of the Mutiny Act, and subjects the whole population of the proclaimed district to orders according to the rules and discipline of war, and renders all persons amenable to courts-martial on the order of the military authority and so long as the civil judicature is not in force. There is also a modified exercise of martial law where, by special intervention of the authority exercising the supreme legislative power, courts-martial have been erected into tribunals for the trial of persons not otherwise subject to military law for certain specified offences, notwithstanding that

1. State *v.* Stillman, Supt. Ct. Tenn., 7 Coldwell, p. 352; 1 Wallace, pp. 251-4. 2. Constitution and Practice of Courts-Martial, 7th edition, Sec. 36.

the ordinary course of law may have been partially restored or may never have been altogether stayed." He then remarks that the Mutiny Act, by prohibiting martial-law methods in time of peace, indirectly recognizes resort to this expedient as legal in time of war and rebellion, or such armed rising as is levying war against the crown; that no legal dogma can be clearer than this, and being each year recognized by Parliament, it is entitled to all the deference which may be due to an act of the legislature so repeatedly revised and considered; finally, that the legal right of the sovereign to resort to the exercise of martial law, as here defined, has been frequently reasserted by the legislature and is not to be questioned.

397. To the same effect is McArthur, who calls attention to the confusion of thought often fallen into by able lawyers and writers, who constantly confound military law as exercised by authority of Parliament, the Mutiny Act, the Articles of War, and Army Regulations, "with a different branch of the royal prerogative denominated martial law, and which is only resorted to upon an emergency of invasion, rebellion, or insurrection."[1] This was in 1813; and he observes that martial law is proclaimed by authority of Parliament over the kingdom partially or wholly for the suppression and extinction of the rebellion; that the authority under which martial law is exercised, when it prevails in its full extent, claims a jurisdiction in summary trials by courts-martial not only over all persons in the military service under all circumstances, but that it also extends to a great variety of cases not relating to military matters, but affecting those occupying the district for the time being subjected to martial law.

398. Griffiths observes that martial law extends to all persons within the district affected, while military law applies only to those belonging to or serving with the army; that necessity is the only rule of the former; that the punishments which courts-martial may inflict under its authority are not limited as

1. Vol. 1, p. 33.

under ordinary circumstances, and that imperious necessity under the actual surroundings at the time determine in any case what punishments are suitable for established guilt.[1] This accords with the remarks of Stephen, before quoted, that courts under martial law are not bound by nor could they seek the shelter of the Mutiny Act.

399. In the Manual of Military Law issued with the sanction of the British War Office it is stated that martial law as distinguished from military law and the customs of war is unknown to English jurisprudence; that the intermediate state between war and peace called by Continental writers a "state of siege" does not exist in English law, which never presupposes the possibility of civil war, and is silent as to such a condition of things; that within the United Kingdom peace always exists in contemplation of English law, and the disturbers of that peace are considered guilty according to the gravity of their offences and punishable therefor with fine, imprisonment, penal servitude, or death; that while what is called martial law had been in former times proclaimed against disturbers of the public peace in England, yet such a proclamation in no degree suspended the ordinary law or substituted any other in its stead, and amounted to no more than an authoritative announcement of the existence of a state of things in which force would be used against wrong-doers for the purpose of protecting the public peace; that the origin of the misuse of the expression "martial law," as implying a state of things in which subjects in time of peace are rendered amenable to some other than the ordinary law, would probably be found in the illegal attempts which have been mentioned as made in the arbitrary times of English history to apply military law to the civil population, as in those days a proclamation of martial law would have the significant effect that military, or, as it was then called, martial law, would be substituted for the ordinary law as respects the disturbers of the public peace; in other words, that the rioters, when cap-

1. Notes on Military Law, London, 1841, p. 20; see also Franklyn's Outlines of Military Law, p. 84.

tured, would be tried and punished by military and not by civil tribunals; that such a state of things never legally existed in England, although a restricted power of trying by military tribunals offenders against the public peace in Ireland has on several occasions been created by act of Parliament, and that by English law those persons only can be tried by courts-martial who are by the Army Act declared to be subject to military law.[1]

400. Such may be the theory of the law. But as to this it imports little whether martial law be recognized in English jurisprudence or not, if in fact it be appealed to not infrequently by Parliament, the crown, and the governors of important colonies. The theory that this law has no recognition in the judicial polity of any country, when the facts show that it is invoked either by direction or with the approbation of the highest governmental authorities, can only be productive of evil consequences; it confuses the mind by creating a doubt whether such summary procedure as attends the martial law actually in force can ever legally be resorted to; and however pleasing the idea to those who erect for themselves in this world a condition of society and government where all is bliss, contentment, and all without coercion obey the laws, experience shows that it is impractical. The history of England refutes it. Whether martial law be or be not recognized by her system of jurisprudence, its assistance has often been utilized by those who in one capacity or other are held responsible for the preservation of law and order in the community. Upon this point a recent English authority remarks: "The occasions on which force may be employed, and the kind and degree of force which it is lawful to use in order to put down a riot, is determined by nothing else than the necessity of the case. If, then, by martial law be meant the power of the government or of loyal citizens to maintain public order at what-

1. Page 4 *et seq* (2d edition).

ever cost of blood or property may be necessary, martial law is assuredly a part of the law of England."[1]

401. Since the Petition of Right none, not even the sovereign, it is apprehended, has seriously entertained the thought that martial law in time of peace was legal within the realm. To argue that it is not, is a waste of words; it is denying what no one asserts to be true. What is claimed, however, and what the experience of that country proves to be true is this: When the ordinary authorities are unable to secure to the people the rights of life, person, and property which society was organized to protect and government to maintain in consequence either of insurrection, rebellion, or invasion, and it becomes necessary to put forth every resource of the State with an energy and promptness of which the military power alone is capable, then, under these circumstances, the proper governmental agents are justified in proceeding by another and unwritten law, sanctioned by custom and recognized by both the executive and legislature as that law only which is adapted to such emergencies. It is not, in the proper sense, a time of peace, hence the laws of peace are not applicable; but it is either absolutely or in great measure time of war, and the laws of war largely prevail.

402. In this view it becomes important to know what constitutes war, and in regard to this the remarks of Lord Tenterden are worthy of particular notice: "The pomp and circumstance of military array such as usually attend regular warfare are by no means necessary to constitute an actual levying of war. Rebellion at its first commencement is rarely found in military discipline or array, although a little success may soon enable its actors to assume them."[2] To the same effect Lord Campbell, then Attorney-General, remarked that "levying war against the crown is where there is an armed force seeking to supersede the law and gain some public object."[3] Lord Chief

1. Dicey, Law of the Constitution (1889), p. 268. 2. 37 State Trials, p. 684. 3. Regina *v.* Frost, 9 Car and Payne's Reports, p 141.

Justice Tindal added that "there must be an insurrection and force accompanying it and an object of a public nature." It matters not what kind of force, if it be offensive and destructive—the club or the sword, the fire-arm or the fire-brand. Numbers armed with rude weapons may overpower a smaller force armed and disciplined; and when that disproportion of force is established, and the ordinary powers of law which apply only to actual resistance manifestly fail, recourse must be had to measures of war.[1]

403. Without going back to the more violent periods of her early history, English modern experience furnishes evidence that the ordinary machinery of civil government may be inadequate successfully to deal with a mere passing social disorder arising out of local causes. Recall scenes attending the seating of Mr. Wilkes in Parliament in 1768, the so-called Lord George Gordon riots of 1780, before mentioned, and those at Manchester in 1830![2] On the first occasion alluded to matters soon passed beyond the power of the magistracy to control, and the military were called out to aid the civil authorities. At last, every effort to restore tranquillity proving ineffectual, the soldiers received the word of command and fired. Five or six persons were killed and fifteen were wounded. The mob was dispersed, but inexpressible rage prevailed against the soldiers. The King, however, sanctioned their conduct, which put a timely check to the daring spirit shown by the mob, and returned thanks to the commanding officer for his prudence and resolution. Certainly the military had acted none too soon. "Nothing," says the historian Adolphus, speaking of these scenes, "could exceed the frenzy and indignation which prevailed in the public mind; riots of the most dangerous nature were daily excited. All was terror, confusion, and alarm, and under the mask of patriotism treason was actively employed; combinations were formed in different parts of the country; the civil arm seemed too weak to restrain the general spirit of licentiousness which,

1. Finlason, Repression of Riot and Rebellion, p. 33. 2. Adolphus' History of England, Reign of George III., Vol. 1, pp. 312, 313.

actuated by a designing leader or stimulated by a real cause of complaint, would have produced a total devastation of the social order. The spirit of revenge against all who appeared to support the government in the late proceedings was carried to the greatest excess."

After quiet was restored, the magistrate who authorized the military to fire and several of the soldiers were indicted for murder, but they were all acquitted. This prosecution of a faithful officer who had done his duty could not but have a baleful influence, which twelve years afterwards made itself manifest in the Gordon riots. In the latter the mob finally attacked the bank, but the soldiers inflicted a servere chastisement upon them. The military came in from the country, and, in obedience to an order of the King in council, directions were given to the officers to fire upon the rioters without waiting the sanction of the civil power. Tranquillity was restored, but not before four hundred and fifty-eight persons had been killed or wounded. 1

"The magistracy of the metropolis," says the historian, "have been reproached for supineness during the prevalence of these dreadful riots; but it was not forgotten that an excellent magistrate for the county of Surrey was tried for his life in consequence of the order given by him at the riots in 1768, for the military to fire, after long and patiently enduring the greatest provocation from the rioters and twice reading the riot act. Such a precedent could not but tend, in a similar emergency, to enfeeble the civil power." 2 As, after the riots of 1768, the magistrate was prosecuted for calling on the military to suppress the disturbance, so now, when that very example had deterred him from acting, the lord mayor of London was indicted and convicted for not calling them out.

In the remaining instance referred to, the Manchester riots of 1830, the civil officers seem again to have been influenced by the fate of their predecessor in authority, the lord mayor of

1. Wade's History of England, p. 516. 2. *Ibid.*, p. 517.

London. This was but natural, and it led them to resolve to escape indictment for non-action at least. The result was that they let loose the yeomanry cavalry upon an indiscriminate crowd of men, women, and children, of whom several hundred were either cut down or trampled under the horses' feet. We may infer, however, that the officials, civil and military, in this instance hit the "precise line" of their duty, as Lord Sidmouth communicated to them the thanks of the Government for their prompt, decisive decree and efficient measures for the preservation of the public tranquillity. 1

With such instances of failure of civil government to meet unusual ebullitions of local discontent, it is not surprising that the theory which invests the common law with an energy equal to every emergency has become discredited even with Englishmen. In the light of these facts, what becomes of the principle that peace always exists in contemplation of English law?

404. Whatever the theory may be, the fact is that martial law, even if "unknown to English jurisprudence," is, as here shown, not unknown to English law and experience. The various acts of Parliament before cited, providing for its enforcement, and its declaration in English colonies either under the sanction of statutes or the custom of war, furnish cumulative evidence of this. Nor is the great English constitutional historian in accord with the Manual. "There may indeed be times of pressing danger," remarks Hallam, 2 "when the conservation of all demands the sacrifice of the legal rights of the few; there may be circumstances which may not only justify but compel the temporary abandonment of constitutional forms. It has been usual for all governments during an actual rebellion to proclaim martial law or the suspension of civil jurisdiction. And this anomaly, I must admit, is very far from being less indispensable at such unhappy seasons in countries where the ordinary mode of trial is by jury than where the rights of decision reside in the judge. The executive department in modern times has

1. Wade's History of England p. 750 2. Constitutional History of England, Vol. 1, p. 240 *et seq.*

been invested with a degree of coercive power to maintain obedience of which our ancestors in the most arbitrary reigns had no practical experience. If we reflect upon the multitude of statutes enacted since the days of Elizabeth in order to restrain and suppress disorder, and above all, on the prompt and certain aid that a disciplined army affords to our civil authorities, we may be inclined to think that it was rather the weakness than the vigor of her government which led to its inquisitorial watchfulness and harsh measures of prevention." To the same effect is Dicey: "The belief, indeed, of our statesmen down to a time considerably later than the revolution of 1689 was that a standing army must be fatal to English freedom. Yet very soon after the revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation."[1]

405. Referring to the apprehension that it would be dangerous to liberty thus temporarily to elevate the military over the civil power, Hallam continues:[2] "Nothing could be more idle at any time since the revolution than to suppose that the regular army would pull the speaker out of his chair, or in any manner be employed to confirm a despotic power in the crown. Such power, I think, could never have been the waking dream of either king or minister. But as the slightest inroads upon private rights and liberties are to be guarded against in any nation that deserves to be called free, we should always keep in mind not only that the military power is subordinate to the civil, but as the subordination must cease when the former is frequently employed, that it should never be called upon in aid of the peace without sufficient cause. Nothing would more break down the notion of the law's supremacy than the perpetual interference of those who are really governed by another law; for the doctrine of some judges, that the soldier, being still a citizen, acts only in the preservation of the public peace as any

1. Study of the Constitution, p 268. 2. Vol. 3, p. 253.

other citizen is bound to do, must be felt as a sophism even by those who cannot find an answer to it."

406. Viewed in the light of such authority and of the various statutes instituting martial law in Ireland and the carrying it into execution in various British colonies under executive sanction, the dogma that martial law is unknown to English jurisprudence will scarcely be deemed by the unprejudiced to be of great importance. Those who have actually to deal with the affairs of this world and are responsible for the preservation of society and supremacy of the laws are, as a rule, more interested in knowing what exists in fact rather than in theory. "When," says Clode, "foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution

NOTE.—The language of the historian in the closing sentence above quoted, as to the proposition that the soldier, being still a citizen, is bound equally with all other citizens to aid in putting down insurrections, was called out by a remark made by an eminent English judge relative to the employment of the military in suppressing the Gordon riots. Hallam pronounces it a sophism. And so in fact it is, unless it be understood in a particular sense. The military, especially the regular force, are governed by a law of their own; every member of it takes an oath to obey the lawful orders of the superiors appointed over him. To these superiors his services and obedience are first due. If, therefore, it should happen that the civil magistrate calls the soldier in one direction, and his superior military officer in another, he must obey the latter. The proposition is true, therefore, only in case the soldier, when the magistrate demands his services, is not called elsewhere by his officers. So much for the soldier acting individually in response to the demand of the civil authorities. But all know how inefficient and futile such assistance must be in times of extreme peril. Individual soldiers, how many soever they may be on such occasions, are mixed with and are lost to view almost in the multitude. They have not even arms in their hands; for the soldier, when walking the streets like a private citizen, does not carry his arms with him. His presence adds nothing, therefore, to the power of the civil arm. It is only when organized and directed by their own officers that the military become formidable. Yet when so acting there can be seen little similarity in the position of the soldiers and that of citizens forming the *posse comitatus*, and directed by the civil magistrate, except that both act to sustain the law's supremacy.

of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community. While the laws are silenced by the noise of arms, the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society."[1] And of course insurrection or rebellion will, if the danger be sufficiently pressing, equally with invasion or civil war, justify resort to the same measures of self-preservation.

407. Clode elsewhere remarks that martial law is not a written law; that it arises on a necessity to be judged of by the executive, and ceases as soon as possible with safety to the country or community; and that while existing it covers all

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The important point is—and herein lies the fallacy of the proposition referred to by Hallam—that regular soldiers, in the capacity which alone renders them effective against disturbers of the peace—namely, when acting as an organized body under their military commanders, are not, like the ordinary citizen, immediately amenable to the civil magistrate, who secures the services of the soldiery, if at all, through the instrumentality of their officers. Regular soldiers so circumstanced form no part of the *posse comitatus*, as that term applies to civilians, upon whom the civil magistrate lays the hand of authority directly. In the United States there is a federal statute forbidding the use of the army as a *posse comitatus*, save in a very few instances.[2] And although this is not true in England, yet it is true there as here that the regular forces, when acting with arms in their hands, do so mainly under the direct orders of their lawfully appointed military superiors. It is therefore plainly erroneous to class them with civilians as to obligations to obey the mandates of civil magistrates in summoning the *posse comitatus* to suppress insurrection. When the military are called out, it is through the medium of their commanding officers, who alone direct their movements; while, as regards civilians, the civil magistrate not only drafts them into service, but personally commands them and directs their energies to the maintenance of the law. When the civil magistrate has indicated to the officer commanding where and how the services of the troops are desired, his functions cease; it is for the officer to adopt whatever measures his experience and knowledge of military affairs suggest as best suited to accomplish the end in view.

1. M. F., Vol. 2, p. 161. 2. Act, June 18, 1878, Sec. 10, Ch. 263.

persons, civil and military, but that those who act under it must, if called to account, justify their acts by showing that the necessity actually existed.[1]

408. The English writer, Pratt, considers somewhat particularly the subject of martial law, but does not sufficiently distinguish that law from military government. "In most foreign countries," he observes, "certain laws are made applicable to a state of war or a state of siege or insurrection when a city or county is wholly or partially placed under military authority. In England no such regulation exists. When an authority is forced by necessity to suspend the ordinary legal procedure, it is for it to lay down the limits of its action and to justify itself for using exceptional power."[2]

He then lays down the following principles as those which, as far as practicable, should be observed in carrying martial law into effect: (1) It is not retrospective; an offender cannot be tried under it for a crime that was committed before martial law was proclaimed. (2) It does not extend beyond the proclaimed district outside of which an offender cannot be either arrested or tried. (3) It should not be kept in force longer than absolutely necessary. (4) The process of military law should, as far as practicable, be adhered to.

The field of vision of this writer, when considering martial law as a domestic fact, seems to be contracted to the occasion of mere riot, insurrection, or minor rebellion. The circumstance either of invasion by a foreign foe or of a rebellion like that of 1861–65 in the United States, or of the seventeenth century in England, receives nothing more than a passing allusion.

409. The general rules which this author lays down as those to be followed in the administration of martial law are good in themselves, and the only question likely to arise is as to their applicability to varying circumstances.

410. His proposition that martial law cannot operate retro-

1. Military and Martial Law, Chap. II, Secs. 3, 5. 2. Military Law, p. 214

spectively may be conceded as agreeing generally with the fact; yet it should be received with caution. It will scarcely be questioned, for instance, that those whose crimes have rendered martial law in any district a necessity will not be permitted on such a plea to escape the legitimate consequences of their misdeeds. If the civil judicature can take cognizance, well and good; but if not, are such criminals to go unwhipped of justice on the specious plea that the military authorities—the only power that exists—cannot act in their cases?

411. The second proposition—namely, that martial law 'does not extend beyond the proclaimed districts, and an offender cannot be either arrested or tried beyond its limits"—is very general in its terms, and as a principle to be remembered without being strictly guided by it perhaps will do no harm; yet this, too, as will hereafter be seen, is subject, in practice, to so many exceptions that as a rule of conduct it is of little value.[1]

412. The third rule laid down by Pratt—namely, that martial law should never be kept in force longer than is absolutely necessary—will not be disputed. Yet, like the two preceding rules, it is but a general guide, subject to modification with varying facts and circumstances. What is meant by "absolute necessity"? Who is to judge of its existence? It is a condition of affairs in which were the military rule withdrawn, society would disintegrate and government become chaos? This would render martial law an absolute necessity; but will nothing short of this do it? It should and will remain in operation until this stage of the public danger has been passed.

413. But when invasion has either been repelled or its efforts warded off; the riot, insurrection, or rebellion so far suppressed that the municipal authorities, acting through their normal and wonted channels, secure to the people the enjoyment of civil institutions, with safety to the State, martial law must cease. With safety to the State, we have said, and this is the fundamental consideration, because even although the danger at the

1. See chapter "Martial Law Tribunals," *post*.

particular locality be not urgently pressing, still, if taking into view the situation of the whole country, national interests would be jeopardized by a cessation of the martial rule, yet would the military properly retain the reins of power.

414. What has been said answers the second queston grcwing out of the third proposition—namely, Who is to judge whether or not that absolute necessity exists which justifies the continuance of martial law? In the first instance, the commander or other authority responsible for the maintenance of law and order, or repelling the invasion, must determine it. In the case of a military commander who had assumed the anthority to declare martial law or to put it in operation under previous legislative sanction, his judgment would be subject to review by his military superiors, and also, it is conceived, before a jury of his countrymen, should he take advantage of his position to act in a capricious, oppressive, and tyrannical manner.

415. At first blush it might seem that this possible responsibility to a body of twelve men who survey the circumstances of the commander from the safe and unexciting station of a jury-room would in any event be a great hardship, the propriety or wisdom of which it would be difficult to vindicate. This dilemma of the officer has not escaped notice, and the policy of the law has been animadverted upon. Sir Charles Napier in his remarks on military law complains of the position of an officer who, in the corresponding case of suppressing a riot, is still liable to trial by the ordinary tribunals for what he may do in executing the duty imposed on him by the civil magistrate. 1

416. It is deserving of notice, however, in this connection, that the military officer apparently acts under no greater responsibility than the civilian official. In the theory of the law this is strictly true. Still, in fact, the situations are very different, to the disadvantage of the soldier. The military officer amidst the scenes of martial law and the civil officer acting in times of peace or of minor disturbance even are in very differ-

1. Page 38.

ent positions, and the relative difficulties of their respective situations are greatly against the former and in favor of the latter. To the military commander is given little or no time for the formation of a judgment based on calm reflection and a dispassioned view of the circumstances which beset him. Promptness and firmness are expected of him. With him hesitancy is fatal. In all these particulars the position of the civil magistrate is more advantageous. The machinery of municipal authority is well regulated and its workings understood not only by the officers, but the people themselves. The civil officer surveys the field and with due deliberation adopts measures to meet the exigency.

417. To apply the same principle of responsibility to both classes of officials, military and civil, when the position of the latter is so much more eligible, might seem to be unjust. But experience proves that this is more in appearance than in fact, for juries act under the instructions of judges who, as a rule, are at once patriotic, learned, and impartial, and who point out the law applicable to the case with wisdom and in a spirit of fairness. The unusual circumstances of difficulty which surround military men so situated are generally given due consideration, and the leaning of his countrymen will generally be found towards that commander who, even if it be by the exercise of questionable authority, has the courage and fortitude to protect property, preserve life, and restore order to a distracted community.[1]

418. The fourth proposition of this writer—namely, that the forms of military law should, as far as practicable, be adhered to—requires no extended notice. While in the trial of causes thus arising it will be convenient to adhere to well-known court-martial rules of procedure, they are not obligatory except in so far as superior authority may have rendered them so. The fairest trial that the case will admit of should be had; but substance under such circumstances takes precedence of form.

1. Hare, Constitutional Law, Vol. 2, p. 920.

Military law proper—the statutory law—is applicable directly to the army and, in time of war, to camp-followers; and while the commander might on principles of analogy, and as far as wisdom dictates, render the inhabitants of a district subjected to martial rule amenable to military law, he is under no obligation to do so. He neither derives his authority over them from that law, nor can he appeal to it to justify his conduct towards them should this become necessary.

419. Martial law being *lex non scripta*, its rules of action rest upon the customs of civilized nations.[1] These are well established, and to most military men are familiar. They vary with circumstances and the exigencies of the occasion. To repel invasion, for instance, it might be necessary for the commander to gather into his hands all the reins of government, and for the time rule in a wholly arbitrary and even despotic manner, directing every resource of the district to the one object of frustrating the plans of the enemy. For this purpose whatever property is necessary may either be taken or destroyed, and the personal freedom of the people be regulated in such manner as the commander of the defending forces may direct. At such times the maxim, "*Salus populi est suprema lex*," is peculiarly applicable.

On the other hand, if a minor case of rebellion is being dealt with, an insurrection or formidable riot, the military commander may well avail himself of the aid of the civil machinery of government, including the courts, to bring delinquents to justice and in other ways vindicate the law, all, of course, under his authority and direction so long as martial law is maintained.

1. American Instructions, Sec. 1, par. 13.

CHAPTER XIX.

Theory of Martial Law in the United States.

420. So much for English authorities as to the nature of martial law and powers exercisable thereunder. In the United States the disposition to refer to English precedents has had its influence in this as in other juridical fields. Hence we find these frequently quoted by American writers, lawyers, and jurists when treating this subject. Still, as before observed, the circumstances under which martial law has here been instituted differ in so many particulars from those attending a corresponding exercise of power in England and her dependencies that new rules or material modifications of those inherited from the mother country are with us necessary.

421. In his argument in the Milligan case,[1] the attorney-general[2] defined martial law as the will of the commanding officer of an armed force, or of a military geographical department, expressed in time of war within his military jurisdiction as necessity demands or dictates, restrained or enlarged by the orders of his military chief or the supreme executive ruler.

422. He laid down the broad principle that the officer executing martial law is at the same time supreme legislator, supreme judge, supreme executive; that as necessity makes his will the law, he only can define and declare it, and whether or not it is infringed, and of the extent of the infraction, he alone can judge and his sole order punishes or acquits the offender.

423. This definition and these views seem to be in a measure inconsistent. For if the commander be supreme to the degree indicated in the closing sentences, how can he be subjected to those restrictions laid down as proper in this

1. 4 Wallace, p. 2. 2. Speed.

definition of martial law? It is believed that upon the latter point the definition conforms to the true doctrine; that the official carrying martial law into execution acts subject to restrictions imposed by superior authority; and not only that, but through the instrumentalities of the civil courts he may be made, as before pointed out, responsible to those whose rights of person and property he may have violated through inconsiderate and unjustifiable conduct. When it is said that he is supreme, it can only be meant that on the spot there is no power capable of arresting the execution of his mandates. In this sense and to this degree he is supreme. So, likewise, are very many besides military officers, who in isolated positions have authority placed in their hands to be exercised at discretion; they for the time being are supreme within their spheres of action, but the chain of their ultimate responsibility is unbroken, binding them to a faithful discharge of their public trust under penalities provided by the law itself.

424. The opposing counsel[1] in the case referred to, while arguing upon the subject under discussion from different premises, arrived at essentially the same conclusions regarding the authority of military commanders under such circumstances: "I say what is called martial law," he observed, "for strictly there is no such thing as martial law; it is martial rule—that is to say, the will of the commanding officer, nothing more, nothing less. What is ordinarily called martial law is no law at all. Wellington, in one of his despatches from Portugal, in 1810, and in his speech on the Ceylon affairs, so describes it. Let us call the thing by the right name; it is not martial law, but martial rule. And when we speak of it, let us speak of it as abolishing all law and substituting the will of the military commander, and we shall give a true idea of the thing and be able to reason about it with a clear sense of what we are doing." Thus do extremes meet. Each side to the contention erroneously maintained the absolute nature of the power wielded under martial law; the one to lend a sanction to military com-

1. Mr. David Dudley Field.

missions far from the field of operations, the other to prove that such commissions legally could not be convened.

425. The reference, however, to the remarks of the Duke of Wellington sufficiently evinces that the advocate making use of it did not properly discriminate between military government which the Duke had in mind, and which is governed by the laws of war, and that martial law, considered as a domestic fact, the exercise of which was being argued in the case at bar.

426. It is plain, too, that this arbitrary authority was, in the argument, held to be closely allied, if not identical, with irresponsible power. But this was clearly wrong. In this country, at least, military officers cannot exercise such authority; it is inconsistent with the principles of our government, under which the people justly regard the responsibility of all public servants to the law as the palladium of liberty.

427. The Supreme Court in this case, as is well known, took occasion to support the view that martial law, under certain conditions, legally could be enforced in the United States. And while the justices disagreed upon the question as to the territorial limits that properly should be assigned to the exercise of martial-law power, they all agreed that in cases of great emergencies, when society was disordered by insurrection or invasion, and the exertion of every energy of government was necessary to save the country, the exercise of martial law, from the necessities of the case, then became legal.

428. What was said by the justices regarding martial law was indeed *obiter*. That question was not before the court for determination. Upon the matter at issue all were agreed. Still, as in the arguments the nature of martial law was elaborately discussed, all the justices, five expressing the majority and four the minority views, took occasion to clear up the judicial atmosphere which before had rendered the subject hazy. Nor did this division of opinion lend greater obscurity. The difference between opposing views reduced itself to one point, namely, whether or not martial law legally could be enforced in districts far removed from the tread of contending armies,

or the operations immediately attendant thereon. The majority, in the proportion of five to four, held that it could not.

429. In enforcing martial law the officers act within and not outside the pale of law. As was said by the Supreme Court of the United States in Luther *v.* Borden:[1] "Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority."

430. The case which called forth this opinion arose, as is well known, from an attempt forcibly to change the government of Rhode Island, and was an action of trespass for assault and false imprisonment, brought for breaking and entering the plaintiff's house with an armed force and taking and holding him a prisoner. The defendants, who were acting at the time in pursuance of martial-law authority, justified, pleading, in substance, the existence of the insurrection, the declaration of martial law by the legislature, that plaintiff was aiding and abetting the insurrection, and the defendants, members of an infantry company acting under the governor's orders, broke into the plaintiff's house for the purpose of arresting him. The court held the breaking and entering entirely justifiable under the circumstances, declaring in most decided language that without the power to proceed to such extremities the government would be powerless against rebels, the declaration of martial law a useless procedure, the array of military force thereunder mere empty parade; but the court took care sedulously to guard the rights of the people by remarking that no

1. 7 Howard, p. 1.

greater force on the part of officials was to be used than that necessary to accomplish the object; and if under color of this martial-law authority power be used for the purpose of oppression or any injury wilfully be done to either person or property, the responsible party would undoubtedly be answerable

431. The rule of amenability here stated is none other than an extension of the common-law principle of responsibility when official powers are abused. The correctness of the rule laid down by the Supreme Court will scarcely be questioned It follows that the absolute military power contended for by counsel in the Milligan case is not possessed by officers upon whom is conferred the duty of carrying martial law into execution. However high they may soar on the wings of authority, their actions may be overlooked and inquired into by a still higher power.

432. Such at least are the recognized principles of the law; yet there have been grave, although it is believed ill-founded, apprehensions that the actual facts might be otherwise; and not alarmists only, but good, learned, patriotic men have indulged these gloomy forebodings. "The danger of our government," wrote ex-President John Adams, "is that the general will be a more powerful man than the President, and the Army possess more power than Congress. The people should be apprised of this and guard themselves against it. Nothing is more essential than to hold the civil authorities decidedly superior to the military power."[1] The experience of nearly a century since this was written has not, however, confirmed these fears. If communistic importations be eliminated, no one with candor will assert that devotion to the principles of civil and religious liberty is anywhere more conspicuous than among the people of the great Republic with whom martial law, while not unknown, yet when enforced has proved but a mere passing distemper growing out of those temporary disorders incident to all governments.

1. Works, Vol. 10, p. 17.

433. There is no portion of the community more deeply imbued with this sentiment than the military. Officers trained to arms instinctively shrink from the responsibilities and annoyances incident to conducting municipal affairs which they at best but imperfectly understand. Their desire is that civil government shall pursue its ordinary course with the assistance, if need be, of the military acting in conjunction with, yet in subordination to, the civil authorities. If we seek an explanation of this, we need look no further than the simple consideration of self-interest, if we deny that it is based on patriotic sentiments, which latter, however, form its true foundation. While the civil authorities act as indicated, they and not the military are answerable for results. Few men desire unnecessarily to assume this responsibility. For the reasons suggested military men avoid it. They can gain nothing by assuming it. But the time having passed within which it is possible for civil authorities to protect life and property and secure society against disorder, it then becomes necessary for the only force remaining in the community to act, which, as pointed out by the Supreme Court in the opinion just quoted, is the military. When officers of the army are called upon under these circumstances to enforce martial law, the situation is not one of their seeking, or which they have been instrumental in bringing about, but is forced upon them by an overpowering necessity, the result of the weakness of the ordinary powers of government.

434. And so when martial law is rendered justifiable within our own territory to repel invasion. The condition of affairs at New Orleans in 1814–15 illustrates this. The circumsstance attending the exercise of martial law on this occasion will be more particularly mentioned hereafter, when treating of the nature of the necessity which alone justifies the measure; for the present it suffices to call attention to the fact that the enemy, flushed with the triumphs of the protracted and sanguinary struggle in the Spanish Peninsula, had landed in apparently overwhelming force near the city. To repel him became the

supreme duty of the hour. All other considerations became for the time insignificant compared with this. Success demanded the united exertions of the community, the directing to that end, and with a single hand to guide them, all defensive means of the threatened territory.

With this object in view the citizens united in calling on the commanding general to proclaim and enforce martial law. The enemy, advancing in all the pride of anticipated success, was repulsed; the flower of the British Peninsular army fled before troops to a great degree raw levies who were held together by the indomitable will of their commander. All the elements of strength which the district afforded were gathered together to compass the enemy's defeat. On that day was written one of the brightest pages of the country's history. Only the complete military control exercised over the community and all that was in it rendered such a result possible.

435. For the time being, and in that locality, the military commander could truthfully have said, "I am the State." Speaking of the authority he then assumed, he afterwards remarked that he well knew the extent of his ordinary powers, and that they were far short of that which necessity and the situation required. He determined, therefore, to venture boldly forth and pursue a course correspondent to the difficulties that pressed upon him. He had an anxious solicitude to wipe off the stigma cast upon the country by the destruction of the capital. If New Orleans were taken, he knew that new difficulties would arise, and every effort be made to retain it; and that if regained, blood and treasure would be the sacrifice. His determination, therefore, was formed not to halt at trifles, but to lose the city only at the boldest sacrifice, and to omit nothing that could insure success. It might be that calculating politicians, ignorant of the difficulties that surrounded him, would condemn his course; but this was not material. What became of him personally he considered to be of no consequence. If disaster did come, he expected not to survive it; but if a successful defence could be made, he felt assured that the country, in the objects

attained, would lose sight of and forget, if it did not approve, the means that had been employed.[1]

Public opinion at the time throughout the Union approved his action as being both necessary and patriotic, and in this posterity has confirmed the judgment of his contemporaries. But it will not be forgotten that the situation was one which the commanding general neither created nor wished to perpetuate. Could he have fought the enemy with reasonable chances of success, at the same time leaving the municipal authorities undisturbed, he would gladly have done so. In fairness, therefore, this can never be cited as an instance of military usurpation. And although misunderstandings arose with the local judiciary regarding the nature and extent of the military authority exercised, the verdict of history has sustained the commanding general in the heroic measures he adopted to drive from its soil the invaders of that distant frontier. Judges sitting after the event in that security and quiet which the measures adopted by the commander alone rendered possible, were sometimes inclined to question the legality of those very measures the results of which they accepted without hesitancy and enjoyed in quiet and repose. This was perhaps not unnatural, as the authority temporarily assumed by the commander was at variance with ordinarily recognized judicial rights, and friction was the result; but the calm judgment of the country, that exponent of the intelligence of the people, by which is weighed as in a balance the merits of generals in the field and judges on the bench, both then and since has overwhelmingly sustained

1. Parton's Life of Jackson, Vol. 2, p. 60.

NOTE.—While martial law was being exercised on this occasion, a civilian, Louis Louaillier, published a newspaper article in the city reflecting upon and protesting against some of the acts of the commanding general. He was promptly arrested. Federal Judge Hall issued a writ of *habeas corpus* to release him. The judge was then arrested, kept in custody a few days, and then sent beyond the military lines.

Upon the restoration of civil jurisdiction the judge fined the general one thousand dollars for contempt, which was paid at once. The money, with interest, was afterwards returned to him by Congress.

the commander, and with this judgment there is reason to believe the better judicial opinion of the country concurs.[1]

436. We thus see that martial law is dominant military rule springing out of necessity and exercised under ultimate military and civil responsibility. When, because of internal commotion, the bonds of society are loosened, and the people, stripped of that protection which government is instituted to afford, or when, in presence of an invading army, it becomes necessary to concentrate every element of resistance to repel it, the necessity for enforcing martial law arises. Yet it is not to be put in practice in an irresponsible manner. As a rule, those who call it forth can be held strictly civilly answerable;[2] while those who carry it into execution may always be required to give an account of their stewardship. There is nothing here to alarm the good citizen. It is the strong arm of military power interposed either between him and anarchy, or his home and the horrors of invasion.

437. The establishment of martial law does not of necessity create antagonism between the judicial and the military authorities. In fact, these two powerful instrumentalities, if their functions be examined, will be found to supplement each other in the great work of preserving order in the community. The duty of the one begins where that of the other ends. If the judiciary be not elective, it is placed above the temptation of being influenced by popular clamor. On that plane it joins hands with the military in their efforts to secure to the citizen the advantages of well-regulated government. Nor have the efforts of the latter, acting with calmness, firmness, and discretion under martial law, ever received more successful vindication than from the able judges who have adorned the highest ranks of the judiciary of England and the United States.

438. In the aspect that it is the exercise of the last power of government, when civil authorities either will not or cannot perform their part, martial law springs out of the infirmities of

1. 21 Indiana, p. 370; 4 Wallace, p. 2. 2. The failing case would be where the legislature instituted martial law.

municipal law; when resorted to on the theater of military operations or to repel invasion, it has its foundations in the customs of war. In England it is presented in the former view only, while in the United States not only has the Federal Government had experience in both branches, but it has been extended to some of the States and Territories of the Union.

439. Nor can more instructive instances be adduced of resort being had to this law of necessity than were afforded by the Southern Confederacy during the Rebellion. It matters not that this was the experience of rebels; for it must not be forgotten that though the Confederate States were in insurrection, yet they had for several years a regularly organized government; the people, united by common sympathy, had instituted a compact and powerful union modeled upon that whose allegiance they were endeavoring to renounce. The repugnance of the people and authorities of this formidable rebel government to even the shadow of military supremacy was conspicuous. And yet experience quickly taught them that the laws of peace may not in all respects be suited to the exigencies which invariably accompany violent governmental crises.

440. Whenever, particularly during the first two campaigns of the war, they were confronted with a condition of affairs which threatened either the success of their arms or disastrous civil commotions in their midst, they did not hesitate to call martial law to their aid. They saw that therein lay their safety; for if the laws of peace are to be stretched, twisted, and turned to adapt them to a condition of affairs which they were never intended to meet, these laws themselves will become unsuited to their proper functions. The channels in which they pursue their course are well understood. But let them be diverted therefrom on the ground either of convenience or necessity, and at once that certainty which is the very essence of proper civil administration disappears. Under such circumstances men cease to regard the law, because they cannot know what their rights are under it. Such confounding of ideas regarding the scope of municipal administration cannot

but affect prejudicially the well-being of the community. Far better restrict the operation of ordinary laws enacted for and suited to quiet times to their proper sphere, and, on those occasions which under all governments arise, when public emergencies for what cause soever render these laws inadequate through disturbances and civil commotions to meet the ends for which they have been enacted, temporarily to replace them by that sterner, more summary, yet more efficacious rule of the sword, wielded, as it must be in all well-regulated States, under a proper and abiding sense of legal responsibility.[1]

1. See Secs. 602, 603, 604, Chap. XXV., *post*.

CHAPTER XX.

MARTIAL LAW SUPPLEMENTS COMMON LAW.

441. The common law has been eulogized as the perfection of reason. There is certainly much in it to admire. It was rough-hewed, indeed, and in some respects barbarous; the many statutes of modern times, both in England and this country, smoothing down its asperities, being evidence of this. But its foundations were laid in justice and fair dealing; it was essentially a law of freemen, and it taught men to rely for their defence, the preservation of their lives, liberty, and property, upon their own right arms. Its proudest eulogium can never be written; it exists in that nation which grew up as part and parcel of the common law itself, and which has for centuries increased in strength under its beneficent influences. Yet in one important respect the common law was based on error. It assumed that there was always at its disposal an armed force adequate to the preservation of the public peace and security, while there might and in fact often did happen unlawful uprisings which overwhelmed the civil authority and for the time being left society a prey to disorder.

442. This weakness was originally due to the unbending love of freedom of the people which rendered them intolerant of control. They would not part from one iota of their natural liberty until long after the necessity of the sacrifice was fully demonstrated. Moreover, they relied upon their trusty swords for righting all wrongs. But civil commotions were bound to arise. No government has existed or apparently can exist without them; they seem to be inseparable from human existence. Yet when they arose in England prior to the establishment of the regular military force, there was under the common law no way of dealing with them except the illusory one of calling on

the people to put down the uprisings of their own brothers, neighbors, and friends with whom they sympathized.

443. It was the inadequacy of such a reliance for the preservation of order and the repression of lawless violence which led many of the early sovereigns of England to resort to what was denominated martial law. Before finding fault it would be well to point out what course could have been pursued except to resort to the rule of force. In many instances the alternative appeared to be either martial law or anarchy. Could the sovereign hesitate? Yet power needs to be controlled; left unbridled it soon degenerates into tyranny. England proved no exception to this rule. On the other hand, as Hallam remarks, the existence of a regular military force to aid in the preservation of order and the enforcement of the laws now obviates the necessity which formerly existed of the sovereign resorting to irregular measures for preserving the peace and upholding the dignity of lawful authority.

444. The private citizen under the common law may endeavor on his own account, without any command or sanction of magistrate, to suppress a riot by any means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those engaged in it from executing their purpose; he may stop others whom he may see coming up from joining the rest. If the riot be dangerous, he may arm himself against evil-doers (that is, to resist their attacks, but not to assail them with deadly weapons unless they are in the act of felonious outrage); and if the occasion demands immediate action, it is the duty of every subject to act for himself in suppressing riotous assemblages.[1] And he may assume that whatever is done by him honestly in the execution of that object will be justified by the common law.

445. The difficulty of the situation is that if one *not* riotously involved be killed, the slayer is criminally responsible. On the one hand, if he exceed his power and occasion death or other

1. Blackstone, Com. IV., p. 293; Whiting, War Powers, p. 176; Chitty, Common Law, p. 217.

injury, he is liable to be proceeded against for murder or manslaughter; and on the other, if he does not do enough, he is liable to be proceeded against for culpable neglect. Practically the common law fails in the presence of a really formidable disturbance unless supported by adequate military force. Even in counselling how this should be used the magistracy have often hesitated because of the responsibility involved; the military, except when ordered by those having unquestioned authority, naturally hesitate to use their arms against the citizen. That is the most thankless and disagreeable duty that can be imposed upon the soldier.

446. Nor could the military lawfully kill at common law, even where the felon was caught in the felonious act, unless this were necessary to prevent the felony being consummated, or to prevent the felon's escape, or unless in encounter with a felonious or rebellious body of men. Hence it is not surprising that the common law, even with the assistance of a subordinate military force, should prove not well adapted to times of great civil commotion.

447. In some respects under that law the rioter was more favorably situated than its officers. He could be convicted only after all reasonable doubt as to his guilt was removed from the minds of a jury composed of his peers. That guilt had to be established under the strict technical rules of evidence applicable to criminal cases, and all of which were especially intended to guard the legal rights of the criminal. The officer, on his side, acted in suppressing any disturbance at his peril. If loss of life resulted from his acts, it was necessary that he show justification under the law governing homicides. His position in this regard was not an enviable one. It was necessary for him to follow the precise line marked out by the law—often a difficult task in times of peace, and all the more so when amidst civil disturbances, the fears, hopes, and passions of men are excited and calm deliberation before decisive action often is rendered impossible.

448. It has been said that the common law is based upon considerations affecting (1) the public good; (2) the safety of the community. But in emergencies it recognized another rule as applicable—namely, the customs of war. Did rebellion close the courts in fact, resort was had to this more summary rule. In truth this was demonstrated to be a necessity, for the common-law powers of anticipating civil disorders were *nil*, while those of suppression and prosecution, as just seen, were incompetent to cope with rebellion.

449. When we consider the inadequacy of common-law power effectually to deal with popular disturbances of magnitude or fierceness, and the fact that the sovereign had not ready at hand a military force to suppress riots, insurrections, or rebellions in their incipient stages, it is not to be wondered at that the crown, when the civil magistracy could not protect life and secure property, should resort to the swifter, more certain, and effectual measure of martial rule.

450. The danger to be apprehended was that this power, if permitted to be exercised at all, would be turned into an instrument of oppression. And notwithstanding the barons, sword in hand, had at Runnymede in 1215 forced from the crown an acknowledgment that the great principles of liberty embraced in Magna Charta were the law of the land, the plea of civil commotion might be used as a cloak for the exercise of irresponsible authority.

451. Yet the weight of authority is to the effect that it has ever been deemed constitutional for the sovereign in times of disorder and turbulence to use the military power of the crown for the speedy repression of enormities and the restoring of the public peace. It has been conceded always that there are times when the ordinary course of justice is, from its slow and regulated pace, utterly inadequate to the coercion of the most dangerous crimes against the State when every moment is critical; and, without some unusual measures on the part of the authorities, society would be disturbed and government itself shaken. The extension of power beyond its ordinary lim-

its is therefore in such times justified on the principle of absolute necessity.[1] And in this Mr. Sergeant Spankie concurred when he wrote that martial law was in fact the power of social defence, superseding under the pressure, and therefore under the justification, of extreme necessity the ordinary forms of justice.[2] In such cases it is held that by virtue of the necessities of the situation, the crown in the exercise of its prerogative—that is, of its right to do its duty, at all hazards, to preserve the peace of the realm—proclaims martial law. "And although," says Finlason, "it might be doubtful at common law whether the exercise of martial law would be justifiable except in districts covered by rebellion, yet if there were such a degree of danger in the district by reason of its contiguity to the scene of actual rebellion, and imminent danger of its spreading, that might be enough to excuse an honest exercise of it under supreme authority, or even to justify it legally."[3] This recently was verified in some of the Cape Colony districts.

452. As to the colonies, the Petition of Right did not affect the prerogative of the crown, which could scarcely be said to be aught than a shadow if it did not embrace the power of putting down rebellions in those distant possessions by the firm measures of martial law. In the colonies which afterwards became the United States there existed from the first an abhorrence of military rule. The suggestion of it on any occasion was received with aversion. In great measure the people had left the comforts of life behind them to escape from oppression. They were willing to brave the dangers and hardships of the wilderness that they might breathe the air of freedom. For many years they saw no military force save that raised from among their own ranks to ward off attacks of the Indians, to follow and punish them in their fastnesses, or to carry on war against the enemies of the mother country in the western world.

1. Tytler, Military Law, p. 52. 2. Hough's Military Law, p. 350. 3. Commentaries on Martial Law, p. 129.

453. When the Revolution of 1775 was precipitated, the people had thus become familiar with practical military life in a new country, but they had not contemplated for one moment the possibility of deposing the civil by military authority beyond the limits of the armed camp. Accordingly the proclamation of martial law, June 12, 1775, at Boston, by the royal governor, Gage, was reprobated as an act of despotism. Yet if such proclamation were ever justified, it was here. The colony was in a state of insurrection. The royal forces, sent out to secure public property, had been attacked, compelled to abandon their enterprise, and many of them killed. The sympathy of the people was with the assailants of the troops. This was rebellion, pure and simple; if not, it were difficult to show what constitutes rebellion. And it does not in the least affect the facts as they then existed that the perpetrators in this act are honored by us as patriots; success made them that.

454. On May 3, 1775, Gage wrote to Governor Trumbull, of Connecticut: "You ask whether it will not be consistent with my duty to suspend on my part the operations of war. I have commenced no operations of war but defensive; such you cannot wish me to suspend while I am surrounded by an armed country, who have already begun and threaten further to prosecute an offensive war, and are now violently depriving me, the King's troops, and many others of the King's subjects under my immediate protection, of all the conveniences and necessaries of life, with which the country abounds." So of Lord Dunmore's proclamation of martial law in Virginia, November 7th, same year. The events which were transpiring around him plainly justified such action on his part, which was not taken until after troops were being raised and trained for the avowed purpose of resisting the constituted authorities in their efforts to uphold the law of the land.

455. These and other similar measures, taken elsewhere by the royal governors, were regarded by the people as evidences of a predetermined plan on the part of the crown to reduce them to a condition but little removed from slavery. Accordingly, in

the Declaration of Independence, it was one of the charges brought against the crown that it had affected to render the military independent of and superior to the civil power. Still, as the royal governors were answerable to their government for the maintenance of order and the due observance of the laws in their respective colonies, it would be difficult to establish that they exceeded their authority by proclaiming martial law. The course of justice was obstructed. The courts performed their functions imperfectly. The Executive Department was thwarted in its efforts at maintaining order. Troops were being raised by the colonists, arms and ammunition collected to oppose the measures of government. According to all accepted ideas, this was a fitting occasion for the employment of the most efficacious methods at the command of the authorities, even if it involved proclaiming martial law. The fact that they were tried, and at once was precipitated the struggle which resulted after eight years in the complete independence of the colonies, in no manner derogates from the correctness of the position which the royal governors took in their efforts to cause the authority of the crown to be respected. It was their duty to enforce the law as they found it. The crown, upon issuing their commissions, had expressed especial confidence that they would do this.

456. The Revolution of 1775–83 was characterized by heroic sacrifices. But it would be practicing self-deception to imagine that it was not accompanied by the usual incidents of plunder, hardship, and oppression, the inevitable concomitants of war, particularly when waged to suppress rebellion. On numerous occasions the military assumed supreme control even with the colonists. The principle of the subordination of military to civil power was, however, never lost sight of. When the former predominated it was well understood to be but for a passing occasion.

457. Perhaps the most conspicuous instance of military supremacy was in the latter part of 1776 and early 1777. The closing year had been one of disaster to the American arms

New York city with its adjacent defences had been seized by the enemy. The commander-in-chief, with but a handful of troops, had been chased almost in derision across New Jersey. The army seemed to be disintegrating, the terms of service of the troops were expiring, and a reorganization of the army in the very teeth of the enemy was slowly being carried on under circumstances of discouragement. Philadelphia, where Congress sat, was threatened, and, to avoid capture, that body hastily adjourned to meet at Baltimore. It was then that by formal resolve of Congress all affairs of government, in so far as they related to the prosecution of the war, were placed for the time being in the hands of the commander-in-chief.

458. By this act the civil was completely subordinated, wherever necessary, to the military power. But the trust was not abused. Whatever it was necessary to do for the safety of the country, that the military chief did until Congress again took up the reins of authority. In his conduct on this interesting occasion he acted with that moderation which generally will be found to mark the exercise of military authority by other commanders upon whom great responsibility rests, either his contemporaries, or those who, following upon later stages of the country's history, have had the benefit of his patriotic example.

CHAPTER XXI.

NATURE OF NECESSITY JUSTIFYING MARTIAL LAW.

459. If we inquire regarding the nature of the necessity which alone justifies martial law, the answer is that it arises out of a condition of affairs which cannot be met by the ordinary municipal authorities. This excludes the idea of expediency, although it often may be difficult to determine where expediency ends and necessity begins.

460. "When the necessity arises, the military power is paramount, and the laws are silent. But war is an anomalous condition. When peace is restored or the necessity for military rule has terminated, the supremacy of the civil laws is restored."[1] It is true the court had not here in mind a case of technical martial law, yet the principle announced as to the supremacy of military rule upon occasions of necessity is of the very essence of martial law. In this instance a rebel officer had during the progress of the Rebellion stolen into New York city for the purpose, in conjunction with others, of burning it. After hostilities had ceased, he was arrested both as a spy and for attempted arson. It was while releasing him from custody under the charge of being a spy[2] that the language quoted was used.

461. Military rule was not unknown, however, in New York city during that great struggle for the preservation of the Union. On the 13th of July, 1863, a serious and extensive riot broke out there in opposition to the draft to fill the ranks of the Union army. Before it was suppressed one thousand lives were sacrificed either to the frenzy of the mob or the fire of the troops. For several days the city was virtually under mob rule. The civil authorities, partly through sympathy with, partly through

1. *In re* Martin, 45 Barbour, p. 142. 2. In this connection, see Sec. 1343, R. S., U. S.

terror of the rioters, and partly through inadequate physical force to grapple with so widespread an uprising, were utterly unable to enforce the laws. The military then took possession of the city and restored order. Had it not been for this energetic use of the troops the hopes of the rebels might have been realized, the city reduced to ashes, and the cause of the nation struck a dangerous if not a fatal blow.

462. The necessity which justifies martial law will vary with circumstances. If it be a case of civil commotion, a not unnatural inquiry will at once be made regarding the efforts which the civil officers, including the courts, have put forth to perform their functions. Hence Blackstone's remark, that martial law is built upon no settled principle, but is entirely arbitrary in its decisions and ought not to be permitted in time of peace, when the king's courts are open to all persons to receive justice according to the laws of the land.[1] By this was of course meant that the courts were not only open, but able and willing to perform their functions and enforce their mandates.

463. In the nature of things, it is extremely difficult to fix upon any definite rule by which shall be determined, in anticipation of the event, whether or not martial law shall be put in force. Is the test to be that courts of justice can not perform their duties? In the first place, there may be an irreconcilable difference of opinion as to whether or not such exigency has arisen. Is it necessary that judges be actually pulled from their seats; or does it suffice that the public disorder renders the administration of justice precarious, fitful, uncertain, thus defeating the purpose for which courts are organized? Again, the difficulties of the situation may be increased by the conduct and sympathies of the judges themselves. They retain the passions of men, and remain to some extent at least influenced by early education and prejudice. This is the common experience. The course of judicial decisions may be appealed to in verification of the assertion. This is not said to detract from the

1. Vol. 1, p. 413.

dignity, learning, and impartiality of that noble department of government—the judiciary. It needs neither defence nor praise It is venerated beyond any other instrumentality devised for the building up and preservation of society. It is treasured in the affections of the civilized world. It holds in its keeping the lives and property of rulers as well as of the people—bringing all to the common touchstone of the law—nor could any wish that this guardianship rested elsewhere, nor could it be placed in safer hands.

That is the general rule. This fact makes exceptions the more conspicuous. The elevated standard established for the judiciary makes that standard the more difficult to reach and maintain. Still human nature is the same on the bench as elsewhere. If there be not independence of position there is not likely to be independence of action. Until cured by the act of settlement,[1] the dependence of the judge upon the crown was deemed to be one of the greatest blemishes, not to say weaknesses, of the English Constitution. Prior to this judges held their seats at the pleasure of the king. The effect of this was markedly prejudicial to the administration of justice. The interests of private subjects meet on very unequal footing the pretensions of the sovereign. "It is requisite that courts of justice," says Kent, "should be able at all times to deal impartially between suitors of every description, whether the cause, the question, or the party be popular or unpopular. To give them courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station."[2]

If this be true—and who will deny it?—it is easily seen that if judges are not so secured, they may shape their course to catch the popular breeze. They will not lose sight of their own while serving the public interests. To imagine otherwise would be plainly illusory. As a result they may be influenced by that feeling in some communities which leads to a questioning of established authority; and whether this feeling manifest itself in mere local riots or extended rebellion, they naturally

1. 12 and 13 William III, Chap. 2. 2. Vol 1, p 294.

take the part of those who put and keep them in office. Judges under such circumstances may see much that is commendable in the actions of their neighbors and friends even when strangers do not. They may not, when so situated, be capable, even if willing, of meting out justice fairly and impartially and as they would if their personal, professional, family, and pecuniary interests were not so intimately involved. What boots it, then, that courts are open and free to render their dicisions if for this or other cause justice will not be administered?

464. Not to mention other instances, the border States within the Union lines furnished numerous cases illustrative of this fact during the Civil War. The remedy was martial law. Summary took the place of the usual courts of justice. No government worthy the name will be bound by its own agents at the feet of a foe, either foreign or domestic. Nor will this be permitted under the guise of legal proceedings. The important and vital point may be, not that courts can not, but that they will not do their duty. This was evidently thought to be the case in Ireland in 1803.[1]

When such a contingency arises, it is not only the right, but the duty of the government whose integrity is thus assailed to adopt whatever measures are necessary to cure the evil which threatens it. That is what the Imperial Parliament proceeded to do during the Irish rebellion,[2] while the act of Congress of July 19, 1867, establishing martial rule over the late rebellious States, made it the duty of the military commanders to remove from office all persons who were disloyal to the United States, or who used their official influence in any manner to hinder, delay, prevent, or obstruct the due and proper administration of the laws. It is a well-known fact that this power was as frequently exercised in the case of judges as of others.[3]

465. There may be other obstacles which, equally with physical force, render the civil authorities incapable of serving the purpose of their being. If they can not perform their duties,

1. 43 George III., Chap. 117. 2. See act just cited. 3. See Chap. XXIII, *post.*

it matters little what the cause is. They exist for the benefit and protection of the people. When, with the facilities the law has given them, they cease to perform their functions, they become an incumbrance to society. Experience has everywhere shown that this stopping the wheels of civil government, or diverting the course of affairs into improper channels, may result just as easily in times of civil commotion from indisposition on the part of officials as from the interposition of physical obstacles to prevent them doing their duty. The danger in the former case is the greater because the more insidious. When it appears, it should be dealt with promptly and decisively.[1]

466. The same principles apply in case of invasion. It is true that the Supreme Court of the United States has said that martial law can not arise from a threatened invasion;[2] that the necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration But it is apprehended that this language is to receive a reasonable construction. Otherwise it can scarcely stand the test of time and experience.

In the presence of invasion, either actual or threatened, martial law may become necessary for two distinct reasons.

First. The commander upon whom devolves the duty of repelling the enemy may be justified in gathering into his hand every warlike resource of the district to direct them with the greater effect. What excuse would the commander to whom was given the defence of the national capital have if he failed to do this, and that fair city, the pride of the nation, fell again, as in 1814, into the hands of Vandals? He would be without excuse. There is not involved here in any degree, necessarily, the question of the courts being closed by overpowering force, and the people, including the magistrates, may all be inspired by a spirit of patriotism. It might be wholly practicable for the courts to sit as usual; marshals might serve their processes; juries return indictments, or determine questions of fact.

1. Johnson *v.* Jones, 44 Illinois, p. 155. 2. *Ex parte* Milligan, 4 Wallace, p. 2.

467. "Nothing short of necessity can justify a recourse to martial law," says Mr. Hare, "but such a necessity may exist before the blow falls. An army assembled in Canada might necessitate extraordinary measures of precaution on the northern frontier, although no hostile force had crossed the line. So the able-bodied population of Philadelphia might have been forcibly enrolled to provide for the defence of the city in the summer of 1863, while Lee's army was still in Maryland, and before he entered Pennsylvania." And he observes that by confining the necessity to *actual* and excluding threatened invasion the Supreme Court in *Ex parte* Milligan went too far, thus unduly limiting the right of the military authorities to provide for the safety of the community.[1]

468. The municipal law provides no means for pressing all classes into the defending army in an emergency, or for directing all the resources of the country to the single purpose of defeating and driving back an invader. At such times the last effective power—the military—is resorted to and becomes for the time paramount. It may be said that here is illustrated the maxim, "Necessity has no law," but at the same time is exemplified that other maxim of good government, "Public is greater than private necessity."

469. In his correspondence growing out of the *Caroline* affair, Mr. Webster, while affirming the rule which regards as inviolable neutral territory, describes a case of necessity which would justify a belligerent in disregarding the rule. The application of the law of necessity is different from that which we have just described as justifying the declaration of martial law to repel invasion, but the principle involved is the same. That statesman and constitutional lawyer admitted that the necessity of self-defence might justify hostility in the territory of a neutral power, but to do this such a necessity must be shown, instant, overwhelming, leaving no choice of means, and no moment for deliberation. He added that the aggressor must not do anything unreasonable or excessive, since the act justified by the

1. American Constitutional Law, Vol. 2, p. 964.

rule of self-defence must be limited to that necessity, and kept clearly within it.[1]

470. As further illustrating this principle there may be cited several instances where, in order that frontier settlers might be protected, United States troops have followed hostile Indians across the line to their strongholds in the mountains of Mexico at a time when there was no agreement that such action mutually should be permitted the armed forces of the two republics. A present overpowering necessity alone could justify what otherwise would be international discourtesy, leading, perhaps, to grave complications; but as no rule had been agreed upon between the two governments, necessity, "which has no law," forged one for the occasion.

In these instances of the invasion of friendly territory the government whose officer was directly an international trespasser would be answerable to the other under the laws of nations. The officer himself, except in the rare instance when his conduct was disavowed by his government, would not be responsible.

471. On the other hand, when the commander upon whom has been devolved the duty of repelling hostile invasion assumes to establish martial law because of alleged necessity for the measure, the correctness of his conclusions, as we have seen, may be judged by courts and juries whenever his acts are subsequently drawn in question. Yet the determining principle of necessity is the same in both instances. And it generally will be found to justify the measures adopted. The officer who assumes extraordinary authority under such circumstances does so, it is true, under responsibility. This is a necessary check upon capricious and oppressive conduct. But in judging of his actions his surroundings at the time are not to be forgotten; on the contrary, they are a preponderating factor in determining the merits of the case, and if he act with prudence, decision, and a judgment enlightened by his opportunities for observation

1. Diplomatic and official papers, pp. 112–120.

and the single desire to serve his country well and loyally in its hour of need, he has little to fear. 1

472. We have thus far considered the necessity for martial law which results from foreign invasion in the view only that the commander may direct with greatest effect all the power and resources of the district to the one object of defeating the enemy. We will now examine this necessity from another point of view—namely, the resulting terror, demoralization, even disintegration of society which sometimes accompanies threatened invasion.

473 Amidst this general consternation, the military commander may be the sole person inspired with confidence. He may encourage the people to pursue their affairs undeterred by fear of the enemy. But it by no means follows that he will be able to reassure those whom he thus would quiet. An undefined dread of evils to come may have paralyzed the usually strong arm of civil authority. Secret enemies, disguised as friends, contribute to the feeling of unrest. The machinery of municipal government stands still or works remittently. This may be unattended by civil commotion, no trace of which may anywhere be discernible. No disposition may exist to thwart the ordinary authorities in the performance of their duties. And yet, while attention is fixed upon one object only, and every energy is bent to the one paramount duty—repelling the invasion—the power of effectively carrying on the civil government imperceptibly may pass away. But no community can live without government, which in times of great excitement must needs be active and forceful. And if it become incompetent to perform its functions, not because of opposition, but from mere inanition, nothing remains but to call forth that great reserve power, martial law.

474. Nor is the condition of affairs rendering this necessary the mere creation of fancy. It is the usual attendant upon invasion when resisted with spirit by a people devoted to their coun-

1 Hare, Constitutional Law, Vol. 2, p 920.

try's cause. Not to mention others, recall the events in the Spanish Peninsula from 1807 to 1814, when ambition carried the eagles of France first proudly in advance, only to be driven back sullenly and defiantly to the protection of their native soil! Witness the swiftly following descent by a portion of the victorious British army upon the almost unguarded coast of Louisiana, and the resulting declaration of martial law as a necessary measure of defence, at the solicitation of all classes of the people—an act of fortitude and patriotism, the harbinger of the decisive victory over the invader which was its reward!

475. The declaration of martial law in New Orleans in 1814, here referred to, was the better to unite the resources of the district against the enemy. At the same time the feeling of uncertainty, discontent, and suspicion against the foreign element demanded that the most stringent measures to counteract their machinations should be adopted. When martial law was proclaimed the enemy was not actually at the city limits. There was no physical obstacle to prevent the courts from sitting.

Speaking of the general's martial law proclamation, Parton says:1 "It was wholly, greatly, and immediately beneficial. The panic subsided. Confidence returned. Cheerfulness was restored. Faction was rendered powerless, treason on any considerable scale impossible. While the danger lasted not a voice was raised against a measure which united the people as one man against the invaders of their soil. It was felt to be a measure which grew out of the necessities of the crisis, and one which alone was adequate to it."

476. On the 13th of March, 1815, official information was received of the treaty of peace and martial law was withdrawn. Meanwhile, the enemy, beaten but hoping for reinforcements, remained hovering on the coast, anxious to wipe off the stigma of defeat. Under these circumstances the commanding general did not deem it wise to abate the rigors of military rule. He had gathered into his hands the reins of government for the purpose of beating the enemy and saving the country, and not

1. Life of Jackson, Vol. 2, p. 58 *et seq.*

until this object was attained beyond question was he willing to relax the rigor of the measures he had adopted.

477. The commander there was the legally and constitutionally authorized agent of the government and the country to defend that city and the adjacent territory. His duty as prescribed by the Constitution and the laws, as well as the instructions of the War Department, was to defend the city and country at every hazard. It was conceded that nothing but martial law would enable him to perform that duty to the greatest advantage. If, then, his power was commensurate with his duty, and he was authorized to use the means essential to its performance, and to exercise the powers necessary to remove all obstructions to its accomplishment, he had a right to declare martial law when it was ascertained and acknowledged that this was absolutely necessary to enable him to defend the city and country.

478. This principle has been recognized and acted upon in all civilized nations, and is familiar to those who are conversant with military history. The principle is that the general may go so far and no farther than is absolutely necessary to the defence of the city or district committed to his protection. To this extent General Jackson was justified; if he went beyond it, the law was against him. But in point of fact, he did not supersede the laws, nor molest the proceedings of the civil tribunals any farther than they were calculated to obstruct the execution of his plans for the defence of the city. In all other respects the laws prevailed and were administered as in times of peace, until the legislature of the State of Louisiana passed an act suspending them until the month of May in consequence of impending danger that threatened the city.

479. There are exigencies in the history of nations as well as individuals when necessity becomes the paramount law to which all other considerations must yield. It is that first great law of nature which authorizes a man to defend his life, his person, his wife and children, at all hazards and by every means in his power. It is that law which enables courts to defend

themselves and punish contempts. It was this same law which authorized the general to defend New Orleans by every means in his power which would accomplish the end. In such a crisis necessity confers the authority and defines its limits. If it become necessary to blow up a fort, it is right to do it; if it be necessary to sink a vessel, it is right to do it; if it be necessary to burn a city, it is right to burn it.

480. The ground upon which it is held that this extraordinary power is inherent and original in all courts and deliberative bodies, is that it is necessary to enable them to perform their duties imposed upon them by the Constitution and the laws. It is said that the divine and inalienable right of self-defence applies to courts and legislatures, to communities and States and nations, as well as to individuals. The power, it is said, is co-extensive with the duty; and by virtue of this principle each of these bodies is authorized to use not only the means essential to the performance of the duty, but also to exercise the powers necessary to remove all obstructions to the discharge of that duty.[1]

481. If it be true that this principle of an overpowering necessity is of universal applicability, as here claimed—indeed, as universally conceded, even amidst the calm of peaceful surroundings, as when courts and legislatures resort to it to vindicate their dignity, with how much greater reason can it be invoked during the turbulent scenes of war, actual or threatened, when deliberation is out of the question, and for the commander to hesitate is to endanger all. Tested, therefore, by the standard of acknowledged maxims of government, the wisdom and legality of the course pursued in declaring martial law upon this occasion is fully sustained.

482. To add to the embarrassment of the general's situation, the inhabitants of Louisiana were not all thoroughly loyal. The territory but ten years before had passed by treaty from foreign domination. A large proportion of the people spoke a foreign language. They but indifferently responded to those

1 Debate, first session, 28th Congress (1843).

sentiments of patriotism which should unite the community as one man to repel invasion at whatever cost of life and property. Evidence of this is found in the fact that on the 8th, 12th, and 30th of August and 30th of September, 1814, the governor of Louisiana had expressed his deep chagrin at finding a large number of the people inimical to the American cause and favorable to the enemy, and agreeing with the general that the country was filled with spies and traitors. It would seem, then, that the declaration and strict enforcement of martial law was, under the then existing circumstances, a patriotic duty—a duty performed without hesitation by the distinguished soldier who fortunately there commanded. And his vigilance, his energetic and successful efforts to repel an insolent invader, have caused his name to be honored among those who have done most to illustrate the constancy and valor of the nation's arms.

483. Under the influence of the common law, which was centuries in developing and coming to full fruition, there grew up a people who have gone forth to plant the seeds of civil liberty in the remotest corners of the earth. Yet no sooner did they venture beyond their original island home than it became apparent that whilst admirably adapted to an insular community in times of peace, the common law, because of the rigidity of its rules, was but illy suited to the variable circumstances attendant upon a strife for existence waged between the nation on one side and those who would destroy it on the other.

484. In England the legislature lent its aid. By Statute 1, George I.—the Riot Act—it was made a capital felony for persons riotously assembled to the number of twelve or more so to continue for one hour after proclamation by a justice of the peace requiring them to disperse. This raised what before was a mere misdemeanor to the grade of felony, punishable by death. The common law, as we have seen, stepped in here, and by requiring all lookers-on to suppress felonies actually being perpetrated, even killing the felons if they could not be

arrested, greatly strengthened the hands of authority. In theory, at least, all that was needed now was concert of action between the officers of the law and the well-ordered portion of the community.

485. But it is practically very difficult to secure such concert of action. Civil officers are slow to assume unusual responsibility even in times of riot or other great disturbances. This causes delay, of which the evil-disposed ever will take advantage. Hesitancy on the part of those in authority at such times is fraught with peril.

Promptly to unite the law-abiding elements to put down numerous malcontents is well-nigh impossible. Even after the Riot Act was read, a necessity was found still to exist for using a force susceptible of prompt and more effective action. This is the military. Kept back as a last resort, it will, if discreetly used, restore quiet and give that security to society which the civil law cannot. That is its function on such occasions. The experience of nations has shown that this confidence in the soldier is not in danger of being abused, so long as the government itself is administered for the public good. Martial law when thus exercised is based upon the necessities of social organization.

486. An instructive illustration of this was afforded in the early part of 1861 by the United States military authorities in Baltimore, Maryland. That State had never attempted formally to secede from the Union. Yet there, as in some other doubtful States on the border-line of rebellion, disloyalty was scarcely disguised, and if treason did not manifest itself in overt acts, the spirit of disaffection was widespread. It became necessary for the safety of the national capital to extinguish with an energetic hand these smouldering embers of rebellion, which, blazing forth, led to the attack upon the Sixth Massachusetts Volunteers on the 19th of April while they were hastening to the relief of Washington City.[1] On June 24, 1861, Lieutenant-General Scott directed the general commanding

1. R. R. S., I., Vol. 2, pp. 7–21.

the Annapolis Department, in which Baltimore was situated, to arrest the Baltimore marshal of police and the police board.[1] The department commander took virtual military control of the city. In a proclamation he let it be known that he did not intend to interfere with, but support the civil government. The fact was put prominently forward, however, that combinations to give aid and comfort to the enemy existed not only in the city of Baltimore, but elsewhere in the department, and that the arrested officials were cognizant of these combinations and sympathized with their objects. The people were informed that in so far as the paramount object of preserving the Union permitted, the civil authorities would be upheld in the performance of their functions.

This in fact was placing the city under martial law. No use of words could change the state of affairs actually existing. The civil laws, enforced through their appropriate officers, operated no farther than the military commander decreed that they should. The civil was wholly subordinated to the military power. Martial law could scarcely go farther than that. It is true that no proclamation had brought it into existence; it existed in fact despite official protestations to the contrary.

487. Yet courts of justice sat undisturbed by mob or other physical violence; the police regularly patrolled their beats; civil officers of all grades performed the duties assigned in the conduct of municipal affairs. Upon the surface all seemed smooth.

488. It was from the unseen yet universally felt undercurrent of sympathy with those who were openly seeking to destroy the Union that danger was to be apprehended. It was pre-eminently the situation described by the minority in *Ex parte* Milligan when they observed that "in times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies"; and further, that "these courts might be open and undisturbed in the execution of their func-

1. R. R. S., I., Vol. 2, pp. 138–156.

tions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty the guilty conspirators."

489. What loyal citizen could wish that the military had, under the circumstances, done less than assume the reins of government at Baltimore? There and then was demonstrated the important fact that the power of the Government was competent to strike down covert as well as open treason. The time had come when the contrary doctrine was to be effectually refuted, and so far as the semi-disloyal inhabitants of Baltimore were concerned, the first step in this demonstration to the world that the nation possessed self-sustaining power was the virtual establishment there of martial law by the Union authorities. In no other way than by such decisive measures could the important State of Maryland have been kept in the ranks of loyal States.

490. This condition of affairs led to the delivering by Chief-Justice Taney of the celebrated opinion in the Merryman case,[1] in which the acts of the Executive Department in the premises were pronounced usurpations, and the President was called upon to restore the civil tribunals in Baltimore and vicinity to undisturbed control. But that opinion neither then nor since made any impression upon the great mass of loyal people, nor did it cause the patriotic President for one moment to doubt the legality or necessity of the measures taken to sustain the dignity and authority of the general government against the plots of those who in secret gave aid and comfort to rebellion. The weak point in the chief-justice's opinion lay in the fact that it ignored, because possibly he could not see or understand the actual state of affairs, the but illy concealed treasonable sympathies which rendered the local civil authorities inimical to the Union cause and incapable of joining in measures for its support. The chief-justice argued from the premise that matters of local government were as they seemed. The Executive Department of the Government knew otherwise. They knew

1. *National Intelligencer*, May 29-30 and June 4, 1861.

what the chief-justice did not know, and what, due to sectional prejudice, he possibly would not have acknowledged had he known the facts, that there existed in the then condition of the municipal government at Baltimore a danger as formidable to the national cause as was presented by the enemy in the field. And the former was more difficult to deal with; it acted under cover, and had to be sought out in the dark.

491. Had the President hesitated to act as he did, making the military the dominant power and using the local government only as a matter of convenience, he would have been chargeable with neglect of duty at the moment of supreme importance to the cause of the Union. Such an error would never have been recovered from. Everything depended upon decision, promptness, and effective action. Fortunately for republican institutions, those at the head of national affairs were in no manner recreant to the great trust reposed in them by the people. When, to save the Republic, it became necessary to institute martial law, they did it; and posterity, enjoying the blessings of the government thus transmitted, cherishes with grateful remembrance the names and services of those whose energy, ability, and devotion to duty thus rescued the Union from threatened destruction.

492. Nor, during the progress of the Civil War, did it always follow that to justify martial law it was necessary that the people sympathize with and covertly aid the enemy. That was only one cause giving rise to the martial-law necessity. Take the case of Kentucky. A majority of her people, including many of the wealthier classes, were loyal. It certainly was not the policy of the national authorities to bear heavily upon those who, amidst the most trying surroundings, then upheld the Union cause. On the contrary, that policy was to favor them in every practical way. Kentucky was, however, a border State. Her territory at first was overrun, her cities occupied, her substance appropriated by rebel hordes; and until the end of the war it ever was a fond hope of the Confederacy to plant the triumphant flag of rebellion permanently upon

her soil. Several times its armies temporarily occupied the fairest portions of the State; only, however, to be driven back discomfited. The effect of all this could not but be to disarrange and weaken the administration of civil government if resort were had only to its regularly constituted organs. Rebel emissaries were harbored by friends within the State. The latter did not hesitate to give aid and comfort to the rebels when this could be done without danger of discovery and punishment. Districts dominated by the Union arms were made hatching-grounds for traitorous schemes devised and carried into execution by a small but influential minority of the people, who lacked either the inclination or courage openly to join the ranks of the enemy.

493. The Federal Government was embarrassed by this state of things in its efforts to pursue toward the people and authorities of the State a consistent or even a just course. Regarding the parasites who secretly clung to the enemy while openly professing attachment to the Union, there was no trouble except to find them out. The disposition was to treat them with the rigor their duplicity merited. This, however, was by no means easy of accomplishment. The bad were so inextricably mixed up with the good in the community that it was found impossible to strike the former without injuring the latter, who already had sufficient burdens to bear. The former deserved to have the strong hand of military authority laid on unsparingly; the latter merited every consideration consistent with public safety and the successful prosecution of the war in that part of the theater of operations. A rigid enforcement of the powers of martial law could alone mete out justice to the former; to the latter, except as a last and necessary resort, it would be oppression.

494. This unsettled condition of affairs continued for three years. An attempt was made to steer between military rule and civil administration. The policy failed of any good purpose except to prove its utter insufficiency either to punish enemies or reward friends. Finally, the President,

despairing of securing the supremacy of the national authority and frustrating the secret combinations of the enemy by milder methods, issued his proclamation placing the State under martial law. And how much soever the measure may have been condemned by some, loyal citizens approved of it as necessary, and it was duly carried into effect. Nor will it be forgotten that this was the same President who labored so unselfishly, finally sealing with his life his devotion to the cause, and so successfully, that the integrity of the Union might be preserved.

495. One important question arising out of the opinion of the Supreme Court in the Milligan case is, "When are the courts to be considered open and in the proper and unobstructed exercise of their jurisdiction?" Are they to be so considered when, murders having been committed or property illegally taken, thus rendering security through the civil laws a mere delusion, juries, influenced either by terror of or sympathy with the malcontents, fail to convict in face of the most conclusive evidence? What, so far as the ends of government are concerned, does it matter whether judges are driven off by physical force, or their efforts are paralyzed by wide-spread disaffection to the laws, which, while not making itself openly manifest, yet renders the administration of justice through the courts a delusion and a reproach?

496. This, in great degree, was the condition of affairs existing in Kentucky at the time the President placed the State under martial law. It was a grave and a necessary measure. The civil authorities of the State, including the judiciary, could not or would not effectually frustrate the treasonable designs of the enemy, countenanced as they were by many of her own citizens. The paramount duty devolved upon the Executive Department to see that the laws were faithfully executed, the authority of the national Government upheld at any cost. The necessity for subjecting loyal citizens equally with disloyal to the summary rule of martial law was deeply deplored. None regretted this necessity more than the President. But the time had arrived

when sentiment gave way to the inexorable facts of the situation. The Executive acted with becoming promptness and decision. And surely it seems singularly unfitting that those who then were saved from the secret plottings of the rebels, or who have received the benefits of that Union which these energetic measures in no slight degree contributed to perpetuate, should find fault with officers who reluctantly were compelled to adopt them. We have here the case of justifying and excusing peril mentioned by the minority opinion in *Ex parte* Milligan, when, due to insurrection or civil war within districts where ordinary law no longer adequately secures public safety and private rights, the President has authority to declare martial law.

CHAPTER XXII.

FEDERAL AUTHORITY TO INSTITUTE MARTIAL LAW.

497. The political organization of the United States embraces two distinct sovereignties, that of the general Government and that of the States, each of which within its appropriate sphere of action is supreme. Martial law may be invoked to defend each from danger, either external or internal.

498. The Constitution provides that Congress shall have power to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion.[1] Within a few years after the government was organized it became necessary to make use of this constitutional power. An insurrection broke out in the western part of Pennsylvania against the laws of the United States. President Washington at once marched a large militia force into the disturbed district. It was a case of necessity. In those early days the organized militia was, theoretically, depended upon to do the military work of the country, except to fight Indians, and to this end a law was passed empowering the President to call out the militia to repel invasion, suppress either insurrections or combinations against United States laws.[2] In the first instance he moved upon his own initiative; in the second, upon that of the governor or legislature; in the third, upon notification of a United States associate justice or judge. In the Whisky Rebellion in Pennsylvania in 1794 the governor refused to assist the judge when called upon; but President Washington himself took the field at the head of the militia from several States. The rebellion collapsed at rumor of this show of force. Another so-called rebellion occurred in the eastern part of the same State in 1799, but, in

1. Art. 1, Sec. 8. 2. Act May 2, 1792.

presence of a few troops, evaporated. In both these instances regular troops equally with militia were put in motion, although at this time there was no statute which specifically authorized regulars to be so used to vindicate the laws as was the case with the militia.[1] The Federal party, of which President Washington and Mr. Hamilton were exponents, regarded only the fact that the constitutional duty was imposed on the Executive to see that the laws were faithfully executed, and they unhesitatingly made use of any coercive force within reach to perform the task. The theory that the militia was all-sufficient for all purposes, except against the Indians, was waning under the Federalist administration, but it was revived with greater vigor than ever under the Republican precepts of Mr. Jefferson, who sustained and gave it new strength until the so-called Burr conspiracy and the unreliability of the southwestern militia making the Army, in those days of secret machinations the only force that really could be depended upon, caused the act of March 3, 1807, to be passed, authorizing the regular troops, equally with the militia, to be used to suppress insurrections and enforce the laws.[2] Thus Mr. Jefferson, after having left nothing undone to asperse the regular establishment and show his dislike for it, while at the same time he gave an unsound and fictitious importance to the militia, was compelled to reverse the judgment of a lifetime, and to save his administration from disgrace, when drawing to a close, called to his assistance that army which he ever had contemned, although this plainly involved the disparagement of that insufficient militia, the value of whose services he had lauded beyond the bounds either of reason or experience.

499. It was in pursuance of these laws, and the implied powers vested in him in order that he might carry out the constitutional injunction to see that the laws are faithfully executed, that President Lincoln took, immediately after his first inauguration, the initiatory steps to put down the

1. Act February 28, 1795. 2. R. S., 5298, 1642; Hildreth, Vol. 5, p. 627.

rebellion in 1861.[1] The occasion, however, demanded more heroic legislative measures; consequently the act of July 29, 1861, placed at his disposal, whenever there were unlawful obstructions, combinations or assemblages of persons, or rebellion against the authority of the United States, rendering it impracticable in his judgment to enforce the Federal laws by ordinary judicial proceedings, to employ the whole armed force of the nation, regular and militia, to suppress such rebellion.[2] The act of 1795 authorized calling out the militia of States nearest the disturbance. That of 1861 took them all, yet even this did not authorize the employment of the military power in all cases of possible necessity. Accordingly, by act approved April 20, 1871, it was provided that whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the Federal laws as to deprive any portion or class of the people of the rights, privileges, immunities, or protection named in the Constitution or secured by those laws, and the State authorities either cannot or will not protect them therein, the whole military force of the nation be placed at the President's disposal to use at discretion for this purpose, first warning the insurgents by proclamation to disperse.[3] There are numerous other provisions of the Federal laws authorizing the employment of the military for national purposes, such as to enforce the neutrality[4] and quarantine laws,[5] to execute United States warrants or other lawful process in certain cases,[6] for many purposes in the Indian country,[7] and in various other ways.

500. Now, except in so far as the act of February 28, 1795, referred to insurrections against State laws, all these authorizations are for the maintenance of Federal supremacy. They provide for defending the national Government either from a foreign or domestic foe, or maintaining the supremacy of the Federal laws or the dignity of the United States. And they

1. 2 Black, p. 666. 2. Chap. 25 (R. S., 5298). 3. Chap. 22 (R. S., 5299). 4. R. S., 5287–98. 5. R. S., 4792. 6. R S., 1984. 7. R. S., 2052, 2062, 2118, 2147, 2150.

seem, taken all together, equal to any probable emergency. Some of the statutes cited relate also to State affairs; but that branch is not at present regarded; reference is here confined to the Federal aspect of the law.

501. When the President proceeds to use the military power of the nation for the objects mentioned, he does it independently of State authorities. When necessary, he moves the troops to the threatened district. It may be against the protests of the State authorities. He uses the requisite force to sustain the law, suppress rebellion, or to repel invasion. The law intrusts to his judgment the determination of the question how much force the occasion demands. He is expected to meet the crisis. He takes his measures accordingly, and if the condition of affairs be such as heretofore in this work has been pointed out as justifying the enforcement of martial law, it will be his duty to enforce it.[1]

502. So, depending upon the circumstances of each case, a subordinate military commander, entrusted with great responsibility, and whose discretionary powers are equal to the duty imposed upon him, might be authorized to enforce that law. "It will be borne in mind," said the Supreme Court in *Ex parte* Milligan, "that this is not a question of the power to proclaim martial law where war exists in the community and the civil authorities are overthrown. * * It follows from what has been said on this subject, that there are occasions when martial rule can be properly applied. If in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authorities thus overthrown to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial law until the laws can have their free course."[2] The whole subject of martial law when thus instituted by Fed-

1. 7 Howard, p. 1; 4 Wallace, p. 2; 21 Indiana, p. 370. 2. 4 Wallace, p. 1 *et seq*

eral executive authority must be determined in all its details by the President and his subordinates. The troops are there to repel invasion or compel obedience to the supreme law of the land. If the confidence be abused, which is altogether improbable, relief can only come through repeal of the law authorizing the employment of the military in the manner indicated, the power of impeachment, or the responsibility of subordinates before the civil courts.[1]

503. In his dissenting opinion in Luther *v.* Borden, Justice Woodbury conceded that a state of war may exist, both foreign and domestic, in the great perils of which it is competent, under its rights and on principles of international law, for a commanding officer of troops, under the controlling government, to extend certain rights of war not only over his camp, but its environs and the near field of his military operations.[2] It will be remembered that the Supreme Court of the United States, Justice Woodbury alone dissenting, fully sustained the State government in establishing martial law in Rhode Island, out of which the case cited arose.

504. The decision was a signal triumph for the friends of good government. Attention was called in it to the fact that the President is given power to determine which is the legislature and who the governor in case of internal State conflict.[3] If it be said that this power is dangerous to liberty and may be abused, the reply is that all power may be abused if placed in unworthy hands. But it would be difficult to point out where else the power would be more safe and at the same time equally effectual. When citizens of the same State are in arms against each other, the constituted authorities unable to execute the laws, the interposition of the Federal Government must be prompt or it will be of little value. The ordinary course of proceedings in courts of justice are utterly unfit for the crisis.[4]

505. In relation to the act of the Rhode Island Legislature declaring martial law, it was not necessary, the Supreme Court

1 Act March 3, 1875, 25 Statutes at Large, p 433. 2. 7 Howard, p. 41 3. Act of February 28, 1795, Chap. 36. 4. 7 Howard, p. 44.

remarked, to inquire to what extent or under what circumstances the power could be exercised by a State. Unquestionably a military government, established as the permanent government of a State, would not be a republican government, and it would be the duty of the Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely to meet the peril wrought by armed resistance to the existing government. It was so understood and construed by the State officials. In this condition of things, the officers engaged in the military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and they might order a house to be entered and searched if there were reasonable grounds for supposing he might be there concealed.

506. In the argument of the case before the court the right of the State to declare martial law had been denied on the ground of the supposed danger to free government which was necessarily involved in such a principle. To support this view the practices of the crown prior to the Petition of Right were cited. But the court remarked that such citations were wholly irrelevant, if, as was evidently true, the inference was sought to be drawn that because in the instances cited from early English history an arbitrary power had been abused to the injury of the subject; therefore the exercise of similar authority by the supreme power in the State under limitations which insured the maintenance of governmental and municipal institutions and the just rights of the people was unconstitutional.

507. An important feature of this decision was the statement that the existing condition of affairs at the time martial law was declared constituted a state of war. When that point is legally determined, or legally can be inferred, the Executive Department of the government may at once proceed to adopt the necessary measures to meet the emergency. Its determination, however, is not always an easy matter. "If war be actually levied," said the Supreme Court in another case, "that

is, if a body of men be actually assembled for the purposes of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war."[1] Again, levying war is said to be direct if it be immediately against the government with intent to overthrow it; constructive, if it be levied for the purpose of producing changes of a public and general nature by an armed force. In the Rhode Island case the war was direct; but had it been otherwise—had it been simply for the purpose by armed force of producing some general change in government, or to accomplish some general object without governmental sanction, which, if desirable, it was the duty and province of government alone to bring about—it would have been constructively war, and, under the ruling of the Supreme Court, equally justifying, if the authorities deemed it necessary, the proclamation of martial law.[2] This principle, as will hereafter more fully appear, has had recent application in the State of Idaho.

508. The militia of Rhode Island were put in the field without any thought of their being subordinate in any degree to the civil power, or hint that concerted action by the two jurisdictions—military and civil—was desirable. Indeed, it is a noticeable fact that neither in Luther *v.* Borden nor in *Ex parte* Milligan did the Supreme Court suggest that it was the duty of the military, in moments of peril to society or government, either in conjunction with or in subordination to the civil power. Evidently in the opinion of the court, when the time for martial law had arrived, all thought of the military necessarily acting a subordinate part was out of the question. Nor, as some seem to think, would a mere suspension of the privilege of the writ of *habeas corpus* have amounted to martial law. The suspension would have been far short of that

1. *Ex parte* Bollman, 4 Cranch, p. 126; U. S. *v.* Burr, *ibid.*, p. 469.
2. U. S. *v.* Mitchell, 2 Dall., p. 348; U. S. *v.* Vigols, 2 Dall., p. 246.

law. The former, indeed, is embraced in the latter, but does not constitute the whole. The suspension authorizes detention in prison without reason shown; while martial law means not only this, but may mean arrest without warrant, breaking into houses, trials by courts-military of civil offenders, and acting generally under military orders to the exclusion of civil precepts.

509. The case of Commonwealth *v.* Blodgett illustrates another phase of martial law growing out of the Rhode Island rebellion.[1] The insurgents, being dispersed, fled beyond the limits of the State. Blodgett, a militia officer, lawfully engaged under competent authority, pursued some of the fleeing rebels into an adjoining State, arrested and carried them back to Rhode Island for trial. This was plainly an armed invasion of friendly territory; the act was repudiated by the Rhode Island authorities; the officer on demand sent back to Massachusetts for trial. Yet the offence was known to be a strictly technical one, without any intention to offend the majesty of Massachusetts law; it was not intended to derogate from the competency and sufficiency of the jurisdiction of the authority of this State within her own limits, but simply an exhibition of too great zeal in serving the government of Rhode Island.

510. In delivering his opinion in this case, Chief-Justice Shaw admitted that there might be circumstances which would render justifiable the acts of the defendants. If there existed a necessity for the defence and protection of the lives and property of the citizens of Rhode Island, that Blodgett and his men should do the acts complained of in the indictment; or if there was probable cause at the time to suppose the existence of such a necessity, the acts would be justifiable. Whether such necessity or probable cause of necessity existed, the jury were to determine from all the facts in evidence.

511. It was during the Civil War and the reconstruction period immediately following that martial law received most attention in this country. Both parties, and equally perhaps,

1. Metcalf (Mass.), p. 56.

found it necessary to resort to this efficient measure. In some instances the Executive Department acted independently; at other times, pursuant to laws passed expressly to meet the occasion; while in others, the legislature, by giving express sanction to what the Executive Department had done in this behalf, adopted the measures taken as their own.[1]

512. So early as August 8, 1861, General Canby, commanding the United States forces in the territory of New Mexico, which the rebels had invaded, found it necessary to guard against treasonable designs, correspondence, and aiders and abettors of the enemy by suspending the privilege of the writ of *habeas corpus*.[2] It is true that the military were in this instance instructed to unite with the civil authorities in maintaining order, while those guilty of treason and misprision of treason were to be tried by civil courts. But this was confessedly only a matter of convenience to the military authorities, who were supreme. The power here assumed, however, was exercised with as much attention to the civil rights of the citizen as a proper regard for the interests of the Federal Government would admit. Care was taken to guard against abuse of the unusual authority here assumed. No one was arrested except upon probable cause of suspicion of being dangerous to the public safety. Immediately upon arrest an examination was made, and if found innocent, the accused set free.

513. In the case arising in Colorado, in 1904, during the suppression of an insurrection declared by the governor to exist in a certain district, one Mayer, arrested for being a leader in the unlawful acts, applied to the Supreme Court of the State, by *habeas corpus* proceedings, for release. This was denied by that court. In the course of its decision the court remarked:

"Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained. So with the Constitution. It must be given that construction of

1. G. O., A. G. O., 104, 1862; *ibid.*, 114, 1862; *ibid.*, 73, 1863; Act March 3, 1863; Act May 11, 1866; Proclamation, Sept. 15, 1863; *ibid.*, July 5, 1864. 2. R R. S., I., Vol. 4, p. 62.

which it is susceptible, which will tend to maintain and preserve the government of which it is the foundation and protect the citizens of the State in the enjoyment of their inalienable rights. In suppressing an insurrection it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters.

"Without such authority the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct.

"If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to."

514. It has been mentioned that in the adjacent Territory of Arizona not only was it found necessary for the military to assume control, as in New Mexico, but a government complete in all its parts was set up there, first by the rebel and continued afterwards by the Union commander.[1] The isolation of the two Territories mentioned, the time required to communicate with them the difficulties and dangers which beset all attempts at such communications had the effect as completely to render them distant colonies as in the British Empire are the West India possessions. The military authorities present were compelled of necessity to use their best judgment as to what was proper to maintain national control. The choice of measures rested with the commander. In him was vested a discretion as to the means to be adopted to preserve order, protect society, and render life and property secure. This was to be exercised by him upon the sound principle that where discretionary power is lodged in a public officer he is the sole judge of the justifying

1. *Ante*, Sec. 66.

facts, and can only be held accountable civilly for corrupt and criminal abuse of authority.

515. The condition of affairs in Missouri, previously adverted to, early called for the use by the Union authorities of measures of repression.[1] Although, as they never officially had been declared by the President to be in a state of insurrection, her people technically were considered to be loyal; but the real facts, as well known, were far otherwise. A large portion of the wealthy and influential classes openly or secretly sympathized with the cause of secession. Thousands of the bravest and most reckless of the male population were enrolled in the armies of the enemy or organized into partisan bands terrorizing the districts they infested. These could all be dealt with according to the laws of war. But the case was different with secret rebel sympathizers, who covertly extended aid and comfort to the enemy. As a result, confidence was impaired, disloyalty became the boast of some who sought and were given the protection of the Government, while in some parts of the State midnight assassinations, robberies, and burnings carried on by marauders and guerillas converted extensive cultivated and productive districts into deserts. The administration of justice became such in name only; causes were determined not on their merits and the evidence, but according to the political bias of litigants and the loyalty or otherwise of judges and juries.

If society were not to be permitted to dissolve and the State become the scene of inextricable confusion, the time had come for the Union military officers to act. Accordingly August 14, 1861, General Fremont, commanding the Western Department, declared martial law in the city and county of St. Louis, and extended it on the 30th of the same month to the whole State. The object was explicitly stated to be to place in the hands of the military authorities the power to give instantaneous effect to existing laws, and to supply such deficiencies as the conditions of war demanded. It was not intended to suspend the civil tri-

1 R. R. S., I., Vol. 3, p. 442.

bunals where the law could be administered by the regular officers exercising their ordinary authority.[1]

516. General Fremont was relieved on the 2d, and General Halleck was appointed to the command of the department on the 9th, entering upon the duties on the 18th of November, 1861. This officer perfectly understood the legal aspects of the situation and the relation which the military power in free governments should bear to the civil. On assuming command he found civil government within the limits of his department in a state bordering on dissolution. He saw that the necessity existed for exercising the inherent right of government to enforce martial law. He was aware that this law had been instituted by his predecessor, yet he found no written authority for this, which, in his judgment, could only emanate from the President. He at once informed the general-in-chief of these facts, and requested such written authority.[2] With evident reluctance, and not without considerable delay, at a time when every day was big with important events, the requisite "written authority" was given by the President.[3]

517. Here again we have evidence of the fallacy of the doctrine which would make the justification of martial law depend solely upon the fact whether civil courts are or are not in the unobstructed physical exercise of their jurisdiction. What impediments in the way of physical obstacles to courts sitting existed in St. Louis at this time? Sheriffs might make their returns, juries deliberate, judges expound the law. The obstacle to the due course of justice was not of a physical nature. It was of a more formidable character, and consisted in the secret machinations of friends of the enemy who, except they were held in check by the strong arm of military power, would have made of the municipal government an engine for the advancement of the rebel cause. To enforce martial law under such circumstances was a duty.

1. R. R. S., I., Vol. 3, pp. 466-67. 2. R. R. S. I., Vol. 8, p. 817; *ibid.*, p. 395. 3. R. R. S., I., Vol. 8, p. 401.

518. This condition of society—calm exterior, while close underneath rebellion was fermenting—extended to many other parts of the State dominated by Union arms. Many of the male population who, during the daytime and in presence of the Federal troops, seemed to be peaceable, sought only the cover of night to burn bridges and destroy railroads and telegraphs. To indict and try them by civil courts, composed of their friends and associates, would have been useless, although no physical obstacle interposed.[1] Here again the military power alone was equal to the occasion. Any one caught in these acts was ordered to be shot, and those arrested on suspicion of guilt were tried by military commissions. All who had guilty knowledge of the crimes mentioned, or kindred ones, were considered as accomplices and treated accordingly. At last towns and counties were made to pay for the destruction caused in this way, unless the presence of the enemy rendered its prevention impossible.

519. As time passed the hope was entertained that the State might be relieved from this rule which necessity had forced upon it. This expectation, born of the bright promise of the hour, was doomed to disappointment. The State remained during the war the theatre of discord—political, civil, military—which rendered the cessation of martial law impracticable.

520. By March, 1863, the Union cause in Missouri was endangered from a different direction. A bitter and uncompromising spirit of faction had broken out among its friends. Two parties existed; the one favored a radical, the other a conciliatory policy toward the enemy and their abettors in the State. The rivalry between them knew no bounds. The common cause seemed to be lost sight of in the local struggle for ascendency. The President was sorely perplexed by this dissension. Openly to espouse the cause of either party seemed injudicious, and accordingly a middle line was marked out,

1. See remarks of U S. Supreme Court on this subject, *In re* Debs, 158 U. S. Reports, p. 565.

which, while pleasing neither, secured in a measure the support of both.

521. One of the most important questions that had to be dealt with in this connection was that of martial law. It was in pursuance of the plan now determined upon by the President that General Schofield, when he assumed command of the department, issued precise instructions with regard to the enforcement of that law throughout the State. These were concise and clear, and gave all concerned an understanding of their rights and duties in the premises.

The supremacy of military authority was asserted; yet, where they were disposed efficiently to pursue their ordinary functions, civil courts and officers were encouraged to perform their duties as usual. It was pointed out that the mere declaration of martial law did not suspend the functions of civil government unless precisely so stated. The duty of all loyal civil officers was to execute State and municipal laws, as far as practicable, as though no troops were present. The duty of the military was declared to be to abstain from interference with civil officers, and to protect them, if need be, while in the discharge of their duties Resistance to or interference with them in the discharge of their legitimate functions by the military was declared to be a crime meriting severest punishment. It was announced that the mission of the army was the putting down rebellion, restoration of supremacy of civil law, the encouragement and strengthening the authorities until they were able again to enforce the laws and maintain peace. The rigors of martial law, it was stated, would be relaxed as peace should be restored and these authorities regain their strength. It could, however, be abrogated only when it was no longer necessary.

522. These instructions regarded civil institutions with respect, even veneration. They came as near retaining municipal supremacy as the circumstances of the times would permit. Nothing more reasonable could have been wished by the most zealous advocates of civil government. The military power

from necessity, not from choice, was supreme; yet the civil judicature, where practicable, was left unimpaired, and where there was departure from this rule, those who assumed the responsibility were held strictly accountable. This sufficiently attested the good-will of the military towards the civil community, which they were there to protect, not to oppress.

523. The sequel proved how the best-intentioned measures, based upon respect for law, and which, were that possible, should have brought the people to a realizing sense of their duty as citizens and to the government which protected them, may fail in moments of great social disturbance to accomplish their benign purpose. The instructions which established these rules for the exercise of martial law were issued July 7, 1863. Their effect was far from uniting even the loyal in the common cause. The people unfortunately did not realize the generosity of this policy. To such extent was opposition carried that newspaper articles appeared intended to excite mutiny among the soldiers, both national and State. To meet this new danger orders were issued two months later (September 17, 1863), rigidly enforcing martial law against all who within the department in any manner encouraged mutiny, insubordination, or disorderly conduct, or endeavored to create dissatisfaction among the troops. All persons who should either publish or publicly utter words calculated to excite insurrection or lawless acts among the people, and all who should publish falsehoods or misrepresentations of facts calculated to embarrass the exercise of military authority, were to be brought for their offences before military commissions for trial.[1]

524. When courts of justice cannot properly exercise their jurisdiction, it is admitted on all hands that martial law may be invoked. But it by no means follows that the converse of the proposition is true, and that this law cannot be appealed to unless the civil judicature is forcibly deposed. Among many illustrations of this fact furnished by the Civil War the condition of affairs in Kansas may be cited. The people of that

1. R. R. S., I., Vol. 22, Part II., p. 546.

State were devotedly loyal. The armed forces of the enemy in few instances, and then for the briefest periods, touched her soil. The border land, however, adjoining Missouri had for years been the theatre of lawless deeds. The outbreak of civil war furnished the excuse for long-engendered rancor to be given full vent by the people of each against their neighbors of the other State. Murders, stealings, burnings, robberies, and every crime which characterizes sectional strife converted fairest districts into scenes of desolation. Still, in Kansas particularly, the municipal authorities were in full exercise of their functions. They could not, however, give security to life and property. The agents of the law were frequently those who were most active in creating disorder and pursuing their purposes of avarice or revenge. It was under these circumstances that the general commanding the Department of Kansas declared martial law throughout the State.[1] It was announced that it was not intended to interfere with the civil authorities in cases of ordinary nature with which they were competent to deal. It was intended to put down the crimes before mentioned as so prevalent along the border, with a strong hand and by summary process. For this purpose the trial of all prisoners charged with armed depredations against property or assaults upon life were to be conducted before military commissions, and interference of the civil authorities in such cases was prohibited.

525. The enforcement of martial law in Baltimore and vicinity early in 1861, with the causes that rendered it necessary, has been already adverted to. In June, 1863, when the insurgents were actually within the boundaries of the State, or in large numbers menacing its invasion, the military commander again, but this time in a formal manner, established martial law in Baltimore and those parts of the State which formed the scene of warlike operations. This avowedly was to meet an emergency, but as the proclamation was never recalled, martial rule disappeared simply by falling into disuse.[2]

1. R. R. S., I., Vol. 8, p. 547. 2. Winthrop, Military Law, 2d edition, Vol. 2, p. 1287.

The commanding general announced that the suspension of civil government should in no case extend beyond the necessities of the occasion. All civil courts and functionaries continued to discharge their duties as in times of peace, taking care not to interfere with the exercise of the military power, which was predominant. Citizens remained quietly at their homes pursuing their ordinary vocations, except when called upon for service by the military authorities. Seditious practices which tended to encourage the enemy were particularly denounced. The people and the civil magistracy in all its branches were given to understand that so far as the paramount duty of saving the country would admit of it, they were to be left undisturbed; yet that the military power was supreme; that the duty of all was loyally to uphold the Government against the common enemy, and that whatever degree of force became necessary for the military to put forth to sustain the national cause would be exercised.

526. The President, except in rare instances,[1] fully sanctioned the acts of military commanders in enforcing martial law during the Civil War, and indeed set them an example. It may be assumed without greatly erring that the power to suspend the privilege of the writ of *habeas corpus* and the power to declare martial law are not widely different.

527. The War Department order of August 13, 1862, issued by the President's directions, can be looked upon in no other light than as an exercise of martial-law power.[2] It was intended to prevent evasions of the draft, and, to this end, authorized the arrest of those who, to avoid their duty to the country which had protected and nurtured them, were seeking to leave it in its hour of greatest need; and as to them, it authorized the suspension of the privilege of the writ of *habeas corpus*. This order was speedily followed by the President's proclamation of September 24th, subjecting to martial law anywhere within the United States rebels and insurgents.

1. Proclamation, May 19, 1862; R. R. S., I., Vol. 22, Part II., pp. 17, 41. 2. G. O. 104, A. G. O., 1862.

their aiders and abettors, and certain other disloyal persons or those guilty of disloyal practices, whom it was declared were not adequately restrained by the ordinary processes of law from embarrassing the Government and aiding the insurrection, and all of whom were declared to be liable to trial and punishment by courts-martial or military commissions; while, as to such enumerated classes of persons, so tried and sentenced to imprisonment, the privilege of the writ of *habeas corpus* was suspended.[1] Nor did the Executive stop here; but with regard to all persons who during the rebellion had been imprisoned in any fort, camp, arsenal, or other place of confinement by military authority, the privilege of the writ was also suspended.

528. This proclamation carried the right of summary arrest, trial, and punishment to the extreme. If this authority lawfully could be exercised, there remained, in times of great national danger, little to add to the completeness of executive power. Unquestionably the President, whose untiring labors to preserve the Union have sanctified his memory in the affection of the American people, deemed this assumption of power to be necessary. Nothing in his public acts evinces that he aspired to the exercise of unconstitutional power. But he came upon the scene when a powerful rebellion menaced the existence of the Union. Its suppression taxed every resource of the Government to the utmost. The so called Confederacy was a military despotism, in which every element of strength, mental, moral, physical, and all the resources of a vast and fertile territory, aided by assistance from abroad, were being directed to the establishment of a new independent government by disrupting the old. To overcome this it was necessary that the power of the nation should be put forth in a manner equally earnest. It was not a time for half-hearted efforts. If the measure were reasonable in itself, did not infringe too much upon the rights of the citizen, and added to the military strength of the nation, it was in general held to be justified.

1. G. O. 141, A. G. O., 1862.

The rule was to derive from the measure every military advantage possible, leaving the question of legality for after-consideration.

529. Whether or not the President rightfully exercised this authority became the subject of animated discussion. He never seems to have doubted it. However, to quiet the angry waters of disputation, Congress, March 3, 1863, passed what might be looked upon as an enabling act, authorizing the President to suspend the privilege of the writ. This satisfied those whose only doubts were as to the right of the President to suspend the writ without legislative authorization. But it raised up another class of objectors who, conceding that Congress had plenary power in the premises, denied that they could delegate it to the President. Whether the President or the Congress exercised the power, it was found equally impossible to meet the constitutional scruples of all. By the terms of the act mentioned the suspension of the writ during the then existing rebellion was, throughout the United States, made to depend upon the judgment of the President of the necessity of the measure; and further, whenever or wherever the privilege should be so suspended, no military or other officer was compelled, in answer to a writ of *habeas corpus*, to return the body of any person or persons detained by him by the President's authority. The officer had only to make oath that he held the party under such authority to suspend further action on the part of the judge or court issuing the writ.

530. To give efficacy to the act of Congress, the President issued his proclamation of September 15, 1863. This was necessary to give warrant and protection to executive officers whose duty it became to enforce the law. The different classes of cases which, in the President's judgment, came within the purview of the act, were thereby announced. They included all cases where, by authority of the President, military, naval, and civil officers of the United States held persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, sailors, or seamen

enrolled, drafted, or mustered, or enlisted in, or belonging to the land or naval forces of the United States, or generally of any offence against the military or naval service.

531. By War Department orders issued immediately afterwards, all military officers holding prisoners under the President's authority as contemplated in the act, were directed, should writs of *habeas corpus* be served upon them in behalf of said prisoners, to make respectful return thereto, but without producing the body of the prisoner, and to resist to the utmost any attempt to take by force those held in custody; and in this respect no distinction was made between courts and judges, whether of State or Federal jurisdiction.

532. In the nature of things this period was signalized by many seemingly arbitrary acts of Federal executive officers. They were not confined by any means to arrests and possible trial and punishment of offenders in the manner just pointed out. Grave questions arose as to the legality of such acts even when directed by superior authority. It was not the policy of the Government to permit its officers—those who amidst dangers and difficulties had performed their duty to the best of their ability—to be vexed therefor by civil suits.

533. To protect them the act of May 11, 1866, one year after the war in effect closed, was passed, amending the act of March 3, 1863, before mentioned. The amendatory law provided that any search, seizure, arrest, or imprisonment made, or acts done or omitted to be done during the rebellion, by any officer or person under and by virtue of any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States holding the command of the department, district, or place within which the act was done or omitted to be done, should be held to be within the purview of the act of March 3, 1863. There were liable also to arise difficulties as to the evidence of authority under which officers had proceeded. To meet this it was provided that when the order was in writing it was sufficient if the original were produced or a certified copy thereof, or if sent by telegram, the

production of the latter was *prima facie* proof of authenticity, and if the original in either case could not be produced, then secondary evidence was admissible.

534. So far as the political department of the Government could secure them, officers were thus amply protected against judicial persecution for acts honestly done in furtherance of the Union cause from the commencement of the rebellion down to the 11th of May, 1866. This was eminently proper. It would have been singularly unjust to have abandoned to civil prosecutions officers who, acting under the orders of superiors, had, while war was flagrant, taken the most effective measures to sustain the national cause, yet which measures might not be susceptible of vindication under the law of peace.

535. It is true that courts have not always taken this view—a fact to be accounted for in great measure, perhaps, by the circumstance that the judicial determination of causes so arising took place after the war, when the disposition of all parties was to sink the animosities then engendered out of sight. By some courts and judges the occasion was considered a fitting one to indulge in abstractions regarding the rights of the citizen, which, however unsuited to the times from which the nation had just emerged, were not particularly harmful at a later and calmer period in its history.

536. This was not unreasonable. The great principles at stake during the war should never be lost sight of. They should never be compromised, abated, or belittled in one jot or tittle. But, this being kept in mind, those principles being guarded and preserved as part of the fundamental creed of our government, it serves no useful purpose to nurture the passions aroused during the Civil War. If, therefore, that which is suggested above were the judicial theory, there were many considerations to commend it to favor. Still it was easy to carry such speculations too far. It was easy to forget that times had not always been peaceful, and that executive officers whose acts were complained of had to take action under circumstances which placed deliberation out of the question. Decisions ren-

delved after the war regarding the legality of measures taken by the political department during that eventful and critical period savor much of theorizing. It may be that had executive officers not acted as they did, the courts would not have been able to sit. Without the measures they adopted, it might not have been possible to suppress the rebellion. There is something incongruous in the spectacle of a judicial tribunal inveighing against instrumentalities of coercion adopted by the department of the government which is responsible for the suppression of a rebellion, when to the use of these instrumentalities the fact is to be attributed that the tribunal itself exists.

537. Meanwhile, as previously mentioned, the President, by proclamation of July 5, 1864, had established, and, by another proclamation of October 12, 1865, had revoked martial law in Kentucky.[1] Following this he, on December 1, 1865, annulled and revoked the proclamation of September 15, 1863, suspending the writ of *habeas corpus* throughout the United States, except as to the insurrectionary States, to Kentucky, the District of Columbia, and the Territories of New Mexico and Arizona, which exception itself was annulled by the proclamation of April 2, 1866, thus re-establishing in all portions of the United States the privilege of the writ of *habeas corpus*.

538. The District of Columbia, the seat of the national capital, was fully guarded during the Civil War by the national forces. The retention of the city of Washington by the Federal and the preventing its capture by the insurgent armies was a matter of the greatest importance. It was fortified and garrisoned sufficiently to prevent being taken by *coup de main*, while troops were kept within ready call to defend it against more regular attacks. Such was the purely military situation. The military supervision of the city extended, however, far

1. General Burnside had previously, G. O. 120, Department of Ohio, July 31, 1863 (R. R. S., I., Vol. 23, Part II., p. 572), declared martial law in Kentucky for the same reasons essentially given by the President in his proclamation of 1864.

beyond this. There were many interests of national importance to be guarded at the capital. Besides being in a peculiarly exposed position, as regards liability of attack, it was in all particulars the center of Federal governmental control. All the great departments were there located, and all had to be protected. From there the affairs of the nation were regulated. But aside from this, there were many matters to be looked after in the city which, while ordinarily within the purview of local government, became, under the conditions surrounding the capital, of national moment. There foreign representatives lived, whom, at that time, it was particularly desirable to guard from the semblance of molestation; there were the public buildings, offices, and records of the general Government, destruction of which would be an irreparable loss; there, also, emissaries of the enemy, many of whom lived in the city, were plotting for his advantage.

To aid the local civil authorities in guarding public interests springing out of these and other kindred matters, a provost-marshal's staff, assisted by a military police, was organized soon after the war began, one of whose important duties it was carefully to guard political prisoners gathered from all parts of the country, and who, either because they had given aid and comfort to the enemy, or were suspected of it, had become subjects for restraint. In March, 1862, the provost-marshal of the Army of the Potomac was relieved of the supervision of these duties in the city of Washington by a military governor, who was assisted by a proper corps of subordinates, including his own provosts.[1] This military governorship over the District of Columbia continued until the close of the war.

539. The various proclamations suspending the privilege of the writ of *habeas corpus* in certain enumerated cases heretofore cited were as applicable in the District of Columbia as elsewhere in the United States. Such suspension, however, in the instances specified did not operate necessarily to institute mar-

1. G. O. 25, A. G. O., March 15, 1862; S. O. 353, par. 20, A. G. O., November 19, 1862; S. O. 449, par. 38, A. G. O., December 16, 1864.

tial law, which, in the proper acceptation of the term, was not at any time fully established over the District. It is true that in many respects the city of Washington had the appearance of being under martial law. Troops were to be found in all parts of the District. The police of the city were under the orders of the military governor, as was also the fire department organized into a brigade for better military control.

The civil magistracy of the District exercised their vocations as usual. Civil officers were chosen, they entered upon or surrendered their duties as in times of peace. To this extent the military, instead of supplanting the civil authorities, rendered it possible for the latter to exercise their functions. Without the former the latter would have been powerless to protect and render secure either life or property. Yet in doing this the military did not act in subordination to the civil power. It strengthened the latter, but in its own way. The principle upon which the laws were administered and order preserved throughout the District at this time appeared to be this: as to ordinary matters of municipal cognizance, it was the duty and purpose of the military to sustain the civil authorities, unless, indeed, such a course were prejudicial to the military interests of the country, which were treated as of first importance; while, as to other matters, of greater or less military consequence and which existed solely because the war was being waged, the military alone had control. The latter branch of the subject was perhaps best illustrated by the hold the military retained of jurisdiction of military offences, without regard to the civil aspect of the case, as in the trial, conviction, and execution of the conspirators against the lives of the President and members of the cabinet in 1865, although at the time the war was over, and civil courts were open for the trial of causes properly presented.

CHAPTER XXIII.

CONGRESSIONAL MARTIAL LAW.

540. In treating of the exercise of martial law under Federal authority, the action of Congress in this field must not be omitted. The subject has been adverted to in the introduction to this work, where the constitutional question thence arising has been suggested and briefly considered.[1]

541. The United States Supreme Court sustained the legality of martial law instituted by act of State legislature.[2] But State legislatures are not singular in this exercise of power. We have witnessed the spectacle of the national legislature placing under martial law a large portion of the United States. This was immediately following the Civil War. The insurgents had been reduced to subjection. It became a question as to the terms upon which the conquered States should be restored to their places in the Union. The question was of momentous import. The Executive and the Congress were not agreed upon it. The result showed how nearly omnipotent in this country the latter is. Virtually for purposes of reconstruction it exercised command of the Army; not, however, by virtue of constitutional, but usurped authority.

542. The series of acts by which legislative martial law was accomplished were passed in 1867 over the Presidential veto. The claim here set up for Congressional authority was in effect sustained by the Supreme Court.[3] The first of the acts referred to,[4] after declaring in the preamble that no legal State governments or adequate protection for life or property existed in the rebel States, and further, that it was necessary that peace and good order should be enforced there until loyal and republican governments[5] could legally be established, pro-

1. *Ante*, Sec. 11, Introduction, *et seq.* 2. Luther *v.* Borden, 7 Howard, p. 1. 3. 7 Wallace, pp. 707–8; 13 Wallace, p. 646. 4. March 2, 1867. 5. Constitution, U S., Art 4, Sec. 4, clause 1.

ceeded to place the designated States under military control. Five military districts were created. It was made the duty of the President to assign to the command of each an army officer not under the rank of brigadier-general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority. It was made his duty to protect life and property, suppress insurrection, disorder, and violence, and to punish or cause to be punished all disturbers of the public peace and criminals; and to this end he might allow local civil tribunals to take jurisdiction or he might organize military commissions or tribunals for that purpose, and all interference under color of State authority with this exercise of military authority was declared null and void. All persons placed under military arrest by virtue of the act were to be tried without unnecessary delay; no cruel or unusual punishment was to be inflicted; no sentence of a military commission or other tribunal authorized by the act affecting life or liberty to be executed until approved by the district commander, nor sentence of death until approved by the President. Provision was made for the admission of the States affected into the full communion of the States of the Union upon the performance of certain conditions precedent; and it was declared that until this was done any civil government which might exist in any one of them should be deemed provisional only, and subject to be modified, controlled, or abolished by the supreme authority of the United States.

543. It is difficult to conceive of a more rigid system of martial law than this. In essence, in idea, and largely in terms, it was erected upon the same principles as the recent martial-law proclamation in the British South African colonies. The districts involved were subjected absolutely to military control. If the civil jurisdiction were resorted to, it was matter of convenience merely. The military administrative arm was assisted when necessary by the military judicial function; and the two, acting together, were supreme and sufficient for all purposes of government. As an example of legislative

martial law, this act is a model. It evinces the entire confidence which Congress had in the Army. The President strenuously objected to it for the reason, among others, that it was a legislative usurpation of executive authority; but, having passed by the constitutional majority over his veto, he was bound to see it carried into execution. Its effect could be avoided only by a decision of the Supreme Court declaring it unconstitutional, a tedious process at best; besides, when actually presented for decision, that court might determine the question the other way.[1] Under the plan of martial rule instituted by Congress there were but two subjects of Presidential cognizance: First, the appointment of the military commanders; second, cases of death penalty when adjudged by the military courts authorized by the act.

544. Notwithstanding it would seem that there was no room for doubt as to the meaning of this act, controversies upon this point soon arose which led to still more stringent legislative measures. The Attorney-General, when called upon for advice as to the signification of the act, gave as his opinion that its terms must be strictly construed; that military authority under it was nothing more than a police power, and did not include the exercise of civil government; that it did not include the appointment of civil officers or interference with civil laws and ordinances or the course of civil jurisprudence, except in extreme criminal cases, and by this theory of the law the jurisdiction of the military tribunals created by it was greatly circumscribed.[2]

545. In the then temper of Congress there could be but one result. Within a month of the time this opinion—which, in effect, would have deprived the law of its sterner martial-law features—was promulgated, a supplemental act was passed explanatory of the former, but with additional and yet more rigid provisions.[3]

1. 7 Wallace, pp. 707–8; 13 Wallace, p 646. 2. 12 Opinions of Attorney-General, 182, June 12, 1867. 3. Act, July 19, 1867.

It was declared to be the true intent and meaning of the act of March 2, 1867, that the governments of the "rebel States" therein mentioned were not legal, and that if thereafter they continued, they were to be subject in all respects to the military commanders of the respective districts and to the paramount authority of Congress.

How this construction of the law could have been questioned by one who gave even moderate attention to the language of the original act, it is difficult to comprehend. It is no doubt a correct principle that in time of peace statutes authorizing the exercise of military power over civilians are to be construed strictly. It was also true that March 2, 1867, war had ceased to be flagrant, and it was therefore technically time of peace.

546. But it was also true that the civil governments in the late insurrectionary States were inimical to the Union; that society there was in a dangerously disordered condition; that deep-seated enmity was at this period entertained by the leading people towards important principles of governmental policy which those who had saved the Union had resolved should be incorporated into the Constitution. The act of March 2, 1867, was to be construed in the light of these facts. Technically it might be termed "time of peace"; but in reality it was far different, as that phrase is generally understood. It was a state of latent rebellion. Had the President, the Attorney-General, and their friends been able to take this view of the case and given the law a construction in consonance with its intent, they would have been spared the disagreeable experience which followed, during which they were compelled to drain the bitter cup of humiliation to its dregs.

547. By Section 2 of the supplemental act[1] the general commanding the Army of the United States was interposed between the President and the district commanders with an authority which greatly derogated from that of the Executive as commander-in-chief. And to meet the difficulty arising from the Attorney-General's opinion, that the act of March 2d gave

1. July 19, 1867.

military district commanders no authority in matters of civil government, they were now in express terms given such authority fully and completely, not as formerly under the direct supervision of the President, but of the general commanding the Army.

548. The general of the Army was invested with every authority to appoint and remove civil officers within the military districts that the various district commanders possessed. All previous acts of the latter, either making or unmaking civil offices, were confirmed. No district commander was to be bound in his actions by any opinion of any civil officer of the United States. The object of this was evidently to provide against any future opinion of the Attorney-General adverse to the general purposes of the law; and it was declared that the provisions of the acts involved should receive a liberal construction, to the end that the intents thereof should fully and perfectly be carried out.

549. There have been numerous instances in the history of the United States and of particular States of the declaration of martial law. But for completeness of design and efficacy of measures for carrying it into successful execution, nothing could surpass these acts of Congress. They established a military despotism. The insurrectionary States had been reduced to subjection by the sword; they were to be ruled by the sword until they were willing to return to their former positions upon such terms as would not again, from the same causes as before, imperil the safety of the Union. Judging from these acts, the authority of Congress in this regard would seem to be complete. It was attempted in vain to enjoin the carrying this legislative martial law into execution.[1] The Supreme Court refused to interfere. The power and duty conferred and imposed by those acts, it was observed, were purely executive and political in their nature and beyond the sphere of the judicial cognizance. Nor was this system of government wanting i

1. 4 Wallace, p. 475; 6 Wallace, p. 50.

the attributes of power, firmness, and, considering the times, justice.

"The national legislature," said the Supreme Court of Texas, "used its legitimate powers with moderation and magnanimity, endeavoring to encourage the formation of republican governments in these States, and bring the people back to a due appreciation of the law and of the liberty which is secured to the free enjoyment of every citizen under the Constitution."[1] To the same effect was Texas *v.* White, decided by the Supreme Court of the United States.[2] It was there held that while war was flagrant it was within the power of the President to institute temporary [military] governments over the insurgent territory. But, rebellion being suppressed, and the question being upon what conditions the conquered territory was again to be admitted into the Union, the duty devolved upon Congress to determine that question, which it had done, in a constitutional manner. This position was affirmed in various decisions. "From the close of the rebellion," said the same court in White *v.* Hart, "until Georgia was restored to her normal relations and functions in the Union, she was governed under the laws of the United States known as the Reconstruction Acts. The State, having complied with the terms of these acts, was declared by Congress entitled to representation in that body. The action of Congress upon the subject cannot be inquired into. The case is one in which the judicial is bound to follow the action of the political department of the Government and is concluded by it."[3]

550. It was doubtless true that the condition of public feeling in the late insurrectionary States, which led to the enactment of the laws just cited, was not such as ordinarily would cause a nice regard to be paid to the convenience and prejudices of the people thus subjected to martial law. Yet we see on every hand military commanders making use of the civil institutions of their respective districts to the utmost that regard for the objects of these laws would permit. As observed by

1. 33 Texas, p. 570. 2. 7 Wallace, p. 701. 3. 13 Wallace, p. 646.

Chief-Justice Chase, the military existed only to prevent illegal violence to persons and property, and to facilitate the restoration of the States, and this fact district commanders constantly sought to impress upon the people interested. This appears from their orders, as, for instance, that the military courts convened under these laws were to be "governed by the rules of evidence prescribed by the laws of the State in which the case was tried";[1] that it was the purpose of the commanding general "not to interfere with the operation of the State laws, as administered by civil tribunals, except where the remedies thereby afforded are inadequate to secure individuals substantial justice";[2] that "the trial and punishment of criminals was to be left to the civil authorities, so long as the said authorities are energetic, active, and do justice to the rights of persons and property without distinction of race or color."[3]

551. We have not far to go in seeking for the reason of this universal deference to civil institutions on the part of military officers. It is a part of their existence. They are educated to regard the civil law with the greatest respect, and are solicitous to avoid being brought under its censure. Indeed, the general principle that the civil is superior to the military jurisdiction is so firmly implanted in their minds that they never question, save in extreme cases which their good sense rejects at first sight as improper, the acts of agents of civil government. It easily can be imagined that a class of public officials thus imbued not only with a profound regard for civil administration, but a desire to avoid if possible having anything to do with it, would not seek even a temporary extension of their own authority over it. It results that military officers are as a rule not the first to suggest such a measure. When, however, the necessity arises, they generally do not shrink from the responsibility thereby imposed, conscious that they are actuated by love of good order and not by lust of power.

1. Second District, G. O. 18, 1868 (Winthrop's Military Law, Vol. 2, 2d Ed., p. 1331, notes). 2. First District, G. O. 24, 1868, *ibid.* 3. Third District, G. O. 10, 1868, *ibid.*

552. Martial law either with or without formal declaration having become an established fact, how reluctantly soever this may be, it is natural that the military commander, now supreme, should avail himself of ordinary governmental instrumentalities when and to the extent that this can be done consistently with the objects he has in view. Successfully to govern a community even in times of peace is not an easy task. To the casual observer the machinery of municipal affairs may seem to run itself, but closer examination will evince that when this is so, it is due, first, to a well-digested system of laws, and second, to unceasing vigilance on the part of those entrusted with their execution. But martial law does not exist in ordinary times of peace. That it exists at all is evidence that society is disturbed to a degree beyond the power of civil government to manage. Good government is more difficult to maintain at such times than at any other. The military is made the dominating power because of this weakness of the civil power. By virtue of their decree, and according to their plan, order is enforced and individuals rendered secure in persons and property.

553. But this exercise of military authority may not, operating alone, fully meet the ends for which it is invoked. Under it many subordinate authorities and instrumentalities find their spheres of action extending out into the minute details of private and municipal affairs. A vast mass of matters intimately affecting the happiness of the governed, their liberties and property rights must hourly be cared for by duly constituted officers, or great suffering, inextricable confusion, and injustice to individuals will result. Property is entailed, marriages entered into, contracts made, and many other every-day domestic concerns must regularly and sytematically pursue their accustomed course, or society receives a shock from which it but slowly and painfully recovers. It is not the policy of military commanders to bring about such a condition of affairs. On the contrary, it is a matter of deep solicitude with them to prevent it. The attainment of this end is most easily accom-

plished by the civil judicature, to the extent absolutely necessary, acting under military control. Hence it was that on both the Union and Confederate sides during the Civil War, when martial law was declared it was generally stipulated that this was not to be considered as disturbing the usual order of things except in so far as imperatively necessary; while often supplementary orders were issued by those upon whom the duty of enforcing martial law devolved, calling the civil and municipal administration to their assistance.

CHAPTER XXIV.

MARTIAL LAW IN STATES AND TERRITORIES.

554. We have seen that in carrying into execution those laws which provide for protecting the national Government against both invasion and insurrection, and maintaining Federal supremacy, the President may act within the States independently of State authorities and even against their wishes. There have been numerous instances of this exercise of power in the history of the Government. Under those circumstances, if measures proceed to the extremity of martial law, the Federal Government acts without necessarily inquiring how the State is affected.

555. There is, however, another case when the interposition of Federal power is authorized by the Constitution and wherein the State acts a more determining part. Article 4, Section 4, provides that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and, on application of the legislatu e or of the executive (when the legislature cannot be convened), against domestic violence."

556. Regarding this duty of guaranteeing governments republican in form but little need be said. A question might arise as to what constituted such government. If this happened, it would be necessary for some controlling power to decide, and unquestionably it would be Congress. The Supreme Court of the United States so stated in Luther *v.* Borden, and the Reconstruction Acts of March 2 and July 19, 1867, proceeded upon this principle.[1] If the instituting martial law under these circumstances became necessary, it would be wholly a matter of Federal cognizance.

1. Texas *v.* White, 7 Wallace, p. 700.

557. It is conceived that the same would be true when the Federal authority proceeded to the second duty here indicated, to protect a State against invasion. The duty in both these instances is mandatory. The Federal Government when organized took upon itself the obligations imposed in these provisions of the fundamental law; and in acquitting itself thereof, it would move in the manner most expeditious, effective, and satisfactory to itself. All measures taken, including if need be martial law, would be Federal in nature, and the United States would take and maintain the initiative.

558. The case, however, is different regarding the remaining guarantee clause. This provides against danger to the States, not from without, but within. If the legislature be in session, the application should come from it. That is not the language of the Constitution, but is its meaning. When not in session and it cannot be convened, the State executive makes application to the President to have made effectual the constitutional guarantee against domestic violence.

559. By the act of February 28, 1795, Congress vested in the President power to meet emergencies of this character. Should there be a question as to which is the legislature and who the executive, the President must determine it.[1]

560. Many if not all of the United States statutes passed since then, providing for the employment of regular troops or the militia or both for national defence and maintaining the supremacy of Federal laws, at the same time equally guard all the States and their laws. Thus means are fully provided for meeting the national obligations imposed by the clauses of the Constitution mentioned.[2]

561. The act of February 28, 1795, does not render it imperative that the President call out the militia on application of State authorities. It only states that it may be lawful for him to do so. He exercises his discretion when the exigency arises. In the case of Dorr's Rebellion he declined to interfere,[3]

1. Chapter 36; 7 Howard, pp. 42–43. 2. Art. 1, Sec. 8, clause 14; Art. 4, Sec. 4. 3. 7 Howard, p. 41.

and the State proceeded unaided to maintain its authority. In nearly all cases, however, the President has promptly responded with Federal aid. In fact, he prepared to sustain the regular government of Rhode Island, but his measures were taken with extreme caution, and, before the fitting moment came to show the Federal hand, the Dorr movement collapsed.

If it be a case of insurrection, and the President deem it a fitting occasion to interpose, the statute provides that he shall forthwith by proclamation command the insurgents to disperse and retire peaceably to their abodes within a limited time.[1]

562. It now becomes necessary, the troops having entered the State, to determine under whose authority they shall act. This question the President decides. He is proceeding, pursuant to law, to render effective one of the guarantees which the Constitution has given each State from the United States. The law prescribes that this shall be done by military force. But it does not enter into details as to how this force shall be used. This is left to the President. The responsibility is his, and he is given a discretion as to the manner in which he shall use the means supplied to him by law to meet the Federal obligation.

563. A State under these circumstances will seldom be disposed to dictate how the assistance called for is to be used. Having exhausted her own coercive resources, she has turned to the stronger power provided by the Constitution to rescue her from the violence of her own members. The power invoked must direct its own energies. It cannot abdicate its functions and transfer its duties to the inferior power. Consequently, whether the President either commands in person, as President Washington for a time did in the Pennsylvania rebellion of 1794, or devolve this duty on a subordinate, he must and will reserve the right to resume the reins of supreme authority should the occasion require it.

564. It follows that the President might proceed to protect the State against domestic violence, either by acting independ

4. Sec. 5300, R. S.

ently of State authorities or in coöperation with them; or for this occasion the troops might, it is submitted, be placed subordinate to and at the disposal of the chief executive of the State. They may be used either to sustain or supplant the civil authorities, depending upon the President's view of the exigency. But whatever plan be adopted, the President would necessarily have the right to modify or abandon it if the public interests and the object to be attained would thereby better be subserved. When the time for the interposition of Federal authority arises, the President, not the State officers, is charged with the duty of seeing that it is wisely and efficaciously exercised.

In 1877, during the great railroad strikes, this question was raised. The administration was by no means certain what course to pursue, varying this from time to time. But finally the troops on the scene of operations, in pursuance of the governor's call for aid, were placed by the President under command of the regular army officer of his selection, to carry out military measures as he saw fit. They did not report to nor act under the governor's orders.

565. Yet there is a limit to the authority which may be exerted to protect a State against domestic violence. This must be done in such manner as not to defeat the object of that other guarantee in the same clause, and which engages the United States to ensure each State a republican form of government. The military power invoked must not erect a permanent government non-republican in form. Permanently to secure one republican in form, however, it may be necessary temporarily to erect a complete government of the sword, or such modification of this as the emergency, in the judgment of the officer entrusted with the management of affairs, calls for. That martial law may be a proper measure under these circumstances, the Supreme Court of the United States in Luther *v.* Borden explicitly declared. The domestic violence may vary in its proportions from a local riot or insurrection to rebellion which strikes at the supremacy of State government itself.

The assistance rendered by the President will correspond to the occasion, from a few hundred to perhaps many thousand troops. The district occupied may vary from one or two points to extensive portions of State territory. The measures of administration and control necessary to adopt in every instance will depend upon its own circumstances. The President or the officer to whom he confides the direction of affairs will decide upon this, and if martial law be a necessary and proper measure, he will institute it. His is both the duty and the responsibility.

566. The duty and authority of the President, when either the execution of Federal laws is obstructed, Federal territory invaded, or the States call for assistance, to enforce martial law if in his judgment the exigency requires it, seems to be complete. In this regard the Executive is invested with all power necessary to vindicate the laws and preserve unimpaired both the integrity of civil institutions and the national domain.

567. There is no reason why the governor of a State, who is the commander-in-chief of its armed forces, should not have the power, equally with the President, locally to enforce martial law should occasion justify it. If the legislature be in session or can be convened in time to meet the emergency, he might with propriety await its coöperation. On the other hand, the state of facts which is held to justify this law generally is of such a nature as to demand prompt action. Delay may be fatal to the maintenance of good order. Such in fact generally will be the case. And even if it be practicable to convene the legislature, there may be sufficient reasons why the governor, in the exercise of a wise discretion, may not deem it either advisable or necessary. There have, however, been few instances of the exercise of martial law by State authority. That of Rhode Island has already been mentioned. The exercise of martial law in the mining district of Idaho in July, 1892, and again in 1899, were occurrences of recent date. An armed mob took possession of the mines with the avowed purpose of preventing their being worked by persons obnoxious to the rioters. The latter were well armed and provided

1. See also the exercise of martial law in Colorado, 1904.

with dynamite and other high explosives for their measures of threatened and actual destruction. The disaffected district was a mountainous, isolated region. A reign of terror soon was inaugurated which swept away or through disaffection rendered powerless the local civil magistracy. Circumstances at once reduced the situation to one wherein the military alone could preserve order and re-establish lawful authority. But the State militia were few in numbers and, without support, utterly inadequate for this purpose. In 1899 they had gone as volunteers to the Philippines. The cases were, therefore, those contemplated by the Constitution, and the governor, as the legislature was neither in session nor could be convened, applied to the President for the Federal protection to the State guaranteed by that instrument.

568 Meantime, and as if to leave no means at his command for sustaining civil authority untried, the governor in each instance issued a proclamation declaring the county which was the scene of disturbance to be in a state of insurrection and rebellion. It was preliminary to proceeding by summary processes so soon as the military should be upon the scene of action. It authorized the adoption of martial law or other measures which the exigency of the case rendered necessary. The President promptly responded to the governor's call for regular troops. It is particularly to be noticed that the object for which they were sent, as indicated by the President himself, was, in the terms of the governor's request, to coöperate with the civil authorities in the preservation of the peace and protecting life and property. Fortunately for all concerned, a prudent and able regular commander was near at hand. To him was entrusted the management of military matters. The appearance of the military upon the scene was the signal for rioting miners to disperse to their various camps. But here, as has been so often the case elsewhere, it was found that the local authorities, either from sympathy with the rioters or through fear of their vengeance, were incapable properly of performing their functions. They could not be trusted to proceed

promptly against the law-breakers to bring them to justice and restore confidence to the community. The civil magistracy being powerless either to protect society or to maintain government, martial law, without formal proclamation other than that of the governor's mentioned, now found its fitting field of action. Local civil officers who had been duly elected or appointed under the laws of the State were in some instances removed, and others appointed by the governor's representative on the spot, who was given direction of martial-law measures. United States as well as State marshals were there to make arrests with the assistance of the troops, without which they could have done nothing. Some hundreds of the malcontents, charged with murder, robbery, plunder, and criminal destruction of property, were thus taken into the custody of the civil authorities, and escorted by the troops, pursuant to the President's express orders, to the State capital for trial.

NOTE.—The order of events in the Cœur d'Alêne district of Idaho, 1892, was as follows: On July 13 the governor declared Shoshone County, the seat of disturbance, to be in a state of insurrection and rebellion. On the 15th the President issued his proclamation commanding all persons engaged therein peaceably to return to their homes. Meanwhile both Federal and State troops had been moved to the scene of action. The commander of the latter represented the governor in the field. He exercised martial-law powers fully, removing the sheriff and appointing another in his stead. The appointee was instructed to take possession of all books and property appertaining to the office, and perform the duties thereof strictly according to law, except that he was "not to interfere in any way with the administration of martial law as conducted by the military authorities." Mills in the mining region were shut down, and other martial-law measures taken by the State military commander. No use of words could relieve the situation from one of the rule of martial law to the fullest extent. No formal proclamation instituting it was issued, but the status became that from its incidents as here narrated. This was eminently proper. The lawful declaration that the district was in insurrection and rebellion authorized the usual measures of war against the rebels and the adoption of whatever means contributed to the speedy restoration of order. The exercise of martial-law authority was by State, not Federal authorities. The latter acted simply to uphold the former by their presence. The influence they exerted was moral rather than physical.

569. It thus will be seen that in the exercise of martial law upon these occasions the military acted in coöperation with, yet a part superior to, the civil power. There were no antagonisms; no strifes for precedence between these agents of the law. All worked together harmoniously for the common end, the restoration of law and order in the community, giving security to property, the bringing criminals to justice. Subsequently this exercise of martial-law power was justified and authority vindicated by the State Supreme Court of Idaho.[1]

570. The Confederate State authorities did not hesitate to exercise similar authority. On numerous occasions the governors appealed to the Confederate President to exercise within their respective jurisdictions the martial-law power; and when this was not done, as sometimes was the case, they enforced it themselves. When, in the fall of 1862, the orders of Confederate generals establishing martial law were rescinded, except where expressly authorized by the President, the governor of Texas expressed his regret, and at his solicitation the general commanding there continued to exercise that law over a portion of his territorial command, notwithstanding his orders from superior authority to the contrary.[2]

South Carolina, the front of the rebellion, was not to be left behind in sealing her devotion in this as in other respects to the cause she had espoused. An ordinance was adopted by a State convention of her people on the 7th day of January, 1862, empowering the governor and executive council, acting together, to declare martial law to such extent, in such places, and at such times as might be required by the exigencies of public affairs. In pursuance of this authority, the governor, May 1, 1862, proclaimed martial law over the city of Charleston and the country for ten miles around, as well as the adjacent islands. This proclamation curiously, though perhaps so far as its promulgator was concerned unconsciously, illustrates the hallucinations of a devotee to the fatal doctrine, so pleasing to local and pride, and until then so prevalent in South Carolina,

1. See Sec. 503, Chap. XXV., *post*. 2. R. R. S., I., Vol. 15, p. 829.

that the State, and not the Nation, is supreme.[1] Having declared martial law, Governor Pickins proceeded solemnly to invest the Confederate general commanding the department with authority to enforce that law! and with further authority to impress, in the country south of the Santee River, labor of all kinds for the public service in like manner as if martial law were there declared! Of course, the principle that the State was the source whence the authority of Confederate officers flowed, as here assumed, was a mere figment of a disordered States' rights mind, and wholly untenable; the necessities of war soon swept to one side and strangled the heresy. The Confederate general could not and did not act under the pretended authority conferred by the governor. On the same day that the latter proclaimed martial law the Confederate President issued a similar proclamation embracing the same and much more territory—the whole country between the Santee and South Edisto rivers in South Carolina—and it was duly maintained until August 19, 1862, when the orders instituting martial law were rescinded.[2]

In Georgia, the governor, while not proclaiming, expressed himself as willing that martial law be extended by Confederate authority over those portions of the State the inhabitants of which, as at Augusta, were calling for its exercise.[3] In Louisiana we are presented with the spectacle of the governor soliciting the Confederate President to declare martial law in certain parishes, and expressing his deep regrets that it was not done, as thereby "much, very much serious trouble would have been avoided."

571. There have been few examples of the enforcement of martial law in the Territories of the United States. The Territory of Washington furnishes two instances. The first was in 1856, when the governor, himself an able and distinguished soldier, proclaimed and enforced it. The question of the governor's authority on this occasion having been submitted to the

1. R. R. S., I., Vol. 14, pp. 489, 491. 2. *Ibid.*, p. 599. 3. R. R. S., I., Vol. 15, p. 492.

Attorney-General for an opinion, that officer, after exhaustively examining the subject, arrived at the conclusion that such authority did not exist.[1] The reasoning was to the effect that the Territorial governor, being an appointee of the President, had only those powers which statutes, strictly construed, gave him; and although occasions might arise, in a Territory as in a State, when the enforcement of martial law would be necessary, the legislature alone could seemingly authorize the exercise within a Territory of the martial-law power.

572. It is safe to assume that this reasoning will not be deemed conclusive. In fact, it was disregarded, with the apparent approval of the President, by a subsequent governor of the same Territory.[2] In the years 1885–86 there were frequent illegal uprisings of the lower classes in the western portion of that Territory against the Chinese. These gradually grew into riotous assemblages in defiance of civil authority, the centers of disturbance being in Tacoma and Seattle. The rioters were armed and defiant. The local militia were called out in aid of the officers of the law, supported by the *posse comitatus*. The proclamation of the governor warned the mob to disperse. It was wholly disregarded. In a conflict between the rioters—who were the worst characters from that part of the United States—and the State authorities, one rioter was killed and several were wounded.[3] The governor issued a second proclamation, declaring that an insurrection existed by which life, liberty, and property were endangered, that the civil power was unable to suppress the disorder, and placing the city of Seattle under martial law. Before taking this step the chief-justice and the United States attorney of the Territory were consulted, both of whom earnestly counselled the measure.

573. The President of the United States, far from finding fault with the governor, promptly seconded his efforts to main-

1. 8 Opinions of Attorney-General, p. 365 *et seq.* 2 Report of Governor of Washington Territory to Secretary of Interior, 1886. 3. This was a state of war under English authorities; see Regina *v.* Frost, 9 Carrington & Payne's Reports, p. 129.

tain the law at all hazards. He immediately issued a proclamation stating that a case had arisen which justified and required, under the Constitution and laws of the United States, the employment of military force to suppress domestic violence and enforce the faithful execution of the laws, and directed General Gibbon, commanding the United States forces in that quarter, to move with regular troops to the assistance of the governor. These energetic measures had the desired effect. Quiet was soon restored. The presence of the regular troops gave confidence to the business and law-abiding members of the community. Having been in force two weeks, the proclamation of martial law was revoked. After the arrival of the regulars —and until February 22, 1886—martial law was enforced. General Gibbon had complete military control. This was with the acquiescence of the governor and at his request.

574. For his course in this trying emergency, Governor Squire had the approval of all good citizens. The bar of Seattle passed resolutions declaring that the exigencies of the occasion fully justified martial law, and pledging the governor their support. A feeling of relief pervaded the community when the strong military hand was felt at the helm, and of gratefulness to those who had saved the people from anarchy and the rule of a cowardly mob. To render martial law effective, provost-marshals were duly appointed; the privilege of the writ of *habeas corpus* was suspended as to rioters, while in respect to ordinary municipal affairs the military in no wise interfered.

575. The remaining conspicuous instance of martial law in a Territory was that of Arizona in 1862. When the Rebellion of 1861 broke out, the insurrectionary government promptly put in execution a scheme of conquest of the southwest Territories of the Union. Both New Mexico and Arizona were invaded, and the latter for some time held by the rebel military forces. Early in 1862 a relieving column of national troops from California reached the Territorial capital, where, June 8, 1862, its

commander, Colonel Carleton, issued a proclamation establishing martial law throughout the Territory.*

576. The summer of 1892 has furnished an unprecedented number of instances within the States of the military power being appealed to for that energy and sstrength which civil administration lacked. In several different and widely separated districts, riots or similar disturbances, accompanied by loss of life and destruction of valuable property, demonstrated how inadequate municipal authorities quickly may become to secure

*This was worded as follows: "In the present chaotic state in which Arizona is found to be, with no civil officers to administer the laws—indeed, with an utter absence of all civil authority—and with no security of life or property within its borders, it becomes the duty of the undersigned to represent the authority of the United States over the people of Arizona as well as over all those who compose or are connected with the column from California. Thus, by virtue of his office as military commander of the forces now here, and to meet the fact that wherever within our boundaries our colors fly there the sovereign power of our country must at once be acknowledged, and law and order at once prevail, the undersigned, as a military governor, assumes control of this territory until such time as the President of the United States shall otherwise direct. Thus also it is hereby declared that until civil officers shall be sent by the Government to organize the civil courts for the administration of justice, the Territory of Arizona is hereby placed under martial law. Trials for capital offences shall be held by a military commission, to be composed of not more than thirteen nor less than nine commissioned officers. The rules of evidence shall be those customary in practice under the common law. The trials shall be public and shall be trials of record, and the mode of procedure shall be strictly in accordance with that of courts-martial in the Army of the United States. Unless the public safety absolutely requires it, no execution shall follow conviction until the orders in the case by the President shall be known. Trials for minor offences shall be held under the same rules, except that for these a commission of not more than five nor less than three commissioned officers may sit, and a vote of the majority determine the issue. In these cases the orders of the officers ordering the commissions shall be final. All matters in relation to rights in property and lands which may be in dispute shall be determined for the time being by a military commission, to be composed of not more than five nor less than three commissioned officers. Of course appeals from the decisions of such commissions can be taken to the civil courts when once the latter have been established." (R. R. S., I., Vol. 9, p 561.)

the people the enjoyment of their just rights when a considerable portion of the community unite in setting the laws at defiance. And not only that, but how a very few individuals, encouraged in lawless deeds by secret societies who tender them sympathy and material aid, may render necessary the exertion to counteract their machinations, the exercise for a protracted period of the energies of government upon an extensive scale.

577. The contemplation of this condition of affairs must give rise to disagreeable sensations in the breasts of all citizens who either own property which may then be destroyed or who desire only to live in peace under the protection of the law—in other words, who ask only that government do its duty. The instances of disorder show unmistakably that there is abroad in the land a spirit of reckless defiance of authority which the experience of the world has demonstrated cannot be controlled without the application of overwhelming physical force, disciplined, armed, and directed systematically to that end. Furthermore, it seems that, in great exigencies, the military is the only force that can be so utilized successfully.

578. Not the least alarming feature of these riotous proceedings is the melancholy evidence they furnish of the general helplessness in their presence of the civil authorities. The *posse comitatus* has signally failed. It is an old and honored institution, sanctified in the Anglo-Saxon system of jurisprudence. But events are fast accumulating which furnish ground for the belief that it is not suited to the present conditions of society. Where was the *posse comitatus* when death and destruction stalked abroad in the Tennessee and Cœur d'Alêne regions, at the Homestead, Pennsylvania, mills, and the extensive railroad dépôts of Buffalo, New York? The confession is unwillingly forced from us not only that it could not be assembled in force sufficient to sustain the civil officers in the execution of the law, but that efforts to do this only brought the whole system into contempt by demonstrating to the lawbreakers its insufficiency as an energetic, forceful instrumentality of government. There exist, of course, reasons for this

change from former and honored practices. Private citizens in the disaffected community often will not brave the resentment of reckless and desperate men, who compose largely the disturbing element, by appearing in arms against them. When the efficiency of the *posse comitatus* was at its height, society, business interests, and government were far less complex than they are now. And while sometimes it may still be resorted to effectively, yet the time seems to have arrived when, to meet great emergencies of disorder, local or general, resort must be had to some other and more potent agency.[1]

Until it was put a stop to by act of June 18, 1878, it had been the practice of the Government to consider the United States Army as available as a portion of the *posse comitatus*. That act, based on political considerations alone, and which attempts to deprive the President of the most potent agent in the performance of his constitutional duty to see that the laws are faithfully executed, is of doubtful constitutionality, but it relieves the Army from possibly much disagreeable service. So unsatisfactory from the standpoint of efficiency did the control of civil officials prove that in time the habit grew up of requiring the civil officer to state boldly what he wished done to the officer in command, and the latter would take measures at discretion and according to his best judgment; in fact, it was demonstrated that this was the only effective way to employ the military. A development of this was the experience during 1894, when the Army was used to remove obstructions to the transportation of the mails and interstate commerce. In performing this duty the Army worked under its own officers exclusively, in its own way, and without deferring to any civil officers as having any other than advisory authority in the premises. It was during these events that the salutary and military Army regulation was promulgated, that the employment of the troops in the aid of the civil authority was a purely tactical question, to be met by tactical

1. See Sec. 384, Chap. XVII., *ante*.

methods, and that when shooting, unfortunately, became necessary, it would be to kill.[1]

579. If the *posse comitatus* fail, some other effective coercive power must take its place, or disorder grows apace and government fails of its purpose. That power is the military. If this fail, revolution results. The question then becomes interesting, Who is to control this new force, the military authorities alone, the civil alone, or both combined, and working to a common end? The question is not only interesting, but of importance as well, for experience everywhere has shown that this force of last resort acts effectively only when, whether theoretically so or not, it is practically independent of civil interference. It does not fit into the niche in the governmental structure that the *posse comitatus* was intended to fill, but has left vacant. It is wholly different from the latter in origin, organization, design, and method of employment. The opposite assertion, as Hallam points out, is a sophism. In suppressing the distubances to which reference here is made, the military, except in the Idaho instance, in contemplation of law, proceeded in coöperation with, if not in subordination to, the civil power. But did the latter really exercise control in one instance? If so, it is not known where or when. At most the civil authorities perforce contented themselves with indicating what they deemed desirable, and then the military proceeded to carry out the plan agreed upon. In this union of civil and military power the latter acted with preponderating influence, decision, and effect. At Homestead the situation fell little short of that at the Cœur d'Alêne mines, before mentioned. If martial law did not hold sway there theoretically, it certainly did as a practical fact; and from necessity the civil authorities temporarily were powerless. Moreover, the military performed this onerous duty well. If errors were committed, they were the inevitable attendants upon the unusual and trying situation in which the troops were placed. The manifest and gratifying result was the speedy re-establishment of order and the rule of law where before there reigned social anarchy which

1 A. R. 488, 1904.

aimed at nothing short of the destruction of all government save that of the mob. An efficient substitute for the apparently obsolete *posse comitatus* has been found.

580. In none of the instances here referred to was martial law formally declared over the theater of disturbance. Yet in all, if not equally, it was carried into effect. When civil officers, without the interposition of those instrumentalities which the law has provided for the purpose, are deposed and others set up in their places by the military arm; when civilians are arrested, and in some cases injured even unto death by the same dominant power, regardless of civil precepts, martial law prevails. Whether justifiable or not may become a matter of subsequent determination. It certainly was deemed so at the time, for in each instance civil officers asked for this power and assisted to give it direction, while all good citizens welcomed the military as conservators of peace, defenders of their homes, and vindicators of that law which alone renders life, liberty, and property secure.

581. The effect of this supremacy of military power—not self-sought, but forced upon the soldier either because the civil officers surrendered their authority, or through sympathy with the lawless element proved themselves unworthy to exercise it thus necessitating their removal—was that whenever the military thus were made predominant, the law of the camp extended to the degree that the successful application of the martial-law power rendered necessary. It is true that its exercise was actually brought home to comparatively few people, for the masses were well disposed, desiring only to live in peace and quiet. It was not a state of war, yet the conditions were far from those of peace. In every instance the recognized officers of the law either could or would not perform their appropriate functions, because violent physical force and measures deterred them.* While, therefore, it was not technically a state of war,

*NOTE.—In this connection the following extract from the charge of the chief-justice of Pennsylvania to the grand jury in the case of the Homestead rioters is interesting: "A mere mob, collected upon the impulse of

the status was not wholly unlike it. The situation brought with it new offences, aggravated the heinousness of others, and rendered necessary the adoption of measures, repressive and deterrent, which at other and more orderly times would not have been justifiable. Such measures are not to be judged by the standard of peace alone, but by that of the *quasi* state of war which gave rise to them. An act which in ordinary times would be harmless and pass unnoticed might now become so aggravated an offence as to render proper the most summary and effective punishment. The transgression may be such that if left unnoticed will lead to the most deplorable results. That is the case with mutiny in all services, and which is held to justify the infliction of the death penalty even during peace. The summary punishment of offenders under martial law proceeds upon the same principle. Otherwise, and if the slower process of the regularly constituted tribunals be resorted to, the moment for effective action may pass, the evil example have worked its baleful influence, and punishment as a deterrent measure be useless.

582. Necessity is the keynote. Obviously, measures which would be justifiable in a serious insurrection would be excessive under a less disturbed condition of affairs.[1] In the long run any amount of just severity becomes a mercy; the bringing a few promptly to answer for their offences may be the means of saving much property, many lives, and prevent the spread of the contagion of revolt. When military officers in the presence of mob rule, or other similar danger to the social order, are constrained to take summary measures, it may not be possible to justify their conduct under the strict rules of law. But no in-

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the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason, although it destroys property and attacks human life. But when a large number of men arm and organize themselves, and engage in a common purpose to defy the law, to resist its officers and deprive their fellow-citizens of the rights to which they are entitled under the Constitution and laws, it is a levying of war against the State and the offence is treason."

1. Lieutenant Young, Military *v.* Mobs (1888).

stance is on record where exemplary damages were recovered unless wanton disregard of human rights was evident on the part of the officer, and such cases have been very rare. Judges and juries on such occasions are not inclined, nor if inclined are they at liberty, to ignore the all-important fact that the officer has acted for the good of the whole community, even if thereby a techincal invasion of the rights of individuals has resulted. The danger may have been secret, not to be seen or heard, but felt, like the dissemination of the spirit of mutiny, or the virus of insurrection and revolt. Someone must take control and act promptly to prevent direst consequences perhaps, and no one can do this under martial law, whether formally proclaimed or not, except the military officer. No principle is better established in the rugged common-law system of jurisprudence than that occasions arise when the rights of individuals must temporarily give way to the public welfare. This is an occasion when the principle has application. If damages are recoverable at all against officers, owing to the particular circumstances of the case, they are only compensatory, not vindictive, unless it can be shown that the adjudged wrong complained of was wrought with an evil intention or from bad motives.

583. In England it has been laid down that no civil action will lie in the first instance against a commissioned officer for a discretionary exercise of military authority whilst in the performance of actual duty in the field. If the authority be discretionary, questions regarding its exercise are so essentially military that the civil tribunals decline to consider them without the previous judgment of a court-martial.[1]

1. Pendergrast, p. 138; Barwis *v.* Keppel, 2 Wilson, p. 314; Sutton *v* Johnson, 1, Term Reports, p. 548. See Chap. XXVII, *post;* full consideration of this subject.

CHAPTER XXV.

Administration of Martial Law.

584. Martial law existing either by proclamation or force of circumstances, an efficient system of administration must be maintained. Otherwise, instead of ameliorating the condition of society or being a weapon of defence against an enemy, it might prove to be the reverse. Hence the officer entrusted with its enforcement should make clear what authority his subordinates may exercise. All, whether soldiers or civilians, within the martial-law field, are subject to his orders. If it be a case of legislative martial law, the statute, in so far as it shows what the legislative will is, prescribes the rule of action. In other respects the rules by which it is to be carried into execution are found in military orders or the customs of service, meaning by "custom" the precedents established by determining what has been treated as justifiable in our own and other countries under similar circumstances. This makes the administration of martial law a delicate matter, because, first, the times give birth to many offences which ordinarily would not be noticed, or greatly aggravates those already known to the law; second, special tribunals may be necessary for both new offences or ordinary ones which must now be tried under unusual conditions; third, those who are instrumental in enforcing martial law may be held legally responsible for their acts.

585. "The effect of the declaration of martial law," says Finlason, "is to establish in the proclaimed district a state of war and a species of rule, altogether different from and opposite to that of the common law in every respect, whether as to (1) offences, (2) penalties, (3) manner of procedure, (4) power of arrest, (5) nature of proof, (6) mode of trial.[1] In the extreme case this is true. It was so in Ireland in 1798 and 1803, in

1. Commentaries on Martial Law, p. 58.

Jamaica in 1865, Arizona in 1862, East Tennessee in 1862-63 and other portions of the Confederacy at various times during the Civil War, and in portions of Missouri and Kentucky under Federal control from 1861 to 1865. This, however, is martial law in its severest form. In most instances the commander is not only willing, but anxious to avail himself to the utmost, consistent with military control, of the ordinary machinery of government. All civil ordinances and instrumentalities may, indeed, be ignored; they exist only at the will of the commander, but they remain in existence and continue in operation unless he decides to the contrary. Hence, not only in justice to all concerned, but for his own convenience, the military commander publicly should make known the principles upon which martial law is to be enforced. And this both as to matters civil and criminal.

586. Reverting to the fact that under martial law many offences unknown to ordinary times may spring up, while others become aggravated, it may be instanced that seditious publications tending to excite rebellion often on account of that tendency are peculiarly dangerous, for, although in times of peace they may do no great mischief, in times of insurrection they are most formidable and fatal offences.[1] At such times overt acts, which although taken alone and without reference to the actual circumstances of the military situation might not amount to any crime, may become injurious and criminal. "A citizen," says Whiting, "may commit acts to which he is accustomed in ordinary times, but which become grave offences in time of war, although not embraced in the civil penal code. Actions not constituting any offence against the municipal code of the country, having become highly injurious and embarrassing to military operations, may and must be prevented and punished. If an act which interferes with military operations is not contrary to the municipal, the greater is the reason for preventing it by martial law. And if it may not be punished or prevented

1. Wells, Jurisdiction of Courts, p. 578; Finlason, Martial Law, p. 104.

by civil or criminal law, this fact makes stronger the necessity for preventing evil consequences by arresting the offender."[1]

587 It is, as was remarked when treating of military government, a well-established rule that belligerents have the right to employ such force as may be necessary to obtain the object of the war. Beyond this the use of force is said to be unlawful. The same principle governs under martial law. In both cases the use of force is authorized to the extent that may be necessary. The commander determines what acts of persons within his jurisdiction are offences under the martial-law code. If he have the power of determining what constitutes an offence, he has the power to apply the preventive or corrective principle, whether it be trial and punishment or merely the summary arrest and detention of the offender. Arrest of the person is of little consequence if power to detain, in spite of civil writs, does not exist. Hence the importance of that clause of the Constitution of the United States authorizing in certain exigencies the suspension of the privilege of the writ of *habeas corpus*.[2] There is no doubt of the existence of the power. The language of the Constitution is clear upon that point. The great question is as to who is authorized to exercise the power.

588. Much attention was given this subject during the Civil War. As we have seen, the President of the United States early resorted to this measure, and continued to suspend the writ throughout the war, although after the proclamation of September 25, 1863, it was done under legislative authority. The polemic contest between those who sustained the President and those who maintained that Congress alone had power to suspend the privilege of the writ of *habeas corpus* was earnest, protracted, and characterized by an intensity of feeling showing that the disputants were fully aware that there was here involved a determination of one of the most important constitutional principles, and one affecting the most cherished of all rights, that of personal liberty.

1. War Powers, 10th edition, p. 190. 2. Art 1, Sec. 9, cl. 2.

589. It might appear that the President, by giving his sanction to the act of March 3, 1863, acquiesced in the view that the authority to suspend the privilege of the writ belonged to Congress alone. The conclusion, however, does not follow from the premises. The President was not inclined to engage in controversies with the friends of the Union upon nice shades of construction of the fundamental law. The times were not propitious for it. His mind was intently fixed upon a successful issue of the great struggle for the preservation of the Union. This in his view dwarfed every other consideration. The act referred to strengthened his hands for this mighty work. That fact was sufficient to insure its approval. But there exists not the slightest evidence that for one moment then or at any time he doubted his power, should the necessities of the war in his judgment justify the measure, to suspend the privilege of the writ of *habeas corpus*. In the nature of things it would seem that the Executive Department must have that power. It is the department which keeps watch and ward over the public safety. If not entrusted with power necessary to that end, it will either be usurped or government fail in its duty. Moreover, experience has shown that danger to the liberty of the citizen may flow from legislative as well as executive action. Consider the Parliament of Great Britain from 1642 to 1658; the National Assembly of France and its successors from 1789 to 1799; and the Congress of the United States in 1867. Not that either one of these legislative bodies did anything not justified by events; yet it will not be denied that their acts bore with terrible severity upon portions of the community; and their history brings ever to the minds of all a realizing sense of the important fact that the legislature equally with the executive may resort to extreme measures—deterrent, coercive, punitive.

590. Within the martial-law district all persons who act as enemies, and all who by word or deed give the authorities reasonable cause to believe that they intend to act as such, may lawfully be arrested and detained for the purposes of

preventing the consequences of their acts.[1] That was the law as laid down in Luther *v.* Borden.

591. The earliest amendments to the Constitution are in the nature of a bill of rights.[2] That unquestionably is what they were intended to be, and unlike the privilege of the writ of *habeas corpus*, there is no express provision in the Constitution for suspending, under any circumstances, the guarantees of life, liberty, and property therein contained. If, however, war intervenes, they remain available, only subordinate to military necessities. Otherwise war could not successfully be prosecuted. The existence of martial law may suspend these rights or continue them only so far as their existence is compatible with military exigencies. Here the military commander, in the first instance, must be the judge, and all within the limits of his authority must, for the time being, submit to his decisions.

592. In his argument before the Supreme Court of the United States, January 27, 1848,[3] Mr. Webster very clearly set forth the discretionary nature of the commander's martial-law authority in the following words: "I shall only draw attention to the subject of martial law, and in respect to that, instead of going back to martial law as it existed in England at the time the charter of Rhode Island was granted, I shall merely observe that martial law confers power of arrest, of summary trial, and prompt execution, and that when it has been proclaimed the land becomes a camp, and the law of the camp is the law of the land. Mr. Justice Story defines martial law to be the law of war, a resort to military authority in cases where the civil law is not sufficient; and it confers summary power, not to be used arbitrarily or for the gratification of personal feelings of hatred or revenge, but for the preservation of order and public peace. The officer clothed with it is to judge of the deg. ee of force that the necessity of the case may demand, and there is

1. Whiting, War Powers, p. 198. 2. Articles 1 to 8. See Sec. 384, Chap. XVII., *ante*. 3. Case of Luther *v.* Borden (for defendant); Webster's Works, Vol. 6, p. 240.

no limit to this except such as is to be found in the nature and character of the exigency." Had it been added that on the one hand, when used calmly, reasonably, and with the evident desire to compass the public weal, though great errors of judgment may have been made, much latitude is permitted the commander in the exercise of his authority; and on the other hand, if a determination to use power for personal ends or in an oppressive manner be manifest, he is liable to be held to account for his acts, both militarily and civilly, the picture is complete. The rule is that when martial law exists, either by proclamation or otherwise, the commanding officer must use his discretion, and he is reasonably expected to come as near to the line of justice and fair dealing as the circumstances and the information he has or might easily obtain will permit.

593. In all cases the commander must assume the responsibility of acting. He cannot delegate his power to another and so evade that responsibility. He will find justification, if that be legally questioned, in the exigency of the times, and his ability to prove that giving credence to information which he had a right to depend upon, his measures were proper. But the justifying facts must, if the case be brought to trial, be found by a jury either to have existed, or, if not, then that the officer, acting as one should in his station, was warranted in believing that they existed.

594. The remarks of the Supreme Court of Indiana in the case of McCormick *v.* Humphrey evince a just appreciation of the difficulties which sometimes embarrass commanders even within friendly territory.[1] At the same time the principles enunciated are very strong for the necessity that exists of sustaining officers in the exercise of martial-law power, even though the danger that besets them, instead of being open rebellion, is secret conspiracy. It was alleged that Humphrey, during the latter days of the Civil War, was an officer in a treasonable organization in Indiana, the object of which was to give the enemy aid and comfort. McCormick, a civil officer, arrested him.

1. 27 Indiana, p. 144 (1866).

The local court refused to transfer the case, under Section 5, act of March 3, 1863, to the United States Circuit Courtfor determination; on appeal to the State Supreme Court the decision of the lower court was reversed. In the opinion the Supreme Court remarked: "In October, 1864, the armies of the United States were in active service in the field. To sustain these armies the Government was drawing supplies, both of men and material, from this State. Its officers were active in procuring the enlistment of recruits for the military service. Without these supplies from the country in rear of the armies it was impossible to carry forward movements or to prosecute the war Prisoners of war were sent by the military officers in command of our forces in the field to military camps within the State, to be guarded and securely kept. Under these circumstances was it the duty of the President or of the officers in command of the military district under him to permit a hostile organization, as alleged in the petition, to be formed, armed, and freely organi ed, to act in the interests of the rebellion, and by force of arms to attempt the release of the prisoners of war and the destruction of the Government? Must the military commander wait for an actual attack upon the military camps? Must he depend upon the courts to guard the prisoners of war placed under his charge. Must he permit the supplies of men and provision to be cut off, and the country in rear of our armies to be occupied by hostile forces? Must he wait for the blow to fall, or may he seize the conspirators while they are collecting their forces and preparing to strike? These are grave questions; they may involve not only the liberty of the men who, while claiming to be peaceable citizens employed in civil pursuits, were, it is charged, in fact engaged in secretly organizing a hostile military movement for the destruction of their own Government; but the decision of these questions may also concern the future life of the nation."

595. This is all true. The necessity that exists for arbitrary arrests may not always be confined to times and places of open resistance to the execution of the laws. The arm of authority

may as effectually be stricken down by the hostile workings of professed friends as by the more manly defiance of open enemies. Indeed, the former may constitute the greater danger, because it operates under cover, lulling vigilance into fancied security until the deadly work is accomplished; while in the latter case government is at once put upon its guard

596. In the United States there has been a change of judicial opinion on this subject,[1] which marks the approach of the bench to firmer ground. Speculations of former days have given place to the rational, practical principles of the present, based on a century's experience of peace and war.

597. The difference discernible between the opinion of the Louisiana court in Johnson *v.* Duncan,[2] and of the Supreme Court of the United States in Luther *v.* Borden and *Ex parte* Milligan illustrates this. The first case mentioned arose out of the declaration of martial law at New Orleans in 1814. And the fact before remarked upon, that the commanding general and the civil courts came into direct conflict on that occasion, seems to have given to the remarks of the judges an unwonted vigor, and created in their minds a bias which cannot but impair the value, as correct expositions of the law, of the views they expressed.

"A motion that the court might proceed in this case," says the opinion, "has been resisted on two grounds: First, that the city [of New Orleans] and its environs were, by general orders of the officer commanding the military district, put, on the 15th of December last, under strict martial law. * * * * At the close of the argument on Monday we thought it our duty, lest the smallest delay should countenance the idea that this court entertain any doubt on the *first* ground, instantly to declare *viva voce* (although the practice is to deliver our opinions in writing), that the exercise of an authority vested by law in this court cannot be suspended by any man.

1. Hare, Constitutional Law, Vol. 2, p. 973. 2. Martin (La.), Vol 3, O. S., p. 530 *et seq.*

"In any other State but this, in the population of which are many individuals who, not being perfectly acquainted with their rights, may easily be imposed upon, it could not be expected that the judges of this court should, in complying with the constitutional injunction, in all cases to adduce the reasons on which their judgment is founded, take up much time to show that this court is bound utterly to disregard what is thus called martial law, if anything be meant thereby but the strict enforcing of the rules and articles for the government of the Army of the United States established by Congress, or any act of that body relating to military matters, on all individuals belonging to the Army or militia in the service of the United States. Yet we are told, by this proclamation of martial law, the officer who issued it has conferred on himself, over all his fellow-citizens within the space which he has described, a supreme and unlimited power, which, being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them. * * * * Under the Constitution and laws of the United States, the President has a right to call or to cause to be called into the service of the United States even the whole militia of any part of the Union in case of invasion. This power, exercised here by his delegate, has placed all the citizens here subject to military duty under military authority and military law. That is conceived to be the extent of martial law, beyond which all is usurpation of power."

598. In the light of the decisions of the Supreme Court of the United States in Luther *v.* Borden, *Ex parte* Milligan, and the numerous instances where the military during the Civil War assumed the responsibility of enforcing martial law, the President's proclamations to the same effect, as well as the experience of the States of the Union during the last half-century, this opinion of the Louisiana Court seems strangely wide of the mark, and indicates a surprising lack of appreciation of the nature of that law.[1]

1. See *ante*, Sec. 384, Chap. XVII.; *post*, Secs. 602, 603, 604.

599 Unquestionably the judges were honest in their expressed convictions. But they did not state the law. The cause of action they were passing upon arose when the city was under martial law and the enemy near at hand were menacing descent. Whatever diversity of views may exist regarding the legality of martial law on other occasions, repeated decisions of the Supreme Court of the United States have established beyond cavil that martial law is legal under such circumstances;[1] and being so, the functions of all civil tribunals were suspended temporarily except in so far as the military commander might require their assistance. If the Louisiana judges were right, then the act of the Rhode Island Legislature declaring martial law was void; the decision of the Supreme Court of the United States sustaining its action was judicial tyranny; and the deliberate judgment of the same court in *Ex parte* Milligan, that under just such circumstances as surrounded New Orleans in 1814–15 martial law was justifiable, was an act of judicial usurpation which ruthlessly trampled under foot the most sacred rights of the citizen; the proclamation of the President instituting martial law in Kentucky, and the various orders of military commanders establishing martial law in the same State, and in Missouri, Kansas, Arizona, New Mexico, and other places during the Civil War, were all mere nullities, conferring no rights upon the military authorities, and relieving them of no responsibility for any acts which affected civilians within the proclaimed district.

600. In this age and at this stage of governmental development it is scarcely necessary to remark that this is not the judicial interpretation of the law. The opinion of the Louisiana judges belongs to that class of legal theories which would hold the commander liable for destroying the house of a loyal citizen which protected and strengthened the enemy's line of battle, and which would compel him either to keep to the public roads in taking up his position on the field, or be adjudged a trespasser

1. 7 Howard, p. 1; 4 Wallace, p. 2; 110 U. S., p. 633; 18 Wallace, p. 510.

for treading down while so doing the growing corn by taking a more direct route. Well-meaning people, and jurists even, have held such views. But they find no lodgment in the minds of practical men. They are mere vagaries which, even in times past, seldom received and need never receive serious consideration from those who are entrusted with the powers and responsibilities of government.

601. Nor was the conduct of the Louisiana judiciary in 1815 regarding the enforcement of martial law consistent in itself. The bar and bench of the city had joined with the other best elements of the citizens in advising the measure. That was when danger was impending. Martial law was enforced; the enemy driven back in confusion; peace returned to bless the land; and now the judiciary, when all danger is passed, boldly comes forth the self-assertive champion of the citizens whose rights it is assumed have been jeopardized or disregarded through the necessary measures of that military power which they had invoked to save them from a rapacious enemy.

602. Two recent instances of the use of organized militia to preserve order and protect property when, after long suffering, it had been demonstrated that the civil officials either would not or could not do it, deserve especial notice. One occurred in Pennsylvania in 1902, the other in Colorado in 1903–04. In both cases the governor, acting upon information officially and accumulatively conveyed to him, called out the State military, in Pennsylvania from the start to act independently of the civil officials, and this became the rule in Colorado after it was shown that the militia could not act efficiently under the orders of the sheriff. In both cases the governor, in calling out the militia, acted in accordance with statutes.

In the Pennsylvania case a militiaman, a private soldier, stationed as a sentinel, shot and killed one who came upon that post. In so doing he carried out his orders. The soldier was arrested by a civil official, charged with the homicide, and the case came before the Supreme Court of the State on a writ of

habeas corpus, which the court granted, discharging the prisoner harmless.

The court remarked that the order of the governor sending the militia into the district created there a condition of qualified martial law, and referred approvingly to the views on martial law of the Chief-Justice of the United States in *Ex parte* Milligan. Qualified, because the military were there only to preserve the public peace and order, and not for the ascertainment and vindication of private rights, or other ordinary functions of government. For the latter purpose the courts and other agencies of the law were still available, and only needed the strong arm of the military to preserve that degree of order necessary to enable them to perform their functions. The condition established by calling out the military, within its necessary field of action, was martial law, with all its powers. "The Government," the court significantly remarked, "has and must have this power or perish; and it must be real power, sufficient and effective for its ends—the enforcement of law, the peace and security of the community as to life and property." In response to the proposition that either peace or war, with no intermediate state, must prevail, the court remarked that this was an error, and that the condition of the community under discussion was an illustration of that fact. It remarked that there may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operative for sane purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve

and operating only by its moral force, but now brought into active exercise. The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law; so far as his powers for the preservation of order and the security of life and property are concerned, there is no limit but the necessities and exigencies of the situation.[1]

This case cleared the atmosphere for the Colorado cases, which in all important respects were of the same nature.

The Governor of Colorado announced in some instances that a condition bordering on insurrection and rebellion existed, and in others that such insurrection and rebellion actually prevailed. Applying the principles of the law as enunciated by the Pennsylvania Supreme Court, the situation should have been, from a judicial standpoint, as easily disposed of as was that in Pennsylvania. This, however, did not prove to be the case, due to the indisposition of elective judges sometimes to thwart the wills of those whose franchises put them on the bench. The condition of affairs, so far as certain judges were concerned, was precisely that described by the Supreme Court of the United States as dooming in advance to failure efforts to maintain the laws through State agencies.[2] However, this was not the general tendency of the Colorado judiciary, which upheld as a rule the executive power, citing the precedent of the Pennsylvania case just commented upon. The Circuit Court of the United States refused to take jurisdiction of certain phases of the contention when appealed to, but its remarks unqualifiedly showed that its sympathies were with the governor, who with firmness and patriotism was establishing the rule of good order in what for a long time had been a lawless and terrorized district of the State. "There is now a governor," said the court, "who is disposed to enforce the laws of the State, and I can only say that the people of the State are to be congratulated upon the circumstance. We

1. Commonwealth *v.* Shortall, *Atlantic Reporter*, 55, p. 952 *et seq.*
2. 158 U. S. Reports, p. 565.

do not sit here to restrain him in the exercise of his authority." This also was a point made by the State judiciary—namely, that the governor was responsible for calling out the military; that the law had lodged with him the discretion of determining when the exigency that required this had arrived; and that the judiciary would not interfere in the exercise by another department of the government of a discretionary authority. The attitude of the judiciary in this matter was like that of the Supreme Court of the United States when certain of the so-called Reconstruction Acts came before it for decision. It likewise refused to interfere in the manner in which the Executive Department performed its duty.[1]

603. The experience in Idaho in 1899 was the same in all essential respects with that of Pennsylvania in 1902. The military were placed in the field after the governor had by proclamation declared, in the manner by statute made and provided, that a state of insurrection and rebellion existed and for several years last past had existed in a certain county, many officials of which were removed from office because of inability or indisposition to sustain the laws. In due course, as is apt to occur on such occasions, cases arising out of this condition of affairs came before the courts for decision. One was a *habeas corpus* case, the petitioner alleging summary arrest and detention without due authority. Petition was denied, and the prisoner remanded to military custody.

The Supreme Court of the State did not permit its attitude with reference to the great questions involved to remain in doubt. It was of opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded it, for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it if issued. It would be an absurdity to say that the action of the executive under such

1. 4 Wallace, p. 475; 6 Wallace, p. 50; 12 Wallace, p. 174; 13 Wallace, p. 646; 18 Magoon, pp. 234, 364.

circumstances may be negatived and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. The action of the governor in declaring Shoshone County in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force to a limited extent martial law in said county. Such action, it was declared, was not a violation of the Constitution, but in harmony with it, being necessary for the preservation of the Government.

These decisions of the Supreme Courts of Idaho and of Pennsylvania are entirely in unison with the decisions of the supreme Federal tribunal in strikingly analogous cases. The use of the regular Army in 1894 during the railroad strikes cut adrift from precedents in this: The governor declared that no such troops were necessary, though an unimpeded reign of terror paralyzed the civil administration and effectually obstructed the execution of certain Federal statutes of daily importance to the country; hence the President could not send the regular troops under the usual appeal of the State executive under Section 4, Article IV. of the Constitution; hence it was necessary for him to move the Federal military into the State without such apppeal and in spite of the governor's opposition. One Debs, the alleged leader of the strike and the main inciter of the lawlessness, was arrested for contempt of court, and his case went to the Supreme Court of the United States on a writ of *habeas corpus*, which was denied. The national Government, the court observed, had provided for interstate commerce and carrying the mails. These are great national purposes. The authority of the national Government was commensurate with the duty this imposed upon it. In the performance of that duty all the governmental agencies at command of the national Government, military or civil, could be utilized without express statutes authorizing it. If all the inhabitants of a State, or even a great body of them, should

combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. If this were known, the whole interests of the nation in these respects would be at the mercy of a portion of the inhabitants of that single State. There is no such impotency in the national Government.

As was the case in certain preceding decisions, this one greatly strengthened the hands of the Government in self-defence, sweeping to one side the idea that great national purposes, sanctioned and provided for by law, were to be thwarted and rendered non-effective with impunity through the machinations of a small but bold and lawless element of the community.[1]

604. The decisions of the Supreme Courts of the United States and of the States cited evince how the law has set its face against the proposition that government, whether Federal or State, will permit itself to be dethroned, the people it was created to protect in life and property to be deprived of these at the instigation of the malevolent members of society. Each court lays down the rule in no unmeasured terms that government is not to be chased from the earth because, forsooth, the written law cannot be found prescribing just what the executive power shall do to meet the special emergency; but, a duty to society having been imposed, the executive lawfully may make use of every instrumentality, including the military power, to secure the proper performance of that duty. Not only this, but, in case of the State Supreme Courts, the term "martial law" was used without tremor, and it was avowed firmly that such law was right and a legitimate governmental agency to be invoked by the executive whenever the civil administration failed in its duty to the lives, liberty, and property of the people. They declare that such power must exist, to be exercised when necessary, or government must perish, and

1. *In re* Siebold, 100 U. S. Reports, pp. 371–399, 404–422; *In re* Neagle, 135 U. S. Reports, pp. 63–5; *In re* Debs, 158 U. S. Reports, p. 565.

the executive judges of the exigency. The language of the United States Supreme Court decisions is to the same effect; the identical principles are involved in these, although the term "martial law" is not often found there. That term, however, has ceased to be pronounced with bated breath, because it is recognized by the law-abiding and law-enforcing community as one of the necessary safeguards of government.

CHAPTER XXVI.

MARTIAL-LAW TRIBUNALS.

605. As martial law brings unusual offences, it authorizes also tribunals suited to their adjudication. In his Principles of Constitutional Law, Judge Cooley remarks that offences against martial law and the laws of war, and all acts not justified by the latter which are calculated to impede or obstruct the operation of the military authorities, or to render abortive any attempt of the Government to enforce its authority, may be punished by military courts and commissions organized either by the President as commander-in-chief, or by the immediate military commander, or established under the authority of Congress. But these tribunals, he maintains, cannot try offences against the general laws when the courts of the land are in the performance of their regular functions and no impediment exists to a lawful prosecution there. An impediment does exist, however, when martial law is lawfully declared; and this creates an exception to the general rule obtaining in times of peace, that the military is in strict subordination to the civil power.[1]

606. It is not to be denied that the legality of martial-law tribunals has been brought in question. "How," it has been asked, "are they to be organized? What shall be the number of their members? What offences come within their jurisdiction? What is their code of procedure? How shall witnesses be compelled to attend? Is it perjury for a witness to swear falsely?" And it has been asserted that none of these questions can be answered, because they are not matter of positive enactment.[2]

To this it truthfully may be answered, that long-established custom has fully settled all these questions. They are based

1. P. 137. 2. *Ex parte* Milligan, 4 Wallace, p. 83.

on no more reason than similar questions would be regarding common-law courts, because the latter are not founded on positive provisions of the law. The same objections might be raised also against the whole system of international law, which is not founded on statute. Both common-law courts and martial-law tribunals have the same origin—custom approved by those who have the power to enforce their decrees. With as much reason can "the customs of war" be questioned as can the validity under proper conditions of military commissions. Indeed, these customs and commissions are the counterparts of one another. Yet the former are not based on the written law. They are, however, recognized by statute, every officer sitting on a court-martial swearing to observe the customs of war in the trial of the case in hearing; but, whether recognized by statute or not, they will continue to exist so long as military establishments are maintained.

607. The appellant in *In re* Neagle took the ground that as there was no statute authorizing in terms a United States marshal to accompany a justice of the Supreme Court on circuit to protect him from bodily harm, a marshal so employed who took the life of one who assailed the justice was not acting under a "law of the United States" within the purview of Section 753, Revised Statutes.[1] But the Supreme Court of the United States held otherwise, and reaffirmed the oft-repeated doctrine that a duty being imposed by the laws or the Constitution on the Executive Department, all the necessary powers followed as of course to render the performance of the duty possible and effective. While there is no express statute authorizing the appointment of a marshal or any other officer for the purpose indicated, the general obligation imposed upon the President to see that the laws are faithfully executed, and the means placed in his hands both by law and the Constitution to do this, impose upon him the duty of protecting judges from assault at all hazards when there is just reason to believe that they are in personal danger. No express statute for this

1. 135 U. S., pp. 63–5.

purpose is necessary. All requisite authority flows from the nature of the duty imposed.[1]

608. The court had come to the same conclusion in other cases.[2] This reasoning is as applicable when we seek to ascertain the authority for instituting summary military tribunals under martial law as in the cases decided by the court. And it throws around officers a protecting shield when in the discharge of their duties that must add greatly to their intrepidity and independence of spirit.

609. A great mass of traditions and recognized practices cluster around, attach to, and form a most important element of well-regulated armies, which are known as the customs of war. They are the martial legacy of centuries. Many of them go back in antiquity, as do those of the common law, to a period so remote "that the memory of man runneth not to the contrary."[3] This it is which gives the customs of war weight and authority as a code. It is true that some military customs once held in esteem in civilized armies are no longer observed, while new ones have slowly crept in. These changes have been the result of extending Christianity, of education, and advancement in the arts and sciences. Precisely similar changes, due to similar causes, have taken and are taking place in the common and in statute law. And as regards the term "military commission" to designate a martial-law tribunal, while the designation is of modern origin, the tribunal itself, with nature and powers essentially unchanged, has existed for centuries.

610. The general rule is that authority to appoint martial-law courts and approve their sentences rests only with the commanding general. It is not a power to be lightly dealt with. The exigency may be such as to cause the power to be trusted to inferiors, yet when it is reflected that these tribunals sometimes may have jurisdiction of causes involving life, the liberty of the citizen and his entire property, the gravity of the responsibility thus imposed becomes apparent—a responsibility

1. *Ante*, Chap. XXV., Sec. 604. 2. 11 Howard, pp. 552, 104 U. S., 444; 125 U. S., pp. 273–80. 3. 1 Blackstone, p. 76

which never should be placed in subordinate hands except upon occasions of extreme and pressing necessity. This was the rule generally adopted by both the Federal and Confederate services during the Civil War. It is in consonance not only with military practices, but principles of justice. It has commended itself to the approbation of the military profession, and is illustrated in the customs of the armies of all civilized nations when called upon to enforce martial law within the limits of their own territory.[1]

611. Martial-law tribunals legally cannot oust courts-martial of jurisdiction conferred by the Articles of War, nor can they assume concurrent jurisdiction in such cases. If martial law be the result of legislative enactment, the offences which properly can be brought before military courts may be set forth in and limited by the statute. But here again only the general purpose may be stated, and the details be left to be filled in by the military commander. If the authority, legislative or executive, which institutes martial law reserves causes for trial by the ordinary civil courts, the military would to this extent be debarred from assuming jurisdiction. There was scarcely one instance of the enforcement of martial law either North or South during the Civil War—and the instances were many—which did not illustrate these principles. As was said in a case then arising, "military commissions, as a rule, should be resorted to for cases which cannot be tried by courts-martial or by a proper civil tribunal. They are, in other words, tribunals of necessity, organized for the investigation and punishment of offences which would otherwise go unpunished."[2]

612. The jurisdiction exercised by these tribunals is determined by custom modified, possibly, either by statute or the orders of military superiors. In this respect they are on the same footing with civil courts. With respect to the latter it is a well-recognized principle that those originating in the common law have a jurisdiction which is regulated by the common law until some statute shall change their established principles;

1. 4 Wallace, p. 13. 2. R. R. S., I., Vol. 8, p. 822.

but civil courts which originate by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.[1] Nor is there perceived any ground upon which can be based a well-founded claim that the decisions of martial-law tribunals, proceeding within the sphere of their jurisdiction, are less determinate in character than are those of the ordinary courts-martial. Regarding the latter Lord Campbell has said: "The court-martial having had jurisdiction of the person and the case, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there be such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest under like circumstances."[2]

613. No reason is seen why the principles of responsibility attaching to those who sit on courts-martial should not apply to members of martial-law tribunals. The latter equally with courts-martial are of limited and special jurisdiction. Within the martial-law district these two classes of courts may sit side by side, each taking cognizance of appropriate subjects-matter of adjudication. The members of one class of these tribunals may under these circumstances even drop the official habiliments of one and take up those of the other with no formality except the reading an order from superior military authority. True it is that the court-martial is a tribunal of both peace and war, while the martial-law tribunal may be more nearly characterized as a war-code tribunal only. Yet as the latter determines causes within friendly territory alone, where, except for the disturbances which called forth martial law, the ordinary civil courts would have complete jurisdiction, it is not be ieved that its members successfully can claim immunity from responsibility upon any broader principle than can the members of a court-martial. There is this in favor of the members of the martial-law court: they act under great difficulties, dealing with

1. 4 Cranch, p. 93. 2. Lives of the Chief-Justices, Vol. 3, p. 91.

persons in a manner and with offences which in their nature may be unknown to ordinary times. They sit in judgment because of an imperious necessity; their conduct amidst such surroundings is entitled to be viewed with the greatest possible consideration; and experience has shown that where honesty and fair dealing evidently characterized their proceedings, even although jurisdiction may be matter of doubt, both judges and juries have been inclined to give due weight to every circumstance both in justification and extenuation of their actions.

614. Following the analogies of ordinary criminal courts, it has been held by some that martial law tribunals can take cognizance only of causes arising within the particular martial-law district where the tribunal sits. It is questionable if this is the true doctrine. In the first place, all such analogies are forced and unnatural. The civil is the court of peace; the martial-law tribunal that of great disturbance or war. The one is established by law, either statutory or common; its procedure is regulated by known rules; its jurisdiction has defined territorial limits; the causes it takes cognizance of are well known. The other, with rare exceptions, is called into being by a military order alone; its procedure is regulated by the customs which, though well understood in their general bearing, are of variable application; the causes it is to determine are to a great extent known only to the anomalous condition of martial law; why then should the rules of territorial limits as to jurisdiction be the same? Courts-martial are not so bound. They take cognizance of causes wherever they may have arisen, if the parties can be brought into the court's presence. Even if the offence happen in foreign lands, the transgressor, if subject to the Articles of War, may be brought to account for it here before a court-martial. This has occurred time and again on our Mexican border.

Under Section 1343, Revised Statutes, all persons who, in times of war or rebellion against the supreme authority of the United States, shall be found lurking as spies in or around the hosts or encampments of the armies or elsewhere are subject to

trial before a military commission. Let us suppose that there has arisen an extensive rebellion against Federal authority. After the experience of a century, this is not a violent supposition. As a result of this state of affairs it may happen that martial law exists at various places—not contiguous. A person is arrested in one district for having lurked as a spy about the military forces in another and perhaps far-distant district. The evidence against him is complete at the spot where arrested, and is to be furnished by the very soldiers who now have him in custody. Is it to be supposed that he will be emoved back to the vicinity o: his crime for trial, when that t ial can be so much more expeditiously conducted at the very place where he wa taken into :u tody? It is apprehended that this would hardly be done. If the py, when arraigned, interposed a plea to the jurisdiction, claiming a right to have his case determined at the vicinage where the alleged crime was perpetrated, would the plea be sustained because of any supposed analogy existing between the rules of p ocedure of martial law and of ordinary criminal courts? Yet unquestionably if it were attempted to render him amenable before the latter, his objection would be well taken. The plea, as a bar to trial by the military, would ha dly be sustained. There is no good reason why it should and many why it should not be. Promptness of action, with a determination to do substantial justice as nearly as circumstances will permit, is the rule of the military tribunal. The delay resulting from carrying both criminal and witnesses back to the very scene of the crime would wholly defeat the fundamental idea of promptness so essential on such occasions. It would be useless trouble, because, even if the criminal were thus removed, the military court would not be bound, either as to rules of procedure or evidence, a would a local criminal court proceeding in a case regularly before it. It might be impracticable thus to carry him back, as if the neighborhood of the crime were now held by the rebels. Is it to be supposed in such case that trial either is not to proceed at all, or is to be deferred until the district has been reduced into the

possession of the legitimate government? This, it is believed, would not be done. In truth, any attempt to shackle tribunals sitting under martial law by criminal-court rules and limitations as to jurisdiction would defeat the object for which they are instituted. The former essay to mete out substantial justice amidst great social disorder; the latter, in times of peace, dispenses an exact justice so nearly as human frailties render possible. The former are often compelled to proceed largely upon appearances; the latter seeks to interpose a protecting wall against the errors which appearances often give rise to by requiring consistent and conclusive proof of every essential element of the crime. The former are characterized by the nervous energy of executive, the latter by the calm deliberation of judicial action. Each is best adapted to the time, place, and circumstances which environ and call it into being. Both have proved essential to well-regulated, stable government; to omit either impairs the strength or the benignity of the system; to devolve upon one the duties rightly appertaining to the other leads to confusion in the exercise of authority and invites that very revolution which renders military tribunals necessary; while to impose upon either restrictions as to jurisdiction which peculiarly appertains to the other, regardless of the essential differences of their constitution and the purposes of their being, would fatally impair its efficiency.

These must be the principles by which the question of territorial jurisdiction of tribunals under martial law is to be tested. Otherwise, the very object for which they are instituted might totally be defeated. Would, for instance, he who had rendered himself amenable to trial in Norfolk, Virginia, while that city was under martial law, but had escaped to be afterwards apprehended in East Tennessee, also under martial law, have been permitted to plead to the jurisdiction of the commission sitting in judgment upon his case in the latter district—especially in view of the fact that not long after martial law was proclaimed at Norfolk, that city and the adjacent country was occupied and permanently held by the Union forces? Again, both the State

of Kentucky and large portions of the State of Missouri were under martial law during the same period of the Civil War, the result of vast territorial insurrection. Is it to be supposed that one who had fled from martial-law justice in Kentucky and was apprehended in the martial-law district of Missouri, where also those cognizant of the circumstances of his alleged offence had been transferred, would be sent to the former for trial by military commission? It is doubtful if the accused would think of interposing a plea to jurisdiction on territorial grounds, and it is not doubted that, if he did, it would promptly be overruled.

615. So as to the time when the offence was committed. If the commission have jurisdiction of the person and the offence, it may proceed, if the offence was committed within a martial law district, even if it was of a date anterior to the proclamation of martial law at the place of the trial. A different rule would give immunity to crime at the most critical periods. To be safe, the schemer against that military rule which it has been found necessary to establ sh over his district has only to remain concealed from view until the regu'ar government is re-established at that point. Martial law may indeed be existing elsewhere, under the same general author ty after such re-establishment; but if it were declared of a date subsequent to the offence, the culprit, if this rule were true, would go free. Apply such a principle of immunity to the cases before mentioned of martial law at Norfolk, in East Tennessee, Kentucky, and Missouri, and observe to what results it might lead. Martial rule would lose much of its efficacy. But if he who under such circumstances contemplates offending against the dignity and authority of the powers then in being, knows that he may elsewhere and at some future period be brought to a reckoning therefor before summary military tribunals, the fact might have a salutary and deterrent effect.

616. Military tribunals, under martial-law authority and in absence of statutory regulation, should observe, as nearly as may be consistently with their purpose, the rules of procedure

of courts-martial. This, however, is not obligatory. But the rule is based upon the consideration that both species of tribunals are in most respects of the same summary character; that the object in each is rather to arrive at substantial than at a nicely discriminating measure of justice; and that the procedure of courts-martial is well understood by those who with rare exceptions compose martial-law courts The customs of courts-martial are the teachings of ages. They have been transmitted from one generation of soldiers to another. While subject to modification, all such changes are watched with a jealous eye by military men. This is because these customs are well adapted to the purpose of securing material justice, being simple in character and in great degree devoid of the technicalities which characterize the proceedings of ordinary courts; and besides, experience has demonstrated that changes, unless carefully made, are more apt to embarrass than to facilitate and render certain the administration of justice through military tribunals.

617. In the exercise of the martial-law power a discretion in the choice of means is necessarily allowed. It is essential that the means be proper for carrying into execution the power conferred, and that no act be done and no authority exercised which is either prohibited by statute or unsanctioned by military customs. Should the conduct of those who compose martial-law tribunals become matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary. This is not a new principle. It accords with the practice of civil courts when dealing with questions which have been passed upon by the executive departments, in a particular manner, unchallenged for a considerable period.[1] Here the judiciary have often yielded to executive rulings when the question to be determined was the correctness of the practical construction of the

1. Cooley, General Principles of Constitutional Law, p. 139

law by the executive departments in the performance of their duties.

618. After the Jamaica rebellion of 1865 a royal commission was sent out from England to investigate and report upon all the facts in connection with the execution of martial law. The subject of the military courts which had been appointed under the martial-law power received exhaustive investigation. The commission was composed of eminent professional men—military and legal—well qualified to pass upon all questions involved. Referring to the martial-law courts, numerous of which had been convened, and which had in many instances adjudged the death penalty for crime, the commission remarked that in fact they were committees rather than courts; and while they proceeded in their deliberations upon principles of natural justice, yet they disposed in a summary manner of all cases brought before them, even those involving the punishment of death.

The "committees" here referred to are the "military commissions" of the United States and other nations. And while not bound by the Articles of War, from which, in the absence of statutory provisions, they derived no authority, yet they were duly constituted martial-law tribunals. Their members were sworn to the faithful performance of their duty; they heard evidence, deliberated thereon, and determined causes. Their origin was military; and in absence of instructions from the convening authority or statute, it was both natural and proper that in conducting their proceedings they should observe the rules of courts-martial practice.[1]

It took the British authorities a good deal longer to straighten out this matter than it did those of the United States, but at last they have done it. The United States long ago adopted the military commission as its war court; and, in its latest experience in instituting and enforcing martial law in South Africa, the British authorities adopted what was

1. Finlason, Martial Law, preface, pp. 16, 36, text, p. 49; Clode, Military and Martial Law, Chap. 11, Sec. 6.

styled the "military court" for trial of cases beyond the civil-court and court-martial jurisdiction.

619. In regard to martial-law tribunals the remark of Lord Loughborough, that "it would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace," finds peculiar emphasis.[1] So as to the penalty to be awarded. The situation renders it imperative that martial-law tribunals should be given great freedom of action. In the case of The King *v.* John Suddis the important point was decided that courts-martial sitting under the Mutiny Act and the Articles of War are not bound, in awarding sentences, to adhere to or observe the limits of punishment permissible for the same offences by ordinary criminal courts administering the laws of England.[2] Such also is the common practice in the United States; even the 97th Article of War, which authorizes confinement in the penitentiary, does not limit the punishment to what, in analogous cases, criminal courts might inflict. Every consideration which would lead to conceding such freedom of action to courts-martial under statutory authority, applies yet more strongly to military commissions under martial law. This must be so in the nature of things. The effect of the lawful declaration of that law is to suspend and exclude, so so far as the power inaugurating it may determine to be necessary, the ordinary laws of this land. It follows that the punishable offences need not be common, or statutory, law offences, still less that the penalties inflicted should be those only which, in ordinary times, are suited to these offences.[3]

620. In point of fact, it is only the graver instances of the institution of martial law that warrant a military commission being organized to try cases. It would have been so, for instance, in Kentucky and Missouri during the Civil War. These were occasions when large geographical districts were involved,

1. Grant *v.* Gould, 2 H. Blackstone, p. 69; *In re* Poe, Barnwall & Adolphus' Reports, Vol. 5. 2. East Reports, p. 306; Finlason, Martial Law, p. 104. 3. Finlason, Martial Law, p. 101.

the population extensive, and the condition of affairs a combination of insurrection and war regularly conducted, either in the immediate theatre or adjacent thereto; they were occasions, therefore, when martial-law power was demanded in amplest manner, including the instrumentality of military commissions. The same also would have been true when martial law was declared in Rhode Island.

Such, however, has not been the ordinary case when martial law has been given sway within the boundaries of the United States. These occasions have, as a rule, resulted from local commotions, confined directly to limited districts, extending no farther than the utter breakdown of the civil jurisdiction to meet the ends of government, either through terror inspired by law-breakers, or sympathy with the latter by officials who depend upon the lawless for their tenure in office. Under these circumstances of martial-law enforcement, the situation has not been held to warrant the invoking the military commission. The privilege of the writ of *habeas corpus* may be and sometimes is suspended; the military power, although it may be called out to assist, generally rises superior to the civil authority; still the bringing the evil-disposed before courts is generally postponed until the civil courts again properly can resume their functions.

In English experience the case is somewhat different. Under that Government the cases of instituting martial law are less numerous, and that instrumentality is reserved until the occasion is one so strikingly similar in its incidents to a state of war, growing out of rebellion, that the adoption of warlike methods of meeting the difficulty has fully been determined upon and are put into practice. Hence the military court always can be expected to form an incident in the execution of martial law under English jurisprudence.

621. It is a principle that the accused always must have a fair trial, taking into consideration the circumstances surrounding each case. Keeping this in view, military commissions may so vary their procedure as to adapt it to any situation, and may

extend their powers to any necessary degree, not only to punish offenders, but by the moral effect of their proceedings deter others from indulging in forbidden acts at these unpropitious moments when the bonds of government and society are already loosened. The military commander decides upon the character of the military tribunal which is suited to the occasion, unless, as rarely happens, this is settled by statute, and his decision is final.[1] Nor have well-affected loyal civilians anything to fear from this.

622. There could not exist a more erroneous apprehension than that military men are anxious to exercise martial-law powers over the civil community. There is connected with it neither glory nor even professional credit for them, and the duty involves many weighty responsibilities. With rare exceptions, arising out of the peculiar circumstances, military men seek to support the civil authorities rather than act alone and independently of them in civil affairs. It is true that many civilians think otherwise. They look with apprehension at the appearance of the military upon the scene as the signal for all law to be trampled under foot. Generally this will be found to be the effect of prejudice. If they will take counsel of the facts of modern history in free governments rather than of groundless fears, they will realize that military officers assume the responsibilities of martial law but reluctantly, after the civil authorities have signally failed to meet the ends of government, and it becomes necessary to have some powerful and sufficient substitute to maintain order in the distracted district.

623. Except in the presence of an enemy upon the theatre of warlike operations, or in the immediate vicinity thereof, the military do not take the first steps towards instituting martial law. That is done by the civil officers making an appeal for protection and assistance, or even the temporary assumption of all authority by the military. Not only do soldiers acknowledge on proper occasions the subordination of military to civil authorities as being a cherished principle of our governmental

1. Finlason, Martial Law, preface, p. 16.

polity, but they take pride in and are ever ready to maintain it.

The danger is not serious that those who thus have a just appreciation of the true relation of civil and military authority, and who with arms in their hands stand ready to uphold the supremacy of the former if necessary, will often be found seeking to overthrow established civil institutions, and rear upon the ruins for ever so brief a period the rule of military power. When, therefore, these officers, as members of military tribunals, have placed in their keeping, in the regular course of their duty under martial law the lives, liberty, and property of their fellow-citizens, it scarcely need be apprehended that they wantonly will abuse their temporary authority.

624. Regarding rules of evidence which should be observed in their proceedings, it may be remarked that martial-law tribunals are not to be bound either by common-law rules or those which ordinarily govern in courts-martial. Here, however, as in their procedure, the rules which are observed by courts-martial may well be taken as a guide. The reason why common law rules of evidence do not bind martial-law tribunals is not that they are not, under ordinary circumstances, well adapted to the development of truth. They are so adapted; the wisdom of generations has built them up, not only as a strong protection to the accused, but a means of eliciting truth. Yet the extreme nicety of the distinctions which characterize those rules, and which, as a protection to innocence, is their chief ornament, renders them inapplicable for courts proceeding by more summary methods.

625. As a general thing, military men are but imperfectly versed in the rules of evidence before criminal courts. Familiarity with these requires much study and practice. It is impossible for them to acquire more than a general knowledge of their fundamental principles. Otherwise it were necessary for officers to renounce their profession as soldiers and become lawyers. Sad indeed will be the day for any military service when such ideas predominate. While members of military tribunals engage in legal disputations the time for action passes

and discipline is sacrificed. Thenceforward in that country a permanent military establishment is a useless expense. It should be abolished, and the nation depend for both defence and offence upon the armed levies drawn out from among its citizens as the exigencies of war require. Fortunately, the view that officers are to be lawyers first and soldiers afterwards does not extensively prevail. The results which have followed occasional attempts to carry this perverse idea into practice have but the more strongly demonstrated its inherent viciousness and its demoralizing effect upon the military system. Military courts endeavor to strike in the most direct way at the merits of the case before them. Understanding these, they are then prepared to deal out that measure of justice which the case demands. And it is a fact which candid men admit that they quite as often succeed as their more learned coadjutors of the civil branch of the judiciary. A court-martial is not a pleasant tribunal for a guilty man to face, no matter how ably he may be defended; whereas, on the other hand, the innocent may with confidence rely upon its verdict, however ably the prosecution be conducted. If there have been exceptions, their conspicuousness but emphasizes the generality of the rule.

626. It being true that only the plainest, most easily understood, and generally applicable of the rules of evidence are followed by courts-martial sitting under the Articles of War, and then not as of binding force, but simply as directory of their proceedings for the sake of regularity and the dispatch of business, so much the more is it necessary that this principle be observed in the proceedings of martial-law tribunals.[1] The former act under a well-established code, either statutory or the common law of the Army, and have therefore a feature of permanency and stability which might be held as to them to render rules of evidence of more binding efficacy; the latter, being the tribunals of the great law of necessity, must in the nature of things adopt for their own guidance whatever rules

1. Finlason, Commentaries, Martial Law, p. 49.

will elicit with greatest facility and certainty the highest degree of truth that the extraordinary occasion will permit.

627. Such, likewise, are the views of military authorities in other services. Mr. Clode, after remarking that martial law will sometimes be established, thereby rendering some substitute for the regular courts of law a necessity, observes regarding the martial-law tribunal: "It should proceed upon charges based on the known criminal law, and upon sworn evidence given in the presence of the accused. What he has to say in his defence should be patiently heard, and a record complete, so far as circumstances will permit, should be made of all the proceedings. The analogy of the military code is to be followed, not as binding, but as directory, for the jurisdiction of the court is to be upheld, not by the authority of the Mutiny Act, but by the supreme power of the executive government to administer *justice* at all times."[1]

628. The rules of procedure and of evidence of martial-law tribunals may seem crude when judged by the common-law standard. But it must be remembered that these tribunals are convened only when ordinary methods have ceased to be applicable, and therefore that which in the normal condition of society would be irregular becomes regular and highly commendable. By eschewing wherever they find it expedient to do so common-law court processes, particularly in regard to matters of proof of alleged offences, martial-law tribunals are enabled to deal out promptly, effectively, and in a manner suited to the times in which they hold sway, a crude it may be yet an even-handed measure of justice well suited to the protection of the lives, liberty, and property of the citizens, and yet uphold and vindicate the power of the law.

629. Generally in the enforcement of martial law the military will content themselves simply with preserving order and defending their dignity and authority from atttack, delivering civilians who may be arrested over to civil officers for trial

1. Military and Martial Law, p. 169; and see Finlason, Martial Law, p. 359.

when the courts are reinstated. Still, as instanced in Ireland in 1798 and 1803, in Jamaica in 1865, and in our own country during the Civil War and the reconstruction periods immediately following, there may and do arise occasions when such tribunals justly may be invoked to supply the energy and certainty in the administration of penal affairs which have become necessary and which cannot be furnished by the ordinary judicial system.

CHAPTER XXVII.

RESPONSIBILITY OF COMMANDERS—MARTIAL LAW.

630. Coming now to the question of responsibility of officers whose duty it is to enforce martial law: First, the necessity for its enforcement, if questioned in a court of law, must be made out. This is a circumstance to be determined by the jury from all the facts in the case, under instructions as to the law from the court. In this work the necessity is assumed to have been established. The question then recurs as to the rule of responsibilty governing those who enforce the law.

631. It is necessary to remember that these officials are not mere intruders in the domain of authority; nor are the questions arising those between parties as private individuals. The rule in such cases is, that so long as the officer does not transcend the limits of his jurisdiction in the exercise of discretionary authority, he cannot be rendered liable unless it be shown that he maliciously abused the power confided to him.[1] Under these circumstances, if a military commander honestly exercises his judgment and has reasonable grounds for believing that the necessity exists for enforcing martial law, he cannot be held criminally liable for what is done under it in accordance with military usage. At the same time it is recognized as an unbending rule of law that the exercise of military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires.[3]

632. "While an officer acts within the limits of that discretion," said the United States Supreme Court, "the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposi-

1. 7 Howard, p. 130; 12 Howard, p. 404. 2. Finlason, Commentaries on Martial Law, p. 50. 3. 91 U. S. Reports, p. 712.

tion, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble the victim. When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion, because, then, acts of violence being first proved, the person using them must go forward next and show the moderation or justification of the blows used. The chief mistake below was looking to such cases as a guide, for the justification rests here on a rule of law entirely different though well settled, and is that the acts of a public officer on public matters within his jurisdiction, and where he has a discretion, are to be presumed legal until shown by others to be unjustifiable. This, too, is not on the principle merely that innocence and doing right are to be presumed till the contrary is shown; but that the officer, being entrusted with a discretion for public purposes, is not to be punished for the exercise of it unless it is first proved against him, either that he exercised the power confided without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression, or, in the words of Lord Mansfield, in Wall *v.* McNamara, that he exercised it as if the heart were wrong. In short, it is not enough to show that he committed an error in judgment, but it must have been a malicious and willful error."

633. This case arose from a naval officer, Wilkes, while on a distant, foreign station, having inflicted corporal punishment upon a sailor, Dinsman, who after their return to the United States instituted suit against the officer, resulting in a verdict for the plaintiff. This the Supreme Court reversed, holding that, for all that appeared on the record, Captain Wilkes had but done his duty. The opinion is replete with important principles affecting executive officers called upon to exercise their judgment in positions of responsibility.

It was observed in the opinion that Captain Wilkes' duties were imposed upon him as a public officer, and required him to

exercise a discretion in their execution. The position of the officer in such cases becomes *quasi* judicial and is not ministerial. It is well settled that all judicial officers, when acting on subjects within their jurisdiction, are exempt from civil prosecution for their acts.[1] It was especially proper not only that an officer situated like Captain Wilkes be invested with a wide discretion, but upheld in it when honestly exercising and not transcending it. When so situated, an officer's reasons for action one way or another are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts or juries or subordinates.

The case being returned and again coming up for decision, the Supreme Court remarked that the whole matter turned upon the motive which induced the officer to inflict the punishment. This question was one exclusively for the jury. If they believed, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interests of the service in which he was engaged, he was not liable in damages. If, on the other hand, they found that the punishment was in any manner or degree increased or aggravated by malice or vindictive feeling towards the plaintiff, Dinsman, or a disposition to oppress him, then he was entitled to recover.[2]

634. It is fortunate that there exists a judicial tribunal, the court of last resort, imbued with a just appreciation of the necessity for sustaining executive officers in the performance of their duties; a court of so elevated a station, with such a sweep of the legal horizon, that it can see not only statutes, but their intent as well, and with the courage to give them effect. No abler exposition of the principles which form at once the guide and protection of officers is anywhere to be found than in the opinions cited.

1. 11 Johnson (N. Y.), p. 113; Scott's Digest, p. 377 (d); 11 Johnson (N. Y.), p. 160. 2. 12 Howard, p. 404.

635. That such officers must be supported, so long as they remain within the limits of their authority, will appear upon even slight consideration. The legislature makes the laws; the judiciary, constitutionally, pass upon them; the executive enforces them. The latter it is which comes in direct contact with the people and upholds the prestige and power of government. Impair the efficacy of the Executive Department and to that extent the energies of government are paralyzed. Neither a legislature nor a judiciary is at every instant of time absolutely essential to government; in times of great peril they may for the time be swept away, but no government could exist for a moment without an executive. Hence the importance of having a clear understanding at all times of the rights, duties, and obligations of its officers.

636. There exists no difference in principle as to the rule of immunity for acts of military officers in the line of their duty, whether that immunity be set out affirmatively in statute or results from long-established custom—the common law of the Army.

637. The rules of official responsibility are applicable under martial law as elsewhere. The comander cannot evade a just liability for his acts, yet upon every legal and equitable principle he is entitled so long as he does not abuse his power, to every consideration due to the difficulties of his situation. Our safeguard against the misuse of power will not be found in denying that officers may act, thus depriving ourselves of the benefit of that power, but in holding them to a strict accountability.[1] After martial law has been proclaimed by the proper authority, officers engaged in the military service may lawfully arrest anyone whom they have reasonable grounds to believe is engaged in insurrection or rebellion, and may forcibly enter and search premises where it is reasonable to suppose that such offenders are secreted.[2]

1. Whiting, War Powers, p. 170; General Butler's argument, *Ex parte* Milligan. 2. 7 Howard, 46.

638. Early instances of military commanders of United States forces being held liable for an exercise of power over civilians, even in face of the enemy, are not wanting. But the judicial determinations in these cases must be considered as having been reversed in more recent times.

639. Among the instances growing out of the War of 1812, in which the power of officers to try civilians for alleged offences against the well-being of the service was judicially passed upon, two cases arising in northern New York are especially interesting. The first arose from the circumstance that one Shaw, a civilian, was arrested fifteen miles from Sackett's Harbor, an important military station on the Lakes, and which then was occupied by the American army operating against Canada. He was surrendered into the custody of Smith, the commander of the army there. The charges alleged against Shaw were: (1) exciting an insurrection against the authority of the United States; (2) violating his parole; (3) furnishing the enemy with necessaries; (4) being a spy. It did not appear that the conduct of the military commander was harsh or oppressive. But the New York Court of Appeals, before which the case finally came, emphasized the fact that it was the principle involved which rendered it important. If the military officer were justified in doing what he did, the court did not see but that every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power. Judgment, which in the trial below had gone against the military commander, was therefore affirmed.

Regarding this case it may be observed, however, that when Shaw was arrested and tried by court-martial, the 56th, 57th, 80th, 81st, and 82d of the Rules and Articles of War were in force.[1] Article 56 made punishable by death or otherwise, as a court-martial might direct, the offence of relieving the enemy by money and victuals, whoever the guilty party. Article 57 denounced the same penalty against whomsoever should be convicted of holding correspondence with the enemy or giving him

1. Act approved April 10, 1806, Chap. 20.

intelligence. The terms of the law, which remain unchanged to this day, are comprehensive; they except no one. It never can be permitted that exceptions should be made. The safety of the country will not admit of it. Yet these are the alleged offences that Shaw was court-martialed for. As to the alleged offence of being a spy, the court of appeals remarked that the court-martial had no jurisdiction of a civilian arrested as a spy; that he must be turned over to the civil courts. Is this true? If so, the commander is left powerless against those persons who approach his camp under the guise of friendship, and then for gold sell information thus acquired to the enemy. What was the object of using the term "whosoever" unless to give courts-martial cognizance of the offences specified, no matter who might be the offenders? The Continental Congress by resolution of October 8, 1777, denounced as traitors all persons who should be guilty of giving intelligence or aid to the enemy.[1] This, too, after a case involving the trial of a civilian by court-martial for holding correspondence with the enemy had been reported to and considered by that body. Nor was General Washington of opinion that civilians had any such immunity from court-martial jurisdiction, as is evidenced by the trial before a military tribunal of the alleged civilian confederate of General Arnold in his conspiracy.[2] "That these articles were similarly construed," says Winthrop, "after their re-enactment in 1806 appears from the military orders of the Army of West Lake Champlain in 1813, in which the two articles were published for the information and warning of the civil community as 'being equally binding on the citizen as the soldier.' "[3]

640. During the Civil War the view was adhered to that the Articles of War in question embraced civilians within their purview, and many courts-martial were convened to try offenders from that class; their proceedings were approved and no question of jurisdiction arose. Finally, the act of March 3, 1863,[4] denounced the death penalty against "all persons" found lurk-

1. 2 Journals, pp. 281, 459. 2. *Magazine American History*, 1877, p 540. 3. Vol. I., 2d ed., p. 139. 4. Chap. 75, Sec. 38 (Sec. 1343, R. S.).

ing as spies in or about the camps or posts of the Army in time of war, if convicted thereof before either a court-martial or military commission. It is difficult to perceive how the term "all persons" is of more general application in this connection than "whosoever." Evidently the statute in each case was intended to embrace transgressors of all descriptions who should thus violate the laws of war. And though the civil courts could take cognizance of the civil aspect of the case, it is of paramount importance that courts-martial may likewise pursue the military. It is necessary that spies, whoever they be, shall speedily be made examples of. This salutary end the summary processes of courts-martial and military commissions are peculiarly well suited to accomplish.

641. Of course, when a military commander assumes the responsibility of arresting and trying a civilian for being a spy, he should be certain that the case is clear. Otherwise he is liable to answer in damages. It is his duty to prevent spies from carrying intelligence of his movements, strength, and plans to the enemy. In the execution of this duty he has necessarily to use his discretion as to the means he will adopt. And it would be opposed to all principles of law, justice, or sound policy to hold that officers, called upon to exercise their deliberate judgment, are answerable for a mistake when their motives are pure and untainted with fraud or malice. Nevertheless, he is expected to act calmly, to examine into the facts of each case as much as circumstances will permit, and to show that he is possessed of that amount of good judgment and common sense which reasonably may be expected of one in his position.

642. The case of McConnell *v.* Hampton, the second of the cases just referred to, arose out of the circumstance that General Hampton, commanding the American forces at and in the vicinity of Burlington, Vermont, near the Canadian border, where war was being actively prosecuted, arrested McConnell as a spy, although he was a citizen. He was tried and acquitted. There were many circumstances apparently against

him; he had been seen in the company of British officers; he was known to be a smuggler of goods across the border; and when interrogated, he made untruthful statements about his suspicious actions to the commanding general. The next year, action for assault and battery being sued out against the general, the jury rendered a verdict for $9,000 in favor of the plaintiff. On appeal, a new trial was granted, because of excessive damages, the court remarking that in awarding damages the jury must have overlooked the critical and delicate situation of the defendant, as commander of an army upon the frontiers, as also the very suspicious light in which he must have viewed McConnell's conduct.

Looked at from whatsoever standpoint we will, this case does not present many features which the law-abiding citizen will contemplate with pleasure. If it were to be considered as establishing a precedent, the result would be that military commanders, even within sight of foreign hostile territory, and actively operating against the enemy, would prefer to give spies immunity rather than suffer the consequences of arresting and trying them. General Hampton was in command of an army which had been organized to invade Canada. He was, for this purpose, upon the frontiers of the United States, and it was of the first importance to prevent the enemy from receiving information regarding his army or its movements. To do this it was necessary that he arrest those whose actions or words gave reasonable grounds for belief that they were in correspondence with the enemy. The law then on the statute-books denounced the death penalty against any person whomsoever convicted by a court-martial of this treasonable offence. General Hampton proceeded, therefore, strictly within the line of his duty when he arrested and tried McConnell under the suspicious circumstances surrounding him. Hence it was a case coming peculiarly within the rule before mentioned, as laid down by the Supreme Court of the United States, that a commander, acting as a public officer, invested with certain discretionary powers, cannot be made answerable for any

injury, if he does not exceed the scope of his authority and is not influenced by malice, corruption, or cruelty. 1

643. Had the general declared martial law in his camp and the immediate vicinity, he would have been justified. 2 He was in command in the face of the enemy, whose territory and military forces were but a few miles distant. The United States Goverment had entrusted to him the task of defeating the enemy in that quarter and maintaining there the prestige and success of the American arms. No more onerous task could be imposed upon a public officer. Whatever reasonable and usual means were necessary he had a right to utilize for the accomplishment of his purpose. Assuredly it was necessary that he prevent spies from plying their nefarious practices. Had he failed in this, he would have been without excuse if disaster resulted. He could not wait, perhaps for positive proofs of guilt, such as would be necessary in a court of law to convict of treason; but he had to act upon reasonable cause of suspicion that McConnell was a spy, and in this the attending circumstances justified him. It is well known that military commanders in such situations, while they must avoid the charge of acting oppressively, yet they are required to act promptly and upon evidence which to them at the time seems sufficient, though afterwards it may transpire, that appearances had deceived them. If it were otherwise—if it were necessary that the commander pause in the midst of important operations and carefully examine the evidence upon which spies and others traitorously are plotting with the enemy, in order that he, the commander, may subsequently vindicate his conduct in arresting them before a civil court sitting long after the event, when the pressing necessities of the circumstances which impelled the commander to act have disappeared, the hour for action would pass unimproved, the enemy accomplish his purpose through the very information which these spies had given him. Had the arrest not been made, the courts might have

1. 7 Howard, p. 89. 2. 4 Wallace, p. 2.

been driven out by that very enemy whose machinations the arrests frustrated.

644. Civil courts should not judge too harshly of the measures taken by military commanders under such circumstances. They should remember that to these measures being taken they may owe it that now they are able to sit undisturbed. Such considerations should prevent their being swayed by ignorant and popular prejudice. To the credit of the judiciary be it said that they are not as a rule unmindful of these weighty considerations, particularly in the higher branches.

645. The case of McConnell *v.* Hampton was considered by some at the time as a striking illustration of the independence of American judges and juries in the maintenance of the sacred principle of personal liberty against encroachment, no matter how high the official and social position of him who would assail it. Regarded, however, in the light of history, when the passions of the moment have subsided, it will be more apt to impress posterity as presenting the spectacle of a public officer who acted to the best of his judgment in a great emergency being prosecuted therefor, not from considerations affecting the public weal or in order that the just rights of the citizens thereby might be maintained against the attacks of tyranny, but that the forms of law might be used as a screen to further the ends of private vengeance, whetted by the mercenary hope of recovering heavy damages which the reputed wealth of the distinguished defendant was believed to render possible. The fact that General Hampton was a large property-owner was dilated upon before the court. Every device was made use of to prejudice the jury. And, as remarked by Lord Campbell regarding the condemnation of Governor Wall, the prosecution of General Hampton appears not to have been a striking display of the impartiality of the bench, but rather as "an instance of the triumph of vulgar prejudice over humanity and justice."[1] "Commanders in the field are under no obligations to take the opinions of judges," says Mr. Whiting, "as to the character

1. Lives of the Chief-Justices of England, Lord Ellenborough, p. 18

and extent of their military operations, nor as to the question who are and who are not public enemies, nor who have and who have not given reasonable causes to believe that acts of hostility are intended. These questions are by the paramount laws of war to be settled by the officer in command."[1]

646. Upon this subject Mr. Pomeroy, in his Constitutional Law, remarks: "Whenever a civilian, citizen or alien, is engaged in practices which directly interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result; and when, therefore, these practices are something more than mere seditious or traitorous designs or attempts against the existing civil government, the President, as commander-in-chief, may treat this person as an enemy and cause him to be arrested, tried, and punished in a military manner, although the civil courts are open, and although his offence may be sedition or treason, or perhaps may not be recognized as a crime by the civil code."[2]

647. Thus far it has been assumed that officers, in exercising military authority under martial law, keep within the limits of their jurisdiction, if not as defined by statute, yet as recognized by custom. So long as this is done they deserve, as they generally will receive, not only the support of their superiors, but of the civil community and authorities.

648. The question as to what is within an officer's jurisdiction under martial law may not be well settled. It is seldom that statutes confer such authority. The Supreme Court decided that a state of war existed in Rhode Island when martial law was declared there, hence those entrusted with its execution were warranted in enforcing the laws of war. When Congress, through the Reconstruction Acts, established martial law over certain States, only the more general powers of the military commanders were defined. The latter went for the great mass of rules by which they were to be governed to the maxims, traditions, and customs of the military service. In a

1. War Powers, 10th edition, p. 173. 2. Sec. 714.

case of martial law without legislative sanction, but which results from circumstances, it will be for officers who enforce it to lay down the rules by which the people are to be governed; and, if this be not done, it only remain to apply to the civil the ordinary rules for governing the military community.

649. "One should always bear in mind," says Dicey, "that question, whether the force employed [under martial law] was necessary or excessive will, especially when death has ensued, be ultimately determined by a judge and jury, sitting in quiet and safety after the suppression of a riot, and their judgment may differ considerably from that formed by a general or magistrate, who is surrounded by armed rioters and knows that any moment a riot may become a formidable rebellion, and the rebellion, if unchecked, become a successful revolution."[1] This is necessary as a restraint upon unwarranted use of temporary authority. But in passing upon the acts of executive officers under these circumstances, every consideration must be given to the fact that they were compelled, upon trying occasions, when they had little time for reflection, and events of gravest importance hung upon their promptly taking decisive action. If they acted honestly, with an eye single to the best interests of the service and government, it never can be made a basis of a claim for vindictive damages that they committed an error of judgment.[2]

650. It is not meant by this that United States officers must, of necessity, defend themselves before the State courts. Congress has provided for this case. Section 753, Revised Statutes, reads as follows: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless when he is in custody under or by color of the authority of the United States; or is committed for trial before some court thereof; or is in custody for an act done or committed in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or

1. Law of the Constitution, p. 268. 2. 3 Bissell, 13; 1 Abbott, pp. 212–45.

treaty of the United States." Appeal lies finally in such cases to the Supreme Court of the United States.

It cannot be doubted that the intention and effect of this law is to withdraw the Federal question, on which a petitioner under the act claims justification and exemption, away from the State courts for full and final determination by the Federal judge, and to discharge the petitioner from State custody when he establishes by proof to the satisfaction of the Federal judge that he is entitled to his discharge. In this case the necessary theory of the law is that he is to be deemed innocent; that he has committed no crime; that he has only done what the supreme law of the land has required him to do. If, however, he fail to make out his alleged justification under Federal authority, then he is remanded for trial on the charge made in the State Court.[1]

651. It has been judicially decided, as before remarked, that the phrase "a law of the United States," in Section 753, R. S., does not necessarily mean a statute law. It means unwritten law as well. This construction is important in connection with the exercise of martial-law authority. Commenting upon the language of the Constitution, that the President "shall take care that the laws be faithfully executed," the Supreme Court says: "Is this duty limited to the enforcement of acts of Con-

1. 135 U.S., pp. 40–76; *In re* Neagle.

NOTE.—The case in *In re* Neagle was this: A justice of the Supreme Court had punished certain parties—man and wife—for contempt committed in presence of the court. They were known desperate characters, and vowed vengeance upon the justice. The attorney of the United States, in view of the premises, took measures to protect the justice when next time he went on duty in that circuit. Neagle was appointed a deputy marshal and put upon the service of defending the justice if attacked. The assault being made, as was anticipated, Neagle slew the assailant. Being arrested by the California State authorities on the charge of murder, Neagle petitioned the United States Circuit Court, under Section 753, R. S., for a writ of *habeas corpus* and a hearing before the latter court. The court granted the petition and discharged the accused. The State appealed, and the judgment of the Circuit Court was affirmed by the Supreme Court of the United States.

gress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, or international relations, and all the protection implied by the nature of the Government under the Constitution?" The argument of the court, upon which it based its opinon, was that the latter view was the correct one, and consequently that the phrase "law of the United States" in the statute embraced acts taken in pursuance of the injunction to "see that the laws were faithfully executed," if they were necessary and proper to that end, even although they were not prescribed in the letter of the law equally as though they were enjoined and fully set out in the statute-book.[1] The ground was taken in no unmistakable manner that a written law was not necessarily meant by the statute (Section 753), but that any obligation, fairly and properly inferable from the Constitution, or any duty of an executive officer to be derived from the general scope of his duties under the laws of the United States, is "a law" within the phrase "a law of the United States," contained in that section.[2]

652. Not only are United States officers protected by the Federal power when they are arrested for crimes, provided there is a question involved arising under the interpretation here given to "laws or Constitution of the United States," but in civil suits they may likewise have the benefit of trial before Federal tribunals. This was not true down to March 2, 1833. Prior to that time all persons, in either the civil or military service of the United States, were left to the jurisdiction of State tribunals for alleged violation of local laws, and the only source of relief was through writ of error from the Supreme Court of the United States for the correction of any mistake that might have been made in point of law. By act, March 2, 1833 (4 Statutes at Large, 632, Chap. 57), came the first relief; and, in certain cases, revenue officers, proceeded against in State courts, were entitled to have their causes transferred through writ of *habeas corpus* for determination before the

1. 135 U. S., pp. 40-76. 2. *Ibid.*, p. 79; Lamar, J., and Fuller, C. J., dissenting views.

Federal tribunals. This was followed by Section 5, act March 3, 1863, which provided that any suit or prosecution instituted in a State court for an act done by virtue of an order of the President, or under color of his authority, or that of an act of Congress, might be removed to the Circuit Court of the United States of the district, and that thereupon the jurisdiction of the State court should cease. This act by its terms applied only to causes arising during the then existing rebellion. Its terms were afterwards modified, but not to the prejudice of the Federal officers (act May 11, 1866). Finally, we have the act of March 3, 1875 (25 Statutes at Large, 433), which interposes an obstacle to the prosecution of Federal officers in the State courts in all controversies arising under the Constitution and laws of the United States by providing for the transfer of causes to the circuit court embracing the district where suit is brought. The whole tenor of the act shows conclusively that it was intended, at the option of the defendant, to avoid the effect of local prejudice that might unconsciously affect a State court by giving a Federal officer, there pursued, the right to be heard in a Federal forum.[1]

653. It may be easy, the hour of danger and threatened anarchy having passed, quietly to sit down under the protection of vindicated law and point out alleged errors which military authorities may have fallen into in those trying times. But it must not be forgotten that calmness and quietude do not, as a rule, attend the enforcement of martial law, or if so, it is because the military power is being put forth to crush out concealed conspiracy, which, while not disturbing the surface of affairs, yet is more dangerous, perhaps, to the community and to good government than open insurrection. At such times the military authorities must act with promptness, or they will be too late for any useful purpose, either repressive or deterrent. They must act with firmness, moderation suited to the occasion, and that degree of discretion which reasonably may be expected of public officers in their stations; but they must not hesitate

1. Hare, Constitutional Law, Vol. 2, pp. 1082–84; see *ante*, Sec. 162.

to act with precision and dispatch when the hour of action arrives, or all is lost.

654. The military authorities proceed to the extremities of martial law to preserve society and government from some great danger, either present or immediately impending. They may, indeed, sit supinely and let disorder and treason run their course. They may plead in extenuation of this that they are not called upon to interpose the military arm in the regulation of civil affairs. In such an emergency the civil power is left to struggle with disturbing elements beyond their ability successfully to manage. As a result, society is distracted, the orderly conduct of affairs impeded, and the people deprived, for the time being, of protection to person and property. By adopting this course the military would run no risk of prosecutions for assumption of authority. But would it be the patriotic course? Would it be that which the law-abiding portion of the community would have them adopt? If not; if those who are interested in maintaining and perpetuating good civil government prefer to have the military interfere in those great emergencies which sometimes arise, and with which the ordinary civil authorities cannot contend, they must see to it when the soldiers—not from love of power, but from public-spirited motives or a sense of duty—do interpose, that they are not afterwards unreasonably pursued by civil actions because the measures they then adopted might not in all instances be susceptible of a strictly technical defence under the rules of the civil judicature. This may be considered certain: If this course be pursued towards them in one instance, their military successors will be very cautious how they incur similar liabilities.

655. Ultimately the responsibility must rest upon those entrusted with the civil administration to determine upon such occasions whether it be better to permit accumulating dangers to run their course, at whatever sacrifice of law, order, life, and property, until license has spent itself and civil government can again properly perform its functions, or to make way for the military more speedily to restore the civil power, even if this

costs the temporary forefeiture of a portion of the rights, privileges, and immunities of the citizens involved. This is the case of ordinary rebellion, insurrection, or disturbances which set at defiance the powers of government over districts more or less extensive. When open war exists, and the commander within his own territory is operating in face of the enemy, his liberty of action is greater. It is then for him to decide what measures, restrictive or suppressive of civil authority, the success of his military movements may render necessary. Not that he may even then wanton with power at the expense of his fellow-citizens. Far from it. But, having exercised his acknowledged right of self-determination as to what is necessary for military success under the circumstances, even though this include martial law in his immediate vicinity, he is to the fullest entitled to every consideration which springs out of a charitable construction of his acts when viewed in the light of the dangers surrounding and responsibilities devolving upon him at the time.

656. In Commonwealth *v.* Shortall[1] the Supreme Court of Pennsylvania remarked: "While the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overwhelming duty is to repress disorder, whatever the cost, and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to—the liability to subsequent investigation in the courts of the land after the restoration of order."

1. *Atlantic Reporter*, 55, p. 956.

CHAPTER XXVIII.

Responsibility of Subordinates.

657. It may become an important question for subordinates how far the orders of military superiors justify them before the civil law in the exercise of martial-law powers. "Inferiors are required to obey strictly and to execute promptly the lawful orders of the superiors appointed over them."[1] They are not required to obey unlawful orders. Yet the subordinate who assumes to determine what is lawful does so under grave responsibility. The presumption of law is against him. He must remove it or stand without justification. And this in the military profession means much to his disadvantage. Not that the penalty which may attach to trial and conviction by a court-martial may be so great, although the blot thus cast on one's record is to be shunned; but, let it once be understood that a soldier hesitates to obey orders and his usefulness receives a fatal stroke. His superiors no longer implicitly trust him, and no greater misfortune can befall a soldier, be he high or low, than to lose the confidence of his superior officers. It cannot be too firmly impressed on the mind of the military man that the first and last duty of the soldier is cheerful obedience. It is not for him to hesitate except to determine how his orders can most faithfully be executed, not only in letter, but in spirit. This cheerful obedience to the powers that be is the foundation of discipline, which itself is the soul of the military system—not discipline inspired by terror, but based upon affection for and pride in the profession and a willingness, even anxiety, to do whatever will enhance its credit and honor. So simple does the matter of obedience to orders appear that its importance is often overlooked by soldiers themselves. Experience, however, makes plain the simple truth that no more

1. Paragraph 1, Regulations, Army U. S.

vital principle inheres to the military code, and that it well deserves the prominence given it as the leading article of the Regulations of the Army.

658. Yet the Regulations enjoin obedience to lawful orders only, leaving the inference that if unlawful they are of no binding force. The interesting question at once arises, Who is to judge upon this point? The law, strictly interpreted, places this responsibility upon the subordinate. In Commonwealth *v.* Blodgett *et al.*, the distinguished Chief-Justice of Massachusetts adverted to the subject of military responsibility in the following terms: "It has been argued, upon the ground of the evident hardships of the case, that men ought not to be held responsible for acts done in obedience to orders which they are compelled to obey under severe military discipline. But this is not the true principle, and it would be dangerous in the extreme to carry it out into its consequences. The more general and the sounder rule is, that he who does acts injurious to the rights of others can excuse himself, as against the party injured, by pleading the *lawful* commands of a superior whom he is bound to obey. A man may be often so placed in civil life, and more especially in military life, as to be obliged to execute unlawful commands on pain of severe legal consequences. As against the party giving such command he will be justified; *in foro conscientiæ* he may be excusable; but toward the party injured the act is done at his own peril, and he must stand responsible.[1]

659. The rule may sometimes appear to be unjust, but it is based on public policy and flows from the consideration that society should be protected from the evil-doer, who may not be permitted to evade the consequences of his unlawful acts by pleading the orders of anyone, for no one has a right either to set the laws at defiance or authorize another to do so. Still, as regards members of the military profession, the workings of the rule are liable to be so harsh that judges are moved sometimes not only to temper justice with great mercy, but, so far as

1. 10 Metcalf (Mass.), p. 56 *et seq.*

practicable, to transfer the responsibility to the officer who issued the illegal order. The subordinate is certainly in a most trying position when called upon to obey an order which he deems to be illegal. If he disobey and his judgment be at fault, he is without recourse; he must answer to his commander for disobedience and to the law for any resulting evil consequences within its cognizance. If, on the other hand, he obey, yielding his judgment of the law to the soldierly instinct of obedience, and that judgment prove to have been correct, he stands without any defence which the law, strictly construed, can admit as a justification. And even though he disobey and his view of the law prove to be correct here, while the law vindicates him, still, unless it be a most flagrant case of illegal orders, such as seldom arises, he may find that his legal triumph has impaired his reputation as a willing, obedient soldier.

660. No wonder that courts, when they pass judgment in such cases, yield a willing ear to the promptings of humanity, and place, so far as possible, responsibility for violations of the law upon superiors who initiate them, rather than upon subordinates whose actions, in carrying into execution the orders of those whom the law has placed over them, are wholly involuntary. "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal," said the court in McCall *v.* McDowell, "I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third parties for obedience to an order, and to the loss of his commission and disgrace for disobedience thereto."[1]

661. The court further remarked in this case that it was not necessary to the ends of justice that the subordinate or soldier should be responsible for the illegal order of a superior; that in any case the party injured can have but one satisfaction, which might and should be obtained from the really responsible

1. Deady, J., 1 Abbott, pp. 212–229.

party—the officer who gave the illegal order. In civil life the rule is well settled otherwise, but the circumstances of the two cases are entirely different. In civil life the two parties are equal in the eye of the law; the subordinate, unlike the soldier, does not act upon compulsion, but is a free agent and at liberty to exercise his judgment in the premises.

662. As a result of the law as thus expounded, Captain Douglass, a co-defendant who kept plaintiff, a citizen, in prison under an illegal order of McDowell, the superior, was declared not liable in damages, and given his costs and expenses in the suit. McDowell was held responsible; but the rule was laid down that although plaintiff was entitled to some damages, they were to be compensatory only, and not vindictive or exemplary, unless it could be shown that the illegal order was issued with evil intention or from bad motive.[1]

663. This opinion of a learned and experienced judge deserves careful consideration. The principle upon which it proceeds conserves at once the public interests by maintaining discipline in the Army and the private rights of the citizen by holding to a just responsibility those who invade them. The case is this: On hearing, at San Francisco, California, of the assassination of President Lincoln, one McCall, it was alleged, publicly gave expression to feelings of rejoicing, and was arrested therefor under an order published by General McDowell, commanding that military department. The district was not under martial law. Having been confined in Fort Alcatraz upon arrest, where Captain Douglass commanded, McCall, upon release, brought suit against both these military officers for his illegal arrest and imprisonment. The court, in disposing of the case, ruled: (1) That the order was illegal; (2) that plaintiff was entitled to recover; (3) that the order sprang not from improper, but good motives, involving the public peace and safety; (4) that consequently only compensatory damages were recoverable; (5) that for ill-treat-

1. See also to same effect as to damages, Milligan *v.* Hovey, 3 Bissell, p. 13.

ment at Alcatraz, unless it could be traced directly to Douglass, McDowell was responsible; (6) that Douglass, acting under orders, was not liable for the arrest and imprisonment.

664. Like other principles of the law, the rule of responsibility applicable to military subordinates who tread the thorny path of obedience to the illegal orders of their superiors, has received the impress of an advancing and refining civilization. The older rule of the English law made no distinction between the civil obligations of soldiers and other citizens at any time.[1] Nor can the rule even now be said to be otherwise firmly established, although the reasoning and conclusions of the court in the case just referred to indicate a change towards more liberal judicial rulings.

665. The reasoning of the Supreme Court of the United States in Martin *v.* Mott, and the conclusions as to the duty of obedience drawn therefrom, were much to the same effect.[2] This was a case where a drafted militiaman had refused to be mustered into the service of the United States, because, as he alleged, the President had made the order in a case of contemplated by the law under which he professed to act. The court held that the President had a right to determine when the militia should be called out, and this decision was conclusive upon all other persons. The service required was military, the command of a military nature. In such cases every delay and every obstacle to an efficient and immediate compliance necessarily tended to jeopardize the public interests. "While subordinate officers and soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services," it remarked, "the hostile enterprise may be accomplished without the means of resistance. If a superior officer has a right to contest the orders of the President upon his own doubt of the exigency having arisen, it must be equally the right of every inferior officer and

1. Lord Campbell's Lives of the Chief-Justices, Vol. 3, p. 91. 2. 12 Wheaton, p. 19.

soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to re-establish the facts by competent proof. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict legal proof, or the disclosure of the evidence might reveal important events of State, which the public interests, and even safety, might imperiously demand to be kept in concealment."

666. A subordinate stands in a different position from the superior when he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, Had accused reasonable cause for believing in the necessity of the act which is impugned? and in determining this point a soldier may take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong, with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances.[1]

In the case of a soldier, or guard, who shot and killed an escaping military prisoner, the United States Circuit Court said: "Under the common law an officer having custody of a prisoner charged with a felony may take his life if it become absolutely necessary to prevent his escape. The military code practically abolishes distinctions between felonies and misdemeanors. The same principle applies to a soldier in the performance of his duty who, in doing so, killed an escaping

1. Hare, Constitutional Law, p. 920.

prisoner. The sentinel could not be successfully prosecuted unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, and, if he acted in good faith and without malice, he would not be criminally liable."[1]

667. To the citizen who regards the maintenance of society under the protection of law as the great end and aim of government, the principles of law here announced must be particularly gratifying. The soldier no longer here appears as the natural enemy of his country and mankind, bent only upon rearing his fortunes upon the liberties of the people which he has prostrated in the dust. On the contrary, he appears the friend as well as defender of the people. But discipline in any military establishment is indispensable. Obedience in all armies is the first rule of the soldier. And yet, neither the discipline of the Army nor the public safety seems, according to these enlightened views, to require the sacrifice of subordinates whose only desire has been loyally to carry out orders of their superiors.

668. It is to be regretted that this question of responsibility for executing illegal military orders should, by conflicting judicial decisions, be left in the least doubt. The reasonable rule, which at the same time absolutely guards the rights of the citizen, is that laid down in McCall's case. As there mentioned, the citizen whose rights are assailed is entitled to but one satisfaction; that he may have against the superior who issued the illegal order, why not compel him to seek this means of redress? Such a rule, universally recognized, would foster a proper spirit of discipline in the Army; in this all classes, particularly the civil community and property-owners, are deeply interested; for, as experience has shown, an illy disciplined military is a menace to government; a source of weakness, not of strength. Besides, it would fix responsibility certainly and at all events, and obviate lukewarm prosecutions; for where both judge and jury feel that in equity if not in law

1. *Federal Reporter*, 31, p. 710.

the wrong person is being prosecuted, justice is not apt to be zealously or even fairly administered.

669. It has been said that if the commands of the superior be illegal and obviously so, the inferior who obeys cannot avoid responsibility; if illegal, and not obviously so to the ordinary understanding, he will not be held liable for obedience; if legal, and yet the inferior believes it to be otherwise and disobeys, he will be triable by court-martial; if legal, yet not obviously so, the subordinate is not answerable for disobedience.[1]

But it is apprehended that in the present state of the law as generally expounded, he who obeys an illegal order, whether obviously so or not, may, in the strict construction of the law, be held responsible. On the other hand, if the order be legal, and he assume to disobey, he may be held responsible not only for the military, but the civil consequences. In the latter case, that the subordinate doubted the legality is no defence whatever. In the first instance, it is true that, from tenderness of feeling, courts are inclined to make a broad distinction between orders that are plainly illegal to the ordinary mind and those wherein the legality is doubtful, holding the subordinate liable in the first case, and in the other giving weight to every circumstance that can operate in his favor, which, as a rule, amounts practically to immunity from liability.

670. "I do not think, however," said Mr. Justice Stephen, in his History of the Criminal Law, "that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose the superior officer to have good reasons. * * * The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel

1. Lieutenant Young, Military *v.* Mobs (1888).

by the orders of the captain, or in deserting to the enemy on the field of battle by the order of his immediate commander. * * The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds."[1]

671. Upon the same subject, Willes, J., remarked: "I hope I may never have to determine that difficult question, How far the orders of a superior officer are a justification? Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war—at all events, as against enemies or foreigners—and, I should think, even with regard to English-born subjects of the crown, unless the orders were such as could not legally be given. I believe that the better opinion is that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders."[2]

Commenting upon these views, Mr. Dicey, in his Introduction to the Study of the Constitution of England, observes: "A critic were rash who questioned the suggestion of a jurist whose dicta are more weighty than most considered judgments. The words, moreover, of Mr. Justice Willes enounce a principle which is in itself pre-eminently reasonable. If it be not admitted, results follow as absurd as they are unjust; every soldier is called upon to determine on the spur of the moment legal subtleties which, after a lengthy consultation, might still perplex experienced lawyers, and the private ordered by his commanding officer to take part in the suppression of a riot runs the risk, if he disobeys, of being shot by order of a court-martial, and if he obeys, of being hanged under sentence of a judge. Let it further be carefully noted that the doctrine of Mr. Justice Willes, which is approved by the criminal code commissioners, applies, it would seem, to criminal liability only. The soldier or policeman who, without full legal justification,

1. Pp. 205–6. 2. Keightly *v.* Bell, 4 Foster & Finlason's Reports, pp. 763–90.

assaults or arrests a civilian, incurs (it is submitted), even though acting under orders, full civil liability." [1]

672. Yet the principle of immunity in such cases is not fully established; and though the weight of decisions is tending that way, the older rule of law, that he who under any circumstances obeys an illegal order may be held responsible for the results, cannot be said to be reversed, though its strictness is impaired. In regard to the disobedience of a legal order, when it is not obviously so, the principle never can be admitted that the subordinate is not responsible for disobedience. Nowhere, in any military system, certainly not in that of the United States, is the idea for one moment tolerated that a subordinate can with impunity disobey a lawful order. The claim that it was not obviously legal to an ordinary understanding would be as unsoldierly as it would be unavailing.[2]

673. Nor does it signify whether subordinates act singly or collectively; the rule of responsibility of members of martial-law tribunals, for instance, is identical with that of the individual. The reason for this is apparent. Such tribunals exist by virtue only of an order issued by a military superior, who either has or assumes to have authority to convene them. The members of the court are, therefore, proceeding under military orders as certainly as though each member had received a distinct order to do a certain thing. The difference is, that here each has associated with him others in the allotted work given them by a common superior. Such tribunals belong in the category of inferior courts in the sense that, when their authority is questioned, the person who has acted under it must be able to show that jurisdiction existed.[3] All courts must have jurisdiction of persons and causes to render their proceedings valid. Superior courts of general jurisdiction are supposed by law to have this until the contrary be shown. Members of inferior courts, however, can only justify when he

1. Appendix, p. 422. 2. Whiting, War Powers, 10th edition, p. 182; Hall v. Howd, 10 Conn., p. 514. 3. 19 Johnson, p. 7; 20 Johnson, p. 343; 3 Cranch, p. 337.

who claims right or exemption under the decree or judgment shows jurisdiction affirmatively.

674. The tribunal will decide whether or not it has jurisdiction. It may, indeed, happen that a question will arise on this point, as in rare instances has occurred. In such cases it is the duty of the tribunal to proceed with the business before it, under such orders as the convening authority may give. That is the rule laid down by the military authorities. It is a safe and proper rule, conducive to discipline and the prompt administration of justice through the instrumentality of military tribunals. It proceeds upon the principle that obedience to orders among military men is a first duty; that where a question arises upon the legality of the order, the subordinate disobeys at his peril; and that in matters which have been so carefully considered as those which deliberately and formally are referred to a military tribunal for its determination, the convening officer has had time and opportunity fully to pass upon the question of their legality, and in his decision the court should acquiesce without factious opposition.[1] Of course this does not excuse the members if the matter referred to the court is one which, obviously, and without reflection, is seen to be beyond the cognizance of the court. We can scarcely conceive of such a case in an intelligently conducted service, yet if it arose, it would then be necessary for the court to decide whether or not it would proceed in a matter clearly beyond its jurisdiction under all the responsibilities attached to such a line of conduct.

675. But it is not the question of jurisdiction which possibly may arise between commander and subordinates that now is being treated of; it is that question arising before the civil courts when military officers are called upon to vindicate their actions as members of martial-law tribunals. And here the rule of responsibility attaching to inferior courts applies. If the tribunal had apparent jurisdiction upon the facts spread before it, after opportunity given all parties to be heard, the

1. 1 Opinions of Attorney-General, p. 233.

members are not liable because subsequently it might appear that there had been a mistake as to the facts. They can only judge of the facts laid before them, and if these give jurisdiction, they are not liable.[1] Nor does it matter that the charges are not drawn up with that particularity which characterizes pleadings at common law, and which under the pressure of modern business requirements are being pruned of their verbiage by statutes. Certainty is indeed essential. The time, place, who the offender is, and the character of his offence must clearly appear. But this may be set out in the baldest terms.[2]

676. Jurisdiction being had, members of military tribunals are not liable unless it can be shown that they acted maliciously; and the difficulty of making out such a case is hardly greater than the improbability that they have so acted. Such tribunals unite in themselves the functions of judge and jury. They decide upon the effect of evidence, and construe the law applicable to the case before them. The members are not liable because they form an erroneous judgment upon the facts proved, or as to what facts were proved, or the mode of proving. In common law, if a magistrate return a regular conviction, the matter being within his jurisdiction, it is good in law, although he was wholly wrong. On the other hand, to kill a convicted murderer is itself murder, unless done in the manner prescribed by law. In the case of Linford *v.* Fitzroy,[3] the court remarked that no action would lie against a magistrate for anything done by him in the discharge of his judicial duty without proof of actual malice or ill-feeling, or bad evidence. And so in regard to military tribunals; if the proceedings are regular under the law and usage of the service, it does not add to the legal liability of those who participate therein that afterwards it should transpire that the accused was innocent, unless bad motives on the part of the members be shown.[4] The law

1. Lowther *v.* Lord Randor, 8 East's Reports, p. 173. 2. 5 Barnwall & Adolphus' Reports, p. 681 (1833); 1 Opinions of Attorney-General, p. 294. 3. 13 Queen's Bench Reports, p. 230. 4. Finlason, Martial Law, p. 99.

governing in such cases is similar to that applicable to actions for malicious prosecution. The true grounds for the latter actions are the plaintiff's innocence, and the claim that it was not an honest prosecution of justice. Yet if the grand jury have found an indictment, the defendant in an action for malicious prosecution will not be found to show probable cause, but the plaintiff will be constrained to show malice and iniquity in the prosecution. And if the party were convicted, even though judgment were reversed on appeal, it is impossible for an action for malicious prosecution to succeed unless the trial court can be fixed with malice, and even then the prosecutor in the original cause must be fixed with it in order to render him liable.[1]

1. Saville *v.* Roberts, 1 Lord Raymord's Reports, p. 374; Jones *v.* Gwyn, 1 Wilson's Reports, p. 91; Reynolds *v.* Kennedy, 1 Wilson's Reports, p. 232.

CHAPTER XXIX.

Bills of Indemnity.

677. It has been the usage in England to pass bills of indemnity, after martial law has ceased, to protect from prosecution those who then were called upon to exercise unusual military authority. To some extent this has been followed in the United States.

678. Where martial law has been carried into execution pursuant to positive statute, as in Ireland in 1803 and Rhode Island in 1842, or in numerous instances in British islands and colonies, such bills could only indemnify against prosecution for acts done in *excess* of what customary practices under martial law would justify. The statutes, which either directly institute martial law or lodge in the chief executive authority to exercise this power under defined circumstances, carry their own immunity for acts done under that law, provided he does not transcend its ordinary limits. Hence the Supreme Court of the United States, in referring to the Rhode Island rebellion, said that it was a state of war; and the established government by proclaiming martial law resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition. And notwithstanding the provision in the Federal Constitution,[1] securing the people in their persons, houses, papers, and effects against unreasonable searches and seizures, and always in any event upon duly certified warrants, the court in its opinion justified an officer who had entered a house without such warrant while martial law prevailed.

679. After the cessation of martial law in Jamaica in 1865, a bill of indemnity was passed by the colonial legislature. It became an interesting question what protection this act afforded

1. Article 4, Amendments.

those who, in the performance of their duty, had been instrumental in enforcing that law. Upon this point the home Government took the advice of the law officers of the crown. As a result the Secretary of State informed the colonial governor that the effect of the Indemnity Act was not to cover acts of either the governor or subordinate officers, unless such as, in case of the former, he might reasonably and in good faith have considered to be proper for putting an end to the insurrection, or such as, in case of subordinates, had been done under and in conformity with the orders of superior authority; or, if done without such orders, to have been done in good faith and under a belief, reasonably entertained, that they were proper for the suppression of the insurrection and for the preservation of the public peace on the island. Regarding measures taken under military authority, the important announcement was made that the proclamation of martial law, under the island statute, operated within the declared district to give as complete indemnity as the Indemnity Act itself. As to civilians who within the proclaimed district had acted *bona fide* for the suppression of the rebellion—even without military orders—they had a protection secured to them by the Indemnity Act which they might not obtain from the mere operation of martial law. To acts beyond the proclaimed district the Indemnity Act had no applicability.

680. Thus the principle of immunity for acts under martial law enunciated by the Supreme Court of the United States impliedly, and by the English Government explicitly, was in substance the same—namely, that, martial law having been legally instituted, for acts which reasonably and with fair intendment lie within the domain of military customs, both officers and men are justified, and a bill of indemnity adds nothing to their security. It is simply a statute of repose as to such cases.

681. Under this view of the law, bills of indemnity are necessary only for the protection either of those civilians who, how worthy soever their motives, unite in martial-law measures without being impelled by the coercion of military authority,

or of the military themselves when they resort to excessive measures, not clearly warranted by the customs of war, yet adopted in perfect good faith, for the public interest.

682. It may be asked, Why the necessity for bills of indemnity, if what is lawful under the laws carries within itself its own immunity at such times? Why not allow what is unlawful to justify itself as best it may when this becomes necessary? The answer is, that such a course would be contrary to public policy, for it would expose to prosecution those who, amidst scenes of unusual disturbance and danger, were obliged for the public safety to adopt stringent measures of control, but which the law, strictly or perhaps liberally construed, might not warrant. Out of abundance of caution, therefore, bills of indemnity have sometimes been enacted for their protection. While in England this is the usual practice, it has not been considered necessary in the United States. No bill of indemnity followed the exercise of martial law in Rhode Island by legislative, nor at New Orleans, nor upon either occasion when martial law was instituted in Washington Territory by executive authority, nor were such bills ever thought of in connection with the exercise of martial-law power under the Reconstruction Acts of 1867.

683. The frequency with which martial law was resorted to during the Civil War by both the Union and Confederate authorities was a striking feature of that contest. The proclamation of the President of the United States of the 24th of September, 1862, was sweeping in its terms.[1] It set at naught the usual safeguards of the civilian in time of peace, both as regards security of person and property. This was necessary that full effect might be given to the unusual powers assumed by the President in the first instance, and now conferred upon him by the legislature. It was not a time which admitted of a wavering policy. Still, by carrying the President's orders into effect, officers rendered themselves liable to civil prosecutions. It therefore became necessary to protect them.[2] Hence, the acts before mentioned of May 11, 1866, and March 2, 1867, were

1. *Ante*, Sec. 528 *et seq.* 2. See *ante*, Sec. 533.

passed, "among other things," to use the language of the Supreme Court of the United States, "to protect parties from liability to prosecution for acts done in the arrest and imprisonment of persons during the existence of the rebellion, under orders or proclamations of the President, or by his authority or approval, who were charged with participation in the rebellion, or as aiders or abettors, or as being guilty of disloyal practices in aid thereof, or any violation of the usage or laws of war." [1]

684. In this case a provost-marshal had, pursuant to the President's instructions, as it was maintained, arrested without warrant a civilian for persuading a soldier to desert, and, after keeping him in confinement for several months, released him without trial. The officer, in his defence, set up the President's orders as his justification. The Supreme Court remarked upon this point that, granting that the statutes were not liable to any constitutional objection, still they did not change the rule of pleading when the defence is set up in a special plea, or dispense with the exhibition of the order or authority upon which the defendant relied. Nor did they cover all acts done by officers in the military service of the United States simply because they were acting under the general authority of the President as commander-in-chief of the armies of the United States. The acts of Congress only covered what was done under orders or proclamations issued by the President or under his authority; and there was no difficulty in the defendant setting forth such orders or proclamations, whether general or special, if there were any applicable to the case. And although in its decision the Supreme Court did not pass upon the constitutionality of the acts in question—that point not being before them—it is a significant fact that these acts were referred to in terms of commendation as measures which an exigency had rendered necessary.

685. In Mitchell *v.* Clark these acts of Congress were again carefully and fully considered. The case arose in St. Louis,

1. Bean *v.* Beckwith, 18 Wallace, p. 510; see also Beckwith *v.* Bean, 8 Otto, p. 266.

Missouri, when General Schofield was in command there. It has been before remarked that the military commanders in that department during the Civil War resorted to forced contributions, under the martial-law power, from citizens whose loyalty was at least doubtful, for the purpose of making less uncomfortable the situation of Union refugees who had been driven into the city from portions of the State occupied by rebels.[1] Among others of this description, who enjoyed the protection of the Union Army only, as alleged, to plot against it in the dark, was Clark, the defendant in error, who either was openly disloyal or strongly tinctured with disloyalty. Pursuant to the United States military policy indicated, the rents due to Clark on certain real estate were seized upon. This, it will be observed, was an act which martial law alone could justify. The city where the real estate was situate was, and had always been, within Federal control. The State was never declared to be in a condition of rebellion. Military authority over civilians and civil matters could only be exercised there, therefore, by virtue of martial-law power. After the war Clark brought action against the officer who had, in obedience to superior military authority, appropriated his rents. The defendant set up in defence the fourth and seventh sections of the act of March 3, 1863. The fourth section provided that any order of the President, or issued pursuant to his authority, made at any time during the existence of the rebellion, should constitute a sufficient defence to any action or prosecution for acts done under or by virtue of such order, or any law of Congress; while the seventh section limited the bringing all such actions to two years after the passage of the law.

686. The Supreme Court, after citing the provisions of the acts of March 3, 1863, and of May 11, 1866, which last greatly enlarged the indemnifying scope of the former, proceeded:[2] "It is not at all difficult to discover the purpose of all this legislation. Throughout a large part of the theatre of the Civil War the officers of the Army, as well as many civil officers, were

1. *Ante*, Sec. 207 *et seq.* 2. 110 U. S., p. 633.

engaged in the discharge of very delicate duties among a class of people who, while asserting themselves to be citizens of the United States, were intensely hostile to the Government, and were ready and anxious at all times, though professing to be non-combatants, to render every aid in their power to those engaged in active efforts to overthrow the Government and destroy the Union. For this state of things Congress had provided no adequate legislation. Some statutes were passed after delay of a general character, but it was seen that many acts had probably been done by these officers in defence of the life of the nation for which no authority of law could be found, though the purpose was good and the act a necessity. The act of 1863 and the amendatory act of 1866 seem to have well considered the subject. By the fourth section of the act of 1863 Congress undoubtedly intended to afford an absolute defence as far as it had power to do so." The court then sustained the defense of the statutory limitation to the action provided in the seventh section of the act.

687. In Beard *v.* Burts the Supreme Court held that the acts of March 3, 1863, and May 11, 1866, extended protection to all persons for acts they had taken in subordination to the military authorities engaged in conducting the war, and conferred upon them the same exemption from liability to suit which belonged to the President, the Secretary of War, and department commanders. If these expressions of the supreme Federal tribunal did not go to the extent of sustaining affirmatively the constitutionality of the acts of Congress in question, they did by the strongest implication. The question of constitutionality was not directly before the court for decision; had it been, the language used can leave scarcely a doubt as to what the opinion of the court upon this point would have been.

688. We have thus reviewed the exercise of military authority over the civil community, both in foreign lands and within our own territory. We have seen that, rightly regulated, the people under free governments have no just cause of anxiety from this source. There all authority, military and

other, is exercised subject to a proper system of checks and balances.

689. The purpose of a military force is to wage war against the armed enemies of the State. That is what officers are trained for, the object for which expensive armaments are maintained. That is the duty in which the soldier takes pride. Herein he finds the path to fame. The rule by the sword over the civil community in a district distracted either by war or lesser disturbances has nothing attractive to the military mind. It may upon occasion be necessary, but it appears as a necessary evil only. Government of some kind is a necessity, and any government is better than none at all. This, however, does not make the military duty more attractive.

690. There is only one reason why the military is resorted to for governmental purposes—namely, that it possesses the physical and thence the moral power to cause its mandates to be respected. It is not only fair, but absolutely necessary, that the military commander and his subordinates be sustained in the reasonable use of authority they now must exercise. They may not with impunity abuse it. But what is then done is entitled to generous interpretation until evil intent be made to appear. What authority lies strictly within the jurisdictional line may not be easy of speedy determination; and yet prompt action may be requisite or direst consequences follow. The law in its regard for its own dignity and perpetuity on the one hand, and the rights of the citizen on the other, is not unmindful of this fact. It weighs any case arising in the balance of its environments, holding to strict account here, and making charitable allowances there, that justice may fairly, evenly, and impartially be meted out to all—ruler and subject alike. In this reckoning the circumstances of peril as they appeared at the time operate with preponderating influence; and inquiry is directed to ascertain, not whether that was done which the law in times of quiet and good order only will justify, but whether the line of conduct adapted to the facts as they actu-

ally existed, or reasonably were thought to exist, was pursued with due solicitation for the rights of individuals, the needs of society, the demands of government. All these interests are involved, and must receive consideration. Hence it is appropriate that indemnity acts should hush in the repose of oblivion what in good faith those in power are thus impelled to do while guarding with the strong military arm the welfare of all concerned.

APPENDICES.

APPENDIX I.

HEADQUARTERS OF THE ARMY
NATIONAL PALACE OF MEXICO, September 17, 1847.

[General Orders, No. 287.]

The General-in-Chief republishes, with important additions, the General Orders, No. 20, of February 19, 1847 (declaring martial law), to govern all who may be concerned.

1. It is still to be apprehended that many grave offences, not provided or in the act of Congress "establishing rules and articles for the government of the armies of the United States," approved April 10, 1806, may again be committed—by, or upon, individuals of those armies in Mexico, pending the existing war between the two Republics Allusion is here made to offences, any one of which, if committed within the United States or their organized Territories, would, of course, be tried and severely punished by the ordinary or civil courts of the land.

2. Assassination, murder, poisoning, rape, or the attempt to commit either; malicious stabbing or maiming; malicious assault and battery, robbery, theft; the wanton desecration of churches, cemeteries, or other religious edifices and fixtures; the interruption of religious ceremonies and the destruction, except by order of a superior officer, of public or private property, are such offences.

3. The good of the service, the honor of the United States, and the interest of humanity imperiously demand that every crime enumerated above should be severely punished.

4. But he written code, as above, commonly called the *Rules and Articles of War*, does not provide for the punishment of any *one* of those crimes, even when committed by individuals of the Army upon the persons or property of other individuals of the same, except in the very restricted case in the 9th of those articles; nor for like outrages committed by the same class of individuals upon the persons or property of a hostile country, except very partially in the 51st, 52d, and 55th articles; and the same code is absolutely silent as to all injuries which may be inflicted upon individuals of the Army, or their property, against the laws of war, by individuals of a hostile country

5. It is evident that the 99th article, independent of any reference to the restriction of the 87th, is wholly nugatory in reaching any one of those high crimes.

6. For all the offences, therefore, enumerated in the second paragraph above, which may be committed abroad in, by, or upon the Army, a supplemental code is absolutely needed.

7. That *unwritten* code is *martial law*, as an addition to the *written* military code prescribed by Congress in the Rules and Articles of War, and which unwritten code all armies in hostile countries are forced to adopt, not only for their own safety, but for the protection of unoffending inhabitants and their property about the theaters of military operations against injuries, on the part of the Army, contrary to the laws of war.

8. From the same supreme necessity martial law is hereby declared as a supplemental code in and about all cities, towns, camps, posts, hospitals, and other places which may be occupied by any part of the forces of the United States in Mexico; and in and about all columns, escorts, convoys, guards, and detachments of the said forces while engaged in prosecuting the existing war in and against the said Republic, and while remaining within the same.

9. Accordingly, every crime enumerated in paragraph No. 2 above, whether committed—(1) by any inhabitant of Mexico, sojourner, or traveler therein, upon the person or property of any individual of the United States forces, retainer or follower of the same; (2) by any individual of the said forces, retainer or follower of the same, upon the person or property of any inhabitant of Mexico, sojourner or traveler therein; or (3) by any individual of the said forces, retainer or follower of the same, upon the person or property of any other individual of the same forces, retainer or follower of the same, shall be duly tried and punished under the said supplemental code.

10. For this purpose it is ordered that all offenders, in the matters aforesaid, shall be promptly seized, confined, and reported for trial before *military commissions*, to be duly appointed as follows:

11. Every military commission, under this order, will be appointed, governed, and limited, as nearly as practicable, as prescribed by the 65th, 66th, 67th, and 97th of the said Rules and Articles of War, and the proceedings of such commissions will be duly recorded in writing, reviewed, revised, disapproved or approved, and the sentences executed—all, as near as may be, as in the cases of the proceedings and sentences of courts-martial; *provided*, that no military commission shall try any case clearly cognizable by any court-martial; and *provided*, also, that no sentence of a military commission shall be put in execution against any individual belonging to this Army which may not be, according to the nature and degree of the offence, as established by evidence in conformity with

known punishments in like cases in some one of the States of the United States of America.

12. The sale, waste or loss of ammunition, horses, arms, clothing, or accoutrements by soldiers is punishable under the 37th and 38th Articles of War. Any Mexican or resident or traveler in Mexico who shall purchase of any American soldier either horse, horse equipments, arms, ammunition, accoutrements, or clothing shall be tried and severely punished by a military commission as above.

13. The administration of justice, both in civil and criminal matters, through the ordinary courts of the country, shall nowhere and in no degree be interrupted by any officer or soldier of the American forces, except (1) in cases to which an officer, soldier, agent, servant, or follower of the American Army may be a party; and (2) in *political* cases—that is, prosecutions against other individuals on the allegations that they have given friendly information, aid, or assistance to the American forces.

14. For the ease and safety of both parties in all cities and towns occupied by the American Army, a Mexican police shall be established, and duly harmonized with the military police of said forces.

15. This splendid capital, its churches and religious worship, its convents and monasteries, its inhabitants and property are, moreover, placed under the special safeguard of the faith and honor of the American Army.

16. In consideration of the foregoing protection, a contribution of $150,000 is imposed on this capital, to be paid in four weekly installments of thirty-seven thousand five hundred dollars ($37,500) each, beginning on Monday next, the 20th instant, and terminating on Monday, the 11th of October.

17. The Ayuntamiento, or corporate authority of the city, is specially charged with the collection and payment of the several installments.

18. Of the whole contributions to be paid over to this Army, twenty thousand dollars ($20,000) shall be appropriated to the purchase of *extra* comforts for the wounded and sick in hospital; ninety thousand dollars ($90,000) to the purchase of blankets and shoes for gratuitous distribution among the rank and file of the Army; and forty thousand dollars ($40,000) reserved for other necessary military purposes.

19. This order will be read at the head of every company of United States forces serving in Mexico, and translated into Spanish for the information of Mexicans.

APPENDIX II.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

SECTION I.

Martial Law.

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.

*ARTICLE XLII. *Territory is considered occupied when it is actually placed under the authority of the hostile army.*

The occupation applies only to the territory where such authority is established and in a position to assert itself.

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

ARTICLE L. *No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.*

*The articles in italics are from the Hague Conference Code, proclaimed by the President of the United States, April 11, 1902 (G. O., 52, A. G. O., 1902).

Military Jurisdiction.

5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only: their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of Ambassadors, Ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the Army, its safety, and the safety of its operations.

ARTICLE LI. *No tax shall be collected except under a written order and on the responsibility of a commander-in-chief.*

This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.

For every payment a receipt shall be given to the taxpayer.

ARTICLE LII. *Neither requisition in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.*

These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offences to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the Chief Executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial, while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial are tried by military commissions.

Military Necessity.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such

deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

ARTICLE XXII. *The right of belligerents to adopt means of injuring the enemy is not unlimited.*

18. When a commander of a besieged place expels the noncombatants in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

ARTICLE XXVI. *The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.*

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be

spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

ARTICLE XLV. *Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.*

Retaliation.

27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously are wars pursued, the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defence against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.

Public and Private Property of the Enemy.

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

ARTICLE LIII. *An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the state, dépôts of arms, means of transport, stores and supplies, and, generally, all movable property of the state which may be used for military operations.*

Railway plant, land telegraphs, telephones, steamers and other ships, apart from cases governed by maritime law, as well as dépôts of arms and, generally, all kinds of war material, even though belonging to companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.

ARTICLE LV. *The occupying state shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile state, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.*

ARTICLE LVI. *The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when state property, shall be treated as private property.*

All seizure of and destruction or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

ARTICLE XLIV. *Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited.*

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning, or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

ARTICLE XLVI. *Family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.*

Private property cannot be confiscated.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

ARTICLE XXVII. *In sieges and bombardments all necessary steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.*

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

Protection of Persons, and Especially of Women.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacred-

ness of domestic relations. Offences to the contrary shall be rigorously punished.

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 uses.

ARTICLE XLVII. *Pillage is formally prohibited.*

38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

ARTICLE XXVIII. *The pillage of a town or place, even when taken by assault, is prohibited.*

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

ARTICLE XLVIII. *If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do it, as far as possible, in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate government was bound.*

ARTICLE XLIX. *If, besides the taxes mentioned in the preceding article, the occupant levies other money taxes in the occupied territory, this can only be for military necessities or the administration of such territory.*

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

ARTICLE XXV. *The attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited.*

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

ARTICLE XLIII. *The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

42. Slavery, complicating and confounding the ideas of property (that is, of a *thing*), and of personality (that is, of *humanity*), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or state can have, by the law of postliminy, no belligerent lien or claim of service.

Punishment of Crimes against Inhabitants of Hostile Country.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offences to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offence may require; if by soldiers, they shall be punished according to the nature of the offence.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and

rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

SECTION III.

Deserters.

48. Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

Prisoners of War.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

ARTICLE I. *The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:*

1. *To be commanded by a person responsible for his subordinates;*
2. *To have a fixed distinctive emblem recognizable at a distance;*
3. *To carry arms openly; and*
4. *To conduct their operations in accordance with the laws and customs of war.*

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on

belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

ARTICLE XIII. *Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.*

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

ARTICLE II. *The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops, without having time to organize themselves in accordance with Article I., shall be regarded a belligerent, if they respect the laws and customs of war.*

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if at their own desire they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

ARTICLE III. *The armed forces of the belligerent parties may consist of combatants and noncombatants. In case of capture by the enemy, both have a right to be treated as prisoners of war.*

ARTICLE XV. *Relief societies for prisoners of war, which are regularly constituted in accordance with the law of the country with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and administrative regulations, for the effective accomplishment of their humane task. Delegates of these societies may be admitted to the places of internment for the distribution of relief, as also to the halting-places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all their regulations for order and police.*

Hostages.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offences. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

Troops That Give No Quarter.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64 If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them

for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

ARTICLE XXIV. *Ruses of war, and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable.*

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign state, and therefore admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

60. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

ARTICLE XXIII. *Besides the prohibitions provided by special conventions, it is especially prohibited—*

(a) *To employ poison or poisoned arms;*

(b) *To kill or wound treacherously individuals belonging to the hostile nation or army;*

(c) *To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion,*

(d) *To declare that no quarter will be given;*

(e) *To employ arms, projectiles, or material of a nature to cause superfluous injury;*

(f) *To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva Convention;*

(g) *To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.*

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

Booty on the Battlefield.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

Prisoners of War (Treatment of).

ARTICLE IV. *Prisoners of war are in the power of the hostile government, but not in that of the individuals or corps who captured them.*

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE XIV. *A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent states, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and deaths.*

It is also the duty of the information bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.

ARTICLE XVI. *The information bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war or dispatched by them, shall be free of all postal duties, both in the countries of origin and destination, as well as in those they pass through.*

Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by the government railways.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

ARTICLE XVII. *Officers taken prisoners may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their government.*

74. A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor or to any officer in command. The government alone releases captives, according to rules prescribed by itself

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

ARTICLE V. *Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety.*

76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

ARTICLE VI. *The state may utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.*

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the state shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

ARTICLE VII. *The government into whose hands prisoners of war have fallen is bound to maintain them.*

Failing a special agreement between the belligerents, prisoners of war shall be treated, as regards food, quarters, and clothing, on the same footing as the troops of the government which has captured them.

77. A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

ARTICLE VIII. *Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.*

Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners are not liable to any punishment for the previous flight.

ARTICLE XVIII. *Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities.*

ARTICLE XIX. *The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the national army.*

The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ARTICLE XX. *After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible.*

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

ARTICLE XXI. *The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22nd August, 1864, subject to any modifications which may be introduced into it.*

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

SECTION IV.

Partisans.

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

Armed Prowlers, Not Belonging to Hostile Army.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and vocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

Scouts.

83. Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

Armed Prowlers.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

War-Rebels.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not pris-

oners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.

SECTION V.

Safe-Conduct.

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

Spies.

88. A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

ARTICLE XXIX. *An individual can only be considered a spy if, acting clandestinely or on false pretences, he obtains, or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.*

Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy. To this class belong likewise the individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory

ARTICLE XXX. *A spy taken in the act cannot be punished without previous trial.*

ARTICLE XXXI. *A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.*

89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

War-Traitors.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offence.

Guides.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

Captured Messengers.

99. A messenger carrying written despatches or verbal messages from one portion of the army, or from a besieged place, to another portion

of the same army or its government, if armed, and in the uniform of his army, and if captured, while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of a prisoner of war, and may be dealt with according to the circumstances of the case.

Deception Permissible or Otherwise.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offences, makes no differenee on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.

Exchange of Prisoners.

105. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instanee, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the pu pose of obtaining better treatment.

Offences to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

ARTICLE IX. *Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.*

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable as soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

Flags of Truce.

111. The bearer of a flag of truce cannot insist upon being admitted He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

ARTICLE XXXII. *An individual is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag-bearer, and the interpreter who may accompany him.*

ARTICLE XXXIII. *The chief to whom a flag of truce is sent is not obliged to receive it in all circumstances.*

He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the envoy temporarily.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offence, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

ARTICLE XXXIV. *The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.*

Flags of Protection.

115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.

The Parole.

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

ARTICLE X. *Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personal honor, scrupulously to fulfill, both as regards their own government and the government by whom they were made prisoners, the engagements they have contracted.*

In such cases, their own government shall not require of nor accept from them any service incompatible with the parole given.

120. The term "parole" designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

ARTICLE XI. *A prisoner of war can not be forced to accept his liberty on parole; similarly the hostile government is not obliged to assent to the prisoner's request to be set at liberty on parole.*

121. The pledge of the parole is always an individual, but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

ARTICLE XII. *Any prisoner of war, who is liberated on parole and recaptured, bearing arms against the government to whom he had pledged his honor, or against the allies of that government, forfeits his right to be treated as a prisoner of war, and can be brought before the courts.*

125. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No noncommissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battlefield, no paroling of entire bodies troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These

cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him, he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.

SECTION VIII.

Armistice—Capitulation.

135. An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared, without conditions, it extends no farther than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

ARTICLE XXXVI. *An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.*

137. An armistice may be general, and valid for all points and lines of the belligerents; or special, that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

ARTICLE XXXVII. *An armistice may be general or local. The first suspends all military operations of the belligerent states; the second, only those between certain fractions of the belligerent armies and in a fixed radius.*

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

ARTICLE XXXVIII. *An armistice must be notified officially, and in good time, to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or at a fixed date.*

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases as soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

ARTICLE XXXIX. *It is for the contracting parties to settle, in the terms of the armistice, what communications may be held, on the theatre of war, with the population and with each other.*

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

ARTICLE XXXV. *Capitulations agreed on between the contracting parties must be in accordance with the rules of military honor.*

When once settled, they must be scrupulously observed by both the parties.

145. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

ARTICLE XL. *Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.*

ARTICLE XLI. *A violation of the terms of the armistice by private individuals acting on their own initiative only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained.*

146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case, the war is carried on without any abatement.

SECTION IX.

Assassination.

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.

SECTION X.

Insurrection.

149. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against

an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

Civil War.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

Rebellion.

151. The term "rebellion" is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

154. Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

Loyal Citizens.

155. All enemies in regular war are divided into two general classes —that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the noncombatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government has the right to decide.

Treason.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

The Articles of the Hague Conference Code enumerated below are not precisely apposite to any of the sections of the Instructions for the United States Armies in the Field:

ARTICLE LIV. *The plant of railways coming from neutral states, whether the property of those states, or of companies, or of private persons, shall be sent back to them as soon as possible.*

ARTICLE LVII. *A neutral state which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.*

It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

ARTICLE LVIII. *Failing a special convention, the neutral state shall supply the interned with the food, clothing, and relief required by humanity.*

At the conclusion of peace, the expenses caused by the internment shall be made good.

ARTICLE LIX. *A neutral state may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such a case, the neutral state is bound to adopt such measures of safety and control as may be necessary for the purpose.*

Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral state, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral state with regard to wounded or sick of the other army who may be committed to its care.

ARTICLE LX. *The Geneva Convention applies to sick and wounded interned in neutral territory.*

[General Orders, No. 3.]

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,

Washington, January 14, 1892.

1. The Convention between the United States, Baden, Switzerland, Belgium, Denmark, Spain, France, Hesse, Italy, Netherlands, Portugal, Prussia, Wurtemberg, Sweden, Greece, Great Britain, Mecklenburg-Schwerin, Turkey, Bavaria, Austria, Russia, Persia, Roumania, Salvador, Montenegro, Servia, Bolivia, Chili, Argentine Republic, and Peru, with additional articles: For the amelioration of the wounded in armies in the field; concluded August 22, 1864; acceded to by the President March 1, 1882; accession concurred in by the Senate March 16, 1882; proclaimed as to the original Convention, but with reserve as to the additional articles, July 26, 1882; commonly known as the Geneva Convention, is as follows:

ORIGINAL CONVENTION.

ARTICLE I. Ambulances and military hospitals shall be acknowledged to be neuter, and as such shall be protected and respected by belligerents so long as any sick or wounded may be therein.

Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

ART. II. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or to succor.

ART. III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfill their duties in the

hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong.

Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

ART. IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

ART. V. Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it.

Any wounded man entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

ART. VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

ART. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must, on every occasion, be accompanied by the national flag. An arm-badge (brassard) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

The flag and the arm-badge shall bear a red cross on a white ground.

ART. VIII. The details of execution of the present Convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective governments, and in conformity with the general principles laid down in this Convention.

ADDITIONAL ARTICLES.

ARTICLE I. The persons designated in Article II. of the Convention shall, after the occupation by the enemy, continue to fulfill their duties, according to their wants, to the sick and wounded in the ambulance or the hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay for a short time in case of military necessity.

ART. II. Arrangements will have to be made by the belligerent powers to ensure to the neutralized person, fallen into the hands of the army of the enemy, the entire enjoyment of his salary.

ART. III. Under the conditions provided for in Articles I. and IV. of the Convention, the name "ambulance" applies to field hospitals and other temporary establishments which follow the troops on the field of battle to receive the sick and wounded.

ART. IV. In conformity with the spirit of Article V. of the Convention, and to the reservations contained in the protocol of 1864, it is explained that for the appointment of the charges relative to the quartering of troops, and of the contributions of war, account only shall be taken in an equitable manner of the charitable zeal displayed by the inhabitants.

ART. V. In addition to Article VI. of the Convention, it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms and within the limits fixed by the second paragraph of that article, the wounded fallen into the hands of the enemy shall be sent back to their country, after they are cured, or sooner if possible, on condition, nevertheless, of not again bearing arms during the continuance of the war.

* * * * * * *

II. The foregoing Convention and additional articles are published by order of the President, who commands that the original Convention and the first five of the additional articles shall form part of the "Instructions for the Government of Armies of the United States in the Field," as published in General Orders, No. 100, 1863, from this office.

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By command of Major-General Schofield.

J. C. KELTON,
Adjutant-General.

APPENDIX III.

The Brussels Project of an International Declaration Concerning the Laws and Customs of War.

ARTICLE I. A territory is considered as occupied when it is actually placed under the authority of the hostile army.

The occupation only extends to those territories where this authority is established and can be exercised.

ART. II. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure, as far as possible, public safety and social order.

ART. III. With this object he will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.

ART. IV. The functionaries and officials of every class who at the instance of the occupier consent to continue to perform their duties, shall be under his protection. They shall not be dismissed or be liable to summary punishment [*punis disciplinairement*] unless they fail in fulfilling the obligations they have undertaken, and shall be handed over to justice only if they violate those obligations by unfaithfulness.

ART. V. The army of occupation shall only levy such taxes, dues, duties, and tolls as are already established for the benefit of the state or their equivalent, if it be impossible to collect them, and this shall be done as far as possible, in the form of, and according to, existing practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as was obligatory on the legal government.

ART. VI. The army occupying a territory shall take possession only of the specie, the funds, and marketable securities, etc. [*valeurs exigibles*], which are the property of the state in its own right, the dépôts of arms, means of transport, magazines, and supplies, and, in general, all the personal property of the state which is of a nature to aid and carry on the war.

Railway plant, land telegraphs, steam and other vessels not included in cases regulated by maritime law, as well as dépôts of arms, and generally every kind of munitions of war, although belonging to companies or to private individuals, are to be considered equally as means of a nature to aid in carrying on a war which cannot be left by the army of occupation at the disposal of the enemy.

Railway plant, land telegraphs, as well as the steam and other vessels above mentioned, shall be restored, and indemnities be regulated on the conclusion of peace.

ART. VII. The occupying state shall only consider itself in the light of an administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile state and situated in the occupied territory. It is bound to protect these properties [*fondes de ces proprietes*], and to administer them according to the laws of usufruct.

ART. VIII. The property of parishes [*communes*], of establishments devoted to religion, charity, education, arts, and sciences, although belonging to the state, shall be treated as private property.

Every seizure, destruction of, or willful damage to, such establishments, historical monuments, or works of art or of science should be prosecuted by the competent authorities.

Of Those Who Are to Be Recognized as Belligerents; Of Combatants and Noncombatants.

ART. IX. The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions:

1. That they have at their head a person responsible for his subordinates;
2. That they wear some settled distinctive badge recognizable at a distance;
3. That they carry arms openly; and
4. That in their operations they conform to the laws and customs of war.

In those countries where the militia form the whole or part of the army they shall be included under the denomination of "army."

ART. X. The population of a non-occupied territory who, on the approach of the enemy, of their own accord take up arms to resist the invading troops without having had time to organize themselves in conformity with Article IX., shall be considered as belligerents if they respect the laws and customs of war.

ART. XI. The armed forces of the belligerents may be composed of combatants and noncombatants. In the event of being captured by the enemy, both one and the other shall the enjoy the rights of prisoners of war.

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Of Sieges and Bombardments.

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ART. XVII. In the like case all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, arts, sciences, and charity, hospitals, and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes It is the duty of the besieged to indicate these buildings by special visible signs, to be notified beforehand by the besieged.

ART. XVIII. A town taken by storm shall not be given up to the victorious troops to plunder.

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Of the Sick and Wounded.

ART. XXXV. The duties of belligerents, with regard to the sick and wounded, are regulated by the Convention of Geneva of the 22d August, 1864, subject to the modifications which may be introduced into that Convention. [See G. O., No. 3, A. G. O., 1892, Appendix II.]

Of the Military Power with Respect to Private Individuals.

ART. XXXVI. The population of an occupied territory cannot be compelled to take part in military operations against their own country.

ART. XXXVII. The population of occupied territories cannot be compelled to swear allegiance to the enemy's power.

ART. XXXVIII. The honor and rights of the family, the life and property of individuals, as well as their religious convictions and the exercise of their religion, should be respected.

Private property cannot be confiscated.

ART. XXXIX. Pillage is expressly forbidden.

Of Contributions and Requisitions.

ART. XL. As private property should be respected, the enemy will demand from parishes [*communes*], or the inhabitants, only such payments and services as are connected with the necessities of war generally acknowledged in proportion to the resources of the country, and which do not imply, with regard to the inhabitants, the obligation of taking part in the operations of war against their own country.

ART. XLI. The enemy, in levying contributions, whether as equivalents for taxes [*vide* Article V.], or for payments which should be made in kind, or as fines, will proceed, as far as possible, according to the rules of the distribution and assessment of the taxes in force in the occupied territory.

The civil authorities of the legal government will afford their assistance, if they have remained in office.

Contributions can be imposed only on the order and on the responsibility of the general-in-chief, or of the superior civil authority established by the enemy in the occupied territory.

For every contribution a receipt shall be given to the person furnishing it.

ART. XLII. Requisitions shall be made only by the authority of the commandant of the locality occupied.

For every requisition an indemnity shall be granted or a receipt given.

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APPENDIX IV.

Extract from the Laws of War Proposed by the Institut de Droit International, Oxford, September, 1880.

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Of Occupied Territory.

Definition.—A territory is considered to be occupied where, as the result of its invasion by an enemy's force, the state to which it belongs has ceased in fact to exercise its ordinary authority within it and the invading state is alone in a position to maintain order. The extent and duration of the occupation are determined by the limits of space and time within which this state of things exists.

Rules of Conduct with Regard to Persons.

Since new relations arise from the provisional change of government, it is the duty of the occupying military authority to inform the inhabitants of the occupied territory as soon as possible of the powers which it exercises, as well as of the local extent of the occupation. The occupier must take all measures in his power to establish and to preserve public order.

With this object the occupier must, so far as possible, retain the laws which were in force in the country in the time of peace, modifying, suspending, or replacing them only in case of necessity. The civil functionaries of every kind who consent to continue the exercise of their functions are under the protection of the occupier. They may be dismissed, and they may resign at any moment. For failing to fulfil the obligations freely accepted by them, they can only be subjected to disciplinary punishment. For betraying their trust they may be punished in such manner as the case may demand.

In emergencies the occupier may require the inhabitants of an occupied district to give their assistance in carrying on the local administration.

As occupation does not entail a change of nationality on the part of the inhabitants, the population of an occupied country cannot be compelled to take an oath of fidelity or obedience to the enemy's power. Persons doing acts of hostility directed against the occupier are, however, punishable.

Inhabitants of an occupied territory who do not conform to the orders of the occupier can be compelled to do so.

The occupier cannot, however, compel the inhabitants to assist him in his works of attack or defence, nor to take part in military operations against their own country.

Moreover, human life, female honor, religious beliefs, and forms of worship must be respected. Interference with family life is to be avoided.

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NOTE.—Careful examination of Appendices III. and IV. will show where much of the material and many of the ideas came from that are embodied in the articles of the Hague Conference Code which appear in Appendix II.

APPENDIX V.

STATE OF SIEGE IN FRANCE.

[From *Code Manuel de l'Autorité Civile.*]

The state of siege, says Mr. Foucart, gives rise to a form of legislation wholly exceptional. The peculiar circumstances in the midst of which one finds himself, necessitate the transfer of all the rights of the civil to the military authority, upon which then depends the safety of the place, and, perhaps, even that of the state. The military commander is clothed, for the maintenance of order and interior police, with prerogatives which belong to civil and judicial magistrates, and he exercises them exclusively on his personal responsibility; he can, therefore, issue legal mandates, order arrests; he can also force dangerous characters to leave the town. [Law of 8th July, 1791, Articles IX., X., XI., XII.; decree of 24th December, 1811, Articles XCV., CI., CII.; see *post*, pp. 620–21.]

This definition of the state of siege sums up the opinion of all text-writers; the learned professor wrote it in 1839, in the second edition of his Elements of Public Law, a work worded with as much judiciousness as talent, and to which we have often had recourse. [See Article LIII., decree, 24th December, 1811, *post*, p. 621.]

By the law of 1791 [*post*, p. 620], the state of siege, like the state of war, is recognized by legislation; by the law of 10th Fructidor of the year V. [*post*, p. 624], the state of siege may be placed upon communes of the interior, and no one will be persuaded that the word "commune" [parishes] is restricted to the interior of towns.

The decree of 1811 [*post*, pp. 620–21] has in no wise modified these laws, but the legality of the state of siege, either in fortified towns or in communes of the interior, not being contested, it would be superfluous here to dwell upon that part of the legislation included in our text. There is another question which, by its importance, demands our attention, to-wit: Whether Article CIII. [*post*, p. 621] of the decree of 24th December, 1811, which, for all offences committed during the state of siege replaces the ordinary tribunals by military tribunals, has been abrogated by the constitutional charter.

This question, it is known, was the subject, in 1832, of a decree of the Court of Appeal, to which was given, erroneously, by public opinion, an extension of meaning that it is far from having; the decree of the 19th June, in fact, has purely and simply admitted the appeal of Mr. Geoffroy from a finding of the second "*conseil de guerre*" of the first military division, set aside the proceedings and sentence by sending the aforesaid Geoffroy on a warrant of commitment before the examining magistrate of the Court of First Instance [a court of inferior jurisdiction] and after-

ward before the Court of Assizes, etc., and this because, Geoffroy not being a soldier or having any military character, there had been an exceeding of jurisdiction and a violation of Articles LIII. and LIV. of the Charter, etc., etc.; the same decree recognizing, nevertheless, the legality of the legislation regarding the state of siege.

If we go back to the epoch when this decision was rendered, to the particular circumstances which called it forth, it is impossible not to recognize that it cannot in the future have the force that the decisions of the Supreme Court would ordinarily give it. The decree of the 19th of June can evidently, let us say, be considered only as an act of policy for the moment, having no other object than to quiet feeling and not to invalidate impliedly one or more portions of a law, all the principles, all the provisions of which are bound together so closely and are so inseparable that to destroy a single one of them would be to annul all. This decree finally bears the stamp of the most striking anomaly. How, indeed, is it possible to recognize the legality of legislation on the state of siege that of the jurisdiction of military tribunals, the legality of the suspension of ordinary jurisdiction, and to desire, on the other hand, that the latter exist, even though for the trial of a class of individuals? As has been well said, the true principle of the state of siege lies above all in the necessity for defence; this is an absolute principle that all states, all governments, despotic, republican, or constitutional, have never contested. Suppose the Court of Appeal itself closed in a place that is invested, besieged, bombarded; its power has ceased, its jurisdiction exists no more than does that of the ordinary courts or other ordinary tribunals. The court-martial alone has jurisdiction; it acts even when the enemy is in the breach, and when he even enters the place. In such cases an appeal is not thought of; there is no appeal, there can be no appeal other than to the clemency of the conqueror. This is the spirit, the letter of the law regarding the state of siege; the commander of the place is the sole, the only authority who gives orders and the only one to whom one owes obedience; there cannot, therefore, be side by side with his jurisdiction, or that which emanates from him, any other jurisdiction. Admit for one instant this other jurisdiction and there will no longer be commanders who answer, on the penalty of their heads, for the safety of all in the place, often for the safety of the state.

We reason here, as is well understood, in a general way in regard to the *state of siege* and in the strict meaning of that situation; the Court of Appeal has, on the contrary, seen only a particular case, the mitigating circumstances of which have dictated its decree which, once more, cannot be considered as a decision of principle without the greatest danger to the defence of the state.

Articles LIII. and LIV. of the Constitution are urged against this:

"ARTICLE LIII. No one will be deprived of his natural judges."

"ART. LIV. In consequence, extraordinary commissions and tribunals cannot be created by virtue of any right or under any name whatever."

These articles had as an object to prevent the revival of the military commissions of the Empire, of the prevotal courts of the Restoration, finally, of any extraordinary improvised jurisdiction. But the permanent military courts are not extraordinary commissions newly and specially created for certain cases; they are sanctioned in law; the Court of Appeal decided a hundred times before the decree of the 19th of June that the Constitution had not abolished them; that they were the ordinary tribunals of the military as naval courts-martial are the tribunals of the naval service, and by virtue of the decree of November 12, 1806, the judges of offences committed in port by non-military persons. Finally, during the state of siege, the military tribunals become the ordinary tribunals, and since the decree of June 19, 1832, itself recognized the legality of the state of siege, it could not, without self-contradiction, fail to recognize the jurisdiction that this situation brings about.

The objection, based upon the fact that under the government of the Constitution the crime of sedition committed by non-military persons is within the jurisdiction of the Court of Assizes, cannot here have the slightest consideration, as it is not a question, we repeat, of ordinary times, when sedition may be committed, but of a time of war, of the state of siege, in short, which is war in the very height of its action. As to the objection that the state of siege resulting from a sedition in an interior commune differs from the state of siege of a fortified place invested and besieged by an enemy, the very legislation regarding the state of siege destroys it completely, since the definition of the state of siege comprises both cases. But let us quote here Mr. Voysin de Gartempe, who filled the office of attorney-general of the Court of Appeal on the 19th June, 1832, in the appeal of Geoffroy:

"What! the necessity for the state of siege, recognized by the laws, should be least against the aggression of enemies from the inside? What difference is there between the war which is at the foot of the ramparts and that which breaks out within the very walls of the city? What! Because French blood has been shed by French hands, the government will not be able, in order to stop its being shed, to use, on its own responsibility, all the means which belong to it? Civil war is, then, less odious than foreign war? Does it no longer exact means of repres-

sion that are quite as prompt, quite as powerful? To allow the facts to speak suffices for an answer.

"When lately the fires of sedition were smouldering in the provinces of the west, when they were being overrun and ravaged by armed bands few in numbers, what did the deputies of these provinces ask? What did the general councils of these departments say? What did the press of the opposition repeat with great outcry? From every side they called for the placing of the state of siege or accused of feebleness, of timidity, the government which hesitated to employ this means, the only one, they said, which was proportionate to the evil," etc., etc.

Extract from the Law Concerning the Preservation and Classifying of Fortified Towns and Military Posts, the Police of Fortifications and Other Objects Relative thereto, Given at Paris, July 10, 1871.

Decree of the National Assembly of May 24, June 25, 27, and 30, July 2, 4, 5, and 8, 1791.

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ARTICLE X. In fort fied places and military posts, when these places and posts shall be in a state of siege, all authority with which the civil authorities are clothed by the Constitution for the maintenance of order and interior police shall pass to the military commander, who shall exercise it exclusively on his personal responsibility.

ART. XI. Fortified towns and military posts shall be in the state of siege not only from the instant of the commencement of the attack, but even as soon as, by the effect of their investment by hostile troops, the communications from the inside to the outside, or the outside to the inside, shall be interrupted at a distance of 1,800 toises from the crest of the covered way.

ART. XII. The state of siege will cease only upon the raising of the investment; and in case attacks shall have been begun, only after the works of the besiegers shall have been destroyed, and the breaches repaired or placed in a state of defence.

NOTE.—On the 24th of June, 1848, in the midst of the terrible insurrection that covered Paris with blood, Mr. Pascal Dupont proposed to the Constituent Assembly to place Paris in a state of siege. The state of siege was voted for. It lasted until October 19, 1848. This time the state of siege covered with its shadow the giving to courts-martial of the jurisdiction of citizens *now sanctioned by the Court of Appeal.* This was followed the 18th of June, 1849, by a law placing Paris again in a state of siege, proposed and passed at the same session; and, to show how events bring changes, the same M. Orilon Barrot, keeper of the seal, who introduced this law, was the advocate who pleaded so eloquently for M. Geoffroy, as narrated in the text in 1832 (Dictionaire de la Conversation, article State of Siege).

Extract from the Decree of the 24th December, 1811, Relative to the Organization and Service of the Military Staff of Fortresses.

CHAPTER I.—*General Provisions.*

ARTICLE I. Fortified places shall, in regard to their service and police, be considered under three relations—viz., in the state of peace, in the state of war, and in the state of siege, in accordance with Articles V.–XII. of sub-head 1 of the law of July 10, 1791, and subject to modifications established in the following: * * * *

ART. LIII. The state of siege is determined by a decree of the emperor, by investment, by an attack in force, by a surprise, by an insurrection, or, finally, by mustering troops within the radius of investment without the authority of the magistrates.

In the case of a regular attack, the state of siege ceases only after the works of the enemy have been destroyed and the breaches put in a state of defence.

In these different cases the duties and obligations of commanders of troops are subject to the rules laid down further on, Chapter IV.

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CHAPTER IV.—*The State of Siege.*

ARTICLE CI. In places in a state of siege, the authority with which the magistrates were clothed for the maintenance of order and police passes in its entirety to the commander of troops, who exercises it or delegates to them such part of it as he thinks proper.

ART. CII. The governor or commanding officer exercises this authority or causes it to be exercised under his supervision and in his name, within the limits determined by the decree, and if the place is invested, within the radius of investment.

ART. CIII. For all crimes which the governor or commandant has not judged proper to leave to the cognizance of the ordinary courts, the duties of police justice are performed by a military provost, selected as far as possible from among the officers of the *gendarmerie* and the ordinary tribunals are superseded by the military tribunals.

ART. CIV. In the state of siege the governor or commandant determines upon the service of the troops of the national guard and that of all the civil and military authorities, following no other rule than his secret instructions, the movements of the enemy, and the works of the besieger.

Constitutional and Organic Laws Relating to Public Powers.

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State of Siege

Can be declared only in case of imminent danger and by the Assembly only, except in case of prorogation. [Law of 9th August, 1849, Articles I., II., and III.]

In the colonies and in Algeria the declaration of the state of siege may be made by the governor.

In fortified towns it may be made by the military commander. [Law 9th August, 1849, Articles IV. and V.; decree 29th April, 1857, Article X.]

The state of siege has as a result the transfer to the military authorities of the powers with which the civil authorities are clothed for the maintenance of order and police. [Law 9th August, 1849, Article VII.]

Only the Assembly has the right to raise the state of siege when it has been declared or maintained by it.

Nevertheless, in case of prorogation, this right belongs to the President of the Republic. [Law 9th August, 1849, Article XII.]

Law Regarding the State of Siege of 9th August, 1849.

CHAPTER I.—*Cases in which the State of Siege May be Declared.*

ARTICLE I. The state of siege can be declared only in case of imminent peril for the purpose of interior or exterior safety.

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CHAPTER II.—*Forms of the Declaration of the State of Siege.*

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ARTICLE II. The National Assembly has the sole power to declare the state of siege with exceptions mentioned below.

The declaration of the state of siege designates the communes, the districts, and the departments to which it is applied and may be extended.

ART. III. In the case of prorogation of the National Assembly, the President of the Republic may declare the state of siege by the advice of the Council of Ministers.

The President, when he has declared the state of siege, must immediately notify the commission instituted by virtue of Article XXXII. of the Constitution of the fact, and, according to the gravity of the circumstances, call the National Assembly together.

The prorogation of the Assembly ceases as of right when Paris is declared in a state of siege.

The National Assembly, as soon as it has assembled, continues or raises the state of siege.

ART. IV. In French colonies the declaration of the state of siege is made by the governor of the colony. He must immediately account for it to the Government.*

ART. V. In fortified towns and military posts, either on the frontier or in the interior, the declaration of the state of siege may be made by the military commander in the cases provided by the law of 10th July, 1791, and by the decree of 24th December, 1811.

The commandant immediately gives an account of it to the Government.

ART. VI. In the cases provided for in the two preceding articles, if the President does not believe that the state of siege should be raised, he will without delay propose the continuance of it to the National Assembly.

CHAPTER III.—*Effects of the State of Siege.*

ARTICLE VII. Immediately on the declaration of the state of siege the powers with which the civil authority was clothed for the maintenance of order and police passes in its entirety to the military authority.

The civil authority continues, nevertheless, to exercise those powers of which the military authority has not deprived it.

ART. VIII. The military tribunals may be vested with the jurisdiction of crimes and misdemeanors against the safety of the State, against the Constitution, against public order and peace, whatever the status of the principals or accomplices.

ART. IX. The military authority has the right:

1. To search by day or night the homes of citizens;
2. To send away individuals who have undergone judicial punishment, and individuals who have not their domicile in the places subject to the state of siege;
3. To order the surrender of arms and stores, and to proceed to search and seize them;
4. To prohibit publications and meetings that it judges to be of a nature tending to incite and maintain disorder.

ART. X. In the places named in Article V. the effects of the state of siege continue, in addition, in cases of foreign war, to be determined by the provisions of the law of July 10, 1791, and the decree of December 24, 1811.

ART. XI. Citizens continue, notwithstanding the existence of the state of siege, to exercise all those rights guaranteed by the Constitution, and the enjoyment of which is not suspended by virtue of the preceding articles.

*Article X. of the decree of April 29, 1857, is thus worded: "In Algeria the state of siege results from the cases enumerated in Article XXXIX. of the decree of August 10, 1853, or from the promulgation of a decree issued by reason of emergency by the governor-general."

CHAPTER IV.—*Raising of the State of Siege.*

ARTICLE XII. The National Assembly has the sole right to raise the state of siege when it has been declared or continued by it.

Nevertheless, in case of prorogation, this right will appertain to the President of the Republic. The state of siege declared in conformity with Articles III., IV., and V. may be raised by the President of the Republic, provided it has not been continued by the National Assembly.

The state of siege declared in conformity with Article IV. may be raised by the governors of the colonies as soon as they believe quiet to be sufficiently restored.

ART. XIII. After the raising of the state of siege the military tribunals continue to take cognizance of crimes and misdemeanors, the prosecution of which has been turned over to them.

[From *Repertoire Universelle et Raisonée de Jurisprudence.*]

The Constitution of the 5th Fructidor, year 3, not having expressly determined the cases or the forms in which the towns of the interior could be declared in a * * * state of siege, the law of the 10th Fructidor, year 5, provided for it in the two following articles:

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"ART. II. The communes of the interior will be in a state of siege as soon as by the effect of their investment by hostile troops or by rebels the communications from within to without, or from without to within, shall be interrupted at a distance of three thousand five hundred and two metres (eighteen hundred toises); in this case the executive directory will warn the legislative body of the fact."

But the fact was soon recognized that this law was contrary to the spirit of the Constitution of the year 3; and by Article XXXIX. of the law of the 19th of the same month, "the power to put a commune in a state of siege was given to the directory."

The Constitution of the 22d Frimaire, year 8, is no more explicit than that of the year 3, about the power to declare places in a state of siege or of war. But that this power did belong to the head of the government without the concurrence of any other authority, that the head of the government was alone able, as the King still is to-day, to declare war against foreign powers, is not to be doubted.

Furthermore, we see that the fortified towns of Antwerp and Brest were declared in a state of siege by two decrees of the 26th March, 1807.

APPENDIX VI.

The matter contained in this Appendix is the latest authoritative publication by the War Department of the "Geneva Convention" and of the "Instructions for the Government of Armies of the United States in Time of War." It is contained in the "Field Service Regulations," issued just as this book was going to the press.

THE GENEVA CONVENTION.

665. The Convention between the United States and the principal European and other powers for the amelioration of the condition of the sick and wounded of armies in the field, concluded August 22, 1864, and acceded to by the United States Government in March, 1882, commonly known as the Geneva Convention, is as follows:

ART. I. Ambulances and field hospitals shall be recognized as neutral establishments, and, as such, shall be protected and respected by belligerents as long as they contain sick or wounded.

Such neutrality would cease if the ambulances or hospitals were held by a military force.

ART. II. The personnel of hospitals and ambulances, including the administrative and supply departments thereof, the medical service, the transport service for wounded, and likewise chaplains, shall participate in the benefit of neutrality while on duty, and as long as there remain any wounded to bring in or to succor.

ART. III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfill their duties in the hospital or ambulance which they serve, or may withdraw to rejoin the body of troops to which they belong.

Under such circumstances, when these persons shall cease from their functions, the occupying army shall take care to deliver them to the enemy's outposts.

ART. IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals can not, in withdrawing, carry away any articles except such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

ART. V. The inhabitants of a country who may assist the wounded shall be respected, and shall remain free. It shall be the duty of the commanding generals of the belligerent powers to notify the inhabitants of the appeal addressed to their humanity, and of the neutrality resulting therefrom.

Any wounded man received and nursed in a house shall act as a safeguard thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempt from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

ART. VI. Wounded or sick soldiers shall be collected and treated, to whatever nation they may belong.

Commanders in chief are authorized to deliver to the enemy's outposts at once all soldiers wounded in combat, when circumstances permit and both parties consent to such action.

Those who, after their wounds are healed, are recognized as incapable of serving, shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during continuance of the war.

Evacuations, together with the personnel conducting them, shall be protected by absolute neutrality.

ART. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuations. It must on every occasion be accompanied by the national flag. A brassard for the neutralized personnel shall also be allowed, but the delivery thereof shall be regulated by military authority. Flags and brassards shall show a red cross on white ground.

ART. VIII. The details of execution of the present Convention shall be regulated by the commanders in chief of belligerent armies, according to the instructions of their respective governments, and in conformity with the general principles laid down in this Convention.

ART. IX. The high contracting powers have agreed to communicate the present Convention to those governments which have not found it convenient to send plenipotentiaries to the International Convention at Geneva, with an invitation to accede thereto. The protocol is for that purpose left open.

ART. X. The present Convention shall be ratified, and the ratifications exchanged at Berne in four months, or sooner if possible.

ADDITIONAL ARTICLES.[a]

ART. I. The persons designated in Article II. of the Convention shall continue, after the occupation by the enemy, to take the necessary care of the sick and wounded in the ambulance or hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall not be allowed to put off for more than a brief period, in case of military necessity.

ART. II. Arrangements shall be made by the belligerent powers to insure to neutralized persons fallen into the hands of the enemy's army the enjoyment of their entire salary.

ART. III. Under the conditions provided for in Articles I. and IV. of the Convention the name "ambulance"[b] applies to field hospitals and other temporary establishments which follow the troops on the field of battle to receive the sick and wounded.

ART. IV. In conformity with the spirit of Articles V. of the Convention and with the reservations contained in the protocol of 1864,

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[a] The additional articles now are generally accepted and have acquired the force and effect of an international treaty.

[b] This interpretation is of especial importance in the United States, where the term "ambulance" is generally applied to a vehicle for the transportation of the sick and wounded.

it is explained that in the apportionment of the burdens relating to quartering of troops and contributions of war an equitable allowance only shall be made for the charitable zeal displayed by inhabitants.

ART. V. In addition to Article VI. of the Convention, it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms, and within the limits fixed by the second paragraph of that article, the wounded who may fall into the hands of the enemy, even if not considered incapable of serving, shall be sent back to their country after they are cured, or sooner, if possible, on condition, nevertheless, of not again bearing arms during the continuance of the war.

ART. VI. The boats which, at their own risk and peril, during and after an engagement, pick up the shipwrecked or wounded, or which, having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, as far as the circumstances of the engagement and the position of the ships engaged will permit.

The appreciation of these circumstances is intrusted to the humanity of all the combatants. The shipwrecked and wounded thus picked up and saved must not serve again during the continuance of the war.

ART. VII. The religious, medical, and hospital personnel of any captured vessel are declared neutral, and, on leaving the ship, may remove the articles and surgical instruments which are their private property.

ART. VIII. The personnel designated in the preceding article must continue to fulfill their functions in the captured ship, assisting in the removal of the wounded made by the victorious party; they will then be at liberty to return to their country, in conformity with the second paragraph of the first additional article.

The stipulations of the second additional article are applicable to the salaries of this personnel.

ART. IX. Military hospital ships remain subject to the laws of war in all that concerns their equipment and supplies; they become the property of the captor, but the latter must not divert them from their special assignment during the continuance of the war.

ART. X. Every merchant vessel, to whatever nation it may belong, loaded exclusively with sick and wounded being removed, is protected by neutrality; but the mere fact, noted on the ship's books, that the vessel has been visited by one of the enemy's cruisers, renders the sick and wounded incapable of serving during the continuance of the war. The cruiser shall even have the right of putting on board an officer to accompany the convoy, and thus verify the good faith of the operation.

If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerent.

The belligerents retain the right to prohibit to neutralized vessels all communication and any course which they may deem prejudicial to the secrecy of their operations. In urgent cases special conventions may be entered into between commanders in chief, in order to

neutralize temporarily and in a special manner the vessels intended for the removal of the sick and wounded.

ART. XI. Wounded or sick sailors and soldiers, when embarked, to whatever nation they belong, shall be protected and taken care of by their captors.

Their return to their own country is subject to the provisions of Article VI. of the Convention, and of additional Article V.

ART. XII. The distinctive flag to be used with the national flag, in order to indicate any vessel or boat which may claim the benefit of neutrality, in virtue of the principles of this Convention, is a white flag with a red cross. The belligerents may exercise in this respect any mode of verification which they may deem necessary.

Military hospital ships shall be distinguished by being painted white outside, with green strake.

ART. XIII. The hospital ships which are equipped at the expense of the aid societies recognized by the governments signing this Convention, and which are furnished with a commission emanating from the sovereign, who shall have given express authority for their being fitted out, and with a certificate from the proper naval authority that they have been placed under his control during their fitting out and on their final departure, and that they were then appropriated solely to the purpose of their mission, shall be considered neutral, as well as the whole of their personnel. They shall be respected and protected by the belligerents.

They shall make themselves known by hoisting, together with their national flag, the white flag with a red cross. The distinctive mark of their personnel, while performing their duties, shall be a brassard of the same colors. The outer painting of these hospital ships shall be white with red strake.

These ships shall bear aid and assistance to wounded and shipwrecked belligerents, without distinction of nationality.

They must take care not to interfere in any way with the movements of the combatants. During and after the battle they will act at their own risk and peril.

The belligerents shall have the right of controlling and visiting them; they may refuse to co-operate with them, order them to depart, and detain them if the gravity of the circumstances demands such action.

The wounded and shipwrecked picked up by these ships can not be claimed by either of the combatants, and they will be required not to serve during the continuance of the war

ART. XIV. In naval wars any strong presumption that either belligerent takes advantage of the benefits of neutrality with any other view than the interest of the sick and wounded gives the other belligerent, until proof to the contrary, the right of suspending the Convention as regards such belligerent.

Should this presumption become a certainty, notice may be given to such belligerent that the Convention is suspended with regard to him during the whole continuance of the war.

ART. XV. The present act shall be drawn up in a single original copy, which shall be deposited in the archives of the Swiss Confederation.

THE HAGUE PEACE CONFERENCE

666. The Convention between the United States and certain powers for the adaptation to maritime warfare of the principles of the Geneva Convention, signed at The Hague, July 29, 1899, and published in G. O. No. 4, A. G. O., 1902, is as follows:

ART. I. Military hospital ships—that is to say, ships constructed or assigned by states specially and solely for the purpose of assisting the wounded, sick, or shipwrecked, and the names of which shall have been communicated to the belligerent powers at the beginning or during the course of hostilities, and in any case before they are employed, shall be respected and cannot be captured while hostilities last.

These ships, moreover, are not on the same footing as men-of-war as regards their stay in a neutral port.

ART. II. Hospital ships equipped wholly or in part at the cost of private individuals or officially recognized relief societies shall likewise be respected and exempt from capture, provided the belligerent power to whom they belong has given them an official commission and has notified their names to the hostile power at the commencement of or during hostilities, and in any case before they are employed.

These ships should be furnished with a certificate from the competent authorities, declaring that they had been under their control while fitting out and on final departure.

ART. III. Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, if the neutral power to whom they belong has given them an official commission and notified their names to the belligerent powers at the commencement of or during hostilities, and in any case before they are employed.

ART. IV. The ships mentioned in Articles I., II., and III. shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents independently of their nationality.

The governments engage not to use these ships for any military purpose.

These ships must not in any way hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents will have the right to control and visit them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

As far as possible the belligerents shall inscribe in the sailing papers of the hospital ships the orders they give them.

ART. V. The military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.

The ships mentioned in Articles II. and III. shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, together with their national flag, the white flag with a red cross provided by the Geneva Convention.

ART. VI. Neutral merchantmen, yachts, or vessels, having, or taking on board, sick, wounded, or shipwrecked of the belligerents, can not be captured for so doing, but they are liable to capture for any violation of neutrality they may have committed.

ART. VII. The religious, medical, or hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship, they take with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave when the commander in chief considers it possible.

The belligerents must guarantee to the staff that has fallen into their hands the enjoyment of their salaries intact.

ART. VIII. Sailors and soldiers who are taken on board when sick or wounded, to whatever nation they belong, shall be protected and looked after by the captors.

ART. IX. The shipwrecked, wounded, or sick of one of the belligerents who fall into the hands of the other, are prisoners of war. The captor must decide, according to circumstances, if it is best to keep them or send them to a port of his own country, to a neutral port, or even to a hostile port. In the last case, prisoners thus repatriated can not serve as long as the war lasts.

ART. X. (Excluded.)

ART. XI. The rules contained in the above articles are binding only on the contracting powers in case of war between two or more of them.

The said rules shall cease to be binding from the time when, in a war between the contracting powers, one of the belligerents is joined by a non-contracting power.

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ART. XIV. In the event of one of the high contracting parties denouncing the present Convention, such denunciation shall not take effect until a year after the notification made in writing to the Netherlands Government, and forthwith communicated by it to all the other contracting powers.

This denunciation shall only affect the notifying power.

ARTICLE XII.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN TIME OF WAR.a

SECTION I.—Military government.—Military jurisdiction.—Military necessity.—Hostilities.

MILITARY GOVERNMENT.

667. A place, district, or country occupied by an enemy stands, in consequence of that fact, under the military government of the invading or occupying army, whether any proclamation declaring the same, or any public warning to the inhabitants, has been issued or not. Military government is the immediate and direct effect and consequence of occupation, which includes only the territory where the authority of the hostile army is established and in a position to be exercised.

The presence of a hostile army proclaims its military government.

668. Military government does not cease during the hostile occupation, except by special proclamation issued by the commander-in-chief, or by special mention in the treaty of peace terminating the war and stipulating occupation of places or of a territory pending the fulfillment of certain agreements.

669. Military government in a hostile country consists in the suspension, by the occupying military authority, of the domestic administration and government in the place or territory occupied; in the substitution of military rule and force for the same; and in the dictation of general laws, as far as military necessity requires this suspension, substitution, and dictation.

670. Military government applies only to foreign territory and to domestic territory in which enemies, or rebels treated as belligerents, are operating. The military commander is, with rare exceptions, amenable for his acts in accordance with the laws and customs of war only. Military government must be carefully distinguished from martial law, which is of domestic application only; for in the latter case the legality of the acts of a military officer may be questioned not only by his military superiors, but also by the civil tribunals of the territory in which such martial law may be exercised.

671. Military government simply is military authority exercised in accordance with the laws and usages of war. Military oppression is not military government; it is an abuse of the power which the law of war confers. As military government is carried on by military force, it is incumbent upon those who administer it to be

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strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

672. Military government should be less stringent in places and countries fully occupied and fairly submissive. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed when face to face with the enemy, because of the absolute necessities of the case. Even in the commander's own country, the duty of stopping the progress of the invasion and eventually expelling the enemy rises superior to all ordinary considerations.

673. All civil and criminal law of the places and territories captured from the enemy shall continue to take its usual course under military government, unless, in case of absolute impediment, the same be interrupted or modified by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under military government, or continue only with the sanction, or, if deemed necessary, with the participation of the invader.

The commander of the occupying forces may proclaim that the administration of all civil and criminal law shall, either wholly or in part, continue as in time of peace.

The commanding officer may require the magistrates and other civil officials of the occupied territory to take an oath of temporary allegiance or an oath of fidelity to the victorious government or rulers, as a condition to the continuance of their functions. But whether such oath has been taken or not, the people and their officials owe strict obedience, at the peril of their lives, to the military government of the occupying power as long as it holds sway over the district or country.

674. Military government applies to property and to persons, whether the persons are subjects of the enemy or aliens to his country.

675. Consuls, among American, European, and other civilised nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to military government in cases of urgent necessity only; their property and business are not exempt. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

676. The functions of ambassadors, ministers, or other diplomatic agents accredited by neutral powers to the hostile government cease, so far as regards the displaced government; but the conquering or occupying power usually recognises them as temporarily accredited to itself.

677. Military government affects chiefly the police of occupied territory and the collection of public revenue, whether at the rate imposed by the expelled government or according to a new scale prescribed by the invader. Its principal object is to provide for the security of the invading army and to contribute to its support and efficiency.

678. Whenever feasible, military government is carried out in cases of individual offenders by military courts. Sentences of death shall be executed only with the approval of the President, provided the urgency of the case does not require a speedier execution, and then only with the approval of the commander in chief.

MILITARY JURISDICTION.

679. Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the organized and active land forces of the United States the first is exercised by *courts-martial*, while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by ***military commissions.***

MILITARY NECESSITY.

680. Military necessity, as understood by modern civilized nations, consists in the urgency of those measures which are indispensable for securing the end of the war, and which are lawful according to the modern law and usages of war.

681. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy and of every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith, either positively pledged regarding agreements entered into during the war, or supposed by the modern law of war to exist.

682. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

HOSTILITIES.

683. Public war is a state of armed hostility between states or parts of states. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units,

called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

684. The citizen or native of a hostile country is thus an enemy, as one of the members of the hostile state or nation, and as such is subject to the hardships of war.

685. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will permit.

686. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

Any pressure on the population of occupied territory to take an oath of allegiance to the hostile power is prohibited.

687. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

688. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

689. When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender.

690. The attack or bombardment of towns, villages, habitations, or buildings known to be not defended, is prohibited.

691. The law of war not only disavows all cruelty and all bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace and intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or of connivance at such acts.

Offences to the contrary shall be severely punished—especially so if committed by officers.

692. A belligerent has no right to announce his intention to give no quarter, nor can he refuse to give quarter except in the case of some conduct of the enemy in gross violation of the laws of war, and then only in the way of retaliation for similar acts. Under such extraordinary circumstances troops who give no quarter still have no right to kill enemies already disabled on the ground and who have ceased fighting, or prisoners captured by other troops.

693. All troops of the enemy discovered or positively known to

give no quarter in general, or to any portion of our army, receive none.

694. Detachments of troops who disguise themselves in the uniform of their enemies for the purpose of taking treacherous advantage of the resemblance, can expect no quarter if they be taken in the act.

695. If a commander, under stress of urgent necessity, utilizes articles of uniform captured from the enemy, sufficient dissimilarity in the uniform as a whole must remain to protect troops and individual wearers against the charge of willful deception.

696. Quarter having been given to an individual enemy under misapprehension of his true character, he may nevertheless be ordered to suffer death if within three days after capture it is discovered that he belongs to an organization which is notorious for not giving quarter.

697. The use of the enemy's national standard, flag, or other emblem of nationality for the purpose of deceiving the enemy in battle is an act of perfidy by which the troops resorting to it lose all claim to the protection of the laws of war.

While deception in war is permitted as a necessary means of hostility and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous and it is so difficult to guard against them.

698. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and indeed, modern war itself, are means to attain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

699. Firing upon the sentinels of the enemy's outposts, as an individual act, is strictly prohibited. An attack may, however, be made on any part of the enemy's outposts pursuant to the orders of officers, with the express or implied sanction of higher authority.

700. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself beyond the pale of the law and usages of war.

701. Whoever intentionally inflicts additional wounds on or kills an enemy already wholly disabled, or who orders or encourages soldiers to do so, shall, if duly convicted, suffer death, whether he belongs to the organized and active land forces of the United States, or is an enemy captured after having committed such a misdeed.

702. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civ-

ilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

703. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably. The facts in a case having been ascertained with absolute certainty, they may, if practicable, be communicated to the commander of the enemy's forces for such action as he may deem appropriate. If the injury complained of is then repaired, or if satisfactory explanation of the occurrence is offered, with assurance of the continued enforcement of the laws of war and punishment of offenders, all ground for retaliation vanishes.

When reprisals are absolutely necessary, they will only be resorted to with the express authority of the general in chief and must not exceed in degree the violation of the law of war committed by the enemy. The methods of retaliation must conform to the laws of humanity and morality; the maximum retribution for the fiendish atrocities of savage and half-civilized enemies is the infliction of death by hanging or shooting.

No general penalty, pecuniary or otherwise, shall be inflicted on the population on account of the acts of individuals for which it can not be regarded as collectively responsible.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

704. Ever since the formation and co-existence of modern nations, and ever since wars have become great national conflicts, war has come to be acknowledged to be not its own end, but the means of attaining great ends of state, or to consist in defence against wrong.

The more vigorously wars are pursued, the more humane they are in the end; but the law of war imposes many restrictions, based on principles of justice, faith, honor, and humanity, on the means and methods adopted to injure the enemy.

SECTION II.—Public and private property of the enemy.—Protection of persons, of religion, and of the arts and sciences.—Punishment of crimes against the inhabitants of hostile countries.

PUBLIC PROPERTY.

705. A victorious army appropriates all public money, seizes all public movable property and holds the same awaiting instructions from its government, and sequesters for its own benefit or for its government all the revenues of real property belonging to the hostile government or nation. All means of public transportation and communication may be seized and used by the invading army. The destruction of public property, except as demanded by military necessity, is prohibited. The title to public real property remains in abeyance until finally determined in the treaty of peace.

706. As a general rule, churches, hospitals, or other establishments of an exclusively charitable character, and establishments of education or institutions for the promotion of knowledge, such as

public schools, universities, academies, observatories, and museums, are not to be considered public property in the sense of paragraph 705; but they may be used when the public service demands it, and the property belonging to them may be taxed.

707. Works of art, libraries, scientific collections, and valuable astronomical and meteorological instruments, as well as hospitals, must be protected against all avoidable damage, even when contained in fortified places undergoing siege. Such works of art, libraries, collections, and instruments will not be removed, except as a measure of retaliation for similar acts. In no case shall they be sold or given away, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

PRIVATE PROPERTY.

708. The United States acknowledges and protects religion and morality; strictly private property; the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished.

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 uses.

709. No tax shall be collected except under a written order and on the responsibility of a commander in chief.

This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.

For every payment a receipt shall be given to the taxpayer.

710. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of requisition or when justified by military necessity for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause formal receipts to be given, which may serve the spoliated owner to obtain indemnity.

711. The salaries of civil officers of the occupied territory, such as judges and administrative or police officers, who remain, and with the sanction of the military government continue the work of their office as far as practicable under the circumstances arising out of the war, shall be paid out of the public revenue of the invaded territory; and other necessary expenses of administration shall be provided for out of the same fund.

PUNISHMENT OF CRIMES.

712. There exists no law or body of authoritative rules of action between hostile armies except that branch of the law of nature and nations which is called the law and usages of war on land.

All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

713. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the

authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

714. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, nor even for commercial transactions otherwise legitimate. Offences to the contrary committed by commissioned officers will be punished by dismissal from the military service or by such other punishment as the nature of the offence may require; if by soldiers, they shall be punished according to the nature of the offence.

SECTION III.—Prisoners of war.—Deserters.—Hostages.

PRISONERS OF WAR.

715. A prisoner of war is a person, armed or unarmed, forming part of the hostile army or attached to it for active aid, and who has fallen into the hands of the captor, on the field or in the hospital, by individual surrender or by capitulation.

When thus captured, all soldiers of whatever species of arms; all men belonging to a rising *en masse* of the hostile country; all who are attached to the army for its efficiency and promote directly the object of the war, except persons hereinafter specifically mentioned; all disabled men and officers on the field or elsewhere; all enemies who have thrown away their arms and asked for quarter, are prisoners of war and as such exposed to the inconveniences as well as entitled to the privileges pertaining to that condition.

716. Moreover, civilians who accompany an army for whatever purpose, such as sutlers, contractors, interpreters, and newspaper correspondents, if captured, may be detained as prisoners of war.

The head of the hostile government and members, male or female, of its reigning family, the chief officers of the hostile country, its diplomatic agents, and all persons of special use to the hostile army or its government, become prisoners of war if captured on territory not belonging to a neutral power.

717. If the people of a country, or of that portion thereof not yet occupied by the enemy, rise *en masse* under a duly authorized levy to resist the invader, they shall be considered as belligerents if they observe the laws and usages of war, and, in case of capture, shall be treated as prisoners of war.

718. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

719. As soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

720. When sovereign states make war upon each other, the law of nations does not inquire into the reasons for such action, and therefore, in regard to the treatment of prisoners, permits no departure from the rules of regular warfare in case the prisoners belong to the army of a government which the captor considers a wanton and unjust assailant:

721. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

722. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States can not retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

723. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

724. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are to be regarded as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they may have been placed in the private luggage of the prisoners.

725. All officers, when captured, must surrender their arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored can not wear them during captivity.

726. A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor or to any officer in com-

mand. The government alone releases captives, according to rules prescribed by itself.

727. Every prisoner of war, if interrogated on the subject, is required to declare his true name and rank, and, in case of infringement of this rule, may be exposed to a restriction of the benefits accorded to prisoners of war of his class.

728. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

729. Prisoners of war are subject to such restriction of liberty as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating prisoners may be varied during their captivity according to the demands of safety.

730. The state may utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the state shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

The wages of the prisoners shall go toward improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

731. The government into whose hands prisoners of war have fallen is bound to maintain them.

Failing a special agreement between the belligerents, prisoners of war shall be treated, as regards food, quarters, and clothing, on the same footing as the troops of the government which has captured them.

732. A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security may be used after an unsuccessful attempt to escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or with other persons.

733. If prisoners of war, who have given no pledge nor made any promise on their honor, escape forcibly or otherwise, and are captured again in battle after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they may be subjected to stricter confinement.

734. The obligations of belligerents in respect to the sick and wounded are regulated by the Geneva Convention, which is hereby made part of these instructions and will be fully complied with when the occasion arises.

735. The enemy's medical officers and members of his hospital corps or sanitary service, including the personnel for superintendence, administration, and service of ambulances, military hospitals and transport of wounded (by land or by water), and his chaplains, shall be considered neutral and will not be made prisoners of war unless the commander in chief has special reasons for detaining them.

The conduct to be observed toward these persons, and also with respect to ambulances, military hospitals, and hospital trains and ships, is prescribed in the articles of the Geneva Convention and the Hague Peace Conference.

736. A bureau for information relative to prisoners of war shall be instituted, on the commencement of hostilities, in each of the belligerent states, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital, and deaths.

It is also the duty of the information bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.

737. Relief societies for prisoners of war, which are regularly constituted in accordance with the law of the country with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and administrative regulations, for the effective accomplishment of their humane task. Delegates of these societies may be admitted to the places of internment for the distribution of relief, as also to the halting-places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on givng an engagement in writing to comply with all their regulatons for order and police.

738. The information bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels, destined for the prisoners of war or dispatched by them, shall be free of all postal duties, both in the countries of origin and destination, as well as in those through which they pass.

Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by the government railways.

739. Officers taken prisoners may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their government.

740. Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services,

provided only they comply with the regulations for order and police issued by the military authorities.

741. The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the national army.

The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

742. After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible.

DESERTERS.

743. Deserters from the organized and active land forces of the United States, having voluntarily entered the service of the enemy, suffer death if they fall again into the power of the United States, whether by capture or by being delivered up. If a deserter from suffer death if they fall again into the power of the United States, is captured by the enemy and punished with death or otherwise, it is not a breach of the laws and usages of war, and does not call for redress or retaliation.

HOSTAGES.

744. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during a war or in consequence of a war. Such hostages are rare in the present age between civilized powers.

If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may permit.

The right to take hostages may also be exercised by seizing locally influential persons and holding them as security against damage to railroads, telegraph lines, bridges, tunnels, etc., on the line of communications, by hostile inhabitants.

When the conduct of a hostile population in occupied territory amounts to guerrilla warfare, resorting to assassination of soldiers and intimidation or murder of citizens disposed to be loyal, hostages may be required to march at the head of detachments of troops, and they may be held subject to retaliation after due warning.

SECTION IV.—Partisans.—Armed enemies not belonging to the hostile army.—Scouts.—Armed prowlers.—War rebels.

PARTISANS.

745. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

GUERRILLAS.

746. Men or groups of men who commit hostilities, whether by fighting, by inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the

organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and vocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the appearance of soldiers and again assuming it when it serves their purposes—such men or groups of men are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

In the absence of general instructions or special orders on this subject from higher authority, the commanding officer on the spot becomes responsible for suitable action whenever such men are caught in the act or when there is no reasonable doubt of their guilt. Before enforcing the death penalty, the commanding officer, in order to protect himself against possibility of error, may convene a board of three officers to ascertain the facts, with names of witnesses, and later submit the same with report of action to his immediate superior. If three officers be not available, the board may consist of two, or even one. If the commanding officer be the only officer present, such record shall form part of his report. When such immediate example is not deemed necessary, the culprit may be confined and formal charges forwarded as a basis for trial by a military commission, provided that the exigencies of the campaign do not render such course impracticable.

747. Scouts or single soldiers, if disguised in civilian dress or otherwise, or in the uniform of the army hostile to their own, if found within or lurking about the lines of the captor, are treated as spies, and suffer death upon conviction before a military commission.

748. Armed prowlers, by whatever names they may be called, who steal within the lines of the hostile army, and inhabitants of the enemy's territory who kill or rob, destroy bridges, roads, railroads, or canals, rob or destroy the mail, or cut telegraph wires, are not entitled to the privileges of prisoners of war.

WAR REBELS.

749. War rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.

SECTION V.—Safe-conduct.—Spies.—War traitors.—Guides.

SAFE-CONDUCT.

750. All intercourse between the territories occupied by belligerent armies, whether by traffic, written or printed correspondence, cable, telegraph, telephone, or wireless telegraphy, or in any other way, ceases. This is the general rule to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct or by permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, or by other methods of communication, can take place only according to agreement approved by the government, or by sanction of the highest military authority.

Violation of this rule of non-intercourse is highly punishable.

751. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they can reach the place of their destination conveniently by another route. It implies no international affront if safe-conduct is refused. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

SPIES.

752. A spy is a person who secretly, in disguise or under false pretences, obtains, or seeks to obtain, information in the zone of operations of a belligerent with the intention of communicating it to the enemy.

753. Soldiers not in disguise who have penetrated into the zone of operations of a hostile army for the purpose of obtaining information are not considered spies. Similarly, soldiers or civilians carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or that of the enemy, and likewise the individuals sent in balloons to deliver dispatches or to maintain communication between the various parts of an army or a territory, shall not be considered spies.

754. A spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

A spy taken in the act shall not be punished until after trial and conviction.

755. Spies, war traitors, and war rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

756. A successful spy or war traitor, safely returned to his own army and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war traitor, but he may be held in closer custody as a person individually dangerous.

757. If a citizen of the United States, be he a military or civil officer or a private citizen, obtains information of military value and betrays it to the enemy, he shall, upon conviction, suffer death.

WAR TRAITORS.

758. A traitor under the law of war, or a war traitor, is a person in a place or district under military government who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

759. A war traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

760. If a citizen of occupied territory gives information to his own government or its army, being separated therefrom by the hostile army, he is a war traitor, and, upon conviction, death is the usual penalty for his offence.

761. The law of war, like the criminal law regarding other offences, makes no distinction on account of the difference of sexes concerning the spy, the war traitor, or the war rebel.

762. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

GUIDES.

763. All armies in the field stand in need of guides, and impress them if they can not obtain them otherwise.

No person having been forced by the enemy to serve as guide is punishable for having done so.

764. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war traitor. and shall suffer death.

765. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

766. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

SECTION VI.—Exchange of prisoners.—Flags of truce.—Flags of protection.

767. Exchanges of prisoners take place number for number, rank for rank, wounded for wounded, with added condition for added condition—such, for instance, as not to serve for a certain period.

768. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government or of the commander of the army in the field.

769. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released, either for the payment of a stipulated sum of money, or, in urgent cases, of provisions, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

770. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it can

not be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable as soon as either party has violated it.

771. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

FLAGS OF TRUCE.

772. An individual who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag, is considered as a bearer of a flag of truce. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag-bearer, and the interpreter who may accompany him.

773. The bearer of a flag of truce can not insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

774. If the bearer of a flag of truce offers himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

775. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

776. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offence, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

FLAGS OF PROTECTION.

777. Dressing stations, ambulance stations, and hospitals of whatever description, or buildings temporarily used as such, whether in besieged places, on or near the line of battle, or on the line of communications, are designated by hoisting the national flag and the red cross flag of the Geneva Convention.

Honorable belligerents will abstain from inflicting intentional damage on establishments thus designated, and will be guided by such flags of protection as much as the contingencies of the fight will permit.

778. It is justly considered an act of bad faith, of infamy, or fiendishness, to deceive an enemy by improper use of flags of protection, especially of white flags and of the red cross flags reserved to designate medical establishments. Such acts of bad faith call for notification to the commander of the hostile forces and to his government, and severe punishment of the responsible officers.

When in occupied territory treacherous use is made of such flags by inhabitants to convey information to guerrillas or detachments of the enemy's forces, such act is doubly reprehensible and justifies instant application of severe measures.

779. The besieging belligerent may request the besieged to designate observatories, precious libraries, scientific museums, and buildings containing collections of works of art, so that their destruction may be avoided as far as practicable.

SECTION VII.—The parole.

780. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

781. The term "parole" designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been released, or the conditions of his confinement modified.

782. The pledge of the parole is always an individual, but not a private act.

783. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

784. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

785. Breaking the parole is punished with death when the person breaking the parole is recaptured after again serving in the enemy's forces.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

786. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

787. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

788. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

789. No paroling on the battle-field; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

790. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

791. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts and can be

visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service in which the paroled officer may be employed.

792. If the government does not approve of the parole, the paroled officer must return into captivity; should the enemy refuse to receive him, he is free of his parole.

793. A belligerent government may declare by a general order whether it will allow paroling, and on what conditions. Such order is communicated to the enemy.

794. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

795. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.

SECTION VIII.—Armistice—Capitulation.

796. An armistice is the cessation of active hostilities for a period agreed upon between belligerents. The agreement must be in writing and duly ratified by the highest authorities of the contending parties.

797. If an armistice be declared without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

798. An armistice may be general, and valid for all points and lines of the belligerents; or special—that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time, or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

799. The motives which induce belligerents to conclude an armistice, whether it be intended as a preliminary to a treaty of peace or to prepare for more vigorous prosecution of the war, in no way affect the character of the armistice itself.

800. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

801. Commanding generals have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giv-

ing notice of cessation and the resumption of hostilities should have been stipulated for.

802. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

803. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must stop all extension, perfection, or advance of his works, as well as desist from attacks by main force.

But as there is a difference of opinion among martial jurists whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, the point should be determined by express agreement between the parties.

804. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

805. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

806. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace, but plenipotentiaries may meet without a preliminary armistice; in the latter case the war is carried on without any abatement.

807. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

808. As soon as a capitulation is signed the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

SECTION IX.—Insurrection.—Civil war.—Rebellion.

809. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

810. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

811. The term "rebellion" is applied to an insurrection of large extent, and is usually a war between the legitimate government of

a country and portions or provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

812. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it in no way implies a partial or complete acknowledgment of their government, if they have set up one, or of their existence as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

813. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them, addressing officers of a rebel army by the rank they may have in the same, accepting flags of truce, or, on the other hand, proclaiming military government in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

814. Treating the rebellious enemy in the field according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason and from treating them accordingly, unless they are included in a general amnesty.

815. All enemies in regular war are divided into two general classes—that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it; and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

816. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens in revolted territories against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge

themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government has the right to decide.

817. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

INDEX.

A

Absence, compulsory, parties not affected by; case of Doroteo Cortes, 232, 233.
Of statute, customs of war govern courts, 336.

Abuse, of power, martial law, 430.

Accidental killing, rule of responsibility, 445, 446, 447.

Actions, transitory, accruing to neutrals, 167.
Ex-delicto or ex-contractu, 316.
Ex-delicto, case of Mitchell vs. Harmony, 318.

Acts of Congress, no confiscation by, during foreign wars, 180.
Confiscation by, in Civil War, and reason, 181, 182, 183.

Administration, reluctance of, martial law, 544, 545.
Regard of military for civil, 550.
Of martial law, 584 to 604.

Administering, efficient, of martial law necessary, 584.

Alarm, military authority over civil community, no cause for, 688.

Allegiance, temporary, int., 5, 26, 27, 28, 29, 30.

Allies, trade restrictions, 274.

American Colonies, feared military rule, 452.
Martial law as war measure, 456.

Anglo-Saxon, policies, int., 17.

Appropriation, of private property, 172.
Confiscation, 173.
Hague Conference, 199.
On land and sea, 200.
Destroyed property, 217, 218.
Destruction, 265.

Arbitrary Acts, martial law, 532.
Community protected from, subordinates' rule, 659.

Arizona, assumption of military control in, 514.
Martial law in, 575.

Armed force, common law had no, 441.
Common law, 442.
Menace to peace, 443.

Armed resistance, met by martial law, 505.

Army, foreign, on friendly soil, 114, 115.
Of invasion, in re tribunals, 149, 150, 151, 152, 153, 154.
Subsisting, right to take supplies, 194.

Army, contributions, 211.
In the field, guerillas, 302.
Officers responsible to President, 308.
General of, authority, 584.
U. S. regular, deference to civil authorities, 551.

Arrest, responsibility for, outside martial law district, 509, 510.
Right or, martial law, 28.
Of those attempting defeat martial law, 589.

Articles of War, provisions of, 144.
Theatre of operations, 145.
Scope of, 146.
To whom and when applicable, 147.
Who not triable, 148.
Certain of, 156.
Legal construction of, 157.
63rd, trial, 158.
When civilians triable, 160.
In War of 1812, 639.
Construed in Civil War, 640.

Article IV., Sec. 4, Constitution, 555.

Art works, seizure allowable, 555.

Assistance, called for by State, President's discretion, 561.

Assumption, of power, armed force, 443.
Of military control in Arizona, 514.

Attitude, of courts, enforcing martial law, 602, 603, 604.

Attorney-General, definition of martial law, 421, 422, 423.

Authority, in military occupation, 50.
Of military commanders, 127, 128.
Of trade in military occupation, 272, 273.
Of President to license trade, 281.
Of commander, under military government, limit, 305.
Of military commission, 339.
Of martial law varies under governments, 386.
Fears martial law a usurpation of, 450.
Of the military is supreme under martial law, 460.
Of President may be entrusted to whom, 502.
Of commander extends where and when, 503.
Of President impugned by Congress, 547.
Of general of army augmented, 548.
Martial law, of State and Territories distinct from Federal, 554.
Of State. President to recognize, when, 559.

Authority, limit of, Federal jurisdiction in State, 565.
Of President in martial law when called in State, 566.
Exercise of, in the field, English rule, 583.
Of martial law, Webster's view, 592.
Must be assumed by commander, when, 593.
Same in what cases, 594, 595.
To convene martial law tribunals, 607.
Of summary martial law tribunals, 608.
Commanding general power appoint martial law courts, 610.
Military, over civil community disagreeable to officers, 622.
Reasonable use of, military to be sustained, 690.

B

Baltimore, 1861, 486, 487.
1863, 525.
Banditti, 10.
Battlefields, private property taken on, 214.
Bedreechund, Elphinstone vs., 151.
Belligerents, rights, 12, 13, 19, 22.
Rebels treated as, 53, 54.
Rule of war making enemies, 60.
Occupation of territory, 81, 82, 83.
Enemies of the subjects of the other, 92, 93.
Treatment of, 93.
Treated as enemies, 98.
Treated as rebels, where, 123, 124.
Rule of confiscation, 178.
Rebel territory, treated as, policy local, 307.
Right, martial law, 377.
Martial law as, right, based on laws of war, 380.
Measure, Lincoln's course in Kentucky, 492, 493, 494.
Measure, martial law a, during war, 519.
Martial law justified in Baltimore, 1863, on ground of, 525.
Blockade, and military occupation, 42.
Booty, 196.
Boston, martial law in, Gen. Gage, 1775, 453, 454, 455.
Bills of indemnity, 677 to 690.
Customary in English jurisprudence, 677.
What acts indemnified, 678.
Colonial, 679.
When only statute of repose, 680.
Policy involved in, 682.
After Civil War, 683, 684, 685, 686, 687.
Bills in nature of indemnity, by Congress, 533, 534.
Bill of Rights, not always effective, nor cloak for license, 591.
British, government principles of conquest, 56.
British, occupat'n Castine Maine, 51, 52.
Experience South Africa, war courts, 343.
Government martial law, war conditions, 387.
Colonial experience, martial law, 391.
British Martial Law Courts, what cases tried in, and in U. S., 393, 394.
Character of, 395.
British martial law, Mutiny Act, 396.
Royal prerogative, 397.
Distinction military law, 398.
Theoretically not part of jurisprudence, 399, 400.
In time of peace, 401.
When may obtain, 402, 403.
English jurisprudence, 404.
Fears of, idle, 405.
Principle for enforcement of, 408, 409, 410, 411, 412, 413.
Civil administration fails, obtains, 406, 407.
Who judges necessity, 414.
Civil responsibility of military officers of, 415, 416.
Courts, advised use rules of court-martial, 418.
Method of enforcing, varies 419.
And in United States, 420.
Rules of evidence, 627.

C

California, Upper, war tariffs, 58.
Camp-followers and soldiers, subject to laws of war, 143.
Camp-followers amenable to Articles of War, 147.
Camp, laws of the, extends to whole community, 581.
Discipline, originally martial law, 363, 364.
Captain Wilkes, 633.
Castine Maine, British occupation of, 51, 52.
Caution, of commanders in re civilians, 641, 642, 643.
Changes, in judicial opinion in U. S. re martial law power, 596, 597, 598.
Characteristics, of military government, 18.
Character, of government decided by dominant power, 20, 21.
Charles I., martial law practice under, 367.
Chief-Justice Taney, Merryman case, 490.
Citizens and soldiers, laws of occupation applicable to, 142.
Citizens and civilians, of conquering state subject to statutory law and laws of war, 159.
Citizens, duty to aid the law, 444.
City, military government, 133.
Sacking of, 215.
Civil administration, unobstructed, martial law illegal, 428.
Fails, martial law necessity, 459.

Civil administration, military regard for, 550.

Civil authorities, fail, martial law obtains, 373.
Fail, martial law obtains, England, 406, 407.
Respect of military officers for, 433.
Subordinate to military when, 508.
And institutions treated with respect, 522.
Deference paid by military, 551.
Supporting military, 552, 553.
Subordinate to military, when, 569.
Weakness of, 578.
The only ones to institute martial law outside theatre of war, 623.

Civil affairs, increased demand in, for martial law, 576.

Civil community, military men exercising military law over, 622.
Under military, not cause alarm, 688.

Civil conditions, acts under, may be offences under martial law, 586.

Civil courts, not same precision in military courts as in, 619.
When civilians turned over to, 629.
May inquire into conduct officials of martial law, 630.
Should remember martial courts, 644.

Civil disorganization, may justify martial law, 472.

Civil jurisdiction, regarded by statutes, 560.

Civil judicature, must ultimately decide, what, 655.

Civil government, int., 13, 14, 16.
Policy in establishing, 76, 77.
When succeeds military government. 346, 347, 348, 349.

Civil law, martial law supplement to, 365.

Civil officers, responsibility, British rule, 416.
Military officers, British, 417.

Civil officials, inertness of, may justify martial law, 473, 474, 475.

Civil responsibility, characteristic of martial law, 381.
Military officers, in British martial law, 415, 416.

Civil war, military government during, 40.
Reprisal and retaliation, 55.
Confiscation, 181, 182, 183.
Government determines course, 270.
Responsibility of commanders, 329.
After, what right given people, 352.
Dates of termination of, 353.
Reconstruction, martial law under, 511.
President revokes martial law measures at end of, 537.
District of Columbia, military control, 538, 539.
Force to attain ends of martial law in, 538.
Articles of War construed in, 640.

Civil War, bills of indemnity after, 683, 684, 685, 686, 687.

Civilians, when triable under 63rd Article, 160.

Civilians and soldiers, martial law applies to both, 366.

Civilians, when turned over to civil courts, 629.
Caution of commanders toward, 641, 642, 643.

Cloak for license, bill of rights, 591.

Coercive measures, taking property for, exceptions, 201, 202, 203.

Coleman vs. Tennessee, 152.

Colonial, bills of indemnity, 679.

Colonies, British, martial law, 391, 392.

Colorado, privilege of habeas corpus in, 513.

Combatants, authorization necessary, 105.

Commander, political views of, modify powers, 71.
Responsibility, extreme measures, 97, 98.
Military, authority, 127, 128, 185.
Untrammeled, when, 181.
Preserve records and matters historical, 200.
When may alienate government property, 217.
Review of power of, 280.
Responsibility, military government, 305 to 332.
Authority of, under military government, limit, 305.
Responsibility of, 310.
Military, entitled to every intendment, 322.
Responsibility of, same as judge, 326, 327, 328, 329, 330, 331.
Responsibility of, appointing military commission, 337.
Will of, superseding all law, 424.
May extend authority, when, where, 503.
Must take initiative, martial law, 593.
Power appoint military commission, 610.
Responsibility of, martial law, 630, 656.
Caution of, in proceeding against civilians, 641, 642, 643.

Commander-in-chief, power of President, 14, 15.
Having all power, 457, 458.

Commercial dealers, warning of war, 287, 289.

Commission, military, criminal jurisdiction, 134.
Responsibility of commander appointing, 337.
Under authority of statute or custom of war, 339.
Based on statutory law and laws of war, 609.

Common law, trial of crimes under, 161, 162.
Rule of responsibility of officials in martial law, 431.
Supplemented by martial law, 441 to 458.
Defective in not having armed force, 441.
Recognizes customs of war, when, 448.
Aided by martial law, 449.
Inadequacy of, gave credit to martial law, 451.
Not suited to case of rebellion, 483.

Community, punishment, 204.
Hague Conference, 205.
Have right of self-defence, 480.
Laws of camp extend to whole, 581.
Protected by rule in re subordinates, 659.

Compulsory payments, effect on private debt paid to conqueror if due displaced state, 230.

Conduct of officials, martial law, may be inquired into by courts, 630.

Confiscation, a formal legal process as distinguished from summary appropriation, 173.
Views as to right of, 174.
Right to, judicially determined, 176.
Basis of right to, 177.
Congress source of power of, 179.
None in foreign war, by Congress, 180.
Acts of Congress in Civil War, and reason, 181, 182, 183.
Only by judicial decision, 184.
Laws, not conflict with laws of war commanders may not confiscate, 185.
Decisions of Supreme Court, 186.
Crimean War, 222.
Not of debts due enemy subject, 223, 224.
Treaty of Great Britian and United States, 224.
Incorporeal rights, 231.
Immovable property not for, 240.
Confederate acts, 244.

Congress, right to institute martial law, int., 23.
Implied powers, int., 24.
War without declaration, 6.
Political governments, 88.
Source of power to confiscate, 179.
No confiscation by, when, 180.
Right to discuss measures of President, 529.
Passed bill in nature of Indemnity Act, 533, 534.
Power to establish Federal martial law, 540.
Power of under U. S. Government, 541.
Martial law powers of, emphasized, 544, 545.
Exercised power to suspend habeas corpus, 585.

Congressional martial law, 540 to 553.

Congressional legislation, impugning power of President, 547.

Conqueror, will of, law in military occupation, 61.
Suspension municipal laws, 65, 66.
Prescribes the laws, 68, 69.
Courts installed by, 119.
Merciful, 117.
Regulates local justiciary, 123, 124.
Payments to, and effect, 230.
Title with possession, 238.
Title by seizure, 247.
Acquire title how, 249.
Paramount force, 250, 251.
Paramount force state property, 262.
As to implied obligations and the state, 269, 270.
Responsibility of, when and what, 313.
Expelled, hold territory, or surrender, when, 345.

Conquest, its criterion, 37.
Limits military government, 38.
Permanency by, treaty, 39.
Principles of, British Government, 56.
Permanent, not contemplated, 78.

Consideration, due officers, 637, 653.

Constitution, recognition of laws of nations, 9.
Article IV., Section 4, 555.

Constitutional policies, int., 17.

Contracts, precipitation of war not to avoid, 293, 294.

Confederacy, confiscation acts, 244.
Martial law under the, 370.
Experiences in martial law same as in U. S., 439, 440.
Used martial law, case necessity, 590.

Contributions, for destitute, 207.
Of property instead of enslavement, 209.
Equitable, support of army, 211.
German theory, 213.

Corporeal rights, same rule as incorporeal, 229.

Courts, election of conqueror, 119.
Criminal, establishment, 129, 130.
Of war, of civil jurisdiction, 131.
Of war, New Orleans, 132.
Of war, by plenary power, 141.
Provisional, plenary power, court record, 140.
Of claims, organization, 321.
Of war, distinguished from courts-martial, 333.
Of war, how invoked in early U. S. service, 334.
Of war, how invoked by Gen. Scott in Mexico, 335.
Of war, invoked under customs of war, 336.
Of war, responsibility of members of, 338.
Of war, relief of responsibility for members of, 340.

Courts, of war, jurisdiction of, as to persons, 341.
Of war, cognizance of what cases, 342, 343.
Those enforcing martial law answerable before the, 374.
Of martial law, to try certain cases, in England, in U. S., 393, 394.
Though able to sit, may be succeeded by martial law, when, 463, 464.
Have right of self-defence, 480.
Of justice in Baltimore in 1861, 487.
How affected by disloyalty, 495.
Construe law, how, 533, 534, 535, 536.
Attitude of, enforcing martial law, 602, 603, 604.

Court-martial, distinguished from war court, 333.
Rules advisable for martial law courts, British, 418.
Not interfered with by martial law courts, 611.
Responsibility attaches to martial law courts, 613.

Crimean War, no confiscation, 222.
Rule of trade in, 276.

Crimes and misdeeds, punished under Articles of War, 147.

Criminal offences, trial of neutrals, 186.

Customs of war, controls invoking of war court, 336.
Or statute, gives authority to military commission, 339.
Common law recognizes, 448.
Immunity following from, 636.
To govern officer, 648.

Cuba, occupation of, 63, 64.
Rule of military occupation, 73, 74.
Character of military government, 89.

D

Dagupan Railroad, Luzon P. I., ruling in re military government control, 193.

Dates, of termination of Civil War, 353.

Death, great responsibility, 447.

Dealers, commercial, should be warned of war, 287, 288.

Debts, of enemy not confiscated, 223, 224.
Private, effect on, payment to conqueror, 230.
Due old government and paid to new government, 252.

Deceptive nature, of illustrations of English history, 506.

Declaration, martial law not necessary to effect it, 580.

De facto government, acts of, depend on outcome of contest, 242, 243, 244, 245.

Defeat, all who attempt to, martial law, may be arrested, 589.

Defence, to civil authority by the military, 551.

Despotism, military, reconstruction of, 549.

Destruction, or use of property creates distinction in payment, 208.
Of private property, as well as appropriation, 217, 218.
Of private property as punishment, 219, 220.
What property may be, 221.
Wanton, when allowable, 259, 260.
Right to, same as to appropriation, 265.
Of warlike stores, 266.
Private property, 267, 268.

Dicey on subordinates' rule, 671.

Discipline, of camp, original martial law, 363, 364.

Discretion, of President when State calls for assistance, 561.
Of authority in the field, English rule, 583.
Of military, in re rules of evidence, 625, 626, 628.
Of authority, officials to keep within, 631.

Disinclination, of officials, cause for martial law, 465.

Disloyalty, cause for military rule, 488, 489.
Inimical to courts, 495.

Disposition, on part of some to question legality martial law tribunals, 606.

District, martial law, responsibility for arrest outside of, 509, 510.
Of Columbia Civil War, military control, 538, 539.

Divisions, in Missouri, 520.

Documents, rule for seizure of incorporeal rights, 236.

Domestic, martial law is, 358.
Martial law, civic responsibility characteristic of, 381.
Disturbances, military called in, in U. S., 498.
Violence, case of, Federal Government should be called in, 558.

Dominant power, decides character of government, 20, 21.
May authorize trade when, 272, 273.
Regulates introduction merchandise and persons, 291.
Government concedes what rights, when, 350, 351, 352.

Doroteo Cortes, Manila, case compulsory absence, 233.

Drafts, evasion of, martial law measures taken, 527.

Drastic measure, martial law, 244, 245.

Duty, of military government, Int., 12, 42.
Of citizens to suppress lawlessness, 444.
Of officers, protection, 533, 534.
And patriotism, course for officers to pursue, 654.
Of military, 689.

E

Efficient system, in administering martial law, 584.

Elphinstone vs. Bedreechund, 151.

Emergency, in case of, common law recognizes customs of war, 448.
In case of, officers to have consideration, 653.

Enemy, territory and military occupation, 49 to 56.
Rule in re property of, 169.
Right to seize property of, 170.
Who has right to seize property of, 171.
Debts not confiscated, 223, 224.
Property of, rule for confiscation, 225, 226.
Property of, under military occupation, 227.
Property of, at purchaser's risk, 237, 239.
Property of, right to destroy, 265.
Exception to rule of no trade with, 292.
Proximity of, cause for martial law, 477.

Enforcement, of military government, 75 to 91.
Martial law, court's attitude, 602, 603, 604.

English jurisprudence, origin martial law, 361, 362, 363, 364.
Bills of indemnity, 677.

English history, deceptive nature of, 506.

English rule, responsibility in the field, 583.

Enslavement, property taken instead of, 209.

Evasion, of draft, martial law measures, 527.

Evidence, rules of, before military tribunals, 624.
Rules of, not part of business of military officer, 625, 626, 628.
Rules of, British, 627.

Evidences, of lawless spirit in the land, 577.

Ex contractu, actions, 316.

Ex delicto, actions, 316.
Actions, case of Mitchell vs. Harmony, 318.

Executive, implied powers of, re martial law, 369.
State, martial law, occasion necessity, 567, 568.

Executive officers, to be sustained, 635.
Consideration for, emergency, 653.

Exempting property from seizure and levies en masse, 212.

Exemplary damages, not assessed if superior acts in good faith, 663.

Exercise of military authority, not cause for alarm, 688.

Ex-members army, where triable, 148.

Expediency, not affect rule non-intercourse, 279, 280.

Expediency, right to rebel a question of, 296, 297, 298.
Martial law eschews, 459.

F

Failure of civil administration creates necessity martial law, 459.
Posse comitatus, resort to military, 579.

Fears of early patriots re martial law, 432.
That martial law, an assumption of authority, 450.

Federal authority, to institute martial law, 497 to 539.

Federal matters, President independent, 501.

Federal martial law, Congress power to establish, 540.
Distinct from that of States and Territories, 554.

Federal cognizance, republican government, 556, 557.

Federal protection, to be called by State, 558.

Federal, limit of, authority in State, 565.

Federal court, proper forum for trial Federal officers, 652.

Felony, rule responsibility in case of attempted, 446.

Females, treatment of, 96.

Force, paramount, rights of conqueror, 250, 251.
In re state property, 262.

Force, armed, common law lacked, 441.
Common law, 442.

Force, physical, disloyalty as inimical to courts as, 495.

Force, justified in attaining ends of martial law, 587, 588.

Foreign territory, military government, 11.

Foreign wars, no confiscation by Congress, 180.

Foreign state, no necessity to complicate state, 306.

Foundries, right to destroy, 266.

France, occupation of, 17.
Proclamation King William, 94.
German practices in, 100.
Wellington in, 300.

Franco-German War, ruling in re military government control, 192.

Friendly soil, foreign army, 114, 115.

G

Gen. Gage, martial law in Boston in 1775, 453, 454, 455.

General of army, authority augmented, 548.

Generous policies, when misunderstood, 523.

Germany, practices in France, 100.

Germans, at Strasburg, 301.

German theory, of contributions, 213.

Government, war powers, limit, 10.
Defects, acts of, depend on what, 242, 243, 244, 245.
Debts due old government paid to new, 252.
Military occupation, rights of old government revert, 253, 254, 255, 256, 257.
Ousted, claims of, 263, 264.
Determines course in civil war, 270.
Property of, may be alienated when, 271.
Home, controls military governor in re trade, 277.
Necessities of, and personal rights under martial law, 383, 384.
Under different, martial law varies, 386.
Power of, to exercise martial law, 438.
Resistance to, met by martial law, 505.
United States, power of Congress, 541.
Great Britain, U. S. treaty, in re confiscation, 224.
Guarantee, of Art. IV., Sec. 4, Constitution, 555.
Guerillas, military occupation, 45, 102. And levies en masse, 106 to 112.
Guerilla warfare, 103.
Inefficient against regular operations, 299, 302.

H

Habeas corpus, suspension of, in New Mexico, 512.
Privilege of, in Colorado, 513.
Close relation in power to suspend and martial law, 526.
President and Congress exercised power to suspend, 588.
Hague Conference, appropriation, 199.
On punishment of community for act of one, 205.
Hampton, McConnell vs., 642, 643.
Not a precedent to-day, 645.
Hardship of war, relieved by legislation, 319, 320.
Hardship subordinate rule, modified, 660, 661, 662.
Harmless acts, under civil conditions, may be offences martial law, 586.
Harmony, Mitchell vs., 318, 332.
Hostages, 206.
Hostile territory, rule for confiscation, 225, 226.
Hostilities, active, war may exist though, cease, when, 354.
Human tendencies, int., 11.

I

Ignorance, of laws of evidence by military men, 625.
Illegal, orders of superior executed by subordinates, 660, 661, 662.
Implied obligations, of conqueror to private and state property, 269, 270.
Immunity, in customs of war, 636.
Incorporeal rights, rule same as to corporeal, 229.
Purely personal, not confiscable, 231.
What may be seized, 235.
Rule for seizure, 236.
Individuals, have right of self-defence, 480.
Indemnity bills, 677 to 690; see Bills of indemnity.
Indemnity Act, passed by Congress, 553, 554.
Inertness of officials, may justify martial law, 473, 474, 475.
Inhabitants, all enemies, 92 to 112.
Initiative, taken by commander, when, 593.
Ireland, Parliamentary martial law in, 382.
Martial law in, 388.
Irresponsible officials, martial law, not to set up, 426.
Institutions, treated with respect, 522.
Instructions for Armies in the Field, 118, 302.
Insurrections, and duty of society, 23.
Against military government, 296 to 304.
Measures to take in case of, 303.
Policy of U. S. in Philippines, 304.
International codes, comparisons, int., 8, 9.
Intendment, construed favor commanders, 322.
Intercourse, of trade stopped by war, 285.
Time when, and where, becomes illegal, 289, 290.
Exceptions to rule in re enemy, 292.
Restrictions, a rule of war, founded on public policy, 295.
Invaded country, tribunals of, have no jurisdiction over members of invading army, long occupation does not change this rule, 149, 150, 151, 152, 153, 154.
Invading army, not subject tribunals of invaded country, long occupation does not change this rule, 149, 150, 151, 152, 153, 154.
Invasion, may justify martial law, 466, 467, 468, 469, 470.
Justification for martial law, 478, 479.
Of State, Federal Government assists, 557.
Invoking, of martial law tribunals, 620.

J

Jamaica, martial law courts of, royal commission, 618.
Judicial opinion, in U. S. re martial law power, 596, 597, 598.

Judicial decisions, confiscation, 184.
Judicial system, in New Mexico, 120.
Of Gen. Scott in Mexico, 121, 122.
Judicial tribunal, of deposed state, efficacy of judgment after military occupation, 168.
Judiciary, local, in territory of rebels as belligerents regulated by conqueror, 123, 124.
Judiciary war, Memphis, Tenn., 126.
Judges, officials acting as, have discretionary powers, 323.
Responsibility of commanders same as, 326, 327, 328, 329, 330, 331.
Of necessity for martial law, England, 414.
Of necessity for martial law, state, when, 429.
Those who execute martial law to be, of principles, 471.
In Louisiana case, 1814 and 1815, 600, 601, 602.
Judgments, efficacy, supreme judicial tribunals of state, when, 168.
Judgments, in peace and in turbulence, 649.
Jurisdiction, military, int., 1.
Effect of abandonment by expelled state, 46.
Of war courts extended, 139.
Civil, of war courts, 131.
Criminal, military commission, 134.
General, provost courts, war courts, 135, 136, 137.
Of tribunals of invaded country no control over member of invading army, long occupation does not change rule, 149, 150, 151, 152, 153, 154.
Of war court as to persons, 341.
Limit of Federal, in State, 565.
Martial law courts, depend on, what, 612.
Martial law courts, territorial limit, 614.
Limit in re time of offence, 615.
Of military tribunals, malicious acts, 676.
Justice, substantial, the end of martial law courts, 621.
Justification, of martial law, 439 to 496.
Of martial law, 462.
Terror may be a, for martial law, 472, 473, 474, 475.
Self-defence a, for martial law, 481.
Attitude of people Louisiana, necessitated martial law, 482.
Martial law, when, 524.
Of official and private citizen, 632.

K

Kentucky, Lincoln's course in, 492, 493, 494.
Conditions in, in 1864, 496.
Keynote, martial law, necessity, 582.
King William, France, proclamations, 94.

L

Land and sea, property captured on, 200.
Law, of nations, 9.
Will of conqueror is, when, 61.
As to persons and property, 116.
Martial, 357 to 690.
Military, 360.
All, abolished, will of commander, 424.
Strictly construed, what and how, 533, 534, 535.
Governing those interfering with martial law, 646.
Of the camp, 581.
Laws of evidence, 624, 625, 626, 627, 628.
Laws, applicable to neutrals, when, 163, 164, 165.
Political, cease on occupation, 67.
Of occupation, to whom applicable, 142.
Laws of war, limit government war powers, 10.
In occupied territory, 113 to 168.
Those subject to, 143, 159.
Commanders under, 187.
Confiscation law shall not interfere with, 185.
Destruction under, when, 259, 260.
Limit commanders, 305.
Direct responsibility of commanders, 313.
Basis of martial law, belligerents, 380.
Military government as part of, confounded with martial law, 425.
Military commission based on, 609.
Lawlessness, duty of citizen to suppress, 444.
Frowned upon by courts, martial law, 604.
Latent spirit of rebellion, martial law measures, 546.
Legal life, military government, 25.
Legal construction, of Articles of War, 157.
Legality, of military occupation, 34, 35, 36.
Of acts of government officers may be inquired into, 314.
Martial law tribunals questioned, 606.
Martial law tribunals, 607.
Legislation remedial, to meet hardships of war, 319, 320.
Legislation, impugning power of President, 517.
Legislative martial law, what indemnified, 678.
Legislature, has right self-defence, 480.
Levies en masse, guerillas, 106 to 112.
Exempted property, 212.
License, President power to, trade, 281.
Bill of rights not a cloak for, 591.

Limit, of authority Federal jurisdiction in State, 565.
Of authority, officials to act within, 631.
Jurisdiction, in re time of offence, 615.
Limitations, of military government, 32.
Lincoln, course of, in re Rebellion, 491.
Course of, necessary in Kentucky, 492, 493, 494.
Proclamation of, September 15, 1863, 530.
Local administration, effects of occupation on, 57 to 74.
Local disturbances, martial law invoked in, 379.
Local authorities fail, President to call in the military, 499, 500.
Loyalty, doubtful, of people Louisiana necessitated martial law, 482.
Louisiana case, 1814-1815, attitude of judges, 600, 601, 602.

M

Magazines, right to destroy, 266.
Manila, capture of, sovereignty Spain, 48.
Doroteo Cortes, compulsory absence, 233.
Smith, Bell & Co., reverting rights, 254.
Martial law, limit, int., 3, 4.
Int., 13 to 25.
Part II., 357 to 690.
Definition, 357.
Domestic and unwritten, 358.
Confounded with military law, 360.
Origin, 361, 362, 363, 364.
Supplements civil law, 365.
Applies to soldiers and civilians both, 366.
Practice under Charles I., 367.
Scope of, 368.
Implied powers of executive re, 369.
Southern Confederacy, 370.
Theatre of, not necessarily of war, 372.
Obtains when civil authority fails, 373.
Those who enforce, answerable before courts, 374.
When to be invoked, 375.
Resort to, a common practice, 376.
As belligerent right, 377.
Who judges of necessity for, 378.
Invoked to suppress local disturbance, 379.
As belligerent right based on laws of war, 380.
Domestic, what characteristics, 381.
Parliamentary in Ireland, 382.
Necessities of government and rights of people under, 383, 384.
Times of peace in U. S., 384.
When to be invoked, 385.
Martial law, under English jurisprudence, 386 to 496.
Varies under different governments, 386.
Under British Government, war conditions, 387.
In Ireland, 388.
Features of, statute, 389, 390.
In British colonies, 391.
Acts in colonies, prosecuted at home, 392.
Courts, to try offences after active disorder, 393, 394.
British tribunals, character of, 395.
British, military act, those subject to, 396.
British, royal prerogative, 397.
British, distinction, military law, 398.
British, English jurisprudence, 399, 400.
British, in time of peace, 401.
British, may obtain, when, 402, 403.
Unknown to British jurisprudence, though not experience, 404.
British, idle fears of domination of, 405.
British, obtains on failure of civil administration, 406, 407.
British, principles for enforcement of, 408, 409, 410, 411, 412, 413.
British, who judges of necessity, 414.
British, civil responsibility of military officer of, 415, 416.
British, rules of courts-martial, to be used in, 418.
Methods of enforcing, vary, 419.
Theory of, in U. S., 420 to 440.
In U. S., in England, 420.
Attorney-General's definition of, 421, 422, 423.
Function of officer executing, 422, 423.
Confounded with military government, etc., 425.
Not setting up irresponsible officials, 426.
View of Supreme Court, 427, 428.
Held illegal when, 428.
Legally established, and abuse of power, 430.
Necessity for martial law in 1814-15 in New Orleans, 434.
Universal demand dictates measures, 435.
A war measure in U. S., 436.
Offspring of necessity in U. S., 437 to 440.
Experience of Confederacy and U. S., 439, 440.
Supplements common law, 441 to 458.
Came to aid of common law, 449.
Fears of, usurping authority, 450.
Inadequacy of common law, credited the, 451.
In Boston, by Gen. Gage in 1775, 453, 454, 455.

Martial law, a war measure in American colonies, 456.
Necessity overwhelming justification, 459.
Military law supreme, 460.
Necessity for, varies, 462.
When necessity may exist, 463, 464.
Disinclination of civil officials cause for, 465.
Justified by invasion, 466, 467, 468, 469, 470.
Principles for judges of, 471.
Justified by terror, 472.
Justified by secret machinations, 473, 474, 475.
At New Orleans after peace, 476.
Proximity of enemy, cause for, 577.
Invasion the necessity for, 478, 479.
Justified under right of self-defence, 481.
In Louisiana, 482.
By Federal authority, 497 to 539.
Invoked by Federal or State authority, 497.
U. S. Supreme Court on State exercising, 504, 505.
U. S. Supreme Court held, a state of war, 507.
Under, military not subordinate to civil authorities, 508.
District, responsibility for arrest outside of, 509, 510.
During reconstruction, 511.
State of Missouri, 515, 516.
When may be exercised, 517, 518.
Continued as necessity, during war, 519.
Principles enforcing, defined, 521.
Respect paid by, 522.
Generous policy of, 523.
Justified when, 524.
Baltimore in 1863, 525.
Close relation power to order, and suspension habeas corpus, 526.
Measures taken in evasion of draft, 527.
Right of arrest, trial, punishment, 528.
Proclamation of Lincoln, September 15, 1863, 529.
Measures revoked by President, Civil War, 537.
Congressional, 540 to 553.
Congress, power to establish, 540.
Reconstruction, 542.
Military administration of reconstruction, 543.
Powers of Congress, emphasized, 544, 545.
States and Territories, 554 to 583.
In States and Territories, distinct from Federal, 554.
Authority of President when called in State, 566.
Necessity, Confederacy, 570.
In Territories of Union, 571, 572, 573, 574, 575.
Martial law, New Mexico, Arizona, 575.
Declaration of, not necessary to effect, 580.
Necessity, keynote of, 582.
Administration of, 584 to 604.
Should be administered efficiently, 584.
Offences and how dealt with under, 585.
Offences under, and civil conditions, 586.
Force to attain ends of, justified, 587, 588.
All attempts defeat, subject to arrest, 589.
Authority, Webster's view, 592.
Powers, change in judicial opinions in U. S., 596, 597, 598.
Courts enforcing, 602, 603, 604.
Tribunals, 605 to 629.
Tribunals, correspond to offences of the times, 605.
Tribunals, legality of, questioned, 606.
Tribunals, power to accomplish purpose of, 607.
Courts not to interfere with courts-martial, 611.
Jurisdiction of, depends on what, 612.
Courts, responsibility courts-martial attach to, 613.
Courts, territorial limits, jurisdiction, 614.
Courts, follow procedure of courts-martial, 616.
Responsibility, opinions of officers as to customs of war of great weight, 617.
Courts of Jamaica, character, 618.
Courts, not same precision as in civil courts, 619.
Tribunals, when invoked, 620.
Courts, adjustment procedure, 621.
Only instituted by military in theatre of war, 623.
Tribunals, rules of evidence, 624, 625, 626, 627, 628.
Responsibility of commanders, 630 to 656.
Necessity for, may be inquired into by courts, 630.
Measures, civil courts should remember, 644.
Bills of indemnity, 667 to 690.
What indemnified, 678.
Legally instituted, bill of indemnity statute of repose, 680, 681.
Martin vs. Mott, rule of obedience in, 665.
Malicious abuse of authority, officials guilty of, 631.
Malicious acts, of members of tribunals, 676.
Measures, which survive military occupation, 195.
Measures of war, martial law in U. S., 436.

Measure of war, martial law a, in American colonies, 456.
Measures, martial law, evasion of draft, 527.
Measures, of President subject to Congressional discussion, 529.
Measures of relief, military supported by loyal civil authorities, 552, 553.
McClellan, Gen., orders in Peninsular campaign, 125.
McConnell vs. Hampton, 642, 643.
Not a precedent to-day, 645.
Mercy, of conqueror, 117.
Of American armies, 118.
Merchandise, entrance of, into territory of military occupation, 291.
Memphis, Tenn., seizure of rents, 47.
War judiciary, 126.
Instance of authority of commander, 128.
Merryman case, opinion Chief - Justice Taney, 490.
Mexican War, instructions for supply, 79.
Mexico, judicial system Gen. Scott, 121, 122.
Conduct of Gen. Scott invoking war court, 335.
Military, when judges necessity for martial law, 378.
When necessary to resort to, 485, 486, 487.
Employed in early U. S. to quell disturbances, 498.
When, not subordinate to civil authorities, 508.
Military, the, regard for civil administration, 550.
Supported by civil authorities, 552, 553.
Statute authorizing, to pay regard to civil jurisdiction, 60.
President determines under whom, troops shall act, 562, 563, 564.
Placed about State authorities, when, 569.
Increase in demand for, 576.
Resorted to on failure of posse comitatus, 579.
Upheld by courts, when, 602, 603, 604.
Only institute martial law at theatre of war, 623.
When have rights and obligations of war, 623.
Exercise of martial law over civil community not attractive to, 689.
To be sustained, when, 690.
Military administration, of reconstruction, martial law, 543.
Military authority, supreme when, 430.
Over civil community, 622.
Military commission, criminal jurisdiction, 134.
Based on statutory law and laws of war, 609.
Territorial limit, 614.
Procedure, 615.
Military control, assumption of, in Arizona, 514.
District of Columbia, Civil War, 538, 539.
Military domination, fears of, England, 405.
Military despotism, reconstruction acts, 549.
Military duty, officers protected in their, 533, 534.
Done in military way, 656.
Military governor, prescribes the laws, 69.
Appointment of, 84, 85, 86, 87, 88.
Attitude of, in re trade, 277.
Military government, int., 1 to 12, 13, 14.
1 to 356.
Of cities, 133.
Control of and exceptions, 189, 190, 191, 192, 193.
Destruction of property under, 219, 220.
Old State rights, when revert, 253, 254, 255, 256, 257.
Authority of commander, limit, 305.
Those enforcing, may be investigated, 314.
Vigilant and prompt, 324.
Tribunals, 333 to 343.
When ceases, 344 to 356.
Confounded with martial law, as part of law of war, 425.
Military law, 357 to 385.
Confounded with martial law, 360.
British, distinction between martial law and, 398.
Military measures, in Southern States, 546.
Military occupation, extent of legality when, operation, 33, 34, 35, 36.
And blockade, 42.
And tactics and by force, 43, 44, 45.
Enemies' territory, 49 to 56.
Laws of, to whom applicable, 142.
Laws applicable to neutrals, 163, 164, 165.
Efficacy of judgments, of courts of former government, 168.
Measures which survive, 195.
Enemy's property under, 227.
Effect on property, 234.
What not confiscable under, 241.
Property purchased under, 245.
State rights revert after, 253, 254, 255, 256, 257.
Rule in re merchandise taken into, 291.
Military officers, enforce occupation, 75.
State sustains, 315.
Civil officers, British, 416, 417.
Respect civil authorities, 433.
Protected by Indemnity Act, 533, 534.
Military power, abuse of, 432.
When to be invoked by President, 499, 500.

Military responsibility, 311. 312; see Responsibility.
To neutrals, to state subjects, 317.
Rule ameliorated in modern times, 664.
Military rule, disfavored by colonies, 452.
Disloyalty a cause for, 488, 489.
Military system, demands obedience, 657.
Military tribunals, summary authority, 608; see Tribunals.
Responsibility of member of, 673, 674.
Missouri, martial law in, 515, 516.
Divisions in, 520.
Mitchell vs. Harmony, 318, 332.
Mobs, New York city in 1863, 461.
Moderation, to conquered not obligatory, 95, 96.
Municipal laws, 62, 63, 64, 65, 66.
Mutiny Act, British martial law, 396.

N

Napoleon in Spain, 45.
Napoleon, wars of, property 256.
Nations, have right of self-defence, 480.
Navy officers, responsible to President, 308.
Necessity, rule of, in Mitchell vs. Harmony, 332.
Determining when military government ceases, 344.
Of martial law, 375.
Of martial law, who judges, 378.
Of government and rights of people under martial law, 383, 384.
Makes martial law part of English jurisprudence, 400.
Of British martial law in times of peace, 401.
Of British martial law, who judges of, 414.
For martial law, when State is judge of, 429.
For martial law, in New Orleans in 1814 and 1815, 434.
Cause of martial law in U. S., 437 to 440.
Gave martial law acceptance, 451.
Justification martial law, 459 to 496.
Of martial law, varies, 462.
When may exist, for martial law, 463, 464.
Disinclination of officials, cause, martial law, 465.
Of repelling invasion cause for martial law, 478, 479.
When, for military, 485, 486, 487.
Martial law continued as, during war, 519.
Martial law, State executive, 567, 568.
Martial law, Confederacy, 570.
Keynote martial law situation, 582.
For martial law, may be inquired into by courts, 630.
For sustaining officers, 635.
Neagle, Supreme Court in re, 651.
New Mexico, President as commander in-chief, 15, 16.
Judicial system, 120.
Suspension of habeas corpus in, 512
Martial law in, 575.
New Orleans, occupation of territory, 82.
War courts, 132.
Martial law in 1814-1815, 434.
Martial law, 476.
New York city, mobs in 1863, 461.
Neutrals, laws applicable to, under military occupation, 163, 164, 165.
Their trial for criminal offences, 166.
Transitory actions accruing to, 167.
Responsibility to neutrals, 317.
Non-combatants, duty of, 99, 100.
Non-intercourse, expediency no effect on rule of, 279, 280.

O

Obedience, to lawful orders of superior, 657.
Rule of, in Martin vs. Mott, 665.
Obligations and rights of war, to be followed by military, 656.
Occupied territory, what law prevails, 113 to 168.
Officers, entitled to every consideration, 637.
Entitled to support, 647.
Must be governed by customs of war, 648.
Protected by statute, 650.
Officers, Federal, triable in U. S. courts 652.
Officials, disadvantage of two sets of, 85, 86, 87, 88.
State sustains military, 315.
Responsibility of, in judicial matters, 323.
Responsibility of, in British military law, 415, 416.
Military and civil, British martial law, 415, 416, 417.
Functions of, executing martial law, 422.
Officials, irresponsible, martial law not to set up, 426.
Officials, responsibility of, in martial law extension of common law rule, 431.
Disinclination of civil, may be cause for martial law, 465.
Protected by indemnity act, 533, 534.
Responsibility, of martial law, 630, 631.
Justification of, 632, 633.
Sustained by Supreme Court, 634, 635
Offences, trial of neutrals, 166.
After active disorder, martial law court, 393, 394.
Under martial law, 585, 586.
Under martial law, tribunals, 605.
Time when, limit jurisdiction, 615.
Omnipotence, of Congress under U. S. Government, 541.

Open resistance to laws, authority of martial law, 594, 595.
Operations, regular, inefficiency guerilla warfare, 299-302.
Opinion, in Louisiana case, 1814 and 1815, 600, 601, 602.

P

Parliamentary martial law, Ireland, 382.
Parties, in public war, 4.
Compulsorily absent not bound, 232, 233.
Parties, private, immovable property not confiscable, 240.
Patriots, fear of martial law by early, 432.
Patriotism, proper course for officer, 654.
Payment, to new government of debts due old government, 252.
Peace, fully established before war ceases, 354.
Peace, times of, martial law in U. S., 384.
Demand for martial law in England, 401.
Armed force, 443.
Martial law at New Orleans even after, 476.
Peninsular campaign, Gen. McClellan's orders, 125.
People, war brought home to the, 286.
People subjugated, responsibility of commander toward, 313.
People, rights of, when civil government succeeds military, 350, 351, 352.
Persecutions, officers protected from, 533, 534.
Persons and property, laws affecting, 116.
Persons, in territory of military occupation, 291.
Jurisdiction war courts as to, 341.
Petition of right, when martial law obtains in England, 401.
Philippines, illustrating government, 21.
Character military government, 90.
Guerilla warfare, 103.
Insurrection, revenues claimed, 264.
Insurrection policy of U. S., 304.
Pillage, unlawful, 210.
Plenary powers, provisional courts, courts of record, 140.
Appoint war courts, judicially settled, 141.
Political views, modify powers of commander, 71.
Political governments, experimental, 87, 88.
Police power, depends on circumstances, 359.
Policy, foundation of, in occupation, 80, 81.
Military, determined by whom, 278.
Policy, of trade, Treasury Department, 282.
Of U. S. in re insurrection in Philippines, 304.
Local, in re territory of rebels, 307.
Of U. S., as to rights of people after military government, 351, 352.
Generous, misunderstood, 523.
Involved in bills of indemnity, 682.
Possession, rule for seizure in, incorporeal rights, 236.
Title of conqueror only on, 238.
Posse comitatus, weakness of, 578.
Failure of, 579.
Post liminium, what vests title, 228.
Powers, express and implied, 7.
War, 8.
What, determines policy, 278.
Powers, implied, of executive in re martial law, 369.
Powers, military, fears of, 432.
Powers of government, to exercise martial law, 438.
Powers, all, placed in commander-in-chief, 457, 458.
Prejudice, early, disfavored military rule, 452.
Preservation, of rights of all, question, 655.
President, meeting war emergency, 5.
Powers as commander-in-chief, 14, 15.
Political governments, 88.
War power of, 138.
Authority to license trade, 281.
Army and navy officers responsible to, 308.
Authorized to call in the military, when, 499, 500.
Independent in Federal matters, 501.
Authority of, may be entrusted to subordinates, 502.
Confirmed martial law in Missouri, 516.
Subject to Congress, when, 529.
Revokes martial law measures, end Civil War, 537.
Authority of, impugned by Congress, 547.
Decides what State authorities to recognize, 559.
Exercise discretion when State calls for assistance, 561.
Determines under whom the military to act, 562, 563, 564.
Authority of, complete, when called in by other State, 566.
Exercised power to suspend habeas corpus, 588.
President Lincoln, course of, in Rebellion, 491.
Principles, applicable to military government, 30.
Applicable to martial law, by whom, 471.
Enforcing martial law defined, 521.
For enforcing British martial law, 408, 409, 410, 411, 412, 413.

Procedure, military commission same as court-martial, 616.
Of martial law courts, 621.
Proclamation, not necessary, if issued, effect of, 24.
Of Lincoln, September 15, 1863, 530.
Property, private, rights, 169 to 245.
Appropriating, 172.
Property rights, in vanquished states, 175.
Property, rule of enemies', 169.
Right to seize enemies', 170.
Who has right to seize enemies', 171.
When belongs to State, and how, 197, 198.
On land and sea, 200.
Taking of, as coercive measure and exceptions, 201, 202, 203.
Taken in lieu of enslavement, 209.
Pillage of, unlawful, 210.
By contribution, 211.
Property, real and personal, no distinction in taking, use or destruction is the distinction, 208.
Property, exempted, levies en masse, 212.
Taken on battle-fields, 214.
Private, 4th rule, may not be seized, 216.
Private, destroyed as well as appropriated, 217, 218.
Destroyed as punishment, 219, 220.
Kinds that may be seized or destroyed, 221.
Of enemy, rule for confiscation, 225, 226.
Enemy's, under militar- occupation, 227.
Movable private, what vests title "post liminium," 228.
Rules of corporeal same as incorporeal, 229.
Immovable, under military occupation not ipso facto, 234.
Immovable, when may be seized, 235.
Rule for seizure of incorporeal rights, 236.
Purchaser of enemy's, at own risk, 237, 238, 239.
Immovable, of private parties not confiscable, 240.
Private, under military occupation may be alienated unless forbidden, 241.
Private, acts of de facto government in re, 242, 243, 244, 245.
Purchased under military occupation, 245.
Private, to be protected from unnecessary destruction, 267.
Private, obligation of conquerors, 269, 270.
Public, 246 to 271.
Of State, seizure, no tenderness, 246.
Of State, seizure gives title, 257.
Discriminates in movable and immovable, 248.
Property, title acquired by conqueror how, 249.
Reversion of rights in, when, 253, 254, 255, 256, 257.
Public, wanton destruction, when, 259, 260.
Of historical value, to be preserved, 261.
Immovable state, paramount force, 262.
Right to destroy same as to appropriate, 265, 266.
Public, obligation of conqueror, 269, 270.
Government, to be alienated when, 271.
Promptness, military government to exercise, 324.
Prosecutions, at home, for martial law acts in colonies, 392.
Protection, and allegiance of inhabitants, 26, 27, 29, 30.
To officers by Indemnity Act, 533, 534.
Of State by Federal government, 558.
Of officers by statute, 650.
Provisional courts, plenary powers, courts of record, 140.
Provost courts, general jurisdiction, a war court, 135, 136, 137.
Proximity, of enemy, cause for martial law, 477.
Public policy, foundation, rule of non-intercourse, 295.
Punishment, of community for act of one member, 204.
Of community for act of one member, Hague Conference, 205.
Punishment, right of, martial law, 528.
Purchasers, at own risk, 237.
Purchases, under Confederate confiscation acts, 244, 245.
Under military occupation, 245.

R

Rebel, right to, one of expediency, 296, 297, 298.
Rebels, territory of, treated as belligerents in local justiciary, 123, 124.
Territory of, local policy.
Rule of confiscation, 178.
Rebellion, common law not suited to case of, 483.
Lincoln's course, 491.
Spirit of, cause for drastic measures, 546.
Reckless spirit, abroad in the land, 577.
Reconstriction, Civil War, martial law during, 511.
Act, amounts to martial law, 542.
Military administration of, martial law, 543.
Acts, military despotism, 549.
Regular Army, deference to civil authority, 551.
Relation, between power to suspend habeas corpus and to order martial law, 526.

Relief, for military, support of civil authorities, 552, 553.
Reluctance, cause of drastic measures martial law, 544, 545.
Remedial legislation, to meet hardships of war, 319, 320.
Rents, seizure of, 47.
Repressive measures, in insurrections, 304.
Reprisal and retaliations, attempts to avoid, 55.
Republican government, what constitutes, matter of Federal cognizance, 556, 557.
Responsibility, of commanders, 305 to 332.
Of Army and Navy officers, 308.
Of subordinates, 309.
Kind of, of commanders, 310.
Military, 311, 312.
Of conqueror, when and what, 313
Military, to neutrals and subjects of dominant state, 317.
Of official in judicial capacity, 323.
Rule for, of subordinates, 325.
Rule for, of commanders, same as of judges, 326, 327, 328, 329, 330, 331.
Of commander appointing military commission, 331.
Of members of war courts, 338.
Rule of, members of war court, 340.
Civic, characteristic of martial law, 381.
Civil, of military officer of martial law, England, 415, 416.
For abuse of power, martial law, 430.
Of official, common law rule, martial law, 431.
For accidental killing, 445, 446, 447.
For arrests out of martial law district, 509, 510.
English rule for, in the field, 583.
Court-martial attaches to martial law courts, 613.
Of commanders, martial law, 630 to 656.
Of officials, 630, 631, 632.
Rule of, in ancient times, 638.
Of subordinates, 657 to 676.
Military, in modern times, 664.
Responsibility rule, of subordinate and superior, 666.
Of subordinate, 667 and 668.
Of subordinate special, 669, 670, 671.
Of subordinate not absolute, 627.
Responsibility, of member of military tribunals same as orders to an individual, 673, 674.
Of tribunals, 675, 676.
Revenues of property, in military occupation do not belong to ousted government, 263, 264.
Resistance to laws, authority martial law, 594, 595.
Right, to establish military government, 19, 22.
Right, of people when civil government succeeds military government, 350, 351, 352.
Of the few, gives way to preservation of the many, 371.
Of people, necessities of government under martial law, 383, 384.
Of arrest, trial and punishment, martial law, 528.
Rights and obligations, of the military, 656.
Riot Act, attempt to quell rebellion, 484.
Risk, purchaser takes at own, 237, 239.
Royal prerogative, British martial law, 397.
Rules of evidence, before martial tribunals, 624.
Military officers, 625, 626, 628.
British, 627.

S

Sacking, cities of Spanish Peninsula, 215.
Sacrifice, of rights of few, when, 655.
Salutary character, of subordinates' rule, 667.
Scott, Gen., judical system in Mexico, 121, 122.
Conduct in Mexico, invoking war court, 335.
Secret machinations, may justify martial law, 473, 474, 475.
Authority martial law, 594, 595.
Seizure, 4th rule private property, 216.
What may be subject of, 221.
When property may be subject of, 235.
Of state property, 246.
Gives title of state property, 247.
Of works of art, 258.
Self-defence, a right of courts and others, 480.
Justification of martial law, 481.
Severity, of subordinates' rule, 659.
Smith, Bell & Co., Manila, old State rights revert, 254.
Smith, Thorington vs., 243.
Society, duties of, under insurrections, 23.
Allegiance and protection basis of, 29.
South Africa, character military government, 91.
Guerilla warfare, 103.
British experience, war courts, 343.
Southern States, spirit of rebellion caused drastic measures, 546.
Soldiers and citizens, laws of occupation applicable to, 142.
Soldiers and camp-followers, subject to laws of war, 143.
Soldiers, amenable to laws of war, 147.
Soldiers and civilians, martial law applies to both, 366.
Spain, ousting severeignty, capture of Manila, 48.

Spain, military government in, 72.
Spanish Peninsula, sacking cities, 215.
Special, responsibility rule of subordinate, 669, 670, 671.
Speculations, carried too far, 536.
State, limits danger from within or without, int., 19.
Policies and martial law, int., 16.
Policies, character of military, 111.
State, deposed, efficacy judgments, 168.
State, vanquished, property rights, 175.
State, when property belongs to and how taken, 197, 198.
State, property, seized without tenderness, 246.
State, rights, revert when, 253, 254, 255, 256, 257.
State, policy, determined by whom, 278.
Law-making power of, may proscribe laws, 70.
May rely on levies alone, 110.
Responsible for acts of subordinates when, 309.
Policy of, to sustain military officers, 315.
Calls assistance, President exercises discretion, 561.
President determines under whom military sent into, shall act, 562, 563, 564.
Limit in, of Federal jurisdiction, 565.
Demands protection of Federal Government, President, 566.
Subordinate to military, when, 569.
Rights of people after Civil War, 352.
Judge of necessity for martial law, when, 429.
Has right of self-defence, 480.
Authority may invoke martial law 497.
State subjects, responsibility to, 317.
State, authorities, subordinate in Federal matters, 501.
State, martial law, distinct from Federal, 554.
State, invaded, Federal Government assists, 557.
State, legislature, when call on Federal Government, 558.
State, authorities, President decides what, to recognize, 559.
State executive, invokes martial law, occasion necessity, 567, 568.
Statutes, in the absence of, customs of war control invoking of war courts, 336.
And customs of war give authority to military commission, 339.
War courts cognizant all cases except in provision of, 343, 344.
Features of martial law, 389, 390.
Authorizing the military to pay regard to civil jurisdiction, 560.
Protection of officers 650.
Of repose, bill of indemnity a, when, 680, 681.
Statutes, bills of indemnity after Civil War, 683, 684, 685, 686, 687.
Statutory law, those subject to, 159.
Basis of military commission, 609.
Stephen, Justice, on subordinates' rule, 670.
Strasburg, Germans at, 301.
Subjugated people, responsibility of commanders to, 313.
Submission, tacit, to military occupation, 43.
Subordinates, State responsible for, when, 309.
Rule for responsibility of, 325.
May enforce authority of President, 502.
Responsibility of, 657 to 676.
If prosecuted, cannot set up unlawful orders of superior, 658.
Subordinates' rule, 659, 660, 661, 662.
Salutary character of, 667.
Left in some doubt, 668.
Special, 669, 670, 671.
Not absolute, 672.
Subordinates and superiors, responsibility of, 666.
Summary, military tribunals, authority of, 608.
Supplies, right of army to take, 194.
Support, of officers within proper jurisdiction, 647.
Suppression of disorder, what rights and obligations of military, 656.
Superiors, to have obedience, 656.
Subordinates cannot set up unlawful orders of, 658.
Responsible for subordinate, when, 662.
Acting in good faith, no exemplary damages, 663.
Superiors and subordinates, difference in responsibility rule, 666.
Supreme Court, on war powers, int., 10.
On confiscation, 186.
Action of, in evasion of trade laws, 284.
On martial law, 427, 428.
On State exercising martial law, 504, 505.
Holding martial law a state of war, 507.
Of State, when military above State, 569.
Sustaining officers in line of duty, 634, 635.
In re Neagle, 651.
Surrender, of territory, when, 345.

T

Taney, Chief-Justice, Merryman case, 490.
Tennessee, Coleman vs., 152.
Territory, occupied, regarded as foreign, 57, 58.
Trade, 272 to 295.
Territory, military, regulations in re merchandise, 291.

Territory of rebels, treated as belligerents in local justiciary, 123, 124.
Territory, reclaimed from rebels, policy of government local, 307.
Held by conqueror, when, 345.
Territory, held permanently, change of government, when, 346, 347, 348, 349.
Territories, martial law of, distinct from Federal, 554.
Martial law in, 571, 572, 573, 574.
Territorial limits, martial law courts', jurisdiction, 614.
Terror, may justify martial law, 472.
Theatre of operations, Articles of War apply, 145.
Theatre of war, only place military institute martial law, 623.
Theory, of martial law in U. S., 20 to 440; see Martial Law.
Of martial law courts, territorial limits, 614.
Thorington vs. Smith, 243.
Title, post liminium, to movable property, 228.
Only on possession of conqueror, 238.
By seizure of conqueror of state property, 247.
In removable and immovable property, 248.
Of conqueror acquired how, 249.
Records of, to be preserved, 261.
Trade, with occupied territory, 272 to 295.
President authority to license, 281.
Policy of, Treasury Department, 282.
Trade, laws of, attempts to evade, 283.
Attempts to evade, action of Supreme Court, 284.
Trade, stopped by war, 285.
Trade intercourse, when and where illegal, 289, 290.
Exception to rule in re enemy, 292.
Trade, case in Sulu Archipelago, 294.
Restrictions of, in war, founded on public policy, 295.
Treaty, necessary to permanent military government, 39.
Territory surrendered by, when, 345.
Treasury Department, policy of trade, 282.
Trial crimes, under common law, 161, 162.
Trial, of neutrals, criminal offences, 166.
Right of, martial law, 528.
Trials, under 63rd Article of War, 158.
Of civilians under 63rd Article of War, 160.
Tribunals of invaded country, no jurisdiction over whom, 149, 150, 151, 152, 153, 154.
Tribunals, military government, 333 to 343.
British martial law, character of, 395.
Tribunals, martial law, 605 to 629.
Correspond to offences of the times, 605.
Legality questioned, 606.
Tribunals, martial law, authority, 607.
When invoked, 620.
Tribunals, if had jurisdiction, not responsible for failure of facts, 675.
Members of, acting maliciously, 676.
Turbulence, judgments in times of, 649.

U

Union, division of friends of, in Missouri, 520.
United States, armies, instructions in the field, int., 7.
United States Army system, deference civil authority, 555.
United States, and the Confederacy, martial law, 439, 440.
Early services in, invoking court-martial, 334.
Great Britain, treaty in re confiscation, 224.
Martial law in times of peace, 384; see Martial Law.
Martial law, cases to be tried in, and in British, 393, 394.
Martial law, theory, 420 to 440.
Supreme Court on martial law, 427, 428.
Martial law in, offspring of necessity, 437 to 440.
Supreme Court, on State exercising martial law, 504, 505.
Increased demand for martial law, 576.
Martial law, cases to be tried in, and in British, 393, 394.
Martial law, tribunals invoked when, 620.
Military officers, respect civil authority, 433.
When military called in, 498.
Moves to protect State from invasion, 557.
Supreme Court, on sustaining officials, 634, 635.
Officials, triable in U. S. courts, 652.
United States policy, in establishing military government, 40.
In Philippines in re insurrections, 304.
After military government, 351, 352.
Unlawful, orders of superior cannot be set up by subordinates, 658.
Orders of superior executed by subordinate, 660, 661, 662.

V

Vanquished states, property rights in, 175.
Vigilance, military government to exercise, 324.
Violence, domestic, in State, Federal Government called in, 558.

W

War, amelioration of hardships, int., 6.
Tendency to make more humane, int., 11.
Right to declare, 2.

War, origin of, 8.
Existence without declaration by Congress, 6.
Complete powers, 8.
Irregular warfare cannot be legalized, 104.
Laws of, in occupied territory, 113 to 168.
Laws of, those subject to, 143-159.
At once suspends intercourse, 285.
How brought home to people, 286.
Warning of, to dealers, 287, 288.
Exceptions to rule of no trade with enemy, 292.
Precipitated, not to avoid existing contracts, 293, 294.
Rule of, non-intercourse founded on public policy, 295.
Laws of, limit commander in military government, 305.
Hardships of war ameliorated by legislation, 319, 320.
Actual, may not exist, then martial law, England, 402, 403.
In time of, commander may extend authority, 503.
State of, U. S. Supreme Court holds martial law a, 507.
During, martial law, 519.
During, bill of rights not effective, nor cloak for license, 591.

War powers, decisions of Supreme Court, int., 10.
Limited by laws of war, 10.
Of President, 138.

War, customs of, control invoking war court, 336.
And statutes give authority to military commission, 339.

War, exists till when, 354.

War power, an extension of the police power, 359.

War, active, not necessarily theatre of martial law, 372.

War, laws of, basis of martial law, belligerents, 380.

War conditions, British Government, martial law, 387.

War judiciary, Memphis, Tenn., 126.

War courts, with civil jurisdiction, 131.
At New Orleans, 132.
Jurisdiction extended, 139.
Appointment, how, 141.
Distinguished from courts-martial, 333.
Early instances of invoking, 334.
Conduct of Gen. Scott invoking, 335.
How invoked, 336.
Responsibilities of members of, 338.
Rule for responsibilities of members of, 340.
Jurisdiction as to persons, 341.
Of what cases cognizant, 342, 343.

War Department, defining course of affairs, 531, 532.

War emergency, President's duty, 5.

War measures, martial law, int., 25.
Martial law in U. S., 436.
Martial law in colonies, 456.

War tariffs, 58.

War of 1812, Articles of War, 639.

Weakness, civil authorities and posse comitatus, 578.

Webster's view authority martial law, 592.

Wellington, occupation south France, 17.
In France, 300.

Wilkes, case of, U. S. Navy, 633.

Willes, Justice, on subordinates' rule, 672.

Writ of habeas corpus, suspension of in New Mexico, 512.
Privilege in Colorado, 513.
Power to suspend, and martial law, 526.