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PAGE ___ OF ___ PAGES

MILITARY LAW

AND

PRECEDENTS

BY

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OF THE JUDGE ADVOCATES GENERAL

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PREFACE TO THE FIRST EDITION OF 1886.

In view of the absence and want of a comprehensive treatise on the science of Military Law, it has been for some years the purpose of the author—a member of the bar in the practice of his profession when, in April, 1861, he entered the military service—to attempt to supply such want with a work, which, by reason of its extended plan and full presentation of principles and precedents, should constitute, not merely a text book for the army, but a *law book* adapted to the use of lawyers and judges. The present treatise was substantially completed in 1880, when the author was called upon to publish his annotated "Digest of Opinions of the Judge Advocates General," and some of the references embraced in the original work were inserted in the notes of that publication. Since its date certain unusually important military trials and investigations have been had, sundry valuable opinions upon questions of military law have been pronounced by the courts and other legal authorities, and our written military law—especially the Army Regulations—has been materially modified. Meanwhile also, in England, the time-honored Mutiny Act and Articles of War have wholly passed away and been succeeded by the new "Army Act" and "Rules of Procedure,"—a reform of great interest to the military student,—and this legislation, &c., has been copiously illustrated by the excellent official "Manual of Military Law" and a series of minor commentaries.

In view of these changes, the present work has been revised, and in great part re-written, and the references have been brought down to the end of the year 1885. Apart from the views and conclusions of the author, the *precedents*, now first collected and considered, will, it is believed, be found to be valuable both as law and history. A complete history, for example, of the late war could scarcely be written without taking into consideration the more important trials and acts of military government of that period instanced in the course of these volumes.

The author, however, will be fully recompensed for his labors if the same shall result in inspiring an interest in the study of Military Law as a department of legal science not heretofore duly recognized. The lawyer who, if he has not been led into the old error of confounding the military law proper with martial law, has perhaps viewed it as consisting merely of an unimportant and uninteresting scheme of discipline, will, it is hoped, discover in these pages that there is a military code of greater age and dignity and of a more elevated tone than any existing American civil code, as also a military procedure, which, by its freedom from the technical forms and obstructive habits that embarrass and delay the operations of the civil courts, is enabled to result in a summary and efficient administration of justice well worthy of respect and imitation. The military student, on the other hand, in examining the cases cited, as adjudicated by the courts which expound the international law, the common law, the criminal law, and the maritime law, will, it is thought, more fully appreciate the connection between the military law and the general law of the land;—will perceive that the former, while distinct and individual,

force or compulsion," in contradistinction to the use of the "influence or persuasion" intended by the previous Article in the act therein specified of *speaking words inducing* the abandonment of a post, &c. The compulsion need not consist in the use of actual violence or force. An absolute refusal to obey orders or do duty, or to participate in any further measures of defence, might be as effectual a form of compulsion as if physical constraint were resorted to. Of the offence Samuel further writes:[70]—"This amounts to a plain and palpable act of *mutiny*, being nothing less in effect than the supercession, or the assumption and exercise by force, of the powers of the governor or commanding officer, by his refractory troops." The moving cause or *animus* of the act, whether insubordination, cowardice, treachery, &c., is quite immaterial.[71] It is observed by O'Brien[72] that—"no amount of suffering, privation, or sickness, to which the garrison may be exposed by the firm intrepidity of the commander, will avail as an *excuse* for the crime."

No instance of a trial for the specific offence made punishable by this Article is known to have occurred in our army.[73]

973 XIX. THE FORTY-FIFTH AND FORTY-SIXTH ARTICLES.

[Relieving, and Communicating with the Enemy, &c.]

"ART. 45. *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.*

"ART. 46. *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.*"

ORIGIN OF THESE ARTICLES. These Articles may be traced to Arts. 3 and 4, Sec. II, of Charles I, Art. 8 of the Code of James II, and to Arts. 67, 70, 71, 76 and 77 of Gustavus Adolphus. In the American military law, they first appear as Arts. 27 and 28 of 1775.

THIS CLASS OF OFFENCES COMPARED WITH TREASON. Treason *as such* is not an offence properly cognizable by a court-martial.[74] The offences, however, which are the subject of these two Articles are treasonable in their nature and are characterized by Samuel[75] as "overt acts of treason;" by O'Brien[76] as "closely allied to treason." Our Constitution, (Art. III, Sec. 3 § 1,) declares that—"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Whenever, therefore, an overt act of the class specified in these Articles gives substantial aid and comfort to the enemy, and thus evidences, so far forth,

[71] See Hough, 359.

[72] Page 148. But compare, in this connection, Art. 73 of the Code of Gustavus Adolphus.

[73] In 1862, twelve officers were, without trial, summarily dismissed by order, (G. O. 120, War Dept.,) for publishing a card stating that they had advised their regimental commander (previously similarly dismissed,) to surrender his post to the enemy.

[74] See Gen. Hull's Trial, p. 118; *In re* Stacy, 10 Johns., 333; Procés du Marechal Ney, Part I, p. 70, and Part II, p. 33; also G. O. 1, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the Northwest, 1864. "Treason" has sometimes been charged before military commissions, and, in the English practice, before courts-martial held under martial law—as in Wolf Tone's case and the case of Geo. W. Gordon in Jamaica. See PART II.

[75] Page 577. And see Id., p. 583.

[76] Page 146.

an adherence to his cause, it can scarcely be regarded as less than an act
974 of treason.[77] It may thus happen that an offender whose crime has been committed upon the theatre of war, and who is therefore amenable to trial as for a military offence under one of these Articles, may at the same time be liable to an indictment for treason. A violation of the Articles, however, will not amount to the latter offence, in the absence of the requisite *animus* implied in the constitutional definition.[78]

CONSTRUCTION OF THE TERM "WHOSOEVER." The subject of the interpretation of this initial word of the two Articles, as indicating the classes of persons made amenable thereby to trial by court-martial for the offences therein specified, has already been considered in Chapter VIII on Jurisdiction.

Forty-fifth Article.

THE OFFENCE OF RELIEVING THE ENEMY WITH MONEY, VICTUALS OR AMMUNITION—"Relieves." This word is evidently employed not merely in the restricted sense of *alleviate* or *succor*, but also in that of *assist*. In the connection in which it is used it may be construed as substantially equivalent to *furnish* or *supply*. The mere giving or selling to the enemy of any of the things specified, though the same may not really be *needed* by him, is so far an assistance rendered him, and thus an offence within the Article. That the article furnished is *exchanged* for some commodity returned by the enemy does not, as noticed by the Judge Advocate General,[79] affect the legal quality of the act.

975 It is to be observed that the enemy must be *actually* relieved—reached by the succor or assistance tendered. An *attempt* to relieve him, not successful, will not constitute the specific offence.

"The enemy." This term does not necessarily refer to the enemy's government or army, nor is it required to constitute the offence that the relief should be extended *directly* to either: it is sufficient if it be furnished to a single citizen or to citizens, or to a member or members of the military establishment, in his or their individual capacity;[80] the words thus admitting of the same import as the term "*an enemy*" which occurs subsequently in the Article. In the language of Chief Justice Chase of the U. S. Supreme Court,—"all the citizens or subjects of one belligerent" are "enemies of the government and of all the

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[77] See Respublica *v.* Carlisle, 1 Dallas, 39, a case of an indictment for treason, for giving intelligence to the enemy, &c.; also U. S. *v.* Pryor, 3 Washington, 234, 238, where the court speaks of a form of treason as—"an adherence to the enemy by supplying him with provisions." In a charge to the grand jury of the U. S. Circuit Court, in Nov., 1861, reported in 5 Blatchford, 549, 550, Nelson, J. clearly sets forth that giving intelligence, sending provisions or money, and furnishing arms or munitions to the enemy, are all overt acts of treason. And see *In re* Stacy, 10 Johns., 332; Jones *v.* Seward, 40 Barb., 563, also 4 Black. Com., 82, (and Christian's note;) Hensey's Case, 1 Bur., 650; Stone's Case, 6 Term, 527.

[78] Thus correspondence with an enemy in regard to matters purely social or domestic, while lacking the *animus* of treason, would, unless duly authorized, constitute an offence under Art. 46. (See *post.*) In Fottrell *v.* German, 5 Cold., 280, it was held not to be treason to relieve the sick and wounded of the enemy by renting a building for a hospital to a surgeon of the enemy's army—an act, however, which might be regarded as coming within the definition of the offence of *harboring* an enemy, made punishable by Art. 45.

[79] See G. O. 78, Mil. Div. W. Miss., 1864.

[80] The term "enemies," as employed in the British statute against treasons, the 25th Edward III, from which our constitutional provision on the same subject is taken, is defined, (4 Black. Com., 83; Simmons § 1070,) as including—"the subjects of foreign powers with whom we are at open war; pirates who may invade our coast; * * * and our own fellow-subjects when in actual rebellion."

citizens or subjects of the other," both in "civil and international wars."[81] Relief, therefore, afforded to individuals is relief to *enemies*, and, so far forth also, relief to *the enemy* considered as a nation or government.

It need hardly be remarked that the term "the enemy," or "an enemy," does not include enemies regularly held as *prisoners of war;* such, while so held, being entitled, by the usages of civilized warfare, to be furnished with subsistence, quarters, &c.[82] It would include, however, a prisoner of war who has escaped and while he is at large,[83] as also one who, having been made prisoner of war, has been paroled, and is at large upon his parole.[84]

976 The term under consideration embraces also—as has been specifically held by the Attorney General[85]—an Indian tribe or band in open hostility to the United States.

"Money, victuals, or ammunition." In this enumeration the Article is bald and imperfect. Some such addition as *or other thing*, or *or otherwise* is required to complete and render fully effective the enactment.[86] "Money" includes of course either metallic or paper currency, as also money issued by or current with the enemy as well as money of the country of the accused. As held by the Judge Advocate General,[87] the furnishing of money to the enemy is no less a relieving of him where a consideration is received in return than where the amount supplied is a free gift. And convictions have been had, under the Article, for relieving the enemy with money, by purchasing (with money paid) cotton from agents of the Confederate government,[88] as also by similarly purchasing Confederate bonds.[89] "Victuals" is defined by Hough to be "any article that will support life;" and he concludes that all wines, spirituous liquors, "and even water are included in the term."[90] In the reported cases occurring during the late war, the most usual form of furnishing an enemy with victuals was for the accused to entertain him at meals at his residence.[91] As to "ammunition," no sufficient grounds are perceived

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[81] The Venice, 2 Wallace, 418. And see The Prize Cases, 2 Black, 666; also case of Mrs. Alexander's Cotton, 2 Wallace, 274; Gooch *v.* U. S., 15 Ct. Cl., 287–8. The term "the enemy" includes not only civilians, soldiers, &c., but also persons who, by the laws of war, are outlaws—as "guerillas" and other freebooters. See G. O. 30, Dept. of the Mo., 1863.

[82] Compare Hough, 328.

[83] See the case of harboring, &c., an enemy, published in G. O. 88, Mil. Div. W. Miss., 1864, where the person harbored was an escaped prisoner of war.

[84] In the leading case of B. G. Harris, a member of Congress from Maryland, the relieving by the accused, with money, of two soldiers of the army of the enemy, at large under their parole as prisoners of war, and unlawfully within our lines, was considered by the court to be, as charged, an offence under Art. 45, and the conviction and sentence of the accused accordingly were duly approved. G. C. M. O. 260 of 1865; also Proceedings published in Ex. Doc., No. 14, H. of R., 39th Cong., 1st Sess. And compare 11 Opins. At. Gen., 204.

[85] 13 Opins. At. Gen., 470.

[86] In the early Resolution of Congress, *in pari materia*, of Oct. 8, 1777, the particulars are stated as—"supplies of provision, money, clothing, arms, forage, fuel, or any kind of stores." 2 Jour. Cong., 281.

[87] DIGEST, 41.

[88] G. O. 14, Mil. Div. W. Miss., 1865—where the accused is convicted of having paid to the enemy's agents about $500,000 for cotton.

[89] See G. O. 78, Mil. Div. W. Miss., 1864.

[90] Page 327; Id., (P.) 158. In a case published in G. O. 27, Mil. Div. W. Miss., 1865, the enemy was relieved with "flour, coffee, oil, wines and whiskey."

[91] See G. O. 76, 175, of 1863; Do. 51 of 1864. Also G. C. M. O. 260 of 1865, where the accused procured two rebel soldiers to be fed at the house of a neighbor. In the cases of two women convicted of this effence by military commission, published in G. O. 148, Dept. of the Mo., 1863, the enemy. ("bushwhackers,") were relieved by sending and carrying victuals to them in the woods.

977 for ascribing to this word a meaning larger or other than that which it bears in common military parlance.[93]

THE OFFENCE OF KNOWINGLY HARBORING OR PROTECTING AN ENEMY. This offence may be defined as consisting mainly in receiving and lodging, sheltering and concealing, or shielding from pursuit, arrest, or "any injury which in the chance of war may befall him,"[93] a person known as, or confidently believed to be, and who is in fact, an enemy. If the party harboring, &c., is in no manner apprized that the other is an enemy, the specific offence is not committed; but where the circumstances are such as to induce the inference that he is or may be an enemy, it will be for the accused to rebut the presumption that he had the knowledge contemplated by the Article. In the cases as published in General Orders, this offence has commonly been committed by lodging or procuring lodging for officers or soldiers of the enemy's force,[94] or by concealing them, and denying their presence or refusing to furnish any information of their whereabouts.[95]

PROOF. It must of course appear that a *status belli* prevailed at the date of the offence, but of the existence of such status the court will ordinarily take judicial notice without proof. Where it is doubtful whether the war had begun at the time of the offence, or had not ended before such time or the time of the ordering of the court, it may be necessary to put in evidence the action of Congress or the Executive in declaring war, announcing the recurrence of peace, &c. A state of war being admitted or established, the fact that the party
978 relieved, &c., was an enemy will be exhibited by evidence that he was a member of the military force of the enemy, or a citizen or resident of the enemy's country.

DEFENCE. The only justification of an act made punishable by this Article would ordinarily be the order or sanction of a competent military superior,[96] or an authority conferred by an Act of Congress or the President.[97]

PUNISHMENT. This, being in the discretion of the court, will commonly be not severe where the relief or harboring is but slight or for a very brief period, or where it is rendered to a destitute person; and will ordinarily be less severe where assistance is rendered to an individual for his personal benefit than where it is rendered to the government or the army of the enemy. But in every case the *animus* of the offender will properly be the most material circumstance to be considered in awarding the punishment. Where his act has proceeded from, or illustrates, a strong sympathy on his part with the cause of the enemy, or a marked animosity towards his own government, he will merit a much heavier penalty than where he was actuated mainly by an impulse of

[93] The view expressed by Hough, (p. 328,) that "ammunition" was synonymous with *munition*, and included arms and other *matériel* of war, does not seem to have been favored by other authorities.

[94] Hough, 328.

[95] See cases, cited in note *ante*, of relieving an enemy by entertaining him at meals,—in which cases he was generally also lodged.

[96] See two cases in G. O. 52, Dept. of the Ohio, 1863. In a case in G. O. 88, Mil. Div. W. Miss., 1864, a seaman was convicted of harboring and protecting a prisoner of war, "by hiding him in the hold of the ship to enable him to escape."

[97] Samuel, 578–9: G. O. 78, Mil. Div. W. Miss., 1864.

[97] See the Act of July 13, 1861, authorizing the President to permit commercial intercourse with persons in the insurrectionary States, under which it was held by the Supreme Court, (5 Wallace, 630; 6 Id., 521,) that the President was alone empowered to license such intercourse, and that a military or naval commander was not authorized to do so.

hospitality. Capital sentences were rarely imposed for violations of this Article during the late war; imprisonment and fine being the forms of punishment usually resorted to.[98]

FORTY-SIXTH ARTICLE.

THE OFFENCES MADE PUNISHABLE. This Article makes capitally punishable by sentence of court-martial the two distinct acts of holding
979 correspondence with, and giving intelligence to, the enemy; and all material communications made to the enemy will be found to be included within the one or the other description. The terms "*whosoever*" and "*the enemy*" have already been construed under the preceding Article.

HOLDING CORRESPONDENCE WITH THE ENEMY. The word "*correspondence*" is understood to be here employed in its usual and familiar sense, as intending written communications, especially by letter, and embracing of course communications in print and telegrams. The term, however, is not to be viewed as implying that there has been, or should be, a mutual interchange of letters or communications between the accused and the enemy; nor is it necessary that the communication which is the occasion of the charge should be an answer to a previous one from the party to whom it is addressed. The offence may consist in the sending of a single letter, and this may be the first and the only one that has passed, or been attempted to be transmitted, between the parties.

Any correspondence with the enemy being a violation of the absolute rule of non-intercourse pertaining to a state of war, the Article, naturally, does not characterize the correspondence, the holding of which is made punishable, as treasonable, hostile, injurious, &c.,[99] but makes it an offence to hold *any* correspondence whatever. Not only therefore is correspondence by which valuable information is imparted or important public business transacted, as well as correspondence calculated to stimulate or encourage the enemy,[100] properly chargeable under the Article, but also correspondence of a comparatively harmless character—as the writing of a letter relating to private or domestic affairs.[1] And so of the communicating to the enemy of supposed facts, which however are not true and do not therefore amount to the giving of intelligence.[2]

It is further to be observed that the crime is complete in the writing or
980 preparing of the letter or other communications, and the committing it to a messenger, or otherwise putting it in the way to be delivered. It is not essential that it be received by the person for whom it is intended, or that it reach its place of destination. If it be intercepted while *in transitu*, the legal character of the offence will not be affected.[3]

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[98] An instance of a *capital* sentence is found in G. O. 76 of 1863, where, however, the same was commuted by the President to imprisonment during the war at Fort Delaware. Instances of sentences of confinement at hard labor for *twenty* years occur in G. O. 14, 27, Mil. Div. W. Miss., 1865. In the case of Harris, (G. O. 260, of 1865,) the offender being an official person, (member of Congress,) disqualification for office was added to imprisonment.

[99] In the "additional" Article of November, 1775, the offence was described as "holding a *treacherous* correspondence."

[100] See case in G. O. 190, Dept. of the Mo., 1864; also case, (tried by a military commission,) in G. O. 132, Dept. of the Gulf, 1864.

[1] Unless of course such correspondence be expressly authorized by the Government. See *post*, p. 635.

[2] See *post*, as to the offence of *giving intelligence*, also DIGEST, 42.

[3] Hensey's Case, 1 Bur., 65; Stone's Case, 6 Term, 527; Samuel, 580; Respublica v. Roberts, 1 Dallas, 42; DIGEST, 42; also cases in G. O., 203, Dept. of the Mo., 1864; Do. 132, Dept. of the Gulf, 1864.

GIVING INTELLIGENCE TO THE ENEMY. This offence will consist in communicating to the enemy, by personal statement, message, letter, signal or otherwise,[4] information in regard to the number, condition, position, or movements of the troops, amount of supplies, acts or projects of the government in connection with the conduct of the war, or any other fact or matter that may instruct or assist him in the prosecution of hostilities.[5]

Of the specific instances of a direct violation of this Article which have been made the subject of trial, some of the principal, as published in General Orders, are—the furnishing to the enemy a plan of the defences of a military post;[6] the pointing out to enemy's cavalry the road by which a herd of government cattle had been driven to avoid capture, and stating that the same was without a guard;[7] the writing and sending letters to a person in the enemy's service in which information was given of the movements of troops and of intended military operations;[8] and the giving of similar information to scouts of the enemy.[9]

It is necessary that the enemy shall have been *actually informed.* If therefore the intelligence fails to reach him, this offence is not completed,
981 though the offence of holding correspondence may be.[10] It would seem also that the facts communicated should be in part at least true, since, if they are entirely false, *intelligence* cannot be said to be given.

"EITHER DIRECTLY OR INDIRECTLY." These words are construed as applying to both the acts made punishable, not to the last one only. The modes of holding correspondence and giving intelligence already instanced have been mainly of a direct character. It was, however, the indirect modes which, during the late war,—as in previous wars,[11]—principally exercised the vigilance of our military authorities. The proceeding of this sort which it was found especially necessary to denounce and prohibit was the *publication in newspapers* of particulars in regard to the numbers, organization, position, operations, &c., of the army, by which information might readily be communicated to the enemy;[12] and in several instances the offence thus committed was made the subject of charges under the present Article,[13] or of trial by military commission.[14] The publishing by way of advertisement in newspapers, of "Personals," by means of which an indirect correspondence was maintained with individuals within the enemy's lines, was also expressly prohibited.[15]

PROOF. In addition to what has already been said on this subject, (including the observations under the previous Article—apposite here also—as to the

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[4] See case in G. O. 26, Dept. of Va. & No. Ca., 1864, in which a soldier guarding a prisoner is charged with allowing the latter to escape *for the purpose* of having him communicate to the enemy valuable information.

Art. 8 of James II made punishable the giving of intelligence "either by letters, messages, signs, or tokens, or in any manner of way whatsoever."

[5] The intelligence may be of a negative character. Thus in Stone's case, 6 Term, 527, the sending to the enemy a paper containing reasons for *not invading* England was held to constitute high treason.

[6] G. O. 242 of 1863.

[7] G. O. 250 of 1863.

[8] G. O. 371 of 1863.

[9] G. O. 157 of 1864.

[10] "It is essential to the offence of giving intelligence to the enemy that material information should actually be communicated to him." DIGEST, 42.

[11] See G. O. of Nov. 27, 1812; Tulloch, 40–41.

[12] G. O. 67 of 1861; Do. 151 of 1862; Do. 125, Army of the Potomac, 1862; Do. 29, 48, Id., 1863; Do. 44, Id., 1864; Do. 48, Dept. of the Mo., 1862.

[13] G. O. 10, Dept. of Washington, 1863; Do. 13, Dept. of the Tenn., 1863.

[14] G. O. 29, Army of the Potomac, 1863.

[15] G. O. 10, Dept. of the East, 1865.

proper evidence of the existence of a state of war, &c.,) it may be added that where the correspondence has been carried on, or intelligence supplied, by a written communication in the *handwriting* of the accused, it will be necessary to prove this in the usual manner, as indicated in the Chapter on Evi-
982 dence. Where the communication is in *cipher*, the possession of a key, or a knowledge of and ability to employ the cipher, must ordinarily be brought home to the party.[16]

DEFENCE. The general principle laid down as applicable to defences to charges under the 45th, is apposite under the present Article.

Under a charge for holding correspondence, where the communication referred solely to private or domestic affairs, it would be a good defence to show that the same was authorized under regulations such as those which prevailed during the late war, by which communications of such a character were permitted to be exchanged with the enemy through the lines at Fortress Monroe.

A not unusual form of defence to a charge of giving intelligence to the enemy, (especially where it was verbally and personally communicated to the enemy in his presence,) has been that the same was furnished *under duress*. But to constitute this defence, the duress must have been such as to put the party in reasonable fear of present *death* if he refused to give the information required of him. Any form of bodily constraint or injury, not immediately endangering life, although it might be admitted in evidence in mitigation of punishment, would not amount to a *defence* in law. Thus, neither the mere presence of a force of the enemy sufficient to overpower the party and destroy him, nor the ordering him peremptorily to furnish the information desired, nor the imprisoning of him until he should disclose facts within his knowledge, would constitute the defence of *duress*, where his life was not seriously threatened or otherwise put in actual peril.[17]

PUNISHMENT. The penalty to be awarded will properly depend upon the *animus* of the offender, whether treasonable, treacherous, or sympathetic
983 with the enemy's cause, or comparatively innocent of any such feeling; upon the matter of the communication—whether beneficial to the enemy, authentic and original, or mounting merely to hearsay or rumor; upon the manner and form of imparting it—as whether it be communicated to the enemy's government or its official or military representative, or to a private individual, &c. The death penalty has sometimes been adjudged in our practice for a violation of this, as of the previous, Article,[18] but imprisonment has been the more usual punishment.[19] In some cases the sentence has required that the accused be sent without the lines of the army.[20]

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[16] In Smithson's Case, (G. O. 371 of 1863,) the letter conveying intelligence to the enemy was signed with a fictitious name and enclosed in an envelope addressed in *cipher*. See also a case of writing a letter with a fictitious signature in G. O. 203, Dept. of the Mo., 1864.

[17] See the analogous case of entering the military service of the enemy under duress, in Respublica *v.* McCarthy, 2 Dallas, 86; U. S. *v.* Vigol, Id., 346; U. S. *v.* Greiner, 4 Philad., 396. And compare U. S. *v.* Hodges, Brunner, 465. See also, in this connection, the comments of the Secretary of War upon the findings in Cashell's Case, in G. O. 250 of 1863.

[18] G. O. 106, 157, of 1864; Do. 67, Dept. of the Gulf, 1865.

[19] In a case published in G. O. 14, Mil. Div. W. Miss., 1865, the sentence is confinement at hard labor for twenty years.

[20] Thus, in a case in G. O. 58, Dept. of the Mo., 1863, the sentence was—"To be sent South beyond the lines of the Federal forces." And see a similar sentence in G. O. 13, Dept. of the Tenn., 1863.

The law, as laid down in this case, is illustrated by the later instance, occurring in 1857, of the impressing into the service of the United States by Colonel A. S. Johnson, in command of the Utah expedition, of the teams and property of certain freighters,—in which judgments were rendered in favor of these parties against the United States for the value of the property taken.

The military orders made and executed in this instance evidently
1208 "were," observes Attorney General Bates,[10] "the wise and proper precautions of an officer to protect his own force and prevent his enemy from being strengthened;" and he holds that these orders and acts of Col. Johnson were "justified by military necessity," thus contrasting the case with that of Harmony *v.* Mitchell, as adjudged.[11]

A material difference between the cases of Mitchell and Johnson was that the claims of the freighters in the latter were, by legislation of Congress, referred to the Court of Claims for adjudication—which left little more to that Court than to assess the value of the property taken. It may be added, as to Mitchell's case, that it was clearly a hard one, and, by special Act of March 11, 1852, he was relieved of the judgment against him, which was assumed and paid by the United States.

ARREST AND RESTRAINT OF PERSONS. The Laws of War authorize the arrest, trial and punishment of such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violation of those Laws. The liability and disposition of such offenders has already been in part considered under the 45th and 46th Articles of War, and will be further discussed in treating of the jurisdiction and powers of the MILITARY COMMISSION. The restraints which may be exercised over the citizen will also enter into the consideration of the subject of MARTIAL LAW.

II. THE LAW OF WAR AS AFFECTING INTERCOURSE BETWEEN ENEMIES IN GENERAL.

RULE OF NON-INTERCOURSE. The principle here to be noticed is simply that of the absolute non-intercourse of enemies in war. As frequently reiterated in the rulings of the Supreme Court, not merely the opposed military forces but all the inhabitants of the belligerent nations or districts become, upon the declaration or initiation[12] of a foreign war, or of a civil war, (such as was
1209 the late war of the rebellion,) the enemies both of the adverse government and of each other,[13] and all intercourse between them is terminated and

[10] 10 Opins. At. Gen., 23.

[11] See Irwin *v.* U. S., 23 Ct. Cl., 149; U. S. *v.* Irwin, 127 U. S., 125; 10 Opins. At. Gen., 21.

[12] As to what constitutes such declaration or initiation, see *ante;* "Fifty-Eighth Article," Part 1, p. 668.

[13] Vattel, 321; Manning, 166; Dana's Wheaton § 345; 1 Kent, Com., 55; Halleck, 357; Jecker *v.* Montgomery, 18 Howard, 112; White *v.* Burnley, 20 Id., 249; Prize Cases, 2 Black, 666; Mrs. Alexander's Cotton, 2 Wallace, 274; The Venice, Id., 418; Coppell *v.* Hall, 7 Id., 542; Texas *v.* White, Id., 700; Lamar *v.* Browne, 92 U. S., 194; Ford *v.* Surget, 97 Id., 594; Dow *v.* Johnson, 100 Id., 164. "In the state of war nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat. War strips man of his social nature." The Rapid, 8 Cranch, 160. (Johnson, J.)

This view, however, is strongly combated by Bluntschli (§ 531). "Die Privaten," he writes, "als solche sind bei diesem Streite nicht unmittelbar betheiligt, sie sind nicht Kreigs- und nicht Process-parteien, und eben dessbalb nicht Feinde im eigentlichen und vollen Sinn des Worts."

interdicted.[14] Hence the general rule that, pending the war, all domestic, social, and business relations are forcibly severed; all interchange, however personal and intrinsically harmless, is forbidden; no new contracts or engagements can be entered into; existing partnerships and joint undertakings are dissolved, and existing contracts and pecuniary obligations are suspended,[15] and "the courts of each belligerent are closed to the citizens of the other."[16]

1210 **ENFORCEMENT AND VIOLATION OF THE RULE.** The drawing of strict army lines, the patrolling, with troops or armed vessels, of the territory, rivers, &c., intervening between the belligerents, and the establishment of military posts upon main routes of travel and of blockades of important ports, while measures defensive and offensive as against the hostile forces, are also efficient means for the enforcement of this rule of non-intercourse. Infractions of this rule, by selling to, buying from or contracting with enemies, furnishing them with supplies, corresponding, mail carrying, passing the lines without authority, &c., are *violations of the laws of war*, more or less grave in proportion as they render material aid or information to the enemy or attempt to do so, and, as will hereafter be illustrated, are among the most frequent of the offences triable and punishable by *military commission*.

EXCEPTIONS TO THE GENERAL RULE—LICENSES TO TRADE. By the custom of war, however, certain exceptions have come, from necessity or considerations of policy or humanity, to be admitted to the general rule of non-intercourse. Among the more familiar of these exceptions are the use of flags of truce, the entering into armistices, cartels, or other conventions, and the exchange of prisoners of war. These will be noticed under the next Title, as relating to the carrying on of war and the treatment of captives.

A more distinctive exception is the licensing of trading between belligerents. Early in our late civil war, which, because of its great proportions, was assimilated to a foreign war, and in which, as has been remarked, belligerent rights were conceded by the United States to the Confederate forces,[17] an Act of Congress of July 13, 1861, c. 3, s. 5, in supplementing the law of war by specifically interdicting commercial intercourse with the insurrectionary States, yet authorized the President in his discretion to license such intercourse in particular instances when deemed conducive to the public interests. Such licenses being exceptional, it was held by the Supreme Court that they were to be strictly
1211 construed;[18] also that no authority other than the President could grant a

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[14] "Interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself." Prize Cases, 2 Black, 688. And see the other authorities cited in last note; also Woolsey § 117; Schooner *v.* Patriot, 1 Brock, 421; The Julia and Cargo, 1 Gallison, 603; The Sea Lion, 5 Wallace, 630; The Ouachita Cotton, 6 Wallace, 521; Hanger *v.* Abbott, Id., 535; McKee *v.* U. S., 8 Id., 163; U. S. *v.* Lane, Id., 195; U. S. *v.* Grossmayer, 9 Id., 72; Montgomery *v.* U. S., 15 Id., 395; Hamilton *v.* Dillin, 21 Id., 73; Mitchell *v.* U. S., Id., 350; Desmare *v.* U. S., 93, U. S., 612; Brown *v.* Hiatt, 1 Dillon, 372 and 15 Wallace, 184.

[15] Hoare *v.* Allen, 2 Dallas, 102; Foxcraft *v.* Nagle, Id., 132; Manning, 176; and cases cited in the two preceding notes. But "war does not confiscate debts or property for the benefit of debtors, but only suspends the right of action." Caldwell *v.* Harding, 1 Lowell, 329. As to the unlawfulness of the act of drawing bills by or upon enemies during the late war, see Britton *v.* Butler, 9 Blatchford, 457; Williams *v.* Mobile Sav. Bk., 2 Woods, 501; Woods *v.* Wilder, 43 N. Y., 164; Lacy *v.* Sugarman, 12 Heisk., 354. That exceptions to the general rule stated in the text may be admitted in cases of prisoners of war drawing bills for subsistence furnished them by enemies, (or for their ransom,) see Antoine *v.* Morehead, 6 Taunton, 237; Halleck, 359; DIGEST, edit. of 1868, p. 292.

[16] Brown *v.* Hiatt, 15 Wallace 184.

[17] Dow *v.* Johnson, 100 U. S., 158; Stevens *v.* Griffith, 111 U. S., 51; Freeland *v.* Williams, 131 U. S., 416; U. S. *v.* Pacific R. R., 120 U. S., 233.

[18] The Reform, 3 Wallace, 632; McClellan *v.* U. S., 21 Id., 98; Cutner *v.* U. S., 17 Id., 617; Millar *v.* U. S. 8 Ct. Cl., 487; Cone *v.* U. S., Id., 421.