

**THE LAWS OF WAR,
AFFECTING COMMERCE
AND SHIPPING**

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The Laws of War, Affecting Commerce and Shipping by H. Byerley Thomson

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BY
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A NEW EDITION, ENLARGED,
WITH AN
INTRODUCTION AND INDEX.

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1854.

PREFACE TO THE SECOND EDITION.

The success which attended the publication of the First Edition of this Treatise, on "The Laws of War, affecting Commerce and Shipping," has confirmed the author's opinion of the utility of such a work; and its hearty acceptance by the mercantile world has induced him to add largely and materially to this edition. The general plan of the former work has not been departed from in the first portion of the present; and although a great number of fresh and popular topics have been here touched upon, the author has endeavoured to preserve (as far as was consistent with accuracy), that concise and popular character which he believes in no small degree contributed to the favourable reception of the first edition.

An Introduction has also been added, discussing the origin of the Laws of War generally, and the utility of the work has been enhanced by an Index for facilitating reference.

In a Second Part, which will shortly appear, the Author proposes to treat of the Laws of War relating to the Army, Navy, and the Militia, as well as the administration of the bodies governing those various sections of the war force of the country.

H. B. T.

8, SERJEANT'S INN, TEMPLE,
APRIL 15, 1854.

THE
LAWS OF WAR.

PART I.

THE LAWS OF WAR AFFECTING COMMERCE
AND SHIPPING.

CHAPTER I. COMMENCEMENT OF WAR.

SECTION I.

The Immediate Effects of War.

For some months the state of war that has been impending between Russia, and the Allied Powers,—England, France, and Turkey,—has now become actual; and though there have been many acts of preparation and precaution on the part of England and France, we have not been, up to the present crisis, engaged in what is termed by international writers, Public and Solemn War; such a position of affairs has at last arrived.

The War then, that England has entered into, is of Solemn the most Public and Solemn kind. Public War is divided ^{War.} into Perfect and Imperfect. The former is more usually

called Solemn. Grotius defines Public or Solemn War to be such Public War as is declared or proclaimed.

Imperfect Wars between nations, that is such wars as nations carry on one against the other, without declaring or proclaiming them, though they are Public Wars, are seldom called wars at all; they are more usually known by the name of reprisals, or acts of hostility. It has often been important to determine, on the re-settlement of peace, what time war commenced, and when reprisals ceased.*

According to the Law of Nations, two things are required for a Solemn War; first, it must be a Public War; that is, the contending parties must be two nations, or two parties of allied nations, contending by force under the direction of a supreme executive; and secondly, it must be proclaimed, notified, or declared. And probably it must be general in its character, and not simply local or defensive. Presuming that the coming contest will be of the widest character, I shall proceed to examine its legal effects on Commerce, on that supposition.†

Declaration
of War.

Declarations of War have existed from the most ancient times, having been borrowed by modern nations from the manners and customs of the Romans. But in present times, (although they may be very properly put forward,) they are not necessary to a state of actual war, or as it is technically termed, to legalize hostilities. A Declaration of War is not a matter of international right.‡ Acts of hostilities, without such an instrument, cannot be denounced as irregular or piratical, unless committed in manifest bad faith. But though war may lawfully com-

* The Law of Reprisals; *Vide* note (A.)

† Rutherford's Institutes, vol. ii. p. 509.

‡ 2 Wheaton, p. 11; 1 Kent, p. 54.

mence without an actual declaration, yet a declaration is of sufficient force to create a state of war, without any mutual attack. It is not a mere challenge from one country to another, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also in a state of war, though, he may, perhaps, think proper to act on the defensive only.*

War now generally commences by Actual Hostilities, ^{War, how commenced.} by the Recall or Dismissal of an Ambassador or Minister, or by a Manifesto published by one belligerent power to its own subjects.

Manifestoes are issued to fix the date of the commencement of hostilities; for as a state of war has many various effects on commercial transactions, such as the confiscation of certain property, and the dissolution of certain contracts, it is very necessary that such a date should be accurately known. When a Manifesto or Declaration is issued, it is said to legalize hostilities, that is to say,—to make all acts done, and all breaches committed, under pressure of war, good and lawful acts and breaches.

I have given this explanation, because it is a popular notion that a declaration always precedes war; but in reality, in modern times, few wars are solemnly declared;—they begin most often with general hostilities; thus the first Dutch War began upon general Letters of Marque, and the War with Spain, that commenced by the attempted invasion of the Armada in 1588, was not declared or proclaimed between the two crowns.†

The Manifesto not only announces the commencement ^{Contents of Declaration.} and existence of hostilities, but also states the reasons of, and

* Per Sir W. Scott—Case of the *Eliza Ann*, 4 Rob. Adm. Rep. 247.

† Wildman's International Law, vol. ii. p. 5.

attempts the justification of the war; and it is necessary for the instruction and direction of the subjects of the belligerent state, with respect to their intercourse with the foe; it also apprizes neutral nations of the fact, and enables them to conform their conduct to the rights belonging to the new state of things.*

Without such an official act, it might be difficult to distinguish, in a Treaty of Peace, those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.

When war is duly declared, it is not merely a war between one government and another, but between nation and nation, between every individual of the one state with each and every individual of the other. The subjects of one country are all, and every one of them, the foes of every subject of the other, and from this principle flow many important consequences.†

Property of
Subjects of
Belligerent
States in
the Enemy's
Country.

On the commencement of hostilities a natural expectation will arise that the Property, (if not the Persons) of the Belligerent State, found in the Enemy's Territory, will become liable to seizure and confiscation, especially as no declaration or notice of war is now necessary to legalize hostilities. According to strict authority, the Persons and Property of Subjects of the Enemy found in the belligerent state are liable to detention and confiscation; but even on this point diversity of opinion has arisen among institutional writers; and modern usage seems to exempt the Persons and Property of the Enemy found in either territory at the outbreak of the war, from its operations.

* 1 Kent, p. 54; Vattel, book 3, chap. iv. sec. 64.

† 1 Kent, p. 55.

Without entering on the long arguments that have been produced on this subject, and which it is not the intention of this treatise to reproduce, the rule may be stated very nearly as follows.*

That though, on principle, the property of the enemy is liable to seizure and confiscation, yet it is now an established international usage that such property found within the territory of the belligerent state, or debts due to its subjects by the government or individuals, *at the commencement* of hostilities, are not liable to be seized and confiscated as prize of war.

This rule is often enforced by treaty, but unless thus enforced it cannot be considered as an inflexible, though established, rule. This rule is a guide which the Sovran of the belligerent state follows or abandons at will, and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule, but depends on considerations which continually vary.†

The rule is different with respect to Immoveable Things, such as Landed Estates. He who declares war does not confiscate the Immoveable Estate possessed in his country by the enemy, but the Income may be sequestrated, to prevent its being remitted to the enemy.‡

Rule with respect to Immoveable Property.

Public Funds, or in other words, debts due from the Sovran of the hostile state to Private Persons, are always held protected from confiscation, and there is only one instance in modern times where this rule has been broken. It is a

Public Funds.

* 2 Wheaton, p. 12; 1 Kent, p. 55; Rutherford's Institutea, book 2, chap. 9, sec. 10.

† 2 Wheaton, p. 12—25; 1 Kent's Com. p. 55—6; Brown v. United States, 2 Cranch, 110; see also 228, 229.

‡ Idem.