fully assent to the recommendation for the creation of a High International Court of Criminal Jurisdiction with authority to interpret and apply the law of humanity. Mr. Lansing expressed the belief that the provisions adopted by the Council of Four, for the arraignment and trial of the former German Emperor, create "not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly."

Mr. Lansing vigorously urged the maintenance of individualism between nations and within nations, declaring it the very life blood of modern civilization. He said, in closing:

> If we Americans abandon individualism, we have bartered away our birthright, we have cast aside that for which our forefathers were willing to die. The same is true of individualism among nations. It must be maintained if the peoples of the earth are to possess patriotism, love of liberty, and that generous devotion to national ideals which have made nations great and prosperous.

Much that transpired at this great meeting was of legal and intellectual interest. Its omission here is solely due to the limits appropriate to a publication confined to international law.

CHARLES NOBLE GREGORY.

JURISDICTION OF LOCAL COURTS TO TRY ENEMY PERSONS FOR WAR CRIMES

Supplementing the literature which appeared in periodicals during the war on the competence of local courts to try and punish enemy persons for what are regarded as crimes against the recognized laws and customs of civilized warfare, it will be of interest to leave the forum of academic discussion of conflicting theories and systems of jurisprudence, and enter the realm of actually ascertained and applied law on the subject.

In the United States the principle that local courts have no jurisdiction to try a punishable crime committed by members of the invading army, either during or after the enemy occupation, has been declared by the Supreme Court to be a principle of international law. After the Civil War in the United States, the Supreme Court was called upon to decide a number of cases involving the criminal and civil responsibility of members of the respective military forces

committed during the occupation or invasion of the territory of the other. In deciding these cases the court regarded the States in insurrection against the United States as enemy territory and the people residing therein as enemies, for all purposes connected with the prosecution of the war, and it adopted the principles of public law applicable in international wars. The court found that in the interest of humanity and to prevent the cruelties of reprisals and retaliation, the Confederate Army was conceded such belligerent rights as belong under the laws of nations to the armies of independent governments engaged in war against each other, which concession placed the soldiers and officers of the rebel army as to all matters directly connected with the mode of prosecuting the war on the footing of those engaged in lawful war, and exempting them from liability for acts of legitimate warfare. (Ford *v.* Surget, 1878, 97 U. S. 605.)

The question of the jurisdiction of local courts to try individual members of the enemy forces for war crimes came squarely before the Supreme Court in the case of Coleman *v.* Tennessee (1878), (97 U. S. 509). The facts in that case were briefly as follows: During the military occupation of East Tennessee by the Federal Army, a soldier belonging to that army murdered a woman, for which crime he was tried, convicted and sentenced to death by a Federal court-martial. The sentence, however, for some cause unknown was not carried into effect. After the constitutional relations of Tennessee to the Union were restored, the soldier was indicted in a Tennessee State court for the same murder, tried, convicted and again sentenced to death. The case was brought before the Supreme Court of the United States on a writ of error upon the ground that the conviction by court-martial constituted former jeopardy. The Supreme Court held that such a plea was not proper because it admitted the jurisdiction of the Tennessee court to try the offense, and the judgment was set aside and the indictment quashed for the express reason that the State court had no jurisdiction. The pertinent portions of the opinion of the court, delivered by Mr. Justice Field, follow:

> The doctrine of international law on the effect of military occupation of enemy's territory upon its former laws is well established. . . . 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 commander. By such occupation the political relations between the people of the hostile country and their former

government or sovereign are for the time severed; but the municipal laws . . . remain in full force, so far as they affect the inhabitants of the country among themselves. . . . This doctrine does not affect, in any respect, the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the army of the United States in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people.

. . . . . .

The judgment and conviction in the criminal court should have been set aside and the indictment quashed for want of jurisdiction. Their effect was to defeat an act done, under the authority of the United States, by a tribunal of officers appointed under the law enacted for the government and regulation of the army in time of war, and whilst that army was in a hostile and conquered State. The judgment of that tribunal at the time it was rendered, as well as the person of the defendant, were beyond the control of the State of Tennessee. The authority of the United States was then sovereign and their jurisdiction exclusive. Nothing which has since occurred has diminished that authority or impaired the efficacy of that judgment.

. . . . . .

In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee that the same act may, in some instances, be an offence against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine. The laws of Tennessee with regard to offences and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States and subject to the articles of war. He was 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 the 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.

In the following year the Supreme Court was called upon to decide a case involving a civil suit instituted in a local court of New Orleans by a citizen of New York against General Dow, an officer of the Army of the United States, for plundering the dwelling house and planta-

tion of the plaintiff in Louisiana, which act the petition characterized as "illegal, wanton, oppressive and unjustifiable." The plaintiff further alleged that the act had been perpetrated by officers and soldiers acting under General Dow's secret orders "unauthorized by his superiors, or by any provision of martial-law, or by any requirements of necessity growing out of a state of war." (Dow *v.* Johnson, 100 U. S. 158.) The Supreme Court upheld General Dow in his refusal to submit to the jurisdiction of the New Orleans court. The court reiterated the doctrine laid down in Coleman *v.* Tennessee, adding that the position of the invading belligerent is not affected or his relation to the local tribunals changed by his temporary occupation of the enemy's country, and held as follows:

When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. . . . There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it 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 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.

. . . . . .

This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war.

. . . . . .

If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, 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 question here is, 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.

Ten years later the same court, in the case of Freeland *v.* Williams (131 U. S. 405), had occasion to apply these principles in a case which involved the validity of a judgment rendered on December 22, 1865, in a local court of West Virginia, in favor of the plaintiff in an action of trespass *de bonis asportatis* for the taking and conversion of cattle in that state by a Confederate soldier during the Civil War. The defense upon the merits of the case was that the property had been taken by the soldiery and military authorities of the Confederacy, in whose armies the plaintiff served, and that the acts complained of were "done according to the usages of civilized warfare and in the progress of said war." The plaintiff denied that the cattle had been taken "in accordance with the usages of civilized warfare." The court below took testimony by way of depositions on the issue as to whether the taking was an exercise of belligerent rights and was done according to the usages and principles of public war. From this testimony it found that the defendant was a soldier under the command of General Fitzhugh Lee, whose force was dominant in that part of West Virginia in January, 1864, and that it was under his orders that the cattle were seized while Lee was on his raid through that county.

The case, therefore, presented the counterpart of the case of Dow *v.* Johnson. In the Dow case a court of an invaded country had attempted during the enemy occupation to assume jurisdiction of an act committed by members of the occupying forces, while in the Freeland case a court of the victor claimed jurisdiction after the enemy had been repelled for an act committed by a member of the expelled enemy forces.

Mr. Justice Miller reaffirmed the doctrine of Dow *v.* Johnson in the following language:

Ever since the case of Dow *v.* Johnson, 100 U. S. 158, the doctrine has been settled in the courts, that in our late civil war each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority. (131 U. S., 416.)

He held that the case as presented to the Supreme Court showed that the original judgment was rendered on account of acts done in pursuance of the powers of a belligerent in time of war, that, when the original action was presented to the West Virginia court and the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further and its subsequent proceedings may be held to have been without authority of law.

In these cases, the highest judicial authority in the United States has declared it to be a principle of public international law that the local territorial courts have no jurisdiction to try enemy persons for acts committed during and as a part of belligerent operations, even although such acts be acknowledged war crimes or are alleged to have been committed in violation of the laws of war. The principle has been consistently followed throughout a variety of changing conditions: (1) where a recognized war crime was committed in occupied territory and the local court secured jurisdiction of the offender after the occupation had ceased; (2) where the local court in occupied territory attempted to take jurisdiction of an alleged violation of the laws of war during the period of enemy occupation; and (3) where the alleged violation of the laws of war was committed during an enemy raid and the local court subsequently obtained jurisdiction of the person of one of the members of the raiding party.

GEO. A. FINCH.

IN MEMORIAM—THOMAS JOSEPH LAWRENCE.

1849-1920

In the leading case of Triquet *v.* Bath (3 Burrow, 1478, 1481) decided in 1764, Lord Chief Justice Mansfield quotes Lord Chancellor Talbot as holding in Buvot *v.* Barbut, decided in 1736, and in which Mansfield had been counsel,

> That the law of nations, in its full extent, was part of the law of England. . . . That the law of nations was to be collected from the practice of different nations, and the authority of writers. Accordingly, he argued, and determined