
The Modoc Indian Prisoners.

time during which he was suspended by virtue of the said order of the President.

Very respectfully,

GEO. H. WILLIAMS.

Hon. C. DELANO,
Secretary of the Interior.

THE MODOC INDIAN PRISONERS.

It is within the competency of a military commission to try such of the prisoners taken in the Modoc Indian war of 1873 as are chargeable with offenses against the recognized laws and usages of war, and, if found guilty, to subject them to the punishment which those laws and usages warrant.

DEPARTMENT OF JUSTICE,
June 7, 1873.

SIR: I have the honor to acknowledge the receipt from you of several papers relative to the Modoc Indians now in custody of the United States Army, with a request for my opinion as to the authority to try certain of the prisoners by a military tribunal.

The main facts out of which the question arises are these:

In 1864 the United States made a treaty with these Indians by the terms of which they were to go and remain upon a reservation in the State of Oregon. Late last fall, the Indians being away from their reservation, a military detachment was sent to procure their return. Finding them unwilling to go peaceably, the officer indicated his determination to use compulsion, in consequence of which a conflict ensued between United States troops and the Indians. Soon after several peaceable citizens and their families in the vicinity were murdered by Indians of this band. They then intrenched themselves in the lava-beds in the neighborhood. Fighting ensued, and one or more severe battles, in which persons on both sides were wounded and killed and the United States troops repulsed.

Pending hostilities, negotiations were opened for peace, and on the 13th of April last General Canby, Rev. Mr. Thomas, and Mr. Meacham, at a point between the opposing forces,

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and in pursuance of a mutual agreement to that end, met Captain Jack, the leader of the Indians, with some of his chief warriors, to discuss the terms of a treaty, and while so engaged General Canby and Mr. Thomas were treacherously assassinated and Mr. Meacham severely wounded by the Indians present upon that occasion. Battles followed, and Captain Jack and all or most of his tribe have been captured, and are now in the hands of the military authorities.

General Sherman, in a communication to the Secretary of War dated the 3d instant, recommends that such of these Indians as have violated military law be tried by a military tribunal. This recommendation is approved by the Secretary of War.

"Instructions" were prepared, in 1863, by Francis Lieber, LL. D., revised by a board of officers, of which General E. A. Hitchcock was president, and, after approval by the President of the United States, were published for the government of armies of the United States in the field. Section 13 of these "Instructions" is as follows:

"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 offenses under the statute-law must be tried in the manner therein directed; but military offenses 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."

All the authorities which I have been able to examine upon this subject harmonize with these "Instructions."

According to the laws of war there is nothing more sacred than a flag of truce dispatched in good faith, and there can be no greater act of perfidy and treachery than the assassination of its bearers after they have been acknowledged and received by those to whom they are sent. No statute of the United States makes this act a crime, and, therefore, it is not punishable under the "Rules and Articles of War;" and

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if punishable at all, it must be through a power derived from the usages of war.

Kindred to the act in question in bad faith, is the breaking of his parole by a paroled prisoner. While the United States were at war with Mexico, several officers of the Mexican army were tried by a military commission composed of officers of the United States Army, convicted, and sentenced to be shot, and executed, for breaking their parole.

Numerous trials of a similar nature took place during the war of the rebellion. But there are no statutory provisions whatever upon the subject, and the whole power of the military authorities in such cases is derived from the usages of war.

On the 23d of August, 1865, a military commission duly appointed assembled in the city of Washington for the trial of Henry Wirz, who pleaded, among other things, that the military commission had no jurisdiction over either his person or over the subject-matter of the charges and specifications, being a tribunal unauthorized by either statute, military law, martial law, or well-established usage. But this plea was overruled, and he was convicted upon several charges, one of which was "murder in violation of the laws and customs of war," and after sentence he was hung for his crimes.

All the proceedings in this case derive their authority and validity from the common law of war. Certain persons, it will be remembered, were tried and convicted in the same way for the assassination of President Lincoln.

Attorney-General Speed, in discussing this subject, (11 Opin., 297,) says: "We have seen that when war comes the laws and usages of war come also, and that during the war they are a part of the laws of the land. Under the Constitution, Congress may define and punish offenses against those laws; but in default of Congress defining those laws and prescribing a punishment for their infraction, and the mode of proceeding to ascertain whether an offense has been committed, and what punishment is to be inflicted, the Army must be governed by the laws and usages of war as understood and practiced by the civilized nations of the world."

Again: "If the prisoner be a regular unoffending soldier

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of the opposing party to the war, he should be treated with all the courtesy and kindness consistent with his safe custody; if he has offended against the laws of war he should have such trial and be punished as the laws of war require.

"A spy, though a prisoner of war, may be tried, condemned, and executed by a military tribunal without a breach of the Constitution. A bushwhacker, a jayhawker, a bandit, a war-rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war." * * * "The law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, &c., are offenders against the laws of nature, and of war, and as such amenable to the military. Our Constitution has made those laws a part of the law of the land." (See, also, Vattel, 359; Wheaton's Int. Law, 406; Woolsey's Int. Law, 220; Halleck's Int. Law, 400.)

Milligan's Case (4 Wallace, 2) holds, under the circumstances therein stated, a military commission to be illegal. But the facts there are entirely different from those under consideration. Milligan was the resident of a State not in rebellion. The courts were open and unobstructed for his prosecution. He was neither a prisoner of war nor attached in any way to the military or naval service of the United States.

According to the "Instructions" heretofore referred to, no civil tribunal has jurisdiction in the case disclosed by the papers before me.

Sections 40 and 41 thereof are as follows:

"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.

"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."

Manifestly, these rules to a great extent, if not altogether, are correct; for it cannot be pretended that a United States soldier is guilty of murder if he kills a public enemy in battle, which would be the case if the municipal law was in force and applicable to an act committed under such circumstances.

All the laws and customs of civilized warfare may not be

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applicable to an armed conflict with the Indian tribes upon our western frontier; but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baseness and treachery of their act.

It is difficult to define exactly the relations of the Indian tribes to the United States; but as they have been recognized as independent communities for treaty-making purposes, and as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority.

Doubtless the war with the Modocs is practically ended, unless some of them should escape and renew hostilities. But it is the right of the United States, as there is no agreement for peace, to determine for themselves whether or not anything more ought to be done for the protection of the country or the punishment of crimes growing out of the war.

Section 59 of said "Instructions" is as follows: "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."

My conclusion, therefore, is that a military commission may be appointed to try such of the Modoc Indians now in custody as are charged with offenses against the recognized laws of war, and that if upon such trial any are found guilty they may be subjected to such punishment as those laws require or justify.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

The PRESIDENT.