

**RIGHTS AND DUTIES OF THE UNITED
STATES RELATIVE TO SLAVERY
UNDER THE LAWS OF WAR: NO
MILITARY POWER TO RETURN ANY
SLAVE. "CONTRABAND OF WAR"**

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Rights and Duties of the United States Relative to Slavery Under the Laws of War: No Military power to return any slave. "Contraband of war" by David Lee Child

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DAVID LEE CHILD

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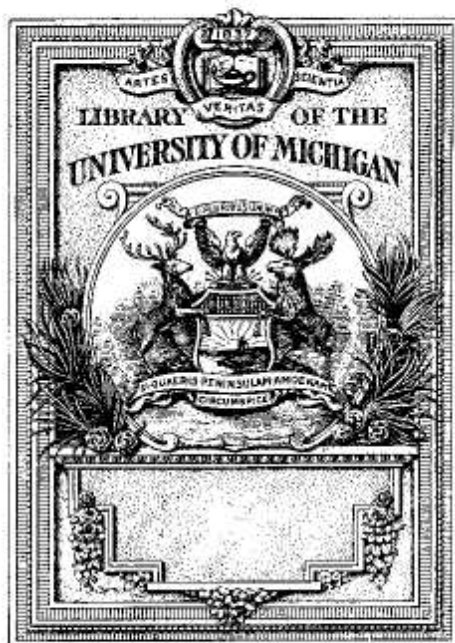
UNITED STATES AND THEIR INSURGENT ENEMIES.

By DAVID LEE CHILD.

[REPUBLISHED, WITH NOTES, FROM “THE LIBERATOR.”]

“We occupy in this supreme moment no petty Thermopylae, guarding some paltry Greece, but the broad, majestic pass, that commands the wealth and worth of human nature itself, the Thermopylae of the human mind.” — HERSEY JAMES.

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1861.



THE WAR POWER OVER SLAVERY.

PART I.

POWER OVER SLAVES AS PERSONS.

CONTRABAND is derived from *contrabando*, a Spanish word, formed of *contra*, *against*, and *bando*, a *proclamation or law*. In a general sense, it means all goods imported or exported contrary to law. This is the *contraband of commerce*, and depends upon the regulations of each particular nation within its territorial jurisdiction.

Contraband of war comprehends such articles only as are used directly, and sometimes those which may be used indirectly, in carrying on war. Of the first class are arms, munitions, soldiers' uniforms, horses, ships of war, etc.; of the second are saltpetre, chemicals for making fulminating powders, and, under some circumstances, provisions, money, ship-timber, naval stores, and, in general, any articles destined for the military or naval use of an enemy, though susceptible of other uses.

These a nation at war may prevent neutrals from carrying to its enemies; and, if neutrals are caught in making such conveyance, they may be punished, either personally or by the confiscation of the hostile goods, together with the vessels or vehicles employed in their transportation.

This sort of restraint upon commerce with enemies is applicable to neutrals alone, and depends wholly on the law of nations. An enemy has a right to supply himself with all kinds of commodities in war as in peace; and the adverse

party has an equal right to seize, if he can, and confiscate them, not as contraband of war, but as the property of an enemy. In the present case, it would also be the property of traitors, waging an unprovoked and unprincipled war against their unoffending and too patient fellow-citizens, against their oaths of allegiance, and against the Constitution and laws they have concurred in establishing.

There is but one other party who can convey any thing to these enemies, and that is a citizen of our own. By the laws of war, *all traffic, contract, intercourse or correspondence between the enemies of a country and its citizens or subjects, is strictly forbidden*. Hence all property of theirs, destined or in process to be transferred to the enemy, or property of the enemy destined to be transferred to our own citizens, is liable to capture and confiscation, not as contraband of war, but as enemy's property.

Such presumptuous and sordid citizens, besides suffering such forfeiture, remain amenable to the laws of their country for treason or misdemeanor, according to the nature and aggravation of the case.

All commerce between belligerent parties being thus prohibited, and all goods, wares and merchandize passing, or destined to pass, to and fro between them, liable to seizure and confiscation, contraband of war, which implies that goods not coming under that description are *free*, can have no distinct existence, but is merged by the common law of nations in the general contraband of commerce.

For these reasons, *there can be no contraband of war between belligerents*, and it is immaterial whether the war be foreign or domestic. It follows that slaves cannot be taken under that title.

Is there any right arising from the state of war, by which, without violation of the Constitution or laws, we may capture or receive, employ or free them?

Slaves must be considered either as persons or property. Mr. Madison, in "The Federalist," maintains that they are both. On their personality, he justifies the provision of the Constitution giving, on their account, to their masters, a heavy additional representation in the national legislature and executive. Upon their chattelism is based the provision for hunting them like partridges, and requiring the people of

the Free States, not to abstain like poor Englishmen from poaching, but to bag the game, and send it back to the lordly owner, when it flies from his warren!

The Constitution affects to deal with slaves as persons only. But it gives Congress the "power to regulate commerce with foreign nations, between the several States, and with the Indian tribes."

In exercising this power in behalf of the victims of the foreign slave trade, as Congress did the first moment that the Constitution untied their hands, they encountered no constitutional difficulty in treating them as a subject of *commerce*. No other idea appears to have been entertained or suggested on that occasion. But when the question of the power of Congress to prohibit the slave trade "between the several States" came before our Supreme Court, ("supreme in mischief,") it was discovered by that learned tribunal, that slaves being *named* in the Constitution as persons, cannot be considered, in a legal sense, as property, but as persons only; and inasmuch as persons cannot be a subject of *commerce*, they decreed that Congress have no authority to prohibit the *American* slave trade! They forgot, or did not pause to reflect, that under this construction, Congress could not have touched the foreign slave trade; and that our treaties with Great Britain for its suppression, and our fleets on the coast of Africa, would all be unconstitutional! Because the term "foreign nations" is annexed to *the same enabling words* as the term "several States." How the South would have yelled, if such an absurd and monstrous inconsequence had been committed *against* any interest of hers, or in favor of any interest of the *North*!

It would be with an ill grace that slaveholders and producers should object to viewing slaves as "persons," having under that title long enjoyed with entire impunity the lucrative luxury of slave-breeding, and in sequence, a vast domestic slave trade. And if they do object, it is of little consequence, for I do not in this discussion make it a paramount object to please and propitiate them, as would seem to be the case with many of the public servants, entrusted with the administration of the government and the conduct of the war.

As "persons," slaves stand in the same relation to an

enemy conquering and occupying the country of their residence, as their masters do. Here is a principle of the laws of war, perfectly settled and unquestioned: *Conquerors have the right, to the extent of their conquests, to establish such government and laws as they see fit, subject to the "higher law" alone.* It is true that they usually permit the civil laws of the vanquished to remain in force; and they do so remain as a matter of course, until expressly altered or abolished by the new sovereign. From this rule, however, is necessarily excepted that portion of the territory which is in the actual occupation, and the area of the operations, of the victorious army. There, martial law invariably supersedes all constitutional and municipal law, so far as concerns the treatment of the vanquished. Indeed, distinguished jurists have suggested that martial law is as much a part of the common law as the law merchant, or parliamentary. But, however it may be considered in this respect, its scope is confined to the hostile and the vanquished; except in the case of enemies and emissaries in our bosom, in which Congress, if it deems it necessary, may suspend the privilege of the *habeas corpus*, and thus give to the authorities, both civil and military, the power of restraining, at their discretion, all disloyal, dangerous or suspected persons.

In all the conquered territory, the orders and proclamations of the commanding generals, or of the sovereign powers which they serve, are, for the time being, the supreme law; and, by the direction of that power, or with its approval, the commanders of armies may prescribe such changes, and initiate such reforms and measures of every kind, as they deem best for the satisfaction, security and indemnification of the conquering nation, for the interests of justice, peace and liberty, and for the general welfare of all concerned. They may dissolve the system of society which they find, and substitute any other which they deem more conducive to the improvement and happiness of the vanquished, and the peace and safety of the conquering nation.

Thus the British nation, of which we were a part in the war with the Pretender in 1745, totally abolished "the patriarchal constitution of the Highlands."* There was much

*Hume.

that was painful, and some things unnecessarily harsh, in this radical and enforced reformation; yet the most enlightened statesmen and purest philanthropists of Scotland, as well as England and America, have recognized the great rebellion of the *Chevalier*, to restore his dynasty to the throne, as a providential dispensation, inasmuch as it afforded the United Kingdom a favorable opportunity, and the most effective means, of eliminating from its polity an incongruous and dangerous element.

The castles of the rebels were sacked and burned, cattle, provisions and other moveable property carried off, the inhabitants disarmed or pursued, and sternly shot down; the hereditary jurisdictions, services, customs and even costumes of the clans, abolished; the traitor chiefs convicted, attainted and executed to the number of eighty or ninety for high treason, and the territory parcelled out in small leasehold estates to loyal, industrious, and skilful cultivators. It was not even allowed to be sold, lest the rebel families should recover possession by purchase, through third persons. The thoroughness and impartiality of the overthrow are evinced by the fact, that Lady Mackintosh, on a charge of treason, was subjected to imprisonment, and her moveable property carried off, although she was not brought to trial, and notwithstanding that *her husband was actually in the service of the government*. Of course, this was the use of the war power.

In 1797, Napoleon I., having beaten and neutralized the King of Sardinia, conquered Lombardy, and broken and driven from Italy the powerful armies of Austria, was occupied in pursuing the remnants, and pushing his conquests toward Vienna, when the usurping oligarchy of Venice, called a Republic, but in reality one of the foulest and cruelest despotisms that ever oppressed a nation or disgraced human nature, broke the peace with France, and stirred up insurrections in his rear. Thereupon he turned suddenly upon that accursed and effete aristocracy of assassins, and at one swoop swept them out. He substituted a democratic Republic for the ancient sham. This was the war power, and so far from being deemed a mistake or a reproach, it has always been considered lawful, just and beneficent, and celebrated among the honorable and redeeming traits of the great but too ambitious warrior and statesman who did it. In crushing