

F 480

-B28

E 480
.B28
Copy 1

THE

RIGHTS OF THE OWNERS

OF

Private Property Taken in War,

AND TO

JUST COMPENSATION, WITHOUT REGARD TO POLITICAL STATUS,

Where there has been no Adjudication of Confiscation.

BY T. W. BARTLEY,
OF WASHINGTON, D. C.

WASHINGTON, D. C. :
CHRONICLE PUBLISHING COMPANY, 511 NINTH STREET.
1873.

E488
B28

61503 ·

'05 ·

U. S. M. 12

THE RIGHTS
OF
PRIVATE PROPERTY TAKEN IN WAR,
AS
SETTLED BY THE HIGHEST JUDICIAL AUTHORITY.

The people of the Southern States have been told that "*they must accept the situation.*" They say that they have accepted it on the basis of the Constitution and the law of the land. But what is that "*situation,*" and what are the terms of it? Is this matter to be determined by the Constitution and the law of the land, as expounded by the highest judicial tribunal, or is it to be determined by sectional and political feeling? Let this be seriously considered, and, in a financial point of view, especially, fully understood; and as a preliminary to the inquiry what the people of the South *may* and *do not* ask, let it be distinctly understood what they *can not* and *do not* ask:

First. No man of ordinary intelligence and common sense in the South even dreams of such a thing as asking, either for compensation for the loss of his slaves, or for the assumption of the debt of the Southern Confederacy. These losses were the inevitable results of the rebellion, and the fourteenth amendment of the Constitution has forever settled all questions about them by taking away from the Government the power of compensation in regard to these two matters.

Second. The inevitable destruction of private property from the operations of large armies in the field, on both sides, and the incidental losses from plundering and robbery and marauding are among the unavoidable calamities of war, and no compensation can be required to be made therefor by the laws of war, and *none is asked.* As the instances where the property of private persons was taken and appropriated for destruction, and was destroyed, under the orders of commanding officers, to prevent its capture and use in aid of the enemy, a different question arises. But as yet no law regulating captures on land has required compensation therefor; and, from the

vindictive feeling of the ruling politicians of the North, it is plain to be seen, that none ever will be enacted.

Third. Losses, by property confiscated by adjudication, by plantations seized as abandoned and sold for taxes due the United States, for a nominal amount, and by the general and permanent depreciation of real estate necessarily resulting from the abolition of slavery, and the measures of Congress which have eventuated in placing the taxing power of the Southern States into the hands of the *non-property-holders*, are wholly beyond the reach of remedy by compensation, and no compensation is asked or expected therefor.

Thus stands "the situation" as to the losses of the South, for which no compensation is asked, and for which none is, from the nature of things, required by law to be made.

The aggregate losses by the abolition of slavery cannot be estimated at less than.....	\$2,000,000,000
The aggregate of the losses by the destruction of private property, together with the losses of private property in the various forms of contributions and subscriptions in aid of the Confederacy, cannot be less than.....	2,500,000,000
The losses, by judgments of confiscation, and by the seizure of plantations as abandoned, and the sale thereof at a mere nominal amount for the taxes, and by the general and permanent depreciation of real estate necessarily resulting from the abolition of slavery, together with the total breaking up of the established channels of productive industry, and the measures of Congress, which have eventuated in placing the taxing power of the Southern States into the hands of the <i>non-property-holders</i> , in the aggregate, cannot be less than.....	2,500,000,000
Total loss for which no compensation is, or can be, asked.....	<u><u>\$7,000,000,000</u></u>

Besides all this, the people of the Southern States are required to pay their proportion of the entire expenditure of the United States in the war to suppress the rebellion, which entire expenditure may be fairly estimated at \$3,000,000,000.

In a financial point of view simply, therefore, beside all the other troubles and disastrous results, which no language can express, the people of the South have suffered losses on account of the rebellion to the amount of \$4,000,000,000, *at least*, over and above the aggregate cost of war to the United States, *for which no compensation is, or can be, asked.*

And it may be added, that while the war of the rebellion devastated and impoverished the South, and brought incalculable ruin

and suffering upon the people, it enriched the people of the Northern States. The prosperity of the Northern cities was immensely inflated, and more large private fortunes were accumulated by people in the Northern States during the war, than in double that length of time at any other period in the history of this country.

In view, then, of what *is not and can not be asked*, let the inquiry be made, what rights of *private property, in the way of restitution, do and can the people of the South in justice and right ask, on the terms and under the requirements of the Constitution and law of the land?*

In the wars which have occurred for the last three hundred years at least, among civilized and Christian nations of people, the rights of *private property* have been respected, and the owner entitled to compensation in case of seizure and appropriation, without regard to his *political status*, unless his rights should be divested by an adjudication of confiscation or forfeiture in court. The people of the South *do ask and have a right to ask*—

First. That the citizens of the South shall be compensated for their cotton seized and taken from them during the war by the agents and officers of the United States;

Second. That they shall be compensated for their property taken and used as army stores and supplies, and for forts, hospitals, &c., during the war.

The aggregate amount of the proceeds of the cotton received in money, by the officers and agents of the United States, can not be fairly estimated at less than from thirty-five to forty millions of dollars. Of this, at least one-sixth part has been paid upon the charges of the agents and officers of the Government, as expenses. And of the remaining part, not over one-half has been demanded on claims preferred. And with a fair opportunity afforded for recovery by judicial proceeding, there is no probability that private persons will be able to establish claims, which in the aggregate, including all which has been already allowed, could amount to three-fourths of the total amount received by the agents and officers of the Government.

And as to the army stores, supplies, &c., for which compensation is asked, the aggregate amount taken may have reached the amount of two hundred millions of dollars. But, *even with a fair opportunity for adjudication*, there is no rational probability that private claims can be established to the one-half of that amount, on account of the manner in which it was taken by the army, and the refusal to appraise its value and give receipts *at the time*.

The Southern people, therefore, do not ask that the United States shall compensate them for their losses by means of the war, but that they shall be *fairly paid for the private* property taken from individual citizens and appropriated and used by the United States. It is simply a demand of compensation for property taken and used, the rights of property in the owners of which were never divested by any judgment of forfeiture or confiscation.

The cotton was seized and shipped North to supply the Northern cotton factories, to aid in sustaining the prosperity of the Northern States. It was not intended at the time as booty or plunder, and the owners were assured that when the war was over they would be paid for their cotton. And the Court of Claims and Supreme Court have repeatedly declared that the proceeds of this cotton created a *trust*, and were held as a *trust fund* for the benefit of the owners.

The liability to pay for the private property taken and used in the service of the army is no less obligatory. To subsist and supply an invading army on the country, by seizing the property of private citizens, is always a harsh and severe measure. By means of it whole families, including women, children and servants, are turned out from their homes and left in a state of starvation. When the pressing emergencies of the war require this, it is always with the understanding and assurance that when the war is over the owner will be compensated. The legislation of Congress has recognized the obligation to pay for this property, but has made a distinction between *loyal* and *disloyal* owners, refusing to pay the latter. This distinction in cases where there has been no judgment of confiscation is not justified by either the Constitution or the laws of war among modern civilized nations. The *surface* politician is heard to say, that he will never agree to pay anything to a rebel. The trite maxim, "give the devil his due," is the simple dictate of *common honesty*. Why were not proceedings for confiscation instituted? Congress had provided in the confiscation act of 1862 for the proper proceeding in court for confiscation. There was no difficulty about this proceeding. The district attorney in each district, on being furnished by the quartermaster with a list of the property and the name of the owner, in each instance, could have obtained the judgment of confiscation, either during the war or after its close; but such proceeding was, for wise and just purposes, waived, and the owner left undivested of his rights of property, and a full pardon was granted, with restoration of all rights, &c.

On the 25th day of December, 1868, the President of the United States, in order “*to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the National Government,*” issued his proclamation “*of universal amnesty and pardon for participation in the rebellion;*” granting “*unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with the restoration of all rights, privileges, and immunities under the Constitution, and the laws which have been made in pursuance thereof.*”—(See United States Stat. at Large, vol. 15, p. 712.)

The power of granting amnesty and pardon is an executive power, vested by the Constitution *exclusively* in the President. And Congress has no power to control it, nor to curtail or limit the legal operation of pardon granted. The effect and operation of pardon and amnesty presented a legal inquiry for the determination of the Supreme Court. That tribunal has, on great consideration, determined and declared in numerous cases that the legal effect and operation of this pardon and amnesty was to wipe out wholly the offense of disloyalty, and restore those who had offended to all their rights of person and property under the Constitution and the laws, and place all the people of the Southern States, in this regard, on an equal footing.—(Padelford case, 9 Wall. R., 537; Klein case, 13 Wall. R., 136; Armstrong case, same vol., p. 155.)

This effect of amnesty and pardon *is the law of the land*. But Congress has taken the extraordinary position of refusing to submit to the law as interpreted and declared by the Supreme Court; as to the property taken for the subsistence of the army, and for hospitals, forts, &c., especially, that body wholly disregards the law of the land as declared by the court. If this course be persisted in, it leads inevitably to repudiation and violations of the public faith in matters involving the integrity of the nation and the honor of our people.

The decision of the Supreme Court of the United States is not a matter of fancy or a freak of political feeling. The grave and learned judges of the court, upon full investigation and great deliberation, ascertained, from the judicial determinations and reports of the enlightened courts of England and this country, the legal effect of pardon and amnesty at the time the Constitution was adopted;

and the Supreme Court has simply expounded and declared the import and effect of these terms, according to their legal signification.

And whether the President's policy in issuing this general pardon and amnesty was right and expedient; whether it was right and expedient to take the essential steps to restore harmony and fraternity, and secure the confidence and respect of the whole people of the United States, is not now the question. The pardon and amnesty were by the authority of the Constitution in due form issued and promulgated; and became the law of the land; and Congress had no more power to revoke, rescind, or curtail the pardon, than that body has to revoke or change the grant of the title to land conveyed and patented under the Constitution and laws by the deed of the President to any private person. The power of pardon and amnesty is one of the highest *exclusive* prerogatives with which the Constitution has clothed the President. And when once issued, he cannot himself revoke it. Had the pardon here granted been partial or conditional, had it made any reservation as to rights of property liable to forfeiture or confiscation, a different question might have been made. But it was not only a "*full pardon*," but it expressly granted "a restoration of all rights," &c. After this all civil disabilities were removed, and no forfeiture or confiscation of property could be adjudged. By the operation of pardon and amnesty, the offense was wiped out, and the offender renewed and restored to the same condition he would have been in had the offense never been committed. In a legal point of view, therefore, pardon and amnesty became *conclusive evidence to repel the charge of disloyalty*. And any attempt by Congress to defeat this effect and operation of pardon and amnesty, by a change in the law of evidence, would be a manifest violation of the Constitution. This is the law and the Constitution, as expounded and settled by the Supreme Court. After full amnesty and pardon, an attempt, by any means, direct or indirect, to forfeit or confiscate private property for participation in the rebellion would be unconstitutional, and would be equivalent to an attempt to punish after full pardon. An attempt by Congress to effectuate such a thing would be not only a manifest breach of the high obligations enjoined by the Constitution, but also of a high duty required of the United States as a civilized nation, *touching the rights of private property*. Not only is this the law as settled and declared by the Supreme Court, but it is the law of war as recognized and established among civilized and Christian nations of people. In the struggles for dominion

and civil authority which occur in modern times, the rights of *private property* are required to be respected. If no pardon or amnesty had been granted, the obligation of the Government to compensate for private property would have still existed.

The following extract from an argument of the author of this article, before the Supreme Court of the United States, in the case of Klein, administrator of Wilson, presents the law touching this point more fully:

“By capture, the right to the possession, and in the case of perishable property, and in some other instances, the right to convert the property into money by sale, passes to the captor. But the contingent right to the beneficial interest in it, *which is in fact the right of property*, still remains in the original owner until divested by some kind of an adjudication. The right in the personal property of a deceased person, which passes to the administrator, is nothing but the right of possession, and the right to convert the property into money for distribution according to law. It is nothing but a trust, while the contingent right of property, or beneficial interest in its proceeds, is vested in the heir or distributee. So in the case of captured property turned over by the military to the civil authorities, the latter can not be invested with the absolute right of property therein, until the right of property of the owner has been divested by an adjudication, or something equivalent thereto. The personal guarantee in Magna Charta, which was incorporated into our Constitution, that ‘no person shall be deprived of his property without due process of law,’ or ‘without just compensation,’ secures this right. And this is in accordance with the international laws and usages of war among *modern civilized nations*, as well as the confiscation laws of Congress, passed during the late rebellion.

“Property captured in war is not *ipso facto* transferred absolutely from the owner to the captor or the government of the captor. The capture does not *per se* effectuate the confiscation, but simply confers the right of confiscation on the proper proceedings being taken for condemnation in court. Such is the doctrine of *Brown vs. The United States*. (8 Cranch R., 112.) This applies to captures on land as well as on the high seas. In the case cited Chief Justice Marshall said (p. 139):

“Even Bynkershock, who maintains the broad principle that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenseless; that fraud, or even poison, may be employed against him; that a *most unlimited right is acquired to his person and property*; admits that war does not transfer to the sovereign a debt due to his enemy, because, he says, ‘the occupation which is had by war consists more in fact than in law.’ * * * *

“And on page 140 he adds: ‘This rule appears to be totally incompatible with the idea *that war does of itself* vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli* that war gives the right to confiscate, but does not itself confiscate, the property of the enemy, and their rules go to the exercise of this right.’

“The antiquated doctrine that by capture an unlimited right was acquired over the person or property of the enemy, prevailed only in barbarous times, and among barbarous nations. It was the doctrine which authorized the victor to make slaves of captives in war, and which has long since been discarded among Christian and civilized nations.

“In England it has not been claimed since the adoption of the Magna Charta at Runnymede, over six hundred years ago, that the absolute interest in property captured in war, and given over to the civil authorities, could pass to the captor without a judgment of condemnation. It appears that where the property was claimed, and the matter was so clear as not to admit of controversy, the Lords Commissioners of the Treasury in England assumed the responsibility of a restoration of the property. (3 Phillimore, 192.) But where there was any question or supposed ground for confiscation, the matter was adjudicated, in very early times, in what was termed the *Court of Chivalry*, held by the constable and marshal; afterward in the court of the King’s Privy Council, until Parliament finally made provision by statute that all matters of capture on land should be referred for adjudication to the Court of Admiralty, where matters of prize and captures on the high seas were adjudicated. (See Elsebe, 5th Rob., 173; Phillimore, vol. iii, pp. 190, 192, 193 and 196.)

“It was in accordance with this doctrine of modern warfare that the Constitution of the United States expressly authorized Congress ‘to make rules concerning captures on land and water.’” Accordingly, in the case of *Brown vs. The United States*, 8 Cranch R., 110, it was held by this court that legislation by Congress was essential to authorize proceedings to condemn property captured in war, and that without this the property could not be confiscated, and the interest therein passed or transferred by the capture.

“The first confiscation act passed by Congress as to *captures on land* was that of August 6, 1861, which in sections two and three provided for the proceedings for condemnation in either the District or Circuit Courts of the United States. (Statutes at Large, vol. 12, p. 319.) The act of March 25, 1862, (Statutes at Large, vol. 12, p. 374,) provided specifically for proceedings in adjudication upon captured property on land under the administration of the law of prize; but the more general confiscation act under which most of the seizures in the late rebellion were made was that of July 17, 1862, in the seventh and eighth sections of which proceedings in the United States District Courts were prescribed and required for condemnation and confiscation. (12 Statutes at Large, p. 591.) In view of this legislation of Congress it will not be claimed, I presume, that the interest in captured property could be transferred from the original owner to the United States without a judgment of condemnation.

“These are the acts prescribing rules concerning captures on land. Then comes in the act of the 12th of March, 1863, in relation to the collection of abandoned or captured property in the insurrectionary States, authorizing the petition in the Court of Claims by the owner of the property. The provisions of the confiscation acts prescribing the proceedings for condemnation are still unrepealed. But as to the captured and abandoned property act of March 12, 1863, the remedy was limited to *loyal* persons.

“The beneficial interest in the captured property could not pass to the United States under these statutes without a judgment of condemnation, or what was made equivalent thereto, a dismissal of the petition of the Court of Claims. An appropriation of the proceeds of this property by the Treasury Department without some such proceedings, or a judgment of condemnation, or some judgment equivalent thereto, would be the act of the freebooter. It could not be justified by any law, either of war or of peace. Modern civilized nations have long since repudiated the practices of the freebooter in war. The doctrine of the right to plunder and rob an enemy in war, much less a *non-belligerent* or *pacific private citizen*, prevailed only

among barbarians in ancient times, when captives in war were made slaves. The respect paid to the right of private property by General Scott and General Taylor in our late war with Mexico, and by the Prussian army under King William in the recent war between Prussia and France, put the blush upon the claim asserted here to take and appropriate the property of pacific citizens in private life and non-belligerents without compensation, and without any pretense of proceedings for confiscation or condemnation. The proceeds of captured and abandoned property in the hands, or under the control, of the Secretary of the Treasury cannot be converted and appropriated to the use of the Government without some kind of proceedings for condemnation, or something equivalent thereto, except on the principle which authorized the conqueror to make slaves of captives in the time of war. While, in our late war to suppress rebellion, slaves were freed instead of men being consigned to slavery, the character of our Government should be saved from the stain and infamy which the rapacity, the cupidity, and the aggressions of the freebooter would impose upon it. Dishonesty and pilfering depredations on the rights of private property in the conduct of individuals are infamous, but in a public officer, or the conduct of the Government, it is perfidy and disgrace, which brings the country into contempt, and makes it an object of reproach and detestation among the nations of the earth.

“Kent, in his Commentaries, (vol. 1, p. 102,) says, in reference to this subject:

“ ‘By the modern usage of nations, neither the twenty-four hours’ possession nor the bringing the prize *infra præsidia*, is sufficient to change the property in the case of maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals as the only sure way to furnish due proof that the seizure was lawful. * * * * *

“ ‘There is a marked difference in the right of war carried on by land and at sea. The object of a maritime war is the destruction of the enemy’s commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end, and is allowed in maritime wars by the law and practice of nations; but there are *great limitations* imposed upon the operations of war by land, though depredations upon private property, and despoiling and plundering the enemy’s territory, are still too prevalent, especially when the war is assisted by irregulars. *Such conduct has been condemned in all ages by the wise and virtuous, and it is usually severely punished by those commanders of disciplined troops who have studied war as a science, and are animated by a sense of duty or the love of fame.*’ ”

In this case of Klein, the humane maxims of the modern law of nations are fully recognized by the court, and in reference to the seizure and confiscation of the *private property* of those who participated in the rebellion, the Chief Justice, in delivering the opinion of the court, said, (p. 13, Wal. R.):

“But it is to be observed that tribunals and proceedings were provided by which alone such property could be condemned, and without which it (that is, the right of property) remained unaffected in the possession of the proprietors. It is thus to be seen that, except as to property used in actual hostilities, as mentioned in the first section of the act of March 12, 1863, no titles were divested in the insurgent States, unless in pursuance of a judgment rendered after due legal proceedings,” &c.

It is, therefore, undeniable that the distinction made by Congress between *loyal and disloyal* citizens in the South, *as to private property*, is untenable, *and, pro tanto, repudiation:*

First, because in violation of the constitutional operation and effect of pardon and amnesty ;

Second, because in violation of the laws of war among civilized nations as recognized by the Supreme Court ;

Third, because in violation of the established rules and regulations governing captures on land, in full force at the time ; and

Fourth, because in violation of the constitutional provision, that “private property shall not be taken for public use without just compensation.”

The obligations of the Government to discharge these liabilities to the people of the Southern States are as clear and unquestionable as the obligations to pay the bonded debt of the United States. The bondholders can claim no higher authority to affirm the liability of the Government to pay their bonds, according to their legal tenor and effect, than the decisions of the Supreme Court of the United States. Besides this, the proceeds of the captured and abandoned cotton is a *trust fund* in the custody of the Government, and so declared by the court. A tortious conversion of the fund, and refusal to pay it over to the owner on proof of his right, would be equivalent to an embezzlement, and would make the original seizure of the cotton a robbery *ab initio*. And the liability of the Government to pay for the *private property* taken from individuals for the subsistence and use of the army, rests upon the constitutional guarantee that “*private property shall not be taken for public use without just compensation.*” The force and operation of this constitutional injunction could have been avoided only by an adjudication of confiscation. The obligations to pay for the *private property taken and used by the army constitute, in fact and reality, a part of the war debt of the country.* The bonded debt was contracted for money obtained to subsist the army and carry on the war. And this private property taken from the people of the South for the subsistence and use of the army saved the Government from a *pro tanto* addition to the bonded debt of the United States. And it should be as honorably met and discharged as *any other part of the war debt.* Let the honor and character of the country be saved from the stain of repudiation as to any part of this war debt.

The immense income of the Government—exceeding at this time

an average of one million and a quarter of dollars per day—with the great and growing resources for taxation in this vast country, extending from the Atlantic to the Pacific, forbid the idea of the slightest embarrassment to the Government in meeting all just and legal demands. A fair and honorable discharge of these demands of the people of the Southern States will never be felt in the public burdens of the country.

While, in the adjudication and adjustment of these claims the most thorough and effective precautions should be used to guard against fraudulent and unjust demands, the remedy and mode of procedure should not be crippled by unreasonable limitations and conditions calculated to defeat the end, and make the proceeding a mere sham.

Attempts have been made by politicians in Congress to circumvent and defeat the operation and effect of the decisions of the Supreme Court by changes in the law of evidence, and directions to the courts what judgments should be entered and what should not be rendered, &c. These having proved abortive, the position is now taken that the judicial determinations of the Supreme Court can be avoided by withholding appropriations, &c. It is true that Congress may refuse to make appropriations to meet the liabilities of the Government, but such refusal is *repudiation*, and brings upon the country all the stain and disgrace of repudiation. A factious majority in Congress might refuse to make appropriations to pay the salary of the President, and the salaries of all the executive officers. But this would be a manifest violation of constitutional duty, and revolutionary in its tendency. Suppose that a majority in Congress should refuse to make appropriations to pay the interest on the bonded debt of the United States upon the alleged ground that the bond-holders were not good citizens. That would be manifest repudiation, but in principle would not be distinguishable from the position now taken in Congress. The obligations of Congress to provide by appropriation for the discharge of the established and ascertained legal liabilities of the Government are enjoined by the Constitution and a proper sense of duty. The fact that Congress may, by contumacy, *repudiate* the national liabilities, cannot justify repudiation.

It is now eight years since the close of the war of the rebellion, and it is time, if that time shall ever come, that the animosities and hostile feeling engendered by the war should be laid aside. Harmony in our political system, and the respect and confidence of the whole

people of the United States are a hundred-fold more important to the Government and the country than the amount of the compensation claimed. It is believed that President Grant desires to do what is just and right in the premises. But the misfortune has been that the South heretofore has been only partially represented in Congress, and, in fact, not at all represented in the Cabinet councils of the President.

The people of the South have, under all their losses and troubles and sufferings, accepted "the situation" in good faith, and they ask most respectfully to be protected in their just and lawful rights. And they ask this by virtue of the Constitution and the law of the land, and also upon the terms of the laws of war which prevail among the civilized nations of the earth.

T. W. BARTLEY.

Faint, illegible text, possibly bleed-through from the reverse side of the page. The text is arranged in several lines and is too light to transcribe accurately.

LIBRARY OF CONGRESS



0 013 701 845 7