THE

COMMANDER-IN-CHIEF;

A

DEFENCE UPON LEGAL GROUNDS

OF THE

Proclamation of Emancipation;

AND AN ANSWER

TO

EX-JUDGE CURTIS' PAMPHLET,

ENTITLED

"EXECUTIVE POWER."

BY GROSVENOR P. LOWREY,

A MEMBER OF THE NEW-YORK BAR.

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PREFACE.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

I, Abraham Lincoln, President of the United States, and Commander-in-chief of the army and navy thereof, do hereby proclaim and declare, that hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and the people thereof, in such states as that relation is or may be suspended or disturbed.

That it is my purpose at the next meeting of Congress to again recommend the adoption of a practical measure, tendering pecuniary aid to the free acceptance or rejection of all the slave states, so called, the people whereof may not then be in rebellion against the United States, and which states may then have voluntarily adopted, or thereafter may voluntarily adopt, immediate or gradual abolishment of slavery within their respective limits, and that the effort to colonize persons of African descent, with their consent, upon this continent or elsewhere, with the previously obtained consent of the governments existing there, will be continued.

That, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any state, or any designated part of a state, the people whereof shall then be in rebellion against the United States, *shall be then, thenceforward, and forever, free;* and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, or any of them, in any efforts they may make for their actual freedom.

That the Executive will, on the first day of January aforesaid, by proclamation, designate the states, or parts of states, if any, in which

the people thereof respectively will then be in rebellion against the United States; and the fact that any state or people thereof shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such state shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such state and people thereof are not in rebellion against the United States.

That attention is hereby called to an act of Congress, entitled, "An act to make an additional article of war," approved March 13, 1862, and which act is in the words and figures following:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, hereafter, the following shall be promulgated as an additional article of war for the government of the army of the United States, and shall be obeyed and observed as such:

"ARTICLE —. All officers or persons in the military or naval service of the United States, are prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor who may have escaped from any persons to whom such service or labor is claimed to be due, and any officer who shall be found guilty by court martial of violating this article, shall be dismissed from the service.

"SECTION 2. *And be it further enacted*, That this act shall take effect from and after its passage."

Also to the 9th and 10th sections of an act, entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate property of rebels, and for other purposes," approved July 17, 1862, and which sections are in the words and figures following:

"SECTION 9. *And be it further enacted*, That all slaves of persons who shall hereafter be engaged in rebellion against the government of the United States, or who shall in any way give aid or comfort thereto, escaping from such person, and taking refuge within the lines of the army, and all slaves captured from such persons, or deserted by them, and coming under the control of the government of the United

States, and all slaves of such persons found on or being within any place occupied by rebel forces, and afterward occupied by the forces of the United States, shall be deemed captures of war, and shall be forever free of their servitude, and not again held as slaves.

"SECTION 10. *And be it further enacted*, That no slave, escaping into any state, territory, or the District of Columbia, from any of the states, shall be delivered up, or any way impeded or hindered of his liberty, except for crime, or some offence against the laws, unless the person claiming said fugitive shall first make oath that the person to whom the labor or service of such fugitive is alleged to be due, is his lawful owner, and has not been in arms against the United States in the present rebellion, nor in any way given aid and comfort thereto; and no person engaged in the military or naval service of the United States shall, under any pretence whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service."

And I do hereby enjoin and order all persons engaged in the military and naval service of the United States to observe, obey, and enforce, within their respective spheres of service, the acts and sections above recited; and the Executive will in due time recommend that all citizens of the United States, who shall have remained loyal thereto throughout the rebellion, shall, upon the restoration of the constitutional relations between the United States and their respective States and people, if the relations shall have been suspended or disturbed, be compensated for all losses by acts of the United States, including the loss of slaves.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

"But what a bottomless slough of absurdities, are even honest men compelled to swelter in, when once they have put their hand in that of slavery, and allowed themselves to be led by it! * * * Only one act, it seems, imposed by the terrible exigencies of war, is unconstitutional, and that is, the destruction of its cause, slavery! No wonder that the great heart of the world swells with a suppressed shout of derision at such acumen and statesmanship."—*From "The Birth and Death of Nations," a pamphlet by James McKaye, Esq.*

"Judge Curtis' argument would give the Constitution and the law to the rebels, as their sword to smite with, and their shield to save them; and leave it to us only as a fetter."—*Extract from Professor Parsons' Letter to the Boston Daily Advertiser.*

THE COMMANDER-IN-CHIEF.

When Congress, at the last session (1862), urged by a great necessity and the irresistible pressure of coming events, passed the bill known as the Emancipation Act, there arose all over the land a loud cry of remonstrance, coming mostly from timid patriots and bold sympathizers with rebellion. With some difficulty it was made to appear from the incoherent utterance that the national legislature had exceeded its constitutional functions, and usurped a power which could be exercised lawfully by the President acting as Commander-in-chief in time of war alone. So confident were the enemies of the policy of that measure, that it would never be acted upon by Mr. Lincoln, that they did not consider it necessary to deny the existence of such a power somewhere, and therefore fully admitted that it belonged to him as a war power. When, at last, he became of like mind, and issued his proclamation to that effect, great political contests were in progress in the various States, and the most bitter opposition was arrayed against it; but, although men of legal eminence were found among its adversaries, it entered no man's mind to question it upon legal grounds, until Ex-Judge Curtis, by his pamphlet, entitled "Executive Power," made that issue before the public. If Judge Curtis's loyalty is great, which I know no reason to doubt, so must his mortification have been great, to see how eagerly his ingenious argument was seized upon, and how comforting it has proved to all the notoriously disloyal among us.

The avowed object of that pamphlet is, not alone to question the power of the President to emancipate the slaves of rebels, but to warn the American people against encroachments upon their civil liberties, by various alleged abuses of those vast powers belonging in time of war to the Commander-in-chief of the army and navy. Had the occasion not

been such that greater danger was to be apprehended from disturbing the public confidence in the government than from any present usurpation by it, good men might find it more easy to sympathize with the distinguished writer.

Impressed by a strong conviction that it is not alone from the side to which Judge Curtis' warning points that dangers threaten the cause of Christian progress, as it is illustrated in our social and political forms, I have felt it an imperative duty to give whatever thought has been given me upon the grave subject discussed by him.

The proclamation of Sept. 22, 1862, commonly known as the Emancipation Proclamation, the proclamation of Sept. 24, 1862, and the orders of the Secretary of War, promulgated Sept. 26, 1862, furnish the occasion and subject for his criticism. It is his opinion that it is not within the lawful authority of the President to issue and carry out these proclamations and orders.

It will be seen by the careful reader, that, notwithstanding the two proclamations are essentially different in purpose, character, and proximate motive, they are so indiscriminately treated by him, as to make it sometimes difficult to know, to which the arguments of the ingenious writer refer; it will also be seen, as has well been said by Prof. Parsons, in his letter to the Boston Daily Advertiser, that there are, touching the Emancipation Proclamation, three questions only. First: Had the President, as the civil executive, constitutional power to issue it? Second: Granting he had the power, was it expedient to use it? Third: Has he power, as Commander-in-chief, to issue it at this time, as an act of war? These three questions, again, are so indiscriminately treated, as sometimes to mislead, and sometimes confuse the reader.

This is, perhaps, the consequence of a desire, on the part of Judge Curtis, to bring the discussion within a convenient space; but such a purpose should be kept subordinate to the higher object of arriving at just and true conclusions.

Of the proclamation denouncing interference with enlistments; and of the orders of the Secretary of War, establishing a provost-marshal system through the country, it is not my purpose to say more, than that they were probably intended as measures of military police, and were conscientiously con-

ceived to be necessary. At least, they had their origin in the paternal and benevolent desire of Mr. Lincoln to protect us from the evil agencies of treason; and no man has dared to charge that any unworthy motive has caused the arrests and detentions which are complained of.

Of the Proclamation of Emancipation, I shall endeavor to show that it is a lawful and necessary measure of war.

Before setting out upon the argument before us, however, it is important to review the peculiar character and purpose of this war, and the situation in which it finds us.

The true and real life of a nation is the political *idea* upon which it is based. The ideas of our government are, Liberty and Unity. The *form* of a government is entitled to greater or less respect, according as it, in a higher or less degree, conserves the governmental idea. The Constitution, which is the form of our national government, has been justly admired and revered, because it has proved itself well adapted—until treason assailed it by force—to preserve and perpetuate liberty and unity. But that noble instrument is not the *cause*, but the *means* of American freedom. The charter of our free system of laws is the Constitution, but the charter of the Constitution is, the purposes for which it was erected, and which are thus declared in the preamble: "We, the people of the United States, in order to form *a more perfect union*, establish justice, *insure domestic tranquillity*, provide for the common defence, PROMOTE THE GENERAL WELFARE, *and secure the blessings of liberty to ourselves and our posterity*, do ordain and establish this CONSTITUTION for the United States of America."

Ordinarily, the mind stops at the Constitution, as the Alpha and Omega of American liberty; and it is eminently safe, judicious, and proper, that this should be the rule of argument when questions arising from or under the Constitution are being considered.

Such would be all questions touching the laws, their administration, the powers and functions of Congress, and of the President. The proximate source of light, and authority for all such questions, is the Constitution. But where the Constitution itself is the subject of consideration, and the question is, shall it exist or cease, and the President finds his powers, as its military champion, challenged, the mind looks

instinctively through the Constitution to that broader charter upon which it rests. And this it does, not for the purpose of finding a "higher law" which shall contradict or thwart the Constitution (dangerous fallacy), but a higher law which shall sustain and be in agreement with it.

But to return to the situation: a great people finding themselves in possession of a great and vital political idea, have devised a scheme for its protection and perpetuation. This scheme is the Constitution. A part of the policy of this scheme is to create a civil office, of supreme executive functions, the incumbent of which is called the President.

This office is artificial and original with the Constitution. Being so, it is necessary that the charter which creates it, should also limit and define its duties and powers. This is easily done, for it is in the nature of civil powers and duties, that they may be defined and limited in advance. For, they are supposed to be exercised, as a part of an orderly system in the midst of order; and, therefore, it is that the powers and duties of the civil Executive are clearly set forth.

Of the acts of the *President*, therefore, constitutionality and unconstitutionality may be predicated.

The authors of this scheme, deeming it necessary, also, to provide means of defence against hostile force, authorized the Congress "to raise and support armies," and "to provide and maintain a navy." Now, as military enterprises are eminently executive in their character, it is necessary that armies shall be under the control of some person chief in command, who shall become the depositary for the time being, within the sphere of his command, of all the war powers, rights, and discretion, which belong to the nation. It is, therefore, provided that the person who shall from time to time be President, shall also be Commander-in-chief of the army of the United States, and of the militia of the several States when called into the service of the United States. The office of Commander-in-chief is not original with the Constitution; but has existed and been recognized from the earliest history of civilized warfare. Its functions are to be performed after disorder has partially or completely overturned the civil power, and produced circumstances, the character of which cannot be foreseen. They are, for that reason, indefinable in advance, except in these general terms: that

the Commander-in-chief, in time of war, is authorized and bound to use any and all accessible means not forbidden by the laws of war, which in his judgment may be useful or necessary to subdue the enemy. The Constitution having thus recognized this necessary office, and declared that the President shall be its incumbent, leaves the matter there. The duties which a Commander-in-chief may be called upon to perform, under the laws of war, are the just and sole measure of his powers; that is to say, he is given power equal to the demands of his duty. These powers it is impossible to declare in advance; such as they are, they inhere in the eternal frame of things.

Constitutionality and unconstitutionality cannot, therefore, be predicated of the acts of the *Commander-in-chief.*

We may say of them, that they are lawful or unlawful, but the tests are military law and the necessities of the occasion.

The Constitution creates the Presidency, and instructs and binds the President; but it only recognizes the necessity that some person shall have chief command, and provides the person to meet the necessity; but neither instructs nor binds him to any duty, or the manner of performing any duty. The President, then, is a constitutional officer, and his functions are constitutional; he is, also, constitutionally the Commander-in-chief, but his functions as such in time of war are extra-constitutional. If these two offices were held by different persons, the distinction would be plain to all; but, their joinder in the same person, tends to confuse the mind without essentially altering the case. I do not, by the phrase "extra-constitutional," mean to intimate that any person in this government can, under any circumstances, lawfully exercise any power which contradicts, varies, or in the least derogates from, the Constitution. To attempt such a thing would be moral treason. But, upon the outbreak of war, the nation, in its character as a nation, receives and deposits with its military executive vast accessions of rights and powers, under the laws of nations; simplest among which, is the right to kill. These rights, with us, are the faithful allies of the Constitution, fighting with and for, but never against its spirit or letter. Though they are the faithful friends and servants of the Constitution, they are not constitutional

powers; and I am compelled to call them extra-constitutional for want of a better name.

The political situation being such as has been described, the nation finds itself attacked. The attack is from within and not from without, which is the same as to say, not by persons claiming to be injured by any act of bad neighborhood, but by persons discontented with the internal form or administration of the governmental idea. The peril is not merely loss of territory, or the payment of tribute to a conqueror, but absolute privation of national life. In such a war the Commander-in-chief is called upon to act; and as has already been said, his powers are, under the laws of war, to be measured by his duties, and his duties by the necessities of the occasion. The *necessity* is to preserve the national life; the *duty* is to use all requisite means, not forbidden by the laws of nations, and the *power* and *authority* strike their roots deep into that first maxim of human language, "self-preservation is the first law of nature."

The peculiar character and purpose of this war is thus alluded to, not because it is supposed to give the nation, or their representative and depositary for the time, any *powers* which he would not have in a foreign war; but because they justify and demand the extremest exercise of all the powers he has. As to our *rights*, they are greater than they would be against a foreign enemy, for a sovereign nation engaged in the duty of suppressing an insurrection of its citizens may, with entire consistency, act *in the twofold character of sovereign and belligerent.* (Upton's Mar. War and Prize, 212; MARSHALL, Ch. J., Rose *v.* Humilly, 4 Cranch, 272. See opinion of SPRAGUE, J., in case of the prize-ship Amy Warwick, Boston, 1862; and opinion of CADWALADER, J., in case of prize-ship General Parkhill, Philadelphia, 1861.) "Against those whom the law cannot reach," says Demosthenes, "we must proceed as we oppose our public enemies, by levying armies, equipping and setting afloat navies, and raising contributions for the prosecution of hostilities." (Grotius, Prolegom. § 23.) But, unlike other enemies, they may, when our arms have prevailed against them, be brought to suffer under the municipal law as criminals; indeed, there is no other way to *punish* treason, except in the manner pointed out by the Constitution. Even Jeff. Davis has, remaining to him, the right to be *constitutionally hung.*

It would have been better to have stated sooner what shall now be observed once for all, that the duties of the Commander-in-chief are divisible into two classes: those routine duties, fixed by law under the authority to Congress to "raise and support armies," such as organization of the army, appointment of officers, &c., which belong equally to peace and war; and those other undefined duties which arise only in time of war. This first class, of routine duties, relates to the citizen, and can be foreseen and provided for by the sovereign legislative power; the second class arises out of the acts of the enemy, relates to him and his abettors, cannot be foreseen, and is left to be governed by the laws of war. The fundamental fallacy of Judge Curtis' pamphlet is, that he utterly confounds these two classes of powers, as well as the difference between the rules applicable in war to the citizen, and those applicable to the enemy.

It is these latter powers and duties only, which are intended to be described as extra-constitutional.

The laws and rights of war which belong to the nation, and are for our use temporarily vested in the Commander-in-chief, are declared by Burlamaqui (Prin. of Nat. & Pol. Law, vol. ii., ch. 5), who cites Grotius, to be substantially contained in the following rules: First—Everything which has a connection morally necessary to the end or object of the war is permitted. For it would be to no purpose to have a right to do a thing if we could not make use of the necessary means to bring it about. Second—The right we have against our enemy, and which we pursue by arms, ought not to be considered only with respect to the cause of the war, but also with respect to such fresh causes as may arise during its progress. Third—A great many things otherwise unlawful are yet permitted, because they are the inevitable consequences of war, and are supposed to happen contrary to our intention.

Under these general rules, many particular maxims range themselves.

Every war is supposed to be defensive in its principles, though it is offensive in its policy, as where attack is the best method to repel threatened invasion; and he who first renders force necessary is the aggressor, though he may not be the first who applies it. (Vattel, b. 3, c. 6, §§ 91, 100.)

For the purpose of defence, a nation is free to use against the enemy, violence and terror, which are the proper characteristics of war, *ad infinitum*, until it has repulsed the threatened danger and obtained security for the future. (Burlamaqui, ib.)

We may employ strategy and artifice, provided it be without treachery or breach of promise. We may also appropriate the enemy's goods, public and private, if we can thereby weaken him or strengthen ourselves; for, says Cicero, "it is not against the law of nations to plunder a person whom we may lawfully kill." (Cic. de. Off. lib. 3, ch. 4.)

We may suspend his civil government, and establish military rule in its place, for the management of civil affairs. (Letter of Pres. Polk to the Sec. of the Treas., on the subject of mil. contributions, March 23, 1847. Fleming *v.* Page, 9 How., 603.)

We may seize upon private property, by way of penalty for the illegal acts of individuals, or of the community to which they belong. So, also, if the offence attach to a community or town, all the individuals of that community or town are liable to punishment, and we may either seize their property, or levy upon them a retaliatory contribution, by way of penalty. (Hall. Int. L., 458. See Scott, Proc. in Mexico, Ap. 11, 1847; Cong. Doc., 30th Cong., 1 sess., Ex. Doc., No. 56, p. 127.)

There may be cases of necessity, so pressing even, that the care of our own preservation will oblige us to the extremity of putting to death prisoners-of-war, which, under any other circumstances, would be absolutely criminal. (Burlamaqui, ib.)

The state of war into which the enemy has put himself, permits us also to take advantage of any occasion or disposition which we may find in his subjects, or any one of them, to commit treason against him. For we are no more obliged, strictly speaking, to respect the right he has over his subjects and dependants, and the fidelity they owe him as such, than their lives and fortunes, of which we may certainly deprive them by right of war. And it is to be observed, that the law of nations allows much difference between a fair and legitimate enemy, and rebels, pirates, and highwaymen. The most religious princes make no difficulty to propose even re-

wards to those who will betray such persons ; and the public odium under which men of this stamp lie, is such, that nobody thinks the measure hard, or blames the conduct of the prince, in using every method to destroy them. (Burl., vol. ii., ch. 6, §§ 18, 21, 24.)

He who is engaged in war derives all his right from the justice of his cause. Whoever, therefore, takes up arms without lawful cause, can absolutely have no right whatever ; every act of hostility which he performs is a crime. He is guilty of a crime against the enemy, and against his own people, whom he forces into acts of injustice, and who lose their lives and property ; and, finally, he commits a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example. (Vattel, b. 3, ch. 9, pl. 183, 184.)

Many incidents follow war which are misfortunes, and are not properly chargeable to the aggressive party. Thus, the brutal license of soldiers, which is sometimes shown after the capture of a town, is to be regretted, but the possibility that it might transpire would be no argument against capturing the place. Burlamaqui further illustrates the same idea by saying that we may attack a ship full of pirates, though there be women, children, and other innocent persons on board.

Assuming it to be clear, from the foregoing observations that, while the Commander-in-chief is a constitutional officer, his war functions are derived from the broad code of war ; and that the general principles of that code have been made sufficiently intelligible for our present purpose ; and it being borne in mind that the war is upon our part a struggle for national life, and the principles of government which underlie the Constitution ; and that the enemy, who have made war without cause, are also rebels and traitors, against whom the law of nations permits the utmost stretch of all the characteristics of war ; we are in a situation to proceed to a more intelligent examination of Mr. Lincoln's Proclamation of Emancipation, and Judge Curtis's argument against it.

It must be insisted, at the outset, however, that one broad and vital distinction, which it would seem Judge Curtis purposely ignores, shall be kept constantly in sight.

It is, that no man can, at the same time, be our enemy,

deserving our utmost wrath, and a friend, entitled to our support and protection. *Rebels in arms against the Constitution, must not be spoken of, as men having constitutional rights.* The whole scheme of Judge Curtis' argument seems grounded in a studied confusion of these two classes of persons ; and such a solecism, at such a crisis, becomes almost a crime. Let it then be borne in mind, that, while the loyal citizen retains all his constitutional and legal rights, as in peace, the armed rebel, having voluntarily withdrawn from the protection of the Constitution and submitted himself to the arbitrament of war, has the same rights as any traitorous public enemy and parricide—no more.

The proclamation will be found, upon examination, to treat of subject-matters coming within its author's functions as President, his war powers as Commander-in-chief, and his routine or peace duties as Commander-in-chief. It commences—"I, Abraham Lincoln, President of the United States, and Commander-in-chief of the army and navy thereof, do hereby proclaim and declare, that hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the *constitutional relations* between the United States and the people thereof, in such states as that relation is or may be suspended or disturbed."

Subordinate to this general declaration, and in accordance with this general purpose, he proceeds to announce his intention to recommend, as President, the adoption of certain measures by Congress ; as a routine duty of the Commander-in-chief, he promulgates an article of war, and calls attention to an act of Congress. But the important portion of the proclamation is that, wherein he, as Commander-in-chief, embodying all the executive war powers and rights of the nation, as in his office of President he embodies the element of their civil executive sovereignty, declares that from a certain day all persons held as slaves in states or portions of states, the people whereof shall then be in rebellion, shall be thenceforward and forever free.

The first question concerning this remarkable claim to power is—Has he, as civil executive, the constitutional authority required ? To this the unequivocal answer is—No ! Second—Had he the power, as Commander-in-chief, to issue the proclamation at this time as an act of war ? Third—Having the power, was it expedient to exercise it ?

Let us not lose sight of what it is he purposes to do ; it is to restore the *constitutional relations* between the United States and the people thereof, in certain insurgent districts. More than this he has no right or occasion to do, and succeeding in this, his duty will be fully performed.

What, then, were these constitutional relations which are now suspended or disturbed. They were, the obligation and privilege to join in a common government ; the obligation and right of common defence ; the duty to obey and the right to enjoy protection under the supreme law of the land.

But was the right to own horses one of the constitutional relations between the states ? No. But it was a right, nevertheless, and its chief protection was the Constitution, though that instrument contains no mention of it.

Was the right to hold slaves one of the Constitutional relations referred to ?

Guided by the same principle, we answer, No ! But it was a right, nevertheless, enjoying the same kind and degree of protection. Though often carelessly spoken of as a constitutional right, it had no special constitutional warrant, over any other property right, but rested under the same general provision which reserves to the states all powers for the regulation of their local concerns not granted to the general government. The same provision protected or permitted the protection in Georgia of the right to life, the right to own horses, and the right to own slaves. Constitutionally, neither could be said to have a higher warrant than the other ; but the two former had high natural and traditional authority which the latter lacked. Yet the privation of those two by force in time of war is not generally considered unconstitutional, or a disturbance of constitutional relations. But slavery is said to be a peculiar institution, and it is so in this respect, at least, that having a narrower charter of right, it claims a broader protection and privilege than the others. It is necessary to test this claim.

Let us suppose an analogous peculiar institution : If, in Georgia, there existed by state law a right of property in unreclaimed wild animals, such as the law calls *ferœ naturæ*, would it, in time of war, and as a measure of harm to their hostile owners, be unconstitutional to kill or entice away those beasts ? Clearly not. It appears, then, that it is not

necessary to the restoration of constitutional relations that the dead killed by us in battle, and who had a constitutional and natural right to life, shall be restored; nor that the horses seized by us for military purposes from citizens of rebellious communities, and which were owned by natural, and protected by constitutional law, shall be returned; nor that the animals *ferœ naturœ* shall be returned to the state, place, and ownership, from which they were taken. How is it, then, that slaves, who are certainly held by a lower tenure than horses, and precisely the same tenure as the wild animals in the suppositious case, must alone be kept in the *status* in which the war finds them, under penalty that by the disturbance of the relation between them and the owners, some incurable fracture of constitutional relations will take place. The *reductio ad absurdum* seems the only process known to logic which is adequate to deal with this anomalous claim.

It seems clear, then, that the *President* will not necessarily find *his* purpose of restoring constitutional relations, rendered futile by the fact—if such should happen to be the case—that the Commander-in-chief, in the prosecution of *his* purpose to conquer rebellion and end the war, has, either temporarily or permanently, disturbed the relation between certain rebel masters and their horses and slaves. And since we are assured that the *President* is not to be embarrassed, we are prepared to look with more favor upon the plans of the *Commander-in-chief*.

What is that which *he* proposes? To set free, by force of military power, and as a measure of offence and defence, the slaves of rebellious communities. In other words, there are in the rebellious communities, which it is the duty of the Commander-in-chief to subdue, a great number of persons actively engaged in supporting the war, by providing subsistence for the rebel armies. They are forcibly held to this service by the same men, and the same inimical authority, which are now assaulting the life of the nation. In the interest of the nation, and for the purpose of weakening the enemy, the Commander-in-chief proposes to disregard and invite the persons so held, to disregard this local authority, and cease to serve it.

What is the objection to this? It is scarcely possible to

quote or condense Judge Curtis's statement, without diminishing its plausibility; but, in substance, he says that "the proclamation, if taken to mean what it in terms asserts, is an 'executive decree,' that at a certain time all persons held as slaves, in certain localities, shall be free;" that "the persons who are the subjects of this proclamation, are held to service in the states where they reside by *state laws*, under authority as clear and unquestionable as the laws of any state on any subject;" and that therefore "this proclamation, by an *executive decree*, proposes to *annul* and *repeal* valid *state laws*."

If the premises of this argument were sound, it would be more difficult to answer; but it seems that, while Judge Curtis is too skilful a logician to err in his method, he is not free from human fallibility to err in his matter. The fallacy, not to say sophism, lurks in the very head of the argument—the first propositions, that the proclamation is an "executive decree," and that to free slaves, is to annul and repeal the laws under which they were held.

It is true, that Mr. Lincoln describes himself, in the proclamation, as the executive, when, to have been technically correct, he should have called himself the commander-in-chief. Undoubtedly, he used the word in that broader sense, in which whoever does an act, whether civil or military, is an executive; and not in the popular sense in which "executive" is a synonym for "president." In other words, he meant military executive and not civil executive. But, however that may be, it is of no importance, and binds neither him nor us. We know his powers as well as he, and are equally able to give a designation to his acts. Had he chosen to call himself king of Great Britain, it would not have detracted from the true force of whatever he rightfully did as Commander-in-chief. Had he called the instrument a general order, its real character would have been the same; but Judge Curtis could not have startled the public ear by miscalling it "decree," a name which suggests emperors and absolutism.

It "repeals and annuls valid state laws," says he. Were this the effect, or the attempt, it would be startling; for the spectacle of a civil system, overturned, destroyed, repealed, or annulled, by arbitrary military force, is not an inviting one

for the eyes of constitutional republicans, even where the system is that of an enemy.

But such is neither the intent nor possible consequence. The act being military, is capable to produce only a military result. The military power suspends, but never destroys the law. So well has its effect been understood for ages, that it has grown into a maxim: *Inter arma silent leges.* But though military power never destroys the law, its very first and principal effect is to destroy rights and things existing under the law. It is this which constitutes war. It may also suspend the relation between persons and things, under such circumstances, that the right or relation can never be restored. Thus, military power may seize a man's house, and suspend his right to its occupancy; yet, when the war ends, and the enemy retires from its possession, he will, if no treaty stipulation intervenes, find himself, by the very fact of peace, reinstated in all his rights to his property. But if, in the mean time, the military power has destroyed the house, the owner will find himself debarred from its enjoyment, it is true, but, by the operation of the necessity which caused its destruction, and not by anything inherent in military law or power. The general rule as to immoveable property is, that peace restores the proprietor to his former rights, unless the terms of peace prescribe otherwise; as to moveable property, the contrary rule, that peace confirms and perfects the title of the captor, prevails, subject to exceptions hereafter to be mentioned.

What this proclamation, or general order, proposes to do, is, to suspend the relation between Robert Toombs, a voluntary white resident of Georgia, who is, by that fact, presumptively a rebel, and Tom, his slave, who is presumptively loyal, so far as he is free to be anything. The civil *status* of Tom was slavery, because certain civil interests demanded it. His military *status* is to be freedom, because the general military interests demand it. This does not abolish slavery; it only abolishes the slave. For though Tom may take advantage of his new *status* to remove beyond the reach of future contingencies, yet, when the martial law is removed, Mr. Toombs may purchase another slave in Maryland, or wherever else he can procure a legal title, and hold him, afterward, in Georgia, under the same law as before.

It is unnecessary to inquire whether—the necessity of the occasion demanding it—the President might have done any act which would have rendered it impossible hereafter to hold slaves in Georgia ; or, whether the Congress, representing in war the deliberative and legislative sovereignty, might do such a thing. As to these questions there are differences among lawyers ; but it is not this, which the proclamation purports to do. The language used is—"That, on the first day of January, 1863, all persons held as slaves within any state, or designated portion of a state, the people whereof shall then be in rebellion against the United States, *shall be then, thenceforward, and forever, free ;* and the executive government of the United States, including the military and naval authority thereof, *will recognize and maintain* the freedom of such persons, or any of them, in any efforts they may make for their actual freedom."

The right, in time of war, to seize, destroy, convert, and transfer, the property of the enemy, is uncontroverted. These rebels call these slaves property ; and were it proper for our government so to regard them, our right to appropriate or sell them would be undisputed. One point of Judge Curtis's cavil against the action of the Commander-in-chief is, that he has declared these slaves free, in advance of his ability to lay his hands upon them, and convert them into possession ; a ceremony required by the law of nations to vest in the captor of enemies' goods any transferable title. To this, several things may be answered ; and, first, if Mr. Lincoln fails to make good his declaration and promise, the only sufferer will be the slave, and I do not understand that it is in his interest that Judge Curtis complains. Second, the customary law of nations requires the belligerent, first to possess himself of his enemy's property, before he can exercise acts of ownership over it, not because of any lack of right in the belligerent, but because of a lack of physical ability to make good his right in any other way. The *right* of the belligerent is, to do his *utmost* to deprive the enemy of the use of his property ; as to irrational animals and dead matter, which form the bulk of all property, the *utmost* which can be done by the belligerent for that purpose, is to take possession of it himself. If the president were a magician, and could, by any effort of his art—by a smell of fresh hay, or other enchant-

ment, potent with horses—inducethose creatures to trot out from their pastures, and come within our lines, Judge Curtis will not pretend that would not, under the law of nations, be a lawful and complete capture. Now, the property in question here, is also a person, possessed of reason, speech, and power of action, and thus capable of becoming an ally in the matter of depriving the enemy of his goods. To reiterate, our *right* is, to deprive the enemy of his goods in every possible way. The only possible way to deprive him of his horse and wagon, is to lay hands upon them—but we may reach his slave by proclamation, and invite him, as our ally and by our authority, to lay hands upon himself. Whenever we may obtain possession of the horse, we have acquired a good title, which we may transfer to another. Whenever the slave has, under Mr. Lincoln's proclamation, done one voluntary act inconsistent with his master's assumed right of full control over him, he has, as our agent and ally, taken possession of himself, and is, in advance, as the price of his alliance, transferred forever to himself. Up to this point, we consider the negro as property, because the enemy, against whom the argument is made, so treat him ; and we have a right to adopt their ground, so far as it can be made useful to him ; and thus far the question has been one of right between belligerents. Now, when a captor has once obtained possession of enemies' goods, he, or his assignor, holds by a good, perfectable title, i. e., a title which will become complete by the return of peace, without any treaty stipulation prescribing the contrary ; but until that time the title is liable to be lost by recapture, and the application of what is known in law as the *jus postliminii*. This right of postliminy, was a fiction of the Roman law, by which persons and sometimes things, taken by an enemy, were restored to their original status and ownership, immediately on coming again under the power of the nation to which they formerly belonged. By it, the returned son came under the power of his parent ; and the returned slave, the power of his master. (Halleck's Int. L. and L. of War, 866.)

But, inquires the startled friend of the slave, is it possible that, by recapture, or any refined technicality of law, this freed-man can ever be lawfully returned to slavery? I answer, emphatically, *No!* The slave, whom we have hereto-

fore considered merely as a chattel, now stands up and asserts his manhood ; not as a newly-acquired right (for as between the master and slave, the right of the latter to his freedom has always been complete), but as a right newly recognized by a powerful ally, heretofore bound to the master, to a silent acquiescence in his usurpation, but now released from that compact, and newly bound to the slave to "maintain" his freedom. This question is no longer one between belligerents simply, but is complicated by a new question—the claim of a man created in the image of his Maker, to enjoy civil liberty. The right of capture and recapture of ordinary goods rests on the same basis, to wit, that they are property by law of nature, and may be passively transferred from hand to hand. But the slave whom we capture as property, is, after his capture and the transfer to himself of all the captured title of his master, no longer a chattel, but a man, insusceptible of recapture, except as a prisoner-of-war, entitled to all the rights and privileges of such persons.

The Roman slave was held as a captive taken in war, and whom, by the then existing rule of war, the captor might lawfully have killed ; having spared his life, he was admitted to have a clear right to his person and services. This right, based on pagan equity, was considered indestructible. But the American slave is under no such obligation to his master. His liberty has been taken from him without his consent, by force and fraud, perpetuated by law and usage until the nation acknowledged the legality of his servitude. But when, even for an instant, his *status* as a slave is suspended, and he remitted to his natural rights as a man, there is no power on earth to take away his freedom, except by a repetition of the original fraud and force. Such an act the laws of nations abhor ;* and to prevent it, the "executive government

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*By the treaty of 1783, the British agreed to take no slaves away ; notwithstanding, great numbers were permitted to follow them. General Washington remonstrated against this as a *breach of the treaty*, and demanded their return. Sir Guy Carleton, acting for the king, admitted that his government was bound to make compensation, but resented with asperity the idea that he would return any of these men, saying it was "*unfriendly* to his majesty to suppose" that he intended to have his officers take from "these negroes *the liberty of which he found them possessed.*" (Sparks' Writings of Washington, vol. viii., p. 544, App.)

of the United States, including the military and naval authority," is pledged.*

But to return to the question whether the proclamation repeals or annuls state laws; let us suppose another case illustrative of the same point. The state of Georgia has on her statute-book a militia law, under which all citizens capable to bear arms are enrolled, and by force of which they owe service and obedience to the state and their officers. This claim to service and obedience rests on precisely the same basis as the claim of the master upon his slave, *i. e.*, "valid state law."

These militia are now in arms, and being used against the government. Would it be regarded as unconstitutional for the military authority of the nation to declare these men absolved from military allegiance to the state of Georgia, and invite them to desert? Or would it be supposed that by this act the government had "annulled or repealed" the militia law of Georgia?

It must be plain from what has been said, that it is not the law, but something existing under it, which is destroyed by the overruling force of martial power. There is nothing very startling about the matter, then, for the very first effect of all war is the disturbance and destruction of civil right.

If we are not mistaken in supposing that it is now clear that emancipation by the military power, as a military measure, does not annul or repeal state laws, and differs from the result which always ensues where martial law prevails, only by having a wider extent, it remains to inquire whether,

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* It has been decided, even in the courts of slave states—and I understant Judge Curtis, in his admirable opinion in the Dred Scott case, to approve—that, when the master voluntarily takes his slave beyond the jurisdiction of the local law by which he holds him, the *status* of slavery is destroyed, can never be restored, and the man is forever free. Now, these rebellious masters have voluntarily made it necessary to introduce within the local jurisdiction a superior authority, the known effect of which—for every man is presumed to know the law, and intend all the legal consequences of his acts—is to disturb and change the *status* of the slave; for, the laws of war will permit us to take cognizance of only two descriptions of persons, viz., enemies or friends. The slave being thus made free, as a consequence of his master's voluntary act, ought not to be remitted to slavery in the one case more than in the other. (See Josephine *v.* Poulteney, 1 Louis. An. R., 329.)

standing upon the clean footing of a war power, it is in accordance with the laws of war,* and demanded by the necessities of the occasion.

What is there in it contrary to the laws of war? It is said that servile insurrection will ensue, and that non-combatants and innocents will suffer. Such is not the necessary consequence; and who has the requisite knowledge to affirm that it will take place? The object is to weaken the enemy by reducing his means of sustenance, and if insurrection by the freed laborers should transpire, it will be one of those unavoidable misfortunes which Grotius illustrates by the case of rapine in a captured town; and the destruction of women and children in a pirate-ship.

Moreover, by the very terms of the proclamation, it is put

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* The more enlightened opinion seems to be that, as between fair and legitimate enemies, it is a duty of honor and conscience which each owes to himself, not to use unworthy means to seduce the subjects of the other. But the case is different with rebels, to whom no one rightfully owes allegiance, and who are themselves unfaithful. Notwithstanding, the British did, in the war of 1812, seduce and take away large numbers of slaves, and although, by the express terms of the treaty of Ghent, they made compensation for some, it was only such as were, at the exchange of ratifications of the treaty, still within the places to be delivered up to the United States. It was not even claimed, by our government, that those who had been emancipated and sent beyond United States limits during the war, were to be paid for. The English raised a question whether, under the terms of the treaty, slaves still upon British vessels, lying, at the time of the ratification, in American waters, were intended to be included; and this question was, by the convention of 1818, referred to Alexander of Russia. The emperor says, in his award, that "it is upon the construction of *the text of the article as it stands*, that the arbitrator's decision should be founded," and he construes the text against the British view. There being some objection still made by Sir Charles Bagot for his government, the emperor makes this supplementary explanation: "The emperor having, by mutual consent of the two plenipotentiaries, given an opinion *founded solely* upon the sense which results from the text of the article in dispute, does not think himself called upon to decide any question *relative to what the laws of war permit or forbid* to belligerents."

The irresistible inference from the language used is, that Alexander considered that the law of nations permitted the sequestration and emancipation of an enemy's slaves; that such persons, when emancipated, cannot be reclaimed; and that they are not subjects whom it is immoral to solicit to treason. His opinion is entitled to all the more weight since he was the largest slave-owner in the world, and specially interested in having the law of nations construed otherwise.

in the power of the enemy himself to avert the danger by a return to duty. Would it be considered by any one, contrary to the laws of war to encourage, in the centre of Alabama, resistance by loyal white men to the confederate government? And, if not, what is there about a black insurrection so much more obnoxious to the law of nations than a white insurrection, except the bare possibility that the debased black—for whose continued debasement, in the midst of Christian civilization, the enemy alone is responsible—may be more cruel in his proceedings; and which result the enemy, but for misguided persistance in treason, might surely prevent?

Judge Curtis also objects that this proclamation will free the slaves of persons innocent of participation in rebellion.

We are to act upon facts as we find them, and it does not appear that there is any considerable number of such persons, or that it is practicable at present to discriminate in their favor.

It is possible, now, to deal only with communities. Individual justice must wait for calmer times. The proclamation does all that can be done in this respect, and promises a recommendation to Congress to provide for compensation to men who have remained loyal, for the loss of their property, including slaves. The loyal men of the South must bear the inconvenience which the war brings upon them, as well as those of the North; and it is a remarkable fact, that all the objections to emancipation come from the North, while *all* the loyal men of the South, from whom we can hear, like Hamilton, Holt, Rousseau, and Johnson, are its supporters.

Is the measure demanded by the necessities of the occasion?

The same considerations belong, in a considerable degree, to this, and the question of expediency, and they may be treated together. As has been before remarked, the necessity of the occasion is, the preservation of national life, which is, the democratic idea. The war appears to be one of essential ideas. It is not confederate swords and muskets which threaten the existence of the nation, for these weapons may be destroyed, or used indiscriminately on either side of the quarrel; as, also, may the men who wield them. But the antagonistic principles which underlie and impel the stroke of battle, are irreconcilable.

Fair Oaks, Antietam, Shiloh, and Bull Run, are related to slavery, just as the branches of a tree are related to its roots, or the assassin's blow to the murder in his heart. Slavery, which is, by its very nature, war with liberty, has simply remitted to the surface of politics some of its inherent tendencies.

These tendencies and principles had entered into a compact of peace with us—the Constitution—and while peace remained, they were beyond the reach of interference. But the aristocratic idea, impelled by the necessities of its aggressive nature, has inaugurated war, and by that act become amenable to the code of war, which has for its first maxim—*Destruction to the cause of war.*

Corresponding to this interior and essential necessity, for the destruction of slavery, there is a more external and practical necessity, which all can see.

It is necessary to distract the attention of the enemy from operations in front; it is necessary, also, to weaken him, by seducing from his service the productive labor by which alone he is enabled to support his armies.

Is it expedient to obey this necessity? Whatever is really necessary must certainly be expedient, or the greater no longer includes the less. Whether, upon all grounds, it was entirely expedient, or whether the matter was one of balancing reasons, it does not enter into my present plan to consider. I have no doubt that, on grounds of expediency, it is the wisest and most statesman-like act of this administration. The strong language of Prof. Parsons is, "I leave this question to the President, for he is honest and capable; he has considered it long and painfully. However wise I may be, or Judge Curtis may be, on this subject, the President is wiser, or all rules of probability fail."

"I guess this is the law," said an indiscreet practitioner, before the chief-magistrate of a western village. "I guess it ain't," said the irate dignitary, "and I have the last *guess.*"

The Commander-in-chief, who must bear the final responsibility, and is clothed for the occasion with all the discretion of the nation, has exercised it finally.*

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*Judge Curtis objects that, the proclamation extends beyond the actual field of operations, and is to take effect in future, instead of the

If the premises and arguments so far are correct, we have adduced these conclusions—First: Abraham Lincoln, as Commander-in-chief in time of war, embodies all the executive war powers of the nation. Second: These powers are extra-constitutional, having their origin in the nature of things, and are recognized as an established code by all civilized nations. Third: Principal among them, is the right to end war and obtain security for the future, by destroying the cause of the war. Fourth: The proclamation in question is intended to have that effect, and is considered necessary to that end by the nation, speaking through its supreme military authority. Fifth: The ownership of slaves is to be distinguished from the right to own slaves. Sixth: The former was not one of the constitutional relations which bound this people, and therefore, to destroy the ownership of slaves will not render a restoration of the Union, under the Constitution as it is, impossible, any more than the destruction of the ownership of horses will have that effect. Seventh: The military power, acting through emancipation, does not pretend to destroy the legal right to own slaves, and is not, therefore, obnoxious to the charge of annulling or repealing state laws. Eighth: It is not against the laws of war to do a necessary act, even though it is possible, or, in extreme cases of necessity, even probable, that some unhappy consequences may come to innocent persons. Ninth: It is by no means a necessary consequence of freeing slaves that harm shall come to non-combatants and innocents; and such accidental result, should it ensue, will be chargeable solely upon the enemy who might have averted it. Tenth: In short, the right to free all persons held as slaves in rebellious states, on the 1st of January, 1863, is a valid war power; it is one necessary to be exercised; and its

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present, thus usurping the legislative function. It is only necessary to suggest in answer, first, that when used in favor of rebellion, the strongest argument loses its force; second, that every plan laid in the present, to be executed in the future, is legislative in the same degree; and, third, that the field of operations is wherever a rebel lives. The territory is ours, and the federal jurisdiction extends over every foot of it. Moreover, the federal flag is now planted within the borders of every rebel state, and we are, presumptively, in actual command of every rebellious locality.

exercise is not forbidden by the Constitution or the laws of war.

Many other suggestions against the power of the Commander-in-chief are thrown out by his ingenious critic; but they will all be found to be auxiliary and dependent upon his main objections, which have already been answered. Such being the case, it is better to leave the intelligent reader to refute them for himself by an application of the principle already stated. Certain of them, however, should perhaps be specially adverted to. Thus, Judge Curtis refers to Mr. Lincoln's declaration—when speaking of the then proposed Proclamation of Emancipation—that he supposed he had the right to take any measure "*to subdue the enemy*;" and this phrase, "to subdue the enemy," is reiterated by the author so frequently, in such connection, with such inuendo and emphasis, that the startled reader at last inquires whether it is the *words*, or the *thing*, *which gives him such great uneasiness.* He also compares the Commander-in-chief to generals in the field, intrusted with a certain expedition, in such a manner as to make one ask if it can be possible that he wishes to degrade, in the mind of the reader, the functions of that high office. It is true, that the martial power of the Commander-in-chief is of the same kind and degree as that of a commanding general in the field, i. e., each has, when the emergency demands it, the power to do any and all things not forbidden by the Constitution, humanity, or the laws of war. But the emergency of the general in the field is fleeting; it embraces a point of time, or a certain enterprise, and his department is his field. The field of the Commander-in-chief includes the remotest point under federal jurisdiction, as well as the seas; the enterprise committed to him is the entire war; the emergency under which, and with reference to which, he must act, is the restoration of order, national supremacy, and assured peace. This emergency is not temporary, but is constantly with him. It has neither past nor future; it is, during war, an ever-present emergency. Thus, it is impossible to measure the powers of the general, in *his* field, by those of the Commander-in-chief, in *his* field, or vice versa. The powers and acts of each are to be

scrutinized in the light of the emergency peculiar to his sphere and employment. The Commander-in-chief differs from all subordinates, then, just as the greater from the less; the superior from the inferior; the whole from a part.

The professional reader will be embarrassed to discover how the case of Mitchell *vs.* Harmony (13 How., 115), which Judge Curtis cites, can apply to the power of the Commander-in-chief to take the property of an armed enemy. That was an action against a lieutenant-colonel for seizing, unnecessarily, the property of a loyal citizen, and it would almost seem that the Judge had forgotten that the persons whose property it is now proposed to take, *are armed rebels, who have no standing except in the tribunal of war.*

Every reader will be amazed and indignant when, after seeing it declared that the "military commander" exceeds his powers, when "he controls the persons or *property* of *citizens* beyond the sphere of his actual operations," he discovers, by the context, that Jefferson Davis, *et id omnes genus*, are the "citizens" spoken of.

The declared purpose of the pamphlet is to protest against infraction of the civil liberties of men in the North, who, if they are guilty, are within the reach of process of law; but the whole complexion of the argument changes, when it is urged to support rights which the rebel, *by a resort to war, has utterly forfeited.*

I have found it impossible to do more within this space than outline the argument; it is to be hoped that abler pens will work at the elucidation of these great questions. The same treason and falsehood which confront our soldiers in the field, is skulking here—seeking to shelter itself behind forms of law until it can organize and perfect its schemes of villany. Loyal lawyers must drag it forth: it must have no refuge here. An enlightened and free profession should regard it as a special duty to refute and denounce, everywhere, the lying justifications and evasions by which rebellion hopes to escape consequences. If this is done; if the people are equal in courage to the demand of this greatest occasion of the world's history; if the government is steady, resolved, and, above all, bold; the crisis will be passed in safety; and America, instead of being overthrown by this

avalanche of treason, darkness, lying, and all evil, will overbear it all, and plant the standard of liberty higher still—a beacon of hope to the oppressed of all the world.

NOTE.—Since writing the foregoing, I have had the great satisfaction to see, "A Treatise upon the Martial Power of the President," a pamphlet by D. Gardner, Esq., author of Gardner's Institutes of American International Law; and the letter of Hon. Alfred Conkling, late Judge of the District Court of the United States, for the Northern District of New York, published in the Rochester Democrat for Nov. 5, 1862. Judge Conkling's judicious and able review of Judge Curtis deserves a wider circulation and more permanent form than can be given in a daily newspaper. The question of the expediency of emancipation has been considered, with characteristic ability, by Hon. Robert Dale Owen, in a letter to Mr. Secretary Chase, published in the N. Y. Evening Post for Nov. 22, 1862.

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