THE

COMING CONTRABAND;

A REASON AGAINST

THE EMANCIPATION PROCLAMATION,

NOT GIVEN BY

MR. JUSTICE CURTIS,

TO WHOM IT IS ADDRESSED,

BY

AN OFFICER IN THE FIELD.

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1862.

THE COMING CONTRABAND.

As our mild and merciful President has seen fit to regard certain chattels personal, called slaves, as so much property placed at his absolute disposal, wherewith he can, like another Caesar, buy off, or punish his recent subjects, the present enemies of the United States, it is become a question of most intense interest, whether our President has an absolute power to give or withhold property, and to assure or take away liberty, as may seem to him best, and if so, then, by what constitution, statute, natural or divine law, *he* became the owner, possessor and disposer, of so many slaves? Now, Sir, as I know you to be learned in our constitutional law, and in all matters relating to our civil polity, and especially, in times past, to have been the bold and justly eminent expounder of a comprehensive construction of the Constitution, and indeed, the author of an opinion containing the germ, if not the fruit, of that Address by which our Commander-in-Chief became famous, and thereby President, I pray your attention to the following reason against the Emancipation Proclamation.

You will recollect, that during the first months

of the rebellion, and at the chief fortress of the country, a new embassy opened negotiations and sought what one would suppose they had a right to demand, the protection of our government as loyal persons, owing and rendering to it allegiance. The principal ambassador pretended to represent about 100 others, though in fact he represented about as many souls as did Franklin at Versailles, all likewise loyal, and desiring to remain within the political and geographical limits of the United States. The old ambassador gave some specious reasons in favor of his mission, and then, unnoticed, asked the great unanswered question, "*What will the Government do with my people?*"

Our Government answered, (with its *usual* ability) as nearly as it could, that it did not know. When their rendition was demanded by their enemy and ours, the commanding officer replied that they were "contraband of war." Waiving its legal inaccuracy this between lawyers and soldiers, was a clever hit—a sharp retort—a good professional joke, but its greatest success was as a word. Those who love to ponder over the changes of language and watch its new uses and unconscious growth, must find in it a rare phenomenon of philological vegetation. Never was a word so speedily adopted by so many people in so short a time. In conversation and correspondence in newspapers

and books, in the official dispatches of generals it leaped instantaneously to its new place, jostling aside the circumlocution "colored people," the extrajudicial "persons of African descent," the scientific "negro," the slang "nigger," and the debasing "slave." Who knows but some future Trench may devote to it a page, and gravely narrate: "Contraband," in the sense of "'serf,' seems to have come into use about the "time of the great American rebellion. No trace "of it is found, anterior to that singular and "causeless outbreak, but as it was in common "use during the latter part of the year 1861, "being employed by all classes of society, as can "readily be shown by the "Diary of Private Dan-"iel Doolittle," and the letters and works of "learned and even eminent scholars, we must "conclude that it had existed previously, and "that society had then lost sight of its original "and proper meaning. Yet it is not found in the "absurd (and now happily obsolete) dictionaries "of Webster and Worcester; nor does our know-"ledge of its etymology explain how it could be "applied to a vassal. The author, like the time "of this application, is buried in obscurity, "though a Government General, named Butler, "seems to have employed the word in a mixed "sense, early in the revolt, showing very clearly "that it was then in its transition state."

But calling men, women, and children, "*con-*

traband of war," though a good retort to an insolent demand, was no answer adequate to the real question of the case; and indeed, the next dispatch of the same General to his Government, contained the truthful confession that it was not sufficient: His Government has not yet given one that is.

The Secretary of War, for answer to Gen. Butler, directed a sort of DR. and CR. account to be opened—not exactly with the master, and not exactly with the slave—but as it were with "whom it might concern." The President, in his message of July, said that it would be his purpose, after the rebellion should it be suppressed, "to be guided by the Constitution and the laws." In the Message of Dec. '61, I find only plans and projects for the bettering of those "*persons*' "*confiscated*," or already free, but no recommendation as to the duty of the government toward loyal "persons" still in bondage, and no allusion to the rights or "welfare" of the "*unconfiscated*" but coming contraband.

Within Congress, a few projects were discussed, resulting only in the paltry expedient of emancipating the small number found in arms and working upon fortifications. Beyond Congress, the champions of the slave, who have made his rights a life study, when the long desired event waited but the remedy, proposed

only the little expedients whereby they have long belittled a great cause, and irritated the Northern as the Southern mind. To them, the constitution seemed an impassible barrier. In the published opinions of those (perhaps most prominent, in this country,) we find that the first, (Mr. Giddings,) proposed *to evade* the Constitution, by aiding a few fugitives on their flight: the second, (Mr. Smith,) to *violate it* by forcibly setting free such as wander into our camps or seek employment from our soldiery, while the third, (Mr. Phillips,) indulged in a hopeful vision that our victorious army would dictate terms to conquered rebels, and by a Convention wiser and purer than the first, throw slavery and the Constitution together down.

To all this it must be answered: "The people "of the U. S. are now in arms to maintain their "Constitution. They will not alter, evade or de- "stroy it. Yet the end of slavery cannot be "avoided and cannot be postponed *Slavery* "*must fall, and the Constitution must be main-* "*tained.*"

And not alone in their error, are the old abolitionists. The people have, by some means, been brought to regard the Constitution of their country as an almost invincible barrier to its acknowledged welfare, and all have set themselves to finding a method by which to overreach it. Some

have said, that, for once, it should be disregarded; others, that all slaves being *prima facie* freemen, the army should not stop to inquire as to the *reality* of their condition, but that they should be allowed to proceed as fugitives, taking with them their chances of escape or rendition. Much has been said of the "war power," and that, under the plea of the national safety, there should be worked out a national emancipation. And thus it would seem as though all were striving to elude the Constitution by *Constitutional evasions.*

The chief and last reliance seems to be in the "war power;" and a bill was proposed in Congress declaring the abolition of slavery a military necessity, and directing the President to declare the same by proclamation. But this would be a strange paradox. Congress are not the Commander-in-chief, nor can they command the Commander to do what they cannot do themselves. They have no power over the army, but to create, maintain, and disband it. The Constitution vests this power of directing, in one man, the President of the United States. His, is the sole power to exercise, and the sole responsibility of not exercising it. The exercise of the "war power" is not authorized by the civil law; it cannot be maintained by the civil law. When exercised, it must be by military authority, and as

a military necessity—military—pertaining to, arising from and exercised for the army; a necessity—that which is, in the discretion of the commander, essential to the succes or safety of the army. It must be resorted to, for military but should not be withheld on account of civil purposes. It becomes operative only through that branch of military law which Wellington accurately defined to be "*the will of the commanding General,*" and it becomes valid, only when the civil law is suspended; for *inter arma leges silent.* What, then, shall we say of a civil law which directs that the civil law shall cease—which seeks to command *by the voice of law.* what can only be commanded *in the silence of law?*

When such an act is passed, it should be entitled "*A law to annul law, and declare unconstitutional acts, constitutional.*"

It is an unfortunate fact that our discussions on slavery have led us into these labyrinths, and far from the light of the Constitution. The one side has claimed that the slave is "property," a chattel, and a thing, and the other has repeated this so often, that we have come to regard it as a fixed ethical fact; when it exists but in a debauched conscience, or a heated argument. Most extraordinary is it, how this has lowered the standard both of our wishes and our judgment. Thus Mr. Joshua R. Giddings, the vigor of whose

understanding, and the sympathy of whose heart no one can doubt, summed up his reflections in a letter, published early in the rebellion, with no better or higher conclusions than, 1*st*, that as slaves assist the enemy, it is the duty of all officers to induce them to leave their *rebel masters*. 2, that slaves who have escaped from *rebel masters* should be allowed to *continue their flight*, and 3, that to send back a fugitive slave to a *rebel master*, would be *lending aid to the rebellion*. Now, stripped of their form, the logical and simple meaning of these conclusions is this, 1st, Slaves have no rights. 2d, The Government of the United States, which, at this present time, in the confidence and support of its loyal subjects, and in the righteousness and dignity of its cause, is more noble and supreme than any other that the sun rises upon, should direct its own soldiers, to assist its own subjects to fly from its own laws, beyond the reach of its own civil officers!

What we do in this matter, let us do honestly, and openly, and boldly, and not by any such subterfuge. Revering the Constitution—holding it to be the supreme wisdom of mankind—the sacred heritage of our fathers, which needs no amendment, is susceptible of no improvement, and contains, within itself, all the elements, that, with public virtue, under all manner of circumstances, are necessary to preserve its own perpetuity, or se-

cure the welfare of this nation, let us not believe that so great and blessed a Charter of liberty and justice is guilty of binding upon the nation that it ennobles, a perpetual national burden—of maintaining treason—or of protecting traitors. And instead of seeking the overthrow of slavery without the Constitution, and around the Constitution, let us have faith sufficient to behold its doom decreed within the Constitution, and by the Constitution.

The argument by which this is established I reduce to a few propositions.

1. The enemies of the country have no rights *under the Constitution*. Whatever restrictions it may impose upon us, it confers no favors upon them. It was ordained and established to secure the more perfect welfare of American citizens. In abjuring the Constitution, the rebels cast off *all* its provisions—not such as suited them; they threw away its guaranties, as well as its obligations. Those rights, so dear and so precious to us, we possess, because it possesses our allegiance. The Constitution expressly recognizes the possibility of their surrender by such as cease to render it allegiance; for the three groups in which are classed all human rights—life, liberty, and property, are forfeited by treason.

2. It is true that a rebel must be tried. But this is only a declaration of what is an attribute of the unwritten Constitutions of every civilized country. It is a right which confers no powers—

a mere provision to secure the ascertainment of a fact. It is a right not limited to citizenship. Indians possess this right; even foreign enemies taken in arms possess the right; and (if a stronger illustration be needed,) so does that chattel called a slave. It therefore comes to this—that the rebel master has but just the same rights under the Constitution as his slave—neither more—nor less, nor different—the right to be tried for his offences.

Yet how sublime is the tribute which these wretches unwittingly pay to the Constitution! Stained with the "highest crime against human law whereof a man can be guilty," yet so accustomed to lean upon it, for aid, so impressed with the silent majesty that has presided over their civil life, and been the guardian of their civil rights, that they unthinkingingly turn to it again, invoking in its name the rendition of their property, and immunity for their crimes, forgetful alas, that they have passed from beneath the shadow of its flag and emblem, and that it is a Constitution for them no more.

3. The error which has perverted our judgment and disturbed our faith, is an acquiescence in the assertion that man can hold property in man. The Roman law gave to the master an absolute property in the *servitum*, the power to sell, to torture, to kill. The common law, which is the

law of the United States, never recognized in the master a property in the *villein*. The difference, is the difference between absolute property and an incorporeal hereditament, between property and something proceeding from property. Our law has allowed the master, in whole or in part, to possess the *services* of the slave, but never to hold property in the *man*.

The laws of the several States make the same distinction; for on the one hand they do not allow the master the absolute disposal of the *man*, and on the other they hold the *slave* to the same moral and legal obligations as other persons—permitting him to testify in civil cases; punishing him by imprisonment, condemning him to death—and where his service to the master as a chattel, and his duty to the State as a man, are in conflict, always disregarding the former.

This encumbered estate of the man in himself and this limited property of the master in the slave, have numerous illustrations in the law—as an estate in fee subject to a rent charge; as an easement—where one man owns property subject to the interest of the other, as a pew in Church, which a man is said to own, but in which he cannot set up a market, or open a bar—or put to any other purpose than that incident to public assemblage; as a highway or street over which any person has a right of passage,

but of which the owner of the adjacent land holds the fee.

4. Within the intent and meaning of the Constitution, slaves are neither citizens nor things, but "persons held to labor or service." The term "person" is not used in a debased nor double sense, for it occurs (as nearly as I now recollect,) *twenty-four* times in the Constitution, and in several instances is obviously applied to citizens as "no person shall be a senator," "the person having the greatest number of votes, shall be President, &c." We must therefore conclude that in the eye of the Constitution the slave and the President are equally persons, and that the Constitution, like the higher law of heaven, makes "no distinction of persons."

5. The Constitution recognizes these persons as men under legal disabilities imposed by State laws; but it imposes none—nor do the laws of the United States They are also recognized as possessing rights, for they are expressly awarded a representation though at a debased standard. It is true that they are not actually represented as a class in Congress. But neither are women nor children, Neither do any of these vote—for the political law supposes the husband the representative of the wife; the father, of the child; the guardian, of the ward; the master, of the slave.

6. Such persons also have rights by law —by the laws of United States, and of every state—the right to live—the right to be secure in their persons—the right to bring suits, and in in many states the right to possess their own service beyond the hours to which their "labor or service *due*," is limited by law.

7. It is evident that in the contemplation of of the Constitution (which is our supreme law) the slave is a person and not a thing —that he is, in short, a man owing service, but in no sense a chattel. Yet more than this: the labor or service must be due, not generally, but to some particular person. He alone has a right to require it—he alone may dispose of it, he alone may surrender it. In the various slave cases which can be found in the reports, the action is generally so far as I now remember invariably, an action brought by the one man (the slave,) against the other man (the master,) to determine which of the two should possess the services. There is no enabling act necessary to aid a slave to possess his liberty. As against all the world, except the master, he is free—and if this one cord of servitude be cut, we restore him to freedom.

8. Within this one limitation, the Government is not only bound to recognize the slave as a person, but to protect him as such. It is not neces-

sary that he be a citizen, Marten Kosta was not. There, the mere declaration of intended citizenship brought one who was a foreigner by birth —by education—by residence, within the protection of the Government, and under the shelter of the flag. It is not necessary that he be entitled to vote, or to hold office. The woman is not—the infant is not—the idiot is not. Yet all of these are in the care of the Government. They are represented by the husband, the father, the guardian, and the master. But whenever the two come in conflict, the representation ceases: the wife enters the court the equal opponent of the husband, the idiot becomes a suitor, the child a man. Nations resented the outrage upon the infant Mortara, and the slave, which in the eye of the Constitution is a person, is like other persons, an object of the Government's protection.

9. Now the slavery which the Constitution recognizes is *American* slavery, not slavery in general, not foreign slavery, and particularly, not *Confederate* slavery. The recognition which it has given and the protection which it has afforded, were also to its own citizens, not to the people of other countries, and particularly not to its armed enemies. The labor and service which it allows to be "due" and "owing," are due and owing to those rendering to it allegiance, and when the allegiance ceases, the labor and service is no lon-

ger "due." Not as a mere matter of property is this forfeiture, but as between these two persons, it cannot continue. *A loyal person, though he be a slave, cannot owe labor and service to a rebel.* The relations of wardship were terminated by treason ; the relations of villeinage were terminated by treason; the relations of slavery are terminated by treason ; and though a man may owe money, he cannot owe *service* to an outlaw. Nor can the slave unlawfully be deprived of his just and constitutional rights; of which is the right to remain within the protection of the United States. He cannot be required to have the *status* of his servitude *unlawfully* changed by the Constitution of any foreign nation. He can not *unlawfully* be carried from beneath the flag, whether it has been to him the emblem of liberty or the sign of oppression. If he must be a slave, he has at least the poor privilege of being an *American* slave.

10. When the Constitution declares the slave a *person*, and defines his condition to be *the owing of service*, it forbids us to regard him as a thing, *or to admit that there can be property in man.* And when the framers of the Constitution rejected the term of degradation "slave," and in its stead inserted the definition of the common law, they intended to, and did, limit the thing defined by the principles of the common law. The Con-

stitution recognized slavery because it existed: it did not ignore what was. But it recognized it *as* it existed; *as* the common law left it, and as the common law limited it.

11. It is easy to determine the question by the common law. *Impius et crudelis adjudicandus est qui libertatem non favet*, says Coke, and he proudly adds "The common law of England always favors liberty."

Writing with a camp chest for a desk; and arms and horse trappings hung around for a library, I can only refer to a few precedents not quite effaced from my memory.

It was (I think) well settled that *villeins regardant* (that is slaves so attached to a manor that they could not be removed from it by the master) passed with the manor, on attainder of treason, to the king. But this was not a mere property confiscation, for the same was true of wardships and of knight service under feudal tenures. Of *villeins* in *gross* or absolute slaves, I cannot recall an instance in which the effect of treason is stated, yet I presume cases can be found. Whether the villeins became enfranchised or whether their services escheated to the king, I do not consider of much moment; it is sufficient to know that they became divested from the owner.

12. *Crimes* against the *villein*, or the law of villeinage, also worked enfranchisement. Thus,

if the master committed an outrage upon a *niefe* or female villein, she became enfranchised. So, where the master committed any offence against the *villein* punishable as a crime, or, in the language of the old law, gave him an appeal of robbery or death, he enfranchised him. In the case now before the country, a very grave offence has been committed against the slaves, in attempting to abduct them from the territory and protection of the United States, and reduce them to a more degraded form of bondage. That the geographical *locus* of the slave has not been changed, is a fact which does not affect the question, for it is no worse to carry him unlawfully within the lines of the Confederacy, than to unlawfully bring the lines of the Confederacy around him. Whoever, therefore, has, in any way, accepted or recognized the new nationality of South Carolina, has thereby confessed judgment in favor of his slaves, in all the tribunals of the United States, civil, military, or political, to which those slaves may, directly or indirectly, apply for redress; and any officer of the United States, who offers to barter away their rights for what is prettily called a "*return to loyalty,*" is offering to pay what he does not possess, and cannot lawfully grant.

13. In our own country, these principles have been enunciated at various times, and in various ways. The laws of Georgia, and, I presume, of

most of the rebelling States, limit the hours during which slaves must render service, leaving the remainder to the natural owner, the slave. The Revised Statutes of Delaware prohibit the importation of slaves, and provide that if any person export, "or *attempt*" to export slaves, *they shall thereupon become free.* As the former provision —the increase of slavery—can only be regarded as an offence against the State, so the latter—the taking a slave from the protection of Delaware—can only be regarded as an offence against the individual.

14. But most strongly has the military arm of the government established precedents. General Jackson, a southern slaveholder, took slaves of loyal owners to work upon fortifications, refusing compensation. Gen. Gaines, a southern slaveholder, refused to deliver up slaves, taken in battle, to loyal owners. Gen. Taylor, a southern slaveholder, would not allow loyal owners to see slaves surrendered to him as prisoners of war, and had them moved with their Indian allies to the west. In, I believe, all of these cases, appeals were taken to the Government, which sustained its Generals and refused compensation. In, at least, one case, an appeal was taken to Congress, which also refused compensation. In all of these cases the action of the Government went far beyond anything now claimed to be its duty, for it there

acted against the *property* of its loyal citizens, while it is now called upon to proceed only against the *interests* of its worst enemies.

15. I conclude, therefore, that slaves have rights, under the Constitution, and by the laws and usages of war ; that, whoever attempts to go unlawfully beyond the jurisdiction or limits of the United States, geographical or political, leaves his slaves behind him. He goes, but they remain. They are not obliged to follow him, or await his return. Though he cease in his allegiance but a moment, he relinquishes their services forever. These services he cannot repossess at his pleasure ; for slaves cannot be released from a state of constitutional slavery, and again enslaved. By his abandonment of the Constitution he abandoned them, and, as it were, restored them to themselves. By his voluntary treason to the Constitution, he voluntarily severed all constitutional connexion between himself and them. They no longer owe to him service ; their labor is no more to him due ; *they are free.*

The eye of Jefferson looked forward in the future of his country, and beheld the overthrow of of slavery in bloodshed and rebellion. He saw dimly, the scene, and mistook the actors. The vision was less true than his forebodings. He saw not, in the shadowy insurrection, that the

children of his kindred and his friends were both the criminals and the victims. He knew not that the descendants of such illustrious parentage so soon would reap destruction in dishonor, nor that the Old Dominion which he loved, would be rent in twain by their act. He was not warned that among his own people and beside his own honored home, the great Declaration, his work and his fame, would be supplanted by another. Such bitterness and shame, he was spared. But on our sight the curtain is now rising and the foretold tragedy being played. We see the shifting scenes, the blood stained stage, and we cannot mistake the actors. We see the southern jails filled with patriots whose crime is faith to their country, and obedience to her laws. We see the southern soil crimsoned with the blood of martyrs fallen for that Union which Jefferson helped to found and to bequeath. And we view the great impending arm of the Nation that rises slowly, and yet hesitates to strike the inevitable blow. Well might he declare he trembled.

The American people have not sought this work of emancipation. Slowly have they been driven from their attitude of indifference, and step by step forced forward to perform the long delayed reform. Oft have they halted and stumbled. Defeat has threatened them when they refused, and now, when they weakly falter, it is made the

condition of their national existence. It is not a welcome work, and were it left to their choice, it would not be a wise one. Better to have been wise betimes—better to have sought a willing manumission under the gentle reign of peace, founded in justice and humanity, and regulated by law, when the master and slave alike should be fitted for the change, and philanthropy hallow the act. But they have thrown away the choice. Their Constitution has become to them an immutable decree, and the events of the preceding year, have left to them no alternative. Memorable year! that witnesses such great enfranchisement in two continents, andthe bondage of men broken among the enlightened nations of the earth. Yet how different the records that will be written. The act ennobling the name of Alexander, and placing the autocrat among the wise, the just, the great of earthly rulers; while with us there will be no one to ask of fame a little word of praise—no statesman, orator or champion of the great event—Philanthropy giving no thanks for the deed, and History speaking in reproachful tones of this great guilty act of emancipation.