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Report : Claim of the Heirs of J. Bulow, jr.

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IN SENATE OF THE UNITED STATES.

JANUARY 25, 1851.

Submitted, and ordered to be printed.

Mr. UNDERWOOD made the following

REPORT:

The Committee of Claims, to whom was referred the petition of W. G. Bucknor, executor of John J. Bulow, jr., praying indemnity for property destroyed by the Seminole Indians, report:

The representatives of John J. Bulow, jr., claim \$83,475, in consequence of the destruction of property by the Seminole Indians, as is alleged, in 1836.

It appears, from the items which constitute the amount, that oxen are charged at the rate of \$60 a head; cotton in bales, at 35 cents per pound; and cotton in the store, or unpicked, or not ginned, is charged at the same price, 35 cents per pound, making no deduction for ginning and baling; corn is priced at \$1 25 per bushel, or near that. The items for cotton and corn amount to \$11,495. Some fodder is spoken of as having constituted part of the loss for which this sum is demanded; but the quantity of "fodder," &c., which entered into the estimate is not stated. \$20,000 are charged for the crop which would have been made in the year 1836, without deducting anything for the expense of making it, or without saying that the \$20,000 are estimated as the net profit resulting from the probable operations of the year 1836, had the owner not been interrupted in his business by his losses. \$3,000 are claimed for household and kitchen furniture; \$30,000 for "stone sugar works 119 by 93 feet, viz: boiling-house, two curing houses, steam engine-house, and a large framed saw-mill, all complete." The other items consist mostly of values put upon dwelling-house and other houses.

It appears, from the proof, that Bulow's plantation was occupied by troops under the command of Major Putman from the 28th of December, 1835, to the 23d January, 1836, during which time it was fortified, and several expeditions against the hostile Indians fitted out from the post, and particularly that which resulted in the battle at Dunlawton, on the 18th of January. After that battle, the post at Bulow's was abandoned by our troops. George Anderson, in his statement, says it was abandoned on the night of the 26th of January, 1836; but the preponderance of proof decidedly fixes the night of the 23d as the time of the "abandonment." He also says: "It cannot be precisely ascertained how soon after the plantation was burned." He further certifies that he was "with Colonel Brisbane's regiment of Carolina militia when they reoccupied the fort at Mr. Bulow's plantation, some weeks after, being the first party of whites

that marched into that part of the country after its abandonment by Major Putman," and adds: "I found every building destroyed, not a vestige of any kind of property or stock remaining; all had either been carried off or destroyed by the Indians."

Francis Pellicer states that, "shortly after the troops abandoned the South, the whole of the buildings on said plantation were destroyed, as large fires were seen in that direction." Colonel Sanchez states that, from 31st of December, 1836, to 5th of January, 1837, he "went to Bulowville and found all the buildings destroyed; but the *fort* which had been erected on the commencement of the year 1836 by our troops for the protection of the place was still standing." This confirms the statement of Mr. Anderson, who speaks of reoccupying the *fort* some weeks after it had been first abandoned. Assistant Adjutant General Gibbs also speaks of occupying the post in September, 1837. From all which it is clear that the *fort* erected upon the occupation of the plantation by Major Putman, was not burnt when the houses owned by Bulow were destroyed.

Captain Douglass Dummett, attached to Major Putman's command, in his affidavit, states that, to the best of his recollection, the post at Bulowville was abandoned on or about the 23d January, 1836; that it was not ascertained when the Indians took possession and destroyed the property, but it is supposed to have taken place a very short time after its abandonment, as large fires were seen in that direction.

F. Pellicer states that the Indians got possession of four prime negroes, (belonging to John J. Bulow may be inferred, although it is not expressly so stated,) to wit: George, July, Sapio, and Abraham.

Major Putman states that he took possession of Bulow's plantation, not only for the protection of his property, but for the good of the service, and more effectually to carry on operations against the enemy. He also states that Mr. Bulow was strongly opposed to his occupying the place: He likewise states that, in building the *fort* or breastwork, he used the wagons, teams, and slaves of Bulow in getting the materials, timber, &c., of which it was constructed.

The foregoing are substantially the leading facts of the case; and the question arises upon them whether the government is under any obligation to pay the representatives of Mr. Bulow the value of the houses and other property which may have been destroyed by the Indians after the abandonment, on the night of the 23d January.

It is very clear that the case is not embraced by the provisions of the acts of 9th April, 1816, and 3d March, 1817. The 9th section of the first act provides for compensating those who "sustained damage by the destruction of his or her house or building by the enemy, while the same was occupied as a military deposite, under the authority of an officer or agent of the United States: *Provided*, It shall appear that such occupation was the cause of its destruction." The act of 1817 rather restricts than enlarges the operation of the act of 1816. Inasmuch, therefore, as the property was not destroyed while the same was occupied as a military deposite, or "as barracks for the military forces of the United States," in the language of the act of 1817, there is no foundation for the claim under either of these acts. But it is contended that, although at the time of the destruction of the property it was neither occupied as a place of deposite nor as barracks for military purposes, yet it had been thus occupied, and that its destruction was the consequence of such occupation; and hence it is insisted

that the government is morally as much bound to make good the loss as if the destruction had taken place during the actual occupancy of the houses by the stores or troops of the government. This presents the grave question whether government is morally bound to indemnify the citizen in all cases of loss superinduced by the military action of its officers, or the operation of the government itself, against a public enemy. War brings a train of calamities upon individuals, in many cases, which are of such a character that admit of no adequate redress. Such, for instance, are the evils and the sufferings resulting from the sacrifice of life. So far as property is destroyed by the operations of war, the individual sufferer may be remunerated by throwing the loss upon the nation or State. If such a rule were adopted and applied to all cases of the destruction of property caused by the war, it might operate as a salutary preventive to hasty declarations of war among nations. It might be an additional motive, having its influence (and especially in a republic whose citizens control the action of the government, and upon whom the burden of making the indemnity would fall) to prevent hostilities. But when war had commenced, such a rule would tempt the citizen to relax his exertions in defence of his property when threatened by the enemy. He might be induced thereby to seek his personal safety by abandoning his property to pillage or destruction, relying on the government for full, if not *double* indemnity. A rule so general, which imposes an obligation upon government to indemnify for all losses necessarily resulting from, and attributable to a state of war, has never, so far as the committee are informed, been adopted by any nation. Such a rule applied to the losses of our own citizens in former wars would embrace all the destruction of property by hostile Indians, or by white belligerents scarcely less savage, from the foundation of the government. Under it all the pillage of every foraging party of the enemy inflicted during each of our wars should be paid for. Every house injured or destroyed in bombarding a town should be paid for. The committee do not hesitate to reject the adoption and application of such a general rule of indemnity to the past; and they are of opinion that, if such a rule is ever adopted, it should be prospective. If it be conceded that Mr. Bulow's property was destroyed as a necessary consequence of the existence of the Seminole war, and on that account he is to be paid, then the rule of equal justice requires that all should be paid for losses properly attributable to the existence of that war; and thus the government will be made the insurer against the depredations and destruction committed by the public enemy. No such rule has heretofore prevailed.

It is insisted that the very recent occupation of Mr. Bulow's property prior to its destruction should be considered as the cause of the destruction, and therefore the case is embraced by the spirit and principle of the acts of 1816 and '17 before referred to. These acts of Congress provide for the case where the attack and destruction of the buildings are induced by the immediate and present occupation of them for military purposes. Enemies in a state of war have a right to attack and destroy public stores and troops of the adversary, and this according to the most humane code regulating the conduct of civilized belligerents. Now, if private property is used to protect such stores as a place of deposit, or to protect the troops engaged in the prosecution of the war, then, should it be destroyed by the rightful attack of the enemy upon the stores or troops for whose protection it is used, there is a plain principle of justice, and with

us a constitutional principle, which requires government to pay for it. The reason is that such present use of the property is regarded as the immediate cause of its destruction. The property is attacked and destroyed to reach the stores and the troops, and thereby to weaken the belligerent, which is proper and right, according to the laws of war. It is, moreover, among civilized nations, a violation of those rules of humanity which happily prevail to attack and destroy private property on land, unless it is so used by the enemy at the time as to strengthen his defences; and hence, in modern warfare, the practice is to leave private property untouched. There are exceptions, however, and just cases of exception, to the general rule. But how does all this apply to the case of Mr. Bulow's property? It was not attacked by the enemy in order to reach the stores or the troops of the United States. Our officers and men had abandoned the position, leaving nothing behind them belonging to the government which could induce an attack from the enemy, unless it was the empty walls of the fort, and those, strange to say, remain unconsumed, when the enemy, as is alleged, burnt the private property! As there was no existing possession or use of the property which could have induced the enemy to destroy it, it must have been destroyed as an act of revenge for the manner in which it had been used, or as an act of policy to prevent a similar use of it in future. If the first, can it be a safe or wise rule to make government responsible in such a case? If so, whenever the army takes possession of and fortifies a town or city for the double purpose of its protection and as a point from which to annoy the enemy, and is thereafter driven from it or abandons it, government must pay the damages, should the enemy, either through revenge or policy, burn the place. Before such a principle is established, we had better consult our past history, and see how it will operate. If the burning was an act of policy to prevent the reoccupation of Mr. Bulow's plantation thereafter, it failed to accomplish its purpose; and if that were the motive, it is unaccountable that the enemy should have left the fort erected by our troops still standing for their accommodation and defence upon their return. The fact that such fort was erected proved that Mr. Bulow's houses were not a sufficient defence, in the opinion of our commanding officer, or that he would not use them for that purpose, unaided by an additional fortification. The enemy must have seen this on visiting the place; and it cannot be supposed that they would have left the fort standing, if their object had been to prevent the reoccupation of the plantation by our troops. But, aside from these considerations, it must appear to every mind a most unsafe rule to make the liability of our government depend upon the motives, either of revenge or policy, which govern the action of the enemy. How are we to ascertain these motives? Who knows them? Who can testify in respect to them but the commander who controls the movements and actions of the enemy? How can we obtain evidence from him?

Shall we in this case establish the principle that, whenever the troops of the government, for military purposes, take possession of a citizen's property, and thereafter abandon it because they have no further use for it, or because they are unable to resist the enemy, it shall be paid for if the enemy destroys it? In regard to personal property or movables, which, but for the possession of the troops, the owner might take to a place of security, the rule would be just, whenever it was shown that the property fell into the hands of the enemy in consequence of such possession by

our troops. For instance, if wagons and teams are pressed and used for military purposes until by detention and such use they cannot escape the enemy, the owner has a just claim for their full value. But it is believed that the same rule cannot apply to real property or fixtures which cannot be removed by any diligence of the owner from the seizure of the enemy. Property of this kind must fall into the hands of the enemy, if he chooses to take it, unless there be sufficient power to repel his attacks; and where real estate has been occupied by our troops and then abandoned by them, it must stand in the same condition, in respect to the liability of government to pay for injuries to it by the enemy, that it would have stood in had it never been occupied by our troops. If the enemy burn a house as our troops are driven from it, and which they have occupied for defence or assault, although the torch may not be applied until the last soldier has retreated and abandoned the house, still the house should be paid for, upon the ground that the battle may not be over; that a rallying party may yet reoccupy the house and renew the battle; and likewise because of the immediate connexion between the battle and burning, blending them into one transaction. But where all danger has ceased, where there is no enemy at hand and no passions raging from the excitements of the battle-field, we cannot perceive how the fact that houses and lands were once occupied for military purposes can make the government liable for their destruction by the enemy, any more than if they never had been so occupied. Once admit the principle that this is to be done by going into the presumed motives of revenge or policy which actuated the enemy, and we have a rule so indefinite that it may be applied without certainty, just to suit the caprice of those who administer it.

But it is not known when or by whom Mr. Bulow's houses were burnt. It is said that fires were seen in the direction of Bulowville *shortly* after our troops abandoned the place. But how soon after, is not stated. Whether a day, a week, or two weeks after, we are left entirely to conjecture. Nor is there any more ground or reason for charging the burning of the houses to the hostile Indians, as an act of revenge, than there is for charging it upon the negroes who ran away and joined the Indians. The case, when stripped of all sympathy for the citizen on account of the loss of his property, is no more than this: Government troops once occupied, for military purposes, the houses and plantation of a planter, and, being apprehensive that they could not defend the place against the superior numbers of the enemy, abandoned it. Some weeks afterwards it was ascertained that the houses had been destroyed by fire; but when or by whom done, whether by hostile Indians or runaway negroes, is unknown; and, under these circumstances, the owner or his representatives petition Congress to pay for the loss. We think the claim ought not to be allowed.

If, however, the claim was just, it is believed to be extravagant. We see no reason to pay the full value of the improvements, and in addition \$20,000, the profits upon a crop never made. Besides, the destruction of the wood-work of the sugar-house, &c., might have left the stone walls valuable; and hence the original cost value—\$30,000—even conceding that sum to be no over charge, is liable to a just deduction. But it is useless to make comments, when we believe the whole should be rejected.

There is evidence among the papers to show that Mr. Bulow was paid for the use of a part of his property, if not for the whole. He certainly was

entitled to compensation for the use which our troops made of his property, both real and personal; and if he has not been fully paid, he ought to be. But, as the claim now presented goes for the destruction by the enemy of his property, and not for its use by our troops, we must decide against the claim as presented, leaving it to those concerned to decide whether they will ever present a claim upon a different basis.

The fact that the enemy were savages, instead of civilized men, so far as it operates, is against the claim now preferred.

It appears from the evidence that Mr. Bulow had a four-pounder on his plantation at the time it was first occupied by our troops, which was no doubt taken there for defensive purposes. It was fired as our troops approached.

Wherefore, a majority of the committee are of opinion that the prayer of the memorial ought to be rejected