

Report of a Committee

APPOINTED BY THE

MASSACHUSETTS HISTORICAL SOCIETY

ON

EXCHANGES OF PRISONERS

DURING

THE AMERICAN REVOLUTIONARY WAR.

PRESENTED DEC. 19, 1861.



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MASSACHUSETTS HISTORICAL SOCIETY.

At a stated meeting of the MASSACHUSETTS HISTORICAL SOCIETY, held Dec. 12, 1861, the President, Hon. ROBERT C. WINTHROP, in the chair, it was *voted*, That —

JARED SPARKS, LL.D.,
HON. EDWARD EVERETT,
GEO. T. CURTIS, Esq.,
Col. THOS. ASPINWALL,

HON. RICHARD FROTHINGHAM,
JOSEPH WILLARD, Esq.,
HON. LORENZO SABINE,
Rev. GEO. E. ELLIS, D.D.,

and WILLIAM BRIGHAM, Esq.,

be a Committee to inquire and report to what extent an exchange of prisoners, during the American Revolution, was effected by the action of the King's Government on the one side, and the Continental Congress on the other side, or by and between the respective military commanders; and especially to ascertain and report, whether, by such exchanges, the rights of sovereignty claimed by the Crown were supposed in England to have been in any way impaired or set aside.

CHANDLER ROBBINS,

Recording Secretary.

R E P O R T.

At a special meeting of the Massachusetts Historical Society, held Dec. 19, 1861, the President, Hon. ROBERT C. WINTHROP, in the chair, Mr. CURTIS submitted the following Report.

The Committee who were instructed to make the inquiries embraced by the foregoing vote have had the subject under consideration, and respectfully submit the following Report:—

It is not necessary for us to remind the Society, that the war of the American Revolution was conducted, on the part of the King's Government, as against rebellious subject Provinces. The great question at issue, after actual hostilities had commenced, was, whether the allegiance claimed to be due from the people of the Colonies to the Crown, upon the principles of the law of England, should be continued, or should be dissolved by a successful Revolution. The British Government, on the one hand, sought to maintain its authority by force of arms: the people of the Colonies, on the other hand, sought to secure and maintain their independence by the same means. Your Committee do not conceive it to be any part of their duty, under the vote above recited, to seek for analogies between the causes which produced the American Revolution, and the alleged reasons on which the people of the seceded States of this Union are now acting in their efforts to separate themselves from the operation of the con

stitution and laws of the United States. If we were to seek for such analogies, we should not find them; for there is obviously one broad distinction between the two cases, founded on the fact, that the Government of the United States has not given, and is not charged to have given, cause for this revolt. But inasmuch as every government, that has the misfortune to encounter a serious revolt of large and organized masses of its people which it is obliged to meet by conducting the operations of actual war, is also obliged to consider how far, and on what occasions, it can relax its rights of sovereignty, and deal with its subjects who take part in the revolt as ordinary prisoners of war,—your Committee do conceive that the precedents of exchanges to be found in the action of the British Government, during the war of the American Revolution, are important subjects of inquiry at the present time. While we disclaim any purpose of suggesting to the Federal Government what policy it should pursue towards any prisoners now in its hands, or that may hereafter be under its control, we venture to believe that our facilities for a careful investigation of the principles on which the most important civil war of modern times was conducted, on the part of the sovereign and parent country, may and should be employed at this period in the public service. The great interests of civilization and humanity require that this war should be so conducted as to secure its legitimate objects at the least expense of human suffering; and whatever tends to throw light upon the principles on which a government may safely conduct such a war ought not to be withheld by those who have the means of exhibiting it. We proceed, therefore, without further preface, to state the general course of action adopted by the Government of Great Britain, after the commencement of actual hostilities between the people of the Colonies and the Crown.

To some extent, an exchange of prisoners began before General Washington took the command of the Revolutionary

forces at Cambridge. Prisoners were captured on both sides during the engagement that is commonly called the battle of Lexington (April, 1775). The British prisoners were taken charge of by the Local Committee of Safety. Certain prominent citizens among the patriots were also seized by the royal authorities; and, among them, John Brown of Providence.

On the 28th of April, the Provincial Congress ordered Samuel Murray, a son of a *mandamus* councillor, and certain British officers held as prisoners of war, to be sent under guard to Providence, and delivered to Hon. Stephen Hopkins, or any other friend of Mr. Brown, to be made use of to obtain the liberty of Mr. Brown and two others, who were then on board a British ship-of-war at Newport.

On the 6th of June, there was an exchange of prisoners at Charlestown, — Warren, who then was the virtual executive officer of Massachusetts, and General Putnam, conducting the business on the American side; and Major Moncrief on the side of the British, who landed from the "Lively."

On the 12th of June, General Gage issued a proclamation, characterizing those in arms as rebels and traitors, but promising pardon to all on submission, excepting Samuel Adams and John Hancock. Five days later, thirty American prisoners were captured at the Bunker-hill Battle. They were lodged in Boston Jail; but they were not proceeded against in the courts as traitors, or subjected to the punishment threatened in the proclamation.

On the 23d of August, 1775, the king's proclamation declared the Colonies to be in open rebellion against the Crown; and all the king's officers, civil and military, were ordered to give information of such persons as should be found aiding and abetting those who were in arms against the Government, or holding any correspondence with them, "in order to bring to condign punishment the authors, perpetrators, and abettors of such traitorous designs."

This proclamation was soon known and published in America; and, on the 7th of December, the Congress issued a counter proclamation, declaring—

“That whatever punishment shall be inflicted upon any persons in the power of our enemies, for favoring, aiding, or abetting the cause of American liberty, shall be retaliated in the same kind and degree upon those in our power who have favored, aided, or abetted, or shall favor, aid, or abet, the system of ministerial oppression. The essential difference between our cause and that of our enemies might justify a severer punishment: the law of retaliation will unquestionably warrant one equally severe.”—*Journals of Congress*, Dec. 6, 1775.

The two parties were thus brought face to face in the field: the one acting as a sovereign to suppress a rebellion, and determined to apply all his judicial powers of punishment, as well as his executive powers of dispersing the rebellious forces; the other acting upon revolutionary principles to accomplish its independence by arms. The one could, of course, make no concession of belligerent rights, beyond those which actual war renders unavoidable, if a civil war is to be conducted between sovereign and subject with reasonable regard to the usages of civilized warfare: the other claimed all the rights of belligerents, as well as those of an independent sovereignty,—staking their lives upon their power to maintain both of these positions.

Before we proceed to detail the action taken on the subject of prisoners, it is important, as a further illustration of the position of the English Government, to notice a measure adopted after the war had been for some time in progress, and after it was deemed necessary to arm the Crown with extraordinary powers with reference to the custody and detention of prisoners. The law and the custom of England required that any man imprisoned on a criminal charge, within the realm, should be brought to a speedy trial, or be discharged on *habeas corpus*. The same law and custom obtained in the Colonies; but, in most of them, no means for the detention or

trial of prisoners, charged with offences against the Crown, existed after the war had actually begun. To obviate these inconveniences, and to furnish power to confine American prisoners anywhere within the king's dominions, the minister (Lord North), on the 6th of February, 1777, —

“Moved, in the House of Commons, for leave to bring in a bill to enable his majesty to secure and detain persons charged with or suspected of the crime of high treason committed in America, or on the high seas, or the crime of piracy. He prefaced the motion by observing, that, during the present war in America, many prisoners had been made, who were in the actual commission of the crime of high treason; that there were others guilty of that crime, who might be taken, but who, for want of sufficient evidence, could not at present be securely confined; that it had been customary in cases of rebellion, or danger of invasion from without, to enable the Crown to seize suspected persons; that he would not, however, be thought to hint at any present necessity of intrusting ministers with such a power in general. The times were happily different from those which called for such exertions in their utmost extent. Neither rebellion at home nor foreign war were at present to be apprehended. For these reasons, it was not meant to ask the full power usually obtained in former cases of rebellion; but, as the law stood at present, it was not possible for Government officially to apprehend the most suspected person. Another circumstance, which required an immediate remedy, was, that the Crown had at present no means of confining rebel prisoners, or those taken in the crime of piracy on the high seas, but in the common jails: a measure not only inconvenient, but impracticable. In the present state of affairs, it was absolutely necessary that the Crown should be enabled to confine prisoners under those descriptions, and to provide for their security, *in the same manner that was practised with respect to other prisoners of war*, until circumstances might make it advisable to proceed against them *criminally*. Such, he said, were the purposes of the bill.” — *Annual Register*, vol. xx. p. 53.

This bill became a law, by a very large majority of both houses;* and it shows several important things:—

* 17 Geo. III. chap. 9. By successive acts, it was continued until Jan. 1, 1783.

1st, That the Government intended to reserve and exercise all its sovereign judicial powers of punishment.

2d, That it meant to punish for treason or for piracy, according as the prisoners captured might be amenable to the law of England from being taken on the land; or from being taken on the sea, cruising against British commerce.

3d, That it was intended to have the trials for such offences take place at the pleasure of the Crown; thus holding the prisoners in a position to be dealt with as criminals or as ordinary prisoners of war, as the Executive Government might find expedient.

These purposes are not left to mere conjecture; for as the Government proceeded under a statute which armed the Crown with unusual powers, and as the grant of those powers can be explained only by what we have said as to their purposes, those purposes are just as plainly apparent from the provisions of the act as if they had been expressly declared. Indeed, the minister, in the course of the debate, could only defend himself against the charge, that a man could not know, under this bill, whether he was to be treated as a felon or as a prisoner of war, by repeating, that it was necessary to give the Crown the extraordinary power of holding persons arrested until *circumstances* might make it advisable to proceed against them *criminally*. This very significant observation shows, quite plainly, that the power to treat the prisoners as prisoners of war or as criminals, according to the exigencies of policy, was what the minister sought and obtained.

The treatment which different prominent Americans received, who were made prisoners in the course of the war, was exactly in accordance with the double powers thus obtained by the Crown. One of the earliest prisoners was our unfortunate countryman, Colonel Ethan Allen, who was captured in a rash attack upon Montreal, Sept. 24, 1775; and who was handed over to the local commander of the British forces, — General Prescott. Prescott, as is well known,

treated his prisoner with great indignity and rigor. Not long afterwards, Prescott was himself taken prisoner by the Americans, in Rhode Island. As soon as the treatment to which Allen was subjected was known to Congress and to General Washington, the latter, on the 18th of December, 1775, wrote to Sir William Howe, announcing that whatever fate Allen should undergo would be meted out to General Prescott; at the same time intimating, that he (Washington) was ready to enter into an exchange of prisoners, Congress having resolved that an exchange was proper, "citizens for citizens, officers for officers of equal rank, and soldier for soldier."

Sir William replied (Dec. 23), that the limits of his command did not extend to Canada, and that he knew nothing of the case of Allen; but he took no notice of that part of Washington's letter which related to a general exchange. But, on the next day, Sir William wrote to the Secretary for the Colonies, enclosing the retaliatory proclamation of Congress, and saying that he should not enter upon exchanges without the king's orders. — *Sparks's Writings of Washington*, iii. 201–204.

Previous to this, — and, in fact, soon after he was taken, — Allen was sent to England in irons as a traitor, and was confined for some time in Pendennis Castle. This, of course, took place before Lord North's Act, already referred to, was passed; and it was doubtless in pursuance of general orders to the British commanders in America, that Allen and his companions were carried to England. The inconvenience of holding them in prison subject to inquiries by *habeas corpus*, and the condition of things at the close of the year 1776, were evidently the causes of the enactment of the law just mentioned.

About midsummer, 1776, Lieutenant-Colonel Campbell, a member of Parliament and a gentleman of fortune, was captured in a transport, in Boston Harbor, with a body of two hundred and ten Highlanders. Colonel Campbell was consigned to Concord Jail. At the close of the campaign of 1776,

the British had an aggregate of nearly five thousand American prisoners in their hands, while the Americans held an aggregate of nearly three thousand British prisoners. But, although the balance was thus largely in favor of the British, an event occurred, before the close of the year, which made it necessary for the English Government to consider whether they would, in defiance of the retaliatory measures threatened by Congress, proceed to use their powers of trial and punishment; or whether, in justice to their own officers and men then in the hands of the Americans, they would permit exchanges as of prisoners of war. This event was the capture of Major-General Charles Lee, the officer next in rank in the American Army to Washington, on the 12th December, 1776. Sir William Howe believed, apparently with great sincerity, that Lee was amenable to military punishment as a deserter, because he had held a commission in the British Army; and Lee was treated accordingly with great severity, as a person liable to be tried by court-martial for the high military crime of desertion. This drew from General Washington a vigorous remonstrance, coupled with the threat, that any injury done to Lee would be severely retaliated upon the Hessian and British officers in the hands of Congress. At the same time, he offered to exchange five Hessian officers for General Lee; and, if that should be refused, he demanded that Lee should be enlarged on his parole. This step was taken by General Washington, by order of Congress, Jan. 13, 1777. Lee was not exchanged at that time, or enlarged upon his parole, but was held for trial as a deserter. Thus this matter stood at the close of the year 1776 and the beginning of 1777.

But it is now necessary to go back, and ascertain to what extent, and under what circumstances, there had been, previous to this time, any arrangements or agreements about exchanges: bearing in mind the prominent cases of Colonel Allen, who was carried to England as a traitor, and against whom Lieutenant-Colonel Campbell was afterwards offered in

exchange; and the case of General Lee, then held in New York as a deserter, for whose safety five Hessian officers were held as hostages by the Congress.

We have seen that Sir William Howe, in December, 1775, when in command at Boston, did not feel himself authorized to make an exchange of prisoners without the king's express orders. We shall see, however, presently, that in January, 1777, he had for some time had, to use his own language, some "agreement with the enemy for exchange of prisoners." What was this agreement? and on what authority did he make it?

On the 20th of July, 1776, Sir William Howe sent his adjutant, Lieutenant-Colonel Paterson, to have a personal interview with General Washington. A careful memorandum of what took place at this interview was preserved by Washington, and may be found in the Appendix to the fourth volume of Mr. Sparks's edition of his works. It was a curious scene. The British officer, with the instincts of a gentleman, addressed General Washington constantly by the title of "Excellency," and did his best to explain the circumstances which had led Sir William formerly to write to him as "George Washington, Esq., &c., &c., &c.:" but the explanation was an awkward one; and as he brought with him the same letter, with its objectionable address, Washington again declined to receive communications so superscribed. This led to a verbal communication of the topics of his errand; in the course of which, Colonel Paterson referred to a paper which he took from his pocket. One of the subjects related to an exchange of prisoners; and Colonel Paterson stated, that he *now* had authority to accede to a particular exchange, which had previously been proposed. In consequence of this interview, Washington, on the 30th of July, wrote to Sir William Howe, informing him that Congress not only approved of this particular exchange, but wished to negotiate a general exchange of "Continental officers for those of equal rank, soldier for sol-

dier, sailor for sailor, and citizen for citizen." He also mentioned the case of Colonel Allen as one for which Congress were particularly anxious to provide. On the 1st of August, Sir William replied with great courtesy, addressing his letter to *General Washington*, and agreeing to the mode of exchange proposed (excepting as to seamen, concerning whom he referred *General Washington* to the admiral), but excluding deserters from the scope of the agreement.

This arrangement, it should be remembered, took place within a few weeks after the Declaration of Independence, and six months before the passage of Lord North's Act. The British general knew that he was dealing in this matter with the American Commander-in-chief, who, he also knew, was acting under the orders of Congress. Now, it is not to be supposed that Sir William Howe *assumed* an authority in 1776 which he did not consider that he possessed in 1775, or that he acted without the king's permission. He was a commander of great intelligence and prudence, a faithful servant of the Crown, and fully conversant with the duties of his position; and, although we cannot trace in any of his published correspondence with *General Washington* any reference to a new authority on the subject of exchanging prisoners, there can be no rational doubt that he had received such authority, and that a search in the London War Office would disclose it. When, too, we connect his course with that subsequently pursued by the ministry in obtaining from Parliament power to hold prisoners, for the present, without trial, and with their directions respecting Lee and Allen, we cannot doubt that they had discovered a principle on which exchanges could be permitted, in a civil war, of men amenable to punishment as criminals, when it suits the convenience of the sovereign to treat them as prisoners of war.

It is proper here to mention, briefly, how this agreement between *General Howe* and *General Washington* operated, down to the time when the exchange of Lee and Allen was permitted by the King's Government.

This period extends from August, 1776, to May, 1778. It would occupy altogether too much space to detail the very numerous exchanges made between the two commanders during this interval, or to describe the various difficulties attending particular cases. The whole of the important facts may be found in the fourth and fifth volumes of Mr. Sparks's collection of Washington's writings, and the Appendices of those volumes. From these sources, it is apparent that great numbers of exchanges were made from time to time, in the course of a correspondence, a large part of which is occupied with mutual complaints of the treatment received by the prisoners on each side. Sufferings, for which the commanding generals were not responsible, of course were endured on both sides; but although it is occasionally sharp, and even stern, probably there is no military correspondence between opposite commanders, in the history of any country, more elevated, and more marked with a spirit of humanity, and a desire to relieve suffering, than that between Generals Washington and Howe which covers this period. It is interesting to observe, that this humane and accomplished British general, for whose character Washington did not hesitate to express both "respect and reverence," and who was prosecuting the war of a sovereign against rebellious subjects, was particularly earnest in insisting on the most liberal application of the rules of war in respect to exchanges of prisoners. He was anxious to have even a daily exchange, so as to include stragglers; but Washington denied that the custom of war required, or that the interest of an army would admit of it. To this, Sir William replied:—

"You are pleased to say, the usage of war does not allow of an *immediate* exchange of prisoners; which I can by no means agree to, the contrary being ever the custom of armies between which an exchange of prisoners has been determined, as far as the nature of business may permit. And in respect to stragglers from your army, since you have been pleased to say I might have set you examples of returning them, I am to inform you that no persons under that

descriptions have fallen into my hands. Such men as have been lately taken in arms, as well as those who have been longer in confinement, are solely detained for the arrival of your prisoners, in consequence of assurances received from you on that subject." — Nov. 11, 1776.

Your Committee do not deem themselves competent to decide on the military point on which these two eminent commanders thus differed; but it is evident, that, whatever Sir William Howe's motive may have been, he, as the military representative of his Government in conducting the war, insisted upon applying what he understood to be the *rules of war* to the relations of the two armies with each other, although one of those armies was composed of rebels in the eye of British law and in his own opinion.

Such continued to be the relations of the two armies in reference to exchanges, under the agreement of August, 1776, down to the time when the case of General Lee made a reference to his Government by General Howe necessary to the safety of the British and Hessian officers then in the hands of Congress. For the particulars respecting Lee's exchange, we are indebted to Mr. Sparks's researches in the English State-paper Office.

Dec. 20, 1776, Sir William Howe wrote to Lord George Germain: —

"General Lee, being considered in the light of a deserter, is kept a close prisoner; but I do not bring him to trial, as a doubt has arisen, whether, by a public resignation of his half-pay prior to his entry into the Rebel Army, he is still amenable to the military law as a deserter: upon which point I shall wait for information; and, if the decision should be for trial on this ground, I beg to have the judges' opinion to lay before the court. Deserters are excluded in my agreement with the enemy for exchange of prisoners."

To this the minister replied: —

"As you have difficulties about bringing General Lee to trial in America, it is his majesty's pleasure that you send him to Great Britain by the first ship-of-war."

Sir William Howe wrote, in answer to this order : —

“ Washington declines to exchange the Hessian field-officers taken at Trenton, or Lieutenant-Colonel Campbell, unless Lee is recognized as a prisoner of war. Lee is therefore detained for further instructions ; being apprehensive that the close confinement of the Hessian officers would be the consequence of sending Lee to Britain, and that this would occasion much discontent among the foreign troops.” — *Letter*, July 8, 1777.

This measure of caution was approved, and the minister replied : —

“ His majesty consents that Lee (having been struck off the half-pay list) shall, though deserving the most exemplary punishment, be deemed as a prisoner of war ; and may be exchanged as such, when you may think proper.” — *Letter*, Sept. 3 (Sparks's Writings of Washington, vol. iv. p. 276, *note*).

Lee was accordingly exchanged for General Prescott at some time in April, 1778.

It is to be observed, that this consent to treat as a prisoner of war a man who was held in England to have deserved exemplary punishment as a deserter, was given six months before our treaty of alliance with France had elevated us into the posture of a nation waging war in conjunction with an ally. We were still the “ rebels ” we had been declared to be by the Proclamation of 1775, — a character in which we never ceased, indeed, to be regarded in the view of the king and his ministers, and in the popular judgment of the British nation, until the Preliminary Treaty put an end to the pretension. Yet General Lee's imputed criminality, both as a traitor and a deserter, was all waived, in order to prevent the military inconvenience and the sufferings of British officers which would have resulted from treating him otherwise than as a prisoner of war.

Allen was sent back to America, as a prisoner of war, in 1776. He was not under the control of Sir William Howe,

when that officer sent his adjutant to General Washington to propose an exchange of prisoners. Allen and about forty other Americans, taken in Canada, arrived in England, Dec. 22, 1775; and were immediately lodged in Pendennis Castle as traitors. The "Annual Register" states, that "whilst their friends in London were preparing to bring them up by *habeas corpus*, to have the legality of their confinement discussed, they were sent back to North America to be exchanged." — *An. Reg.*, vol. xviii. p. 187. At length, Allen and the men who had been captured with him were put on board the fleet commanded by Sir Peter Parker, which sailed from Cork in February, 1776. They were taken first to North Carolina, and afterwards to Halifax, where they remained till October, when they were transferred to New York. In the spring of 1778, Allen, being then within the limits of General Howe's command, was by him exchanged for Lieutenant-Colonel Campbell on the 5th of May, 1778. — See *Life of Allen, in the Library of American Biography, by Mr. Sparks.*

From the foregoing statements, it will be apparent, that both before and after the passage of Lord North's Act respecting American prisoners, by the sanction of his Government, Sir William Howe was permitted to exchange prisoners with the American General; that, after a commitment on a charge of treason, Allen and his companions were returned from England to America as prisoners of war; and that Lee, who was considered in England as a deserter, was converted into a prisoner of war, and exchanged as such.

It now remains for us in this connection, before the termination of General Howe's service in America, to state the reasons why a general cartel was not entered into between the Continental Congress on the one side, and the King's Government on the other. Such an arrangement, to last during the war, and to embrace all prisoners on both sides was desired by Congress and General Washington. After much negotiation, it failed, for reasons sufficiently stated by

Mr. Sparks in a note to his fifth volume, page 316, as follows: —

“Commissioners from General Washington and General Howe met at Germantown on the 31st of March, 1778, where they remained three days. They met again, April 6, at Newtown, in Bucks County. A difficulty arose, at the outset, concerning the nature of the powers contained in General Howe’s commission. It was given on no other authority than his own; whereas the commission from General Washington expressly specified, that it was ‘in virtue of full powers to him delegated.’ This defect was objected to by the American commissioners, and the subject was referred to General Howe, who declined altering the commission; declaring at the same time, ‘that he meant the treaty to be of a personal nature, founded on the mutual confidence and honor of the contracting generals; and had no intention, either of binding the nation, or extending the cartel beyond the limits and duration of his own command.’ As this was putting the matter on a totally different footing from that contemplated in General Washington’s commission, by which Congress and the nation were bound, and as General Howe’s commissioners refused to treat on any other terms, the meeting was dissolved, without any progress having been made in a cartel. It was intimated by the British commissioners, as a reason why General Howe declined to negotiate on a national ground, that it might imply an acknowledgment inconsistent with the claims of the English Government.”

The inferences proper to be drawn from this occurrence, we conceive to be, not that the English Government were unwilling to exchange prisoners, or to sanction an exchange of prisoners, to any extent required by their military convenience, or by the duty which they owed to their own people, but that they were unwilling to make a total surrender of their political and judicial rights by entering into a national cartel embracing all prisoners, and extending through the war; that they considered a reservation of their sovereign powers of judicial trial and punishment to be entirely consistent with exchanges upon military principles, concerted between the commanding generals; and that this mode of exchange left them free to act towards any prisoners

then in England, or that might be afterwards brought there, according to the provisions of the act which Lord North had carried through Parliament in the previous winter. The date of the final termination of this first negotiation respecting a national cartel decisively supports this view of the principles on which the ministry acted. The negotiation broke off on the 6th of April, 1778. Lee, Allen, and many others, were exchanged between Generals Washington and Howe after this date, under their general agreement, which had been in operation since Aug. 1, 1776.

In the following year (1779), when Sir Henry Clinton had taken the place of Sir William Howe, a second attempt was made to arrange a general cartel; and here we are able still more accurately to appreciate the concessions which the British Government was willing or unwilling to make. On the 14th of March, 1779, General Washington proposed to General Clinton the settlement of a general cartel by commissioners. Commissioners were appointed on both sides, and they met at Amboy on the 12th of April. In the instructions given by Sir Henry Clinton to the British commissioners, he said, "You will take care not to admit of any preamble, title, or expression, tending to the acknowledgment of independency on Great Britain." After adding some explicit directions on the details of the exchanges to be agreed upon, he continued:—

"Should it be objected by the enemy's commissioners, that the cartel being between Sir Henry Clinton and General Washington, and not between nations at war, it would be in force only during their holding the command of the two armies, an article may be framed to express, that it should rest with Great Britain and the Congress to give it stability during the war by a ratification within the space of months."

This was going very far; for, although any express or implied admission of independency was excluded, the British general was willing that the cartel should extend through

the war, if his Government should consent. In the report of the British commissioners to their General, they said, —

“They (the American commissioners) disclaim all intention to draw us into an acknowledgment of their independence, and have fully satisfied us that the preamble may be couched in terms not repugnant to our general mode of expression with respect to them.”

But the negotiation came to nothing, partly on account of the difficulties respecting the convention troops, and partly in consequence of disputes respecting the prisoners' accounts.

In January, 1780, General Washington was informed by the minister of France, that the court of London, on account of the difficulty in procuring men, had instructed their commander-in-chief to treat for a cartel on a national footing, rather than fail to obtain a re-enforcement of their army by a release of their prisoners in the hands of the Congress. Washington did not credit this information, but thought it his duty to repeat the experiment; but he instructed his commissioners to do nothing unless the British commissioners should come with national powers. Another meeting took place at Amboy, on the 31st of March, 1780; but this time the effort again failed, because Washington insisted on what was equivalent to a national recognition. On this point, we quote the following remarks made by Mr. Sparks on this occurrence (vol. vii. note, p. 3):—

“It turned out that the enemy had not the remotest idea of treating on national grounds. Perhaps it was not to be expected; and yet, as there could be no fair exchange except on terms of equality, it would seem that the difficulty lay more in the form of words than in the substance of the thing.

“The national faith was as much plighted on one side as the other, and the king was as much bound in honor to confirm the contracts of his generals as Congress was to sanction those of General Washington. The difference was, that Congress pledged themselves beforehand to abide by his acts; whereas the British commanders took care so to express all the instructions to their commissioners as

to make it appear that these instructions emanated from no higher authority than themselves. If a consent to treat on national grounds, as it was called, would seem to imply the political independence of the Americans, it should have been likewise considered, that the course pursued was a standing reproach upon them as rebels; and, if the former was unpalatable to one party, the latter must have been equally so to the other. It was a case, therefore, which required mutual concessions, especially as both parties, in regard to the matter in hand, stood on equal grounds, had the same interests at stake, and would be equally benefited or injured by the result. It was not a subject in which political considerations ought to have interfered. Justice and humanity had superior claims. There might and should have been an explicit understanding, that agreements for the exchange of prisoners should have no bearing on the other relations between the parties, and that the great points at issue should rest on precisely the same foundation as if no occurrences of this sort had taken place.

“Upon this basis, there could never have been any substantial political obstacles in the way of an equitable exchange of prisoners; but there were reasons, perhaps, why neither party was inclined to propose such a basis, or even to adopt it if proposed.”

The exchanges, however, during the years 1779 and 1780, went on as before, without any general cartel, and by the action of the commanders-in-chief, through commissaries of prisoners, or by direct correspondence between the generals. In November, 1780, as many as a hundred and forty American officers and four hundred and seventy-six privates were exchanged at one time. Among the officers were Major-General Lincoln; Brigadier-Generals Thompson, Waterbury, and Duportail; and Lieutenant-Colonel Laurens.

This brings us to the period when Henry Laurens, father of the officer just mentioned, President of Congress, and the intended minister of the Congress to the Hague, was captured off the coast of Newfoundland, carried to London, and committed to the Tower on a charge of treason. Before this event, some thousands of prisoners had been exchanged in America upon the principles and in the mode above described;

that is to say, while the British Government was unwilling to make that species of convention *durante bello*, which is known to the public law as a cartel between nations at war, they constantly permitted exchanges, under the rules of war, for purposes of military convenience, and in relief of the sufferings of their own officers and privates in captivity. Had they not saved the point which distinguishes between an admission of sovereignty and an admission of the physical fact of temporary military force, there would have been gross inconsistency and impropriety in treating Mr. Laurens otherwise than as a prisoner of war. As it was, they had reserved the right, upon their principles of allegiance, to make him amenable to the law of England; but Mr. Laurens, after suffering a long and severe confinement of fifteen months, was released on bail as the prospect of peace drew near, and was finally exchanged for Lord Cornwallis just before the preliminary articles of peace were signed.

With respect to the American prisoners who were carried to England, your Committee find, that, under the operation of Lord North's Act, they were, in general, committed to jail as traitors or pirates. Their treatment was so rigorous, and their condition so bad, that, after the Earl of Abingdon had brought the subject before the House of Lords, a public meeting was held in London, Dec. 24, 1777, at which the sum of eight hundred pounds was subscribed for their relief. Among the persons who interested themselves in their behalf was David Hartley, who corresponded with Dr. Franklin on the subject. In August, 1778, Hartley succeeded in obtaining from the Admiralty an engagement respecting English prisoners under Franklin's control in France, of which he gives the following account to Franklin (*Franklin's Works*, vol. viii. p. 295):—

GOLDEN SQUARE, 14th August, 1778.

DEAR SIR,— I wrote to you, as long ago as the 14th of the last month, to tell you that the administration here had given their con-

sent to the exchange of prisoners at Calais; and that they would agree to give any ship on your part a free passport from Brest to Calais, upon your sending to me a similar assurance that any British ship going to Calais, and for the purpose of the exchange, should have free entrance without molestation, and free egress with the prisoners in exchange. I have again received a confirmation of these assurances from the Board of Admiralty here: and we are now waiting for your answer; after the receipt of which, the exchange will be forwarded with all expedition.

Great delays, however, were interposed by the English Admiralty; and this arrangement was not carried out. Franklin believed that the delay was occasioned in part by the efforts of the English to persuade the American prisoners to enter the king's service. At length, in 1780, Paul Jones came into the Texel with five hundred English prisoners on board of his privateers. Dr. Franklin proposed to exchange them; but this proposition was refused by the English Admiralty, in the expectation, as Franklin believed, that they could recapture them on their way to France. But, Paul Jones's squadron remaining longer in Holland than was expected, the British ministry procured an exchange of those prisoners with the French Government for an equal number of Frenchmen: and Franklin was persuaded to give them up, on a promise of having an equal number of English delivered to his order at Morlaix. But this promise was not kept; and the English Government refused to exchange other Englishmen for Americans, unless they had been taken by American cruisers.

In 1782, the number of American prisoners confined in England was not far from eleven hundred. In April of that year, in consequence of a proposition sent over by Dr. Franklin, an act of Parliament was passed, empowering the king, notwithstanding their commitment for treason, to consider them as prisoners of war, and exchange them as such.

A careful examination of Dr. Franklin's correspondence satisfies your Committee, that, although he never succeeded

in obtaining the execution of any considerable agreement for exchanges with the British ministry, partial exchanges, to some extent, were effected either by or through him, or with the commanders of the American privateers. In general, however, the American prisoners were held in England under the authority of the Act passed in February, 1779, and which we have referred to as Lord North's Act.

Your Committee are not aware that any American taken during the war of the Revolution was actually put upon trial for treason or piracy. Probably, had the struggle terminated differently, some trials and executions for both of those offences would have taken place; for it is an undoubted maxim of all governments, that the sovereign who succeeds in suppressing a revolt may reserve for punishment those whom he sees fit to punish, although, in the course of the struggle, he may have made any number of military exchanges for reasons of temporary policy. Such exchanges are made in his own interest and for his own convenience, and involve of themselves no concessions to the political pretensions of his enemies. They are made from a pure principle of justice to his faithful subjects who expose their lives and liberties in his service, and for the re-enforcement of his own military strength. If a sovereign could not make them, when carrying on a war to preserve the integrity of his dominions against domestic enemies, it would follow that he must wage such a war without one of the most important of the means which belong to him in all other wars; and it would be just as reasonable to suppose that they involve an admission of the political claims of the enemy in a foreign war, as it is to make that supposition when the war is between two parts of the same nation. Certainly, great care should be taken, in making such exchanges, to exclude all political admissions; and your Committee are satisfied that the precedents of the American Revolution amply show that this can be done. Those precedents show, that, where the exchanges are made

by direct negotiation and correspondence between the commanding generals, no political admission can be implied. Where it is necessary to appoint commissioners for a general or a limited exchange, to continue for a greater or lesser period, the powers exchanged may be so framed as to exclude any such admission; and, if the enemy insists on not treating with such an exclusion from the powers, the parties can fall back upon the first-mentioned mode of exchanging man for man, by the direct correspondence of the generals in command.

Your Committee, therefore, respectfully submit the foregoing statements, as furnishing, in their opinion, a sufficient answer to the inquiries propounded by the vote of the Society.

JARED SPARKS.
EDWARD EVERETT.
GEO. T. CURTIS.
THOS. ASPINWALL.
RICHARD FROTHINGHAM.
JOSEPH WILLARD.
LORENZO SABINE.
GEORGE E. ELLIS.
WM. BRIGHAM.

Voted unanimously, That this Report be accepted, and placed on file, and published under the direction of the Committee by whom it was prepared.

Attest :

CHANDLER ROBBINS,
Recording Secretary.

ARE THE SOUTHERN PRIVATEERSMEN PIRATES?

LETTER

TO THE

HON. IRA HARRIS,

UNITED STATES SENATOR.

BY CHARLES P. DALY, L.L.D.

FIRST JUDGE OF THE COURT OF COMMON PLEAS OF THE CITY
OF NEW YORK.

New York:

JAMES B. KIRKER,
599 BROADWAY.

1862.

ARE SOUTHERN PRIVATEERSMEN PIRATES?

NEW YORK, Dec. 21, 1861.

DEAR SIR,

In compliance with your request at our conversation in Washington, I will put in writing the reasons why the Southern privateersmen should be regarded as prisoners of war, and not as pirates.

Privateering is a lawful mode of warfare, except among those nations who, by treaty, stipulate that they will not, as between themselves, resort to it. Pirates are the general enemies of all mankind—*hostes humani generis*; but privateersmen act under and are subject to the authority of the nation or power by whom they are commissioned. They enter into certain securities that they will respect the rights of neutrals; their vessel is liable to seizure and condemnation if they act illegally, and they wage war only against the Power with which the authority that commissioned them is at war. A privateer does no more than is done by a man-of-war, namely, seize the vessel of the enemy, the prize or booty being distributed as a reward among the captors. The only difference between them is, that the vessel of war is the property of the Government, manned and maintained by it, whilst the other is a private enterprise, undertaken for the same general purpose, and giving guarantees that it will be

conducted according to the established usages of war. In short, one is a public, the other a private vessel-of-war, neither of which acquire any right to a prize taken, until the lawfulness of the capture is declared by a competent Court, under whose direction the thing taken is condemned and sold, and the proceeds distributed in such proportion as the law considers equitable. The Government of the United States declined to become a party to the international treaty of Paris, in 1856; and therefore the whole people of the United States—as well those who are now maintaining the Government as those who are in rebellion against it—have never agreed to dispense with privateering. It is not our interest to do so. We are a maritime people, with a large extent of sea-coast, which, whilst it leaves us greatly exposed to attacks by sea, at the same time affords facilities that render privateering, to us, one of our most effective arms in warfare. This was the case in our contest with England in 1812; and should a war now grow out of the affair of the *Trent*, privateering would be indispensable, to enable us to cope with so formidable a Power as that of Great Britain.

A great deal has been written against this mode of warfare, but nations, like individuals, act upon the instinct of self-preservation, and avail themselves of the natural defences which grow out of their situation; and a system, therefore, which enables us to keep but a small navy in peace and improvise a large one in war, will never be relinquished, because nations who have everything to lose, or little to gain, by its continuance, desire that it should be generally abolished.

Being then a legitimate mode of making war, what is the difference between the Southern soldier who takes up arms against the Government of the United States on the land, and the Southern privateersman who does the same

upon the water? Practically there is none, and if one should be held and exchanged as a prisoner of war, the other is equally entitled to the privilege. The Court before which the crew of the *Jefferson Davis* were convicted as pirates, held that they could not be regarded as privateers, upon the ground that they were not acting under the authority of an independent State, with the recognized rights of sovereignty. This objection applies equally to the man-of-war-men in the Southern fleets, and to every soldier in the Southern army, none of whom are acting under the authority of a recognized Government. The Constitution defines treason to be the levying of war against the United States, and the giving of aid and comfort to its enemies. All of them are engaged in doing this. The guilt of the one is precisely the same as that of the other. There is not and cannot be, in this respect, any difference between them. Why then is the mariner distinguished from the soldier, as pursuing the infamous calling of a pirate? If, as the Courts have held, he cannot be considered as a privateersman from the want of the authority of a recognised Government, does it necessarily follow that he is or must be a pirate? The pirate is the Ishmaelite of the ocean, submitting to no law and recognizing no authority human or divine. An outlaw setting all the restraints of society at defiance, whose object unrelieved by any other motive, is plunder, and who in the attainment of that object hesitates at no extent of wickedness. Is this the position of the Southern privateersman? It was shown in the case of the *Jefferson Davis*, that all the formalities which governments require in the fitting out of privateers had been scrupulously complied with, a fact which indicates that the Southern privateersman holds a very different position from that of the marine freebooter, inasmuch as he is acting under the authority and is subject to the control of what he at least regards as a government. His true position is that of a

rebel upon the ocean. As a mariner it is the sphere of his activity, and its pursuits are those on which he depends for a livelihood; and though it be conceded that he is attracted to the kind of service upon which he enters by the hope of large pecuniary profits, is he not as well as the soldier entitled to the consideration that he may also be influenced by a mixed motive? It is the motive that settles whether an act is criminal or not. It is by that test that we determine, in the taking of property by force, whether the act was a robbery or a trespass. Judging the Southern mariner then by this standard, can we say that he is not swayed by the same passions, influenced by the same excitement, and imbued with the same political opinions, that have led such a multitude of men to take part in this rebellion? And if he is, does not that distinguish him from the common criminal?

The act which he has committed—that of rising in arms to overthrow the Government, and to sever one part of its territory from the rest,—is more injurious to the nation than any damage that can be inflicted by the predatory acts of the pirate. It is the gravest and weightiest offence that a citizen can commit; but mankind have always distinguished between political offences and meaner and more mercenary crimes, a distinction which Coke, the profoundest of English jurists, had in view when he says that “those things which are of the highest criminality may be of the least disgrace.” Of this political offence the Southern privateersman is guilty, but he is not a pirate, and the inconsistency of attempting to treat him as such is forcibly illustrated by a case in point from our own annals. On the breaking out of the American revolution a number of privateers were equipped by the colonists, first under the sanction of the State of Massachusetts and afterwards by the authority of Congress; and on the 28th of February, 1777, an act was passed by the British

parliament, under the provisions of which any colonist, taking part in privateering, was declared to be a pirate; and if taken he was to be committed by any magistrate to the common jail upon the charge of piracy, and there detained until the king or privy council should determine whether it was expedient or not to try him for that offence. This act, which was framed by Lord Thurlow, a man of an unscrupulous, arbitrary and despotic character, was strenuously opposed upon its passage by Fox, Dunning, Barre, and all the liberal members of parliament, and was denounced by Burke in the severest terms in his celebrated letter to the sheriffs of Bristol: "The persons," he said, "who make a naval war upon us in consequence of the present troubles, may be rebels; but to call or treat them as pirates, is to confound the natural distinction of things, and the nature of crimes. * * The general sense of mankind tells me that those offences which may possibly arise from mistaken virtue, are not in the class of infamous actions," and he further remarked that if Lord Balmanno, in the Scotch rebellion, had driven off the cattle of twenty clans, he would have thought it a low juggle, unworthy of the English judicature, to have tried him for felony as a stealer of cows. The act was successively renewed every year until near the close of the war; and during that period some 230 persons were detained under it in the English jails. But as a preventive measure it accomplished nothing. Privateering continued unabated, and at last the persons so confined were exchanged under an act introduced through the influence of General Burgoyne.

As all who have participated in the rebellion are alike guilty of the same political offence, and as there is in point of fact no difference between them, the question then arises—is every seaman or soldier taken in arms against the Government to be hung as a traitor or pirate?

If the matter is to be left to the Courts, conviction and the sentence of death must follow in every instance. In the case of the *Jefferson Davis*, the Court said, that during civil war, in which hostilities are prosecuted on an extended scale, persons in arms against the established Government, captured by its naval and military forces, are often treated not as traitors or pirates, but according to the humane usages of war. They are detained as prisoners until exchanged or discharged on parole, or if surrendered to the civil authorities and convicted, they are respited or pardoned; but the Court said that this was a matter with which courts and juries had nothing to do. That it was purely a question of governmental policy, depending upon the decision of the executive or legislative departments of the Government, and not upon its judicial organs.

If this view be correct, the disposition of this matter rests exclusively with the Government, and its decision must be pronounced sooner or later, as every day increases the complication and difficulty growing out of the present state of things. Are the Courts to go on? Is the Government prepared to say that every man in arms against the United States, upon the land or upon the water, is to be tried and executed as a traitor or pirate?—either upon the ground that it is right, or upon the supposition that it will prove an effective means of suppressing this rebellion? That policy was tried by the Duke of Alva, in the revolt of the seven provinces of the Netherlands, and 18,000 persons, by his orders, suffered death upon the scaffold; the result being a more desperate resistance, the sympathy of surrounding nations, and the ultimate independence of the Dutch.

Neither the Constitution of the United States, nor the

act against piracy, were framed in view of any such state of things as that which now exists. The civil war now prevailing is, in its magnitude, beyond anything previously known in history. The revolting States hold possession of a large portion of the territory of the Union, embracing a great extent of sea-coast and including some of our principal cities and harbors. They hold forcible possession of it by means of an army estimated at 400,000 men, and are practically exercising over it all the power and authority of Government. They claim to have separated from the United States, to have founded a Government of their own, and are in armed resistance to maintain it. To reduce them to obedience and to recover that of which they hold forcible possession, it has been necessary for us to resort to military means of more than corresponding magnitude, until the combatants on both sides have reached to the prodigious number of a million of men. The principal nations of Europe recognizing this state of things, have conceded to the rebellious States the rights of belligerents, a course of which we have no reason to complain, as we did precisely the same thing toward the States of South America in their revolt against the Government of Spain. It is natural that we should have hesitated to consider the Southern States in the light of belligerents before the rebellion had expanded to its present proportions; but now we cannot, if we would, shut our eyes to the fact, that war, and war upon a more extensive scale than usually takes place between contending nations, actually exists. It is now, and it will continue to be, carried on upon both sides, by a resort to all the means and appliances known to modern warfare; and unless we are to fall back into the barbarism of the middle ages, we must observe in its conduct those humane usages in the treatment and exchange of prisoners, which modern civilization has shown to be equally the dictates of humanity and of policy.

For every seaman that we have arrested as a pirate, they have incarcerated a Northern soldier, to be dealt with exactly as we do by the privateersman. We have convicted as pirates four of the crew of the *Jefferson Davis*, and there are others in New York awaiting trial. Are these men to be executed? If they are, then by that act we deliberately consign to death a number of our own officers and soldiers, most of whom owe their captivity and present peril to the heroic courage with which they stood by their colors on a day of disastrous flight and panic.

If such a course is to be pursued, it will not be very encouraging for the soldier now in arms for the maintenance of the Union, to know that what may be asked of him is to fight upon one side, with the chance of being hanged upon the other; and in face of the enemy, with his line broken, instead of rallying again, he may, in view of the possibility of a halter, consider it prudent to retire before the double danger.

If, on the other hand, we convict these men as criminals and pause there, then the crime of which we have declared them to be guilty is not followed by its necessary consequence, the proper punishment. There is no terror inspired and no check interposed by such a procedure; for the plainest man in the South knows that the motive which restrains us from going further is the fact, that the execution of these men as pirates seals the doom of a corresponding number of our own people—that the account is exactly balanced—that, with ample means of retaliation, they have the power to prevent; or, if mutual blood is to be shed in this way, *we* and not they will have commenced it. By such a course nothing is effected, except to keep our own officers and soldiers in the cells of Southern prisons, subject to that mental torture produced by the uncertainty of their fate, which, with the

majority of men, is more difficult to bear than the certainty of death itself,—and oblige them to endure, in the ill-provided and badly conducted prisons in which they are confined, sufferings, the sickening details of which are constantly before us in their published letters to their friends.

“I little thought,” writes the gallant Col. COGSWELL, of the regular service, “when I faced the storm of bullets at Edwards’ Ferry, and escaped a soldier’s death upon the field, that it was only to be left by my country to die upon the gallows.” And the nature of their sufferings will be understood when it is told that the noble-hearted and self-sacrificing Col. CORCORAN was handcuffed and placed in a solitary cell, with a chain attached to the floor, until the mental excitement produced by this ignominious treatment, combining with a susceptible constitution and the infectious nature of the locality, brought on an attack of typhoid fever. Shall this state of things continue? Let us take counsel of our common sense. These men are treated as criminals, because, while we give to the Southern soldier the rights of war (for numerous exchanges of soldiers have taken place), we convict the Southern mariner of a crime punishable with death. Is there any reason, even upon the grounds of policy, for making this distinction? We have, by the blockade of the whole Southern coast, cut the privateersman off from bringing his prize into the ports of the South for adjudication; and the ports of all neutral nations being closed against him for such a purpose, he is deprived of the means of making lawful prizes, and must eventually convert his vessel into a ship-of-war, or degenerate into a pirate, by unlawful acts which will make him amenable to the tribunal of every civilized nation. The comparative injury that may be done to our commerce by the few privateers which it will now be in the power of the rebellious States to main-

tain upon the ocean, is as nothing compared to the disastrous and lasting consequences to the whole nation, to its industry, its commerce and its future, that would grow out of making this war one of retaliatory vengeance. We have the fruitful experience of history to admonish us that in such acts are sown the seeds of the dissolution of nations and especially of republics. By according to the rebellious States the rights of belligerents, at least to the extent of exchanging prisoners, whether privateersmen, man-of-war's me, nor soldiers,—we do not concede to them the rights of sovereignty. There is a well-defined distinction between the two, recognized by the United States Court in the case of *Rose vs. Himmley*, 4 Cranch, 241. One may exist without the other; and by exchanging prisoners, therefore, we concede nothing and admit nothing, except what everybody knows, that actual war exists, and that, as a Christian people, we mean to carry it on according to the usages of civilized nations.

The existing embarrassment is easily overcome. All further prosecutions can be stopped, and in respect to the privateersmen who have been convicted, the President, acting upon the suggestion of the Court that tried them, can, by the exercise of the pardoning power, relieve them from their position as criminals, and place them in that of prisoners of war.

In conclusion, we are not to forget that we are carrying on this war for the restoration of the Union, and that every act of aggression not essential to military success, will but separate more widely the two sections from each other, and increase the difficulty of cementing us again in one nationality. We are to remember that the people of the South, whose infirmity it has been to have very extravagant ideas of their own superiority, and whose contempt of the people of the North has been in proportion to their

want of information respecting them — have been hurried into their present position by the professional politicians and large landed proprietors, to whom they have hitherto been accustomed to confide the management of their public affairs; that, though prone to commit outrageous acts when under the influence of excitement, they are upon the whole a kindly and affectionate people, and have, when not blinded by passion, a very keen perception of their own interests; that there are, throughout the South, thousands of loyal hearts paralysed by the excitement around them, who still cling to the flag of their fathers and await the delivering stroke of our armies. Relying on our superior naval and military strength, and the settled determination of our people that this nation shall not be dismembered, we may, as the Swiss Cantons recently did in a similar crisis, put down this rebellion. That great duty imposes upon us all the exigencies of war, and they are greater and heavier than those which the Swiss Government had to contend with. We have to carry on the war against a people who have a large and well-appointed army, under skilful generals, acting on the defensive, in a country abounding with strategic points of defence. War, when conducted in accordance with the strictest usages of humanity, is, as all who have shared in the recent battles know, a sufficiently bloody business; and if we are to add to its horrors by hanging up all who fall into our hands as traitors or pirates, we leave the South no alternative but resistance to the last extremity; and should we ultimately triumph, we would have entailed upon us, as the consequences of such a policy, the bitter inheritance of maintaining a Government by force, over a people conquered, but not subdued.

Very truly yours,

CHARLES P. DALY.

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