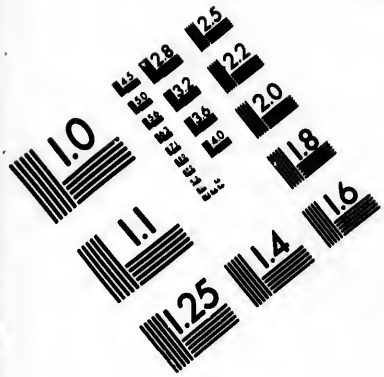

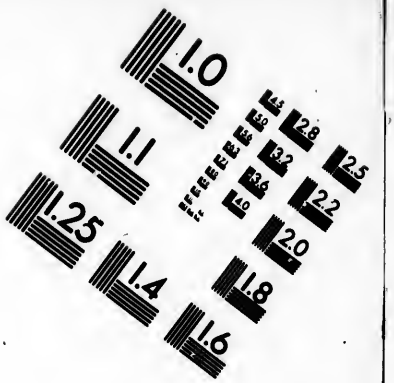

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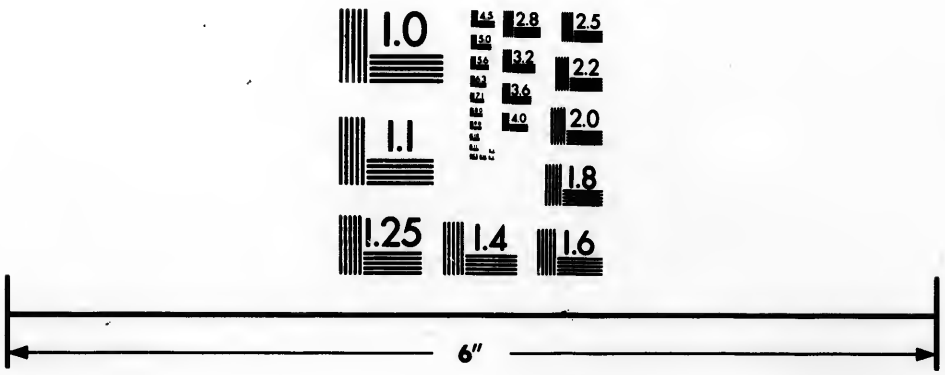

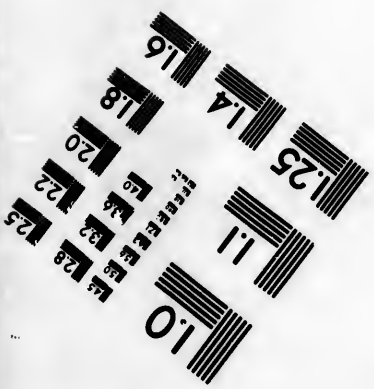

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REMARKS

ON THE

English Enlistment Question,

WITH AN ABSTRACT OF THE CORRESPONDENCE

THEREON.

BY R. W. RUSSELL,

NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. LIBERTY.

1856.

REMARKS

ON THE

ENGLISH ENLISTMENT QUESTION.

The following remarks are made without the authority or cognizance of any English official, and in some respects may be opposed to the English view of the subject in controversy.

The writer has had no means of information other than those afforded by the public press. He has not been professionally engaged or consulted by any or either of the parties alleged to be implicated in the violation of the Act of Congress respecting foreign enlistments; and his reflections may be regarded as those of a perfectly disinterested observer. On the 23d January last he published in the N. Y. Herald a letter upon the question as to what is the true spirit and meaning of the Act of Congress prohibiting foreign enlistments in the United States, and the hiring or retaining of persons to go abroad, with intent to be enlisted in foreign service. Having thus embarked in the discussion, he feels constrained to support his position by a review of the correspondence between the English and American Governments, which was published in the newspapers in the latter part of February last.

In addition to the letter before referred to, the reader will find the substance of that correspondence, and a copious extract from the opinion of Mr. Attorney General Cushing, (as published in the N. Y. Herald,) with various remarks on the questions of law and fact involved in the discussion between the two Governments.

New York, April, 1856.

LETTER ON THE ENGLISH ENLISTMENT QUESTION, PUBLISHED IN THE NEW YORK HERALD, 23D JANUARY, 1856.

1 It has been pretty generally assumed of late by the newspaper press of this country, upon the *supposed* authority of the opinions of Judges Kane and Ingersoll, and Mr. Attorney-General Cushing, that it is unlawful to assist or induce any one to leave the United States for the purpose of enlisting himself in the service of a foreign government; and before Judge Kane's decision in Philadelphia, in the case of the United States *vs.* Henry Hertz, the Attorney-General of the United States, in an official letter dated Attorney-General's office, September 12, 1855, and addressed to Mr.
2 Van Dyke, the District Attorney, at Philadelphia, insists that even if the letter of the law had not been violated by the agents of the British Government, the spirit of the law had been evaded. The President's message also takes the same ground.

I propose, with your permission, to inquire *what is the true spirit and meaning of this law*, which has been so differently understood by the agents of the British Government on the one hand and some of the American authorities on the other.

It will, I presume, be conceded that any person in the United States has a right to go abroad and serve in any foreign army; also, that it was not until recently understood
3 by the public that it was criminal to advise, induce, persuade, or assist men to go abroad for that purpose.

It never occurred to me, for instance, that the act of Congress passed in the year 1818 (re-enacting the law of June 5, 1794,) which provides that no person shall "hire or retain" another to go out of the United States, "with intent to be enlisted," would be construed to mean that I should not be allowed to recommend or assist a poor unemployed Englishman in New York to go to Canada to enlist in the British army. I supposed that the act was merely *designed to prohibit contracts to enlist, or contracts to go*

abroad with intent to be enlisted—that is to say, to prohibit 4
what is commonly known as "recruiting." (1)

It appears, however, that I must have been all wrong in this idea, if Mr. Attorney-General Cushing and the President have rightly interpreted the law; and even if they have not, the Attorney-General will insist that my act would be an invasion of the spirit of the law.

This appears to me to be a mere gratuitous assumption, taking for granted what is not in the slightest degree probable, viz., that *Congress intended to prohibit any one from advising, inducing, persuading or assisting another to go abroad to enlist.* (2) 5

The first question which naturally arises is, if such had been the intention of Congress, *would not appropriate words have been used*—would not the law have prohibited such acts in direct terms, instead of merely prohibiting acts of *hiring or retaining*?

The English statute 59 Geo. III, c. 69, makes it a misdemeanor to attempt to get others to go abroad to serve a foreign prince; but then *the same act prohibits any Englishman from entering into or agreeing to enter into the service of a foreign prince* or people. (3) It is quite clear that Congress did not intend to make *such a law as that, for the* 6
government of the people of the United States. Indeed, the constitutional power of Congress to go so far as that might well be doubted. Nor has any State of the Union yet deemed it necessary or proper to prohibit its citizens from serving in foreign armies. And no such prohibition being in existence, no law has been enacted by any of the States, making it penal to advise or assist citizens to go abroad to enlist. It is evident, moreover, that such a law would

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Note 1.—This is the construction put on the law by Mr. Marcy's first letter (see post folio 50) by Judge Kane (see post folio 72), and in Lord Clarendon's letters (post folios 69, 72, 105, 107, 110).

Note 2.—Mr. Marcy contends in his letter of Dec. 28th (see post folio 178) that such was the intention of Congress, but the position assumed by him in that letter is inconsistent with his remarks referred to in the previous note. See comments on this inconsistency (post folios 133, 135).

Note 3.—Mr. Buchanan erroneously assumes that the policy of the English and American laws on this subject are identical (see post folios 59, 292 to 297).

7 be a rank absurdity, so long as the citizen is allowed to go of his own accord.

In the case of Hertz, tried before Judge Kane, in Philadelphia, the instructions alleged to have been given by the British Minister to the witness Strobel, contained the following :—

"Memoranda for the guidance of those who are to make known to persons in the United States the terms and conditions upon which recruits will be received into the British army :—

8 1. The parties who may go to Buffalo, Detroit or Cleveland for this purpose, must clearly understand that they must carefully refrain from anything which would constitute a violation of the law of the United States.

2. They must therefore avoid any act which might bear the appearance of recruiting within the jurisdiction of the United States for a foreign service, or of hiring or retaining anybody to leave that jurisdiction with the intent to enlist in the service of a foreign power.

9 [Both these acts are illegal by the act of Congress of 1818, sec. 2.]

4. There must be no collection, embodiment of men, or organization whatever, attempted within that jurisdiction.

5. *No promises or contracts, written or verbal, on the subject of enlistment, must be entered into with any person within that jurisdiction.* (4)

Note 4.—If any agent employed by the British Government, to give advice and assistance to persons desirous of enlisting in the British Provinces, did contrary to these instructions make any contract, he did so without authority, and no blame can be attached to the British Government on account of it.

The printed instructions furnished to the agents contain the following caution :

"Should the strict observance of these points be neglected, and the parties "thereby involve themselves in difficulty, they are hereby distinctly apprised "that they must expect no sort of aid or assistance from the British Govern- "ment :—this government would be compelled by the clearest dictates of "international duty to disavow their proceedings, and moreover, would be "absolved from all engagements contingent upon the success of the parties in "obtaining by legal means soldiers for her Britannic Majesty's army."

The information to be given will be, simply, that to those 10
desiring to enlist in the British army, facilities will be afforded for so doing on their crossing the line into British territory, and the *terms offered by the British Government may be stated as matter of information only*, and not as implying any promise or engagement on the part of those supplying such information, so long at least as they remain within American jurisdiction." (5)

This appears to be Mr. Cushing's authority for the statement in this letter before referred to, that "the Government of Great Britain, with extraordinary inattention to the grave aspect of its acts, namely, the flagrant violation of 11
our sovereign rights involved in them, has supposed it a sufficient justification of what it has done, to reply that it gave instructions to its agents so to proceed as not to infringe our municipal laws;" and he continues: "But if the British Government has, by ingenious contrivances, succeeded in sheltering its agents from conviction *as malefactors*, it has, in so doing, doubled the magnitude of the national wrong inflicted on the United States."

The Attorney-General assumes, in the first place, that the acts authorized in the before cited instructions, would be evasions of the municipal laws of this country; and, secondly, that such acts constitute a violation of "our sovereign rights as a nation." 12

No reasons are given by Mr. Cushing for either of these propositions.

In a second letter to Mr. Van Dyke, dated "Attorney-General's office, 17th September, 1855," he says: "I desire to make a further suggestion in regard to the trial of parties charged with recruiting soldiers in the United States for the service of the British Government.

It is known that instructions on this subject were given by that government to its officers in the United States.

Note 5.—In the case of Wagner, it was assumed by the judge, that the terms offered by the British Government were not stated as *matter of information* only by Wagner, but that he Wagner promised on his own behalf or undertook to make a contract on behalf of the British Government, that Cook should receive certain pay for his services as a soldier (see folio 23). This was an unreasonable construction of Wagner's words and conduct.

We are told by Lord Clarendon that those officers had "stringent instructions" so to proceed as not to violate the municipal law—that is, to violate its spirit, but not its letter If so, the instructions themselves violate the sovereign rights of the United States.

But, in the meantime, every Consul of Great Britain in the United States is, by the avowal of his government, subject to the just suspicion of breach of law.

I am unable to see, and Mr. Cushing does not attempt to show how, "the sovereign rights of the United States" can be violated by *the giving of information and assistance to persons desiring to enlist in the British army*, if the giving of that information and assistance be not prohibited by the municipal law. (6.)

It is worthy of observation that these letters of Mr. Cushing, which were very improperly read by Mr. Van Dyke in open court in Philadelphia in the case of the United States *vs.* Hertz, were officious, and not properly official. The duties of the Attorney-General are prescribed by law, and it is no part of his duty to give opinions or instructions to District Attorneys; and many of Mr. Cushing's predecessors have refused to give such opinions or instructions. (Opinions of Attorneys General, 156.) Mr. Cushing's principal object in writing the letters to Mr. Van Dyke, evidently, was to have a fling at the British Government and its agents. But even Mr. Cushing appears to have been outdone by Judge Kane, who is reported to have charged the jury as follows:

"Our people and our government have been accused of forgetting the obligations of neutrality, and pushing ourselves forward into the conflicts of foreign nations, and leaving belligerents to fight out their own quarrels. For one, I confess that I felt surprised, as this case advanced, to learn that during the very time that these accusations were fulminated against the American people by the press of England, there was on the part of eminent British functionaries here a series of arrangements in progress, carefully digested, and combining all sorts of people, under almost all sorts of influ-

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Note 6.—See the discussion on this point (folios 104, 114, 246 et seq.)

ences, to evade the laws of the United States by which our 17
country sought to enforce its neutrality; arrangements matured upon a careful inspection of the different sections of our statutes ingeniously to violate their spirit and principle without incurring their penalty, and thus enlist and send away soldiers from our neutral shores to fight the battles of those who were incontinently, and not over courteously, admonishing us to fulfil the duties of neutrality.

"I allude to these circumstances and this train of thought, gentlemen, not because it is one that should influence your action as jurors, but because I feel it my duty to guard you 18
against its influences."

The Judge delivered this inflammatory harangue, denouncing what he calls the false accusations of the British press and the misconduct of British functionaries, for the mere sake, as he would have us believe, *of soothing the minds of the jury!* Faugh!

The Judge told the jury that it was not lawful for a person to *engage* another here to go to Halifax for the purpose of enlisting. He did not instruct the jury that it was *lawful to assist, induce and persuade another* to go to Halifax for that purpose; and doubtless the jury supposed that any 19
one who received assistance to go to Halifax, engaged to go there within the meaning of the Judge's charge. (7.)

It is observable that in this case of Hertz the witnesses for the prosecution were allowed to state their conclusions of law and fact, instead of detailing the circumstances from which they drew those conclusions. The defence does not appear to have been a real one, and it may be added, that the defendant is at large. When we look at the Judge's charge, the reading of Mr. Cushing's letters in court, and other features of this anomalous proceeding in the shape of

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Note 7.—Judge Kane had previously held that it was lawful "to pay the passage from this country of a man who desires to enlist in a foreign port." If the judge had repeated this opinion to the jury in Hertz's case instead of talking loosely about "*engaging*" another here to go to Halifax for the purpose of enlisting, it is probable that Hertz would not have been convicted. If, however, Hertz did "hire or retain" any person to go to Halifax with intent &c., he violated his instructions.

20 a trial, we may form a pretty shrewd conjecture as to how and why it was got up.

One is *not hired or retained to go out of the United States with intent, &c.*, if he *does not enter into a contract or obligation to do so.* It is necessary for the contract or obligation to be made in such a way that the party could be sued for a breach of it, if it were a legal contract. There must be *an actual hiring or retainer*, not a mere attempt or offer to hire or retain, that not being provided against by the act. If the party *receiving assistance to go abroad with intent to enlist, can alter his mind, and stay here without*
21 *violating any contract or engagement* on his part, there is no hiring or retainer within the meaning or spirit of the act. (8.)

Any other construction would make it *penal to give a man the price of a railroad ticket* to enable him to reach the place where he intends to enlist. (9)

It may be asserted, without fear of contradiction, that *so far from the spirit of the act being as represented by Mr. Cushing, not half a dozen votes could have been obtained in Congress* in the year 1794 or the year 1818, or at any time since, in support of a bill couched in that spirit. (10.)

22 In the case of the United States *vs.* Wagner, tried before Judge Ingersoll in New York, the Judge charged the jury as follows :—

"*Any resident of the United States has a right to go to Halifax with the intent to enlist.*(11) If one person merely informs another that if he went to Halifax, or any foreign country, he can be enlisted as a soldier in the service of a foreign government, this is no offence against the law of Congress."

Note 8.—See Lord Clarendon's remarks to the same effect (folios 69, 72, 107, 110).

Note 9.—See the opinion of Judge Kane on this point, given before the Government, insisted on a different construction of the law (folio 72).

Note 10.—See remarks (folios 34, 41. *Notes* 87, 95.)

Note 11.—See this subject fully discussed (folio 288). The existence of this right makes the authorities relied on by Mr. Cushing, wholly inapplicable to this country (see notes 16, 30, 95). And the neutrality of the U. S. would be in no respect compromised by the exercise of the right which has existed ever since the formation of this government (See, per Galiani, cited by Mr. Cushing folio 198).

Then the Judge instructed the jury that if the man named Cook "agreed" with Wagner that he, Cook, would go beyond the limits of the United States to Halifax and enlist, and if the inducement of such *agreement* "was a promise on the part of Wagner that he, Cook, when he should so enlist should receive $30 advance, and should also receive $10 a month for his services as a soldier; (12) or if a part or the whole of the consideration for such *agreement* on the part of Cook, was the payment of the passage of Cook from New York to Boston, or a promise to pay such passage, or if the consideration of such *agreement*, or reason, or motive, which led to it, was any other promise of money by Wagner, or any other valuable thing; and if Cook, when he entered into such agreement upon any such consideration, had the intent to go to Halifax, and there be enlisted or entered as a soldier," the offence would be complete.

The Judge adds: "So that you see that the mere giving of information is not sufficient—the mere starting to go is not sufficient; there must be *some inducement* such as I have stated to you." (13)

Upon this charge, it is not probable that any of the jury understood the law to be, that not only might information be lawfully given, as suggested in the Judge's charge, but that *any one may lawfully advise and assist, or induce another to go and enlist in the service of a foreign govern-*

Note 12.—See remarks on this part of the charge, ante note 5, page 7.

Note 13.—No exception could have been taken to the Judge's charge as it was delivered; but if he had been required to charge that to "advise and assist" is not to "hire or retain" he could not properly have refused to so lay down the law, and probably would have complied with the request. In that event, it is not at all likely that the jury would have convicted the accused.

The Judges charge properly construed is, that the law is not violated unless a contract is made. But the charge, as reported, was indistinct, and calculated to mislead the jury. It is true that the Judge does not say that the payment of the passage from this country of a man who desires to enlist in a foreign port would be a violation of the Act (that it would not, see per Judge Kane, post folio 72,) but the jury might have supposed that such payment constituted "some *inducement*" within the meaning of those words as used in Judge Ingersoll's charge.

26 *ment.* The Judge does not instruct the jury that one may assist or induce another to enlist, and yet that he, by so doing, cannot be accused of hiring or retaining him to do so. But the Judge repeats to the jury that the mere giving of information is no offence, from which they could but conclude that any act beyond that would be unlawful. (14)

To hire is "to engage a man in temporary service for wages." (Johnson's Dict.) To retain is "to keep in pay to hire." (Ib.) To constitute a hiring or retainer, there must be a promise to render services in consideration of something to be paid or done by some other person.

27 As to what constitutes a contract, see Comyn on Contracts, vol. 1, p. 1; Chitty on Contracts, p. 3. The act of Congress is a penal one, and should be strictly construed; but *if construed ever so loosely, it could not be made to mean that persuading a man to enlist is hiring him to do so*, nor *that the act of assisting a man to go abroad is a retainer of him for that purpose.* (15)

It will be observed that the Judge assumes that what could only have been a representation by Wagner as to the bounty to be paid by the British Government to a soldier and his pay, might be treated by the jury as a promise on the part of Wagner that such bounty should be
28 paid and such pay allowed. This serves to show how loose are the Judge's ideas as to what constitutes a contract of hiring.

The jury, as might be expected from the unpopularity of the cause of the allies in the city of New York, readily adopted the Judge's views; and in the exercise of their power to decide upon conflicting testimony, preferred the evidence of the single witness for the prosecution to that of three respectable witnesses for the defendant, although the former was, by his own account, a participant in the

Note 14.—Upon such a loose charge, a man would be in jeopardy who had, from charitable motives, given a few dollars to another to enable him to emigrate.

Note 15.—Obvious as this may appear, it is contradicted by Mr. Marcy and Mr. Cushing, (folios 133, 135, 178, 218). See remarks on Mr. Marcy's inconsistency. *Notes* 30, 36, 37, folio 295.

alleged violation of the law, and there was no corroboration of his testimony. 29

President Pierce's recent message lays down the undeniable proposition that *no government can be permitted to levy or raise troops in the United States*, and that the attempt to do it would be an unwarrantable attack on the national sovereignty. In this he is fully supported by Vattel, B. 3, ch. 2, s. 15. (16)

He goes on to say that when the British Parliament passed an act to provide for the enlistment of foreigners in the military service of Great Britain, it was not anticipated "that the British Government proposed to attempt recruitment in the United States, nor did it ever give intimation of such intention to this Government. It was matter of surprise, therefore, to find subsequently that the *engagement* of persons within the United States to proceed to Halifax, in the British province of Nova Scotia, and there enlist in the service of Great Britain, was going on extensively, with little or no disguise." (17) 30

Note 16.—Vattel in the passage referred to, speaks of the acts of individuals, and says, that if they acted by the order of their Sovereign, such a proceeding is a sufficient reason for declaring war against him. Vattel does not say that an act which an individual might lawfully perform would become illegal if done by the order of his Sovereign. His words are "*The man* who undertakes to enlist soldiers in a foreign country, *without the Sovereign's permission*, and in general whoever entices away the subjects of another state, violates one of the most sacred rights of the Prince and the nation. The crime is distinguished by the name of *kidnapping* or man-stealing."

As the act of Congress prohibits enlistments in the U. S. for foreign service, the attempt to effect such enlistments would be an unwarrantable attack on the national sovereignty. It would be otherwise, if no municipal law founded on usage or legislation, forbade the act. (see post folio 300 et seq.)

The act of enlisting a person in the U. S. for foreign service, could not however be properly called kidnapping, as the old slavish doctrine of allegiance does not prevail here, a doctrine which "was derived from the feudal system, by which men were chained to the soil on which they were born and converted from free citizens to be the vassals of a lord or superior." (post folio 270.)

Note 17.—There was no such *engagement*, *i. e.*, hiring or retainer effected by the orders of the British Government. But persons were advised to proceed to Halifax and there enlist, and were informed on what terms they could do so, and were supplied with the means of going there. And all this the agents of the British Government supposed they had a right to do. If

31 The President says that suitable representations on the subject were addressed to the British Government. "Thereupon it became known, by the admission of the British Government itself, that the attempt to draw *recruits from this country* originated with it, or at least had its approval and sanction; but it also appeared that the public agents engaged in it had "stringent instructions" not to violate the municipal law of the United States."

"It is difficult to understand how it should have been supposed that troops could have been *raised here* by Great
32 Britain without violation of the municipal law. The unmistakable object of the law was to prevent every such act, which, if performed, must be either in violation of the law or a studied evasion of it, and in either alternative the act done would be alike injurious to the sovereignty of the United States."

In the passage just quoted, the President is speaking of the admission of the British Government that an attempt had been made "to draw recruits *from* this country," by *causing agents to give information to persons likely to go to*
33 *Halifax with intent to enlist;* and the President very unfairly and illogically, as it appears to me, treats that as *an admission that Great Britain had attempted to raise troops here in the United States.*

What he says about "the unmistakeable object of the law," is a mere truism. Now, *if the object of the law really was to prevent American citizens from entering into foreign service*, why does not the President say so? (18) If that had

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Mr. Marcy had told Mr. Crampton, that even the publication of an article or advertisement in a newspaper, stating the terms on which recruits would be received in the British dominions, would be treated as a violation of, or at all events an evasion of the spirit of the act of Congress, or an infraction of international law, it is probable that under the circumstances no attempt would have been made to induce persons to leave this country for the purpose of entering into the service of Great Britain.

But we find that it is only at a recent period, when forced by the exigency of the argument, that Mr. Marcy takes this view of the law (folio 133), against which may be quoted his own exposition of the law in the earlier stages of the controversy. (folios 50, 60).

Note 18.—Mr. Marcy in his first letter on this subject (post folio 45), states the object and intent of the law in the following words "enacted for the ex-

been the intention of Congress, then, indeed, it might well 34
have been said that any attempt to persuade or induce American citizens to enter a foreign service would be a violation of the spirit of the law, although it does not in terms prohibit such attempts.

But the undeniable fact is, that any American citizen or resident of the United States has a right to go abroad and enlist himself as a soldier in a foreign service. And it is an irresistible conclusion, that it is allowable to present to the public the reasons which may be calculated to influence them in making up their minds on the question whether they will assist either of the belligerents. (19) This is

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press purpose of maintaining our neutral relations with other powers." And he complains that persons had been enlisted in the U. S. by the authority of the British Officials (folio 48), that this course of proceedings seriously compromitted the neutrality of the U. S.

Note 19.—See Lord Clarendon's argument on this point (folio 69). President Pierce does not very clearly deny the doctrine contended for by Lord Clarendon, but yet the President seems to take it for granted that if the Queen of England should invite Englishmen in the U. S. to return to serve their native country, such conduct would be a violation of the act of Congress. Mr. Marcy is more distinct on this point. He insists (folio 135), that international law has been violated by the *enticement* of persons away from this country in order to be enlisted.

He calls all agents appointed to give information and assistance "*recruiters*," and treats all the statements contained in the public advertisements issued by the British authorities as *offers* made by those agents. In this disingenuous spirit the discussion is carried on throughout, on the part of the U. S. Government.

The questions in dispute are plain and simple and cannot be effectually mystified by ingenious substitutions of other words for those of the act of Congress "hire or retain."

These questions are:

1. Do I hire or retain a man to go abroad to enlist by merely advising or assisting him to emigrate for that purpose? (see folios 8, 27.)

2. Did Congress intend to forbid such aid or assistance? What was the true object of the act? (see folios 33, 43. *Notes* 22, 95.)

3. Is the act of rendering such aid or assistance in the U. S. a violation of international law having due regard to the political condition of this country? (see folio 241 et seq.)

4. Should the British Government be blamed for anything which may have been done by their agents, beyond the giving of information and assistance, seeing that they were expressly ordered to do nothing more? (see folio 9. *Notes* 4, 81.)

35 an important right which the citizens of a republic should not relinquish or allow to be impaired. The subjects of a monarch may be allowed no option in such matters; but it is otherwise with the republican.

It is true, that all acts should be prohibited by law which might be complained of by either of the belligerents as breaches of neutrality, but no one will pretend to say that either of the belligerents has the right, according to the law of nations, to require the government of this country to *prohibit its citizens or persons resident here from going abroad for the purpose of assisting the enemy.* (20) This would be more than the utmost exercise of good faith towards either
36 party could require. (See Vattel, B. 3, ch. 7.)

If the Government of the United States were to *permit expeditions* to be fitted out in this country to assist a nation at war with another (this country being at peace with both), there would be a breach of the neutrality which the law of nations requires to be faithfully observed. (See Wheaton's Law of Nations, part 4, ch. 3, s. 16, 17.)

Vessels, however, may be fitted out in the ports of the United States for the purpose of conveying military stores
37 to either of the belligerents. "It is not considered as a duty imposed upon a nation, by a state of neutrality, to prevent its seamen from employing themselves in contraband trade." (Opinion of Attorney-General Lee, Dec. 10, 1795.) (House Doc. No. 123, 26th Congress, 2d Session.)

The *great fallacy in the President's message lies in the assumption that the agents of the British Government could not lawfully give any information to residents of this coun-*

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5. Is it unlawful for an agent of the British Government to do what a private individual might lawfully do in regard to giving information and assistance to emigrants who intend to enlist in the British service? (see folios 58, 291 to 300.)

Note 20.—See the passage from Galiani quoted by Mr. Cushing, (post folio 198) where it is laid down that it is no breach of neutrality by a neutral Sovereign to permit his subjects to enlist in the military service of other Governments, unless this permission be given for the first time on the occurrence of war between two States.

A fortiori. No nation can complain of the exercise of the established right of the citizens of this Republic to expatriate themselves—still less of the return of emigrants to their native countries.

try calculated to induce them to go abroad and enlist themselves—that if the British Government should succeed in getting any recruits in that way, there must be a violation of the law, either of its letter or its spirit. The President reads the law just as if it were in the terms of the English act of Parliament, and as if no difference existed between the rights of a British subject and those of a citizen of this republic. 38

With all due submission, it appears plain to my mind that individuals in this country have a perfect right to render material aid and assistance to any nation at war with another, or to any people struggling for independence. Not only may articles be published in the newspapers, calculated to persuade or induce those who sympathise with one of the belligerents to go to his assistance, but subscriptions may be collected to defray their expenses; articles contraband of war may, at the risk of the individuals, be sent; loans may be negotiated, and everything short of the acts which the laws of Congress now prohibit within the jurisdiction of the United States, may be done without affording any just cause of complaint to a foreign nation. 39

When Congress, in 1794, passed the act prohibiting the hiring of men in the United States to enlist in foreign armies, or the hiring of them to go abroad for that purpose, the law of England provided (9 Geo. 2, c. 30, enforced by Stat. 29 Geo. 2, c. 17,) that if any subject of Great Britain should enlist himself, or if any person should procure him to be enlisted, in any foreign service, or should detain or embark him for that purpose, without the King's license, he should suffer death. (4 Black. Com., 101.) 40

Congress declined imitating this legislation (which has since been greatly modified in England by the act 59 Geo. 3, c. 69). 41

The British subject was not allowed to go abroad to serve another government, because he was the property of his sovereign; (21) but the citizen of the United States owns himself, and has a right to go where he pleases, and Congress only desired to prevent such acts within the jurisdiction of

Note 21.—See as to the origin of this prohibition post folio 270.

the United States as might be complained of by any belligerent as involving a breach of neutrality.

I do not believe that the framers of the act of Congress ever intended to prevent any man, or number of men, from furnishing money or other assistance to parties desirous of going abroad to join in military expeditions, provided they are not carried on from the territory or jurisdiction of the United States. The parties supplying the funds may reasonably expect that those who received the money or other assistance will carry out their expressed intentions; but there is no violation of the law if it be left entirely to them to determine whether afterwards they will go or not. But, however this may be, it is quite clear that the admission of the British Government as to the instructions given as above to its agents, does not warrant the President's conclusion, it being evident that the true intention of Congress was merely to prevent "recruiting" within the United States, and that *there was no design or intention to prohibit citizens or residents from going abroad for the purpose of enlisting* in any foreign service, and consequently no intention to make criminal the act of *assisting* them in the exercise of their undoubted right to leave this country for that purpose.

ABSTRACT OF THE CORRESPONDENCE BETWEEN THE GOVERNMENTS OF ENGLAND AND THE UNITED STATES ON THE ENLISTMENT QUESTION, AS PUBLISHED IN THE N. Y. HERALD ON FEB. 29th, 1856.

Mr. Marcy to Mr. Buchanan.

DEPARTMENT OF STATE,
Washington, June 9, 1855.

SIR,—Some time since, it became known that a plan was on foot to *enlist soldiers within the limits of the United States* to serve in the British army, and that rendezvous for that purpose had been actually opened in some of our principal cities. Besides being a disregard of our sovereign rights as an independent nation, the procedure was a clear and manifest infringement of *our laws, enacted for*

the express purpose of maintaining our neutral relations 46
with other powers.(22) It was not reasonable to suspect that this scheme was in any way countenanced by the British Government, or any of its subordinate authorities resident within the United States or in the British North American Provinces; but a further examination into the matter has disclosed the fact that it has had not only the countenance, but the active support of some of the authorities, and, to some extent, the sanction of the British Government.

When intimations were thrown out that the British consuls in this country were aiding and encouraging this scheme 47
of *enlistment within our limits*, Mr. Crampton, Her Britannic Majesty's Minister to this Government, showed me the copy of a letter, which he had addressed to one of them, disapproving of the proceeding, and discountenancing it as a violation of our laws. After this act on the part of the British minister, it was confidently believed that this scheme, however it may have originated, and with whatever countenance it might have been at first looked on by British functionaries, would at once have been abandoned. This reasonable expectation has not been realized; for *efforts to* 48
raise recruits within the United States for the British Army have not been intermitted, but are still prosecuted with energy. To arrest a course of proceedings *which so seriously compromitted our neutrality*,(23) prosecutions, by the order of the Government, were instituted against the offenders. This led to developments which established the fact that the Governor of Nova Scotia, apparently with the knowledge and approval of Her Majesty's Government, had a direct agency in this illegal proceeding. 49

I herewith send you a copy of an order or notification which has been published in our newspapers, and believed to be genuine, purporting to have been issued by that functionary. It clearly appears from this document that the recruits were to be drawn from the United States; that *the engagements with them were to be made within our limits, in open violation of the second section of the act of Con-*

Note 22.—This accords with the view of the object and intent of the act taken ante, (folios 4, 21, 33, 41,) and see post note 95.

Note 23.—See ante note 18 and post folio 252 to 256, 313.

50 *gress* of the 20th April, 1818; and that British officials were the agents furnished with the means for carrying the illegal measure into effect. These agents have been engaged within our jurisdiction devoting themselves to the execution of this plan.

Notwithstanding the legal measures taken by the officers of the United States to suppress the procedure, the work is still going on. We have accounts of persons constantly leaving the United States for the British Provinces, *under engagements, contracted here, to enter into the British military service.* Such engagements are *as much an infringe-*
51 *ment of our laws as more formal enlistments.*(24)

I am directed by the President to instruct you to call the attention of Her Majesty's Government to this subject. He desires you to ascertain how far persons in official station under the British Government acted in the first instance in this matter with its approbation, and what measures, if any, it has since taken to restrain their unjustifiable conduct.

* * * *

The excuse offered by the British authorities for enlisting or engaging soldiers to enlist within the United States is, that *Her Majesty's subjects, and Germans resident therein, had expressed a desire to enter the British army.* This fact, if it were unquestionable, would not justify the Bri-
52 tish authorities in converting the United States into a field for recruiting the British army.

Were not the proceedings in open violation of law, a *respect for our obligations of neutrality*, and the observance of the *comity due to us* as a friendly power, would render such a course by either belligerent disrespectful to us.

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Though the proceedings of this government to frustrate this scheme may have caused the manner of carrying it on to be changed, there is reason to believe that it is still clan-

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Note 24.—Mr. Marcy takes a correct view of the law in this letter, but was mistaken in supposing that the British Government had authorised enlistments to be made in the United States, or any engagements to be made such as he speaks of. See a totally different view of the law adopted by Mr. Marcy, (folio 135) after Mr. Cushing's opinion had been taken, August 9th, 1855, upon the receipt of Lord Clarendon's letter of July 16th.

destinely prosecuted by British officers with means furnished by their Government. 53

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Mr. Buchanan to Lord Clarendon.

LEGATION OF THE UNITED STATES,
London July 6, 1855.

* * * *

The American Government are constantly receiving information that *persons are leaving, and have left the United States, under engagements contracted within their limits to enlist* as soldiers in the British army on their arrival in the British Provinces.(25) These persons are provided with 54
ready *means of transit to Nova Scotia*, in consequence of the express promise of the Lieutenant-Governor of that Province *to pay "to Nova Scotian and other shipmasters" the cost of a passage for each poor man, "willing to serve Her Majesty,"* shipped from Philadelphia, New York or Boston.

The disclosures made within the very last month, upon a judicial investigation at Boston, (a report of which is now before the undersigned,) afford good reason to believe that an extensive plan has been organized by British functionaries and agents, and is now in successful operation in different parts of the Union, to furnish recruits for the British army. 55

All these acts have been performed in direct violation of the second section of the Act of Congress of the 20th April, 1818, which provides, "That, if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of

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Note 25.—It will be observed that Mr. Buchanan did not at this time suppose that there could be any cause of complaint against the British Government unless engagements had been contracted in the way he mentions, (see folio 60) and yet we find Mr. Cushing contending afterwards that the law would be violated by merely *inviting* persons to enlist in Canada.

56 the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, as a marine or seaman, on board of any vessel of war, letter of marque or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years," &c.

The plain and imperative duties of neutrality, under the law of nations, require that a neutral nation shall not suffer its territory to become the theatre on which one of the belligerents might raise armies to wage war against the other. (26.)

57 If such a permission were granted, the partiality which this would manifest in favor of one belligerent to the prejudice of the other, could not fail to produce just complaints on the part of the injured belligerent, and might eventually involve the neutral as a party in the war.

The Government of the United States, however, did not leave the enforcement of its neutral obligations to rest alone on the law of nations. At an early period of its history, in June, 1794, under the administration of General Washington, an *act of Congress was passed defining and enforcing its*

58 *neutral duties*; (27,) and this act has been supplied, extended and enlarged by the act already referred to, and now in force, of the 20th April, 1818. Under both these acts, the very same penalties are imposed upon all persons implicated, whether the actual enlistment takes place within the territory of the United States, or whether an engagement is entered into to go beyond the limits or jurisdiction of the United States, "with intent to be enlisted or entered in the service of any foreign prince," &c., &c. Without the latter provision, the former might be easily evaded in the manner proposed by the Lieutenant-Governor of Nova Scotia. *If the law permitted any individuals, whether official or unoffi-*

Note 26.—This doctrine is unobjectionable. But it by no means follows that a neutral nation is bound to prevent invitations to its citizens to enter into foreign service, especially where under the political system of such neutral nation its citizens have an absolute right of expatriation. See ante folio 35 and post folios 252 to 256, 288, 313.

Note 27.—That was the true object of the act, and it, like the act of 1818, merely forbade enlistments and the hiring or retaining of persons to go abroad with intent to enlist.

cial, (28,) *to engage persons* in Philadelphia, New York and 59
Boston *to serve in the British army, and to enter into contracts to transport them to Halifax*, there to complete the formal act of enlistment, then it is manifest that this law, to a very great extent, would become a dead letter.

The undersigned is happy to know that, in this respect, *the policy of the British Government is identical with that of the United States*, (29.) The foreign enlistment act, (59 Geo. 3, ch. 69,) like the act of Congress, inflicts the same penalties upon any individual who shall, within the British dominions, "engage any person or persons whatever" "to go, or to agree to go, or embark from any part of Her 60
Majesty's dominions, for the purpose or with intent to be so enlisted," as though the enlistment had actually taken place within the same.

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In view of all these considerations, the President has instructed the undersigned to ascertain from the Earl of Clarendon *how far persons in official station*, under the British Government, have acted; whether with or without its approbation, *either in enlisting persons within the United States, or engaging them to proceed from thence to the British Provinces for the purpose of being there enlisted*, (30;) and

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Note 28.—Mr. Buchanan is right in treating the acts of individuals, whether official or unofficial, as standing on the same basis. A different position, however, is assumed by Mr. Marcy. (See on this point folios 294 to 300.)

Mr. Buchanan is also right in saying that the law did not permit individuals to *engage* (*i. e.* to contract with) others in Philadelphia, New York, &c., to serve in the British army. But he mistakes the position taken by the Lieutenant Governor of Nova Scotia who did not authorise any such engagements to be made in the United States.

Note 29.—This is a mistake. (See ante folio 5 and post folio 292.)

Note 30.—N. B.—The only question put to Lord Clarendon is, how far persons in official station have acted "either in *enlisting* persons within the United States, or *engaging* them to proceed from thence to the British Provinces for the purpose of being there enlisted."

On receiving the answer of Lord Clarendon that he did not believe that any persons in official station had acted in the way suggested, and that if they had, their conduct was unauthorised, Mr. Marcy, under the guidance of Mr. Cushing, broaches an entirely new theory and talks about the *seduction* of people from the United States as if they were the subjects of some despotic prince! And all this after Lord Clarendon, in order to avoid any offence

61 what measures, if any, have been taken to restrain their unjustifiable conduct.

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Mr. Marcy to Mr. Buchanan.

DEPARTMENT OF STATE,
Washington, July 15, 1855.

SIR,—Since my dispatch of the 9th ultimo, in relation to the recruiting soldiers within the United States for the Bri-
62 tish army, information has been received here that the business is not only continued, but prosecuted with increased vigor and success, and there is no doubt that it is carried on by the efficient aid of the officers and agents of the British Government. It was expected, after the attention of Her Britannic Majesty's Minister near this Government was directed to this subject, and after he had presented Lord Clarendon's note of the 12th of April last to this Department, and given assurance that steps had been taken to arrest the illegal procedure, that we should have witnessed no further participation by British functionaries in the attempt to invade our sovereignty and defy our laws.

63 * * * *

The notification of the Governor of Nova Scotia (a copy of which accompanied my dispatch of the 9th ultimo,) is unrevoked; agents in our principal cities are now busily engaged in *making contracts with persons to go* into the British Provinces, and there to complete their enrolment in the British army;(31) liberal advances still continue to be made as an inducement for entering into *such engagements*, and a *free passage* to the British Provinces is provided for

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being given to this country by the over-zeal of the subordinates of the British Government, had done far more than could have been required, viz: abolished the recruiting establishment at Halifax for the enlistment of persons coming from the United States.

Note 31.—This letter, like the preceding one from Mr. Marcy, assumes the ground of offence to be the making of contracts here to go into the British Provinces, thereto be enlisted, and he says that on arriving there the parties are "treated as *under obligation* to perfect their enlistment."

them. The facts that these persons receive *compensation* 64
for their engagements, are taken to the provinces free of charge, and *there treated as under obligation to perfect their enlistment* in the British army, show that what has been done in the United States was set on foot by the British officers in the provinces, and that this scheme was not abandoned after the presentation of Lord Clarendon's note of the 12th of April, 1855, but is continued down to the present time, and is prosecuted with more vigor and effect than at any previous period.

If an apology, grounded upon an alleged ignorance of our laws, could be offered for introducing this scheme for recruiting the British army by men drawn from the United 65
States, that excuse could not be available after the provisions of these laws were first made known to those engaged in the scheme. * * *

As recruiting for the British army, in the mode alluded to, is still prosecuted within the United States by officers and agents employed for that purpose, the President instructs you to say to Her Majesty's Government that he expects it will take prompt and effective measures to arrest their proceedings, and to discharge from service those persons now in it who were enlisted within the United States, or who *left the United States under contracts made here to* 66
enter and serve as soldiers in the British army.

These measures of redress cannot, as the President conceives, be withheld on any other ground than the assertion of a right, on the part of Great Britain, to employ officers and agents to recruit her military forces *within our limits*, in defiance of our laws and our sovereign rights. It is not anticipated that any such pretext will be alleged; it certainly cannot be permitted to be a subject of discussion.

The President instructs you to present the views contained in this dispatch to Her Britannic Majesty's Government.

67 *Lord Clarendon to Mr. Buchanan.*

FOREIGN OFFICE, July 16, 1855.

The undersigned, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honor to acknowledge the receipt of the note which Mr. Buchanan, Envoy Extraordinary and Minister Plenipotentiary of the United States, addressed to him on the 6th instant, respecting attempts stated to have recently been made to enlist, within the limits of the United States, soldiers for the British army.

The undersigned must, in the first instance, express the regret of Her Majesty's Government if the law of the United States has been in any way infringed by persons
68 acting with or without any authority from them; and it is hardly necessary for the undersigned to assure Mr. Buchanan that any such infringement of the law of the United States is entirely contrary to the wishes and to the positive instructions of Her Majesty's Government.

The undersigned, however, thinks it right to state to Mr. Buchanan that some months ago Her Majesty's Government were informed, from various sources, that in the British North American possessions, as well as in the United States, *there were many subjects of the Queen who, from sentiments of loyalty, and many foreigners who, from political feel-*
69 *ing, were anxious to enter Her Majesty's service*, and to take part in the war. Her Majesty's Government, desirous of availing themselves of the offers of these volunteers, adopted the *measures necessary for making generally known* that Her Majesty's Government were ready to do so, *and for receiving such persons* as should present themselves at an appointed place in one of the British possessions. *The right of Her Majesty's Government to act in this way was incontestable;*(32) but at the same time they issued stringent instructions to guard against any violation of the United States law of neutrality; the importance and sound policy of which law has been so well expounded by Mr. Buchanan, in whose remarks upon it, as well as upon the foreign en-

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Note 32.—It is not contested in the previous letters of Mr. Marcy and Mr. Buchanan but is fully admitted by implication. The denial of the right is an afterthought.

listment bill of this country, Her Majesty's Government 70
entirely concur.

It can scarcely be matter of surprise that when it *became known* that Her Majesty's Government was prepared to accept these voluntary offers, *many persons in various quarters should give themselves out as agents employed by the British Government*, in the hope of earning reward by promoting, though on their own responsibility, an object which they were aware was favorably looked upon by the British Government. Her Majesty's Government do not deny that the acts and advertisements of these *self-constituted and unauthorized agents were, in many instances, undoubted violations of the law of the United States;* but such 71
persons had no authority whatever for their proceedings from any British agents, by all of whom they were promptly and unequivocally disavowed.(33)

With respect to the proclamation by the Lieutenant-Governor of Nova Scotia, inclosed in Mr. Buchanan's note, the undersigned can assure Mr. Buchanan, with reference both to the character of Sir Gaspard Le Marchant and to the instructions he received, as well as to his correspondence on these instructions, that that officer is quite incapable of intentionally acting against the law of the United States; 72
and in proof that he did not in fact do so, the undersigned begs leave to refer Mr. Buchanan to the legal decision given on the particular point adverted to by Mr. Buchanan, by Judge Kane, on the 22d of May last, in the United States Circuit Court at Philadelphia. The Judge says: "*I do not think that the payment of the passage from this country of a man who desires to enlist in a foreign port, comes within the act.*" (The neutrality act of 1818.) "*In the terms of the printed proclamation, there is nothing conflicting with the laws of the United States.*(34) *A person may go abroad, provided the enlistment be in a foreign place,* not having accepted and exercised a commission. There is some evidence in Hertz's case that he did *hire and retain,*

Note 33.—This is actually treated by Mr. Marcy (folio 128) as an admission that the authorised agents of the British Government had violated the law!

Note 34.—See Mr. Cushing's argument contra with comments thereon, post folio 218.

73 and therefore his case would have to be submitted to a jury. In Perkins' case, there was testimony upon which a jury might convict. In Bucknell's case, it appears that there was a conversation at which he was present, but there was no enlistment, or hiring, or retaining. The conversation related as to the practicability of persons going to Nova Scotia to enlist. If the rule I have laid down be correct, then the evidence does not connect him with the misdemeanor. Mr. Bucknell is therefore discharged, and Messrs. Perkins and Hertz are remanded to take their trial."

74 As regards the proceedings of Her Majesty's Government, the undersigned has the honor to inform Mr. Buchanan that Mr. Crampton was directed to issue strict orders to British Consuls in the United States to be careful not to violate the law; and Mr. Crampton was enjoined, above all, to *have no concealment from the Government of the United States.*(35) In the absence of Mr. Crampton from Washington, Her Majesty's Charge d'Affaires placed in Mr. Marcy's hands a dispatch from the undersigned on this subject, expressly stating that "Her Majesty's Government would on no account run any risk of infringing this (the neutrality)

75 law of the United States."

The undersigned has, however, the honor, in conclusion, to state to Mr. Buchanan that Her Majesty's Government —having reason to think that no precautionary measures, with whatever honesty they might be carried out, could effectually guard against some real *or apparent* infringement of the law, which would give just cause for complaint to the Government of the United States—determined that all proceedings for enlistment should be put an end to, and instructions to that effect were sent out before the undersigned had the honor to receive Mr. Buchanan's note, as the undersigned need hardly say that the advantage which Her Majesty's service might derive from *enlistment in*

Note 35.—In a recent debate in the Senate it was contended by one of the Senators that the fact that Mr. Crampton corresponded by telegraph with various persons in cipher was conclusive proof that he was concealing something from the Government of the United States, as if he were bound to let all the details of his correspondence be known to the clerks of the telegraph offices!

North America would not be sought for by Her Majesty's 76
Government, if it were supposed to be obtained in disregard of the respect due to the law ofthe United States. (36.)

Mr. Marcy to Mr. Crampton.

DEPARTMENT OF STATE,
Washington September 5, 1855.

SIR,—Having ascertained that the scheme to raise recruits for the British army, within the limits of the United States, was vigorously prosecuted after our first conversation on the subject, and that officers of Her Britannic Majesty's Government were taking an active part in it, notwithstanding the disapprobation of this Government was well known, the 77
President directed Mr. Buchanan, the United States Minister at London, to be instructed to bring the subject to the attention of Lord Clarendon, Her Majesty's Principal Secretary of State for Foreign Affairs. Lord Clarendon, in his reply to Mr. Buchanan's note to him of the 6th of July last, *admits that Her Majesty's Government did concur in and authorize some measures to be taken to introduce persons resident in the United States into the British army;*

Note 36.—The British Government gave up all enlistments within the British dominions in North America of persons coming from the United States rather than leave any chance open for causes of complaint on the part of this Government. This was an unadvised act, the spirit in which it was conceived was misinterpreted by Mr. Marcy who treated the concession as an exhibition of weakness and as an acknowledgement that the British Government had no right to enlist, even within the British dominions, such persons as had been invited, persuaded, or induced to leave the United States for the purpose of enlisting themselves. Mr. Marcy consequently presented a new bill of Indictment against the British Government, and insisted on their pleading guilty to it. On the other hand, Lord Clarendon was surprised at the turn the affair had taken—he had expected that the Americans would readily acknowledge that he had made a sacrifice of undoubted rights for the purpose of securing their moral support and sympathy in the war against Russia, when lo and behold, he discovers that they take him as having admitted that they had not claimed enough in the previous correspondence.

78 (37) but places the justification of the proceedings thus authorized upon the narrow ground that "stringent instructions" were issued to the British officers and agents to guard against any violation of the United States law of neutrality; and his Lordship expresses a confident opinion that these instructions have been scrupulously observed. He is fully aware that volunteers have embarked in the scheme, who have violated our laws. Though it was anticipated, as he confesses, that such volunteers, assuming to be agents of Her Majesty's Government, would take a part in carrying out the
79 authorized scheme of drawing recruits from the United States, and would be likely to infringe our laws; yet, as they were, as he alleges, self-constituted and unauthorized agents, he assumes that no responsibility for their conduct attaches to Her Majesty's Government or its officers.

In authorizing a plan of recruitment which was to be carried out in part within our territories, the British Government seems to have forgotten that the United States had sovereign rights, as well as municipal laws, which were entitled to its respect. For very obvious reasons, the officers
80 employed by Her Majesty's Government in raising recruits from the United States would, of course, be cautioned to avoid exposing themselves to the penalties prescribed by our laws; but the United States had a right to expect something more than precautions to evade those penalties; they had a right to expect that the government and officers of Great Britain would regard *the policy indicated by these laws*, and respect our sovereign rights as an independent and friendly power.

It is *exceedingly to be regretted that this international aspect of the case was overlooked.* As to the officers of the

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Note 37.—Here we have the fruits of Lord Clarendon's abandonment of enlistments at Halifax. (see ante note 36.) Mr. Marcy now denies the right of the British Government to authorise any "measures to be taken to introduce persons resident in the United States into the British army." Any invitation, for example, to the English residents in the United States to go to Canada and enlist is "a plan of recruitment," to be carried out in part in the United States. It is now discovered that this would violate the "policy indicated" by the Act of Congress and would moreover be a violation of international law. We hear no more about *contracts* made to go abroad, but the complaint is as to "drawing recruits *from* this country."

British Government, it is not barely a question whether they 81
have or have not exposed themselves to the penalties of our laws, but *whether they have in their proceedings violated international law and offered an affront to the sovereignty of the United States.* As functionaries of a foreign government, their duties towards this country as a neutral and sovereign power, are not prescribed by our legislative enactments, but by *the law of nations.* In this respect, their relation to this government differs from that of private persons. Had there been no acts of Congress on the subject, foreign governments are forbidden by that law to do anything which would in any manner *put to hazard our position of neutrality* in respect to the belligerents. (38.) 82

The information which has been laid before the President has convinced him that the proceedings resorted to for the purpose of *drawing recruits from this country* for the British army, have been instigated and carried on by the active agency of British officers, and that their participation therein has involved them in the double offence of infringing our laws and violating our sovereign territorial rights.

* * * * 83

The case "which the United States feel bound to present to Her Majesty's Government, involves considerations not embraced in Lord Clarendon's reply to Mr. Buchanan's note. The question is not whether that government has authorized, or any of its officers have done acts for which the punishment denounced by our laws can be inflicted, but *whether they participated, in any form or manner, in proceedings contrary to international law or derogatory to our national sovereignty.* It is not now necessary, therefore, to consider what technical defence these officers might interpose if on trial for violating our municipal laws. 84

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(Mr. Marcy informs Mr. Crampton that the disclosures implicate him. He says that the arrangements made "are utterly incompatible with any pretence that they were designed merely to afford facilities to British subjects or other foreigners in this country to carry out their wishes, prompt-

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Note 38.—See note 22 and post folios 252 to 256, 288, 313.

85 ed purely by "sentiments of loyalty" or "political feeling," to participate with the Allies in the existing war in Europe.)"

The course which the President would deem it proper to take, towards the implicated officers within the United States, depends, in some measure, upon their relation to their government in this matter. Lord Clarendon's note of the 16th of July, does not make it quite clear that Her Majesty's Government is prepared to disavow the acts complained of and to throw the entire responsibility of them upon its officers and agents. "Stringent instructions" were undoubtedly given to Her Majesty's officers "to guard
86 against any violation of the United States law of neutrality;" but it does not appear that *respect for our territorial sovereignty, or the well known policy of the United States as a neutral*, not specifically embraced in our municipal enactments, was enjoined. The instructions might therefore be *formally complied with, and their officers, at the same time, do acts which constitute an offence against our rights as a sovereign power.* Such acts, it is believed, they have committed; whether with or without the approval or countenance of their government, does not authoritatively appear. * * *

The object of this note is to ascertain how far the acts of the known and acknowledged agents of the British govern-
87 ment, done within the United States, in carrying out this scheme of recruiting for the British army have been authorized or sanctioned by Her Majesty's Government.(39)

Mr. Crampton to Mr. Marcy.

Washington, Sept. 7, 1855.

SIR,—I have the honor to acknowledge the receipt of your note of the 5th instant, upon the subject of alleged recruitments in the United States of soldiers for the British army.

Note 39.—Compare this question (which opens up a new discussion,) with that put in Mr. Buchanan's letter of July 6th, (folio 60) and see comments thereon, ante note 36.

As your note, although addressed to myself, refers in a great measure to a correspondence which has taken place between Lord Clarendon and Mr. Buchanan, on the same subject, I have thought it expedient to defer replying at length to your present communication, until I shall have been more fully put in possession of the views of Her Majesty's Government, in regard to all the matters to which it relates. 88

I shall then do myself the honor of addressing to you a further communication; and I confidently trust that I shall be enabled altogether to remove the unfavorable impression which has been created as to the motives and conduct of Her Majesty's Government, and their officers, including myself, in regard to this matter. (40.) 89

Mr. Marcy to Mr. Buchanan.

DEPARTMENT OF STATE,
Washington, Sept. 8, 1855.

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Lord Clarendon must have been misinformed as to the actual state of things here, when he assured you that the persons who had violated our neutrality law were self-constituted and unauthorized agents. If the British Government choose to take pains to ascertain what disposition has been made of the large sums of money expended in carrying out the scheme of *enlistments in this country*, it will find that a considerable *amount of it has gone into the hands of these agents*, (41) and that it was paid to them for the 90

Note 40.—The correspondence hitherto published closes with Mr. Marcy's letter of December 28th, 1855. It is presumed that Mr. Crampton's further communication and Lord Clarendon's reply to Mr. Marcy have been since received.

Note 41.—No money had been expended upon "enlistments in this country," but doubtless considerable sums had been paid by the British authorities to agents here "for the purpose of being expended in the United States" in giving information and assistance to persons to go to the British Provinces who intended, on arriving there, to become recruits for the British military service, but properly speaking, no money was expended in "raising recruits" in the United States.

91 purpose of being expended in the United States, in raising recruits for the British military service.

Lord Clarendon to Mr. Buchanan.

FOREIGN OFFICE, Sept. 27, 1855.

(Lord Clarendon says he had hoped that his previous explanations and assurances would have been satisfactory. Referring to Mr. Marcy's letter to Mr. Crampton, of Sept. 5, 1855, Lord Clarendon says:)

"In this letter, Mr. Marcy, laying less stress than Mr.
92 Buchanan did upon the alleged infraction of the *municipal laws* of the United States, dwells chiefly upon the point which was but slightly adverted to by Mr. Buchanan, of an assumed disregard of the sovereign rights of the United States on the part of the British authorities or the agents employed by them.

"Her Majesty's Government have no reason to believe that such has been the conduct of any persons in the employment of Her Majesty, and it is needless to say that any
93 person so employed would have departed no less from the intentions of Her Majesty's Government by violating international law, or by offering an affront to the sovereignty of the United States, than by infringing the municipal laws of the Union, to which Mr. Buchanan more particularly called the attention of the undersigned."

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Great dexterity is evinced by Mr. Marcy in the latter part of this correspondence in the choice of a variety of obscure or ambiguous expressions such as "this scheme of recruiting," "raising recruits for the British military service," "drawing recruits from the United States," "drawing military forces from our territory," "recruiting in the United States," "inducements offered by recruiting agents here," &c., &c., &c.

These expressions may refer only to the exercise of the right claimed by the British Government to invite, persuade, or assist men in the United States, to go to the British provinces and there to enlist them, or may be intended to express a totally different meaning, *i. e.* that men were enlisted here, or that the British agents contracted unlawful engagements here. But all this manœuvring is of no avail, the merits of the discussion can neither be smothered by a mass of words nor mystified by special pleading.

(Lord Clarendon alludes to the extraordinary measures which have been adopted in various parts of the Union, to obtain evidence against Her Majesty's servants or their agents. And referring to the neutrality professed by the United States, he says:)

The United States profess neutrality in the present war between the Western Powers and Russia; but have no acts been done within the United States, by citizens thereof, which accord little with the spirit of neutrality? Have not arms and ammunition, and warlike stores of various kinds, been sent in large quantities from the United States for the service of Russia? Have not plots been openly avowed, and conspiracies entered into without disguise or hindrance, in various parts of the Union to take advantage of the war in which Great Britain is engaged, and to seize the opportunity for promoting insurrection in Her Majesty's dominions, and the invasion thereof by an armed force proceeding from the United States?"

(Lord Clarendon adds that Her Majesty's Government would not have adverted to the exceptional course pursued by a certain number of individuals, if it had not been for the statements in Mr. Marcy's note.)

Mr. Marcy to Mr. Buchanan.

DEPARTMENT OF STATE,
Washington, Oct. 1, 1855.

I herewith send you papers containing the report of the trial of Hertz, for a violation of our neutrality laws by enlisting soldiers for the British army.

The testimony shows that Mr. Crampton and several other British officials are deeply *implicated in the transaction.* Lord Clarendon's note, in answer to yours, bringing the subject to his notice, assumed that none of Her Majesty's officers had been in any way engaged in *the plan of recruiting* in the United States. (42.) Had the facts been as he

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Note 42.—Lord Clarendon does not assume "that none of her Majesty's officers had been in any way engaged in" a plan of recruiting by which men

97 assumed them to be, and this Government had no reason to believe that the measure was not designed to *draw recruits from the United States*, his Lordship's reply would have been satisfactory.

Subsequent developments show that Lord Clarendon was misinformed as to the true state of the case.

The second dispatch on the subject showed that the ground of grievance was not confined to the mere fact of a violation of our neutrality laws by British officers. It presented the case as a national offence committed by them, irrespective of those laws. *These officers may have contrived to shield themselves from the penalties of our laws, and yet have committed an offence against our sovereign*
98 *territorial rights.* (43.) This latter aspect of the case was distinctly presented in my last dispatch to you on the subject. It was this view of the case which the President wished you to present to her Majesty's Minister of Foreign Relations.

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Mr. Marcy to Mr. Buchanan.

DEPARTMENT OF STATE,
Washington, Oct. 13, 1855.

(Mr. Marcy reiterates the charges against the agents of the British Government, and replies to the remarks in Lord Clarendon's letter of September 27, 1855.)

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were to be persuaded and assisted to leave the U. S., to become recruits in the British provinces. In one sense that may be called drawing recruits from the U. S., although the men did not become recruits whilst in the U. S. That "plan of recruiting" and that mode of "drawing recruits from the U. S." was not disavowed by Lord Clarendon. If Mr. Marcy referred to other plans and modes of proceeding, he, and not Lord Clarendon, was "misinformed as to the true state of the case."

Note 43.—See on this question ante fo. 14, notes 17, 30, 36, and post fo. 246 et seq.

Mr. Buchanan to Mr. Marcy. 99

LEGATION OF THE UNITED STATES,
London, Nov. 2, 1855.

Mr. Buchanan, after stating that he had read to Lord Clarendon the last dispatch from Mr. Marcy, adds:—

"I then stated, his Lordship would observe that the Government of the United States had two causes of complaint; the one was such violations of our neutrality laws as might be tried and punished in the courts of the United States; the other, to which I especially desired to direct his attention, consisted in a violation of our neutrality, under the 100
general law of nations, by the attempts which had been made by British officers and agents, *not punishable under our municipal law, to draw military forces from our territory* to recruit their armies in the Crimea. (44) As examples of this, I passed in review the conduct of Mr. Crampton, of the Lieutenant-Governor of Nova Scotia, and the British consuls at New York and Philadelphia.'

* * * *

Lord Clarendon to Mr. Crampton.

FOREIGN OFFICE, Nov. 16, 1855.

(Lord Clarendon observes that Her Majesty's Government 101
had not doubted that the frank expression of their regret for any violation of the United States law, which, contrary to their instructions, might have taken place, and of their determination to remove all cause for further complaint by putting an end to all proceedings for enlistment, in the British provinces would have satisfactorily and honorably terminated a difference between two governments whose duty it

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Note 44.—No "*military forces*" were drawn from the U. S. to recruit the British forces in the Crimea. Some aliens resident in the U. S having learned that they could fight against Russia, went from the U. S., as they had a perfect right to do, and accepted the invitation of the British authorities in Nova Scotia to enlist in the British army. Mr. Buchanan calls this the drawing of "military forces from our territory," as if the emigrants had become soldiers in the U. S.

102 was to maintain the friendly relations which have hitherto, and to their great reciprocal advantage, happily subsisted between Great Britain and the United States.)

"It appears that two distinct charges are made against the officers and agents of Her Majesty's Government:—

First—That they have within the United States territory infringed the United States law; and, secondly, that they have violated the sovereign territorial rights of the United States, by being engaged "in recruiting" for the British army within the United States territory.

103 Now, with respect to both these charges, I have to observe that the information possessed by Her Majesty's Government is imperfect, and that none of a definite character has been supplied by the dispatches of Mr. Marcy, inasmuch as no individual British officer or agent is named, and no particular fact or time or place is stated; and it is therefore impossible at the present to know either who is accused by Mr. Marcy, or what is the charge he makes, or what is the evidence on which he intends to rely." (45)

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"With reference to the second charge made by Mr. Marcy — namely, that of "violating the sovereign territorial rights of the United States, by recruiting for the British army within their territories": I have to observe, that apart from any municipal legislation in the United States on the subject of foreign enlistment, or in the entire absence of any such legislation, Great Britain, as a belligerent nationl would commit no violation of the "sovereign territorial

105 rights of the United States," simply by enlisting as soldiers, within British territory, persons who might leave the United States territory in order so to enlist. The violation alleged is the recruiting within the United States; but to assume that there was in fact any such "recruiting," (that is, hiring or retaining by British officers,) is to beg the question. (46)

Note 45.—Mr. Marcy in his next letter, after arguing that Lord Clarendon had no right to inquire for these particulars (folios 142 to 146), does, for the first time make some specific charges (folios 159 to 185), the answer to which has not yet been published.

Note 46.—That is precisely what is done throughout the correspondence since Lord Clarendon's letter of July 16th, 1855.

It appears to Her Majesty's Government that, provided no actual "recruiting" (that is, enlisting or hiring,) takes place within the United States, British officers who, within the United States territories, might point out the routes which intending recruits should follow, or explain to them the terms upon which they would be accepted, or publish and proclaim such terms, or even defray their travelling expenses, or do similar acts, could not be justly charged with violating such sovereign territorial rights. (47) It has been legally decided in the United States that the payment of the passage from that country of a man who desires to enlist in a foreign port, does not come within the neutrality law of the United States, and that a person may go abroad, provided the enlistment be in a foreign place, not having accepted and exercised a commission. 105 106

It would, indeed, be a violation of territorial rights to enlist and organize, and train men as British soldiers, within the United States (48); and whether or not this has been done by British authority, is the question involved in the first of Mr. Marcy's charges. But it is decidedly *no violation of such rights to persuade or to assist men merely to leave the United States territory, and to go into British territory, in order, when they arrive there, either to be voluntarily enlisted in British service, or not, at their own discretion.* (49) There can be no question that the men who went to Halifax were free, and not compelled to be soldiers on their arrival. (50) Upwards of one hundred Irishmen, in one body, for instance, if Her Majesty's Government are rightly informed, refused to enlist on arriving there, and said they came in order to work on a railway. 107

Note 47.—See on this question notes 1, 30, 36, 37.

Note 48.—See ante fo. 29.

Note 49.—See note 1 and fo. 294.

Note 50.—This is a reply to that part of Mr. Marcy's letter (ante folio 50) where he says that contracts are made with persons to go into the British provinces, there to complete their enrolment in the British army, and that such persons "are taken to the provinces free of charge, and there treated as under obligation to perfect their enlistment."

108 They were, therefore, not enlisted, hired or retained as soldiers in the United States; no attempt was made to enforce against them any such contract or engagement.

Mr. Marcy cites no authority for the position he has assumed in relation to this particular doctrine of the effect of foreign enlistment on sovereign territorial rights; but the practice of nations has been very generally adverse to the doctrine, as proved by the numerous instances, in which foreign troops have been, and still are, raised and employed.(51)

It cannot, therefore, be said that Mr. Marcy's doctrine is
109 in accordance with the general practice of nations; and high authority might be quoted directly adverse to any such doctrine as applicable to free countries, "*ubi civitas non carcer est.*" But even admitting the alleged doctrine as to the bearing of the principle of territorial sovereignty, its application must obviously be subject to many limitations in practice.

Her Majesty had (for instance) internationally *an unquestionable right to recall to her standard displayed upon her own territory those of her own subjects capable of bearing arms, who might be transiently or temporarily resident*
110 *in a foreign country*, and Her Majesty would not thereby incur any risk of violating the "territorial sovereignty" of such country. Again, in the case of political refugees driven from their own country, an essentially migratory class, *owing a merely local and qualified allegiance to the United States*, is it to be contended that to *induce such persons by any fair means short of "hiring" or enlisting them to leave the United States in order to enrol themselves on British territory*, as volunteers, in a war in which many of them feel the strongest and the most natural desire to engage, is to violate the territorial sovereignty of the United States ?(52)

Note 51.—See ante note 47 and post folios 252 to 256, 288, 313.

Note 52.—See Mr. Marcy's reply (folio 132). He is like a zealous young advocate conducting a case in a County Court, unwilling to admit anything, even the most obvious fact or proposition of law. In the first place Mr. Marcy assumes, that Great Britain would be violating "the sovereign rights of the U. S., if she were to enlist, hire, or engage as soldiers, within the

It is, of course, competent to any nation to enact a mu- 111
nicipal law, such as actually exists in many countries, forbidding its subjects to leave its territory, but in such cases "*civitas carcer est*;" and it may be the duty of other countries to abstain from actively assisting the captives to escape from the national prison in order to serve another master. But the Government of the United States has enacted no such law: *it justly boasts of its complete freedom in this respect*, "*civitas non carcer est*;" all residents therein, whether foreigners or citizens, are perfectly free to leave its territory, without the permission of the government, at their own absolute discretion, and to enter the service of 112
any other state, when once within its frontier. *To invite them or persuade them to do what is thus lawful, can constitute no violation of the territorial rights*, which the sovereign power has never claimed or exercised.(53)

It is, moreover, to be observed that in this case *no United States citizens*, as far as Her Majesty's Government are aware, were engaged; but those actually enlisted within the British North American provinces, and those expected, were, to the best of our belief, exclusively foreigners, and not citizens of the United States.(54)

British territory, persons who have left the U. S. for that purpose," if a law of the U. S. should prohibit their so leaving! Secondly. That Great Britain would be violating international law, by enlisting within her dominions persons who have been *enticed* away from this country by tempting offers of *high wages*, &c. See this novel and monstrous doctrine commented on (notes 30, 36, 37, 55, folio 295.)

Note 53.—Lord Clarendon in saying that the citizen is in a prison when he is not allowed to leave his country does not mean to say the same of a citizen who is allowed to go when and where he pleases, although he may not be allowed to serve in a foreign army. In England the subject is quite at liberty to emigrate, yet he cannot throw off his allegiance, neither is he allowed to enter into the military service of another power (see fos. 5, 41, 292 to 295). The Government of the U. S. "justly boasts of its complete freedom in this respect" and it is to be borne in mind that the power of this country has been built up, and that quite recently by the practical recognition of the right of expatriation.

The Frenchman is allowed to become the subject of another power, and to serve in its armies, but must not fight against France. The American Republican can absolve himself entirely from his allegiance to the U. S. See folio 246 et seq.

Note 54.—This is not denied by Mr. Marcy, but he takes the ground that it is a violation of the Act of Congress to "seduce" even *foreigners* to leave the U. S. to enter into a foreign service. See folios 178, 294.

113 Without entering further into a discussion of *this peculia doctrine*, I will only remark that, *at all events, it was not proclaimed or insisted upon by the United States, either at the commencement of the war*, or when the desire of Her Majesty's Government to raise a foreign legion was first published, or when a recruiting station was first opened at Halifax.(55)

The United States, therefore, although always and most properly insisting on their right and intention to punish violations of their municipal law, took no step *to proclaim or vindicate the particular doctrine now set forth* until a very
114 late period of the discussion, and after the time for giving effect to it had gone by. The charge of "violation of sovereign territorial rights" cannot, therefore, in the opinion of Her Majesty's Government, be fairly urged as a separate and different charge from that of violation of the municipal law of the United States.(56) But the municipal law was certainly not violated by the orders, nor, as far as they believe, by the officers of Her Majesty's Government;(57) and both Her Majesty's Government and Her Majesty's Minister at Washington gave reiterated orders to all concerned carefully to abstain from such violation; and if the British Go-
115 vernment did not purposely cause the United States' law to be violated, then the territorial rights of the United States, whatever they may be, were not, as has been said, intentionally violated by Great Britain, "as a nation," even if it should be shown that the municipal law of the Union was infringed.

Before I conclude this dispatch, it may be useful to place on record certain facts connected with the question

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Note 55.—As already observed (folio 30, 36), the doctrine in question was not started until Lord Clarendon resolved to abandon enlistments in the British provinces of persons coming from the U. S. Mr. Marcy was thereupon advised by Mr. Cushing, mainly, it appears on the strength of a passage in Vattel, that the British Government had done no more than they were bound to do by the law of nations, and afterwards we find Mr. Marcy, for the first time, broaching the "peculiar doctrine" referred to by Lord Clarendon.

Note 56.—See folios 13, 104.

Note 57.—This is erroneously assumed by Mr. Marcy, (folio 141) to be inconsistent with Lord Clarendon's previous statement. See note 72.

of recruiting in North America, the correctness of which will, I doubt not, be admitted by Mr. Marcy; and I will observe— 116

First.—That the United States Government were from the first perfectly well aware that Her Majesty's Government were in want of recruits, and were desirous of raising a foreign legion.

Secondly.—That preparations were making to receive recruits in a British North American colony for such a legion.

Thirdly.—That Her Majesty's Government expected to receive recruits there for such a legion from the United States, although, whilst so doing, they were anxious not to violate the United States' law.(58) 117

Fourthly.—That many British subjects and foreigners, in the United States, were *bona fide* "volunteers," desirous from various, but natural and powerful motives, to enlist. Numerous offers to raise men, within the United States, were made, but were consistently and honorably refused by Her Majesty's ministers and consuls, in order to avoid violating the United States' law. 118

Fifthly.—That Mr. Marcy was in confidential communication with you on the subject for months, without ever that I am aware of, warning you against attempting anything of the kind, or stating that the United States would resist or resent it, *apart from any question of municipal law;* thus, in effect, acquiescing, and only insisting that the United States' law should be respected.)59)

Note 58.—It cannot be doubted that the U. S. Government knew very well that the British authorities expected to enlist persons at Halifax, &c., who might come from the U. S. in pursuance of invitations put forth by the British authorities. Mr. Marcy's first letter impliedly admits their right to do so. (See folio 50, note 78).

Note 59.—Mr. Marcy did not at that time intimate that foreigners who had been persuaded to leave the U. S. could not rightfully be enlisted in the British provinces. Neither Mr. Crampton nor anybody else could have then supposed that such a doctrine would be set up by a Republic, whose fleets and armies are composed almost exclusively of foreigners.

119 *Sixthly.*—That as soon as it became apparent that the United States Government was adverse to the scheme, and that it *might* lead to violations of the United States' law, the whole project was abandoned out of deference to the United States; but this conclusive proof of the good faith and good will of Her Majesty's Government has not been noticed or appreciated by the Government of the United States.(60)

Seventhly.—That the whole question in dispute now turns, not on what is doing, or shall or may be done, by
120 Her Majesty's Government, but on what was done many months ago, under a system which is not continuing nor about to be revived, and which has been voluntarily and definitively abandoned, in order to satisfy the United States, and to prevent the occurrence of any just ground for complaint.

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Lord Clarendon to Mr. Crampton.

FOREIGN OFFICE, April 5, 1855.

SIR,—I entirely approve of your proceedings, as reported in your dispatch, No. 57, of the 12th ult., with respect to the proposed enlistment, in the Queen's service, of *foreign-*
121 *ers and British subjects* in the United States.

The instructions which I addressed to you upon this subject, and those which were sent to the Governor of Nova Scotia, were founded upon the reports from various quarters that reached Her Majesty's Government of the desire felt by many British subjects as well as Germans, in the United States, to enter the Queen's service, for the purpose of taking part in the war in the East; but *the law of the United States, with respect to enlistment, however conduct-*

Note 60.—See notes 30, 36, 37.

ed, is not only very just, but very stringent,(61) according to 182
the report which is enclosed in your dispatch; and Her Majesty's Government would, on no account, run any risk of infringing this law of the United States.

Mr. Marcy to Mr. Buchanan.

DEPARTMENT OF STATE,
Washington, Dec. 28, 1855.

* * * *

"It is perceived with deep regret, that there exists a very wide difference of opinion between this government and that of Great Britain, in regard to the principles of law involved in the pending discussion, and a still wider difference, if possible, as to the material facts of the case." 123

(Referring to Lord Clarendon's dispatch of Nov. 16, 1855, Mr. Marcy says): "The claim put forth in that despatch of the right of a foreign belligerent power to resort to the territories of a neutral state to *recruit* its armies, and for that purpose employ such means as he justifies, raises one of the gravest international questions which can come under consideration. If that right be conceded, then any foreign power can justifiably resort to measures for recruiting its armies within the jurisdiction of this country almost co-extensive with those which can be employed by this government.(62)

Note 61.—Lord Clarendon is evidently speaking of enlistments in the British provinces of foreigners and British subjects then in the U. S. but who were to be invited to come to the British provinces. He refers to the U. S. law, prohibiting foreign enlistments *in* the U. S., and yet Mr. Marcy insists (folio 126) that by the first paragraph in this letter, Lord Clarendon has expressed his approval of such prohibited enlistments. Mr. Marcy relies on the word "*in*." That construction is wholly unwarranted.

Note 62.—Here Mr. Marcy flatly denies the right claimed by Lord Clarendon (ante folio 110). As to the assertion, that if foreign governments could invite foreigners to leave the U. S., they would possess a power of "recruiting" within the jurisdiction of this country, almost equal to that held by the U. S. government, it is manifestly erroneous. No man can become a recruit in a foreign service whilst he is in the U. S. nor can he engage to go abroad

124 Before adverting to the conduct of the officers and agents of Her Majesty's Government in recruiting within the territories of the United States, it will be necessary not only to define our own rights, but to ascertain the precise limits of British pretensions.

After the debateable ground shall be clearly ascertained, the range of discusssion will, it is hoped, be reduced to narrower limits, and the probability of an amicable adjustment of the present difficulties increased."

* * * *

Mr. Marcy says: "The first intimation which reached
125 this government that recruiting within the United States had the sanction of British authority, was derived from the proceedings which had taken place in executing the plan of enlistment. The first step taken by the British Government, or any of its officers, in communicating with that of the United States on the subject, was one which implied an assurance that the British Government not only had no connection with, but actually discountenanced, the scheme of recruiting for the British army."(63)

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126 Mr. Marcy refers to the letter from Lord Clarendon to Mr. Crampton, dated 5th April, 1855, and says:

"Thus it was brought to light that the *British Cabinet had proposed enlistments in the United States*, and had employed Her Majesty's Envoy Extraordinary and Minister Plenipotentiary accredited to this government to aid in the undertaking. When this despatch was received at this department, Mr. Crampton was in the British provinces. It had direct reference to the enlistment, for the Queen's service, of foreigners and British subjects *in* the United States. (64.) The object to be accomplished was against law; and

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and become such recruit. If any further restraint had been consistent with the institutions of this country, Congress would not have confined its prohibition to acts of enlistments within the U. S. and contracts to go abroad with intent, &c.

Note. 63.—The assurance referred to was merely that no contracts respecting enlistments were authorized to be made here (folio 71). This assurance was in exact accordance with the instructions given to the agents. (See folio 9).

Note. 64—See this remarkable misconstruction of Lord Clarendon's letter commented on. Note 61.

it is difficult to conceive what one step Mr. Crampton could have taken in furtherance of it without putting at defiance an act of Congress which prohibits, in explicit terms and under heavy penalties, such a proceeding." 127

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In the note of the 16th of July, *Lord Clarendon seems to admit that the restraining effect of the law of the United States in regard to recruiting is such as this government asserts it to be;* but, by his exposition of that law in his despatch of the 16th November, it is bereft of the very stringent character he had before ascribed to it, and it is now so construed by him as to afford justification for such acts as, in his former note, he conceded to be illegal. (65.) 128

In the note to you of July, the British Government only claimed the right to make generally known to British subjects and foreigners in the United States, who wished to enter Her Majesty's service and take part in the war, its desire to accept these volunteers, and to receive such as should present themselves at an appointed place in one of the British provinces.

That *Lord Clarendon intended, in his note of the 16th July, to exclude all pretension to a right to publish handbills offering inducements*, (66) and to send agents into the United States for recruiting purposes, is shown by the follow-

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Note 65.—Lord Clarendon's note of 16th July, so far from containing this admission, insists fully and clearly upon the right of the British Government to act as it had done, (folio 68) Lord Clarendon there insists on the right to invite volunteers from the United States, (folio 69) and on the right to pay their passage from the United States to the British provinces. (folio 72) No new claim of right is set up by Lord Clarendon in his dispatch of the 16th November, but he shows clearly that Mr. Marcy had set up a new case and one that was inconsistent with his former letters, (see folios 113, 118, notes 35, 36, 37.)

Note 66.—So far from this, we find that Lord Clarendon, in the letter referred to, claimed the right to adopt "the measures necessary for making generally known that Her Majesty's Government were ready to" enlist in the British Provinces subjects of the Queen, and foreigners in the United States, who, from political feeling, were desirous of entering the British service.

Mr. Marcy's argument is, that Lord Clarendon must be taken as having admitted in this letter that the British Government had no right to publish handbills, &c., to make known their readiness to receive volunteers in British North America, because he said that some unauthorised persons had violated the laws of the United States! a most illogical conclusion.

129 ing passage :—"It can scarcely be matter of surprise that, when it became known that Her Majesty's Government was prepared to accept these voluntary offers, many persons in various quarters should give themselves out as agents employed by the British Government, in the hope of earning reward by promoting, though on their own responsibility, an object which they were aware was favorably looked upon by the British Government. Her Majesty's Government do not deny that the acts and advertisements of these self-constituted and unauthorized agents were, in many instances, undoubtedly violations of the laws of the United States ; but such persons had no authority whatever for their
130 proceedings from any British agents, by all of whom they were promptly and unequivocally disavowed."

These positions, taken by the Earl of Clarendon, brought the matter to a definite point. This government took issue upon his allegation that *the persons engaged in recruiting* in the United States were self-constituted, unauthorized agents, whose acts had been disavowed; (67) and maintained, on the contrary, that the persons performing them were authorized agents, and had embarked in that service in consequence of inducements, stronger than the mere hope of uncertain reward, held out to them by British
131 officers ; that they were promised commissions in the British army, and some of them were actually received and treated as fellow-officers, and as such were paid for their services, received instructions from Her Majesty's servants for the guidance of their conduct while within the United States, and were furnished in the same way with abundant funds for carrying on their recruiting operations in this country. The persons engaged in the United States in recruiting were, in fact, the agents and instruments of eminent British

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Note 67.—Lord Clarendon does not assert that all the persons engaged in what Mr. Marcy calls recruiting in the United States were self-constituted unauthorised agents, for Mr. Marcy calls all persons "recruiters" who were disseminating information respecting the terms on which recruits would be received in the British provinces. Lord Clarendon admits that the agents of the British Government had done all this, and he insists on their right to do so, but adds that unauthorised persons had done more and had violated the laws of the United States.

functionaries resident here and in neighboring British provinces. The numerous judicial investigations and trials have brought out a mass of testimony too strong to be resisted, implicating these functionaries and sustaining the foregoing allegations." (68.) * * * 132

"This government does not contest Lord Clarendon's two propositions in respect to the sovereign rights of the United States—first, that, in *the absence of municipal law*, (69) Great Britain may enlist, hire, or engage, as soldiers, within the British territory, persons who have left the United States for that purpose. This proposition is, however, to be understood as not applying to persons who have been *enticed away from the country* by tempting offers of rewards, such as commissions in the British army, *high wages*, liberal bounties, pensions and portions of the royal domain, urged on them while within the United States, by the officers and agents of Her Majesty's Government; (69) and secondly, no foreign power has a right "to enlist and organize and train men as British soldiers within the United States." The right to do this Lord Clarendon does not claim for his government; and whether the British officers have done so or not, is, as he appears to understand the case, the only question at issue, so far as international rights are involved, between the two countries. 133 134

In his view of the question as to the rights of territory, irrespective of municipal law, Lord Clarendon is understood to maintain that Her Majesty's Government may authorize agents to do anything within the United States, *short of enlisting and organizing, and training men as soldiers* for the British army, with perfect respect to the sovereign rights of this country. (70.)

This proposition is exactly the reverse of that maintained

Note 68.—No doubt these functionaries are implicated, as alleged, if it be an offence to invite or induce foreigners to leave the United States to be enlisted in foreign service, but on no other hypothesis can any charge against the British agents be sustained upon the published allegations and proofs.

Note 69.—See comments on this passage, notes 52, 95.

Note 70.—That is not Lord Clarendon's proposition, for he admits that no contract can be made for parties to go abroad with intent to enlist. His language is express, plain and clear on that subject. (folios 105 to 108, 110.)

135 by this government, which holds that no foreign power whatever has the right to do either of the specified acts without its consent. No foreign power can, by its agents or officers, lawfully enter the territory of another to enlist soldiers for its service, or organize or train them therein, or even *entice persons away in order to be enlisted*, without express permission. (71.)

This, as a rule of international law, was considered so well settled that it was not deemed necessary to invoke the authority of publicists to support it. I am not aware that any modern writer on international law has questioned its sound-
136 ness. As this important principle is controverted by Lord Clarendon, and as its maintenance is fatal to his defence of British recruiting here, I propose to establish it by a reference to a few elementary writers of eminence upon the law of nations:—

"Since a right of raising soldiers is a right of majesty which cannot be violated by a foreign nation, it is not permitted to raise soldiers on the *territory of another* without
137 the consent of its sovereign."—*Wolfius.*

Vattel says, that—

"*The man* who undertakes to enlist soldiers in a foreign country without the sovereign's permission, and, in general, whoever *entices away the subjects of another State*, violates one of the most sacred rights of the prince of that nation."

He designates the crime by harsher names than I choose to use, which, as he says, "is punished with the utmost se-
138 verity in every well-regulated State." Vattel further observes, that—

"It is not presumed that their sovereign has ordered them (foreign recruiters) to commit a crime; and supposing, even, that they had received such an order, they ought not to have obeyed it; their sovereign having no right to command what is contrary to the law of nature."

Hautefeuille, a modern French author of much repute, regards permission—and acquiescence implies permission—

Note 71.—This doctrine as to enticement is unsound as applied to the United States. (See notes 16, 30, fo. 246 et seq.)

by a neutral power to one belligerent, though extended to 139
both, to *raise recruits in its territories*, unless it was allowed in peace, to be an act of bad faith, which compromits its neutrality.

There can be no well founded distinction, in the rule of international law, between raising soldiers for a belligerent's army and sailors for its navy within a neutral country. Hautefeuille says:

"The neutral sovereign is under obligation to prohibit andprevent all *levying of sailors upon its territory* for the service of the belligerents." 140

Again, he says:

"The neutral must prohibit, in an absolute manner, the levying of sailors *upon its territory* to complete a ship's company reduced by combat or any other cause.

"The prohibition to engage sailors on the territory of a pacific prince must extend to foreigners who are found in the ports of his jurisdiction, and even to those who belong to the beligerent nation owning the vessel that wishes to complete its crew, or ship's company."

Reference to other writers might be made to sustain the position contended for by this Government, and to overthrow that advanced by Lord Clarendon; but the au- 141
thority of those presented is deemed sufficient for that purpose.

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"*The ground taken in July—that the persons engaged in recruiting who had violated the laws of the United States were self-constituted and unauthorized agents—is abandoned in his despatch of November.* (72.) In the latter

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Note 72.—Not at all. Lord Clarendon in his July letter observed that some unauthorised persons had violated the act of Congress—he did not say that the British Government had not authorised agents to perform what Mr. Marcy now discovers to be wrongful acts. Mr. Marcy charges the British agents with having effected enlistments and made unlawful engagements in the United States, and also with having invited and assisted foreigners to leave the United States. The latter act is justified, whilst the former is denied, and particulars of the alleged misdeeds are asked for in lieu of vague and general charges.

It is surprising that Mr. Marcy should have supposed that there was any inconsistency in this.

142 it is not denied that these persons have acted under the authority of the British Government; but Her Majesty's ministers now propose to give their attention to the demand of this Government for redress, if it will make and establish more distinct charges, with proper specifications against particular individuals by name. Quite as much, and indeed more than is usual, has been done in this case in specifying charges, and indicating the persons implicated."

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"Not long since, Her Majesty's minister, Mr. Crampton,
143 represented to this Government that the bark Maury was being fitted out in the port of New York as a privateer, to depredate upon the commerce of the Allies. The evidence, if it could be called such, to support the charge, consisted of affidavits, detailing loose rumors, and some circumstances about her equipment, which justified a bare suspicion of an illegal purpose. If there could be a case which would warrant the course suggested by Her Majesty's ministers in respect to the complaint of this Government against British
144 recruitments within the United States, it would be that of the bark Maury; but the President, without the slightest hesitation or delay, ordered proceedings to be instituted against that vessel and against all persons who should be found to be implicated. All the alleged causes of suspicion were immediately investigated, and the result, which showed the utter groundlessness of the charge, was promptly communicated to Her Majesty's Government.

If this Government, acting upon the rule now prescribed in the case of British recruitments in this country, had replied to that of Great Britain, on the complaint against the
145 bark Maury, that inasmuch as Mr. Crampton had not made any definite charge—had not named the persons accused with a precise statement of their acts, or when or where done, or produced the evidence on which he intended to rely to support his allegations, so that the persons concerned might have an opportunity to deal with it, nothing would be done, no step would be taken, until these preliminary matters should have been attended to—would such a reply in the case of the Maury have been what her Majesty's

minister might have expected—would it have been deemed 146
courteous or friendly to the British Government?

Lord Clarendon may be well assured that such a reply, in the case of the Maury, would have been quite as satisfactory to Her Majesty's Government as is his reply to this Government in relation to its remonstrance and complaint against British recruitments within the United States." (73.)

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"This Government asked, as a part of the satisfaction due to it from Great Britain, that the men who had been enticed, contrary to law, from the United States into the 147
British Provinces, and there enlisted into Her Majesty's service should be discharged."

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Mr. Marcy shows that Lord Clarendon does not propose to comply with this request "notwithstanding the illegal means which were used to entice or decoy" men "to leave the United States for the purpose of beingenlisted into the British Foreign Legion." (74.)

"Lord Clarendon has placed on record "certain facts,"—seven in number—the correctness of which he says he does not doubt will be admitted by me. After duly considering 148
them, I am constrained to say there is scarcely one of them, bearing on the merits of the case under discussion, which I can admit without essential modifications. Some of them I shall make the subject of remark. One of these alleged facts, or rather statements, which I cannot omit to notice, is, "that as soon as it became apparent that the United States Government was adverse to the scheme, and that it might lead to violations of the United States law, the pro-

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Note 73.—There is no force in this argument. When a crime is charged, the magistrate should enquire whether the charge is well founded, but he should institute no enquiry without a sufficient complaint. But what has that to do with a case where one Government states to another that its agents have violated the law. Surely it is right to ask who the agents are and what they have done.

Mr. Marcy does answer these questions and furnish the particulars, although before doing so he delivers a long and very bad argument to shew that he ought not to comply with the request.

Note 74.—It is not probable that this demand will be complied with.

149 ject was abandoned out of deference to the United States;" and he adds an expression of regret that " this proof of good faith and good will of Her Majesty's Government has not been noticed or appreciated by the Government of the United States."

If the fact on which Lord Clarendon relies for the proof of good faith and good will shall be shown to be essentially different from what he conceives it to be, he will understand the cause why this Government does not appreciate it as he does.

In a question of this kind, dates are important. When did
150 it become apparent that the United States Government was averse to the recruiting scheme, and how soon thereafter was it abandoned?

I hope to be able to convince Lord Clarendon that they were not contemporaneous events; that far the greatest number of objectionable acts committed by the British officers was performed long after this government had, in the most public and emphatic manner, reprobated the recruiting project; after prosecutions had been pending for
151 months against the agents of British officers, with the full knowledge of these officers, and also, as it was fair to presume, with the knowledge of their government.

Mr. Crampton's intercourse with these recruiting agents commenced in January. On the 4th of February, he notified Strobel and Hertz, by a note addressed to each, that he was then able to give them precise instructions on the subject alluded to in a previous personal interview, and there can be no doubt that the subject alluded to was re-
152 cruiting within the United States. That scheme did not sufficiently develope itself in our principal cities until the month of March. Immediately thereupon, the United States Government manifested the most decided, unequivocal and public demonstration of averseness and resistance to it." (75.)

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Note 75.—Why did not Mr. Marcy then tell Mr. Crampton, that offence would be taken if foreigners were invited or induced in any way to leave the U. S. for the purpose of becoming recruits in the British provinces?

"Not only in New York, but at Boston, Philadelphia, and 153
other places, the most vigorous efforts were publicly made by the federal officers, acting under instructions of the United States Government, to arrest these recruitments for the British service, and bring the offenders to justice. No local transaction was ever more generally known or more freely animadverted on. It provoked much excitement against the persons engaged in it, and had it then been known that they were in fact employed by officers in eminent military and civil positions in Her Majesty's service, under instructions from their Government, *it might have* 154
been difficult to restrain public indignation within proper limits. (76.)

The President cannot adopt the opinion of Lord Clarendon, that the question between the two countries has shrunk into the narrow limits he has assigned to it. It is true the scheme is at length abandoned; and this Government accepts his assurance that it is not about to be revived; but the right to revive it and to carry it out to the same extent as heretofore, is held in reserve.

If nothing more is to be done, the United States are left 155
without indemnity for the past or security for the future,(77) and they will be understood as assenting to principles which have been once resorted to, and may be again, to lay open their territories to the incursions of the recruiting agents of any belligerent who may have occasion to augment its military force.

Another of the facts put on record by the Earl of Clarendon, which he assumes, I will admit, to be correct, is,

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Note 76.—There was no popular indignation on the subject, nor could any have been excited in the northern cities. The public felt no interest in the question whether a few out of the many thousands of unemployed foreigners should go forth to fight against Russia.

Note 77.—Mr. Marcy does not state what indemnity for the past he requires. Perhaps he would be contented with the return of the persons who have been "seduced" from the U. S. (see fos. 147, 183), a sufficient security for the future would probably be an acknowledgement on the part of the British Government, that they have no right to enlist persons in the British North American Provinces, who have been induced to leave the U. S. for that purpose.

156 "that Mr. Marcy was in confidential communication with "you (Mr. Crampton) on the subject for months without "ever, that I am aware of, warning you against attempt- "ing anything of the kind, or stating that the United "States would resistor resent it, apart from any question of "municipal law; thus in effect acquiescing, and only in- "sisting that the United States law should be respected."

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"The charge imputes to me official delinquency; but I shall notice it only on account of its direct bearing upon
157 the merits of the case under discussion.

If *I gave him no warning beyond insisting upon the observance of the United States law*, it was because I had not at that time any knowledge of the extent of the recruiting scheme. (78) He had satisfied me that his Government had no connection with it, and was in no way responsible for what was doing in the United States to raise recruits for the British army.

The first intimation that I had been misled in this respect reached me while Mr. Crampton was absent in the British provinces, shortly before my despatch of the 9th
158 June was sent to you.

It is not for me to raise the question whether Mr. Crampton has or has not complied with his instructions to have "no concealment" with me on the subject; but I am quite certain that on no occasion has he intimated to me that the British Government, or any of its officers, was or had been in any way concerned in sending agents into the United States *to recruit* therein, or to use any inducements for that purpose; nor did he ever notify me that he was taking, or intended to take, any part in furthering such pro-

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Note 78.—This is an admission that Mr. Marcy had given Mr. Crampton warning not to violate the act of Congress, and had given him no warning beyond that—had not, as Lord Clarendon says (folio 113), intimated that the U. S. Government would "proclaim or vindicate" the new fangled doctrine about seduction. Mr. Crampton had not told Mr. Marcy that the British Government had no connection with the means used to disseminate information to foreigners in the U. S. likely to go abroad to enlist, but had assured him that the British Government had not authorized recruiting, *i. e.* enlisting, hiring, or retaining in the U. S. (see notes 58, 59.)

ceeding. Such a communication, timely made, would probably have arrested the mischief at its commencement. (79) 159

Very soon after the first development of the recruiting operations here, Mr. Crampton read to me a letter dated the 22d of March, addressed by him to the British Consul at New York, the contents of which I here insert: "I have received your letter of the 20th instant (March) "inclosing a printed handbill, signed Angus McDonald, "and informing me that the said McDonald states to you "that he had issued it by the authority of Her Majesty's "Government." 160

"I have to state to you that Angus McDonald has no authority from Her Majesty's Government for the issue of the handbill in question, or for *hiring or retaining* any person in the United States to go beyond the limits of the same, with intent to be enlisted in Her Majesty's service.

"This would constitute an infraction of the neutrality laws of the United States (Act of Congress, 1818, sec. 2); and Her Majesty's Government, however desirous they may be to obtain recruits for the British army, are still more anxious that the laws of the States, with which Her Majesty is at peace, should be respected." 161

"I regarded this act by Mr. Crampton as a disavowal by the British Government, as well as by himself, of all participation in the recruiting proceedings then just commenced within the United States."

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"Mr. Crampton could not have been ignorant of what is now established beyond doubt—that a scheme for *raising troops for the British service within the United States* had been approved and adopted by Her Majesty's Government; that authorized agents, furnished with instructions and pecuniary means, and stimulated by the promise of commissions in the British army and other tempting rewards, had been employed to *induce* persons to leave this country and

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Note 79.—Doubtless Mr. Crampton never told Mr. Marcy that agents were employed to "recruit" in the U. S., because that was not the fact. But Mr. Marcy must have known at the begining that the British Government intended to invite foreigners to go to Nova Scotia, &c., to enlist, and yet he did not intimate that offence would be taken at it.

162 go into the British provinces for the express purpose of entering into the British service; and that many who were prevailed on to do so, had embarked for Halifax free of expense in vessels employed by British authority for that purpose, and on arriving at Halifax had enlisted and been enrolled in the British Foreign Legion. (80)

It is with reluctance that I perform the duty of bringing in view Mr Crampton's connection with some of the ag[illegible]s who were employed in carrying out the *recruitment sy[illegible]m*, and who have, in doing so, viola'ed the law and
163 sovereign rights of this country.

The intercourse berween Mr. Crampton and Mr. Hertz, who was convicted in September last, for violating the neutrality laws of the United States, is established by Mr. Crampton's two letters to Hertz, one dated the 27th of January, and the other the 4th of February, 1855. The origin[illegible]s of both, in the handwriting of Mr. Crampton, were produced to the Court at the trial of Hertz. In the latter, Mr. Crampton says: "With reference to our late "conversation, I am now enabled to give you some more
164 "definitive information on the subject to which it related."

The connection being established, it is allowed to allude briefly to Hertz's account, verified by his oath, of what took place between himself and Mr. Crampton, in relation to recruiting in this country. Nothing is known which can affect his veracity, except the fact that he was engaged in recruiting for the British army within the United States contrary to law, and has been convicted of that offence.

Hertz says: "All that I did in *procuring and sending* "men to Halifax for the Foreign Legion, was done by the "advice and recommendation of Mr. Crampton, Mr. Howe, "and Mr. Matthew. (81) I was employed by Mr. Howe, and

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Note 80.—This statement is incorrect, if it is meant to assert that there was any scheme approved of for enlisting troops in the U. S., or any illegal contract made therein. But if Mr. Marcy merely intends to say that a plan was approved of to induce and assist foreigners to leave the U. S. for the purpose of entering the British service, it is correct, and it is pretty evident that Mr. Marcy did not think of complaining of this at first.

Note 81.—What Hertz meant by the words "procuring and sending men to Halifax" does not appear, nor is it shown whether he did anything more than

" acted as his agent, with the knowledge and approbation of 165
" Mr. Crampton and Mr. Matthew. Mr. Matthew knew of
" both the expeditions I sent. He approved and encourag-
" ed me in sending them away. He encouraged me by
" his advice and counsel, and in giving me money to send
" them away."

Mr. Max F. O. Strobel acted a more conspicuous part than Mr. Hertz, and his conduct in the affair under consideration requires to be more fully traced. In the statement here presented in regard to his proceedings and connection with the British officers, and among them with Mr. Crampton, I intend to rely almost entirely upon original 166
documents in possession of this Government. I do not mean, however, by this restriction, to cast the slightest doubt upon the credibility of Mr. Strobel.

Mr. Crampton's letter to Mr. Strobel was dated on the same day, (February 4,) as that addressed to Hertz, and is expressed nearly in the same terms.

After Mr. Strobel's interviews with Mr. Crampton in Washington, he embarked in the recruiting service, and suddenly rose to the ra[illegible] f "Captain of the 1st company of the Foreign Legion." He went with a detachment of 167
recruits raised in Philadelphia, to Halifax; was exultingly received into fellowship with the military and civil officers of the highest position in Her Majesty's ser[illegible]e there stationed; was invited to partake of the hospitality of His Excellency, Sir Gaspard Le Marchant, of "Col. Clark and " the officers of the 76th Regiment," and of "Col. Fraser, " Col. Stothera, and the officers of the Royal Artillery " and Royal Engineers;" and the original cards of invitation, addressed to him, were produced on Hertz's trial.

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he was authorised to do, *viz.*, to give the men information and assistance. The British agents could rightfully pay the expences of their passage. (See ante folios 69, 72.) If Hertz made any unlawful engagement with any person the facts constituting such engagement should have been proved, and the case should not have been allowed to depend upon the vague and equivocal expressions of the witness, showing merely his conclusion of matters of law and fact. If Hertz did make any illegal contracts, he violated Mr. Crampton's positive instructions, and it is unfair to treat the latter as responsible for that conduct.

168 After such an endorsement of his character, it would seem that the testimony of Capt. Strobel, even if it were uncorroborated, should command confidence.

Mr. Strobel, who had then acquired the rank of "Captain "of the 1st company in the Foreign Legion," and Mr. Crampton, were again brought together at Halifax, and were engaged there for some time in making further arrangements for recruting within the United States.

Original documents, now in the possession of this Government, show that there can be no mistake as to the object of Mr. Crampton's visit to Halifax, and that it had
169 special regard to *recruitments in the United States* for the British service. (82.)

Bruce McDonald, who appears to have been a Secretary in the Executive Department of Nova Scotia, addressed a letter to "Capt. Strobel, First Company Foreign Legion," dated "Provincial Secretary's office, 3d May, 1855," in these words:—

"Dear Sir,—I am directed by His Excellency the Lieu-"tenant-Governor to introduce to you the bearer, Lieut. "Kuntzel. He comes with a letter to Sir Gaspard from "Mr. Crampton. You will please explain to him the "steps necessary for him to take to secure a commis-
170 "sion."

On the 13th of May, the second or third day after Mr. Crampton's arrival at Halifax, J. W. Preston, Lieutenant of Her Majesty's 76th Regiment, who had charge of the depôt at Niagara for the reception of recruits sent from the United States, wrote to Capt. Strobel as follows:—

"My Dear Strobel,—I am directed by the General to "acquaint you that Mr. Crampton wants to see you at his "house, at 10 o'clock to-morrow morning; be punctual. "If you like, come up to my room at 9½ o'clock, and we "will go together."

These letters corroborate Capt. Strobel's statement that Mr. Crampton, while at Halifax, was engaged about the

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Note 82.—This is evidently an erroneous assumption on the part of Mr. Marcy, for Mr. Crampton has always forbidden any "recruitments in the U. S."

recruiting business within the United States. (83) He after- 171
wards went with Capt. Strobel to Quebec for the same purpose. Passing without comment the plan for recruiting, which Strobel says was prepared at the request of Mr. Crampton, and approved by him and Sir Gaspard Le Marchant, I propose to offer some remarks upon the instructions furnished by Mr. Crampton, while in the Provinces, to the recruiting agents who were to go to "Buffalo, De- "troit, or Cleveland," "to make known to persons in the "United States the terms and conditions upon which re- "cruits will be received into the British service." This paper will be found in the letters referred to in Hertz's 172
trial. Its genuineness, I presume, will not be questioned. It is framed with great adroitness; and as it may be resorted to for a defence of Mr. Crampton's conduct, it is entitled to a careful consideration.

These instructions show that the persons sent into the United States to *raise recruits therein* for the Foreign Legion, were authorized agents of British officers, and received directions for the guidance of their conduct from Her Majesty's Minister to this Government. It is thought to be unreasonable in this Government to complain of any of Her Majesty's officers, because the agents thus employed were "enjoined carefully to refrain from anything which 173
"would constitute a violation of the law of the United "States." A similar injunction to the agents first employed was also contained in the directions which preceded the instructions issued by Mr. Crampton in May, and he well knew how utterly it had been disregarded by them. As his visit to the British provinces had special relation to the recruiting service, it cannot be presumed that he was uninformed of what had then happened to those agents in Philadelphia, New York, and Boston, through which he passed on his way to Halifax. This Government had, as early as March, ordered prosecutions against the recruiting agents in those cities for having violated the law of the

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Note 83.—They show nothing of the kind. What Mr. Marcy *now* calls recruiting in the U. S., is any act of invitation to foreigners to go abroad and then determine whether they will enlist. Mr. Marcy himself did not find any fault with this in the first instance.

174 United States, many had been arrested for that offence, and against several of them grand juries had found bills of indictment.

Instead of disconnecting himself from the proceedings which had led to this disastrous result, Mr. Crampton went to Hialfax and Quebec to make further arrangements for sending *other recruiters* into the United States.(84)

He could have had no sufficient reason to believe that those who received fresh instructions, however cautiously devised, would pay any more regard to his injunction not to
175 violate the law of the United States than Hertz and others had done. His experiences of the past should have deterred him from renewing the experiment. As these instructions were furnished to many agents, they were doubtless framed with a view to bear a critical inspection, and, in case of emergency, to be adduced as proof to show that special regard was intended to be paid to the United States neutrality law. They will, however, hardly answer that purpose.

There can be no doubt that those revised instructions were intended to impress the recruiting agents with the ex-
176 pediency of greater circumspection in the business; but it is evident that the motive for this caution had much more respect for the success of the recruiting project than for the United States law. This is apparent from the following paragraph of these instructions:—

"7. It is essential to success that no *assemblages of per-*
"*sons* should take place at beer-houses, or other similar
"places of entertainment, for *the purpose of devising mea-*
"*sures for enlisting*, and the parties should scrupulously

Note 84.—No arrangements were ever made for sending any "recruiters into the United States."—Mr. Crampton was perfectly justified in continuing to authorise agents to give information and assistance to foreigners until the recruiting establishment at Halifax was broken up. The federal courts have recognized such conduct to be perfectly legal, (see folio 72.) As to the trials of Hertz and Wagner, see the remarks ante fos. 16 to 29. Mr. Crampton could not have anticipated the course which Mr. Marcy and Mr. Cushing have thought fit to take. How could it have been supposed for instance that any American President would broach the absurd doctrine lately concocted by Messrs. Cushing and Marcy about seducing foreigners to leave the United States!

"avoid resorting to this or similar means of disseminating 177
"the desired information, inasmuch as the attention of the
"American authorities would not fail to be called to their
"proceedings, which would undoubtedly be regarded by
"them as an attempt to carry on recruiting for a foreign
"power within the limits of the United States, and it cer-
"tainly must be borne in mind that the institution of legal
"proceedings, against any of the parties in question, even
"if they were to elude the penalty, would be fatal to the
"success of the enlistment itself."(85)

Though the last instructions are a restriction upon the construction which Lord Clarendon has given to the law and rights of the United States, they would, even if literally observed, infringe both. 178

This Government maintains that *in every instance where a person, whether a citizen or a foreigner, has been brought to the determination to leave the country* for the purpose of entering into a foreign service as a soldier, or sailor, *by any inducements offered* by *recruiting agents* here, *the law of the United States* has been violated.

There certainly can be no doubt of the violation of the law of the United States in every case where one party—the *recruit*—has been *induced by the terms offered to him* 179 actually to leave the United States for the purpose of entering into foreign military service, and the other party has furnished the means and borne the expense of taking him to a foreign depôt in the expectation that he would consummate the act by an enlistment. It will not, I presume, be denied that several hundred cases of this kind actually occurred in carrying out the scheme of British recruitment. The very design of employing agents for such a purpose, to act within the limits of the United States, involved in its consequences an infringement of that law.(86)

Note 85.—See the other instructions accompanying this, especially the 5th, (folios 8, 9, 10), expressly forbidding the making of any promise or contract, written or verbal, on the subject of enlistment. The instructions are plain and clear when read together, and it is not fair to pick out one of the instructions and read it as if it stood alone.

Note 86.—There were no "recruiting agents" here and no terms were offered by the agents appointed to give information and assistance.

The terms offered by the British Government were stated by the agents ac-

180 It is the solemn duty of the Government of the United States to maintain this construction of their Neutrality Law, and the attempt to set up and sustain a different one has created much surprise; that it has been done by a friendly government with which the United States are most anxious to maintain and strengthen the relations of amity, is the cause of deep regret.

When the President presented the case to the consideration of Her Majesty's Government, with the assurance that he had such information on the subject as compelled him to believe that British officers, in eminent stations, were impli-
181 cated in a scheme which had resulted in an infringement of the rights of the United States and a violation of their law, and asked for some satisfaction of the wrong, he certainly did not expect that the conduct of those officers would be justified upon principles which impair the sovereignty of the United States as an independent nation, and by an interpretation of their law which makes it entirely *ineffective for the purpose intended.*(87)

Some satisfaction for the injury was confidently expected; but nothing that can be regarded in that light has been of-
182 fered; and this Government is compelled, in vindication of its rights and laws, to take a course which it sincerely hoped Her Majesty's Government would have rendered unnecessary.

Her Majesty's Minister to this Government, Mr. Crampton, has taken a conspicuous part in organizing and executing the scheme for recruiting for the British army within the United States.

Were it possible, with due regard to the evidence and disclosures in the case, to assign him a subordinate part in

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cording to their instructions "as matter of information only, and not as implying any promise or engagement on the part of those supplying such information." See folio 10.

Note 87.—Not at all so. Mr. Marcy wholly misrepresents the purpose o the law. See fos. 2 to 5, 33.

It may safely be asserted, without fear of contradiction, that Congress cannot even now be persuaded to extend the provisions of the Act of Congress so as to make unlawful the act of advising, persuading or assisting a foreigner or even a native born citizen, to go abroad to enlist in foreign service.

that scheme, even that would not allow the President to 183
change the course which he is obliged, under the circumstances, to pursue toward him. Any participation in the project, as it has been developed, of raising recruits in this country for the British service, was incompatible with his official relations to this Government. His connection with that affair has rendered him an unacceptable representative of Her Britannic Majesty near this Government, and you are directed by the President to ask Her Majesty's Government to recall him.(88)

Mr. Rowecroft, the British Consul at Cincinnati, and Mr. Matthew, the British Consul at Philadelphia, are implicated 184
in the recruiting project; and you are further directed by the President to ask for their removal for that cause.

The persons connected with the British Consulate at New York have been actively engaged in furthering the recruiting scheme. Mr. Stanley, the assistant clerk of the Consul, has taken a more open and effective part than the Consul himself, and is now under an indictment for violating the law against foreign recruiting. The Consul, Mr. Barclay, could not but know of Mr. Stanley's conduct in that matter, but he still retains him in the Consulate. 185

Beside the responsibility that rightfully attaches to Mr. Barclay for the improper conduct of an employée in his office and under his immediate and daily observation, this Government is satisfied that he has, himself, not only favored the recruiting for the British army, but has participated in it. Moreover, the improper conduct of Mr. Barclay in the case of the bark Maury, has justly given offence to the commercial community in which he resides and with which he has official communication.

For these reasons, this Government deems it proper to instruct you to ask the Government of Great Britain to withdraw Mr. Barclay from the post of British Consul at New York.

You are directed by the President to read this despatch

Note 88.—The return of the seduced foreigners does not seem to be insisted upon, nor any "indemnity for the past or security for the future." See folios 147, 155, 319, et seq.

186 to the Earl of Clarendon, and, should he desire it, to hand him a copy.

The copies of the original documents to which I have referred are contained in Hertz's trial. I send you herewith an authentic report of that trial, which you will offer to Lord Clarendon as a document connected with this despatch. I also send herewith a copy of the proceedings of the Chamber of Commerce in the city of New York relative to Mr. Barclay's conduct in the case of the bark Maury. This, also, you will present to Lord Clarendon, as furnishing one ground for the request herein made for the withdrawal of
187 Mr. Barclay.

The President to Attorney-General Cushing.

EXECUTIVE MANSION,
Washington, Aug. 6, 1855.

The reports of the District Attorneys of the Southern District of New York and the Eastern District of Pennsylvania, on the subject of the levy of troops in the United States, by official or other agents of Great Britain, are returned herewith to the Attorney-General; and his opinion is required upon the question, whether or not the acts reported are in violation of the municipal law and of the na-
188 tional sovereignty and neutrality, and especially upon the question, what legal responsibility, if any, those acts devolve on the British Minister and British Consuls?

FRANKLIN PIERCE.

Mr. Cushing's Reply.

ATTORNEY-GENERAL'S OFFICE
Aug. 9, 1855.

SIR,—I have the honor to submit herewith the considerations of law applicable to the *enlistment of troops within the United States* by the British Government, in so far as the facts appearing in the documents before me concern the personal action either of the British Minister or of the British Consuls in the United States.

There is no room for doubt as to the law regarding the 189
general question.

In the first place, the act of Congress of April 20, 1818, contains the following provision:—

Sec. 2. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or *hire or retain* another person to enlist or enter himself, or to go beyond the limits of, or jurisdiction of, the United States, with intent to be enlisted, or enter into the service of any foreign prince, state, colony, district or people, as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque 190
or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years.—(III. Stat. at Large, p. 448.)

Of course, as the levy of troops within the United States for foreign service is forbidden by law, no such right has by executive permission been given to Great Britain. To the contrary of this, the British Government was expressly notified, by letter of Mr. Marcy to Mr. Crampton, of April 28, 1854, that no enlistments in the United States would be permitted either to Great Britain or to Russia. (Exec. Does., 1st sec., 33d Engr., vol. XII., No. 103, p. 5.)

In the second place, independently of municipal rela- 191
tions of the acts in question they constitute, whether they be the acts of the British Government or of its Ministers and Consuls, a violation of the sovereignty and of the neutral rights of the United States.

The rule of public law is unequivocal on this point, and is correctly stated as follows, by Wolfius:—

"Since the right of raising soldiers is a right of majesty which must not be violated by a foreign nation, it is not *permitted to raise soldiers on the territory*(89) without the consent of its sovereign." (Jus. Gentum, s. 1, 174.)

By Vattel:— 192

"As war cannot be carried on without soldiers, it is evident that whoever has the right of making war, has also naturally that of raising troops. The latter, therefore, belongs likewise to the sovereign, and is one of the preroga-

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Note 89.—See as to what acts constitute this offence, notes 1, 16, and fos. 110, 112.

193 tives of majesty." (Vattel, Droit des Gens, B 3, ch. ii, p. 293.)

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"As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country, without the permission of the sovereign; and, even with that permission, none but volunteers are to be enlisted; for the service of their country is out of the question here, and no sovereign has a right to give or sell his subjects to another.

Whoever undertakes to enlist soldiers in a foreign country, without the sovereign's permission, and, in general, *whoever entices away the subjects of another State*,(90) violates one of the most sacred rights of the prince and the nation.
194 This crime is designated by the name of *kidnapping or man-stealing*, and is punished with the utmost severity in every well regulated State. Foreign recruiters are hanged without mercy, and with great justice. It is not presumed that their sovereign has ordered them to commit a crime; and supposing even that they had received such an order, they ought not to have obeyed it their sovereign having no right to command what is contrary to the law of nature. * * * But if it appears that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against
195 him, unless he makes suitable reparation." (Vattel, Droit des Gens, B. III, ch. ii., p. 298.)

By Kluber:—

"A state entirely neutral has the right to exact, even by force if necessary, that belligerent powers do not use its neutral territory for the purposes of war; that *they take not therefrom munitions of war* and provisions and other immediate requirements of war for their armies;(91) that they *do not make there* any military preparations, *enrollments*
196 *or collections of troops*; that none of their troops, armed or unarmed, pass through, &c., &c.; that they exercise there no act of hostility against the persons or property of the subjects of the hostile State; that they do not occupy it militarily, or make it the theatre of war." (Droit des Gens, Modernes de l'Europe, s. 285.)

By G. F. de Martens:—

"Whilst in case of rupture between two nations a neutral

Note 90.—See remarks on this passage and as to its inapplicability to the United States. notes 16, 20; folios 246 et seq.

Note 91.—As to this see folios 36, 254.

State preserves the full enjoyment of its territorial rights, it can, in the absence of treaties, prohibit during the war, as in time of peace, any passage or sojourn of foreign troops; and much more, forbid *the occupation of its fortresses, the recruiting, mustering and exercising troops*, and it may use force against those who shall attempt to violate the prohibition." (Precis du Droit des Gens, s. 350.) 197

By Galiani:—

"All governments are accustomed to forbid, under capital penalty, any foreigner to *make military engagements or recruits within their territory;* in doing which, they do no more than to sustain and defend a natural right, and one inherent in every sovereignty. * * * 198

The neutral sovereign who leaves his subjects at liberty to engage themselves in the service of a foreign belligerent, will not therein be wanting to his neutral duties, provided it has been customary with his nation; if it has been usual in time of peace, *if it accords with the physical and political condition of the country;*(92) if, in fine, he practices indifference and impartiality, not denying to one belligerent what he concedes to the other. But if *a sovereign has not been accustomed to allow his subjects to enlist in the military or naval service of other governments*, it may well be doubted whether he may, for the first time, do it on the occurrence of war between two states, each of which is in amity with him. I am not prepared to say that in doing so, he gave equality of advantage and facilities to both, for there might be inequality in the need of the belligerents; for, perhaps, one of them, suffering from deficiency of men, would derive precious and powerful succor from such provisions, while to the other it would be useless and superfluous. In my opinion, therefore, this question comes within the general rule of essential neutral duties—that is, to continue in the anterior condition, it being lawful only to persevere in what has been usual, but unlawful to innovate." (Dei Daveri de Principi Neutrals, p. 325, 327, 329.) 199 200

By Hautefeuille:—

"The duties of belligerents may be summed up in very few words. The belligerent ought to abstain from the employment of all such indirect means to molest his enemy as in the accomplishment of their object would first injuriously affect a neutral nation. He ought to respect, in the most complete and absolute manner, the independence and sove-

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Note 92.—See remarks on this passage, note 20.

201 reignty of nations at peace ; in a word, he ought to treat them in the same manner as if the most profound peace continued to prevail. Those nations, in fact, are at peace with him. Fulfilling strictly their duties of neutrality, they have the right to enjoy the advantages of their position, and to be exempt from all the evils of war. The duty of the belligerent is to abstain from the infringement of this right. Thus, neutral territory ought to be held sacred and inviolable by nations at war. These last ought not, on any pretext, nor in any manner, to *make use of such territory* to subserve their purposes of hostilities, directly or indirectly. The *passage of armed troops, the levying of soldiers,*
202 &c., without the consent of the sovereign, would constitute an offence against the sovereignty of the neutral and a violation of the duty of the belligerent."—(Droits et Devoirs des Nations Neutres, tome I, 312, 313.

"As to the territory of neutral nations, the occurrence of hostilities makes no change nor modification of their rights : they remain inviolable in time of peace. Their territory ought then to be sheltered from all enterprises of the belligerents, of whatever nature they may be. The consequences of war ought never to be felt by them directly ; that is to say, no act of hostility should be committed against them under any pretext.

203 "Belligerent nations, in this respect, have only the rights they possessed in time of peace, because war never injuriously affects nations at peace. Belligerents cannot, then, in any case, without the permission of the sovereign, *use neutral territory*—I do not say directly for the operations of war—but cannot even make use of it for any advantage whatever, to the prejudice of their enemy. This permission cannot be granted to them by the neutral without violating his duties.

"The principle of the inviolability of the territory being admitted, the conclusion, as absolute as the principle itself, follows, that a belligerent has no right to *use neutral terri-*
204 *tory*, in any manner whatever, without the permission of the neutral nation sovereign of such territory, and cannot, therefore *levy troops there*, and march armies through it, &c., without this permission.

"The neutral has the incontestible right to resist every attempt the belligerent may make to use his territory—to oppose it by all the means in his power, and even by force of arms, in the same manner as a citizen has the right to defend his property by all the means placed at his disposal by the law to which he is subject."—(Ibid, tome II, pp. 48, 49.)

I do not perceive that this doctrine is explicitly produced

in any one of the books of international law published during the last few years in *Great Britain*. Possibly their silence on this point may be caused by the policy of their country, which, under the kings of the house of Hanover, has frequently relied upon foreign recruits in time of war. However this may be, some of the English works referred to recognize the right of every sovereignty to *the exclusive use of its own territory and resources*. (Wildman's International Law, vol. I, p. 64.) But, without adverting to the present logical consequence of this right, although one of them discusses fully the collateral question, *whether a state loses its neutrality by permitting foreign levies*, and concludes properly that if it be permitted to one, it should be permitted to each of the respective belligerent powers. (Manning's Law of Nations, bk. III., ch. 1.)

In this connection the same accredited English writer considers and confutes the assumption, hastily and erroneously taken up in Great Britain, that some doctrine to the contrary of this is to be found in Vattel. And upon an elaborate review of the whole subject, he concludes thus:—

* * "*Foreign levies may not be allowed to one belligerent* while refused to his antagonist, consistently with the duties of neutrality. When *treaties antecedent to war* permit such exclusive privilege, then no complaint of breach of neutrality can be maintained by the excluded party. But when no antecedent treaty exists *such a permission would be a violation of neutrality*, the principles of which demand the strictest abstinence from assistance to either party, and of course will not admit that exclusive privileges in so important a particular should be granted to one belligerent. Nor have the customs of Europe, derived from the practices of the middle ages, established any usage that prevents this question from being settled in accordance with the dictates of reason, or, in other words, with the law of nature."—(Manning's Laws of Nations, p. 180.)

Mr. Manning's reasoning is conclusive, as far as it goes; and the imperfection of other English law books in this respect is of no account, as against the general authority of the expounders of international law in all the rest of Christendom.

Misconstruction has also been placed on the fact that ***Bynkershoeck maintains the right of private or voluntary***

209 *expatriation, even for the purpose of foreign military service.* (93.) But he does not express or countenance the thought that a foreign belligerent may *recruit soldiers in a neutral country* without the consent of its sovereign. On the contrary, he exhibits in full the legislation of the United Provinces, according to which it was a capital offence to *make enlistments in the country without consent* of the States General. (Quæst. Jur. Publici, lib. I., c. 22.)

Besides, Great Britain has by her own legislation sanc-
210 tioned and adopted the rule of public law, by enacting that if any person whatever, within the United Kingdom, or in any part of the dominions of Great Britain, shall hire, engage, retain or *procure*, or shall attempt or endeavor to hire, retain, engage or procure any person whatever to enlist, or to enter or engage to enlist, as an officer, soldier, sailor or marine, either on land or sea service, for or under, or in aid of any foreign prince or government, or to go or agree to go, or embark from any place in the British
211 dominions, for the purpose, or with the intent to be so enlisted, entered or engaged as aforesaid, every person so offending shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment, at the discretion of the court having jurisdiction of the act. (Act 59, Geo. III., ch. 69.)

We in the United States acting in the sense of natural right, and following the rules of public law as explained by the jurists of continental Europe, *asserted and established*
212 *this doctrine* (94) at a very early period, in opposition to the undertaking of the French Government, through its Minister, M. Genet, to man or equip cruisers within the United States. (Mr. Jefferson to M. Genet, June 17, 1793, American State Papers, For. Aff., vol. I. p. 154.) And our judicial text books are full and explicit on the same point. (Wheaton, by Lawrence, p. 491; Kent's Com., lec. vi.) It is obvious to the most superficial reflection that no distinc-

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Note 93.—See extract from Bynk, folio 300.

Note 94.—The United States did not assert the doctrine now contended for, viz: that it is an offence to invite foreigners to leave the United States to serve in foreign armies.

tion of principle exists in the levy of a military force in 213
the neutral country, as between the land and sea service; and if Great Britain may raise within the United States volunteers for her land service, so Russia may raise them for her marine service; that is, may fit out privateers in our ports; and, indeed, if we grant or permit the former privilege to Great Britain, we must in like manner, in order to be impartially neutral, concede the latter privilege to Russia.

And it is equally obvious that foreign recruiting cannot be forbidden or permitted under the influence of any as- 214
sumed national sympathies or antipathies. Individual or national preferences are quite immaterial in such a question. The United States cannot, either lawfully or honorably, practice a stimulated neutrality; nor can a dissembled alliance be claimed or expected from us, either by Great Britain or by Russia.

From the well established rules and principles of law, then, it is plain to conclude:

1. The acts of enlistment in question are contrary to the municipal law of this country, and indictable as a high mis- 215
demeanor.

2. Those acts, if permitted to one belligerent, must be permitted to all, in observance of impartial neutrality.

3. Being against law in the United States, and therefore not permitted to Great Britain, if undertaken by her as a government, they afford just cause of war, being a direct national violation of the territorial sovereignty of one nation by another.

4. Whatever agents of the British Government, whether official or unofficial, acting voluntarily or by orders, have 216
participated in such acts, are not only guilty of a criminal infraction of the statute law, but also, in the language of Vattel, of violating one of the most sacred rights of the nation.

I presume that if, in the present case, the British Minister imagines that the acts performed under his direction were not contrary to the municipal law, it must be on the ground that the recruits were not *completely enlisted in the United States*—that is, did not *here, in all form, enter the military service* of Great Britain. That assumption is altogether erroneous. The statute is express that if any per-

217 son shall hire or retain another person *to go beyond* the limits or jurisdiction of the United States, with intent to be enlisted or entered into the service of any foreign State, he shall be deemed guilty of the defined misdemeanor.

It is possible, also, that he may have supposed that a *solemn contract of hiring in the United States* is necessary to constitute the offence. That would be mere delusion.

The words of the statute are, "hire or retain." It is true, our act of Congress does not expressly say, as the British act of Parliament does, "whether any enlistment money, pay or reward shall have been given and received or not,"
218 (Act 59 Geo. III., chap. 69, sec. 2,) nor was it necessary to insert these words. *A party may be retained by a verbal promise, or by invitation*, for a declared or known purpose. If such a statute could be evaded or set at nought by elaborate contrivances to *engage* without enlisting, to *retain* without hiring, to *invite without recruiting*, to pay recruiting money in fact, but under another name of board, *passage money*, expenses, or the like, it would *be idle to pass acts of Congress* for the punishment of crime or any other offence.(95)

Note 95.—Mr. Cushing would find it difficult to cite any legal authority for the proposition that there can be a hiring or retainer without a contract or engagement. Moreover he has to avoid the effect of the early correspondence between Mr. Buchanan and Mr. Marcy, and especially of that between Mr. Buchanan and the British Government, wherein Mr. Buchanan contents himself with inquiring "how far persons in official station, under the British Government have acted, whether with or without its approbation either in *enlisting* persons within the U. S. or *engaging* them to proceed thence to the British provinces for the purpose of being there enlisted." (folio 60.)

Here Mr. Buchanan assumes that there can be no ground of complaint unless persons had been engaged to proceed from the U. S. to the British provinces for the purpose of being there enlisted. He does not pretend to say as Mr. Cushing does that an invitation to come to Canada is a hiring or retainer within the meaning of the Act of Congress. That was reserved for Mr. Cushing to propound, but the discovery is made a little too late for the purposes of this correspondence.

As to the words quoted by Mr. Cushing from the British Act of Parliament, nobody pretends that they would make any difference, and he has merely conjured up an imaginary argument for the sake of refuting it. Neither does anybody say that parties could be lawfully *engaged* or *retained* to go to the British provinces, having an intention to enlist on their arrival. But it is contended, notwithstanding Mr. Cushing's jumble of the three things together, that an engagement or retainer is quite different from an invitation,

However this may be, and if such were the thought of 219
the British Government, it has not been successfully carried out; for on the *evidence before me, including the general instructions of the British Minister*, and his direct correspondence with the recruiting officers in the United States and others, my opinion is positive, that the parties have made themselves amenable to the penalties of the statute, and may be convicted before any competent court of the United States.

It is further to be observed, in conclusion of this branch of the subject, that whether the acts of the British Minister and his agents, in recruiting troops within the United States, do or do not come within the technical provisions of the

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and although he may not perceive the difference, it is one which will be pretty generally recognised as well by lawyers as the public at large.

According to Mr. Cushing, if I pay the price of the passage of an Emigrant to Canada, knowing that he intends to enlist when he gets there, I am paying "recruiting money," and it may be admitted that in one sense, this statement is correct, for if the Emigrant enlists in the British army the force of Great Britain is recruited to that extent, and I have aided in such recruitment. But how, in the name of common sense, can it be pretended that I have "hired or retained" the man to go? Is a penal Statute or any other Statute to be construed in that way? Can it be reasonably supposed that Congress intended to prohibit such acts, and yet with the English Statutes before them contented themselves with prohibiting in terms acts of hiring or retaining, saying nothing about persuasions or inducements? If Mr. Cushing's doctrine were correct, it would be idle to have rules for the construction of statutes, and equally idle to attempt to judge of the meaning of Legislative enactments by reference to the words used or the mischief intended to be remedied. And any person might be subjected to three years imprisonment for an act innocent in itself, and even laudable.

It was correctly stated in the first letters, written by Mr. Marcy and Mr. Buchanan on this subject, that the true object of the Act of Congress was, to maintain the neutral relations of this country with other powers, and it was contended that such neutrality would be compromitted by permitting either perfect enlistments in the U. S. or incipient enlistments here, *i. e.* contracts to go aoroad for the purpose of being there enlisted. That was the true ground to take, and we may attribute the abandonment of it to Mr. Cushing's unfortunate discovery of the passage in Vattel, about enticing subjects away from their allegiance. The misapplication of this doctrine to Republican America has led to the protracted discussion before us—but for that the matter would, in all probability, have been allowed to rest when the British Government declared that they had not authorized any contracts to be made in the U. S. and would even abandon the practice of inviting enlistments in the British provinces.

202 act of Congress, is altogether immaterial to the question of international right, as between this government and that of Great Britain. If, by *ingenious evasions of the letter of a penal statute*, intended only for private malefactors, the British Government should, nevertheless, *levy troops* here, the fact of the statute being thus defeated and trampled under foot, would serve only to augment the public wrong.

Suppose, for instance, that the British Government shall have said to its officers, civil or military, in the British North American provinces, and to its diplomatic or consular agents in the United States—"You will proceed to *raise*
221 *so many men in the* United States; but remember that to do so is forbidden by the municipal law of that country, and is indictable as a misdemeanor; you will therefore take care to proceed cautiously in this, so as not to incur the penalties of the statute." (96) Such instructions, while they might have the *effect of raising the troops*, as desired by the British Government, without its agents incurring the penalties of the statute, would but constitute a more flagrant and aggravated violation of the national dignity and the sovereign rights of the United States. In truth, *the statute in this matter is of but secondary account.* The main con-
222 sideration is the sovereign right of the United States to exercise complete and exclusive jurisdiction within their own territory; to remain strictly neutral, if they please, in the face of the warring nations of Europe; and of course, not to tolerate enlistments in the country by either of the belligerents, whether for land or sea service. If there be local statutes to punish the agents or parties to such enlistments, it is well; but that is a domestic question for our consideration, and does not concern any foreign government. All which it concerns a foreign government to know is,

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Note 96.—This absurdity exists only in the mind of Mr. Cushing, and his must be bad case to maintain when we find him compelled to resort to such a style of argumentation. The British Government instead of saying "you will proceed to raise so many men in the U. S.," said, you will will take care not to raise any men in the U. S., but you are to inform people there that we invite them to come to the British provinces to enlist, and you may assist such of them as desire to come here, but they must be under no obligation whatever to enlist on arriving here.

whether we, as a government, permit such *enlistments*. It 223
is bound to ask permission of us before coming into our territory to *raise troops* for its own service. It has no business to inquire whether there be statutes on the subject or not. (97) Least of all has it the right to take notice of the statutes, only to see how it may derive means by which to evade them. Instead of this, it is bound not only by every consideration of international comity, but of the strictest international law, to respect the sovereignty and regard the public policy of the United States.

Accordingly, when, at the commencement of the great European struggle between England and France, near the 224
close of the last century, the French Convention assumed to *recruit marine* forces in the United States, it was held by President Washington, and by his Secretary of State (Mr. Jefferson), as explained in the correspondence hereinbefore quoted, that, by the law of nations, in virtue of our sovereignty, and without *stopping to enact municipal laws* on the subject, we had full right to repress and repel foreign enlistments, and, *e converso*, that the attempt to make any such enlistments was an act of gross national aggression on the United States. 225

When a foreign government, by its agents, enters into the United States to perform acts in violation of our sovereignty, and *contrary to our public policy*, though acts not made penal by municipal law, that is a grave national indignity and wrong. If, in addition to this, such foreign government, knowing that penal statutes on the subject exist, deliberately undertakes to *evade the municipal law*, and thus to baffle and bring into disrespect the internal administration of the country, in such case the foreign govern- 226
ment not only violates, but insults, our national sovereignty.

I repeat, then, that if it were to be supposed that the British Government had so far forgotten what is due to its own dignity as to instruct its agents within the territories of the German Bund, in the Netherlands and in the United States,

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Note 97.—It is sufficient to observe upon what is said here and elsewhere about enlistments that none were made by the British Government in the U. S.

227 to *enlist recruits* without respect for the local sovereignty, but with care to avoid or evade the letter of local statutes, instead of diminishing, that would aggravate the injustice and the illegality of the proceeding in the eye of the law of nations, and the intensity of the public wrong as regards the neutral States thus converted, without their consent, into a recruiting ground for the armies of Great Britain.

Such instructions would be derogatory to the public honor in another respect. They presume that the United States, without becoming the open ally of Great Britain, will, by *conniving at the use of its territory for belligerent*
228 *purposes*, while professing neutrality, thus carry on, as already intimated, a dishonorable war in disguise against Russia. (98.)

It appears, however, that the British Government, finding it impossible to keep the ranks of its army filled by voluntary enlistments, and being loath to encounter the responsibility of a law for conscription, or drafts on militia for periodical service of its able-bodied men, or for any other systematic method of raising troops from its own
229 population, introduced into Parliament a bill entitled "An act to *permit foreigners to be enlisted* and to serve as officers and soldiers in Her Majesty's forces," but which *was in fact a bill to authorize the government to employ agents to carry on recruiting service in the neutral states* of Europe and America. (99)

The law was earnestly objected to in its progress, as

Note 98.—If enlistments in the U. S. by the British Government had been permitted, it might have been said that the government of the U. S. had connived at the *use of its territory* for belligerent purposes, but no such complaint could be grounded on the publication of advertisements in the U. S. by the British Government, inviting emigration into the British provinces, of persons desirous of fighting against Russia

Note 99.—The Bill here referred to was necessary to authorize the enlistment of foreigners in the British army, for, although under the political system of the U. S., foreigners may serve in the armies of the Republic (see folio 309), the British sovereign has no right to create an army composed wholly, or in part, of foreigners, without the authority of Parliament. Mr. Cushing with characteristic recklessness, assumes that this Bill was for a purpose wholly different from that stated on its face, and that it was passed to direct a violation of the laws of foreign countries.

insulting to neutral states and derogatory to the national 230
dignity; but was passed, nevertheless, on the 22d of December, 1854. (Hansard's Debates, third series, vol. 136, passim.)

At an early day after the passage of this act, measures were taken to recruit officers and men, for a proposed foreign legion, in the United States, those measures being publicly taken under the official responsibility of Sir Gaspard Le Marchant, Lieutenant-Governor of the Province of Nova Scotia. A military dépot was established at Halifax, for the reception and enrolment of recruits; and Mr. Howe, a member of the Provincial Government, with 231
other agents, came into the United States to make arrangements for *engaging* and forwarding the *recruits*, chiefly from Boston, New York and Philadelphia. Subsequently, corresponding arrangements were made for collecting and forwarding recruits from the Western States, by Buffalo or Niagara, through Upper Canada. (100)

These acts were commenced and prosecuted with *printed hand-bills and other means of advertisement*, and recruits were collected in depots at New York and elsewhere, and 232
regularly transported to Canada or Nova Scotia, with undisguised notoriety, as if the United States were still a constituent part of the British Empire. Of course they attracted great attention, and the various measures, whether legal or political, proper to put a stop to them, were instituted by your direction, through the instrumentality of the foreign or legal departments of the government of the United States.

In the course of the investigations which ensued, among the facts brought to light are some in the documents

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Note 100.—It will be observed that Mr. Cushing here asserts that the British agents engaged and forwarded recruits, whilst the fact is that there were no recruits at all in the U. S.—the persons forwarded were not recruits, not having enlisted themselves, and being at perfect liberty to decline doing so, on their arrival in the British provinces, nor were any "engagements" made by or with the persons forwarded, that they would go to the British provinces at all—they could if they chose, turn back at any stage of the journey, and that without violating any promise or engagement. At all events, if that was not the case, the agents simply violated their instructions, and no blame can be rightfully attached to the British Government if they did so.

233 referred to me, which unequivocally tend to implicate, not only British Consuls, but the British Minister himself, in the unlawful transaction in question; and so call for inquiry as to the rights of the government in reference to them and their government.

In the application of the general rules of law to the offences committed, it is necessary to distinguish between the case of any of the Consuls and that of the Minister.

The several District Attorneys of the United States, within whose jurisdiction respectively the cases occurred,
234 very properly assumed that the Consuls were subject to indictment for infraction of the municipal law, and have proceeded accordingly, indictments having already been found in the Southern District of Ohio against the Consul at Cincinnati, and in the Southern District of New York against an officer of the Consulate of New York.

(The rest of the opinion relates to the liability of the Consuls to, and the exemption of the Minister from, criminal prosecutions.)

In this controversy there are questions of fact, and ques- 235
tions of law.

It is *admitted* that the British Government did authorize its agents in the United States to invite and induce residents of the United States to go abroad to enlist by giving them information and assistance.

It is *denied* that any agents of the Government were authorized to do more than that, and it is proved that the agents were advised that the British Government would not interfere in their behalf if they should violate their instructions, (folio 9.)

It is charged by Mr. Marcy that the agents of the British 236
Government did actually hire or retain persons to go abroad to enlist in the sense in which those words were used in Mr. Marcy's first letter, (folio 50.) He insists that hirings and retainers were effected by men who were not irresponsible and unauthorized persons, but who were the agents of the British Government.

To this it is replied that those agents were only authorized to give information, advice, and assistance; that they were not authorized to hire or retain parties to go abroad; but, on the contrary, were expressly forbidden to do so, (folio 9.) 237

These are the questions of fact, and it will be seen that Mr. Marcy is clearly wrong in assuming, as he has done, (folio 128) that the British Government have admitted that they directed and authorized their agents to do what could not be done without a violation of the law of the United States.

But Mr. Marcy insists, 1stly. That even if the British Government are not to be held responsible for what is alleged to have been done by their agents, contrary to instructions, 238
still the agents were authorized to violate the law of the United States, by inviting, persuading, and assisting residents of the United States to go abroad with the intention to enlist on their arrival in the British Provinces.

2dly. That even if, by those acts, the letter of the law has not been broken, yet its spirit has been violated and its object defeated; and,

239 3dly. That even if the British agents, in giving such information and assistance, did not violate either the letter or spirit of the municipal law, their acts were still a breach of international law.

The questions, then, to be considered are—

1stly. Whether Congress *intended* to prohibit the giving of information or rendering of assistance to persons desirous of going beyond the limits of the United States for the purpose of enlisting.

2dly. Whether the British Government violated the law of nations by the employment of agents to give such information and assistance.
240

As to the first question, *What is the true construction of the municipal law?* we have the admission of Mr. Marcy, in his first letter on the subject, that the law would not be violated unless enlistments were made in the United States, or contracts with parties to go abroad with intent to be enlisted. (See folios 50, 60.)

We have also the opinion of a District Judge, (Kane,) that "the payment of the passage from this country of a man who desires to enlist in a foreign port," does not come within the Act. (See ante folio 72.) And another District
241 Judge, (Ingersoll,) has laid down the law to be that "any resident of the United States has a right to go to Halifax with the intent to list." (Folio 22.)

After Mr. Cushing had given his opinion, (August 9th 1855,) Mr. Marcy presented a new view of the law, (see folio 77 et seq.) and began to complain of acts the rightfulness of which he had previously recognized. (See remarks on the spirit which influenced this conduct, ante notes 30, 36, 37.

242 It has been contended that the British Government is not at liberty to deny the construction put upon the act of Congress by the Government of the United States—that the opinion of the President is conclusive.

It is sufficient to reply, that if that proposition could be maintained, the agents of a foreign government, when accused by the President of violating the laws of this country, could never deny the truth of the accusation, nor even be permitted to show that the charge was made in bad faith,

and for the mere purpose of picking a quarrel. According to 243
that doctrine, a despotic prince might declare an act perfectly innocent to be a violation of the municipal law, and his assertion could in no case be gainsayed. The doctrine is wholly inadmissible, for it is evident that the question whether the law has been violated cannot depend entirely on the assertion of the accuser.

In ordinary cases, the opinion of the President, upon a question as to what is the law of the United States, might be submitted to by a foreign government. But in this controversy we have, in the first instance, the opinion of 244
the Secretary of State that the true object and intent of the law of Congress was merely to prevent a breach of the neutrality which this country desires to observe between belligerents, and that to constitute a violation of that law there must be either an enlistment within the United States, or a contract to go abroad for the purpose of being enlisted, (fos. 59, 60.) And to the same effect are the judicial opinions before quoted.

In opposition to these opinions we have that of the Attorney-General, (folio 218,) given after the above men- 245
tioned letter had been written and sent by Mr. Marcy to Mr. Buchanan to be communicated to Lord Clarendon.

See the question as to the construction of the act of Congress fully discussed, ante. Also, remarks on the trial of Hertz, before Judge Kane, (folio 18,) and of Wagner, before Judge Ingersoll, (folio 22.)

It is clearly too late for the United States Government to contend for the latitudinarian interpretation put upon the act by Mr. Cushing; it was the duty of the Government, if it intended to insist on that doctrine at all, to advise the 246
British authorities at the outset, that invitations to foreigners to go to Canada, &c., to enlist, would be resisted. (See *ante*, fols. 59, 60, notes 25, 30, 31, 36, 37.)

The next question is, whether the British Government violated the *law of nations* by the employment of agents to "induce" residents of the United States to go abroad for the purpose of enlisting themselves in the British army.

The argument of Mr. Marcy, as to the law of nations, is an *afterthought*. (See *ante*, note 30.) It is founded upon the supposed authority of European publicists who are speak-

247 ing of systems of government wholly different from that of the United States. *Vattel* says, that it is a grave offence to "*entice* away the *subjects* of another State." He distinguishes between kidnappers who use violence, and those who have "practised *seduction* only;" observing, that as to the latter "it is generally thought sufficient to punish them when they can be detected and caught;" but that as to the former, "it is usual to demand a surrender of the delinquents, and to claim the persons they have carried off." *Book* 3, *ch.* 2, *sec.* 15.

Adopting this doctrine as being entirely applicable to
248 this republic, Mr. Marcy contends, (See fo. 132, *et seq.*,) that the British Government had no right to enlist men in Halifax, who had been induced to go from the United States to that port by promises of high wages, &c., and that, whether such emigrants were foreigners or natives of the United States. (See notes 30, 36, 37, 55, fo. 295.)

So that, according to Mr. Marcy, if one Englishman should persuade or induce another Englishman, resident in the United States, to return to England to serve in the armies of his native country, the person offering such persuasion would be committing an offence against the law of
249 nations! It will be observed, that *Vattel* does not go so far as that, but merely asserts that it is an offence to "entice away the SUBJECTS of another State." It is unnecessary to argue this question, it being quite plain that such persuasion or inducement may be rightfully offered in the absence of any municipal law forbidding the same. (See ante, fo. 34.)

There is no such law at present in the United States, and, as already observed, (folio 21,) there is no probability of any enactment to that effect, either by Congress or by any
250 one of the State Legislatures.

Nor is it probable that any law will be passed to prohibit any person from persuading, inducing or "seducing" even *citizens* of the United States, whether native or adopted, to leave this country for the purpose of engaging in foreign military service. It would be inconsistent and ungracious for the United States, or for any State of the Union, to make it penal to persuade or induce aliens or naturalized citizens to return to their native country.

Nor would any offence be committed against the law of 251
nations by the act of persuading or assisting a native citizen of the United States to go and serve in a foreign army. As the municipal law does not forbid his going, nor prohibit any one from advising or assisting him to go, there can be nothing wrong in giving such advice or assistance.

Lord Clarendon is perfectly right in saying that the charge of violation of sovereign territorial rights, cannot be fairly urged as a separate and different charge from that of violation of the municipal law of the United States.

When *Vattel* asserts that it is an offence against the law of nations to *entice* away the subjects of another State, he is 252
assuming the policy of such State to be to keep its subjects bound to their allegiance. But in the United States no such doctrine prevails, "the right of expatriation being," in the language of the Court of Appeals of Kentucky, "a practical and fundamental American doctrine." (9 *Dana*, 178, *Alsberry* v. *Hawkins*.)

At all events, the right of the American citizen to go into foreign service is clear, and no one has pretended that the neutrality of this government is compromitted by the exercise of that right.

See remarks on the English Enlistment Act, *Wheaton's* 253
Elements, *part* 4, *ch.* 3, *s.* 17, and *Wheaton's History of the Law of Nations*, *part* 4, *s.* 25.

Wheaton observes, that during the wars of the French Revolution, the United States, appealing to the principles laid down by *Vattel*, *B.* 3, *ch.* 3, *sec.* 104, prohibited "the belligerent powers from equipping, arming and manning vessels of war in their ports." No such doctrine as that now contended for by Mr. Marcy is sustained by Vattel, or any other writer on international law, nor can any countenance of it be found in the course adopted by the United 254
States at the period in question.

See *Martens*, *ch.* 6, *sec.* 2, as to what are the duties of neutrals. Also *Grotius*, *B.* 3, *ch.* 17.

The Supreme Court of the United States has decided that "the sending of armed vessels or of munitions of war from a neutral country to a belligerent port for sale as articles of commerce, is unlawful only as it subjects the pro-

255 perty to confiscation or capture by the other belligerents." The *Santissima Trinidad*, 7 *Wheat. Rep.*, 283.

Bynkershoek, in his treatise on the law of war, devotes a chapter (chap. 22) to the subject of "enlisting men in foreign countries and incidentally of expatriation." He holds that in the absence of municipal law prohibiting the act, it is perfectly lawful and right to enlist men in a foreign State.

A fortiori, a State whose citizens have the right of expatriation, cannot complain if a foreigner merely persuades or invites them to exercise that right. Of course, the State
256 might prohibit the giving of such advice, but legislation of that character would be remarkably ungracious in a State which in its correspondence with foreign powers constantly insists on the natural right of every man to absolve himself from his allegiance to his native country. That is the position assumed by the Government of the United States.

And when, in addition to this, we find that the country has been to a great extent peopled by emigrants from Europe, who have been authorized by the laws of the United States to absolve themselves from their former allegiance, it is clear that the passage, quoted by Mr. Marcy
257 from *Vattel*, has no application.

Nor is there any real conflict between *Vattel and Bynkershoek* on this question, for the former meant only to assert that it is an offence against the law of nations for an individual to disturb the domestic policy of a foreign State; whilst *Bynk.* maintains that when the policy of a State is not opposed to the expatriation of its citizens, then it is lawful to induce them to leave their native country, and enter into the military service of another.

It is true that no American could lawfully in England
258 persuade or assist an Englishman to go abroad to serve in a foreign army, because by the English common law it is a misdemeanor for a subject to enter into foreign service without the consent of the Sovereign. 2 *Kent's Com.* (8 *ed.*) *p.* 5; 1 *East. P. C.*, 81; 1 *Hawk. P. C.*, *B.* 1, *ch.* 22, *sec.* 3.

It would be absurd to maintain, in the present State of the municipal law of the United States, that an Englishman should be subjected to three years imprisonment if he in-

duced one of his fellow-countrymen to return home to serve his country. 259

This country cannot reasonably claim *a monopoly of the right of seduction:* other powers have at least the right to *re-seduce* their citizens to return to their former allegiance; a right which will remain until some new legislation takes place, conceived in the spirit of the old law of Pennsylvania, which made it a crime to seduce artists to settle abroad. (See this law, cited 3 *Dallas Rep.*, 143.) It may be here observed that any foreign government can, without adopting the American doctrine of expatriation, hold this country bound by its repeated affirmance of it. 260

The doctrine of the English law is "that natural born subjects owe an allegiance which is intrinsic and perpetual, and which cannot be divested by any act of their own." 1 Blac. Com., 369. Kent says, 2 *Kent. Com.*, 43, "It has been a question frequently and gravely argued, both by theoretical writers and in forensic discussions, whether the English doctrine of perpetual allegiance applies in its full extent to this country." He reviews the decisions in the United States on this subject, and concludes that the weight of American authority is in favor of the English doctrine; but adds, "The naturalization laws of the United 261 States are, however, inconsistent with this general doctrine, for they require the alien who is to be naturalized, to abjure his former allegiance without requiring any evidence that his native sovereign has released it."

In the case of *Henfield*, reported in *Wharton's State Trials of the United States*, *p.* 49, the defendant was charged with having enlisted in a French privateer, at a time when the United States were at peace with England, and there was war between England and France. The trial took place in the Circuit Court of the United States, 262 at Philadelphia, in the year 1793, before the passage of any act of Congress, respecting foreign enlistments.

Judge Wilson, in his charge to the Grand Jury, said: That "a *citizen* who, in our State of neutrality, and without the authority of the nation, takes an hostile part with either of the beligerents, violates thereby his duty, and the laws of his country."

It appears that the judge referred to acts done within the

263 jurisdiction of the United States. The indictment charged that the defendant was an inhabitant of the United States, and that he being a prizemaster on board the privateer, did sail to several maritime places, within the jurisdiction of the court, to capture English ships, &c. All the counts are to the same effect.

It was contended by the counsel for the prosecution that the law of nations was part of the law of the land, and that the defendant had offended against the law of nations. That at the time of the commission of the act the defendant was a citizen of the United States, had not renounced his
264 country, and was not domiciliated elsewhere, and that his family was still in Massachusetts. The defendant had enlisted in the privateer, at Charleston. The counsel for the prosecution argued as follows, (p. 81):

"Let us suppose America engaged in war, and that one of her faithless children prefers the other party, joins an hostile detachment, which has already invaded his own country, or enters on board a foreign privateer, lying in our bay, and commits those acts which, in war are lawful in peace crimes. Does the right to emigrate, the right to choose his country, to renounce his former allegiance, pro-
265 tect him here?

It will be said that this is not a parallel case. What is the difference?

1. The offender, in the latter case, has a right to leave one country, and become a citizen of another.

2. He has a right to disengage himself entirely from the obligations of duty and obedience to the first country.

3. The act of joining the other country, of itself, exempts him from those primary obligations.

So far the parallel is exact.

To escape its effect, it may be asserted that a man can
266 never lift his hand against his native country. But then what becomes of all these rights? If the slavish doctrine of an unalienable allegiance is admitted, it totally destroys the right of emigration. Thus, after all this circuit, we are let down where we began, viz: That the emigration from one country, and the reception in another, must be substantially and definitively effected before the acts of hostility.

Let it not be said that this doctrine violates the rights of 267
man. It is on the rights of man that it is established."

In charging the jury, Judge Wilson observed (p. 84) that the defendant had admitted that when he committed the act of hostility in question he was a citizen of the United States. It was at that time (says the judge) "the least of his thoughts to expatriate himself."

The jury returned a verdict of not guilty.

See on page 89 the extract from Mr. Jefferson's letter to Mr. Morris, then in England, commenting on this trial. (3 *Jeff. Cor.* 271.) 268

"It has been pretended indeed, that the engagement of a citizen in an enterprise of this nature was a divestment of the character of citizen, and a transfer of jurisdiction over him to another sovereign. *Our citizens are entirely free to divest themselves of that character by emigration*, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen, and withdraws the 269
criminal from their coercion."

In *Talbot* v. *Janson*, 3 *Dallas*, 133, before the Supreme Court of the United States, in 1795, it was held that "a capture by a citizen of a neutral state, who sets up an act of expatriation to justify it, is unlawful, where the removal from his own country was by sailing contrary to the laws of his country in the capacity of a cruiser against foreign powers." The capture was made by a vessel illegally fitted out in the United States by citizens of the United States, and carrying the flag of the French Republic, being commissioned as a privateer.

It was contended by Mr. Ingersoll, that the abstract 270
right of individuals to withdraw from the society of which they were members, was antecedent and superior to the law of society, and recognized by the best writers on public law, and by the usage of nations; that the law of allegiance was derived from the feudal system, by which men were chained to the soil on which they were born, and converted from free citizens to be the vassals of a lord or supe-

271 rior; that this country was colonized and settled upon th doctrine of the right of emigration; that the right was incontestible if exercised in due conformity with the moral and social obligations; that the power assumed by the Government of the United States of naturalizing aliens by an oath of allegiance to this country, after a temporary residence, virtually implies that our citizens may become subjects of a foreign power by the same means.

The counsel on the other side conceded that birth gave no property to the man; that upon the principles of the American Government he might leave his country when
272 he pleased, provided it was done *bona fide*, and with good cause and under the regulations prescribed by law; and that he actually took up his residence in another country under an open and avowed declaration of his intention to settle there.

The question was not decided by the Court.

In the case of *Williams*, tried in the Circuit Court of the United States, at Hartford, 1799, *Wharton's State Trials*, 652, the defendant, a citizen of the United States, was charged with having in the West Indies accepted a commission from the Republic of France, then at war with Great Bri-
273 tain, which country was at peace with the United States, and the indictment alleged that the act of the defendant was a violation of the treaty between England and the United States. The defence was that the accused had become duly naturalized in France, and had renounced his allegiance to the United States.

Chief Justice Ellsworth held that this was no defence, and the defendant was convicted. The judge said: "In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and
274 policy to permit emigration. But our policy is different, for our country is but sparsely settled, and we have no inhabitants to spare." * *

"Consent has been argued from the acts of our government, permitting the naturalization of foreigners. When a foreigner presents himself here and proves himself to be of a good moral character well affected to the Constitution and Government of the United States, and a friend to the good order and happiness of civil society, if he has resided

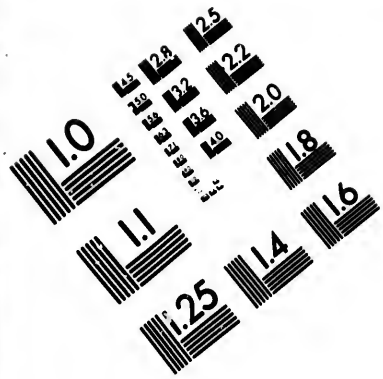
here the time prescribed by law we grant him the privilege 275
of a citizen. We do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate. We leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and the folly are his own. But this implies no consent of the government that our own citizens should expatriate themselves."

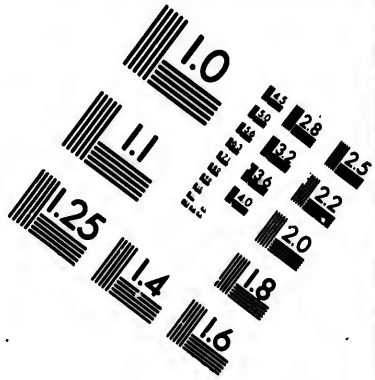
This is but the opinion of a single Judge on Circuit. See, as to the right to go into foreign service, the opinion of Chief Justice Marshall, [illegible] folio (288). 276

Judge Ellsworth's opinio[illegible] in a pamphlet put forth by Mr. Madison's admi[illegible] at the time of the impressment difficulties, now understood to have been written by Mr. Hay, then District Attorney of Virginia. (*A treatise on Expatriation. Washington.* 1814.)

See *Wharton's notes* to this case. "The question raised in the text, whether a citizen may, in any manner, without the consent of his Government, cast off his allegiance to his native country, is one which has arisen in this country to more than theoretical importance." * * * 277
"One of the chief causes of the war of 1812 was the disregard paid by the British Government to the naturalization of British subjects in this country. Within a very short period the matter has been again agitated in the masterly despatch of Mr. Buchanan, arising from the detention of Bergen and Ryan, during the late insurrection in Ireland. The claim of the United States for the release of these parties was founded on the assumption that as naturalized citizens of this country they were no longer subject to the jurisdiction of England."

"The tendency of the public mind in this country is un- 278
questionably in favor of the right of expatriation. The extravagant extent to which the doctrine of perpetual allegiance has been at times carried in England, the grievances suffered by us from the practical operation of the English rule during the early part of this century, and the somewhat migratory habits of our people, have rendered the doctrine distasteful; while the apparent inconsistency with our system of naturalization, and the uniform encouragement offered by the Government to emigration, have been





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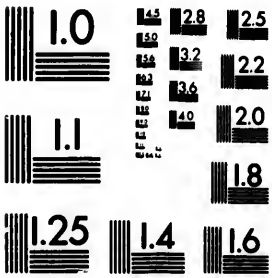

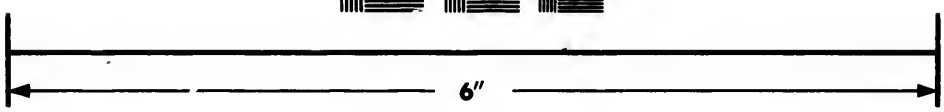

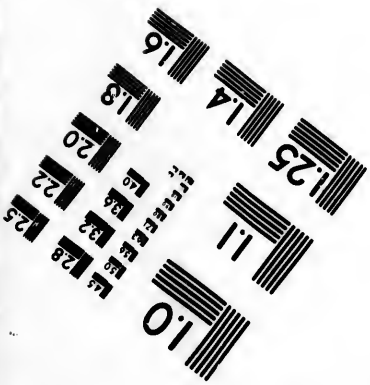

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279 thought to preclude its adoption by the Courts. It has also, as has been seen, been opposed by very high authority in the Cabinet and in Congress."

* * * He refers to the common law maxim "that no one may throw off his country, or abjure his allegiance." "This rule," says he, "founded on the feudal relation of lord and vassal, stamps upon any one born within the British kingdom so indelibly the character of a British subject, that no act on his part can relieve him from its consequent duties."

This doctrine he considers to be adopted in this country !

280 although he admits that the publicists in general speak of the right to leave the State at pleasure as a natural right. "That the King of England refused to permit the naturalization of aliens in the Colonies, was one of the causes of complaint enumerated in the Declaration of Independance Before the adoption of the Constitution, two States, Pennsylvania and Virginia, had provisions in their Constitution, and laws in favor of the right of emigration. These provisions were considered as destroying the common law rule. *Murray* vs. *McCarthy*, 2 *Munford*, 393 ; *Joebson* vs. *Burns*.

281 3 *Binney*, 83."

Mr. Wharton, after referring to the opinion of the Supreme Court of the United States, in *Shanks* vs. *Dupont*, 3 *Peters*, 242, and in Inglis vs. Trustees of Sailors Snug Harbour, *ib.* 99, says: "However distasteful it may have been in a political point of view, we are bound therefore now to hold that allegiance does not shift at will, but is a contract dissoluble only by consent. Nor is it to be disguised that the repugnance with which this view was visited in the earlier stages of the Republic, when the country was com-

282 posed of nothing else than aliens naturalized or revolutionized, is now yielding to a more imperial policy."

In *Shanks* v. *Dupont*, 3 *Peters*, 246, Story, J., delivering the opinion of a majority of the court, incidentally observed that, "The general doctrine is that no person, can by any act of their own, without the consent of the government, put off their allegiance and become aliens." This case was decided in the year 1830. The question involved was whether the heirs of a British subject who owned lands

in South Carolina in 1794, were entitled to the same by virtue of the treaty with Great Britain. 283

The Court of Appeals in Kentucky, in Alsberry *v.* Hawkins, 9 *Dana's Rep.*, 178, held (in the year 1839) that, "*if there be no statute regulation on the subject*, a citizen may in good faith abjure his country, and that the *assent* of the government was to be *presumed*, and he be deemed denationalized." 2 *Kent's Com.*, 49, *note b.*

Most writers on public law affirm the right even of a *subject* to abandon his native country.

Burlamaqui, *ch.* 5, *s.* 13: "It is a right natural to all free people that every one should have the liberty of removing out of the Commonwealth if he thinks proper." 84
He adds that, "in general, a man ought not to quit his native country without the permission of his sovereign. But his sovereign ought not to refuse it him without very important reasons."

Vattel, *B.* 1, *ch.* 19, *s.* 220: "Every man has a right to quit his country in order to settle in any other, when by that step he does not endanger the welfare of his country."

In a note to the 7th American edition, the editor says: "Our laws require the services of naturalized citizens in time of war, even if the enemy should be their native State; and our government has always resisted all attempts 285
by such State to punish them as traitors."

Grotius, *Book* 2, *ch.* 5, *s.* 24, lays down a doctrine similar to that of Vattel.

And so *Puffendorf*, *Book* 8, *c.* 11, *s.* 2, 3, 4.

And see *Martens*, *B.* 3, *ch.* 3, *sec.* 6.

The Romans forced no person to continue under their government, and *Cicero* highly commends this; calling it the surest foundation of liberty, *Orat. pro L. C. Balbo*, *ch.* 13. 286

The publicists quoted above do not, however, mean to assert that the natural right referred to is not subject to the control of municipal law, but only that in the absence of any prohibition in the latter, the subject has a right to leave his country. See on this point *Bynk. chap.* 22. *Bowyer*, in his Treatise on Universal Public Law, p. 273, says: "The power of emigrating and throwing off citizen-

287 ship or allegiance, depends in each country on its municipal laws, and this is a matter of arbitrary or positive law."

In the absence of any legislation on the subject, the right of the American citizen to emigrate, and, in good faith, to absolve himself from his allegiance to the land of his birth, seems to be the direct consequence of the principles upon which the institutions of this Republic are founded. If any restraint of this right be deemed expedient, it should be introduced by legislation. To affirm that the old rule of the common law, founded upon feudal reasons, is in full
288 force here, is to place the nation in a ridiculous attitude; the government of the United States having, in its correspondence with foreign powers, pronounced the English doctrine of perpetual allegiance to be repugnant to the natural liberty of mankind.

In the case of the *Santissima Trinidad*, 1 *Brock. Rep.*, 486, Chief Justice Marshall held, that whether the right of expatriation exists or not, an American citizen may, according to the modern usage of nations, *engage in foreign service*, without compromising the neutrality of his government, or divesting himself of his citizenship. He also held,
289 that the application of this general principle to the case in hand was not prevented by the treaty of peace between the United States and Spain.

This accords with the opinions recently delivered by Judges Kane and Ingersoll, quoted *supra*, so that we may consider it settled that citizens of the United States may go abroad and enlist in foreign service.

But, according to the doctrine sustained by the federal courts, an Englishman, who has become naturalized, will be treated as a traitor, if, after returning to his native coun-
290 try to settle there, he be found in arms against the United States; and yet the application by England, of the same doctrine, is denounced and resisted by this government.

See *Wharton's American Crim. Law*, 3d ed., page 902. "It seems, however, that a foreigner who had applied for naturalization in this country and taken the usual oath, but whose naturalization was not at all completed, and who being abroad, there enters such a privateer, &c., would hardly fall within the compass of the Act." *United States* v. *Villato*, 2 *Dall.* 170.

We have now, in the correspondence before us, still another step taken in this career of inconsistency, it being now contended by the United States that international law is violated, if foreigners resident here are invited to return home to serve their native country. 291

Even in England there is more freedom of speech and action, in this respect, than Mr. Marey would allow in this Republic. Any person may put forth advertisements in the English newpapers, or make speeches in public, recommending the foreigners now resident in England to leave that country and come to the United States, for example, for the purpose of entering into the military service of this country. 292

The Act 59, *Geo.* 3, *ch.* 69 provides that, if any natural born subject shall, without leave, enter or agree to enter into foreign military service, or shall agree to go, or shall go to any foreign country, with intent to enlist, or, if any person whatever, within the United Kingdom or in any part of His Majesty's dominions elsewhere, "shall hire, retain, engage or procure," or attempt to hire, &c., any person to enlist in a foreign service, or to go abroad for that purpose, he shall be deemed guilty of a misdemeanor.

See 3 *Burn's Justice*, by D'Oyley & Williams, p. 240, title "Foreign Service:" 293

As a natural born subject of the Queen of England cannot lawfully enlist in foreign service; it would be a misdemeanor at Common law to advise or persuade him to do so. But the Act of Parliament does not make it penal to advise or persuade a *foreigner* resident in England to emigrate for the purpose of enlisting in foreign service, nor is it an offence to assist him in the accomplishment of that purpose. 294

The Act is a penal one, and would be strictly construed, and acts of advice and assistance would not be treated as acts of hiring or procuring, &c.

No one in England would think of objecting, that either the letter or the spirit of the Act of Parliament would be violated by this course of proceeding, although that Act is more rigid in its provisions than the Act of Congress. Nor would it be contended that the sovereign rights of Great Britain would be violated, if agents of this Republic were to

295 persuade and assist the foreign residents in England to come to the United States for any purpose whatever.

Mr. Marcy, not content even with the doctrine, that it is unlawful to invite foreigners to leave the United States, and go into foreign service, intimates that, if an Act of Congress should be passed forbidding any person from leaving the United States for the purpose of enlisting as a soldier within the British territory, then *the sovereign rights of the United States would be infringed by Great Britain*, if she enlisted such person, (ante folio 132.) And yet Mr. Marcy would doubtless deny, that the sovereign rights of Great Britain are violated when British subjects are enlisted in
296 the United States army and navy, although this government is well aware that the law of England prohibits them from entering into foreign military service!

The upshot of all this is simply that this country is to claim all the benefit of a supposed rule of law which is nevertheless to be repudiated when any other country invokes it. And the government of the United States is to disregard the laws of other countries, forbidding the expatriation of their subjects or citizens, but the Courts here are to enforce similar laws forbidding the expatriation of
297 American citizens native or naturalized.

Mr. Marcy has not directly insisted that the law of nations would be violated by the acts of agents of a foreign government, which would be objectionable if performed by private persons. But the argument in his last letter is, that in every instance where a person, whether a citizen or foreigner, has been induced by agents to leave this country, for the purpose of entering into a foreign service, the *law of the United States* has been violated.

298 If private persons may lawfully assist the emigration of individuals intending to become soldiers in a foreign service, the agents of a foreign government may do the like until prohibited by legislation. (See *ante* fo. 58 and note 19.)

No publicist affirms that it is unlawful for the agent of a foreign government to do what is in itself lawful, and what may be done by private individuals.

In a State where millions of the inhabitants come from other countries, where the fleets and armies are composed chiefly of foreigners, and where the right of expatriation is

insisted on, it cannot be improper for the agent of a foreign 299
government to call public attention to the advantages to be gained from the exercise of that right by either the temporary residents, or naturalized or native citizens.

If it be conceived that good policy requires some restraint in this particular, let new laws be made accordingly.

The passage quoted by Mr. Marcy, from Vattel, draws no distinction between the acts of private persons and those of the agents of a foreign government.

Bynkershœck, in his treatise on the law of war, (*chap.* 22,) considers, the question, "whether a prince may, *in the* 300
territory of a friendly sovereign, enlist private individuals, who are not soldiers, and make use of them in war against his own enemies." He says: "It is certain that if a prince prohibits his subjects from transferring their allegance and entering into the army or navy of another sovereign, such sovereign cannot with propriety enlist them into his service; but where no such probibition exists, (as is the case in most of the countries of Europe,) it is lawful, in my opinion, for the subject to abandon his country, immigrate into another, and there serve his new sovereign in a military capacity. 301

"It is lawful, I repeat it, if there is no law that prohibits it, for a subject to change his condition and transfer his allegiance from one sovereign to another. The writers on public law are all of this opinion; nor does Grotius dissent from them, but he adds, that expatriation is not lawful among the Muscovites, and we know that it is unlawful also amongst the English and Chinese!" * * *
"If it is lawful for a subject to pass under the dominion of another prince, it must be so likewise for him to seek the means for procuring an honest livelihood, and why may he not do it by entering into the land or sea service? 302
In the United Provinces there is certainly no law to prevent it; and many Dutchmen, formerly, as well as within my own recollection, have served other sovereigns, by sea as well as by land.

"When I speak of other sovereigns, I only mean those who are in amity with us."

* * * "If, therefore, our subjects, whose assistance we do not want in time of war, and who are not pre-

303 vented by any law from transfering their allegiance, may lawfully hire out their military services to a friendly prince, why may not also that friendly prince *enlist soldiers in the territory of a friendly nation?* Where it is lawful to let out to hire, it is also lawful to hire, and why should it not be equally so to contract for the hiring of soldiers in the territory of a friend, as to make any other contract and carry on any kind of trade."

He answers the objection, that the soldiers thus hired, may possibly be employed against their own sovereign, by saying, "that we are only to attend to the state of our
304 country at the time, and ought not to look so far into futurity. Nor do I see any difference between enlisting men and purchasing gun powder, ammunition, arms and warlike stores, which may certainly be done by a friendly sovereign in our country, and which he may also use afterwards against us." * * * "I am of opinion, therefore, that the same law which obtains as to the purchase of implements of war, must apply in like manner to the enlistment of soldiers in the territory of a friendly nation," unless there is a legal prohibition. He mentions
305 that there is such a prohibition in the United Provinces.

Bynkershœck's doctrine is not that enlistments may be made in a neutral country without the permission of the sovereign, but that (if that permission be obtained) the objections often raised to the practice are insufficient. Neither of the belligerents can complain of it, if partiality be not shown, and if the practice be not a novel one.

Whether Bynkershœck's opinion be sound or not, no objection can be raised, even by the most captious, against the right to publish advertisements in a free neutral country
306 stating the terms on which foreigners resident there will, on emigrating to another country be received into the service of any of the belligerents, that is to say, if there be no positive law prohibiting such advertisements.

It will perhaps be said that citizens of the United States, whether native or naturalized, should not be permitted to expatriate themselves and enlist in foreign service, because they might be opposed to each other. But this consideration will not appear to be entitled to any weight, when we reflect upon the fact that in this republic men from all parts

of Europe are encouraged to absolve themselves from their allegiances, and are enlisted in the armies of the republic, and may indeed be compelled by this government to fight against their native country. 307

Vattel, *Book* 3, *ch.* 2, *sec.* 13, examines the question, "whether the profession of a mercenary soldier be lawful or not? or whether individuals may, for money or any other reward, engage to serve a foreign prince in his wars?" He says, "This question does not to me appear very difficult to be solved. They who enter into such engagements, without the express or tacit consent of their sovereign, offend against the duty of subject. But if their sovereign leaves them at liberty to follow their inclination for a military life, they are absolutely free. Now, every man joins himself to whatever society he pleases, and which to him appears to him most advantageous. He may make its cause his own, and espouse its quarrels." 308

In *The United States* vs. *Wyngall*, it was held by the Supreme Court of the State of New York, in the year 1843, 5 *Hill's Rep.*, 22, that "there is no statute or principle of public policy which forbids the enlistment of aliens into the army of the United States." 309

Per Cur., p. 22. "It is supposed, however, that independently of the statute, there is such an unfitness in an alien enlisting in our army, thus obliging himself to fight perhaps against his own country, that the act is criminal by the law of nations. We were not referred to any publicist who has advanced such an opinion, nor are we aware of any. There is nothing in the law of nations which denies to a subject the right of expatriation. On the contrary, the right is asserted by all approved writers on that law; sometimes indeed under qualifications, but every man must in effect be his own judge, whether he will continue subject to the government under which he was born, or transfer his allegiance to another. Hardly any nation in the civilized world, whose subject has expatriated himself, would at this day claim to treat him, even in time of war with his adopted country, as still bound by his original obligations. I speak not of the common law, nor of any that is merely local to the country of his first residence, but of the rules which govern the intercourse of nations in their corporate 310

311 capacity. (*See Vattel, B.* 1, *ch.* 19, *sec.* 220 *to* 226. *Du Ponceau's Bynkershœck, chap.* 22, *p.* 175.) Emigration, enlistment, and taking the soldier's oath, is effectually a change of allegiance. Though it do not confer all the rights of citizenship, it is a naturalization *quoad hoc;* and if the expatriation be *bona fide*, there is nothing contrary either to law or morals in the soldier fighting against his original country, should a war break out between that and the one into whose service he has chosen to enter. Being domiciled in the latter for any purpose, his native country would not, in time of war, discriminate between him and
312 his neighbors. The person and effects of each would be alike exposed to the violence and ravages of the conflict, and both would be equally entitled to defence and protection from his adopted country. Who would deny that under such circumstances, he might properly render assistance of any kind toward the common defence?

But whether he may resist his own country or not, he may enlist in a foreign service, binding himself in general terms and acting accordingly, so long as his country is at peace with the state to which he engages himself. The
313 right to do so much, even without an intent to transfer his allegiance, has always been recognized in practice, and forms a familiar head in the works of publicists. Vattel pronounces it to be always lawful, many times laudable; and he defines the obligations which spring out of the relation thus created. (*Vattel, B.* 3, *c.* 2, *s.* 13 *and* 14.)

It has been said that the project of enlisting in the British Provinces emigrants from the United States, was ill conceived and impracticable, on account of the material pros-
314 perity of the people of this Republic. On this point the New York Evening Post (March 5th, 1856,) makes the following remarks:

"It was the most natural thing in the world that when Great Britain wanted soldiers, she should have bethought herself of a country which had sent out so many warlike expeditions against nations with which it was at peace, which abounded with men of a roving, adventurous spirit, and the government of which had so very recently given an example of its contempt for the obligations of neutrality. Here they deemed it easy, by the exercise of a little

quiet dexterity, to collect recruits for their army in the East. They tried the experiment, and, to their surprise, found those who were employed in this service watched and prosecuted." 315

The fact is that at this time there were many thousands of able-bodied men in New York and other large cities of the U. S., emigrants from Ireland and Germany, out of employment and entirely destitute. And but for the latitudinarian construction put upon the act of Congress by the Pierce administration, several regiments could easily have been obtained in the way proposed. It may be here observed that the distress was by no means confined to emigrants, though it was from that class that the recruits were expected to come. 316

An unprejudiced enquirer can scarcely fail, after a careful perusal of the correspondence under review, to come to the conclusion, that in no respect whatever can the conduct of the British Government be justly complained of by the Government of the United States. It even appears doubtful whether the complaint has been prosecuted in good faith, for it seems difficult to escape the conclusion that the real object of the President throughout the correspondence has been to pick a quarrel with England, to be turned to account in the event of a defeat of the Allies in the war with Russia. If the Allies had been compelled to raise the siege of Sebastopol, and if that had been followed by the defection of Austria, it is not improbable that the United States would have been found enrolled amongst the supporters of Russia. 317

As matters now stand, there is but little probability of a rupture between England and the United States; but it is evident, from the captious spirit displayed by the latter in this correspondence, that the continuance of peace depends upon the question, whether a convenient opportunity shall present itself to this Government for joining the enemies of Great Britain. At all events a *casus belli* will never be deemed wanting by this Government so long as the control of affairs remains in the hands of men who have got up the tissue of absurdities, misrepresentations, quibbles, and inconsistencies displayed in the above correspondence. 318

319 The reply, on behalf of the British Government, to Mr. Marcy, will probably not follow that gentleman through all his verbose special pleading. It may be presumed that Lord Clarendon has not sufficient leisure to write a treatise by way of answer to that of Mr. Marcy, and will be content to expose the elaborate fallacies of the latter by reiterating a few plain statements of facts and propositions of law.

A few words from Mr. Crampton would not be amiss in relation to the exact period when the new and peculiar doctrine as to seduction and sovereign rights was first broach-
320 ed by Mr. Marcy, and as to the previous conversations between those two gentlemen on the subject of the proposed enlistments in the British Provinces of foreigners emigrating from the U. S. for that purpose.

The withdrawal, or dismissal, of Mr. Crampton and the accused Consuls, will by no means settle the questions in controversy.

This Government has demanded, "*as a part of the satisfaction* due to it from Great Britain, that the men who had been *enticed*, contrary to law, from the United States
321 into the British Provinces and there enlisted into Her Majesty's service, should be discharged." (Fo. 146.)

Indemnity for the past and security for the future, are required. (Fo. 155.)

England is required to admit the soundness of Mr. Marcy's last construction of the act of Congress, and the unsoundness of his *first* reading of the same, although this is in accordance with the plain meaning of the act and the judicial interpretation thereof. Next, the soundness of the new point of international law lately discovered by Mr. Cushing, must be admitted.

322 And after doing so, it must be acknowledged by Great Britain that if a law be made in the United States, forbidding persons here to go abroad to enlist in foreign service, those persons cannot be enlisted within the British dominions without a violation of international law, (fo. 132) but that the laws of England, forbidding British subjects to enter into foreign military service are void, so far as regards the United States, it being competent for the Government of the latter to absolve British subjects from their allegiance.

It is quite likely that there will be some slight demur to 323
all this. Indeed, it may not be very rash to surmise, that if peace be proclaimed in Europe, we shall find the Pierce administration resting content for awhile with the diplomatic triumph which they have achieved by such a vast display of learning and acuteness, and willing to leave for a more fitting opportunity the task of enforcing a complete submission to these doctrines.