

**REMARKS ON THE ENGLISH
ENLISTMENT QUESTION:
WITH AN ABSTRACT OF THE
CORRESPONDENCE THEREON**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649443826

Remarks on the English Enlistment Question: With an Abstract of the Correspondence Thereon
by R. W. Russell

Except for use in any review, the reproduction or utilisation of this work in whole or in part in any form by any electronic, mechanical or other means, now known or hereafter invented, including xerography, photocopying and recording, or in any information storage or retrieval system, is forbidden without the permission of the publisher, Trieste Publishing Pty Ltd, PO Box 1576 Collingwood, Victoria 3066 Australia.

All rights reserved.

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form or binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

www.triestepublishing.com

R. W. RUSSELL

**REMARKS ON THE ENGLISH
ENLISTMENT QUESTION:
WITH AN ABSTRACT OF THE
CORRESPONDENCE THEREON**

©

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. 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.

3 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 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 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)

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 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

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 Government :—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 af-
 forded 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 im-
 plying 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 state- 11
 ment in this letter before referred to, that "the Govern-
 ment of Great Britain, with extraordinary inattention to the
 grave aspect of its acts, namely, the flagrant violation of
 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 in-
 fringe our municipal laws;" and he continues: "But if the
 British Government has, by ingenious contrivances, succeed-
 ed 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, se- 12
 condly, that such acts constitute a violation of "our sove-
 reign rights as a nation."

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 par-
 ties 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 infor-*
mation 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.

- 13 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*

- 14 *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.

- 15 (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-

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