I.

ARGUMENT

OF

THE UNITED STATES,

DELIVERED TO

THE TRIBUNAL OF ARBITRATION

AT

GENEVA,

JUNE 15, 1872:

JUNE 10, 1872.

SIR: We have the honor to hand you herewith the argument prepared by us as counsel of the United States, in order that, in pursuance of Article V of the treaty of Washington, it may be presented in their behalf to the tribunal of arbitration constituted by that treaty.

We have the honor, sir, to be your obedient servants,

C. CUSHING.
WM. M. EVARTS.
M. R. WAITE.

J. C. BANCROFT DAVIS, Esq.,
Agent of the United States.

ARGUMENT.

I.—INTRODUCTION.

Argument presented in accordance with provisions of treaty of Washington.

By the fifth article of the treaty of Washington, it is provided that, "it shall be the duty of the agent of each party, within two months after the expiration of the time limited for the delivery of the counter case on both sides, to deliver in duplicate to each of the said arbitrators and to the agent of the other party a written or printed argument, showing the points and referring to the evidence upon which his government relies."

The undersigned have had the honor to receive the instructions of the Government of the United States to prepare, and place in the hands of the agent of that Government, the argument on its part, contemplated by this article of the treaty, in order to its submission to the tribunal of arbitration, as in said article is provided.

In execution of this duty, thus intrusted to them by their Government, they respectfully present the following argument on behalf of the United States, conformed to the requirements, in this respect, of the provisions of the treaty under which it is submitted.

Before entering upon the argument in the due order of its presentation and development, we may be permitted, with some advantage to the correct understanding of the precise service which we hope to be able to render to the arbitrators, in the discharge of the arduous and responsible duty which they have undertaken, to point out the character and extent of the discussions on the part of the two contending nations, which have already been laid before the tribunal.

The respective cases and documents.

In the Case of the Government of the United States and in that of Her Britannic Majesty's government, delivered to the tribunal on the fifteenth day of December last, are carefully set forth, in considerable fullness of detail, the principal matters of historical fact, of legal proposition, and of supporting evidence and authorities, which make up the body of the controversy submitted to the judgment of the tribunal by the high contracting parties to the treaty of Washington. In the seven volumes of proofs which accompany the Case of the United States, and in the four volumes which hold a like relation to the Case of Great Britain, are collected, with much else that is pertinent and important, the documents of the diplomatic treatment of the specific controversy, from the commencement of the American rebellion to the conclusion of the treaty, exhibiting, in the most authentic form, the real nature of the differences between the two nations, as they showed themselves in the immediate presence of the events which gave rise to them.

Counter cases.

In the Counter Cases of the two governments, delivered to the tribunal on the fifteenth of April last, the deliberate criticisms of the adverse parties upon the respective original cases have already advised the arbitrators wherein there is a substantial concurrence between them in their estimates of the facts and the law of the matter in

judgment, and wherein opposite or qualifying opinions are insisted upon, or are reserved for fuller treatment in the argument provided for in the fifth article of the treaty. The volumes of proofs which have been presented with the Counter Cases seem designed either to supply what was thought wanting in the original exhibition of proofs, or to meet the contentions raised by the respective adverse original Cases of the two governments.

The issues to be determined are now settled.

It may be assumed, then, that these volumes of proofs, and the Cases and Counter Cases of the two governments, not only present all the materials necessary or useful for the complete intelligence and just determination of this great controversy by the tribunal, but have, in a great measure, reduced the disputation between the parties and the responsible deliberations of the arbitrators within some definite and established limits.

To ascertain these limits and verify them to the approval of the tribunal, and to confine the subsequent discussion rigidly within them, we venture to think should be a leading purpose of this argument. If that purpose shall be successfully adhered to, and if we shall be able to array in a candid temper and with circumspect and comprehensive pertinency, the considerations that should control the adjudication of this tribunal upon the issues thus raised for its solution, we may hope to render, in aid of the deliberations of the arbitrators, in some degree, the service which it was the object of the fifth article of the treaty to provide.

If, however, we should have the misfortune to fail in our estimate of the true points of the controversy, or in our efforts to meet them, as they shall present themselves to the greater learning and intelligence of the tribunal, such error or misconception will not be remediless. The arbitrators may at any time before their deliberations are closed, "if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by counsel upon it." With any such requirement it will be, at all times and in any form, both our duty and our pleasure to comply, and we shall hold ourselves in readiness to attend upon the wishes of the arbitrators in this regard.

II.—THE CONTROVERSY SUBMITTED TO ARBITRATION.

The arbitrators already acquainted with the general nature of the facts.

The counsel of the United States, in propounding to this august tribunal the cause in controversy between that nation and Great Britain, which its deliberations are to explore and its award to determine, have no occasion to feel that the celebrated publicists who represent the friendly nations which take part in this great arbitration are less instructed, already, in the general character and history of the public transactions which are to form the ground-work of the argument, than the eminent public servants of the contending parties, who are joined with them in the composition of the tribunal.

If the publicity and prominence of these events, so recent in the memory, did not themselves preclude any such suggestion, the ample record supplied by the documents presented to the tribunal by the two governments has put the arbitration in full possession of all facts, and their evidence, which, in the judgment of any one, can be thought relevant to the discussion of the principal and collateral issues, to which the judgment of the tribunal will need to be applied. In pursuing, therefore, our immediate purpose of attracting the attention of the tribunal to the elements of the controversy arising between the two nations, upon the actual events which gave it birth, and as it has been shaped for the investigation and determination of the tribunal by the contending parties in the treaty by which its jurisdiction is created, we shall have occasion to consider no matters which are either obscure or disputable, and none which may not be drawn with the same confidence from the documents laid before the tribunal by Great Britain, as from those presented by the United States.

In suppressing an armed insurrection the United States exercised belligerent powers, and prevented insurgents from carrying on maritime war from their own resources.

I. When the great social and political interests developed by the institution of slavery, as it existed in the United States, carried the popular agitations beyond the bounds of obedience to the laws and loyalty to the Government of the United States, as set forth in Part II of the Case of Great Britain and Part II of the Case of the United States, it was not long before a great population occupying a large territory was drawn into an armed insurrection, and, as a next step, pushed into a military rebellion against the authority of the Government. The strength and menace of the attempted revolt soon grew to such proportions that the Government had recourse, in dealing with these rebellious hostilities urged against it, to its undoubted right of superadding to its peaceful authority of sovereignty the exercise of belligerent powers. It met the military array of the rebellion with the loyal forces of the nation, and used all the means for its suppression which the wealth, the courage, and the patriotism of the people placed at its disposal. Itself a great maritime power, both in naval strength and commercial prosperity, the resources of the rebellion included neither. The Government, by prompt, adequate, and successful exhibition of its naval strength, shut up the whole sea-board of the territory in rebellion by a blockade, and was proceeding to cut it off from all opportunity of es-

tablishing foreign commerce, or maintaining maritime hostilities, from its own resources.

The right to do this unquestioned. Other nations no parties to the conflict.

II. The principles of the law of nations recognize this necessity which the vigor and magnitude of rebel hostilities may impose upon the government of a nation, and attribute to a resort to its belligerent powers, in such case, no consequences affecting the attitude toward each other of the parties to these hostilities. Other nations are, manifestly, no parties to the conflict, and cannot become such parties, unless by choice, which is *intervention*, or by the enlargement of the theater of hostilities, or their actual course, forcing upon their notice such questions as specifically arise for solution.

Abstinence of intervention by another power is not "neutrality."

The effect of *intervention* is unequivocal. If attempted in aid of the belligerent sovereign, but without his request, it is officious, and may be unwelcome. If in aid of the rebels, against the sovereign, it is an espousal of their cause, and an act of war against the belligerent sovereign. In such a case, no situation of *neutrality* arises.

It is a maintenance of previously existing relations.

But, if a nation abstains from intervention in the conflict between a sovereign nation and its rebels, it is inaccurate to treat this *abstinence* as *neutrality*. It is simply an unbroken maintenance of the international relations which subsisted between the two powers before the domestic peace of one of them suffered disturbance. It would shock the moral sense of civilization to speak of the United States as standing *neutral* between Great Britain and the Sepoy rebellion in India, or of Great Britain as standing *neutral* between the commune of Paris and the government of France.

Other powers have to decide in such case only whether they acquiesce in the exercise of belligerent powers by the sovereign.

But, when the actual hostilities in which a government is engaged, in the suppression of a rebellion, encroach upon the established relations between it and friendly powers, the latter have presented to them the question whether they will, each for itself, acquiesce in the exercise of belligerent powers, as sought to be made effective against the rebels, at the cost of inteference with the peaceful rights of commerce and intercourse which subsisted before the nation was brought into this stress by its domestic rebellion.

Non-acquiescence is intervention.

But this question, under the rules governing the subject in the modern law of nations, can have but one answer. The nation which has superadded belligerent rights to those of sovereignty, is entitled so to do, and resistance by other nations to the fair consequences of such rights upon their interests, is a violation of the law of nations, and an unjust intervention in the domestic conflict.

Questions arising beyond territorial limits of the sovereign should be decided as they arise.

In regard to the hostilities prosecuted against the sovereign by the rebel, if they should pass beyond the bounds of intestine war and obtrude themselves upon the notice of other sovereign powers, the actual occurrences which raise the question of their treatment by such powers may be trusted, also, to solve it. If the rebels should exhibit their strength by a blockade of any of the ports of the nation, or should keep the seas with cruisers, and assert the right of search, of capture, and of prize condemnation, against the ships or cargoes of another nation, the power thus affected will determine for itself how it will treat this new disturber of its peaceful rights and interests. It has no *antecedent* obligations of friendship, of treaty, or of recognition, even, which compel it to acquiesce, under the law of nations, in the legitimacy of this violence. It may pierce by force the rebel blockade which impedes its commerce, resist and resent the search and capture which threaten its maritime property, and reject

the asserted prize jurisdiction as working no change of title. And it may do all this, without, in the least, taking part in the hostilities of the government against the rebels or espousing its cause, but simply in maintenance of its own rights and interests.

Undoubtedly, it is competent for other nations upon whose notice the hostilities of rebellion, revolution, or revolt may obtrude themselves, to yield such assent and submission to their exercise, to the disturbance of their own rights and to the disparagement of their own interests, as, under sentiments of justice, fair play, or humanity, they may find an adequate motive for.

This course tends to, and naturally results in, a tacit toleration of this violence as in the nature of belligerent power, because it is practiced in that sense and under that justification by those who exert it. Placed, then, between the contending parties in the attitude of obligatory submission to the belligerent right of the sovereign, and of voluntary tolerance of the belligerent practices of the rebels, other nations fall gradually into an equality and impartiality in dealing with the rightful belligerent power and the *de facto* belligerent force, which assimilates itself to the *status* which, between two rightful belligerent powers, is called, in the law of nations, *neutrality*.

Such course secures impartiality and when justified by results, an equality between contending parties, which resembles what is known as neutrality when exercised between rightful belligerents.

This principle of public law, which we here insist upon, that is to say, the *right* of a sovereign engaged in the suppression of rebellion, to superadd belligerent powers to its resources of peaceful authority in dealing with the hostilities urged against it, and to expect from other nations an acceptance of the situation, as toward the sovereign so engaged, with the same consequences to themselves as if the same belligerent powers were put forth in solemn war, had been definitely held by the Supreme Court of the United States in a celebrated judgment pronounced by Chief Justice Marshall in the case of Rose *v.* Himely, in the year 1808. The case arose upon the exercise of belligerent powers by France in attempting to reduce the revolt of the island of San Domingo, and is reported in 4 Cranch, (Sup. Ct. Rep., p. 241.) It was only necessary, therefore, for the inferior courts of the United States, and for the Supreme Court on final appeal, in establishing this principle of public law in its operation upon other nations, when the United States were exercising belligerent powers in suppression of their domestic rebellion, to follow the reason and authority which had been accepted, as a rule of the law of nations, in this early case. We refer to the judgment in the "prize causes," reported in 2 Black's Sup. Ct. Rep., p. 635.

This principle recognized by the United States Supreme Court.

III. The only notable instances, before the rebellion in the United States, perhaps the *only* instances, in which friendly nations have been placed by this obligatory recognition of belligerent rights in the sovereign, and voluntary tolerance of belligerent powers in rebels, in an attitude assimilated to neutrality, have been where the conflict was of subject states seeking to recover their freedom, or between revolted colonies and the mother country, where independence in position, in boundaries, in interests, in population, and in destiny, already existing, in fact the only tie which remained to be severed was that of political sovereignty, and the severance of that tie was the only motive, object, operation, and expected result of the revolt. In such cases, the tendency on the part of other nations to adopt a practical neutrality is greatly prompted and facilitated by the political nature of the conflict, and the further consideration that the intervening seas, the common possession of all nations, are, necessarily,

Previous instances in point.

included in the theater of the war, and must become, more or less, the theater of actual hostilities. From such conflicts, every feature of domestic or intestine rebellion is necessarily absent. They are as dissimilar as are the throes of natural birth from the violence and horrors of mutilation. This difference asserts itself, at once, to the public judgment of other nations, and, scarcely later, to the contending parties, and thus, by the progress of the conflict, a habit of practical neutrality is easily established. But this habit imports nothing inconsistent with the principles we have insisted upon. The allowance by other nations of belligerent methods to the sovereign, is obligatory, systematic, and as his right. The allowance of them to the rebels is voluntary, *pro re natâ* always, and of sufferance.

Belligerent powers belong to the sovereign of right; to the rebel, of sufferance.

IV. In the first moments of the conflict, and when its confinement, as a domestic rebellion, within the territory of the United States, was successfully engaging the attention and the naval strength of the Government, Great Britain intervened, and assumed, by an act of sovereignty, exercised by the royal prerogative of the Crown as the representative of the nation in its foreign relations, to exalt the rebel hostilities to the same level with the belligerent rights of the United States in their suppression, and to place itself in the same attitude in reference to the conflict, as if it were a public war waged by two nations in their sovereign right, towards whom, under the law of nations, Great Britain was under equal obligations, independent of any choice, to respect their belligerent operations and maintain neutrality.

Conferring belligerent rights on the insurgents by Great Britain was an intervention.

The circumstances under which this celebrated proclamation of the Queen of Great Britain, of the judgment of that nation upon, and its purposes toward, the conflict pending within the territory of the United States between that Government and the rebels against its authority, was made, are set forth in Part II of the Case of the United States, pp. 43–65, and in Part II of the Case of Her Majesty's government, pp. 4–9. Our present purpose in referring to it is, merely, as being the first step taken by Great Britain in its relations to the conflict in the United States, which, as they showed themselves throughout its course, and have formed the subject of diplomatic correspondence between the two governments, and, finally, of the first eleven articles of the treaty of Washington, have given rise to the contentions between Great Britain and the United States which are submitted to this tribunal. It is only in its bearings upon these issues that we now comment upon its character and consequences, interpreted by the law of nations, as exhibited in the actual events that followed it.

The Queen's proclamation.

(*a.*) This proclamation, issued in London on the 13th of May, 1861, was purely voluntary, and anticipated the occurrence of any practical occasion for dealing with any actual rebel hostilities, which had invaded, or threatened to invade, the peace or dignity of Great Britain, or the security of the maritime or other property or rights of its subjects.

Was voluntary and anticipatory.

(*b.*) It was not required, in the least, in reference to the relations of Great Britain to the United States. They were fixed by intercourse, by friendship, and by treaties, in all general aspects, and by the principles of the law of nations, applicable to the new situation, which we have already insisted upon.

Was not called for by the relations between the two governments.

(*c.*) It had no justification in the public acts by which nations announce to their people and to the world their sovereign purpose to take part in, or to hold aloof from, a public war

Had no justification.

waged between sovereign powers, and thus enable their subjects to conform their conduct to the purpose, thus proclaimed, of their government. The existence of a civil war within the territory of a nation, certainly does not call for a proclamation from other powers that they do not espouse the cause of either party to this domestic strife.

(*d.*) The intervention of this public act of Great Britain produced certain important changes in the moral and in the legal relations in which its subjects, its commerce, its wealth, all its manifold resources, if aroused to active interference in aid of the rebellion, would stand, in the public opinion of the world, in the municipal jurisprudence of the realm, and in the doctrines of the law of nations.

And changed the legal relations between Great Britain and the insurgents.

So long as the rebellion in the United States remained unaccredited with belligerent rights, all maritime warfare in its name would have borne the legal character of piratical violence and robbery. It would have been justiciable as such everywhere, and punishable according to the jurisdiction to which it was made amenable. "With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and, therefore, are universally subject to the extreme rights of war." (Ld. Stowell, in case of the Le Louis, 3 Dods. Adm. Rep., 244, 246.) "As every man, by the usage of our European nations, is justiciable in the place where the crime is committed, so are pirates, being reputed out of the protection of all laws and privileges, to be tried in what parts soever they are taken." "They are outlawed, as I may say, by the laws of all nations, that is, out of the protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and to root them out." "That which is called robbing upon the highway, the same being done upon the water is piracy." "When this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy." (Sir Lionel Jenkins, as cited in 1 Phill. Int. Law, §§ 356, 358.) The interposition of the Queen's proclamation relieved from the terrible proscription, pursuit, and punishment thus denounced, all who should take the seas in aid of the rebellion against the United States, and exposed them, at the worst, to the municipal penalties of the foreign-enlistment act, or the fate of prisoners of war.

Its effect upon the act of carrying on war on the high seas.

So, too, all commercial contracts, including the raising of money by loan, the building or fitting of vessels, the sale of arms or munitions or other supplies in aid of insurrection or domestic rebellion in a foreign state, are absolutely condemned as immoral in the law of England, and are proscribed by the courts of justice. (3 Phill. Int. Law, § 151; Forsyth Cons. Law, pp. 236–7.) The effect of the Queen's proclamation was to relieve all such contracts in aid of the resources of the rebellion from this proscription for immorality, which, otherwise, the law of England applied to them.

Its effect upon commercial contracts.

V. This public act of the government of Great Britain, of such profound import in its bearing upon the conflict which the United States were addressing themselves to, opened to the minds of the British people entirely new relations, moral, political, and legal, with the pending hostilities, and was followed by an active, constant, and systematic contribution from their inexhaustible financial and commercial resources, in supply of the deficiencies of the rebels, and in reduction of the disparity of strength between them and their Government. The methods and the results, in their nature and magnitude, of this participation of the people of Great Britain in the

It was followed by systematic contributions in aid of the insurgents.

domestic conflict which raged in the United States, are presented to the notice of the tribunal in the Case of the United States, are attempted to be qualified or justified in the Case and Counter Case of Her Britannic Majesty, and are displayed in the volumes of evidence submitted in support of the opposite contentions of the parties before the arbitrators. They were the subjects of contemporaneous correspondence between the two governments, in detail, at every stage of their occurrence, and, since the suppression of the rebellion, the adverse views of the governments concerning them, by the fortunate result of a long, a difficult, and an honorable and amicable course of negotiation, have been put in the way to a final settlement by the judgment and award of this tribunal. It only remains for us, under this division of the argument, to direct the attention of the arbitrators to the situation in which the governments of Great Britain and the United States stood toward each other, and to the subjects of difference between them, at the close of the domestic hostilities in connection with which they had arisen, and to the disposition of those differences sought to be accomplished by the treaty of Washington and the friendly deliberations of the arbitrators.

The United States suffered great injuries.

VI. The United States, notwithstanding the incompetency of the resources of the rebellion in these regards, and the adequate power and success of the Government in suppressing any such efforts, suffered during the conflict, in a very great degree, the injuries which can only be inflicted by hostile commerce and maritime warfare. In the three forms which make up the struggles of maritime war, foreign trade in contraband, violation of blockade, and prize capture, the United States were seriously vexed throughout their conflict, although they were engaged with an adversary which had no commerce, could build, equip, arm, or man no ships, kept open no ports, could furnish no convoy, offer or meet no naval battle, bring no prize *infra præsidia* or under judicial condemnation. By these maritime hostilities, their immense naval force was kept constantly occupied for four years, and their commercial marine was plundered, burnt, and driven from the seas. Their carrying trade in the commerce of other nations was swept away from them, and, in their own commerce, placed at a disadvantage in rates of insurance and freight. In a word, without a maritime enemy or a naval war, the United States suffered the stress, the injuries, and the losses which only naval belligerency could inflict.

Which resulted from aid and assistance originating in British jurisdiction.

VII. In looking for the agencies and operations which had wrought these disasters, the public history of the hostilities, and not less the definite and comprehensive proofs laid before this tribunal, exhibit them as worked out by schemes and enterprises of British origin, maintained by British resources, and placed at the service of the rebellion, under whatever motive of cupidity, of sympathy with that cause, or of enmity to the United States. Systems of British contraband trade, and organized merchant fleets for the breach of the blockade established by the United States; the British possessions, neighboring to the theater of the domestic war, made depots of hostile trade and covers for naval war—

> "accommoda fraudi
> Armorumque dolis;"

ships of war, British-built, armed and supplied, swift and vigilant for the destruction of peaceful commerce, swift and vigilant in elusion of armed pursuit—these were the agencies and operations which the rebel hostilities wrought into the service of their maritime war, and these the au-

thors of the wide-reaching disasters which the maritime property of the United States was subjected to.

VIII. A further examination shows, upon definite and unequivocal evidence, that these powerful and effective contributions of British aid to the pressing occasions of the rebel war, did not spring from the spontaneous and casual, disconnected, and fluctuating motives or impulses of mercantile adventure or cupidity, nor were their immense and prolonged operations sustained and carried forward by any such vague and irresponsible agencies. They were induced, stimulated, and directed by official and authentic efforts, in the name and by the authority of the rebel administration, represented by established agencies and permanent agents within the territory of Great Britain. It was an occupation of that territory, and an application of the manifold means which the boundless resources of its people supplied, by agents of the different departments of the rebel administration, there to conduct the preparations of its hostilities against the United States for which its original internal resources did not furnish the means, and which the belligerent power of the United States could prevent from being introduced or carried on within it. It was this system which is justly described, in the Case of the United States, and exhibited in the proofs, as equivalent, within the sphere of its operations, to using Great Britain as "the arsenal, the navy-yard, and the treasury of the insurgent confederates."

This aid was organized, systematic, and official.

IX. If the actual method and agencies of these disasters were thus manifest, the magnitude and permanence of the injuries suffered from them by the United States are, also, indisputable. These injuries were *specific*, in the shape of private losses and public expenditures, capable of somewhat accurate ascertainment and computation. They were also *general*, (1,) in the burdens upon the commerce of the United States produced by this naval warfare, and of which the enhanced premiums of insurance furnish some measure, and (2,) in the reduction of the mercantile marine of the United States, and the tansfer of its trade to the British flag, which the public records of its tonnage will disclose. Besides injuries in these forms, the influence of these maritime hostilities upon the conduct, severity, length, and burdens of the war forced upon the Government of the United States, in maintenance of its authority and in suppression of the rebellion, constitute another head of injuries suffered by the United States from the prosecution of these maritime hostilities. In the aggregate, then, these injuries make up the body of the grievance which the United States have suffered from the incorporation into the rebel strength and war of the aforesaid agencies and operations, contributed thereto from the interests, the sympathies, and the resources of the people of Great Britain.

Nature of the injuries inflicted on the United States.

X. Upon a survey of the whole field of the international relations which had been maintained toward it by other friendly powers during the severe trials through which it had passed, the Government of the United States found no occasion to occupy itself with any grievance or to lament any disasters which it had suffered from foreign aid to the strength and persistence of the rebellion from any other source than from the action and agency of the people of Great Britain. If other great powers had followed, at greater or less intervals, the precedent of the governmental act of Great Britain in its proclamation, and issued formal declarations in the same sense, these governments had, essentially, kept the action of their subjects within the obligations of abstinence from the contest in obedience

No other nation instrumental in inflicting them.

to the requirements of the law of nations. The United States, therefore, had no duty to themselves and their citizens, and none to their position among the nations of the world, and in maintenance of justice and friendship in the future, which called upon them to assert any rights or redress any wrongs growing out of the conduct toward them of any other power than Great Britain.

They form the subject of this arbitration.

XI. The course of the public correspondence between the governments of Great Britain and the United States, whether contemporaneous with or subsequent to the events to which it related, disclosed so wide a difference in the estimates which the two governments placed upon the rights and duties of satisfaction and indemnity for the injuries the United States had suffered, and for which they were demanding redress from Great Britain, as to produce a situation of the greatest gravity and difficulty. Although it may be confidently hoped that the more general acceptance of the obligations of justice between nations has made it more and more difficult for two such governments to find themselves in the necessity of appealing to the resort by which, as Vattel expresses it, "a nation prosecutes its right by force," yet unappeased complaints of the magnitude and severity of those preferred by the United States against Great Britain do not easily pass into oblivion without some form of adjudication. Whether or not the resources of international justice shall ever furnish to nations a compulsory tribunal of reason that will supersede what Lord Bacon calls "the highest trials of right, when princes and states that acknowledge no superior upon earth shall put themselves upon the justice of God for the deciding of their controversies by such success as it shall please Him to give on either side," it has proved to be within the compass of the public reason and justice of the two powerful, enlightened, and kindred nations, parties to this great controversy, to subtract it from the adjudication of "war, the terrible litigation of states." By amicable negotiations which have produced the treaty of Washington, the high contracting parties have reduced their differences to a formal and definite expression and description of the claims for satisfaction and indemnity by Great Britain which the United States insist upon, and that nation contests, and have submitted to the award of this august tribunal the final determination of the same.

The provisions of the treaty of Washington respecting the arbitration.

The Case of the United States sets forth the text of those articles of the treaty of Washington which provide for the constitution of the tribunal of arbitration, and ascertain and state the subject-matter for its jurisdiction, the measure of its powers, and the form and effect of its authorized award. In the full light of the negotiations which led to and attended this consummation, and which are laid before the tribunal, in the Cases and proofs of the contending parties, the arbitrators will find no difficulty in affixing to the terms of the treaty their true and certain meaning.

We desire, by a few observations, to attract the attention of the arbitrators to some principal features of these provisions of the treaty.

Description of the claims.

I. The situation giving occasion to and intended to be met by these provisions of the treaty is described as "differences that have arisen between the Government of the United States and the government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama claims.'" The only other recital bearing upon this subject, before the operative provisions of the treaty for the disposition of these differences, is to the effect that "Her Britannic Majesty has authorized her high commissioners and

plenipotentiaries to express in a friendly spirit the regret felt by Her Majesty's government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by these vessels."

Upon these premises thus recited, and "in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims," the operative arrangement to that end proceeds in the definite statement that "the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels and generically known as the 'Alabama claims,' shall be referred to a tribunal of arbitration," which this article of the treaty then proceeds to constitute.

II. The sixth article of the treaty imposes certain rules or principles, as the law, accepted by the concurrence of the high contracting parties, according to which the actual matters in difference between them are to be adjudicated by the tribunal; and, accordingly, it is provided that, "in deciding the matters submitted to the arbitrators, they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case." The article then proceeds to give the text of the rules, which it is not necessary here to repeat.

The rules of the treaty.

The only further instruction in regard to the disposition of the matters submitted to arbitration, under the rules prescribed for their determination, is to be found in the seventh article of the treaty, in its provision that "the said tribunal shall first determine as to each vessel separately whether Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to each of the said vessels."

The provisions of Article VII.

Upon this principal determination by the tribunal, it is also provided, in Article VII, that, "in case the tribunal find that Great Britain has failed to fulfill any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it," and, in the tenth article, that, "in case the tribunal finds that Great Britain has failed to fulfill any duty or duties as aforesaid, and does not award a sum in gross, the high contracting parties agree that a board of assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure as to each vessel, according to the extent of such liability as decided by the arbitrators."

The effect of the award that shall be made by the arbitrators under the authority conferred upon them by the treaty, is given by the ninth article, which provides that "the high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration and of the board of assessors, should such board be appointed, as a full, perfect, and final settlement of all the claims hereinbefore referred to; and further engage that every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the tribunal or board, shall, from and after the conclusion of the proceedings of the tribunal or board, be con-

Effect of an award.

sidered and treated as finally settled, barred, and henceforth inadmissible."

From these arrangements of the treaty, it is apparent:

The measure of indemnity claimed.

(1.) That the high contracting parties have found, (in the public act of the government of Great Britain, expressing the regret of that government for certain occurrences in the past, and in the joint public act of the two governments, by which they agree to observe, "as between themselves in future," the rules established as the law of this arbitration, "and to bring them to the knowledge of other maritime powers, and to invite them to accede to them,") the means of reducing the measure of the complaint and demand for indemnity, insisted upon by the United States, and contested by Great Britain, before this tribunal, to all the claims of the United States "growing out of acts committed by" the described "vessels and generically known as the 'Alabama claims.'"

The claims preferred are national.

(2.) That these claims are all preferred by the United States as a nation against Great Britain as a nation, and are to be so computed and paid, whether awarded as "a sum in gross," under the seventh article of the treaty, or awarded for assessment of amounts, under the tenth article.

The authority of the tribunal absolute for their determination.

(3.) That the authority of the tribunal is absolute and final between the two nations, and comprehensive of all the claims falling within the terms of the submission, "whether the same may or may not have been presented to the notice of, made, preferred, or laid before the tribunal or board of assessors."

Its award will be final.

(4.) That by force of this treaty, and the execution of the jurisdiction it confers upon this tribunal of arbitration, the controversy between the two nations, arising upon the conduct of Great Britain during the late rebellion in the United States, will find its final solution in the award of the arbitrators, and will be forever removed as an occasion of estrangement or disturbance of peace.

III.—GENERAL DISCUSSION OF QUESTIONS OF LAW.

We arrive, now, in sequence of the foregoing exposition of the origin, history, and nature of the pending controversy between the United States and Great Britain, to statement of the reclamations of the American Government against the British, comprised in the Treaty of Washington, and explanation of the grounds of public law on which those reclamations are founded, and in view of which the United States ask the judgment of this High Tribunal.

The principle of these reclamations is fully set forth in the Case and Counter Case submitted by the United States.

But a summary restatement thereof is necessary here in order to give completeness to the present Argument, so that it shall constitute a connected and logical *résumé* of the whole controversy between the two Governments.

Contentions of the United States in regard to the failure of Great Britain to maintain neutrality.

I. The United States maintain, as matter of fact, that the British Government was guilty of want of due diligence, that is, of culpable negligence, in permitting, or in not preventing, the construction, equipment, manning, or arming, of confederate men-of-war or cruisers, in the ports of Great Britain or of the British colonies; that such acts of commission or omission, on the part of the British Government, constituted violation of the international obligations of Great Britain toward the United States, whether she be regarded in the light of the treaty friend of the United States, while the latter were engaged in the suppression of domestic rebellion, or whether in the light of a neutral in relation to two belligerents; that such absence of due diligence on the part of the British Government led to acts of commission or omission, injurious to the United States, on the part of subordinates, as well as of the ministers themselves; and that thus and therefore Great Britain became responsible to the United States for injuries done to them by the operation of such cruisers of the Confederates. That is to say, to adopt in substance the language of the treaty of Washington, the United States maintain as fact—

First, that the British Government did not use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of every vessel which it had reasonable ground to believe was intended to cruise or carry on war against the United States, and also did not use like diligence to prevent the departure from its jurisdiction of every vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, that the British Government did permit or suffer the Confederates to make use of its ports or waters as the base of naval operations against the United States, or for the renewal or augmentation of military supplies or arms, or the recruitment of men, for the purpose of war against the United States.

Thirdly, that the British Government did not exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of its aforesaid obligations and duties as respects the United States.

Responsibility resulting from such failure.

II. The United States further maintain that, it appearing as fact that Great Britain did fail to fulfill *all* her duties as aforesaid toward the United States, (Article VII,) thereupon and thereby, in virtue of the Treaty of Washington, and of the express compacts therein contained, Great Britain is *bound* by reason of her liability arising from such failure (Article X) to pay to the United States a sum, in gross or on assessment, for all the reclamations referred to this Tribunal, or such amount or amounts on account of said liability according to the extent thereof as decided by the Tribunal.

Scope of the submission.

III. The United States find, on inspection of the Treaty of Washington, that Great Britain has submitted to this Tribunal "all the said claims" of the United States "growing out of the acts" of the confederate cruisers aforesaid, (Article I,) without limitation, qualification, or restriction; and that, in pursuance of such general submission, this Tribunal is to examine and decide, by the express compact of the treaty, "all questions" which shall be laid before it on the part of the Government of the United States, as well as that of Great Britain. (Article II.)

Meaning of the language, "all claims growing out of the acts of the cruisers."

IV. The United States further find as fact on inspection of the negotiations which preceded the treaty of Washington, that the Secretary of State of the United States declared that the American Government, in rejecting a previous convention, "abandons neither its own claims, nor those of its citizens;"[1] that the claims thus referred to were specifically set forth in a subsequent dispatch of the same minister, as follows:

> The President is not yet prepared to pronounce on the question of the indemnities which he thinks due by Great Britain to individual citizens of the United States for the destruction of their property by rebel cruisers fitted out in the ports of Great Britain.
>
> Nor is he now prepared to speak of the reparation which he thinks due by the British Government for the larger account of the vast *national* injuries it has inflicted on the United States.
>
> Nor does he attempt now to measure the relative effect of the various causes of injury, whether by untimely recognition of belligerency, by suffering the fitting out of rebel cruisers, or by the supply of ships, arms, and munitions of war to the Confederates, or otherwise, in whatever manner.[2]

V. The United States farther find as fact that the President, in his annual message to Congress immediately preceding the conclusion of the Treaty of Washington, and which indeed constituted the inducement thereto, spoke as follows:

> I regret to say that no conclusion has been reached for the adjustment of the claims against Great Britain, growing out of the course adopted by that Government during the rebellion. The cabinet of London, so far as its views have been expressed, does not appear to be willing to concede that Her Majesty's Government was guilty of any negligence, or did or permitted any act during the war by which the United States has just cause of complaint. Our firm and unalterable convictions are directly the reverse. I therefore recommend to Congress to authorize the appointment of a commission to take proof of the amounts and the ownership of these several claims on notice to the representative of Her Majesty at Washington, and that authority be given for the settlement of these claims by the United States, so that the Government shall have the ownership of the private claims, as well as the responsible control of all the demands against Great Britain. It cannot be necessary to add that, whenever Her Majesty's Government shall entertain a desire for a full and friendly adjustment of these claims, the United States will enter upon their consideration with an earnest desire for a conclusion consistent with the honor and dignity of both nations.[3]

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[1] Mr. Fish to Mr. Motley, May 15, 1869. Documents annexed to Case of the United States, vol. vi, p. 1.

[2] Mr. Fish to Mr. Motley, September 25, 1869, Documents as above, vol. vi, p. 13. (See the commentary on these national or (so called) indirect damages by Mr. Abbott, in Lord Clarendon's dispatch, in Appendix to the British Case, N. A., No. 1, 1870, p. 19.)

[3] Papers relating to foreign relations of the United States, December 5, 1870, p. 9.

VI. We, the counsel of the United States, insist, therefore, that such, n their magnitude, nature, and scope, are the claims submitted to the Tribunal by the express tenor, the spirit as well as the language, of the treaty of Washington, as particularly set forth in the Case and Counter Case of the United States.

To these reclamations the British Government, in its Case and Counter Case, responds: Contentions of Great Britain.

First, taking issue with the United States on the question of imputed negligence, or disregard, in other respects, of the rules of public law laid down in the treaty of Washington.

Secondly, alleging as legal theory, that, in the incidents brought under review, the British Government acted in conformity with, and in obedience to, the provisions of a certain act of Parliament, commonly known as the foreign-enlistment act, and that, by the law of nations, or the public law of Great Britain, the obligations of the British government toward the United States are to be measured *in execution* by that act of Parliament.

Thirdly, the British Government, in justification or extenuation of its own imputed delinquencies in the premises, adduces certain incidental considerations, derived from the history and jurisprudence of sundry foreign governments, including the Government of the United States.

VI. As to the first of these points, the counsel of the United States propose to exhibit to the Tribunal a complete and authentic analysis of the great body of pertinent proofs contained in the documents annexed by the two governments to their respective Cases and Counter Cases; and to argue thereon that such documents conclusively establish the main fact of the violation by the British Government of the rules of duty stipulated by the treaty of Washington. Proposed course of argument.

VII. As to the second and third of said points, the counsel of the United States will in the sequel submit considerations which, as they conceive, conclusively establish the legal rights of the United States in the premises, notwithstanding such defensive arguments as are adduced by the British Government.

VIII. Preparatory to which, we submit to the wisdom of the Tribunal the following general considerations of law applicable to the defense set up by the British Government. General considerations of law.

1. We maintain, and undertake to prove, that, even if the provisions of the foreign-enlistment act were the measure and limit of the international duties of the British Government in the premises, still, on the facts, there was culpable negligence on the part of Great Britain. The British Government did not do, by way of prevention, or repression, or punishment, all which that act permitted and required. Great Britain guilty of culpable negligence even when measuring its duties by the foreign-enlistment act.

2. But the international duties of Great Britain are wholly independent of her own municipal law, and the provisions of the above-cited act of Parliament do not rise to the height of the requirements, either of the law of nations or of the rules of the Treaty of Washington. That act makes no *adequate* provision, either of prevention or punishment; and it contains no provision whatever of *executive* prevention, without which no government can discharge its international obligations, or preserve its own international peace. International duties independent of municipal law.

3. If, as a question of local administration, that act was deficient in powers, it was the international duty of Great Britain, as a government, to pass a new act conferring on its ministers the requisite powers. Defects of foreign-enlistment act.

4. In the domestic institutions of Great Britain, no constitutional obstacles existed to prevent the enactment of such new act of Parliament; for, to affirm the existence of such obstacles would be to deny to Great Britain the capacity and right to subsist in the family of nations as a co-equal sovereign State.

They might have been remedied.

In fact, Great Britain has since then, in view of political complications on the continent of Europe, enacted a new act of Parliament, such as she ought before to have enacted, and that on the suggestion of the United States.

5. The British Government throughout argues these questions as questions of *neutrality*. We deny that they are such; we deny, as hereinbefore stated, that Great Britain had right to interpose herself as a professed neutral between her treaty ally, the United States, and the rebels of the United States. But we place ourselves, at present and in this relation, on the premises of the defensive argument of the British Government. And, standing on those technical premises, the counsel of the United States maintain that the neutrality of a government, as respects two belligerents, is a question of international, not municipal, resort. Its legal relations are involved in the question of the rights of peace and war.

These are not questions of neutrality.

Hence, to depend upon punitive municipal laws for the maintenance of international neutrality, is itself neglect of neutral duty, which duty demands preventive interposition on the part of the executive power of the State.

6. Great Britain, therefore, on the narrow and inadmissible premises of her own defense, was legally responsible to the United States for the acts of the cruisers in question, whether as for non-execution of her then existing act of Parliament, which was want of due diligence, or for undertaking to depend on that act, which not only involved want of due diligence, but implied refusal to perform the duties of a neutral.

Great Britain legally responsible to United States.

IX. The counsel of the United States will have occasion to refer to some of these points in the sequel, when they come to present, in full and affirmatively, their own views of the international obligations of Great Britain, and of her delinquency in the premises as respects her special obligations toward the United States.

Sir R. Phillimore's authority cited.

Meanwhile, in vindication of the suggestions in this behalf now made by us, we submit to the consideration of the Tribunal appropriate extracts from the great work on "International Law," by Sir Robert Phillimore, of whom it is little to say that, apart from his eminence as a judge and as a statesman, he is *facile princeps* among the authorities of this class in Great Britain.

We cite as follows:

There remains one question of the gravest importance, namely the *responsibility of a state for the* acts of her citizens, involving the duty of a neutral to prevent armaments and ships of war issuing from her shores for the service of a belligerent, though such armaments were furnished and ships were equipped, built, and sent without the knowledge and contrary to the orders of her government.

The question to what extent the state is responsible for the private acts of its subjects (*civitasne deliquerit an cives?*) is one of the most important and interesting parts of the law which governs the relations of independent states.

It is a maxim of general law that, so far as foreign states are concerned, the will of the subject must be considered as bound up in that of his sovereign.

It is also a maxim that each state has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance.

The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the government of which they are subjects.

A government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign state.

A government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality to which the state is bound.[1]

The government of the owner of the captured property may indeed call the neutral to account for permitting a fraudulent, unworthy, or unnecessary violation of its jurisdiction, and such permission may, according to the circumstances, convert the neutral into a belligerent.[2]

In fact, the maxim adverted to in a former volume of this work is sound, viz, that a state is, *prima facie*, responsible for whatever is done within its jurisdiction; for it must be *presumed* to be capable of preventing or punishing offenses committed within its boundaries. A body-politic is therefore responsible for the acts of individuals, which are acts of actual or meditated hostility toward a nation with which the government of these subjects professes to maintain relations of friendship or neutrality.[3]

The relation of neutrality will be found to consist in two principal circumstances:

1. Entire abstinence from any participation in the war.
2. Impartiality of conduct toward both belligerents.

This *abstinence* and this *impartiality* must be combined in the character of a *bona-fide* neutral.

The *neutral* is justly and happily designated by the Latin expression *in bello medius*. It is of the essence of his character that he so retain this central position as to incline to neither belligerent. He has no *jus bellicum* himself; but he is entitled to the continuance of his ordinary *jus pacis*, with, as will presently be seen, certain curtailments and modifications, which flow from the altered state of the general relations of all countries in time of war. He must do nothing by which the condition of either belligerent may be bettered or strengthened, *quo validior fiat*.

It is for him perpetually to recollect, and practically to act upon, the maxim, "*Hostem esse qui faciat quod hosti placet.*"[4]

We do not overstate the point when we say that these texts, from such an authority, but recently published, (1871,) and in full view of the present controversy between the two governments, compose, not only a complete answer to the legal doctrines of the Case and Counter Case of Great Britain in this behalf, but affirmation of the larger premises of argument assumed by the United States.

1. Sir Robert Phillimore avers that, so far as foreign States are concerned, the will of the subject is bound up in that of his sovereign.

Now, among the persons who equipped, manned, and armed the cruisers of the confederates in question, were *liege subjects* of Great Britain.

True it is that these liege subjects of Great Britain were hired to perform the acts in question by rebels of the United States, and the British Government strangely supposes that, because these rebels were citizens of the United States, therefore Great Britain was not responsible for their acts. The argument implies that foreigners in Great Britain are independent of the local jurisdiction. That, of course, is an error. But, if it were otherwise, the British Government would remain responsible for the acts of the Lairds, and all other British subjects, including Prioleau, an American converted into a British subject for the special object of violating the laws of Great Britain, and committing treason against the United States with impunity, under shelter of the flag of Great Britain.

2. Sir Robert Phillimore, at a blow, strikes to the earth the whole fabric of the British Case and Counter Case, in declaring that no government has a right to set up the deficiency of its own municipal law as excuse for the non-performance of international obligations toward a foreign State.

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[1] Phillimore's International Law, vol. i, preface to 2d ed, p. 21.
[2] Phillimore's International Law, vol. iii, p. 228.
[3] Phillimore's International Law, vol. iii, p. 218.
[4] Phillimore's International Law, vol. iii, pp. 201–2.

3. He lays down the rule that a government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects, (including commorant or transient aliens,) whom *it does not prevent* from committing injury to a foreign State. This proposition is not presented by Sir Robert Phillimore as based on any express treaty stipulation, but as being the doctrine of the law of nations. As such it serves to construe the "due diligence" of the Treaty of Washington.

4. In expounding the proposition of the impartiality requisite in the character of a *bona-fide* neutral, he declares that such neutrality is violated by any act which *betters* or *strengthens* one of the belligerents, or by any act which *gratifies* one of the belligerents.

It needs only to consider the analysis of the facts hereinafter presented, to see how much the British Government did to strengthen and to gratify the rebels of the United States.

5. Finally, he affirms that if a government, professing neutrality, permits a fraudulent, unworthy, or unnecessary violation of its jurisdiction, such permission may, according to the circumstances, *convert the neutral into a belligerent.*

That is the position of the counsel of the United States on this point; and it may be shown by signal examples in the previous history of Great Britain, that she herself has acted on this principle with respect to governments which, professing neutrality, did acts to strengthen or favor belligerent enemies of hers.

Legal theory of the United States respecting questions at issue.

X. We now proceed to develop more distinctly the nature and basis of the legal theory of the United States in regard to the questions at issue between the two governments.

We commence by laying down a series of propositions, which are, as we conceive, axioms or postulates of the public law of Europe and America.

Right to make war.

1. The right to engage in war, and so to become a belligerent, is inherent in the quality of sovereignty.[1]

2. We assume, also, that the right to maintain peace and to stand neutral whilst other sovereigns are belligerent, is inherent in the quality of sovereignty.

Right to give cause for war.

3. As the right of war and peace is inherent in sovereignty, so is the right to give cause of war to another sovereign.

What may be cause.

4. Such cause of war may consist in acts of professed warfare, as the invasion of a foreign country in arms, the reduction of its cities, the military devastation of its territory, the capture of its merchant-vessels, or the armed encounter of its ships of war.

5. Or such cause of war may consist in acts equivalent to professed warfare, as in affording aid to one belligerent against another, such belligerents being each sovereign; or by prematurely conceding the quality of belligerence or of independence to the rebels of another sovereign; or by aiding such rebels in fact, while pretending friendship for their sovereign.

Neutrality.

6. True neutrality between belligerents consists in holding absolutely aloof from the war in fact and in truth, as well as in profession. To profess neutrality, and not to observe it, is disguised war.

War; what it is.

7. War is by land or sea; and war by sea may consist in combats between ships of war, or in the capture of merchant-vessels and their cargoes.

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[1] Vattel, *Droit des gens*, éd. Pradier-Fodéré, tome ii, p. 337, (note.) Cauchy, *Droit maritime*, tome i, p. 18; tome ii, p. 14. Martens, *Droit des gens*, éd. Vergé, tome ii, p. 198.

It is not material to this point that certain of the States of Europe have agreed to abstain from the issue of letters of marque. Even those powers continue to maintain the belligerent right to capture private merchant-vessels and their cargoes, by the agency of men-of-war. The United States have refused to enter into any such agreement, in the conception that it is only adapted to governments which see fit to incur the expense of maintaining a large military marine. The United States have been content to agree with other powers in according immunity from any capture to private property on the sea; but they insist, as they think rightfully, that, if private property is to remain subject to capture, it should be subject to capture by letter of marque as well as by the regular naval forces of the belligerent, letters of marque having the same relation to regular forces in war on the sea, as volunteer levies have to the regular forces in war on land.[1]

Sales of arms and contraband of war.

8. The law of nations, as now practiced, permits the sale of arms by private merchants of the neutral sovereign, and their exportation and transportation for the use of the belligerent, subject to capture as contraband of war,[2] although the tendency of modern opinion is to contend that such acts of sale are contrary to the true principles of neutrality.

Many of the modern regulations of different governments on the subject of neutrality, contained in the documents annexed to the American Counter Case, sustain this view. (See the dispatch of Lord Granville to the Prussian minister of October 21, 1870, on the subject, defending the right of such sales.[3])

But it is admitted universally, in theory as well as in practice, that international law does not permit the equipment of men-of-war, or letters of marque, or their re-armament, or the enlistment of men for the military marine of the belligerent, in the ports of the neutral.

Dispatch of armed vessels.

9. The pretended neutral, who, as a government, expedites vessels, or with culpable negligence permits the expedition of vessels from his ports, to cruise against one of the belligerents, becomes thereby belligerent in fact, and responsible as such to the injured belligerent.

Responsibility of sovereign for violation of neutrality.

10. In questions of international peace or war, and in all which regards foreign States, the will of the subject (or of commorant aliens) is merged in that of the local sovereign; that sovereign is responsible if he permits or knowingly suffers his subjects (or commorant aliens) to perpetrate injury to a foreign State; and, apart from other and direct proofs of permission, or knowledge and sufferance, the responsibility for any injury is fixed on such sovereign, if he depend on municipal means of enforcing the observance of international obligations, instead of acting preventively to that end in his prerogative capacity as sovereign.

Constitutional inabilities cannot be pleaded in answer to a charge of such violation.

11. It is not admissible for any sovereign to plead constitutional difficulties in such an emergency; to do which implies surrender of the rights, as well as abnegation of the power, of a sovereign, and confers on the injured power the right to occupy by force the territory of the incompetent power, and

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[1] See Cauchy, *Droit maritime*, tome ii, pp. 374 and 404. *Idem*, Du respect de la propriété privée dans la guerre maritime, *passim*.

[2] Bynkershoek, *Questiones Juris Publici*, l. i, c. 22. The "*Santissima Trinidad*," Wheaton's Reports, vol. vii, p. 340. Phillimore, vol. iii, p. 321. Pistoye et Duverdy, *Traité des prises maritimes*, t. i, p. 394.

[3] Documents with the message of President of the United States, December, 1870.

to impose upon his subjects that preservation of order which he professes constitutional inability to preserve.

"*Culpâ caret, qui scit, sed prohibere non potest*" is indeed one of the rules of private right; "but," says Sir Robert Phillimore, "such an avowal, actual or constructive, on the part of the unintentionally injuring State, justifies the injured State in exercising, if it can, that jurisdiction by foreign force, which ought to be, but cannot be, exercised by domestic law."[1]

12. But no independent State exists, either in Europe or America, encumbered with constitutional incapacity in this respect.

Violations of neutrality are issues of war and peace. Whatever power in a state declares war, or makes peace, has jurisdiction of the issues of peace and war, including, of course, all violations of neutrality.

In point of fact, such authority is not a quality of despotic government only: it belongs equally to the most constitutional government, as appears, for instance, in the political institutions of constitutional republics, like Switzerland and the United States, and in constitutional monarchies, like Italy and Brazil.[2]

The counsel of the United States submit these propositions as undeniable and elementary truths.

Yet the Case and Counter Case of the British Government assume and persistently argue that the sole instrument possessed by the British Government to enforce the performance of neutral obligations at the time of the occurrences in question, was a particular act of the British Parliament.

Every government in Europe or America, except Great Britain, asserts and exercises authority to prevent its liege subjects (and *à fortiori* commorant aliens) from doing acts which tend to involve it in a war with any other government.

But the British Government maintains that the sovereign State of Great Britain and Ireland, the imperial mistress of the Indies, the proudest in fame, the richest in resources, and (including her transmarine possessions) the most populous of the great States of Europe, does not possess constitutional power to prevent mercenary law-breakers among her own subjects, or bands of desperate foreign rebels, commorant on her soil, from dragging her into acts of flagrant violation of neutrality, and thus affording, or tending to afford, just cause of war to other foreign States.

And such is the defense of Great Britain in answer to the reclamations of the United States.

13. It would be difficult to find any other example of a great State defending itself against charges of wrong by setting up the plea of its constitutional incompetency and incapacity to discharge the most commonplace duties of a sovereign State.

Alleged constitutional inability of Great Britain examined.

Great Britain is not in that condition of constitutional disability which her ministers pretend.

We find, on the most cursory observation of the constitution of Great Britain, that the declaration of war, the conclusion of peace, the conduct of foreign affairs—that all these things are in Great Britain elements of the prerogative of the Crown.

We cannot believe and do not concede that in all these greater prerogative powers there is not included the lesser one of *preventing* unauthorized private persons from engaging in private war against a friendly

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[1] Phillimore's International Law, vol. iii, p. 218.

[2] See Appendix to the American Counter Case, cited or commented on hereafter.

foreign State, and thus committing Great Britain to causes of public war on the part of such foreign State.

If the exercise of such power by the Crown involves derogation of the rights of private persons which ministers fear to commit, they should obtain a proper act of Parliament, either for antecedent general authorization or for subsequent protection, all which is within the scope of the theoretic omnipotence of Parliament. The British ministers do not scruple to suspend the privileges of the writ of *habeas corpus*, whether with or without previous parliamentary authorization, and whether in the United Kingdom or in the Colonies, on occasion of petty acts of rebellion or revolt, that is, the case of *domestic war: à fortiori* they should and may arrest and prevent subjects or commorant foreigners engaged in the commission of acts of foreign war to the prejudice of another government.

Is it possible to deny or to doubt that British ministers might as well do this as the ministers of Switzerland, Italy, Brazil, and the United States, in like circumstances?

Has the Queen of the United Kingdom of Great Britain and Ireland less executive power than the President of the United States? And if she have less, could not the deficient power be granted to her by act of Parliament, just as readily as similar executive power, in this relation, has been granted to the President of the United States by their Congress?

14. But there is no such deficiency of power in the British ministers; their own conduct in pertinent cases proves conclusively that they have the power, and can exercise it, when they choose, without affording occasion of any serious doubt or denial of the constitutionality of their acts.

Be it remembered that the excuse of the British Government, for omitting to detain the Alabama and other confederate cruisers, was the alleged want of power to act outside of the foreign-enlistment act.

And yet, subsequently to the escape of the Alabama from the port of Liverpool, on occasion of the construction in the ports of Great Britain of certain other vessels for the confederates, commonly spoken of as the Laird rams, the British Government seized them upon its own responsibility in virtue of the prerogative power of the Crown, and so prevented their departure to make war against the United States.

And what the ministers did on this occasion was fully justified in the House of Commons by Sir Roundell Palmer, the then attorney-general of Great Britain, in the following words:

> I do not hesitate to say boldly, and in the face of the country, that the government *on their own responsibility* detained them. They were prosecuting inquiries which, though imperfect, left on the mind of the government strong reasons for believing that the result might prove to be that these ships were intended for an illegal purpose, and that if they left the country the law would be violated and a great injury done to a friendly power. The government did not seize the ships; they did not by any act take possession or interfere with them, but on their own responsibility they gave notice to the parties interested that the law should not be evaded until the pending inquiry should be brought to a conclusion, when the government would know whether the inquiry would result in affording conclusive grounds for seizing the ships or not. If any other great crime or mischief were in progress, could it be doubted that the government would be justified in taking steps to prevent the evasion from justice of the person whose conduct was under investigation until the completion of the inquiry? In a criminal case we know that it is an ordinary course to go before a magistrate, and some information is taken of a most imperfect character to justify the accused's committal to prison for trial, the prisoner being remanded from time to time. And that course cannot be adopted in cases of seizing of vessels of this description; the law gives no means for that. And therefore it is that the government, on their own responsibility, must act and have acted in determining that what had taken place with

regard to the Alabama should not take place with respect to these ships, that they should not slip out of the Mersey and join the navy of the belligerent powers, contrary to our law, if that were the intention, until the inquiry in progress should be so far brought to a conclusion as to enable the government to judge whether the ships were really intended for innocent purposes or not.

The government were determined that the inquiries which they were making should be brought to a legitimate conclusion, that it might be seen whether those inquiries resulted in evidence or not of the vessels being intended for the confederates, and that in the mean time they would not permit the ends of justice to be baffled by the sudden removal of the ships from the river.

It is impossible that the case of the government can now be brought before the house; but the government have acted under a serious sense of their duty to themselves, to Her Majesty, *to our allies in the United States, and to every other nation with whom Her Majesty is in friendship and alliance, and with whom questions of this kind may be liable hereafter to arise.* Under a sense of that duty they have felt that this is not a question to be treated lightly, or as one of no great importance. If an evasion of the statute law of the land was really about to take place, it was the duty of the government to use all possible means to ascertain the truth, and to prevent the escape of vessels of this kind to be used against a friendly power. It was their duty to make inquiries, and to act if there was a good ground for seizure, taking care only to adopt that procedure which was justified by the circumstances.[1]

And well might Sir Hugh Cairns say, on that occasion, to the British minister: "Either our Government must contend that what they did in September (that is, in the matter of the Laird rams) was unconstitutional, or they ought to have done the same with regard to the Alabama, *and are liable.*"

But in truth these extraordinary professions of impotency, on the part of the British Government, are but additional proofs of the negligent spirit of that government in permitting or not preventing the expedition of the Alabama and other vessels, and the perilous consequences of which they had come to appreciate and to shrink from at the time of the arrest of the Laird rams.

15. There is another pertinent example in the modern history of Great Britain of the power of her ministers to arrest such expeditions when they have the desire.

We allude to the celebrated affair of the so-called Terceira expedition.

During the pendency of the civil war in Portugal on occasion of the disputed succession between Donna Maria and Don Miguel, certain Portuguese refugees, partisans of Donna Maria, sailed from England in transports ostensibly destined for Brazil, but, as was suspected, intended for Terceira, in the Azores. It was not pretended that the transports were fitted for war, and the Portuguese on board were unarmed. Nevertheless, the British ministers conceived that the expedition was one in violation of the neutrality of Great Britain.

Whereupon, they dispatched a naval force to pursue these vessels, and to prevent the persons on board from landing, either at Terceira, or at any one of the Western Islands; which was done, and the Portuguese were compelled to leave the waters of the Azores, and to take refuge in France.

It is to be noted that this act of force by Great Britain in the maintenance of her neutrality was done, not in the ports of Great Britain, or in her waters, but on the high seas, or rather within the waters of the Western Islands, and in the actual jurisdiction of a sovereign to whom the Portuguese in question professed and owed allegiance; for Terceira then acknowledged the power of Donna Maria.

No pretense existed here of action in subordination to the forms of the foreign-enlistment act, or any other act of Parliament. What was done, was done simply in virtue of the prerogative power of the Crown.

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[1] Documents annexed to the American Case, vol. v, p. 477.

The conduct of the ministers in this affair was earnestly discussed in both houses of Parliament, and was approved by both houses.

But it is remarkable, and pertinent to the present controversy, that neither in the House of Lords nor in the House of Commons was it maintained that the ministers had on this occasion overstepped the limits of *the constitution of Great Britain.*

The objection was, that the British Government had itself committed a breach of neutrality, in undertaking to intercept the transports on the high seas, or within the legitimate jurisdiction of one of the belligerents; and that the act was a violation of the sovereignty of the State to which the island of Terceira belonged.

We respectfully submit to this high Tribunal whether it is not idle to pretend that British ministers, possessing the constitutional power to pursue and arrest the Terceira expedition even on the high seas, for violating the neutrality of Great Britain, have no power to prevent, even within the ports of Great Britain, the expedition of men-of-war against the United States.[1] In fine, the British ministers, it is impossible to doubt, had the same constitutional power to arrest and detain the Alabama in the ports of Great Britain, imperial or colonial, as they had to arrest there the Laird rams; and they had the same constitutional power to arrest the Alabama, Florida, Georgia, and other confederate cruisers on the high seas, as they had to arrest there the Terceira expedition.

16. And the existence of this constitutional executive power serves to explain, what otherwise would be to the last degree inconceivable, that is to say, the omission, in the British foreign-enlistment act of 1819, to provide for executive action, as was done in the American foreign-enlistment act.

The prerogative power of the Crown.

In the United States, it was necessary to impart such executive powers to the President, because, according to the tenor of our Constitution, it does not belong to the President to declare war, nor has he final and complete jurisdiction of foreign affairs. In all that, he must act by the authority, or with the concurrence, as the case may be, of the Congress, or of the Senate.

In Great Britain, on the contrary, it appertains to the prerogative power of the Crown to declare war and to make treaties, either of belligerent alliance or of peace; and, how much soever in practice it may be customary for ministers to communicate with Parliament on these questions, it is not the less true that, constitutionally speaking, the prerogative power resides in the Crown.

17. The affirmative resolution of the British ministers to call this prerogative power into action for the sole purpose of elevating the rebels of the United States into the dignity of belligerents on a level with their own sovereign, and thus converting piratical cruisers into legitimate cruisers, and the negative resolution of the British ministers, in refusing to call into play the prerogative of the Crown, in order to give effect to their own professions of neutrality, injurious as even such professions were to the United States, in undertaking to place them and their rebels in the same category of international rights,—these two resolutions rendered it possible, as it would not otherwise have been, for the confederates to fit out cruisers in the ports of Great Britain: whereupon ensues responsibility of Great Britain for acts of the Confederates, in which, by false theory of action and negligence in fact combined, she participated to the prejudice of the United States.

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[1] See the facts of the Terceira expedition, Phillimore's International Law, vol. iii, p. 229.

IV.—MISCELLANEOUS CONSIDERATIONS.

The British Case and Counter Case are largely occupied with matters which are secondary, immaterial, not to say totally irrelevant, in the judgment of the counsel of the United States, but which, being seriously presented by the British Government, seem to require attention.

Many irrelevant matters in the British Case and Counter Case.

I. Much is said on the subject of the British foreign-enlistment act of 1819, of its assumed adequacy, of its value relatively to the similar acts of the United States, and of the comparative legislation, in this respect, of Great Britain and of other European States.

Its treatment of the British foreign-enlistment act of 1819.

All such considerations would seem to be foreign to the subject and beneath its dignity, when it is considered that laws of this nature, how much soever they may be locally convenient, yet do not serve to determine the duties of neutrality in the international relation of governments.

It is quite vain for the British Government to assert the sufficiency of the foreign-enlistment act of 1819. Its practical inefficiency was glaringly apparent on the face of all the relative diplomatic correspondence between Great Britain and the United States. The same insufficiency manifested itself in the legal proceedings in the case of the Alexandra in such degree as to throw contempt and ridicule upon the whole act. Quibbles of verbal criticism, fit only for insignificant things of mere domestic concernment, pervaded the opinions of the great judges of England in a matter closely affecting her international honor and foreign peace. It needs only to read the report of this trial to see how absurd is the hypothesis of the English Case and Counter Case, in arguing, that any question of peace and war, between Great Britain and other governments is to be determined according to the provisions of that act, and that in such a transcendent question the British ministers are under the necessity of floundering along in the flat morass of the meaningless verbosity and confused circumlocution of any act of Parliament. Well may Sir Robert Phillimore speak of "its loose phraseology and disjointed sentences."[1] Well might Baron Channell say of the language of the act, "more imperfect or faulty wording I can scarcely conceive."[2] We cannot understand by what strange perversion of reason it is that the British Government continues to maintain that its ministers were compelled to drift into the condition of foreign war rather than break free from the entanglement of the cobweb meshes of that act.

But, in fact, its inefficiency has been unequivocally admitted by the enactment, on the part of Great Britain, of the foreign-enlistment act of 1870, and by the official inquiry which preceded the passage of that act.

II. With similar sacrifice of the principal to the incident, and of the large to the minute, the British Government insists that the British act of 1819 is equal in efficiency to the American act of 1818. It is strange enough that the British Govern-

Its comparison between the British and American acts unjust.

[1] International Law, vol. i, p. 466.
[2] Documents annexed to American Case, vol. v, p. 440.

ment should make this suggestion in the presence of the documents contained in the appendix to the British Case, in which appears the report of the British minister at Washington, Sir Frederick Bruce, on the subject of the foreign-enlistment act of the United States, pointing out in detail the plain superiority of the American to the British act.[1]

The great difference between the two consists in the cardinal fact that the provisions of the British act are merely *punitive*, and to be carried into effect only by judicial instrumentality; whereas the American act is preventive, calls for executive action, and places in the hands of the President of the United States the entire military and naval force of the Government, to be employed by him, in his discretion, for the prevention of foreign equipments and foreign enlistments in the United States.

Thus deficient, the British act was valueless, except as, if occasion should arise, to make it serve as a pretext to cover, in diplomatic communication with other governments, indifferent, unfriendly, or hostile *animus* on the part of some British minister. In other respects, however, that is to say, in the narrow limits of its own theory of municipal legislation, the British act is utterly inferior to the American act. Sir Frederick Bruce clearly shows the numerous traits of superiority in the American act.[2]

Thus, in the United States, the Government not only derives aid in the administration of the law from the officers of the customs, who in Great Britain are the sole dependence in this respect, but it has local officers in the principal ports, both administrative and executive, whose action it commands; it may impose bonds of good behavior on the owner of suspected vessels; informers are entitled to a share of forfeitures, and the judicial proceedings have advantages not to be found in the British act.

All these things are trivial when considered in relation to the great international questions of neutrality, and of peace or war. But we are compelled to discuss such trivialities by the extraordinary persistence of the British Government in basing its defense on the very defects of its act of Parliament.

III. Of these differences between the American and the British acts, and of the singular deficiencies of the British act, the explanation is at hand. It is to be found in what English writers themselves delicately describe as the *prejudices* of Great Britain, or which can better be described as indisposition to appreciate fully the rights of other governments.

The Government of the United States has always been anxious to possess legislative powers sufficient for the performance of its duties as a neutral.

The United States encountered the question of their own right of sovereignty in the matter of foreign equipments and foreign enlistments, and the relation of that matter to their own peace and the rights of other governments, at the very commencement of their career as a sovereign State. They were placed, at the very outset, in presence of the state of universal warfare produced by the French revolution, being exposed especially to the extreme exigencies of France and of England. They adopted a foreign policy of peace and neutrality. They determined, if possible, not to be drawn into the vortex of war, which had swallowed up Europe and all European America. The Case of the United States has related with fidelity and with all due amplitude the measures, administrative and legislative, adopted by the American Government, under

[1] Appendix to the British Case, vol. iii, p. 67.

[2] Lord Clarendon. says Mr. Buchanan, in one of his dispatches, referred to our neutrality law of April 20, 1818, in terms of high commendation, and pronounced it superior to their own, *especially in regard to privateers.* (App. Am. Case, vol. iv, p. 69.)

the inspiration of President Washington, to maintain the rights of neutrality, in spite of aggression on both sides, which at length compelled the United States, in the defense of its neutrality, to encounter even war, first with France and afterward with Great Britain.[1]

Among these measures was the enactment of that act for the prevention of foreign enlistments and naval equipments, which, in all the steps of the present controversy, the British Governme nt itself cannot refuse to honor and applaud, and which in the process of time it imitated in its own domestic legislation.

The American Government, sincerely professing neutrality, spared no honorable steps to give effect to its professions and to demonstrate its good faith. Of its own initiation it amended its legislation, when defects therein became apparent to its observation; and it willingly accepted suggestions of amendment from friendly and unfriendly foreign powers. And it has steadily adhered to the doctrine of that legislation.

The American Government has introduced such amendments more than once at the suggestion of Great Britain, not deeming it wise in the sense of its own interests, or just toward other governments, to stand obstinately, as Great Britain has done in like circumstances, on confessedly defective legislation of neutrality, and scorning to pretend that to do justice to such suggestion would be in derogation of the sovereign dignity of the United States.

The British Government alleges that on a recent occasion the American *Government* indicated purpose to repeal or materially weaken its foreign-enlistment act. That is an error. Every member of the Congress of the United States has the right to initiate measures of legislation. No exclusive right in this respect belongs to the President, (that is, the executive Government.) The President of the United States has not proposed the repeal or the diminution of the American neutrality act. A member of the House of Representatives did propose some amendments to that act tending to weaken its force; but his proposition was not inspired by the Executive, and was not adopted by Congress.

Not only in its legislative measures, but in its diplomatic intercourse with other governments, the United States diligently and sedulously pursue the policy of neutral right, and especially the immunity of the ocean, by exerting themselves on all fit occasions to introduce these principles into its treaties with other governments. D. Carlos Calvo calls attention to a "curious document" published by the minister of marine of the French Empire, in 1854, which enumerates some, but not all, of the treaty stipulations of this class initiated by the United States.[2]

We find this document in Pistoye et Duverdy's *Traité des prises maritimes*, tome ii, p. 492, and cite some portions of it to show the estimation in which the neutral faith and the neutral diligence of the United States have been held in France:

Les journaux de France et d'Angleterre (says the document,) d'après ceux des États-Unis d'Amérique, parlent d'officiers russes envoyés à New York avec la mission ostensible de surveiller la construction de bâtiments à hélice pour le compte de leur gouvernement; mais en réalité, afin d'organiser dans les ports de l'union, au moyeu de lettres de marque délivrées au nom du gouvernement russe aux citoyens américains, des armements en course contre le commerce français et anglais pendant la guerre devenue imminente entre la France et l'Angleterre d'une part, et la Russie de l'autre. Le Morning Post rappelait récemment, à ce sujet que le droit conventionnel et la législation des États-Unis leur faisaient un devoir d'empêcher, et, au besoin, de punir de tels actes d'hostilité contre le pavillon d'une puissance en paix avec l'union. Ce journal citait même quelques traités dans lesquels l'acceptation que des citoyens américains feraient de lettres de marque étrangères pour courir sus aux navires de la puissance cosignataire, est assimilée à la piraterie et rendue passible du même traitement. On va donner

[1] Cauchy, *Droit maritime*, tome ii, p. 236 *et seq.*

[2] See Calvo's *Derecho Internacional*, tome ii, p. 181.

ici la nomenclature, aussi complète que possible, des conventions conclues par les États-Unis, et dans lesquels ce principe a été formellement consacré.

The document then refers to the American foreign-enlistment acts, and continues:

Le gouvernement américain a déjà eu l'occasion de montrer qu'il était décidé à remplir loyalement les obligations internationales qui lui sont imposées par cette législation. En 1838, lors du blocus des ports du Mexique et de la République Argentine par nos forces navales, le ministère de France, à Washington, ayant eu lieu de craindre qu'on armât dans les ports de l'union des corsaires munis de lettres de marque des gouvernements du Mexique et de Buenos-Ayres pour courir sus aux navires français, avait appelé sur cet objet l'attention du cabinet américain. Le secrétaire d'État, M. Forsyth, lui donna l'assurance que de tels armements, s'il s'en faisait, ne seraient point tolérés.

C'est à quoi le gouvernment fédéral ne se croirait sans doute pas moins essentiellement obligé, si l'on tentait aujourd'hui d'organiser, dans les ports américains, un système de course, sous pavillon russe, contre le commerce de la France et de l'Angleterre. Il suffisait, tout porte à le croire, de signaler de semblables projets à sa vigilance, pour qu'il s'empressât de prendre des mesures aussi promptes qu'efficaces, dans le but d'assurer la complète exécution des lois en vigueur. Le gouvernnmet qui, en 1823, proposait à l'Angleterre et à la Russie de conclure une convention pour déterminer, sur les bases les plus libérales, les droits des neutres en temps de guerre, et notamment pour la suppression de la course maritime, acte dont la France venait de prendre l'initiative à l'occasion de la guerre d'Espagne, ce gouvernement-là, disons-nous, ne peut qu'être disposé à conformer, en ce qui dépendra de lui, sa politique et sa conduite au sentiment honorable qui le portait alors à considérer comme opportun de "revendiquer et rehabiliter les lois de l'équité naturelle, et d'étendre en mer l'influence bienfaisante des préceptes de la charité chrétienne." (Note adressée par M. Middleton, ministre des États-Unis, à Saint Pétersbourg, au comte de Nesselrode, le 5 décembre, 1823.)

Disinclination of Parliament to legislate on the subject.

IV. In singular contrast with this policy of the United States has been the policy of Great Britain. She, one of the oldest maritime states of Europe, had no legislative prohibitions of private maritime equipment for hostile purposes, until long after such legislation existed in the United States. How did this happen? We may conceive the reasons of this, when we reflect upon the numerous piratical enterprises fitted out in former times in ports of Great Britain against the possessions of Spain in America, and the honor accorded to the chiefs of those expeditions, such as Drake and Hawkins; and when we reflect further that British legislation, in this respect, only commenced when most of the Spanish colonies in America had made themselves independent of Spain.

But, even then, it required all the official and personal authority of Mr. Canning, and of the government of which he was a member, to overcome the *vis inertiæ* of the prejudices in this relation so deeply rooted in the mind of Great Britain.

In reading the debates in the British Parliament on occasion of the passage of the act of 1819, it is notable, first, that the opposition to the enactment seemed to be absolutely unconscious of all those principles of international morality involved in the question; and secondly, that the opposition seemed incapable of looking beyond Spain and Spanish America, taking no thought of the duties of Great Britain toward other governments of Europe, and toward the United States.[1]

It is most interesting to see how, on this occasion, Mr. Canning towered above the other debaters, what clear perception he exhibited of the philosophy of the question, and what distinct knowledge of the true principles of international law, in contrast with the shallow arguments of even so eminent a person as Sir James Mackintosh.

Four years afterward the debate was resumed in Parliament, on a motion made by Lord Althorpe for the repeal of the foreign-enlistment act. On that occasion Mr. Canning again distinguished himself by the courage, the eloquence, the statesmanship, and the elevation of view, with which he combated the prejudices of his countrymen. He referred

[1] See Hansard's Parliamentary Debates, vol. xl, *passim*.

to the United States in language which every American may read with pride, and which is pertinent to the present line of observation on the part of the counsel of the American Government.

And, unfortunately for the good understanding of Great Britain and the United States, the British Government is not yet fully emancipated from servitude to the traditional national prejudices which obstructed Mr. Canning. For, as the Case and Counter Case of the British Government show, it still lags behind the United States in appreciation of the true principles of public law, which lie at the foundation of the relations of independent sovereign States.

Legislation of other countries.

V. The British Case, in strange misapprehension of the facts, assumes that municipal laws for the preservation of neutrality exist only in the United States and Great Britain. Meanwhile the report of the English neutrality laws commission, contained in the appendix to the British Case, exhibits in detail the legislation of this class adopted by most of the governments of Europe.

In the British Counter Case, it is true, the foreign laws of this class are at length recognized, but with refinements of imaginary distinction, which tend to leave some doubt in the mind whether the Counter Case does, or does not, admit the error of the Case. The Counter Case does not seem, even now, to see clearly that all these laws, whatever be the diversity of form or of nomenclature among them, are pervaded by one identical idea, namely, the prevention as well as punishment of acts of private persons, such as the enlistment of soldiers or mariners, or the expedition of men-of-war, or of letters-of-marque, in derogation of the local sovereignty, and tending to involve the local government in war with other governments.

Distinction between preventions and punishment.

Sir Robert Phillimore, himself a member of the commission, expresses the identity of theory and object in this relation between the laws of the United States and Great Britain, and those of other governments, as follows: "It appeared from evidence laid before the English neutrality laws commission, appointed by the Queen in 1867, (the recommendations of whose report are mainly incorporated in the present and recent statute,) that European States generally were furnished by their municipal law with the means of fulfilling their international obligations in this respect." [1]

But the indirect or implied retraction in the British Counter Case does not relieve us from the necessity of examining the legislation of other governments, and their executive action in the premises, because that examination will show that the general conscience of the world rejects the theory of the British Government, and conforms to that of the United States.

France.

(*a*) We commence with scrutiny of the actual legislation of France, because that legislation is the model of the modern legislation, in this respect, of many other governments.

The provision of the French Code Pénal is as follows:

ARTICLE 84. Quiconque aura, par des actes non approuvés par le gouvernement, exposé l'état à une déclaration de guerre, sera puni du bannissement; et, si la guerre s'en est suivie, de la déportation.

ARTICLE 85. Quiconque aura, par des actes non approuvés par le gouvernement, exposé des Français à éprouver des représailles, sera puni du bannissement.

The general commentaries we make on these two articles will apply to similar provisions of law of other governments.

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[1] International Law, vol. i, p. 467.

To the casual reader of them the first idea which suggests itself is their brevity, as compared with corresponding legislation of Great Britain and the United States.

But careful examination shows that they express in plain language the true object and theory of all such laws, which is to punish private persons who undertake acts of war by land and sea, in derogation of the sovereignty and in prejudice of the peace of their country; and that they do it effectually, but in terms of equal terseness and precision.

On the other hand, the English acts are so overloaded with a mass of phrases, alike unprecise and confused, with so much of tedious superfluity of immaterial circumstances, as if they were specially designed to give scope to bar chicanery, to facilitate the escape of offenders, and to embarrass and confound the officers of the government charged with the administration of law. Such indeed has been the ordinary complexion of the legislation of Great Britain, and this style of complex verbosity of legislation has unhappily been transmitted to the United States, although there it begins to encounter steady efforts of reformation, which are conspicuous in the legislation of many of the American States.

These are secondary considerations, however. The important point is, that neither the administrative nor the judicial functionaries of France, nor her legislators and statesmen, ever conceived that the provisions of her penal code were anything more than what they profess to be, namely, the means of punishing the crimes of private persons. Statesmen and legislators of France never imagined that these provisions of the penal code are the measure and limit of her soverign rights or of her sovereign duties. Incidentally those provisions may come in aid of executive action. But to punish individual wrong-doers does not prevent wrong-doing, save incidentally by admonition and example. Punitive legislation is one thing, preventive another; and the only effectual prevention of the wrongful acts of private persons, which tend to compromise the neutrality of a Government, is the summary act of forcible prevention of such deeds by the supreme authority of the Government. Such is the theory of the laws of France in this behalf, as it is of the laws of the United States.[1]

This appreciation of the articles of the French Code Pénal is confirmed by authoritative commentaries thereon, some of which are reproduced in the documents annexed to the American Counter Case.

Accordingly, it is to be remembered that no cruisers sailed from the ports of France to depredate, under the Confederate flag, on the commerce of the United States.

At the very commencement, all Frenchmen were forbidden by sovereign act "to take a commission from either of the two parties to arm vessels of war, or to accept letters of marque for a cruise, or to assist in any manner in the equipment or armament of a war-vessel, or privateer, of either of the belligerents."[2]

And when attempts were made by the Confederates to construct and equip cruisers in the ports of France, on complaint being made by the minister of the United States, the construction of these vessels was arrested; and when a builder professed that vessels under construction, with suspicion of being intended for the Confederates, were in fact intended for a neutral government, the French ministers required proof of such professed honest intention, and carefully watched the vessels to make sure that they should not go into the service of the Confederates.

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[1] See documents annexed to the American Counter Case, pages 803 *et seq.*
[2] See Documents, *ubi supra*, p. 912.

On this point we quote the language of the minister of marine, as follows:

> The vessels of war to which you have called our attention shall not leave the ports of France until it shall have been positively demonstrated that their destination does not affect the principles of neutrality, which the French Government wishes to rigidly observe toward both belligerents.[1]

Contrast this with the conduct of the British Government in like circumstances, as exhibited in the analysis of facts comprised in the present Argument, where it is shown with what incredible credulity the British Government accepted the false and deceptive statements of the criminal and mercenary ship-builders engaged in the violation or evasion of the laws of Great Britain.

It requires exercise of much candor to believe that the British ministers could have permitted themselves to be so grossly imposed upon, if they desired to know the truth. Had they done what the French Government did in like circumstances—if they had required the known tools of Confederates at Liverpool, as might well have been done in virtue of the provisions of the merchant shipping act, and, indeed, of the foreign-enlistment act, to make proof of pretended honesty of purpose,—the present controversy between the two Governments might not ever have arisen.

In like manner the conduct of France, regarding the remanning of Confederate cruisers in her ports, is in striking contrast with the conduct of the British Government in reference to the same subject-matter.

Italy.

(*b*) All the observations regarding the legislation of France apply, in substance, to the legislation of Italy,[2] and the regulations of the Government of Italy, including circulars of the minister of marine, and decrees of the King, all with distinct reference to the present controversy, are comprehensive, definite, and explicit in preventing, as they did prevent, any attempt of the Confederates to fit out cruisers in the ports of Italy, to abuse the right of asylum, or to cruise therefrom against the commerce of the United States.

All these measures, in form and effect, assumed preventive action by the executive, independently of the penal provisions of the municipal laws of Italy.[3]

The universality of laws of this class in the various countries of Europe is indicated by recent Italian juridical writers.[4]

Switzerland.

(*c*) In like manner, examination of the laws, regulations, and political action of Switzerland, in the matter of neutrality, shows their conformity in theory with that of the United States, and emphatically contradicts that of Great Britain.

The *Code pénal fédéral* of Switzerland is in this respect more concise and comprehensive even than that of France, for it inflicts punishment on all persons guilty in Switerland of committing any act contrary to the law of nations.[5]

Various ordinances of the Federal Council contain the most stringent provisions for the maintenance of the neutrality of the republic.[6]

A federal law of Switzerland regulates in the fullest manner, and with all proper restrictions, the enlistment of troops in the territory of the

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[1] See Documents, *ubi supra*, p. 912.
[2] Documents as above, p. 949.
[3] See Documents annexed to the American Case, vol. iv, p. 150 *et seq.*
[4] See Ferrarotti, *Commentario del codice penale*, vol. i, pp. 261–2; and Castelleri, *Legislazioni comparate*, p. 284.
[5] Document annexed to the American Counter Case, p. 1092.
[6] *Ubi supra*, p. 1105.

republic for foreign service, providing that it shall not be done without the express permission of the government; and various official reports demonstrate the active efficiency of the federal government in defending its neutrality, not merely by municipal laws, to be executed by the courts, but by the most complete executive action supported by the military force of the republic.[1]

(*d*) Similar conclusions apply to the legislation and the administrative action of the empire of Brazil: in considering which it will be convenient also to refer to the legislation and administrative action of Portugal, because of the similarity of their laws, and the more or less of common commentary thereon by juridical writers in one country or the other, of eminence and authority. Brazil.

The penal code of Portugal in this respect is substantially the same as that of France.[2] Portugal.

That of Brazil, while comprehending the same idea, is more complete in its development.

By that code it is a crime on the part of any individual to "provoke directly and by acts a foreign nation to declare war against the empire," or "if in case no declaration of war take place, but in consequence of such provocation there should be necessity for any sacrifice on the part of Brazil, or prejudice of her integrity, dignity, or interests."

By that code it is also made a crime to "commit, without order or authority of the government, hostilities against the subjects of another nation, so as to compromise peace, or provoke reprisals."

Furthermore it is declared to be piracy "to practice on the sea any act of depredation or violence, whether against Brazilians, or against foreigners with whom Brazil is not in a state of war."[3]

Both in Brazil and Portugal these provisions of the penal code are but incidental only to the executive action, which prevents by supreme authority any violation of their neutrality, either by subjects or by foreigners.

We beg leave to refer this high tribunal to the administrative regulations of the Brazilian Empire, for the enforcement of neutrality in all the ports of the Empire, in the amplest manner, by efficient action on the part of the imperial ministers, and of the provincial presidents.[4]

In the American Case, and the documents to which it refers, there is sufficient indication of the loyalty and efficiency with which the Brazilian Government maintained its sovereignty against the aggressive efforts of the Confederates.[5]

As to Portugal, we refer to the correspondence annexed to the American Counter Case, to show that she also never pretended that her neutral duty was confined to the execution of the provisions of her penal code. She also put forth the executive power of the Crown to prevent, repress, or repel aggressive acts of the Confederates in violation of her hospitality, or in the derogation of her sovereignty. Nay, more, the Government of Portugal, finding its own naval force inadequate to prevent the Confederates from abusing the right of asylum in the Western Islands, expressly authorized the American Government to send a naval force there for the purpose of defending the sovereignty and executing the law of Portugal.[6]

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[1] Vattel, *Droit de gens*, éd. Pradier-Fodéré, tome ii, p. 454, note.
[2] Documents annexed to the American Counter Case, p. 958.
[3] *Ubi supra*, p. 1041 *et seq.*
[4] See the circulars issued by the Brazilian Government, in supplementary documents annexed to the American Case, vol. vii, p. 107 *et seq.*
[5] American Case, p, 465.
See documents annexed to the American Counter Case, p. 1013 *et seq.*

(*e*) In Spain, the "Codigo Penal," while repeating the general provision of the French "Code Pénal," adds the following important specific enactment to punish "any person who without legitimate authorization shall levy troops in the kingdom for the service of any foreign power, or shall expedite cruisers, whatever may be the object proposed, or the nation against which it is intended to commit hostilities."[1]

Spain.

But Spain never pretended that she had any right to plead these provisions of her penal code as excuse for omitting to act preventively by executive power to repress misconduct on the part of the Confederates.[2]

(*f*) In regard to the governments of Brazil, Portugal, and Spain, it deserves to be remarked that their respective juridical commentators fully explain the theory of their penal codes as being chiefly valuable to aid in the preservation of the national peace. They rightfully maintain that neither the enlistment of troops in a country for foreign service, nor the equipment of ships of war in their ports for such service, would of themselves, and of necessity, involve any disturbance of the domestic peace. Such acts are not prohibited as being immoral or criminal *per se*, but only if done in derogation of the local sovereignty and in prejudice of the rights of other governments. That is to say, these laws, although not bearing the title of "Neutrality Laws," are quite as clearly neutrality laws in fact as the foreign-enlistment acts of the United States and of Great Britain.[3]

We might extend these remarks to the legislation of all the other maritime states of Europe.

Belgium and Holland.

(*g*) The penal laws of Belgium and the Netherlands, in this respect, are identical with those of France.[4]

(*h*) The provision of the penal code of the Netherlands deserves attention because of the very pertinent remarks respecting it made by the Netherlands minister, Mr. Van Zuylen, in reply to the inquiries of the British *chargé d'affaires*, Mr. Ward.

Mr. Van Zuylen writes as follows:

THE HAGUE, *March* 6, 1867.

Mr. Ward's note of the 16th instant, asking information for his government about the laws, regulations, and other means that the Netherlands may use to prevent violation of neutrality within her borders, has been received.

In reply, the undersigned informs Mr. Ward that there is no code of laws or regulations in the Kingdom of the Netherlands, concerning the rights and duties of neutrals, nor any special laws or ordinances for either party, on this very important matter of external public law. The government may use articles 84 and 85 of the penal code; but no legislative provisions have been adopted to protect the government, and serve against those who attempt a violation of neutrality.

It may be said that no country has codified these regulations and given them the force of law; and though Great Britain and the United States have their foreign-enlistment act, its effect is very limited. The Netherlands government has not yet thought proper to collect the regulations in relation to the rights and duties of neutrality; but has always scrupulously observed the principles of the European law of nations, and has published notices (as Great Britain and France did in 1861) to Netherland subjects not to carry dispatches or articles contraband of war, nor to break an effective blockade, nor to engage in privateering, nor accept letters of marque.

The admission of belligerent ships of war into our ports was regulated in the same manner, and the special instructions sent to our colonial governors, during the civil war in the United States, were communicated to the British legation on the 17th December, 1861.

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[1] Documents, *ut supra*, p. 1051 *et seq.*

[2] *Ubi supra*, p. 1072 *et seq.* See also the letter of the Spanish minister, M. Ribeiro, to Sir A. Paget, Amer. App., vol. iv, p. 158.

[3] See Silva Ferrão, *Theoria do Direito Penal*, vol. iv, pp. 181, 231; and Pacheco, *Codigo Penal Concordado*, tome ii, pp. 91, 96, in Documents, *ubi supra*, pp. 958, 1052.

[4] See *Nederlandsche Wetboeken*, ed. 1865, p. 677, for the law of the Netherlands.

Those notices were more extensive and precise last year. The government undertook to prevent the equipment of war vessels for the belligerents in her ports. A copy of the Official Gazette, March 20, 1856, containing those notices, is hereto annexed.

Articles 84 and 85 of the penal code may be used as coercive measures to prevent violations of neutrality. For example, they might serve to prosecute those attempting to equip or sell vessels of war in our port for the benefit of belligerents. The vessels could then be seized on evidence, and their departure be thus prevented.[1]

Mr. Van Zuylen's language is inaccurate. He obviously intended to express that the Netherlands have no laws known by the *name* of laws of neutrality, or codified as such. He seems not to have thought that mere penal provisions deserved the name, although he refers to penal provisions, which, as he says, are ancillary, in that sense, to the exercise of the executive power of the government, this being the proper, and indeed the only effectual, agency for the protection of its sovereignty against invasive or evasive acts on the part of belligerents.

The efficiency with which executive power is applied to such subjects in the Netherlands is fully manifested by the pertinent circulars of that government.[2]

(*i*) We find similar laws existing in Russia; in Prussia, which had occasion once to apply those laws to the acts of British agents in Prussia; in Denmark, and in Sweden.[3] Russia and Prussia, Denmark and Sweden.

(*j*) The documents, which exhibit the legislation and political action of Denmark in this relation, are particularly interesting, because they so clearly show how the penal or punitive laws were merely and simply supplemental to the preventive action of the Government.

6. On review, therefore, of the legislation and political action of Great Britain, as compared with that of all other Governments, we arrive at the following conclusions: Comparative review.

(*a*) The institutions of Italy, Brazil, Switzerland, France, Spain, Portugal, the Netherlands, and all other Governments of Europe indeed, except Great Britain, expressly assume, as do the institutions of the United States, that volunteer and unauthorized military and naval expeditions, undertaken in a neutral country, are to be restrained, because tending to involve such country in war with the country aggrieved. Infringements of the law are punished mainly for that reason, including the protection of the national sovereignty.

(*b*) Hence, in all those countries, except Great Britain, the *punitive* law is a secondary fact; the primary fact being the preventive action of the Government.

(*c*) The United States perfectly understood this, the true relation of things, and while they indicted persons and arrested ships, they did not, when occasion required action, rely on such merely punitive, or at most auxiliary, means, but called into play the armed forces of land and sea to support the Executive in summary acts of prevention by force for the maintenance not only of the sovereignty but of the neutrality of the Government.

(*d*) Neither Lord Russell, in his correspondence with Mr. Adams, nor the framers of the British Case, appear to have had any clear conception of these higher relations of the subject, although distinctly and explicitly stated in the best works of international law of Great Britain herself.

(*e*) Great Britain alone pretends that punitive law is the measure of neutral duties: all other Governments, including the United States, pre-

[1] Documents annexed to the American Case, vol. iv, p. 155.
[2] Documents annexed to the American Counter Case, Supplement, p. 56.
[3] Ibid., pp. 54, 53, 51, 62.

vent peril to the national peace through means of prerogative force, lodged, by implied or express constitutional law, in the hands of the Executive.

Conclusions.

VIII. We are now prepared to judge whether, in the incidents of the present controversy, the conduct of other governments was, as the British government pretends in answer to the reclamations of the United States, the same as that of Great Britain, and whether Great Britain did all which they did in discharge of international obligations toward the United States.

It is obvious to see that, upon her premises of political action, it was impossible that Great Britain should discharge those duties as they were discharged by other governments.

In point of fact she did not.

(*a*) Other governments not only prevented the armament of cruisers, but also forbade their construction. For example, France, the Netherlands, Denmark.

(*b*) Other governments imposed just limits on asylum, and punished its abuse. For example, Brazil, France, Spain, Portugal.

(*c*) No other government allowed armed cruisers to sail from her ports to prey on the commerce of the United States. She alone furnished the *Alabamas* and the *Floridas*, which, by the capture of our merchantmen, gave to the United States cause of national reclamation.

(*d*) In no other government was the wrong committed of allowing itself, as Lord Russell unequivocally admits, to be subjected to the shame of being the established seat of the military and naval supplies of the Confederates.

The history of the United States as a neutral a part of the British pleadings.

IX. Both in the Case and Counter Case of the British government there is elaborate arraignment of the government of the United States, in respect to the manner in which, at various periods of their public history, they have discharged their neutral obligations toward other governments.

Its relevancy denied.

We dispute the right of the British government to discuss any such matter before this Tribunal. Great Britain is here accused, not only of violation of neutrality, but of permitting or suffering the active complicity of her subjects with the rebels of the United States. It is no answer to this charge to say that, at some time past, the American Government was, or may have been, delinquent toward some other government. Such an answer is not compatible with reason or justice, but is contrary to both. Nothing is, or can be, on trial before this tribunal, but the conduct of Great Britain. That, and that alone, is submitted by the treaty of Washington. To summon the United States to enter into discussion of its acts toward other governments, which is in effect now done by the British Government, is to call on the Tribunal to pass judgment on imputed acts of the United States which are wholly outside of the questions to be submitted by the two governments, according to the tenor of the Treaty.

The British Case and Counter Case, it is true, introduce these matters professedly as bearing on the inquiry of what is due diligence, by examination of what has been the conduct of the United States under circumstances of alleged similarity to those involved in the present controversy. But these matters are not the less discussed by the British Government in the manner and spirit of counter accusation. And, even as to the specific relation in which the subject is professedly introduced by the British Government, it is not the less utterly irrelevant, valueless as argument, and incapable in any respect of instructing the conscience of this Tribunal.

The two governments have submitted the question of the conduct of Great Britain at a precise period of time and in a specific relation, that of the late domestic rebellion in the United States. That is the definite subject to be investigated and judged by the Tribunal, upon the proofs presented by the two governments. As incidental to this particular subject, is the Tribunal to take up and examine twenty other controversies, each wholly independent of that and of one another, and to determine *seriatim* each one of them, in order to know how to determine the particular controversy submitted by the Treaty? That would be preposterous as reason, and impossible to be done, as act.

The counsel of the United States must refuse to consent to have drawn in judgment here the past or present relations of their government to France, Spain, Portugal, Mexico, or even Great Britain herself.

Nevertheless, being thus challenged by the British Government, we presume to say that the history of the foreign relations of the United States, in this respect, if it have any pertinency to the present controversy, has such pertinency to the effect of confirming the theories of public law on which the present reclamations of the United States here stand, as maintained in this Argument.

The Tribunal cannot fail to observe, in the first place, that while Great Britain constantly asserts that her duties of neutrality are defined by an act of Parliament, and that her government has no means or power to maintain neutrality, except by the agencies of an act of Parliament, yet during her entire national life, for a period of nearly eight hundred years, she did not possess any such act of Parliament, and, of course, during all that period she neither could nor did discharge her duties of neutrality towards other governments. It would be an unwelcome task to the counsel of the United States, as they well might, to proceed to imitate the British case, and recount all the occasions, even in more modern times, in which it might be charged that by acts of aggressive intervention, by sea and by land, Great Britain has manifested her slight consideration of the proper rights of the other states of Europe, more especially in the class of maritime questions, and of domestic disturbances existing in other states. Are not the works of jurisprudence of all nations full of inculpations of these acts on the part of Great Britain? Has not every maritime state of Europe, one after the other, been forced in self-defense, in these relations, into war with Great Britain?[1]

And yet it would be much more pertinent to the present issue thus to scrutinize the political conduct of Great Britain with reference to other governments, than it is to scrutinize that of the United States.

Now, then, while, until the year 1819, Great Britain had no municipal law for the preservation of neutrality, and while she steadily disavows the possibility of using any other means, the United States, on the contrary, almost at the very moment of entering into the family of nations, asserted, and have continued to assert, the right and the duty of every government to act as such politically, and by exercise of supreme executive force to watch over, guard, and maintain its neutrality between contending belligerents. While England professes, as her view of public law, that constitutional governments must of necessity allow themselves to drift continually into war by reason of having no other means to keep peace except an act of Parliament, and that confessedly insufficient,—the United States, on the other hand, have as constantly maintained, and do now maintain, that it is the duty of all governments, in-

[1] See Canchy, *ubi supra;* Lucchesi Palli, *Droit Public et Maritime*, p. 55, *et seq.;* Cussy, *Phases, etc.*, préf.

cluding especially constitutional governments, to discharge their neutral duties in obedience to rules of right, independent of and superior to all possible acts of Parliament. In consonance with which doctrine it is that every President of the United States, from President Washington to President Grant, inclusive, has never failed to apply due diligence, voluntarily, *sponte suâ*,—in the vigilant discharge of his own official duty, not in mere complaisance to foreign suggestion,—by himself or by other officers of the Government, to prevent all unlawful enterprises of recruitment or equipment in the United States.

In proof of these assertions, we proceed briefly to touch on such incidents of the past history of the United States as are (however illegitimately) brought into question here by the British Case and Counter Case.

Neutrality toward Great Britain during President Washington's administration.

(*a*) In regard to our first controversy with Great Britain in this respect, in the time of President Washington, we need do nothing more than cite testimony of Englishmen themselves, to the honor and good faith of the American Government.

In the first place, Lord Tenterden, in the documents appended to the British Case, admits the good faith and the efficiency of President Washington.

Secondly, Mr. Canning, certainly one of the greatest ministers of Great Britain, on occasion of opposing the repeal of the British foreign-enlistment act, said:

"If I wished," Mr. Canning said, "for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation, the American Government held that such a fitting out was contrary to the laws of neutrality; and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel, fitting out, was seized, delivered over to the tribunal, and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports, for the purpose of cruising against English vessels, was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain.[1]

"Here, sir, (he added,) I contend is the principle upon which we ought to act."[2]

Finally, in the midst of the occurrences now in controversy between the two governments, Sir Roundell Palmer spoke as follows in the House of Commons:

"As long ago as 1793, we emphatically insisted that the American Government should not supply France, with whom we were then engaged in hostilities, with vessels of war. We required them to detain those vessels, and Washington did detain them, before any foreign-enlistment act was passed. Washington not only detained the vessels at our instance, but he proposed and carried in Congress the American foreign-enlistment act, as his enemies then said, at our dictation. Precisely the same attacks which are now directed against Her Majesty's Government in this House were then directed against Washington in Congress. There were members of Congress who said that he was truckling to England and allowing the English embassador to dictate to

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[1] Appendix to British Case, vol. iii, Supplement, p. 22.

[2] Hansard's Parliamentary Debates, N. S., vol. viii, p. 1019. Canning's Speeches, vol. v, p. 50.

him; they lamented the humiliation of their country and declared that the stars and stripes had been dragged in the dust. But that great man despised the imputation of cowardice; he was strong enough not to fear to be thought afraid, and in spite of clamor—for there will always be violent and excitable men in all popular assemblies,—Washington pursued the course which he knew to be just, and at the same time best calculated for the interest and welfare of his own country. He passed the foreign-enlistment act, and a treaty was subsequently entered into, stipulating, among other things, for the restoration of prizes captured by vessels that were fitted out in American ports."[1]

The counsel of the United States are for themselves content with their own convictions on this point, but they conceive that the testimony of Mr. Canning, Sir Roundell Palmer, and Lord Tenterden may fitly serve to satisfy this high Tribunal.

(*b*). The British Case impliedly blames the United States on account of the expedition of Miranda.

Expedition of Miranda.

Francisco Miranda, born in the Spanish-American province of Venezuela, had served in the army of France under commission of the National Convention, but was suspended from command, and banished for misconduct at the battle of Nerwinde.[2] He became besotted with the idea of being the predestined regenerator of his native country, without other capacity or resources than his own extravagant self-conceit. He by some means made himself acceptable to Mr. Pitt, who encouraged him in the idea of getting up an expedition for the invasion of Venezuela.[3]

Political considerations standing in the way of his doing this in England, he went to the United States, thinking to find there a convenient point of departure. But President Adams steadily repelled his advances, and rendered abortive all his attempts to get up the proposed expedition.[4] Some years afterward, still favored by Great Britain,[5] he again appeared in the United States with the same purposes.

He had much of the plausibility, and all the impudence, of that class of cosmopolitan exiles and adventurers. By the exhibition of deceptive letters written by himself to President Jefferson and Secretary Madison—letters, on their face, of mere courtesy—he contrived to impose on credulous persons and obtain aid in New York; for in this case, as in all like cases, fraud and falsehood lie at the bottom of such unlawful enterprises.

Thus he was enabled to organize an expedition and get to sea without knowledge of the Government.[6]

On the way to Caracas he stopped at the English islands of Barbadoes and Trinidad, where he was treated with the utmost consideration by the British officers, civil and military, and where he received from Admiral Cochran, in command of the British West Indies, a written contract of alliance and copartnership under date of June 9, 1806, by the tenor of which Great Britain adopted the expedition of Miranda, and furnished it with additional supplies and vessels.[7]

The expedition landed at Vela de Coro, but failed of success by reason of the deplorable incapacity of Miranda; and he, dishonored by the manifest proofs of the falsehood by which he had imposed upon the

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[1] Hansard's Debates, vol. clxxiii, p. 955.

[2] See History of Don Francisco de Miranda's attempt to effect a revolution in South America.

[3] See Antepara's Documents, Historical and Explanatory, p. 13.

[4] The Works of John Adams, by Charles Francis Adams, vol. i, pages 523, 531; vol. viii, pages 569, 581, 600; vol. x, p. 134.

[5] Dodsley Annual Register for 1807.

[6] History of Miranda's Expedition, as above, *passim*.

[7] See this extraordinary contract in Antepara's Documents, Historical and Explanatory, &c., p. 213.

adventurers, British and American, enlisted in the expedition, disappeared from public sight. We find him living some time afterward; but we do not find that he ever did any actual service to the patriots of Spanish America.

Some of these adventurers, on their return to the United States, were indicted; but the jury failed to convict, partly in consequence of ingenious sophistries of their counsel, and partly, we think, by reason of the notorious participation of the British naval authorities in the West Indies.[1]

We submit that there is nothing in the adventures of this Miranda which reflects discredit on the United States or favors the argument of the British Government.

Whatever responsibility, if any, devolved on the United States in the premises, was long ago amicably settled between them and Spain.

Revolt of Spanish American colonies.

(*c*) Next the British Case calls attention to the general conduct of the United States in reference to the long-continued hostilities between Spain and her revolted Colonies in America.

We confess that we are surprised that Great Britain especially should, in this relation, question the acts of the United States.

The American Government did not hasten at the earliest moment of revolutionary political movement in those Colonies, and before the occurrence of any significant military event whatever, to accord the status of belligerents to the rebels of Spain, as Great Britain did to those of the United States. We waited, as discretion and justice required we should do, until the civil war in Spanish America forced itself upon our attention by incidents in our own ports arising out of captures on the sea, as to which action became requisite on the part either of the Executive or of the courts of the United States.

When that civil war had raged for years, without Spain having succeeded in reducing her rebel subjects to submission, we still abstained from all political action in the premises to the prejudice of Spain, until we had sent informal commissioners to Spanish America to inquire and make report concerning the condition of things there. Even then, before proceeding to definite political action, we deliberated still, and, not without concurrence of opinion at least of Great Britain in this respect, at length we concluded that the revolted Colonies had reached such a condition of sure actual independence as to be fully entitled to be recognized as independent States.

During all this long period, the United States steadily labored to prevent the equipment of vessels in their ports to the prejudice of Spain. The successive Presidents of the United States were positive in instruction to all subordinate officers, and vigilant in observation, to enforce the execution of the laws of neutrality, international as well as municipal. Prosecutions were instituted in the courts; vessels unlawfully captured were restored, by judicial or administrative order; and the principals of neutrality were proclaimed and maintained in every act, whether of the courts or of the Executive.

As to the courts of the United States, we have a right to say that their decisions, during that period, on this class of questions, are now received as authoritative expositions of public law not less in Great Britain, and in other parts of Europe, than in the United States.

As to the deportment of the Executive in the course of these occurrences, we confidently appeal to the mass of official acts and correspondence contained in the documents annexed to the American Counter Case, to prove that the American Government not only did everthing which

[1] See Trial of Smith and Ogden, *passim*.

law required, but did everything which was humanly possible, by preventive vigilance, as well as by punitive prosecution, to discharge the neutral obligations of the United States.

Did the American Government, at any time, or on any occasion, either willfully or with culpable negligence, fail to discharge those obligations? We deny it; although, in the midst of almost continual warfare, both in Europe and America, it is possible that violations of law may have occurred, in spite of all preventive efforts of that Government.

What then? If we did injury to Spain we repaired that injury. The treaty of amity, settlement, and limits between the United States and Spain, of February 22, 1819, disposed of all this subject by mutual concessions, renunciations, or indemnifications, in the following article, namely:

ARTICLE IX. The two high contracting parties, animated with the most earnest desire of conciliation, and with the object of putting an end to all the differences which have existed between them and of confirming the good understanding which they wish to be forever maintained between them, reciprocally renounce all claims for damages or injuries which they themselves, as well as their respective citizens and subjects, may have suffered until the time of signing this treaty.

The renunciation of the United States will extend to all the injuries mentioned in the convention of the 11th of August, 1802.

2. To all claims on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain.

3. To all claims of indemnities on account of the suspension of the right of deposit at New Orleans, in 1802.

4. To all claims of citizens of the United States upon the government of Spain, arising from the unlawful seizures at sea, and in the ports and territories of Spain or the Spanish colonies.

5. To all claims of citizens of the United States upon the Spanish Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State, or to the minister of the United States in Spain, since the date of the convention of 1802, and until the signature of this treaty.

The renunciation of His Catholic Majesty extends—

1. To all the injuries mentioned in the convention of the 11th of August, 1802.

2. To the sums which His Catholic Majesty advanced for the return of Captain Pike from the Provincias Internas.

3. To all injuries caused by the expedition of Miranda, that was fitted out and equipped at New York

4. To all claims of Spanish subjects upon the Government of the United States arising from unlawful seizures at sea, or within the ports and territorial jurisdiction of the United States.

5. Finally, to all the claims of subjects of His Catholic Majesty upon the Government of the United States, in which the interposition of His Catholic Majesty's Government has been solicited before the date of this treaty, and since the date of the convention of 1802, or which may have been made to the department of foreign affairs of his Majesty, or to his minister in the United States.[1]

This high Tribunal perceives that, in view of this treaty, it is vain for the British Case to attempt to revive controversy on the subject. Both Spain and the United States had mutual causes of reclamation, which both governments frankly settled and terminated by amicable convention, to their mutual satisfaction, and on conditions which cannot be questioned by any other government.

One thing more in this relation. We respectfully request the Tribunal to observe that neither Spain nor the United States supposed that damages or injuries done by one government to another were mere indirect damages or injuries, and so not comprehended in the terms of a treaty, expressly professing to dispose of "all claims," "all questions," and "all differences."

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[1] The United States Statutes at Large, vol. viii, p. 258.

Spain and the United States by this treaty "reciprocally renounced all claims for damages or injuries which *they themselves, as well as their respective citizens and subjects*, may have suffered." They rightly supposed that a blow struck by one government at another is a direct wrong, sounding in direct damages, and calling for direct compensation, quite as much at least as a blow struck by one government at individual subjects of another government.

War between Portugal and the Banda Oriental.

(*d*) The British Case also calls in question the conduct of the United States in reference to the war between Portugal and the Banda Oriental. This matter is thoroughly and exhaustively discussed in the correspondence appended to the American Case. It also receives satisfactory exposition in the Case itself.

We, therefore, content ourselves here with reference to the voluminous documents annexed to the American Counter Case, which manifest the unceasing efforts of the American Government to prevent its citizens from taking part in that war, or doing any acts prejudicial to the Portuguese Government.

Walker's expedition.

(*e*) The British Case makes reference to the acts of William Walker, and other adventurers of that sort, who, at a certain period, embarked in expeditions of adventure to Central America.

The United States, in extenuation of the fact that some expeditions of this class escaped the vigilance of the American Government, do not plead either the extent of the coasts of the United States, and consequent difficulty of surveillance, nor the disturbed state of the countries which were the objects of such expeditions, as we might do, but we pass over all that class of considerations to say that the American Government, in these occurrences, exerted all its power, legal and political, to prevent, repress, and punish everything contrary to its duties of neutrality or its rights as a sovereign.

The successive Presidents of the United States acted efficiently in the premises by proclamations to all citizens generally, and by instructions and orders to officers, civil and military; and the Attorney-General of the United States directed the prosecution and secured the conviction of leading offenders; and the naval officers of the United States even proceeded to break up such enterprises by military interposition either on the high seas, or in the ports of Central America, in action not unlike that of the British Government in the affair of Terceira.

We entreat the members of the Tribunal to peruse the documents, in this relation, contained in the appendix to the American Counter Case, to which we confidently point as furnishing complete vindication of the United States in the premises.

Cuba.

(*f*) We make the same observation as to the alleged absence of due comportment on the part of the United States, either at the present time or heretofore, in reference to the Spanish possessions in Cuba. The documents annexed to the Counter Case, we confidently believe, will satisfy this Tribunal of the rightfulness of the conduct of the United States in this behalf.

Here, also, we call attention to signal proofs of the upright spirit and just action of the United States with reference to the rebels of Spain, in contrast with the temper and action of Great Britain with reference to the rebels of the United States.

In the first place, the President of the United States did not jump to make recognition of the belligerence of the Cubans, upon the first rumor of a gun having been fired by or against them; and to this day he

has resisted temptation and pursuasion to take that step, moved to abstinence by his own conviction of public duty and right.

Secondly, in case after case, Cubans seeking to fit out vessels in the ports of the United States have been arrested, and their attempts broken up by the executive interposition of the President.

Thirdly, Spain, as the treaty friend of the United States, has not been subjected to the wrong of seeing her rebels raised in the ports of the United States to the level of herself their sovereign; but, on the contrary, has been allowed, as she had a right to do, openly to build or purchase men-of-war in the United States.

Finally, no cruisers have sailed from the ports of the United States to prey on the commerce of Spain. Therefore, if, which we deny, Spain suffered any damages in the premises at the hands of the American Government, those damages must be of the nature which Great Britain regards as indirect damages, and therefore never in any circumstances due from one to another gonernment.

(*g*) Allusion also occurs, in the British Case or Counter Case, to some occasions in which persons in the United States have invaded, or attempted to invade, the Canadian Dominion. Fenians.

Such occurrences have existed, as they do in all frontier countries. As to the first of them, it deserves to be stated that special provisions of law were enacted to enable the President of the United States more effectually to discharge the duties of the Government toward Great Britain.

In reference to that, and some other occurrences of the same nature, it is well to note the testimony borne by Sir Roundell Palmer in a speech made by him in the House of Commons, already quoted on a particular point, and in which he further says:

I wish to impress upon the House that, as far as the enforcement of their foreign-enlistment act is concerned, we have absolutely no grievance against them, (the United States.) They have again and again restored prizes captured in violation of that act. As recently as the Russian war, in a case where we complained that a vessel called the Maury was fitted out in violation of the foreign-enlistment act, they immediately detained that vessel, her clearance was stopped, and an inquiry was subsequently directed, and that inquiry, conducted entirely to our satisfaction, ended in our expressing a belief that there were no real grounds for the suspicion entertained. In the interest of peace and amity between the two countries, therefore, I wish the House to understand that we have no grievance against them with regard to the foreign-enlistment act, and that it deeply concerns our honor to enforce the foreign-enlistment act.[1]

In reference to later incidents of the same class, in which Irishmen in the United States have attempted to invade Canada, we present the testimony of the British minister in the United States, whose dispatch testifies in terms which may fitly close this part of the present Argument, as follows:

WASHINGTON, *July* 13, 1866.

SIR: I have duly reported to Her Majesty's Government the disturbances that lately took place on the frontiers of New Brunswick and Canada, and the measures taken by the Government of the United States to prevent those expeditions of armed men, in breach of the neutrality laws, from being carried into effect.

I am directed by Her Majesty's government, in reply, to state that for some months past they have observed with regret, though without alarm, the organization of the Fenians in the United States; but they have invariably abstained from making any official representation to the cabinet at Washington, because they felt they had no right, as indeed they had no desire, to interfere with the administration of the law in the United States. They had, moreover, a perfect conviction that if ever the time came for the fulfillment by the United States of the obligations which international law imposes upon friendly and allied governments, that Government would take all the measures which those obligations and regard for its own honor might call upon it to perform.

[1] Hansard's Debates, vol. clxxiii, p. 955.

Her Majesty's Government rejoice to find that this confidence has been fully justified by the result, and that the Government of the United States acted, when the moment for acting came, with a vigor, a promptness, and a sincerity which call forth the warmest acknowledgments.

I am, in consequence, instructed to express to the Government of the United States the thanks of Her Majesty and Her Majesty's Government for the friendly and energetic assistance which they have afforded in defeating the attempts to disturb the peace of Her Majesty's possessions in North America.

I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

FREDERICK W. B. BRUCE.

Hon. WILLIAM H. SEWARD, *&c., &c.*[1]

We remark, in passing, that in all the cases referred to by Sir Frederick Bruce and Sir Roundell Palmer, of the conduct of the United States in relation to Great Britain, this conduct has been the same at all times in relation to other governments. As we are entitled to the ascription of "a vigor, a promptness, and a sincerity which call forth the warmest acknowledgments," in the former class of occurrences, so we are in the latter, the British Case and Counter Case to the contrary notwithstanding. In every instance of attempt to violate our neutrality, on the part whether of governments or of private persons, we have set in action all the juridical machinery of the municipal law; we have pushed into vigilance our custom-house officers, which England has, and our district-attorneys and marshals, which England has not; but in addition to and beyond all that, the President of the United States acted in advance to enforce, not diligence only, but active vigilance, on all subordinate officers of the Government; and when wrong-doers manifested obstinate persistence of wrong, the military and naval officers, of character and discretion, like General Scott, Admiral Paulding, and General Meade were employed to apply to such persons the only method of prevention applicable to the case, namely, force, to maintain the domestic order and foreign peace of the Government.

We regret, and have sufficient cause to regret, as the present controversy shows, that Great Britain, who cannot blind herself to the vigor, promptness, and sincerity manifested by the American Government in repressing such acts in America, has not manifested equal vigor, promptness, and sincerity herself in repressing similar acts in Great Britain.

British enlistments during the Crimean war.

(*h*) The counsel of the United States would gladly abstain from reference to another occurrence in this class of incidents, because, unlike what has gone before, it is not of a defensive, but of an accusatory character.

It singularly happens, while Great Britain, in her Case and Counter Case, is so careful to recount what she assumes to be the imperfections of the United States, in the execution of our foreign-enlistment act, heaping up a long train of accusations against us, she forgets that the most serious of all the occasions, in which the United States have been called on to act, was the attempt of Great Britain, to the prejudice of Russia, to violate, on a large scale, the neutrality of the United States. And the occasion is the more remarkable, seeing that the British ministers themselves, with characteristic misconception of the whole subject of neutral rights and duties, procured a special act of Parliament to be passed for the single and precise object of enabling them to invade the sovereignty, and to violate the local laws, of every country in Europe and America.

We allude to the act of Parliament, passed at an early day during the war between Great Britain and Russia, professedly and avowedly to enlist soldiers abroad of its own authority for service against Russia.

[1] Documents annexed to the American Case, vol. ii., p. 130.

We understand how the British ministers fell into the error of thus exposing to the gaze of the world, on this occasion, the difficulty of obtaining troops at home. In former wars, as we in the United States had sad experience, it had been the custom of Great Britain thus to act, at a period of time when the enlistment of foreign troops was a practice all but universal in Europe.

But what we should not understand, but for the false theory which pervades the Case and Counter Case of Great Britain here, is, that the British ministers should have imagined that the *rights* of Great Britain, as respects all foreign governments, are determinable by an act of Parliament.

On both points British ministers appear to entertain consistent theory. The neutral obligations of Great Britain, as respects any foreign government, are but such as are set forth in an act of Parliament; and Parliament is to determine her *rights* as respects foreign governments. On both related points they act and think as if no law of nations existed, or, at least, as if an act of Parliament could dictate the law of nations for all other governments.

That enlistment of troops in any country, for foreign service, can only be made lawfully with the consent of the local government, is elementary doctrine of public law.[1]

It is equally well established at the present time that, if such enlistment be allowed by a neutral to one belligerent, it must be allowed to the adverse belligerent; and, since the publication of Sir Robert Phillimore's great work on international law, probably no person, even in Great Britain, would dispute the proposition.

It took time, however, for *British* jurists to open their eyes to this self-evident doctrine of neutrality. Wildman seems to have little or no conception of that point,[2] and it needed that Manning should enter into elaborate argumentation on the subject, as if it were a wholly new question, in order to introduce the rightful opinion into Great Britain.[3]

And yet Great Britain herself had manifested, by several acts of Parliament, that she saw clearly the inconvenience and the wrongfulness of foreign governments, or private persons, enlisting troops within the jurisdiction of Great Britain, without the authorization of the government.[4]

There never was any doubt or hesitation upon this subject in the United States. Our statesmen, beginning with Mr. Jefferson, at all times have unequivocally and positively maintained it; and our jurists, such as Wheaton, Lawrence, Kent, and Halleck, are careful to state the doctrine with explicitness. At the present day, in presence of the extensive erudition and systematic completeness with which Sir Robert Phillimore has expounded the principles of international law, including this point in all its relations,[5] it might seem that the truth would be accepted in Great Britain.

Nevertheless the same old error still lingers there, if we may judge from the tenor of the British Case and Counter Case; that "insularity" of legal perception, of which eminent English jurists speak, still ope-

[1] Wolff, *Jus gentium*, s. 747. Vattel, *Droit des gens*, éd. Pradier-Fodéré, liv. iii, chap. 7, s. 449. Klüber, *Droit des gens modernes de l'Europe*, s. 285. Martens, *Précis du droit des gens*, s. 30. Galiani, *Dei doveri de principi neutrali*, p. 325. Hautefeuille, *Droits et devoirs des nations neutres*, tome i, 312, 313. Riquelme, *Derecho publico internacional*, tom. i, p. 144.

[2] *International Law*, vol. i, p. 64.

[3] Law of Nations, book iii, chap. 1.

[4] See numerous acts of Parliament on this subject, collected in Phillimore's International Law, vol. 1, p. 212.

[5] Vol. iii, p. 209 *et seq.*

rates;[1] and, while the British Government acted in the matter of enlistments as if the act passed during the war with Russia was supreme over all the *sovereign* rights of other governments, so it now assumes that an act of Parliament is supreme over all the *neutral* rights of other governments.

On the former occasion Great Britain came in conflict with the neutrality laws of the United States and Prussia. In each of these countries, she assumed to carry into effect a domestic act of Parliament of her own, without asking the consent of the local government. In each of them, her agents were indicted and convicted of violation of the municipal law of the land. And in the United States, where the British minister was personally compromised in these unlawful acts with various British consuls, in disregard of their diplomatic or semi-diplomatic quality, it became painfully necessary for the American Government to withdraw the exequaturs of the consuls, and to deliver his passport to Mr. Crampton.[2]

We trust the Tribunal, on the perusal of those documents, will be satisfied of the sincerity and good faith with which the American Government executed its municipal laws, and discharged its neutral duties, on this, the only occasion, since the revolutionary action of France, in which any foreign government has undertaken to perpetrate such acts in the United States.

Qualis ab incepto talis ad finem. With consistency unwavering, and at whatever hazard of domestic or foreign inconvenience, even if it were friendly powers like France and Great Britain with which we were thus brought into contention, the United States have steadily adhered to the principles of international neutrality; and we may well, therefore, demand the observance of those principles, or reparation for their non-observance, on the part of Great Britain.

The course of Great Britain as a belligerent towards neutrals.

X. We repeat a previous remark, that we are not disposed to follow the example set us in the British Case and Counter Case, as we might well do, by entering into examination and arraignment of the course pursued by Great Britain at various times on the subject of neutrality in her controversies with other governments. It is not agreeable to a *friend* to be compelled to say,

> "All his faults observed,
> Set in a note-book, learned and conned by note,
> To cast into my teeth."

This the British Case does, wantonly, offensively. If the United States were to scan with like evil eye every occasion in which Great Britain might seem to have neglected her duty as a neutral, or to have violated the rights of neutrals, we might produce a fearful list of charges; and such examination would be more pertinent to the present issue, and bring into view matters more pregnant of instruction, than those as to which the conduct of the United States is called in question here by the British Government.

We content ourselves, in this relation, with a brief reference to two or three great controversies of special interest to the American Government, where the British Government has manifested its views of the duties of neutrality, and of the manner of dealing with alleged breaches thereof by the neutral.

Orders in council.

1. The celebrated orders in council, issued by the British government in retaliation of the Berlin and Milan decrees of the first Napoleon, involved intense assertion of neutral obliga-

[1] Phillimore, 1st ed., pref., p. 11; Chitty's Practice, pref., p. 5, note.
[2] See the documents on this subject in the Appendix to the American Counter Case.

tion; and that in the form of acts of force as against the United States, which responded to these wrongful measures by an act of Congress forbidding all commercial intercourse between our citizens and either of the belligerents.[1] This act, says Phillimore, "ranks high in the history of nations. It conveyed a just and dignified rebuke both to France and England, and it was worthy of the country which has contributed such valuable materials to the edifice of international law."[2]

2. The discussion between Great Britain on the one hand, and France on the other, in the first year of the American Revolution, produced three papers on the subject of neutral obligation, of the greatest importance in the diplomatic history of modern times, and which contain many observations pertinent to the present controversy, namely, the "*Exposé des motifs de la conduite du Roi de France relativement à l'Angleterre*, 1779;" the responsive "*Mémoire justificatif*," published by the court of London, the authorship of which is attributed to the historian Gibbon; and the "*Observations de la Cour de Versailles sur le Mémoire justificatif de la Cour de Londres.*"[3]

Course toward France during the American Revolution.

3. Meanwhile, controversy was pending between Great Britain and the Netherlands similar to that with France. The British Government complained that the Government of the United Provinces had not exercised due diligence to prevent their subjects from furnishing arms and other supplies to the Americans; and that abuse of the right of asylum in the ports of the Netherlands had been suffered the advantage of the Americans and the prejudice of Great Britain.

Course toward the Netherlands.

Especially is it interesting to see, in this controversy with the Netherlands, that Great Britain complained incessantly of occurrences in the Dutch colonies of Saint Eustatius, Saint Christopher, Curaçao, and Surinam, charged as breaches of neutrality, although acts by no means so serious as those, of a similar nature, which the United States here charge against Great Britain, in regard to the Bahamas, Bermuda, and other British possessions in the West Indies.

The Government of the United Provinces, unlike France, had no thought or purpose of departing from neutrality. It defended the acts, inculpated as breaches of neutrality, by the same arguments, in reference to commerce, and to the right of asylum, as Lord Russell employed in discussion with Mr. Adams. But the British Government regarded all those acts as acts of neutral negligence or of belligerent complicity on the part of the United Provinces, and as a sufficient cause of war, and thus forced the Netherlands into an armed alliance with the United States.[4]

But the prudent and sagacious statesmen, who have administered the foreign affairs of the United States in the present controversy, have preferred a patient perseverance of insistance in the right direction, so as to cause arbitration to be substituted for the more dread issue, to which, in like circumstances, men of less wisdom conducted Great Britain.

X. The Counsel of the United States desire to say in conclusion of this part of the Argument, that we have, by the imperative exigencies of the present controversy, been compelled to compare and contrast the manner in which the duties of neutrality have been performed at different epochs by the United States and by Great Britain, and especially to insist on the delinquency of the British Gov-

General obligations of neutrals.

[1] Manning, Law of Nations, vol. iii, ch. 10; Phillimore, vol. iii, p. 412.
[2] Vol. iii, p. 250.
[3] See these documents at large in Martens, *Causes célèbres*, tome iii, cause 2de.
[4] See the history of this controversy in Martens, *Causes célèbres*, tome ii, cause 10me.

ernment, in this respect, relatively to the American Government. We could not otherwise discharge the special duty devolved upon us in behalf of the United States.

We concede the embarrassments which a state of war throws upon neutral nations, by reason of the conflict which it involves between the interests of the latter and those of the belligerent state or states.[1]

The right of neutrality, we concede and admit, is co-extensive with the right to declare war and to make peace. All these rights are included in the simple right of national independence and sovereignty.[2]

Recognizing, then, the right of neutrality as equally sacred with the right to make war, we insist that the duty of neutrality corresponds to the right, although to the prejudice of one or the other belligerent; and in so far as the right of neutrality obstructs belligerent operations, the neutral State may nevertheless stand on its neutrality, even combatively. But such neutral must stand there in an attitude of absolute impartiality: that is of course.[3]

And such impartiality implies as well impartiality of inaction as impartiality of action.[4]

Neutrality, as defined by Klüber, is the condition of a neutral people, who, in the case of war, render succor to neither of the belligerent parties.[5]

As defined by Hübner, neutrality consists in complete inaction relatively to the war, and in exact and perfect impartiality, manifested by means of acts with regard to the belligerents, in everything which has relation to the war, and to the means, direct and indirect, of carrying it on.[6]

Azuni defines neutrality to be the continuation of the state of peace on the part of a power, which, on war arising between two or more nations, abstains absolutely from taking any part therein;[7] and this last definition has the approval of one of the most conspicuous of the modern jurists of Italy.

But in whatever sense neutrality is to be defined, and howsoever it originates, certain it is, that such neutrality must be one of absolute good faith: it must not degenerate into war in disguise.[8]

Accepting, as we do, the comprehensive definition of neutrality given by Fioré, we need not scruple to cite the appreciation, which that intelligent author expresses, of the historical attitude of the United States in the relation.

"In spite," says Fioré, "of the efforts of Holland and Scandinavia, the cause of neutrals found no real support until there arose a powerful State to maintain their common rights. It was not, in truth, before the constitution of the potent neutral State of the United States of America, which was followed by the league of the armed neutrality in the seas of Europe, that the right of neutrals, having solid support to stand on, began to develop itself progressively, until that right reached its assured

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[1] See Casanova, *Del Diritto Internazionale*, vol. ii, lez. 21.

[2] Klüber. *Droit des Gens*, § 279; Galiani, *Dei Doveri dei Principi*, pt. i, c. 3; Hautefeuille, *Droits et Devoirs des Nations neutres*, tom. i, p. 376.

[3] Martens, *Droit des Gens*, éd. Vergé, tome ii, p. 292 *et seq.*; Heffter, *Droit international*, p. 276 *et seq.*; Cauchy, *Droit maritime*, passim.

[4] Massé, *Le Droit commercial dans ses Rapports avec le Droit des Gens*, tomo i, p. 165.

[5] *Droit des Gens*, chap. ii, § 279.

[6] *De la Saisie des Bâtiments neutres*, tome i, part 1, chap. ii.

[7] *Diritto Marittimo dell' Europa*, cap. i, art. 3.

[8] See the complete and exhaustive discussion of this question in Calvo, *Derecho internacional, Téorico y Practico, de Europa y America*, tome ii, pp. 150, 403. See, also, Gessner, *Droit des Neutres sur Mer*, passim.

triumph, in resolving, by principles of justice, the multifarious questions which had agitated past ages."[1]

We need not stop to inquire against what power it was that these efforts for the development and establishment of neutral rights were directed by the neutral powers which acted in concert to that great end.[2]

The Counsel of the United States may be permitted, in view of the express or implied charges of the British Case and Counter Case, to regard with satisfaction, if not with pride, the part thus accorded to their country, in the maintenance of neutral rights, and the discharge of neutral duties alike, by the impartial voice of Europe.[3]

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[1] Fioré, *Nouveau Droit international public suivant les besoins de la civilisation moderne*, tome ii, p. 388.

[2] See Cauchy, *Droit Maritime*, tome i, préf.; Cussy, *Phases*, &c., préf.

[3] Among the matters which the British Case or Counter Case introduces to attention are several which are too insignificant for notice in the text, but which may need a word of commentary.

John Laird as a witness.

John Laird, ex-partner and father of "John Laird, Sons & Co.," appears making statements against the United States.

The Lairds, it should seem, would better hide their heads. And it would seem that Great Britain, who, largely by their means, has been involved in acts which profoundly, and perhaps permanently, disturb her relations with the United States, had had quite enough of such persons.

As *witnesses*, they are worthless. Laird, senior, dishonored himself by deceptive statements in the House of Commons with respect to the operations of Laird, Sons & Co. The time when he could win applause there by boastful hostility to the United States has passed. Neither Lord Palmerston, if living, nor Lord Russell, if in the House of Commons, nor Mr. Gladstone himself, could look with complacency to-day on the ship-building firm which so zealously served the confederates, to the injury alike of Great Britain and of the United States.

1. John Laird says that a man-of-war was built in the United States for Russia, and delivered to her during her late war with Great Britain. Proof, a newspaper statement in the Times. Laird and the Times are both mistaken. The case of the Maury, mentioned by Sir Roundell Palmer, shows that at this period British officers in America, while engaged in violating the American foreign enlistment act themselves, were watchful to prevent its violation by Russia.

Laird communicated to Lord Tenterden, December 12, 1871, copies of letters between Laird, Sons & Co. and Mr. H., an American, who corresponded with the former on the subject of building a ship or ships for the United States. The correspondence shows that Mr. H. was a mere speculator on his own account, wholly without any authority from the Secretary of the Navy of the United States. "*Our* Department of *Naval Affairs*," as he ignorantly calls it, and our "Minister of the Navy," which expressions alone ought to have satisfied the Lairds that they were being *victimized* by some ingenious New Yorker. Mr. H. abusively referred to the Secretary of the Navy to promote his own private interests or those of the Lairds.

John Laird, in the zeal of his sympathy with the rebellion, made the same statement in the House of Commons long ago, and was flatly contradicted by Mr. Welles, the American Secretary of the Navy.

The superserviceable Mr. H. had no commission from the American Government. He began to treat orally with the Lairds, early in 1861, before the arrival of Mr. Adams in England. No officer of the United States appears to have countenanced Mr. H., but the Navy Department, according to Mr. Welles, was importuned by more than one person in behalf of Mr. Laird. If Mr. H. was the agent of anybody, it was of the Lairds.

The British Government must be in desperate straits for defense, when it condescends to resuscitate the stale calumnies of "*un homme taré*," like John Laird, and to put them into its Case.

2. In this connection we dispose of another of the smaller items of accusation of the United States.

It is charged in the British Case that we purchased arms in England. What then? Was it not lawful to do so, according to the accepted law of nations?

Purchase of arms.

This charge is another illustration of the injustice of that act of the British Government which assumed to put the United States and their rebels on a footing of international equality in the markets of Great Britain.

Not thus have the United States deported themselves toward Spain in the matter of Cuba.

V.—STATEMENT OF SOME GENERAL FACTS PERTINENT TO THE INQUIRY, AND APPLICABLE TO EACH CRUISER.

Resume of facts stated in the American Case to establish unfriendly animus of British government and people.

The United States in their Case, which was delivered to the Tribunal of Arbitration on the 15th day of December last, presented evidence to establish the following facts:

1. That before the outbreak of the insurrection in the United States, Her Majesty's Government invited the Government of the French Emperor to act jointly with the British Government in the anticipated rising of the insurgents.

2. That before an armed collision had taken place, Her Majesty's Government determined to recognize the insurgents as belligerents, whenever the insurrection should break out.

3. That, in accordance with the previous invitation to the French Government, Her Majesty's Government announced its decision so to recognize the insurgents, and invited France to do the same, as soon as it heard of the outbreak of the insurrection, and before it had official information of the steps which the Government of the United States proposed to take for the suppression of the same.

4. That after the announcement of this decision was made, and before the Queen's Proclamation was issued in accordance therewith, the attention of Her Majesty's Government was called in both houses of Parliament to results which it was supposed would follow the recognition of the insurgents as belligerents, viz, that they would be entitled to carry on war on the ocean, and to issue letters-of-marque.

5. That, simultaneously with the invitation to the French Government to join in the recognition of the insurgents as belligerents, that Government was invited to join Her Majesty's Government in an effort to obtain from the insurgents certain advantages to British and French commerce, on the condition, held out in advance, that the right of the insurgents to issue letters-of-marque should not be questioned.

6. That these steps were taken clandestinely, without the knowledge of the United States; and that the desired advantages were obtained, and the right of the insurgents to issue letters-of-marque was recognized.

7. That these unfriendly acts, committed before or soon after the outbreak of the insurrection, were supplemented by other unfriendly acts injurious to the United States and partial toward the insurgents.

8. That they were also supplemented by public speeches made by various members of Her Majesty's Government, at various times, throughout the war, showing that the speakers had personal sympathies with the insurgents, and had active desires that they should succeed in their attempts to defeat the forces of the United States.

The United States further insisted in their Case that the facts which they had so established showed an unfriendly feeling toward them, which might naturally lead to, and would account for, a want of diligence bordering upon willful negligence.

The British response no denial.

Her Majesty's Government has met this part of the Case of the United States by the following averments:

To the second chapter of the American Case, which imputes to the British govern-

ment hostile motives and even insincere neutrality, no reply whatever will be offered in this Counter Case. The British Government distinctly refuses to enter upon the discussion on these charges. First, because it would be inconsistent with the self-respect which every government is bound to feel; secondly, because the matter in dispute is action, and not motive, and therefore the discussion is irrelevant; thirdly, because to reply and to enter upon a retaliatory exposition, must tend to inflame the controversy, which in the whole tone and tenor of its Case the British Government has shown its desire to appease; and lastly, with respect to the charges themselves, if they were of any weight or value, the British Government would still contend that the proper reply to them was to be found in the proof which it has supplied that its proceedings have throughout, in all points, been governed by a desire, not only to fulfill all clear international duties toward the Government of the United States, but likewise, when an opportunity was offered, even to go beyond what could have been demanded of it as of right, in order to obviate all possibility of cavil against its conduct.

Her Majesty's Government states, in substance, that for three given reasons no answer will be made to the charges made by the United States; and this statement is followed by an averment that "the proof which Her Majesty's Government has supplied" "rebuts the charges which the United States contend to have established." We have but few remarks to make in respect to these conflicting averments.

Rejoinder to the British response.

To the statement that to reply to the charges would be inconsistent with the self-respect of Her Majesty's Government, we cannot presume to interpose an answer. We recognize that each independent Government must be the guardian of its own self-respect, and must decide for itself whether the attempt to answer or to explain such facts as were contained in the Case of the United States is inconsistent with that self-respect.

To the averment that such a reply would tend to inflame the controversy, we venture to submit to the arbitrators that it is not easy to see how a friendly explanation of acts which, when committed, naturally tended to excite the present controversy, will assist in continuing or increasing the feeling which those acts caused.

To the assertion that a retaliatory exposition would tend to inflame the controversy, we reply, denying that any retaliatory exposition can be made by Her Majesty's Government. The tribunal will observe what the "exposition" of the United States has been. It has been charged and proved that Her Majesty's Government collectively committed acts, and that the members of that Government individually made speeches, that revealed an active feeling of unfriendliness to the United States, which would lead to and account for the acts of which complaint is made before this Tribunal. How is it possible to make "a retaliatory exposition of" such charges? Great Britain is not here complaining of any act of the United States. What the Government of the United States may have done, or what the individual members of that Government may have said, in respect to the Government of Great Britain, or in respect to the members thereof, touching any of the occurrences of the war which may be brought to the notice of the tribunal, cannot become material or relevant here.

If Her Majesty's Government conceives that it is in its power to present here proof of acts or of sayings on the part of the Government of the United States, or of the members thereof, which ought properly to be taken into consideration by the Tribunal, the charges should be openly made, rather than insinuated. We feel confident that no such proof can be found.

Relevancy of the facts to the issue.

The averment that the discussion is irrelevant has been received with surprise. We had supposed it to be a fundamental principle of law, in the jurisprudence of all civilized nations, that the motives which prompt an act affect its character; and that, when it

is attempted to charge a principal for the acts of a subordinate, it becomes not only relevant but material to show what influences the former has brought to bear upon the latter.

It is proved, for instance, in the Case of the United States, that the Florida was armed at Green Cay in British waters. Her Majesty's Government replies "that over such a dominion as the Bahamas, no Government could reasonably be expected to exert such a control as to prevent the possibility that acts of this kind might be furtively done in some part of its shores or waters."[1]

The general allegation that acts committed furtively, in remote and unfrequented parts of a coast, against the wishes of a Government, and in spite of well-intended, active efforts to prevent them, are not acts over which that Government could reasonably be expected to exert a control, commands the assent of the United States. They would not themselves consent to be held responsible for the results of such acts. It happens, however, that each Government has furnished the Arbitrators with proof that there was a controlling bias at Nassau in favor of the insurgents and against the United States; and Her Majesty's Government furnished the additional proof that this bias resulted from a similar bias which was supposed to exist in the Government and people of England. It certainly must be relevant for the United States to show that such a bias did actually exist in England; that it was openly shown by different members of Her Majesty's Government; and that their views could not but have been known, not only to the colonial authorities at Nassau, but also to the British subordinates at Liverpool, Glasgow, Melbourne, Bermuda, and the Barbados. Whether the acts or omissions of their subordinates which resulted disastrously to the United States were influenced by the known wishes of their superiors, and whether the expression of those wishes was not therefore an absence of due diligence, is a legitimate subject for argument by the Counsel of the United States.

Lord Westbury.

Lord Westbury acknowledged the relevancy of such evidence when he said, "the animus with which the neutral acted is the only true criterion."[2]

Mr. Montague Bernard.

Mr. Montague Bernard acknowledged it when he said, "injurious remissness or injurious inattention on the part of a Government is not merely something less than the greatest possible promptitude or the greatest possible care." "It has not been usual in international questions to scrutinize narrowly the circumstances from which negligence might be inferred and complaints of actual negligence have been urged but rarely, and with a view rather to security for the future than to reparation for the past. These considerations are indeed plain and obvious, and the Government of the United States is probably not insensible to them, since it is at pains to insist that the neglect with which it charges the Government of Great Britain was 'gross,' 'inexcusable,' and 'extreme,' 'equivalent or approximate to evil intention.'"[3]

Earl Russell.

Earl Russell was of the same opinion when he said: "It appears to Her Majesty's Government that there are but two questions by which the claim of compensation could be tested. The one is: Have the British Government acted with due diligence, or in other words with good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is, have the law-officers of the Crown properly understood the Foreign-Enlistment Act, when they de-

[1] British Counter Case, pp. 78, 79.
[2] Am. Case, p. 101.
[3] Neutrality of Great Britain during the American Civil War, pp. 385, 387.

clined in June, 1862, to advise the detention and seizure of the Alabama, and on other occasions when they were asked to detain other ships building or fitting in British ports."[1]

Her Majesty's Government itself, when it framed its Case, had not arrived at the conclusion put forth in its Counter Case. It then said:

The British Case.

> A charge of injurious negligence on the part of a sovereign Government, in the exercise of any of the powers of sovereignty, needs to be sustained on strong and solid grounds. Every sovereign Government claims the right to be independent of external scrutiny or interference in the exercise of these powers; and the general assumption that they are exercised with good faith and reasonable care, and that laws are fairly and properly administered, an assumption without which peace and friendly intercourse could not exist among nations, ought to subsist *until it has been displaced by proof to the contrary.*[2]

The Counsel of the United States will therefore go into the discussion of the questions of fact as to the several vessels with the fact uncontroverted, that Her Majesty's Government and the individual members of it freely, repeatedly, and publicly gave it to be understood that it was neither expected nor desired in the Cabinet at London, that the United States should succeed in averting the destruction of their nationality; and that these expectations and desires were known to all subordinates of Her Majesty's Government.

The facts stated in the American Case to be considered as proved.

The United States also presented with their Case evidence to show that, at the commencement of the insurrection, the insurgents established on British soil administrative bureaus for the purpose of making British soil and waters bases of hostile operations against the United States; and that from these bureaus and through persons acting under their directions, or in co-operation with them, the several vessels of whose acts they complain were either dispatched from Great Britain, or were supplied in British ports with the means of carrying on war against the United States. They further showed that the existence of these bureaus was brought to the knowledge of Her Majesty's Government and was justified by it.

Proof submitted with the American Case of the systematic and official use of British territory by the insurgents, with the knowledge of Great Britain.

Of a portion of this evidence, which Her Majesty's Government sees fit to style "a mass of confederate papers," the British Counter Case says: "of the authenticity of them, and of the manner in which they came into the possession of the United States, Her Britannic Majesty's Government has no knowledge whatever beyond what it derives from the above-mentioned statement, *which it willingly accepts as true.* Of the person by whom, and the circumstances under which, the letters were written, and the character and credibility of the writers, it (Her Majesty's government) knows nothing whatever. They are persons with whom this Government has nothing to do, and whose very existence was unknown to it; and it does not admit as evidence against Great Britain any statement which they may have made to those who employed them, or to one another."[3] "It is not, indeed it could not, be pretended that the correspondence extracted from these papers was in any way known to the British Government. Nor has the Government of the United States furnished the Arbitrators with any means of judging whether the letters are authentic, or the facts stated in them true, or the persons whose names purport to be attached to them, (persons unknown to the British Government,) worthy of credit. Her Majesty's Government thinks it right to say that it attaches very little credit to them."[4]

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[1] Brit. App., vol. iv, paper v, p. 31.
[2] Brit. Case, p. 166.
[3] British Counter Case, p. 3.
[4] Ibid., p. 56.

The Arbitrators may, therefore, assume, notwithstanding the averment on page 56, that Her Majesty's Government admits that the evidence referred to came into the possession of the United States by capture at Richmond, and that there is no serious question of the authenticity of the letters. They may also assume that there will be no serious question made as to the truth of the facts stated in those letters. It is true that Her Majesty's Government says that it attaches little credit to them. It is equally true that the United States attaches full faith to them. The Arbitrators will judge whether it is probable or improbable that these free and confidential letters do give correct accounts of the contemporaneous events which they describe. They will also judge whether those events are or are not relevant to the issue between the two Governments. The United States think that they are. If they are relevant the United States are justified in bringing them before the Tribunal, especially as it appears that Her Majesty's Government was several times informed of the illegal operations which the writers of these identical letters were carrying on from British soil at the time when the letters were written.

These facts also to e taken as proved.

We, therefore, contend that we go into the discussion of the questions of fact, with the further general facts proved, that the insurgents established and maintained unmolested throughout the insurrection administrative bureaus on British soil, by means of which the several cruisers were dispatched from British ports, or were enabled to make them the basis of hostile operations against the United States, and that Her Majesty's Government was cognizant of it.

VI.—THE FLORIDA.

We now proceed to refer the Arbitrators to the evidence upon which the Government of the United States relies as applicable to the case of each vessel separately. We begin with the Florida. The Florida at Liverpool.

This vessel, under the name of the Oreto, was built at Liverpool, England, and sailed from that place on the 22d of March, 1862, without any attempt at her detention by Great Britain. She was in construction and outfit evidently adapted to warlike use.

On the 18th of February Mr. Adams, in behalf of the United States, submitted to Earl Russell, for his consideration, "the copy of an extract of a letter," addressed to him by the consul of his Government at Liverpool, "going to show," as he said, "the preparation at that port of an armed steamer, evidently intended for hostile operations on the ocean."[1] Information by Mr. Adams.

This communication from Mr. Adams was, on the next day, referred by Earl Russell to the Lords Commissioners of the Treasury — that being the appropriate department of Her Majesty's Government for such reference.[2] This department at once called upon the Collector of Customs at Liverpool for information, and by his direction the vessel was inspected by a government inspector, who, on the 21st of February, reported that she was "a splendid steamer, suitable for a dispatch-boat, pierced for guns, but has not any on board, nor are there any gun-carriages."[3] The builders were W. C. Miller & Sons, one of the firm being a government officer, "the Chief Surveyor of Tonnage" at that port.[4] Action of Her Majesty's government.

This firm, on being applied to by the collector for information, said, "We have built the dispatch-vessel Oreto. * * * She is pierced for four guns. * * * She is in no way fitted for the reception of guns as yet; nor do we know that she is to have guns whilst in England."[5]

On the same day these reports of the Surveyor and builders were transmitted by the Collector to the Commissioners of Customs, with the statement that "the vessel is correctly described" in the note of the builders.[6]

On the 22d of February, the Commissioners of Customs reported to the Lords Commissioners of the Treasury that "the Oreto is pierced for four guns; but she has as yet taken nothing on board but coals and ballast. She is not, at present, fitted for the reception of guns, nor are the builders aware that she is to be supplied with guns while she remains in this country."[7]

A copy of this report was furnished by the Lords Commissioners of the Treasury on the 24th of February to Earl Russell, and he transmitted a copy to Mr. Adams on the 26th.[8]

On the 22d of March, the vessel sailed from Liverpool, and on the

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[1] British Case, p. 53.
[2] Brit. Case, p. 54.
[3] Ibid., p. 55.
[4] Ibid., p. 54.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid, p. 55.

She was then evidently a man-of-war.

28th of April arrived at Nassau, in the island of New Providence, one of the Bahamas, and within the jurisdiction of Her Majesty's Government.[1]

On the 13th of June, while still at Nassau, she was visited by Commander Hickley of Her Majesty's ship Greyhound, with several of his officers. The captain of the Oreto, on being inquired of by Commander Hickley, in the presence of the officers of the Greyhound and three of her own "whether she [the Oreto] had left Liverpool fitted in all respects as she was at present," replied "Yes, in all respects;" and "that no addition or alteration had been made whatever."[2] Captain Duguid, the master of the Oreto himself, on his examination as a witness before the Vice-Admiralty Court at Nassau on the 26th of July, three months after her arrival, testified: "The fittings of the Oreto from the time of her quitting Liverpool up to the present time are the same, with the exception of a little alteration in the boats' davits. Four of them were lengthened two feet. That is the only alteration since she left Liverpool."[3] Duggan, the chief officer, testified to the same effect.[4]

On the 30th of April, only two days after her arrival at Nassau, she was examined by Commander McKillop, of Her Majesty's ship Bulldog, then the senior naval officer in command at that station, and he, on the same day, reported to the Secretary of the Admiralty that "a very suspicious steamer, the Oreto, evidently intended for a gun-boat, is now at the upper anchorage under the English flag; but as there are no less than three cargoes of arms and ammunition, &c., united to run the blockade, some of these guns, &c., would turn her into a privateer in a few hours."[5]

On the 28th of May Commander McKillop, in a communication to the Governor of the Bahamas, reported her as "apparently fitting and preparing for a vessel of war."[6] And again, on the 6th of June, in another communication to the same officer, he says, "I have visited the screw-steamer Oreto, and examined her. She is fitted in every way for war purposes, magazines, shell-rooms, and other fittings, totally at variance with the character of a merchant vessel * * * The captain does not deny that she is intended for a war-vessel."[7] And on the 8th of the same month, in a letter to the Colonial Secretary, he says, "In my letter of the 17th instant [ultimo?] I made His Excellency aware of the war-like character of that vessel, and I am of opinion that she is not capable of taking in any cargo, having no stowage."[8]

The letter of the 17th referred to is not produced, but on the 13th of June Commander Hickley (who had succeeded Commander McKillop in command at the station) and the principal officers of his ship, after having visited and examined the vessel, certified to the Governor that "the Oreto is in every respect fitted as a man of war, on the principle of the dispatch gun-vessels in Her Majesty's naval service. That she has a crew of fifty men, and is capable of carrying two pivot guns amidships and four broadside both forward and aft, the ports being made to 'ship and unship,' port bars, breeching, side-tackle, bolts, &c.; that she has shell-rooms, a magazine and light rooms, and handing-scuttles for handing powder out of the magazine, as fitted in the naval service, and

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[1] Brit. Case, pp. 58 et 61.
[2] Ibid., p. 63.
[3] Brit. App., vol. i, p. 49.
[4] Brit, App., Counter Case, vol. v., p. 37.
[5] Brit. App., vol. i, p. 11.
[6] Brit. App., vol. i, p. 16.
[7] Ibid., p. 20.
[8] Ibid.

shot-boxes for Armstrong shot, or shot similar to them. Round the upper deck she has five boats, (I should say,) a ten-oared cutter, an eight-oared cutter, two gigs and a jolly-boat, and davits for hoisting them up; her accommodation being in no respect different from her similar class of vessels in the Royal Naval service."[1]

Again on the 15th of June, in a further communication to the Governor, the Commander says:

These circumstances, her long detention in this port, her character, her fittings, convinced as I am also that during her stay in the port arrangements have been made for arming her outside, * * her evident equipment for war purposes, * * and my conviction, as also that of my officers and men that have been on board of her, that she is built intently for a war-vessel and not for a merchant ship, make it incumbent on me to seize the Oreto as a vessel that can be no more considered as a free-trader, but that she is, on the contrary, calculated to be turned into a formidable vessel of war in twenty-four hours; and that this I am convinced will be the case if she is permitted to leave Nassau. And, therefore, in her present state, a vessel under British colors, sailing from hence in such an equipped state to a professional eye, that I consider it would be a downright neglect of duty on my part to permit her proceeding to sea, without again urging most strongly on your Excellency the expediency of taking charge of her, as an illegally equipped British vessel, as in my professional capacity, as also in the opinion of my officers, it is impossible to consider her as any other, she being a *bona fide* vessel of war on our royal naval principle.[2]

And still again on the 16th, in another communication to the Governor, he says:

On the Oreto I have repeated my professional opinion, as also that of my officers, and I still have to express my conviction that she is a vessel of war that can be equipped in twenty-four hours for battle, and that she is now going out of the harbor as nearly equipped as a vessel of war can be without guns, arms, and ammunition.[3]

This evidence is taken, as the arbitrators will notice, exclusively from that furnished by Her Majesty's Government in its Case, Counter Case, and accompanying documents; and the United States submit, it shows, beyond any controversy, that on the 18th of February, the date of Mr. Adams's communication to Earl Russell, the Oreto was a vessel specially adapted to warlike use; that this fact was apparent upon an inspection of the vessel herself; that she had been constructed and so "specially adapted" within the jurisdiction of Her Majesty's Government, and that she still remained in that jurisdiction.

She was intended to cruise or carry on war against the United States, and Her Majesty's Government had reasonable grounds so to believe.

Character of Mr. Adams's representation.

Mr. Adams, with his communication to Earl Russell on the 18th of February, submitted an extract from a letter of the Consul of the United States at Liverpool, in which it is said: "Mr. Miller, who built the hull, says he was employed by Fawcett, Preston & Co., and that they own the vessel. * * Frazer, Trenholm & Co. have made advances to Fawcett, Preston & Co., and Miller, the builder."[4] And Mr. Adams in his note to Earl Russell says, "From the evidence furnished in the names of the persons stated to be concerned in her construction and outfit, I entertain little doubt that the intention is precisely that indicated in the letter of the Consul, the carrying on war against the United States. * * Should further evidence to sustain the allegations respecting the Oreto be held necessary to effect the object of securing the interposition of Her Majesty's Government, I will make an effort to procure it in a more formal manner."[5]

This communication was not accompanied by any evidence that could

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[1] Brit. App., vol. i, p. 23.
[2] Brit. App., vol. i, p. 24.
[3] Ibid., p. 26.
[4] Brit. Case, p. 53.
[5] Ibid.

be made available in the courts of Great Britain. It was what it purported to be, a mere "statement of belief." If Earl Russell desired further evidence to be furnished by the United States, he was invited so to say in reply. He did not, but in his reply on the 19th contented himself with acknowledging the receipt of the communication, and stating that he had "lost no time in communicating with the proper department of Her Majesty's Government on this subject."[1]

Action of the British government.

On the 21st of February the builders reported to the Collector at Liverpool, "We have built the dispatch vessel for Messrs. Fawcett, Preston & Co., engineers of this town, who are the agents of Messrs. Thomas Brothers, of Palermo, for whose use the vessel, we understand, has been built. * * Mr. Thomas, of the firm at Palermo, frequently visited the ship while she was being built. * * We have handed her over to the engineers, and have been paid for her. According to the best of my information the present destination of the vessel is Palermo; and we have been asked to recommend a Master to take her out to Palermo."[2]

Thus one of the firms suspected by Mr. Adams is shown, by the statement of the builders, to have been concerned in her construction and outfit. On the same day, the collector transmitted this communication from the builders to the Commissioners of Customs, with a further statement of his own, viz: "I have every reason to believe that she is for the Italian Government, and not for the Confederates."[3]

He gave no facts upon which he predicated his belief, and it will be noticed that there is nothing in the builders' statement to justify such a belief. All the builders state is that they understood she was built for the "use of" a firm in Palermo, and that, according to the best of their information, her present destination was Palermo. Fawcett, Preston and Company were at the time "a firm of engineers and founders," "carrying on an extensive trade" at Liverpool,[4] but no inquiries appear to have been addressed to them. They were, as the builders said, the "agents" of the firm for whose "use" they "understood" the vessel was built, and were certainly likely to know for whose "use" she *actually* was built. It had already been urged against this firm "that they had been concerned in a shipment of arms for the Confederate States."[5] There does not seem to have been any good reason why Her Majesty's Government might not have addressed an inquiry to them, yet for some reason it did not, or, if it did, the result has not been reported.

What might have been done.

On the 22d of February, the Commissioners of Customs reported to the Lords Commissioners of the Treasury that they had instructed the "Collector at Liverpool to make inquiries in regard to the vessel Oreto, and it appears from his report that she has been built by Messrs. Miller & Sons for Messrs. Fawcett, Preston & Co., engineers of Liverpool, and is intended for the use of Messrs. Thomas Brothers, of Palermo, one of that firm having frequently visited the vessel during the process of building. The Oreto is pierced for four guns. * * The expense of her construction has been paid, and she has been handed over to Messrs. Fawcett and Preston. Messrs. Miller & Sons state their belief that her destination is Palermo, as they have been requested to recommend a master to take her to that port;

What actually was done.

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[1] Brit. App., vol. i, p. 2.
[2] Brit. Case, p. 54.
[3] Ibid.
[4] Brit. Case, p. 55; Brit. Counter Case, p. 75.
[5] Brit. Counter Case, p. 75.

and our Collector at Liverpool states that he has every reason to believe that the vessel is for the Italian Government. We beg further to add, that special directions have been given to the officers at Liverpool to watch the movements of the vessel, and that we will not fail to report forthwith any circumstance which may occur worthy of your Lordship's cognizance."[1]

It will be here observed, that the report does not state it was only understood by Miller & Sons that the vessel was intended for the use of Thomas Brothers, but it appeared from the report that she was so intended. Neither does it appear that inquiries had not been addressed to Fawcett, Preston & Co.; but it did appear that "special directions" had been given to the officers at Liverpool to watch the movements of the vessel, and that prompt report would be made whenever circumstances worthy of their Lordships' cognizance might occur.

This report was transmitted by the Secretary of the Treasury to Earl Russell on the 24th;[2] and by Earl Russell to Mr. Adams on the 26th of February.[3] The statements of the officers and builders on which the report was predicated were not sent with it. Earl Russell in transmitting the report did not intimate any desire that Mr. Adams should make an effort to procure further evidence.[4] But on the same day of its date he (Earl Russell) telegraphed to Her Majesty's Minister at Turin as follows: "Ascertain and report to me whether a vessel called the Oreto, now fitting out at Liverpool, is intended for the use of the Italian Government."[5] On the 1st of March the Minister at Turin replied: "Ricasoli tells me that he has no knowledge whatever of the ship Oreto, but will cause inquiry to be made."[6] No inquiries appear to have been addressed to the representative of His Majesty, the King of Italy, in London, or to his consul at Liverpool, and no further information was received from the Minister at Turin until after the vessel had sailed.

On the 1st of March, the same day with the receipt of the reply from the Minister at Turin, John H. Thomas, of Liverpool, "a natural-born British subject, born at Palermo, in the island of Sicily, of British parents," declared in writing in the presence of the Registrar of Shipping at the port of Liverpool (one of the officers of the Government specially charged with the registry of vessels[7]) that he was "entitled to be registered as owner of sixty-four shares (the whole) of said ship. To the best of my knowledge and belief, no person or body of persons other than such persons or bodies of persons as are by the Merchant Shipping Act, 1854, qualified to be owners of British ships, is entitled as owner to any interest whatever, either legal or beneficial, in the said ship."[8]

This declaration was made in accordance with the provisions of section 38 of the Merchant Shipping Act, 1854, of Great Britain,[9] to obtain the registry of the ship as a British vessel. Without it the Registry could not have been granted, for none but natural-born British subjects and persons made denizens by letters of denization, or naturalized, could be owners of a British ship.[10] Registry of the Florida.

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[1] Brit. Case, p. 54.
[2] Ibid.
[3] Ibid., p. 55.
[4] Brit. App., vol. i, p. 3.
[5] Brit. App., vol. i, p. 3.
[6] Brit. Case, p. 55.
[7] Merchant Shipping Act, 1854.
[8] Brit. Case, p. 56.
[9] Am. App. Counter Case, p. 1138.
[10] Mer. Ship. Act, 1854, sec. 18; App. Am. Counter Case, p. 1132.

Upon this declaration the vessel was, on the 3d of March, registered as a British vessel, at the port of Liverpool, under the name of the Oreto.[1] This Registry was made in one of the public records, by an officer of the Government specially charged with that duty.[2]

Clearance.

On the 4th of March the Oreto was cleared at Liverpool in ballast, with a crew of fifty-two men, for Palermo and Jamaica.[3] This clearance must have been obtained from the office of the Collector of Customs at Liverpool.[4] To be regular it should have been signed by the Collector or Comptroller,[5] but that formality seems, in this particular instance, to have been omitted.[6]

On the 3d and 4th of March, shipping articles, in accordance with the form sanctioned by the Board of Trade, August, 1860, in pursuance of 17 and 18 Victoria, c. 104,[7] were signed by the master and all the crew who sailed in the vessel, except two who signed as substitutes on the 14th and 15th, in presence of J. W. Hughes, shipping master at the port of Liverpool.[8] These shipping articles specified a voyage from Liverpool to Palermo, thence (if required) to any port or places in the Mediterranean Sea and the West Indies, and back to a final port of discharge in the United Kingdom, the term not to exceed six months. In the same articles, in accordance with the prescribed form, the vessel is described as having been registered at the port of Liverpool, March 3, 1861; and Fawcett, Preston & Co. are named as "managing owners."[9] Shipping articles, by the terms of the "Merchant Shipping Act, 1854," are required to be signed in duplicate in the presence of the shipping master, whose duty it is to "cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and to attest each signature."[10] One part of the articles, thus in duplicate, must be retained by the shipping master, who is an officer of the Government, and who has a public office, known as the "shipping office."[11]

All this formality was gone through with in this case, as will be seen by a copy of the articles actually signed in the "shipping office" and before a "shipping master," found in the Appendix to the British Case, vol. i, p. 161.

Resume.

Thus then stood the facts known to Her Majesty's Government on the 4th of March, eighteen days before the Oreto sailed. She was designed for war purposes. That was evident. She was for the use of some government, though registered in the name of a British subject. She did not belong to Her Majesty's Government, and it was not "believed" or "suspected" that she belonged to or was intended for any other Government than that of Italy or the insurgents.

There were certainly circumstances of strong suspicion against her Italian ownership or destination. Mr. Adams based his opinion of her destination to the confederates directly upon the fact that he understood Fawcett, Preston & Co. and Frazer, Trenholm & Co. had been concerned in her construction and outfit. This last firm, he informed Earl

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[1] Brit. App., vol. i, p. 10.
[2] Mer. Ship. Act, 1854, sec. 42; Am. App. Counter Case, p. 1141.
[3] Brit. Case, p. 56.
[4] Brit. Case, p. 57; Customs Consolidation Act, 1853, sec. 142; App. Am. Counter Case, p. 1163.
[5] See sec. 142 above.
[6] Brit. Case, p. 56.
[7] Mer. Ship. Act, 1854, sec. 8.
[8] Brit. App., vol. i, p. 161.
[9] Brit. App., vol. i, p. 161.
[10] Mer. Ship. Act, sec. 150; App. Am. Counter Case, p. 1155.
[11] Ibid., sec. 122; App. Am. Counter Case, p. 1151.

Russell as early as the 15th of August, 1861, was "well known to consist in part of Americans in sympathy with the insurgents of the United States."[1] In point of fact, only one of the partners resided in Liverpool, and he was a native of South Carolina, who, on the 13th of June, 1863, applied to Her Majesty's government for a certificate of naturalization.[2] The other members of the firm were at the time actual residents of the State of South Carolina. One of them, afterward the Secretary of the Treasury of the insurgents, was, on the 5th of August, 1861, (as appears by the public records in the office of the Registrar of Shipping at Liverpool,) authorized by a "certificate of sale," from her owner in Liverpool, to sell the ship Bermuda at any place out of the United Kingdom. This certificate of sale also described him as "of Charleston, in the State of South Carolina," one of the ports at the time closed by the blockade of the United States.[3] It was upon the occasion of a complaint by Mr. Adams as to this very vessel that he communicated to Earl Russell the relations of this firm with the insurgents.

The builders stated that Fawcett, Preston & Co. contracted with them for the building, and the records showed that they were the "managing owners," directing the preparations for her departure after Mr. Adams's complaints had been made known. No inquiry had been made of them. Mr. Adams stated she had been paid for by Frazer, Trenholm & Co. Her builders stated they had been paid, but omitted to say by whom.

In fact no inquiry suggested by Mr. Adams had been made, and, although he had been assured that the movements of the vessel "should be watched," no single thing appears to have been done by any officer of the Government at the port of Liverpool after the reports of the 21st of February, or at London after the telegram of Earl Russell to the Minister at Turin on the 26th, until the vessel had been permitted to sail under a clearance granted in the face of so many attending circumstances of suspicion.

On page 55 of the British Case, after a recapitulation of the facts which had been developed up to the 1st of March, it is said, "No further information could be obtained by Mr. Adams or was received by Her Majesty's Government up to the time of the sailing of the ship." Mr. Adams had not been called upon to act further, and he had been assured that "special directions had been given to the officers at Liverpool to watch the movements of the vessel."

Negligence of British officials.

It may be literally true that no other information had been received by Her Majesty's Government. The officers at Liverpool seem to have taken their "special directions" literally, and watched only the "movements of the vessel," but the United States submits that if Her Majesty's Government did not receive further information, it was because it failed to use the means within its power to become better informed. It had been put upon inquiry, and was negligent if it did not act.

What might it have done? On the 3d of March the vessel became a "registered British vessel," and subject to the laws in force in the kingdom for the government and control of such vessels. Her ostensible owner was a British subject residing at Liverpool. Her "managing owners" were "a firm carrying on an extensive trade at Liverpool."[4] Frazer, Trenholm & Co. had a business office at Liverpool, and at least one of the partners (Prioleau) resided there.[5]

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[1] Brit. App., vol. ii, p. 133.
[2] Brit. App., vol. v, p. 202.
[3] Brit. App., vol. ii, p. 136.
[4] Brit. Case, p. 75.
[5] Brit. App., vol. v, p. 202.

What might have been done under the merchant's shipping act.

The Merchant Shipping Act, 1854, under which the vessel was registered, provided[1] that "if any unqualified person * * acquires, as owner, any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, such interest shall be forfeited to Her Majesty," and "if any person on behalf of himself or any other person or body of persons, wilfully makes a false declaration touching the qualification of himself or such other person or body of persons to own British ships, or any shares therein, the declarant shall be guilty of a misdemeanor, and the ship or share in respect of which such declaration is made, if the same has not been forfeited under the foregoing provision, shall, to the extent of the interest therein of the person making the declaration, * * be forfeited to Her Majesty."

The same Act[2] provides that "the Board of Trade" (one of the departments of Her Majesty's Government)[3] may, from time to time, whenever it seems expedient to them so to do, appoint any person as an inspector, to report to them upon the following matter, that is to say: * * *

"2. Whether the provisions of this Act or any regulations made under or by virtue of this Act have been complied with." And by section 15, "every such inspector as aforesaid shall have the following powers, that is to say: * * * * * *

"3. He may, by summons under his hand, require the attendance of all such persons as he thinks fit to call before him and examine for such purpose, and may require answers or returns to any inquiries he thinks fit to make.

"4. He may require and enforce the production of all books, papers, or documents which he considers important for such purpose.

"5. He may administer oaths, or may, in lieu of requiring or administering an oath, require every person examined by him to make and subscribe a declaration of the truth of the statements made by him in his examination."[4]

This was machinery in the hands and under the control of the officers of Her Majesty's Government. It could not be managed or controlled by any of the officers of the Government of the United States. Here certainly were circumstances brought to the knowledge of the officers of Her Majesty sufficient to create at least a strong suspicion that some of the provisions of the Merchant Shipping Act had been violated, and an inspector might with propriety have been appointed and an inquiry instituted by him.

The builders, Fawcett, Preston & Co., Frazer, Trenholm & Co., and Thomas, if necessary, might have been called to give information; and, if called, Prioleau (one of the firm of Frazer, Trenholm & Co.) would have been compelled to state, as he did subsequently state under oath,[5] that the contract for the building was made with Fawcett, Preston & Co. by James D. Bullock, who acted in England as the "agent of the Navy Department" of the insurgents; and that she was paid for through Frazer, Trenholm & Co., who were at the time the "financial agents" of the insurgents in Liverpool. He would also undoubtedly have been compelled to state (as did Mr. George D. Harris, of the firm of H. Adderly & Co., afterward on the trial before the Vice-Admiralty Court at Nassau) that his firm at Liverpool consigned her, on her departure

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[1] Sec. 103, sub. 3, 4; App. Am. C. Case, p. 1148.
[2] Sec. 6; Am. C. Case. App., 1127.
[3] Sec. 14; Am. C. Case, App., 1129.
[4] Sec. 14; Am. C. Case, App., p. 1129.
[5] Am. App., vol. vi, p. 187.

from that port, to the firm of H. Adderly & Co. at Nassau; and in accordance with facts which have been subsequently developed, he must have been compelled to testify that, at the time of her registry she was in fact owned by the insurgent government, and was about to sail from Liverpool for its use.

Fawcett, Preston & Co. would have been compelled to testifythat they contracted with Bullock for the construction of the vessel; that they did not, in their contract with Miller & Sons, act as the agents of Thomas Brothers; and that she was not intended for the Italian Government, but for the insurgents. They would also have been compelled to testify that at the very time they had themselves completed her armament, and were shipping it upon the Bahama (a vessel placed at the disposal of the agents of the insurgents for that purpose by Frazer, Trenholm & Co.[1]) for transfer at Nassau, or some other port that might be agreed upon.[2]

Upon this information being thus obtained, Mr. Edwards, the Collector, would readily call to his mind the fact that, as early as the 4th of July, 1861, the Acting Consul of the United States at Liverpool had addressed him by letter as follows: "From information I have received, I have reason to believe that a person named Bullock has come to England for the purpose of procuring vessels to be fitted as privateers to cruise against the commerce of the United States, and that he will make Liverpool the scene of his operations."[3]

It is true, as is said in the British Counter-Case, that in a court of justice in Great Britain, and, probably, before this tribunal instituted under the Merchant Shipping Act, a witness cannot be compelled to answer any question which would expose him to a penalty or to a prosecution for an offense against the law; but it is just as true that this is a privilege personal to the witness himself, and that the Government need not refrain from calling upon one of its subjects to testify, because he might elect to avail himself of such a privilege.

In view of these facts the United States ask the attention of the Arbitrators to the following statement in the Counter-Case of Her Majesty's Government: "In truth, these open and notorious facts do not appear to have been discovered till long afterward, even by the industrious researches of the Government and subordinate officers of the United States."[4] The arbitrators will look in vain for any evidence of "industrious researches" by the Government or subordinate officers of Great Britain. A builder who knew nothing was inquired of and he gave his "understanding." A Collector expressed his "belief," and there the "researches" ended.

Again, on page 75 of the British Counter Case is this statement:

> What the Government did on receiving Mr. Adams's representations is stated in the British Case. Inquiry was instantly directed, but no information whatever could be obtained tending to connect the vessel in any way with the Confederate States. She was declared by the builder to be ordered for a firm in Palermo, a member of which was registered on his own declaration as her sole owner, and had frequently visited her when building. * * * Her first destination, as stated in her clearance, was Palermo, and her crew were nominally (and, as they evidently believed, really) hired for a mercantile voyage. On the one hand were the positive statements of the builder, the registered owner, and the Collector of Customs; on the other, the suspicion of Mr. Dudley that the vessel was still intended by her owner to pass sooner or later into the hands of the Confederate Government.

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[1] British App., vol. i, p. 178.
[2] Letter from Major Huse to Gorgas, March 15, 1862, Am. App., vol. vi, p. 69.
[3] Am. App., vol. vii, p. 72.
[4] Brit. C. Case, p. 74.

Inquiry was indeed instituted on the 19th of February, but it stopped on the 26th, and was never directed to the sources of suspicion indicated by Mr. Dudley. In fact, on the 26th of February every officer of Her Majesty's Government, that the United States were assured would be on the "watch," appears to have closed his eyes and to have left the vessel and her owners entirely to themselves.

Arrival at Nassau.

On the 28th of April the Oreto arrived at Nassau. She was still a British ship, with a British registry, under the British flag, and in a British port.

Conduct of British officials there.

On the 30th of April Commander McKillop, in his report to the Admiralty, says she is "under the English flag."[1] Governor Bayley, in his letter to Commander McKillop, on the 3d of June, says: She "is a registered British vessel and carries the British flag,"[2] and Commander Hickley, on the 15th of June, in his letter to the Governor, refers to her as "a vessel under British colors."[3]

As has been already seen, she was then evidently a vessel of war, and specially adapted to warlike purposes.

Her Majesty's Government, at this time, certainly had reasonable grounds to believe she was intended to cruise and carry on war against the United States.

On the 9th of May Governor Bayley indorsed on a letter to him of that date from Mr. Whiting, the Consul of the United States,[4] the following statement: "For coupling that fact with the description given me by the Captain of H. M. ship Bull-dog, of the build of the Oreto, I cannot fail to infer that she is a vessel of war intended to act against the United States."[5] On the same day he caused a letter to the same effect to be addressed to H. Adderly & Co.[6]

And again on the 21st of June, in his report to the Duke of Newcastle, he says: "Throughout these occurrences I was averse from proceeding to extremities. Not that I considered the conduct of the Oreto to be entirely free from suspicion, or indeed from discourtesy to a neutral government."[7] How was Great Britain neutral to the Oreto, a British ship, under British colors? And in the same letter, he says Commander Hickley informed him "her real destination was openly talked of."[8] Again, "Her Majesty's Government is informed and believes that during the blockade of the insurgent States it was a common practice for ships leaving the port of Nassau, with the intention of endeavoring to run their cargoes into the blockaded ports, to clear for St. John's, New Brunswick."[9] "Early in the month of June, 1862," (about the 4th,) "the consignees of the vessel, who were a mere mercantile firm at Nassau, applied to the Receiver-General (the proper officer for that purpose) for permission to load her for an outward voyage to St. John's, New Brunswick."[10] At this time she was, according to the opinion of Commander McKillop, "not capable of taking in any cargo, having no stowage." On the 9th she commenced taking in a cargo of "arms and ammunition, including some boxes of shells," (not likely to be of much use at St. John's,) but, being visited by Commander Hickley, discharged her cargo and cleared for Havana in ballast.[11]

Want of due diligence.

At Nassau, then, the Government certainly not only had reasonable grounds to believe, but actually did believe, that she was intended to cruise against the United States.

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[1] Brit. App., vol. i, p. 11.
[2] Ibid., p. 18.
[3] Ibid., p. 24.
[4] Brit. Case, p. 61.
[5] Brit. App. Counter Case, vol. v, p. 35.
[6] Brit. App.,vol. i, p. 15.
[7] Brit. App., vol. 1, p. 13.
[8] Ibid.
[9] Brit. Case, p. 63.
[10] Ibid.
[11] Ibid., p. 63.

Under the Rules of the Treaty, Her Majesty's Government was bound to use "due diligence" to detain the vessel at Nassau, as well as at Liverpool. This was not done, but she was permitted to clear for St. John's,[1] when that was equivalent, according to the practice which prevailed at that port, to a clearance for the insurgent States.

But it is claimed by Her Majesty's Government "that the Florida was seized while at Nassau, on charge of a violation of the Foreign-Enlistment Act; that proceedings were, by the Governor's direction, instituted in the proper court, with a view to her condemnation, and that after a regular trial she was ultimately released by a judicial sentence."[2]

It is also said, on p. 78 of the British Counter Case, that the Vice-Admiralty Court "was a Court of competent jurisdiction; the authorities of the Colony were bound to pay obedience to its decree; and, as soon as it was pronounced the persons claiming the possession of the vessel were entitled to have her immediately released." Judicial proceedings at Nassau.

As between the claimants of the vessel and Her Majesty's Government seeking to enforce a forfeiture under the provisions of the Foreign-Enlistment Act, this decree may have been conclusive; but as between the United States and Her Majesty's Government, it has not that effect. The duty of Her Majesty's Government was to use due diligence to prevent the departure of the vessel, because she had been specially adapted to warlike use within its jurisdiction, and was intended to cruise and carry on war against the United States.

She was proceeded against on the sole ground that an attempt had been made to equip, furnish, and fit her out within the jurisdiction of the Bahamas.[3] This is in terms admitted by Attorney-General Anderson in his defense as published in the Counter Case.[4] The judge, in announcing his opinion, says: "Now, to support the libel it is necessary that proof should be given, first, that the aforesaid parties, having charge of the Oreto, while the vessel was within the jurisdiction of the Vice-Admiralty Court of the Bahamas, attempted to equip, furnish, and fit her out as a vessel of war."[5] And again, on page 43 he says: "With respect to acts which were done, or circumstances which occurred on board the Oreto before she came within the jurisdiction of the Bahamas Vice-Admiralty Court, it is admitted, and is clear, that the Court has no authority to adjudicate." And again, on the same page: "Captain Hickley's evidence as to the construction and fittings of the vessel I should consider conclusive, even had there been no other; but that construction and those fittings were not made here, but in England, and of whatever nature they may be, do not subject the vessel to forfeiture here."

The pleadings and the proof showed conclusively that the vessel had been specially adapted to warlike use at Liverpool, and that she was still with a British Registry under the British flag; but in the opinion of the judge, the proof did not show that any act had been done within the jurisdiction of his Court for which he was authorized to decree a forfeiture to Her Majesty.

This decree, therefore, does not operate as a defense to the claim now made against Her Majesty's Government by the United States.

But the United States, on page 343 of their Case, have gone further than this, and said: "If it had been predetermined that the Oreto should be released by going through the form of a trial under the Foreign-Enlistment Act, the steps could not have been better directed for

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[1] Brit. App., vol. i, p. 58.
[2] British Counter Case, p. 76.
[3] Brit. App., vol. 1, p. 68.
[4] British Counter Case, p. 77.
[5] Brit. App., vol. i, p. 39.

that purpose." To this the Attorney General of the Colony has been permitted, through the British Counter Case, to make his response that, "this charge is wholly unfounded. Under the circular dispatch of the 15th November, already referred to, the responsibility of initiating proceedings under the Foreign Enlistment Act was placed, and properly so, on the Attorney General of the Colony, and that officer had necessarily to be cautious in advising the institution of proceedings, which, if ultimately unsuccessful, might eventuate in rendering the seizors liable to heavy damages.[1]

It will be observed the Attorney General does not deny, but on the contrary admits, that he was, during all the time the Oreto was at Nassau, the "confidential counsel of Adderly & Co.," and that in a speech made in a trial in another court, which took place after the Oreto was libelled and before the decree was rendered, he said that "the Union of the United States was a myth now fully exploded."[2] He thinks he did not use the words "Yankee fiction," as "the use of words of the sort is not the style of language I am accustomed to adopt," but he admits that he "may have used language embodying the expression of an opinion, which I certainly then entertained, that the Union which the flag was intended to represent had, as far as related to the Southern portion of North America, passed away."[3] Neither is it denied that Harris, one of the firm of Adderly & Co., consignees of the vessel, was one of the Executive Council of the Government of the Colony,[4] or that A. J. Adderly, another partner in the firm, was a member of the Assembly.[5]

Her Majesty's Government admits in its Case,[6] and repeats in its Counter Case,[7] that "in a proceeding *in rem* against a ship, to enforce a forfeiture for an alleged infringement of a Statute, a Court, wherever locally situate within the dominions of the Crown, might lawfully receive and adjudicate upon evidence of such infringement wherever the act or acts constituting it might have been committed." The theory, then, on which the Attorney General founded and conducted his case before the Vice Admiralty Court was erroneous. A vessel specially adapted to warlike use in Liverpool might have been condemned on that cause of forfeiture in the Bahamas, but the Oreto was released.

The Attorney General, who conducted the proceedings, was also confidential counsel of Adderly & Co., when the vessel arrived at Nassau on the 28th of April, consigned to their care.[8] One Heyliger, an agent specially detailed by the insurgents to look after their interests at Nassau,[9] directed her to proceed to Cochrane's anchorage, "there being no Confederate naval officer to take charge of her for the present."[10] She was, however, on that day entered at the Custom House at Nassau in ballast.[11] On the 19th of May the Consul of the United States wrote to the Governor of the Colony that it was "believed, and so reported by many residents here, that she is being prepared and fitted out as a confederate privateer."[12]

The Governor directed an immediate report from the Receiver General

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[1] British Counter Case, p. 77; Brit. App. Counter Case, vol. v, pp. 19, 25.
[2] American Case, page 344.
[3] British App., Counter Case, vol. v, p. 25.
[4] American App., vol. vi, p. 237.
[5] Ibid.
[6] Page 66.
[7] Page 76.
[8] Testimony of Harris, British App., Counter Case, vol. v, p. 40.
[9] Benjamin to Maffitt, American App., vol. vi, p. 57.
[10] Heyliger to Randolph, American App., vol. vi, p. 77.
[11] British App., Counter Case, vol. v, p. 35.
[12] British Case, p. 61.

Partial and unfriendly conduct of the colonial authorities.

as to the truth of these allegations, and he, on the same day, reported: "She did not enter the harbor, and now lies at Cochrane's anchorage, and I have no information as to her future proceedings."[1] On the same day the Attorney General was called upon for his opinion, and he reported as follows: "With respect to the Oreto, the Consul's allegation is to the effect that it is believed and reported by many residents here that she is being prepared and fitted out where she now lies at Cochrane's anchorage, which is within the limits of the port of Nassau, as a Confederate privateer. Now if such is the fact, an offense against the Foreign Enlistment Act has been committed, all parties implicated in which are liable to be criminally proceeded against for misdemeanor, and the vessel may be seized by any naval or revenue officer; but to justify proceedings either against the parties or the vessel, the matter must not rest on repute or belief alone, but the authorities must have positive facts to ground their proceedings on, and unless the Consul can adduce such, or they can be obtained through other channels, no steps can be taken either for the arrest of the vessel or those on board of her."[2]

On the same day the Governor caused a note to be sent by the Colonial Secretary to Adderly & Co., as follows: "I am directed by the Governor to notify to you, that if you are arming or putting arms on board the steamer Oreto, His Excellency will enforce the rules laid down in the Queen's Proclamation, for, coupling that fact with the description given to his excellency by the captain of Her Majesty's ship Bulldog of the build of the Oreto, His Excellency cannot fail to infer that she is a vessel of war intended to act against the United States; and as Her Majesty's Government have expressed their deliberate intention of observing and preserving neutrality in the Queen's possessions, His Excellency will use his strongest efforts to prevent either of the belligerent powers from arming or equipping vessels of war in this port."[3]

To this, upon the next day, Adderly & Co. wrote in reply: "We beg to acknowledge receipt of your communication of yesterday's date informing us that, if we were arming or putting arms on board of the steamer Oreto, His Excellency would enfore the rules laid down in the Queen's Proclamation. In reply, we beg to state, for the information of His Excellency, the Governor, that we have neither attempted to arm or put arms on board of the British steamer Oreto, consigned to our firm, nor are we aware of there being any intention on the part of the owners to arm that vessel."[4]

On the trial before the Judge of the Vice Admiralty Court, Harris, one of the firm, and, as has been seen, a member of the Executive Council, testified: "I to'd Captain Duguid, very shortly after he arrived here, that they were talking a good deal about the hull of his vessel; mind, do nothing that will have the appearance of equipping."[5]

Here it may not be improper to call the attention of the Arbitrators to a letter from Heyliger, the agent of the insurgents, to their Secretary of War, under the 2d of May, in what he says; "You are aware that she is a gunboat. * * * The Bahama is expected every moment with her armament, and I shall have it speedily transferred, though the matter will have to be delicately managed."[6] The Bahama did afterwards arrive. The United States are unable to give the date of her arrival, but she first appeared at Cochrane's Anchorage, near the Oreto, without any

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[1] British App., Counter Case, vol. v, p. 35.
[2] British App., vol. i, page 15.
[3] Ibid.
[4] Brit. App., vol. vi, p. 16.
[5] Brit. App., Counter Case, vol. v, p. 42.
[6] Am. App., vol. vi, p. 234.

entry at the Custom-House or any Custom-House Officers on board.[1] On the 26th the Receiver General advised the Colonial Secretary that he had "every reason to believe the consignees of the British steamer Oreto (which vessel arrived from Liverpool in ballast) intend shipping large quantities of arms, and munition of war as cargo. * * * Probably application may be made to allow cargo from other vessels to be transferred to the Oreto where she now lies."[2]

On the 27th the Bahama entered inwards with Adderly & Co. as consignees.[3]

On the 28th Commander McKillip advised the governor that "several steamers having anchored at Cochrane's Anchorage, I sent an officer yesterday to visit them and muster their crews, and ascertain what they were, and how employed. The officer reports that one steamer, the Oreto, is apparently fitting and preparing for a vessel of war. Under those circumstances I would suggest that she should come into the harbor of Nassau to prevent any misunderstanding as to her equipping in this port contrary to the Foreign Enlistment Act, as a privateer or war-vessel."[4]

On the same day the Governor addressed the Attorney General and desired "to know whether it is contrary to law to order the Oreto to come down to the harbor, as the Commander of the Bulldog has reported her to have the appearance of a privateer arming herself."[5] The Attorney General immediately replied that he was "of opinion that an order for the removal of the Oreto from Cochrane's Anchorage, where she now lies, to the harbor of Nassau should not be made, as such order could not be legally enforced unless it was distinctly shown that such a violation of law had taken place in respect of her as would justify her seizure."[6]

On the next day the Governor, having called for a further and more detailed report upon the same subject, the Attorney General in reply said:

> My reply of yesterday was necessarily short, as your note was received at a late hour and I was anxious to send an immediate answer in order that any action in the matter referred to might be prevented. * * Any British or foreign trading vessel has a right, in carrying on her lawful commercial pursuits, to use as anchorage-places any of the harbors, roadsteads, and anchorages in the Colony. * * Beyond exercising the powers conferred on him by the trade laws, His Excellency has no power to compel the removal of the Oreto from her present anchorage, unless some act has been done in respect of her which would constitute a violation of law and subject her to seizure.
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> This brings me to the question whether there is anything disclosed in your communication which would, in a court of law, justify the forcible removal of the vessel from her present position. The information amounts to this: that the senior naval officer on the station has officially reported to the Governor that this vessel is apparently fitting and preparing for a vessel of war, or, as stated in your note of yesterday, has the appearance of a privateer arming herself. Now, unless Captain McKillop grounds the opinion formed and reported by him on some overt act, such as the placing of arms or other munitions of war on board of the vessel without the sanction of the Revenue Department, or some such similar act, evidencing an intention on the part of the persons in charge of the vessel to fit her out as a vessel of war to be employed in the service of a foreign belligerent Power, the forcible removal of the vessel from her present position, merely to guard against a possible infraction of the law, could not be justified. Such removal would in fact constitute a "seizure," which the parties making would be responsible for in damages, unless they could show a legal justification which must be based upon something beyond mere suspicion.

He then says, while mere suspicion might not be sufficient to authorize a removal, it would justify the placing of "a revenue officer on board of her to watch the proceedings of the parties on board, in order

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[1] Ibid., p. 326.
[2] Brit. App., Counter Case, vol. v, p. 35.
[3] Am. App., vol. vi, p. 325.
[4] Brit. App., Counter Case, vol. v, p. 36.
[5] Ibid.
[6] Ibid., p. 37.

that, if any actual contravention of the law took place, it might be at once reported and prompt measures taken by seizure of the vessel and otherwise to punish all parties implicated therein."

Then he says:

I will only now add that I feel that a great measure of the responsibility rests upon me in questions of this nature, and that it behooves me to be particularly cautious in giving any advice which may lead to a course of action on the part of the authorities here which may be considered as contravening the principles enumerated in the circular dispatch of His Grace the Duke of Newcastle, on the 15th of November last, in a part of which it is stated: "If it should be necessary for the Colonial authorities to act in any such case, [*i. e.*, violation of the Foreign Enlistment Act,] it should only be done when the law is regularly put in force, and under the advice of the law-officers of the Crown."[1]

On the next day he wrote to the Colonial Secretary:

I have the honor to acknowledge the receipt of your letter of this day's date, and have to express my regret that His Excellency should have misapprehended the meaning of my letter of yesterday's date, which I certainly never intended should bear the construction which His Excellency appears to have placed on it, and which I respectfully submit a careful perusal will show cannot be placed on it. Any act of arming, or any attempt to arm a vessel in contravention of the Imperial Statute, commonly known as the Foreign-Enlistment Act, will subject the vessel to seizure, and it is quite immaterial in what manner the violation of law is ascertained, or by whose testimony it is established, the only necessary requirement being that the facts testified to should be such as would be received in court of law as legal proof of the violation of the statute sought to be established. With reference to the concluding part of your letter, I can only say that it is far from my wish to dictate to His Excellency the course to be pursued by him, my simple duty being to place before His Excellency my opinion on the state of the law bearing on such points as he may submit for my consideration, and that it is entirely for His Excellency to decide whether he will be guided by my views or not.[2]

The letter of the Colonial Secretary, to which this is a reply, is not given among the documents produced in evidence by Great Britain.

After the receipt of these several letters from the Attorney-General, the Governor addressed a communication to Commander McKillop, under date of June 2, in which he says that the Oreto should not be allowed to arm herself for belligerent purposes within the jurisdiction of the harbor. "But, inasmuch as it is not yet proved beyond doubt that the Oreto is a vessel of war, and as it is just possible that she may be only a merchant ship taking arms and implements of war solely for exportation, it is desirable that a more special and minute examination of her conditions and equipment should be made before she can be treated as a pirate, a privateer, or foreign man-of-war arming within our waters." He therefore requested that such steps should be taken "as in your professional opinion seem best for the purpose of ascertaining the true character of the Oreto and the nature of her equipment; and if, after inspecting her guns, her crew, and the general disposition of the vessel, you are convinced that she is in reality a man-of-war or privateer arming herself here, then it will become your duty, either to concert measures for bringing the Oreto down into this part of the harbor, or, what will be a safer course, to remove your own ship to Cochrane's Anchorage and there watch her proceedings from day to day."[3]

On the day of the date of this letter (June 2) the cargo of the Bahama, consigned to Adderly & Co., was "warehoused" and stored at Nassau in the public warehouses.[4] About this time, Adderly & Co. made application to the Receiver General for leave to ship a load of arms and other merchandise by the steamer Oreto.[5]

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[1] Brit. App., vol. i, p. 17.
[2] Ibid.
[3] Brit. App., vol. i, p. 18.
[4] Am. App., vol. vi, pp. 325, 326.
[5] Testimony of Harris, Brit. App., Counter Case, vol. v, p. 40.

On the 4th of June this application was considered by the Executive Council, (Mr. Harris being a member,) and with their advice it was ordered by the Governor that if practicable the Oreto should take in her cargo within the port of Nassau.[1]

In accordance with the advice of the Council, the Governor appears to have communicated this order to Commander McKillop, and he, under date of the 6th, reports: "I have visited the screw steamer Oreto and examined her. She is fitted in every way for war purposes, magazines, shell-rooms, and other fittings totally at variance with the character of a merchant-vessel. She has no guns or ammunition on board. The Captain does not deny that she is intended for a war-vessel."[2] This report was referred to the Attorney General, and he on the 7th gave his opinion as follows: "There are no facts set forth in the within letter which would in my opinion authorize the seizure of the Oreto. They constitute only circumstances of suspicion, which if coupled with some actual overt act would doubtless materially strengthen the case against the vessel, but which do not in themselves form a ground of seizure."

On the 13th of June the letter of Commander Hickley and the report of himself and his officers, a statement of the contents of which has been already given, was submitted to the Attorney General, and in regard to them he says: "I am of the opinion that there is nothing contained in those documents which would justify the detention of the vessel."[4]

On the 15th of June, Commander Hickley, as has been seen, addressed another letter to the Governor, in which, in addition to what has been before stated, occurs this passage:

> On my former communication to your Excellency of the 13th of June, I have the Crown Lawyers' opinion, and I again bring the facts of the broadly suspicious character of the Oreto before you, with the addition of those of her old crew having left her, and for why, as likewise her entering or attempting to enter a new crew, for your consideration and the Law Officers of the Crown; and failing their sanction to take charge of the Oreto, (and it is improbable, if not impossible, that they can know a war vessel's equipment as well as myself and officers,) I have to suggest that I should forthwith send her to the Commodore or Commander in Chief on my own professional responsibility; as allowing such a vessel as the Oreto to pass to sea as a British merchant vessel and a peaceful trader would compromise my convictions so entirely as to be a neglect of duty as Senior Naval officer here present, and certainly not doing my duty in co-operating with your Excellency for the protection of the harbor of Nassau.[5]

This being submitted to the Attorney General, he replied, that it did not appear to him "to carry the case against the Oreto further than shown in the previous reports of himself and Commander McKillop, and I contend that no case has as yet been made out for the seizure of that vessel under the Foreign Enlistment Act. With respect to the suggestion in the concluding part of Commander Hickley's letter, I have to remark that, if the vessel is liable to seizure at all, it must be under the provisions of the Foreign Enlistment Act, and if so seized the question of her liability may as readily and efficiently be decided in the Court of Vice Admiralty of this Colony as before any Tribunal in Her Majesty's Colonial Possessions, and consequently that no necessity exists, nor do I think that any excuse can be made, for sending her, as suggested by Commander Hickley, to the Commodore or Commander-in-Chief, who I presume are either at Bermuda or Halifax; while, on the other hand, if I am correct in the view I have taken of her non-liability to seizure, the reasons against sending her hence will of course be far

[1] See proceedings of the meeting, which are stated in full on page 62 of the British Case.

[2] Brit. App., vol. i, p. 20.

[3] Ibid.

[4] Brit. App., vol. i, p. 23.

[5] Ibid., p. 24.

more powerful; and therefore, on either view of the case, I advise His Excellency to withhold his sanction from the course of action suggested."[1]

On the receipt of a copy of this opinion, Commander Hickley abandoned his seizure of the vessel, since it was not sanctioned by the Law Officers of the Crown at Nassau, and as he was told by His Excellency that he did not "think it consistent with law or public policy that she should now be seized on the hypothesis that she is clearing out for the purpose of arming herself as a vessel of war beyond the limits of the harbor. We have done our duty in seeing that she does not leave the harbor equipped and prepared to act offensively against one of two belligerent nations, with each of whom Great Britain is at peace."[2]

On the 17th, however, notwithstanding the strong opinion of the Law Officer of the Crown who discharged the duties of Queen's Advocate and Attorney General of the Colony, the Governor yielded to the conviction of Commander Hickley and his officers that she was a vessel of war that could be equipped in "twenty-four hours for battle," and consented to her seizure, as the "equipment of the Oreto, the object of her voyage hither, the intent of her voyage hence, the nature of her crew, and the purpose of their enlistment, are all the fair subjects of judicial investigation."[3] In accordance with this view of the case she was seized and the Governor gave "the necessary instructions to proceed."[4]

Under these instructions the Attorney General proceeded against her on the theory of his opinions, so often reiterated, that she could only be held for acts of equipment and fitting out actually occurring within the jurisdiction of the port of Nassau.

Seizure of the Florida.

The vessel had arrived at Nassau on the 28th of April, six weeks before her final seizure. From the first she was an object of suspicion and comment. Commander McKillop reported her arrival and his suspicions to the Admiralty in London, under date of the 30th of April. His report was received in London, so that it was communicated to the Foreign Office, on the 10th of June.[5] Not a word went from any other officer at the Colony to the Home Government until the 21st of June, when Governor Bayley reported the seizure and all that preceded it, including the opinions of the Attorney General. This was communicated to the Foreign Office at London, on the 31st of July.[6]

It was submitted to the Law Officers of the Crown, and they on the 12th of August reported: "We think that the facts warranted the seizure, but we must add that it is very important that, on the trial, evidence should be adduced of what occurred at Liverpool, as regards the building and fitting out and the alleged ownership and destination of the Oreto."[7]

The Law Officers of the Colony had no communication whatever with the Law Officers of the Home Government. But on the 28th of June, Heyliger, the Confederate agent at Nassau, advised the insurgent Secretary of War that "the proceedings instituted for her release are now complete, and will be pushed forward vigorously. Our complaint was filed in Court this morning, and the libel may be put in to-day or on the 30th. On the 1st July our Counsel will argue on the law points."[8]

And so it was in fact. The seizure was made on the 17th, supported

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[1] Brit. App., vol. i, p. 25.
[2] Ibid.
[3] Brit. App., vol. i, p. 27.
[4] Ibid.
[5] Ibid., p. 11.
[6] Layard to Rogers, Brit. App., vol. i, p. 29.
[7] Brit. App., vol. i, p. 31.
[8] Am. App., vol. vi, p. 88.

by the affidavit of Commander Hickley on the 20th; an affidavit of claim was filed by Captain Dugaid on the 27th; the libel was filed by the Attorney General on the 1st of July; the responsive plea of the claimant on the 21st;[1] the trial commenced on the 10th—at least the first witness was examined then; the last witness was examined on the 26th; the argument was made on the 30th, and the decree rendered on the 2d of August.[2]

It will be interesting to see what was being done by the agents of the insurgents while these proceedings were going on. Maffitt, who had been assigned by Commander Bullock to the command of the Florida, (then called the Manassas,) arrived in Nassau on the 6th of May,[3] and on the 22d he reported to the insurgent Secretary of the Navy that he had arrived at Nassau, and had personally assumed command "of the Manassas, which vessel I hope to have ready for service soon."[4]

On the 26th of May the insurgent Secretary of the Navy made a requisition upon the Treasury for $50,000, to be sent "to fit out and equip the Confederate States steamer Manassas, now at Nassau,"[5] and on the next day (the 27th) a bill was ordered drawn for that amount, "in favor of Lieutenant John N. Maffitt, Confederate States Navy."[6]

Heyliger was superintending the affairs of the insurgents at Nassau, and shipping regularly his cargoes of articles contraband of war.[7]

Nassau was visited by numerous parties, almost all of whom were more or less interested in what was then considered the rising fortunes of a new nation. Many of them were persons of education and acquirements, which gave them ready access to the best society of the place, while unfortunately, on the other hand, we had but few Northern visitors.[8]

The island of New Providence, of which Nassau is the only town, is a barren limestone rock, producing only some coarse grass, a few stunted trees, a few pineapples and oranges, and a great many sand-crabs and fiddlers. Before the war it was the rendezvous of a few wreckers and fishermen. Commerce it had none, except such as might grow out of the sponge trade and the shipment of green turtle and conch shells. The American war, which has brought woe and wretchedness to so many of our States, was the wind which blew prosperity to Nassau. It had already put on the air of a commercial city, its fine harbor being thronged with shipping, and its warehouses, wharves, and quays filled to repletion with merchandise. All was life, bustle, and activity. Ships were constantly arriving and depositing their cargoes, and light-draught steamers, Confederate and English, were as constantly reloading these cargoes and running them into the ports of the Confederate States.[9]

The notorious sympathies of the Colony and the supposed sympathies of England with the Southern Confederacy have, I doubt not, led the Consul, and may lead the Government of the United States, to imagine that the Oreto has all along received a collusive and dishonest support from the authorities of the place. Nothing could be further removed from the truth than this belief; still it would be exceedingly awkward were the reasonableness of these suspicions to be tested by the experience of any vessel which arrived equipped, to act on the Federal side, and expecting to find her arms and ammunition here.[10]

They are all southern sympathizers. * * * Indeed, this seems to be our principal port of entry, and the amount of money we throw into the hands of the Nassauites probably influences their sentiments in our favor.[11]

On the 8th of June Captain Semmes arrived at the island and took rooms at the hotel. Heyliger and Lafitte, agents of the Insurgent States at Nassau, gave him a dinner, at which about forty persons were pres-

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[1] Brit. App., vol. i, pp. 61, 63, 67, and 68.
[2] Brit. App., vol. i, p. 38; vol. v, p. 37.
[3] Am. App., vol. vi, p. 317.
[4] Ibid., p. 236.
[5] Ibid.
[6] Ibid., p. 237.
[7] Letters Heyliger to Randolph, ibid., pp. 76–87.
[8] Attorney-General Anderson's vindication of himself, February 10, 1872. Brit. App., Counter Case, vol. v, p. 25.
[9] Captain Semmes's description of Nassau in his "Adventures Afloat," Am. App., vol. vi, p. 487.
[10] Governor Bailey to the Duke of Newcastle, June 21, 1862, Brit. App., vol. i, p. 14.
[11] Journal found on board the Florida, Am. App., vol. vi, p. 335.

ent. The same gentlemen also gave a dinner to Captain Maffitt while he was there, which was attended by the same number of persons.[1]

During the existence of the blockade of the Southern ports of America, vessels leaving the port of Nassau, with the intention of endeavoring to run their cargoes into the blockaded ports, almost invariably cleared for St. John's, New Brunswick, and many of them took in their outward cargoes at the anchorages adjacent to the harbor of Nassau.[2] Adderly & Co., the most influential mercantile establishment in Nassau,[3] were receiving their two and one-half per cent. commission for transshipment; a most exorbitant demand, but one in unison with the usages of the place, and submitted to in consideration of retaining their interest.[4]

It is known that this trade of blockade-running has been a most profitable trade; that great fortunes have been made by many persons in carrying it on, and that Nassau and some other places have swarmed with vessels which have never previously been seen in those ports.[5]

Trial and release. The criticisms on these proceedings in the American Case are sustained.

In the midst of such surroundings, and with such a prosecutor, the case of the Oreto was tried, and resulted in a decree against Her Majesty; and the United States now repeat what they said in their Case: "If it had been predetermined that the Oreto should be released, the steps could not have been better directed for that purpose." Adderly & Co. were at the outset informed what they must refrain from doing to avoid a conviction under the law as the Attorney General construed it, and they followed this advice, as it would seem, faithfully. The Attorney General commenced and prosecuted the case upon his construction of the law, which Her Majesty's Government admits was erroneous. He made no claim before the judge for a different construction, and the judge proceeded with that point admitted against the Government. The United States believe, as did His Excellency, Governor Bayley, that it would have been found to be exceedingly awkward to Her Majesty's Government if the reasonableness of their suspicions had been tested at that time by the experience of a United States vessel arriving at that port expecting to find its arms and ammunition there.

As soon as the release was ordered, that "energetic officer," Captain Maffitt, and his lieutenant, Stribling, "threw themselves" on board of the vessel.[6] On the evening of her release, solomon, a shipping-master at that port, at the request of Maffitt, commenced engaging men for her at his shipping-office. By Friday morning he had sent on board sixty-five men, but in the mean time the vessel had gone outside,[7] under a clearance in ballast for St. John's, New Brunswick, obtained at the Custom House.[8]

On the 6th of August Lafitte, an insurgent agent, purchased the schooner Prince Alfred in the name of A. J. Adderly, one of the firm of Adderly & Co.[9] On the 7th, Adderly & Co. loaded her from the public warehouse, with the cargo warehoused for them from the Bahama on the 2d of June, and with shot, shells, and stores warehoused at different times from other vessels. She was cleared outward on the same day for St. John's.[10]

Armament of the Florida.

The Oreto went outside and steamed up and down the coast trying her machinery. Her Majesty's ship of war, the Peterel, was at anchor outside the bar, and while there a boat from the Oreto, with "a man who stated he was the master in command of the

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[1] Am. App., vol. vi, pp. 317, 487.
[2] Att.-Gen. Anderson, Sept. 1, 1871, Brit. App., vol. i, p. 53.
[3] Heyliger to Benjamin, Am. App., vol. vi, p. 66. [4] Ibid.
[5] Lord Russell in the House of Commons, February 16, 1864, Am. App., vol. v, p. 526.
[6] Am. App., vol. vi, p. 489. [7] Am. App., vol. vi, p. 311.
[8] Brit. App., vol. i, p. 58. [9] Kirkpatrick to Seward, Am. App., vol. vi, p. 327.
[10] Am. App., vol. vi, pp. 325, 328.

Oreto," came alongside; "said he was very short-handed, and wanted to anchor for about two hours to adjust his machinery, but if he anchored outside he had not sufficient crew to weigh his anchor, and begged I [the captain of the Peterel] would assist him by lending him men." The men were refused, but he was told "he might hold on astern of the Peterel," and a line was given him for that purpose.[1] The same night about one o'clock the Prince Alfred came out from Nassau while the Oreto was fastened astern of the Peterel. When she got outside of the bar, a light was struck on board; the Oreto let go the hawser of the Peterel, stood to the northward for a while, and then rounded to and took the Prince Alfred in tow.[2] The two vessels then proceeded, the Prince Alfred being in tow, to Green Cay, about sixty miles from Nassau, and there the guns, ammunition, and stores were transferred from the Prince Alfred to the Oreto, about a week being occupied in so doing.[3]

It is said on page 78 of the British Counter Case that Her Majesty's Government has no means either of verifying or disproving the truth of the statement in the Case of the United States as to the arming of the Florida. On page 67 of the British Case, however, it is said that Her Majesty's Government "has been informed and believes that she was subsequently armed for war by a Captain Maffitt; * * that she was then commissioned; * * and that after keeping the sea for a few days, she put in at the port of Cardenas, in Cuba, where (or at Havana) she remained for nearly a month. On the 4th September the vessel arrived at and entered the port of Mobile." The precise point at which she took on her armament is not important. It is sufficient for all the purposes of the United States that she was armed within a short time after she left Nassau. It appears from the admissions in the British Case, that she entered the port of Mobile within a month after leaving Nassau; that she remained at Cardenas or Havana about a month before she went to Mobile, and that she was armed and commissioned before she reached Cardenas. These admissions establish, therefore, the important fact of arming shortly after leaving Nassau. But the United States submit that the proof presented by them establishes the further fact that she was armed at Green Cay, in the manner and under the circumstances they have alleged. This proof will be found in vol. vi of the American Appendix, pages 306 to 321.

The Oreto, with her guns all mounted, at 8 a. m. of the 17th, parted from the Prince Alfred, hoisted the flag of the insurgents, and started upon her cruise under the name of the Florida.[4] She proceeded to Cardenas, a port under the jurisdiction of Her Majesty the Queen of Spain, and there attempted to ship a crew, but "the matter was brought to the notice of the Government," and an officer sent to the commander of the Florida "with a copy of the proclamation of the Queen of Spain and a notification to him that the Florida had become liable to seizure." The commander then "repudiated the transaction, and to avoid difficulty with the Government," paid the passage of twenty men to and from Havana, and returned the men to Havana. This was upon the 31st of August.[5]

At Cardenas.

She then sailed for Mobile and ran into the port through the blockade on the 4th of September "wearing the English red ensign and pennant,"[6] and painted like a British vessel of war. A

At Mobile.

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[1] Letter of Watson to Admiralty, Brit. App., Counter Case, vol. v, p. 51.
[2] Affidavits of Solomon and Lee, Am. App., vol. vi, pp. 312, 321.
[3] Brit. Counter Case, p. 78; Am. App., vol. vi, p. 328.
[4] Am. App., vol. vi, pp. 308, 328. [5] Ibid. voucher No. 6, p. 331.
[6] Brit. App., vol. i, p. 74.

commander in Her Majesty's Navy soon after the occurrence said, "had I met the Oreto at sea, armed and having a pennant, I should have taken her for one of our ships."[1]

She remained at Mobile until the 15th of January, and then ran the blockade outwards. Stopping at Havana on the way for forty-eight hours, she arrived again at Nassau early in the morning, about day-break, of the 25th.[2] She steamed in over the bar without a pilot and cast anchor without permission of the governor. On his attention being called to the proclamation which required permission before coming to anchor, Captain Maffitt "expressed his regret for having unwittingly violated the regulations of the port," and was taken on shore by the adjutant of the fort in the Government boat to make his explanations to the Governor.[3]

At Nassau, January 25, 1863; receives coals, supplies, and recruitments.

He called at the Government House between eight and nine o'clock, and not seeing the Governor, addressed him a note as follows: "As this vessel is in distress for want of coal, I very respectfully request permission to anchor in the harbor for the purpose of obtaining the same."[4] Permission was given and she "took on board coal and provisions to last us for several months."[5] Her bunkers were filled with coal, and some placed on deck and in every place that could hold it. The coal was taken from wharves and vessels lying in the harbor. The money for coaling her was paid from Mr. Henry Adderly's store.[6] She remained in the harbor until afternoon of the 27th, and at sunset was outside of the bar, opposite the entrance of the harbor, "within a mile of the light-house, running up and down under slow steam, with just steerage-way on her, apparently waiting for something."[7] Eleven men were obtained there and shipped. Adderly & Co. paid the account for shipping the men, which was signed by Captain Maffitt.[8]

She arrived at Barbados, also within the jurisdiction of Her Majesty's Government, on the 24th of February, and applied, in consequence of her having met with severe weather, to be allowed to ship some coal and some lumber for repairs." Her commander assured the Governor "he was bound for distant waters."[9]

At Barbados February 24, 1863; received coals and repairs.

Under these circumstances she was permitted to take in ninety tons of coal. On going into Barbados the bark Sarah A. Nickels ran in before to avoid capture. The Consul of the United States, after the arrival of the Florida, requested that she might be detained until 5 p. m. of the 25th, in order to give the bark her start of twenty-four hours. This was granted.[10]

On the 8th of May she arrived at Pernambuco. A representation was made that her machinery was out of order, and that it would not be possible to proceed with safety in less than three or four days. Permission to remain and repair was granted, and she sailed at 2 p. m. of the 12th.[11]

At Pernambuco.

From there she went to Bermuda, where she arrived on the 15th of July, and where salutes were exchanged with the fort. "This is the first salute which the flag of the Confederate States has ever received in a foreign port, and consequently we dwellers in the little island of Bermuda think very proudly of it.'[12]

At Bermuda, June 15, 1863: repairs and coals.

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[1] Am. App., vol. vi, p. 332.
[2] Brit. App., vol. i, p. 79.
[3] Ibid., p. 80.
[4] Brit. App., vol. i, p. 77.
[5] Private Journal, Am. App., vol. vi, p. 335.
[6] Affidavit of Demerith, ibid., p. 336.
[7] Affidavit of Jackson, ibid.
[8] Affidavit of Solomon, ibid., p. 312.
[9] Brit. App., vol. i, p. 91.
[10] Ibid., p. 95.
[11] Brit. Case, p. 69; App., vol i, p. 106.
[12] Walker to Huse, Am. App., vol. vii, p. 57.

Captain Maffitt "stated that he had been at sea seventy days, with the exception of two visits to Havana and Barbados, each of which occupied less than twenty-four hours, and a visit of shorter duration to a port in the Brazils; that he was last from the immediate neighborhood of New York, within sixty miles of which he had been harassing the United States commerce; that he was in want of repairs to the hull and machinery of his ship, and a small supply of coal."[1]

Applications were made for leave to purchase coal from and repair at the Government dock-yard, which were refused. She was permitted, however, to remain in port until the 25th, when her repairs were completed,[2] and she took in "a full supply of best Cardiff coal brought here from Halifax by steamer Harriet Pinkney."[3] This vessel was one of the insurgent "transports."[4] The conduct of the Governor was approved by the Government September 16.[5]

At Brest; receives recruits and new machinery from Liverpool.

The Florida arrived at Brest, France, on the 23d of August, "in order that her engines and copper sheathing might be repaired."[6] She remained until the 9th of February, 1864.[7] Captain Maffitt, on the 3d of September, sent to Captain Bullock, "Confederate States Navy, Liverpool," a list of men discharged from her with their accounts and discharges. Many of them asked for "transportation, and others for reference to you [Bullock] or to a Confederate agent."[8] These men went to Liverpool, and were paid off in October, 1863.[9]

At Brest, Captain Maffitt left the ship and Captain Barney took command. On the 22d of September, Frazer, Trenholm & Co. and J. R. Armstrong wrote from Liverpool to the new Captain as follows:

> We beg to acknowledge the receipt of your favor of the 18th instant, the contents of which we have noted, and will have our best attention. We are informed by Messrs. Fawcett, Preston & Co., the builders of the engines of the Florida, that the spare machinery to which you refer was sent to Havre some time ago, and is now lying there subject to an order for delivery, which they have given to Captain Bullock. We are also informed by the same parties that they sent a blower, but they believe it is not the sort required, and they are now endeavoring to procure a more suitable one. As regards the engineers, we must await Captain Bullock's return to know who the men are. We have requested Messrs. Fawcett, Preston & Co. to engage two or three good, steady firemen; and as soon as Captain Bullock arrives (on the 24th) we will endeavor to have engineers, firemen, and machinery sent to you, and by the route you suggest."[10]

The same parties were in frequent correspondence with the paymaster of the vessel at Brest in respect to her finances.[11] A full crew was sent to her from London and Liverpool in January, and "two steel Blakely rifled-guns with steel-pointed elongated shot to fit them."[12] She sailed from Brest under the command of Captain Morris.

On the 26th of April she was at Martinique for coal and provisions.

At Martinique.

On the 13th of May she stopped at Bermuda to land a sick officer and to obtain news.[13] On the 18th of June she appeared at that port again, when she asked permission to take in coal and effect some repairs.[14] Permission was given her to remain five days after the 21st. She quitted the harbor on the 27th, but remained cruising about the island until the 5th of July, when she was seen from the land.[15]

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[1] Gov. Ord. to Duke of Newcastle, Brit. App., vol. i, p. 108.
[2] Brit. Case, p. 69; App., vol. i, p. 111.
[3] Am. App., vol. vi, p. 347; Brit. Case, p. 70; App., vol. i, p. 108.
[4] Am. App., vol. i, p. 732.
[5] Brit. App., vol. i, p. 111.
[6] Brit. Case, p. 70.
[7] Ibid., p. 72.
[8] Am. App., vol. vi, p. 349.
[9] Brit. App., vol. i, pp. 118, 122.
[10] Am. App., vol. vi, p. 352.
[11] Ibid., p. 354.
[12] Ibid., p. 353.
[13] Brit. App., vol. i, p. 132.
[14] Ibid.
[15] Ibid., p. 133; Am. App., vol. vi, p. 356.

While there, on the 27th of June, 135 tons of coal were paid for by G. P. Black, who was temporarily acting as the agent for the "Confederate States."[1]

A draft for £8,500 sterling on Captain Bullock was discounted by this same agent, and money to the amount of more than £600 expended for repairs and supplies.[2]

From Bermuda she went to Bahia where she ended her cruise in the month of October. At Bahia.

It will thus be seen, that the first port which was visited by the Florida after her escape from Nassau was under the jurisdiction of the government of Spain. At this port she escaped seizure for a violation of the sovereignty by "repudiating" the act.

After leaving Mobile she touched at Havana, but does not appear to have taken in coal or supplies. Then she went to Nassau, then to Barbados, then to Pernambuco, then to Bermuda, then to Brest, within reach of her base of supplies at Liverpool; then to Martinique, then to Bermuda, and then to Bahia. After leaving Mobile, she visited once the ports of Spain, twice those of France, twice those of Brazil, and four times those of Great Britain.

During her cruise she commissioned at different times three tenders, the Clarence, the Tacony, and the Archer. For their acts she is liable as for her own. She was the principal, and their acts were her acts. Her tenders.

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[1] Am. App., vol. vi, p. 359; Acting Governor Monroe to Mr. Cardwell, British App., vol. i, p. 133.

[2] Am. App., vol. vi, p. 358, *et seq.*

VII.---THE ALABAMA.

As to this vessel, Her Majesty's Government admits, "that at the time when she sailed from England in July, 1862, she was, as regards the general character of her construction, specially adapted for warlike use; that the adaptation had been effected within British jurisdiction;"[1] and that "the general construction of the vessel was such as to make it apparent that she was intended for war and not for commerce."[2]

The Alabama. Her adaptation to war is not disputed.

The drawings found among the archives of the insurgents signed by the Messrs. Laird, as early as the 9th October, 1861, copies of which are part of the documents and evidence filed by the United States with their Counter Case, show conclusively that she never was intended for anything else than a vessel of war.

It is also admitted in the British Counter Case that "the question for the arbitrators is, whether the British Government had, according to the fair and just sense of those words, reasonable grounds to believe that she was intended to carry on war against the United States; and having it, failed to use such diligence as any international obligation required to prevent her departure from Great Britain, or to prevent her equipment within its jurisdiction."[3]

The question to be decided.

The United States will now proceed to consider the facts necessary to a decision of that question, and for that purpose will use almost exclusively the evidence presented to the Tribunal by Her Majesty's Government.

As has been seen, the Florida sailed from Liverpool, without any attempt at her detention by the Government, on the 22d of March, 1862. The attention of Earl Russell had been called to her by Mr. Adams more than a month previous to her departure, and in so doing he declared that his opinion as to her destination for war against the United States was based upon the "evidence furnished in the names of the persons stated to be concerned in her construction and outfit." These persons named were Fawcett, Preston & Co., and Frazer, Trenholm & Co. As late as the 9th of May, the Foreign Office appears to have been in correspondence with the officers of the Treasury in respect to her escape.[4] She arrived at Nassau on the 28th of April, and her arrival at that port became known in Liverpool and was announced in the Liverpool Journal of Commerce on the 27th of May.[5] It must have been apparent, at that time, to the officers of the customs at Liverpool, that she had not been intended for the Italian Government, but for the insurgents, and that any pretense of Italian destination was false.

Under these circumstances, on the 23d of June, Mr. Adams, in a note to Earl Russell, said:

Some time since, it may be recollected by your Lordship, that I felt it my duty to

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[1] Brit. Counter Case, p. 80.
[2] Brit. Case, p. 118.
[3] Brit. Counter Case, p. 80.
[4] Brit. App., vol. i, p. 9.
[5] Dudley to Seward, Am. App., vol. vi, p. 238.

make a representation touching the equipment from the port of Liverpool of the gunboat Oreto, with the intent to make war upon the United States. Notwithstanding the statements returned from the authorities of that place, with which your Lordship favored me in reply, touching a different destination of that vessel, I have the strongest reason for believing that that vessel went directly to Nassau, and that she had been there engaged in completing her armament, provisioning, and crew for the object first indicated by me.

Mr. Adams gives information of, June 23, 1862.

I am now under the painful necessity of apprising your Lordship, that a new and still more powerful war-steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dock-yard of persons, one of whom is now sitting as a member of the House of Commons, and is fitting out for the especial and manifest object of carrying on hostilities by sea. * * * The parties engaged in the enterprise are persons well known at Liverpool to be agents and officers of the insurgents in the United States, the nature and extent of whose labors are well explained in the copy of an intercepted letter of one of them, which I received from my Government some days ago, and which I had the honor to place in our Lordship's hands on Thursday last. I now ask permission to transmit, for your consideration, a letter addressed to me by the Consul of the United States at Liverpool in confirmation of the statements here submitted, and to solicit such action as may tend either to stop the projected expedition or to establish the fact that its purpose is not inimical to the people of the United States.[1]

The intercepted letter referred to was from Caleb Huse, "Captain of Artillery," to Major J. Gorgas, "Confederate States Artillery, War Department." It is said in the Case presented by Her Majesty's Government,[2] that the copy of the intercepted letter referred to "was a paper purporting to be a copy of a letter or report from a Confederate officer of artillery, addressed to some person unknown," and what purports to be a copy of the letter itself is printed in British Appendix, vol. i, p. 178, without the name of the party to whom it was addressed. The same letter is printed by the United States in their Appendix, vol. i, p. 538, where the name of the person to whom it was addressed appears. It was transmitted by Mr. Seward to Mr. Adams with a dispatch under date of June 2, in which he says:[3]

There has just now fallen into our hands a very extraordinary document, being a report made by Caleb Huse, who calls himself a captain of artillery, and who is an agent of the insurgents in Europe, to the chief of the artillery of the War Department of the insurgents.

The letter was "placed in the hands" of Earl Russell by Mr. Adams on the Thursday which preceded the 23d of June,[4] and inasmuch as the dispatch of Mr. Seward transmitting it stated in terms to whom it was addressed, there can scarcely be a doubt that if the copy omitted his name, the proper explanation was made by Mr. Adams at the time. So that it is hardly to be supposed that the party addressed was unknown to Earl Russell at the time he received Mr. Adams's letter of the 23d of June, although it may have been to the persons who prepared the British Case.

The letter is found in the British Appendix, vol. i, p. 178. It bears date April 1, 1862, at Liverpool, a few days after the sailing of the Oreto, and does, as is stated in the British Case,[5] relate "to purchases of military supplies for the Confederate army and to vessels employed in blockade-running." It also states that "Messrs. Frazer, Trenholm & Co., of this city, placed at my disposal a fine ship, the Bahama, which I supposed would take all the batteries." This is the same vessel which, as has been seen, took out the armament of the Oreto, and which afterward took out that of the Alabama.

In the letter of the consul of the United States at Liverpool, trans-

[1] British Case, p. 81.
[2] Page 81.
[3] Am. App., vol. i, p. 537.
[4] Brit. Case, p. 81.
[5] Page 81.

mitted by Mr. Adams to Earl Russell, on the 23d, it was said: "The evidence I have is entirely conclusive to my mind. I do not think there is the least room for doubt about it. * * * The strictest watch is kept over this vessel; no person except those immediately engaged upon her is admitted into the yard. On the occasion of the trial-trip, made last Thursday week, no one was admitted without a pass, and these passes were issued to but few persons, and those who are known here as active secessionists engaged in sending aid and relief to the rebels." He also stated that "the foreman in Messrs. Laird's yard says she is the sister to the gun-boat Oreto, and has been built for the same parties and for the same purpose; when pressed for a further explanation, he stated that she was to be a privateer for the Southern Government in the United States." And the Consul further stated that certain officers from the Sumter, whose names he gave, had said the vessel was being built for the Confederate States.[1]

Referred to law-officers of the Crown.

This letter of Mr. Adams with that of the Consul, was referred by Earl Russell to the Law-Officers of the Crown and to the Lords Commissioners of the Treasury, on the 25th of June, of which Mr. Adams was duly advised.[2]

Their action upon it.

On the 30th June the Law-Officers reported to Earl Russell that "the report of the United States Consul at Liverpool, * * * besides suggesting other grounds of reasonable suspicion, contains direct assertion that the foreman of Messrs. Laird, the builders, has stated that this vessel is intended as a privateer for the service of the government of the Southern States; and, if the character of the vessel and of her equipment be such as the same report describes them to be, it seems evident that she must be intended for some warlike purpose. Under these circumstances, we think that proper steps ought to be taken, under the direction of Her Majesty's Government, by the authorities of the customs at Liverpool, to ascertain the truth, and that, if sufficient evidence can be obtained to justify proceedings under the foreign-enlistment act, such proceedings should be taken as early as possible. In the mean time, Mr. Adams ought, we think, to be informed that Her Majesty's Government are proceeding to investigate the case; but that the course which they may eventually take must necessarily depend upon the nature and sufficiency of any evidence of a breach of the law which they may be enabled to obtain; and that it will be desirable that any evidence in the possession of the United States Consul at Liverpool should be at once communicated to the officers of Her Majesty's customs at that port."[3]

The Lords Commissioners of the Treasury sent the letter of Mr. Adams, with that of the Consul, to the Commissioners of Customs on the 25th of June.[4] These letters were forwarded by the Commissioners to the Collector of Liverpool previous to the 28th.[5] But before that time, on the 20th, and before the letter of the Consul to Mr. Adams, or that of Mr. Adams to Earl Russell, the Collector's attention had been called to the same vessel by the Consul in a letter to him,[6] in which was detailed, with more particularity than in the letter to Mr. Adams, his knowledge of facts and his grounds of suspicion. This letter the Collector must have had when he received the communication from the Commissioners.

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[1] Brit. Case, p. 81.
[2] Ibid., p. 82.
[3] Brit. Case, p. 83.
[4] Letter from Mr. Arbuthnot to Mr. Hammond, July 2, Brit. App., vol. i, p. 181.
[5] Brit. App., vol. i, p. 183.
[6] Am. App., vol. vii, p. 73.

On the 28th of June the customs surveyor at the port of Liverpool reported to the Collector "that the vessel to which these papers refer has not escaped the notice of the customs officers, but, as yet, nothing has transpired concerning her which appeared to demand a special report. The officers have at all times free access to the building-yards of the Messrs. Laird, at Birkenhead, where the said vessel is now lying, and there has been no attempt on the part of her builders to disguise, what is most apparent to all, that she is intended for a ship of war. Agreeably with your directions, I have personally inspected her and find that she is rightly described in the communication of the United States Consul, except that her engines are not on the oscillating principle. * * * The current report of that vessel is that she has been built for a foreign government, and that is not denied by the Messrs. Laird, with whom I have communicated on the subject; but they do not appear disposed to reply to any question with reference to the destination of the vessel after she leaves this port, and we have no other reliable source of information. It will be in your recollection that the current report of the gun-boat Oreto was, that she had been built for a foreign government, which vessel recently left this port under a British flag, without any guns or ammunition on board, as previously reported."[1] Proceedings of customs authorities.

This report was transmitted by the collector to the commissioners of customs on the same day (the 28th) and by them referred to the solicitor of customs, who, on the 30th, (the same day that the Law-Officers made their communication to Earl Russell, as just stated,) gave his opinion that "the officers at Liverpool have acted discreetly in keeping watch upon her, and should continue to do so, immediately reporting to the board any circumstances that they may consider to call for directions, or advisable to bring under the board's notice; but the officers ought not to move in the matter without the clearest evidence of a distinct violation of the foreign-enlistment act, nor unless at a moment of great emergency, the terms of the act being extremely technical and the requirements as to intent being very rigid. It may be that the ship, having regard to her cargo as contraband of war, might be unquestionably liable to capture and condemnation, yet not liable to detention under the foreign-enlistment act, and the seizers might entail upon themselves very serious consequences."[2]

On the 1st of July the commissioners of customs transmitted their own report to the Lords Commissioners of the Treasury, in which they embodied the substance of the report of the surveyor to the collector, including his statement that the builders did not appear disposed to reply to any questions respecting the destination of the vessel after she left Liverpool, and added that "having referred the matter to our solicitor, he has reported his opinion that, at present, there is not sufficient ground to warrant the detention of the vessel, or any interference on the part of this department, in which report we beg leave to express our concurrence. And, with reference to the statement of the United States Consul, that the evidence he has in regard to this vessel being intended for the so-called Confederate Government in the Southern States, is entirely conclusive to his mind, we would observe that, inasmuch as the officers of customs of Liverpool would not be justified in taking any steps against the vessel, unless sufficient evidence to warrant her detention should be laid before them, the proper course would be for the consul to submit such evidence as he possesses to the collector at that port,

[1] Brit. App., vol. i, p. 183.

[2] Ibid.

who would thereupon take such measures as the provisions of the foreign-enlistment act would require. Without the production of full and sufficient evidence to justify their proceedings, the seizing officers might entail on themselves and on the Government very serious consequences. We beg to add that the officers at Liverpool will keep a strict watch on the vessel, and that any further information that may be obtained concerning her will be forthwith reported."[1]

This report of the commissioners of customs was transmitted by the Lords Commissioners of the Treasury to the Foreign Office, and received there on the 2d of July.[2]

Thus it will be seen that twenty-seven days before the departure of the vessel, Her Majesty's Government was informed by its own officers that the "character of the vessel and of her equipment" was such as the report of the consul described them to be, and that, therefore, in the opinion of the Law-Officers of the Crown, "she must be intended for some warlike purpose." And the Government was also, at the same time and in the same manner, informed that in the face of what had been acknowledged by the Law-Officers of the Crown to be "grounds of reasonable suspicion" of the Consul, the builders of the vessel, (a firm, one of the ostensible members of which, at the time of the original contract for her building, was a member of the House of Commons,)[3] on being inquired of by one of the officers of the Government, *did not appear to be disposed to reply to any question with reference to the destination of the vessel after she left Liverpool.*

At the same time, too, one at least of the departments of the Government was reminded by one of its officers that the Oreto, referred to in the letter of Mr. Adams, had recently left the port, built for a foreign government, but "under a British flag, without any guns or ammunition on board." But the Arbitrators will look in vain for any evidence whatever tending to prove that any officer of the Government, of any grade, ever propounded to the builders, or any other person, a direct question as to the destination of the vessel, insisting upon an answer or a refusal to answer. This, too, when, under the opinion of the Law-Officers, the only material fact remaining to be ascertained was, by whom the vessel was to be employed.

Mr. Adams informed that the American consul may submit evidence to collector at Liverpool.

A copy of the report of the commissioners of customs was sent by Earl Russell to Mr. Adams, accompanied by a note which bears date the 4th of July, but which does not appear to have been received until the 7th, when it was acknowledged. In this note Earl Russell says: "I would beg leave to suggest that you should instruct the United States Consul at Liverpool to submit to the collector of customs at that port such evidence as he may possess tending to show that his suspicions as to the destination of the vessel in question are well founded."[4]

This was the first request ever made of Mr. Adams or any other officer of the Government of the United States, to assist the Government of Her Majesty in procuring testimony against any vessel as to which complaint had been made. As has been seen, Mr. Adams offered the assistance of the United States in respect to the Florida, but his offer was not accepted. Down to this time, therefore, no complaint should be made against the United States because they failed to accompany their representations with proof. But the United States believe

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[1] Brit. Case, p. 83.
[2] Brit. App., vol. i, p. 181.
[3] Brit. App., Counter Case, vol. v, p. 204.
[4] Brit. Case, p. 84.

that, in view of facts already stated, the Arbitrators will feel as did the Consul when he received notice from Mr. Adams of what was required, and addressed the Secretary of State of his Government in the following language:

I do not think the British Government are treating us properly in this matter. They are not dealing with us as one friendly nation ought to deal with another. When I, as the agent of my Government, tell them from evidence submitted to me that I have no doubt about her character, they ought to accept this until the parties who are building her, and who have it in their power to show if her destination and purpose are legitimate and honest, do so. It is a very easy matter for the Messrs. Laird & Co. to show for whom they are building her, and to give such information as to her purpose as to be satisfactory to all parties. The burden of proof ought not to be thrown upon us. In a hostile community like this it is very difficult to get information at any time upon these matters. And if names are to be given it would render it almost impossible. The Government ought to investigate it and not call upon us for proof.[1]

And they will not be surprised that two days after, the Consul wrote Mr. Adams as follows:

When the United States Government, through its acknowledged representatives, say to the British Government that it is satisfied that a particular vessel, which is being built at a certain place in the kingdom by certain parties who are their own subjects, is intended as a privateer for the rebel government, it is the duty of that government to call up the parties who are fitting out the vessel, tell them what the charge is, and require them to state for whom and what purpose she is being built, and if the charge is admitted or shown to be true, to stop her sailing. Our Government has a right, it seems to me, not only to expect but to require this much of another friendly government. And if there was any disposition to do right and act honestly, this much at least would be accorded.[2]

On the 7th of July, and at once upon the receipt of the letter of Earl Russell, Mr. Adams wrote the vice-consul at Liverpool, in the absence of the Consul, transmitting a copy of the letter of his lordship, and in accordance with the suggestion therein, said:

The consul directed to furnish information to the collector.

"I pray you to furnish to the collector of customs, so soon as may be, any evidence which you can readily command in aid of the object designated."[3]

On the 9th of July the consul, having returned to Liverpool, addressed a letter to the collector at that port, in which he detailed with great particularity the circumstances which had come to his knowledge tending to show that the vessel was intended for the use of the insurgents. This letter is printed in full in the Britsh Case,[4] and is explicit in its statements. It certainly made a case which was worthy the attention of the Government. The Consul does indeed say that he cannot, in all cases, state the names of his informants, "as the information in most cases is given to me by persons out of friendly feeling to the United States, and in strict confidence;" but he adds: "What I have stated is of such a character that little inquiry will confirm its truth;" and the names of many persons, all of whom were within reach of the officers, were given to whom inquiries might have been addressed.

He does so.

He then says, the Messrs. Laird "say she is for the Spanish Government. This they stated on the 3d of April last, when General Burgoyne visited their yard, and was shown over it and the various vessels being built there, by Messrs. John Laird, jr., and Henry H. Laird, as was fully reported in the papers at the time." On this point the Consul says he caused inquiries to be made of the Spanish minister as to the truth of the statement, and the reply was a positive "assurance that

[1] Am. App., vol. vi, p. 382.
[2] Am. App., vol. vi, p. 386.
[3] Brit. App., vol. i, p. 242.
[4] Page 84.

she was not for the Spanish Government." If the statements in the letter of the Consul to Mr. Adams on the 21st of June contained, as the Law-Officers of the Crown said, "grounds of reasonable suspicion," this letter certainly ought to have put the officers of the Government upon inquiry as to the truth of the statements made; but the arbitrators will fail to discover in all the evidence submitted by Her Majesty's Government any proof tending to show any attempt at that, or any other time before the departure of the vessel, by any officer of Her Majesty's Government, to inquire as to the truth of any fact stated by the Consul.

The only statements made by him which have not been fully substantiated by subsequent developments are that Captain Bullock was to command the vessel and that the Florida was then arming at Nassau. In point of fact, it was true, however, that Captain Bullock had been, originally, assigned to the command of the Florida, and it was only about the 15th of June that a change was made.[1] As to the arming of the Florida at Nassau, it has already been seen why that had not then been accomplished as it afterward was. This last-named error in the statement of the Consul has, however, been considered of sufficient importance by Her Majesty's Government to be made the subject of special mention on page 85 of its Case.

Conduct of the collector.

On the 10th of July the collector acknowledged the receipt of the letter from the Consul, but accompanied his acknowledgment with the remark, "I am respectfully of the opinion, the statement made by you is not such as could be acted upon by the officers of this revenue, unless legally substantiated by evidence."[2] The collector, however, on the same day, (the 10th) ordered the vessel again to be "inspected" by the the surveyor, who immediately reported that it had been done, and that she was in the same state as regards her armament as on the date of his former report.[3] And the same day (the 10th also) the collector transmitted to the commissioners of customs the letter of the Consul and the report of the surveyor, accompanying them with a copy of his letter to the consul and the statement that "if she is for the confederate service the builders and parties interested are not likely to commit themselves by any act which would subject them to the penal provision of the foreign-enlistment act."[4]

On the 11th of July the solicitor of the customs, having considered the letter of the consul, reported:

> There is only one proper way of looking at this question. If the collector of customs were to detain the vessel in question, he would no doubt have to maintain the seizure by legal evidence in a court of law, and to pay damages and costs in case of failure. Upon carefully reading the statement, I find the greater part, if not all, is hearsay and inadmissible, and as to a part the witnesses are not forthcoming or even to be named. It is perfectly clear to my mind that there is nothing in it amounting to *prima facie* proof sufficient to justify a seizure, much less to support it in a court of law, and the consul could not expect the collector to take upon himself such a risk in opposition to rules and principles by which the Crown is governed in matters of this nature.[5]

On the 15th of July, four days after the opinion of the solicitor was given, and six days after the letter of the Consul, the commissioners of customs advised the collector that "there does not appear to be *prima-facie* proof sufficient in the statement of the Consul to justify the seizure of the vessel, and you are to apprise the Consul accordingly."[6]

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[1] Am. App., vol. vi, p. 488.
[2] Brit. Case, p. 85.
[3] Ibid., p. 86.
[4] Brit. App., vol. i, p. 184.
[5] Brit. Case, p. 86.
[6] Ibid.

It is almost incredible that it never occurred to any one of these several officers of the Government that there was anything in the letter of the Consul calling upon them for investigation of the facts submitted by him. And this, too, when, according to the opinion of the distinguished Law-Officers of the Crown given on the 30th of June, "the grounds of reasonable suspicion" suggested in the letter of the consul of the 21st were sufficient to make it proper that steps should be taken *to ascertain the truth of the statements* then made,[1] and when Mr. Adams, in his first communication upon this subject, had asked an inquiry by the officers of the Government as to the actual destination of the vessel.

On the 16th of July the collector informed the consul that the solicitor of customs had advised the commissioners of customs that "the details given by you in regard to the said vessel are not sufficient, in a legal point of view, to justify me in taking upon myself the responsibility of the detention of this ship."[2]

He declines to act.

On the same day (the 16th) a copy of the letter of the Consul of the 9th was submitted to Mr. Collier, afterward attorney-general and now one of the members of the judiciary committee of Her Majesty's Privy Council, for his opinion, and he promptly replied: "I think the evidence almost conclusive. * * * * As the matter is represented to me to be urgent, I advise that the principal officer of the customs at Liverpool be immediately applied to, under 59 Geo. III, cap. 69, to exercise the powers conferred upon him by that section to seize the vessel, with a view to her condemnation, an indemnity being given to him, if he requires it. It would be proper at the same time to lay a statement of the fact before the Secretary of State for Foreign Affairs, coupled with a request that Her Majesty's Government would direct the vessel to be seized, or ratify her seizure if it has been made."[3] On the next day (the 17th) the commissioners of customs advised the commissioners of the Treasury that the collector at Liverpool had been informed by them "that they do not consider there is *prima-facie* proof sufficient in the Consul's statement to justify the seizure of that vessel, and have instructed him to apprise the Consul accordingly."[4]

On the same day (the 17th) Mr. Adams wrote the Consul directing him "to employ a solicitor and get up affidavits to lay before the collector." That letter was received by the consul on the morning of the 18th and he immediately retained Mr. Squarey.[5] The great difficulty for the solicitor and the Consul with their means of information was "to get direct proof. There were men enough who knew about her, and who understood her character, but they were not willing to testify, and in a preliminary proceeding like this it was impossible to obtain process to compel them. Indeed, no one in a hostile community like Liverpool, where the feeling and sentiment are against us, would be a willing witness, especially if he resided there, and was in any way dependent upon the people of that place for a livelihood."[6]

Mr. Adams instructs the consul to continue to collect proof.

But as early as the 21st, the Consul and his solicitor appeared before the collector and presented to him as witnesses William Passmore, John De Costa, Allen S. Clare, Henry Wilding, and Mathew Maguire, and their affidavits, with that of the Consul, were then taken by the collector, who administered

The consul does so, and presents it to the collector with a request to seize the vessel.

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[1] Brit. Case, p. 83.
[2] Brit. App., vol. i, p. 247.
[3] Ibid.
[4] Ibid., p. 187.
[5] Ibid., p. 244.
[6] Ibid., p. 245.

the necessary oaths. Upon this testimony, under oath, the collector was requested to seize the vessel, and the portions of the foreign-enlistment act applicable to the case were read to him.[1]

The witnesses were all present before the collector. He had full opportunity, if he desired, to examine them personally, and thus test the accuracy of their statements or their credibility. This he does not seem to have done, or, if he did, he has not put on record any suspicion as to the reliability of the testimony.[2]

On the same day (the 21st) the collector transmitted the affidavits to the commissioners of customs, stating that he had been requested to seize the vessel, and asked the board to instruct him "by telegraph how I am to act, as the ship appears to be ready for sea, and may leave any hour she pleases."[6]

Law advisers of the customs.

The affidavits were received by the commissioners of customs on the 22d of July,[4] and at once referred to the solicitor of customs, who, with his assistant, immediately advised the board that the evidence submitted was not sufficient to warrant the seizure or detention of the vessel. The assistant solicitor said "the only justifiable grounds of seizure under section seven of the act would be the production of such evidence of the fact as would support an indictment for the misdemeanor under that section."[5] On the same day (the 22d) the board informed the collector that, as they were advised by their solicitor, the evidence was not sufficient to justify a seizure, and he should govern himself accordingly, but they added: "The solicitor has, however, stated that if there should be sufficient evidence to satisfy a court of enlistment of individuals, they would be liable to pecuniary penalties, for the security of which, if recovered, the department might detain the ship until these penalties are satisfied or good bail given; but there is not sufficient evidence to require the customs to prosecute. It is, however, competent for the United States Consul, or any other person, to do so at their own risk if they see fit."[6]

No copy of the opinion of the solicitor or his assistant was sent to the Consul or Mr. Adams, but on the 23d of July the collector advised the Consul that the board, upon the advice of their solicitors, had concluded the evidence submitted was not sufficient to justify any steps being taken against the vessel, but he added: "It is, however, considered to be competent for the United States Consul to act at his own risk if he should think fit."[7]

This last clause attracted the attention of the Consul at once, and Mr. Squarey called upon the collector and asked its meaning. "His response was that this was copied from the letter addressed to him by the board." Mr. Squarey, of course, advised the Consul he had no power to stop the vessel; that the power to detain her was lodged with the collector.[8] The collector did not intimate that the board referred in their instructions to the prosecution of the individuals and to a possibility of detention by them in case of such a prosecution. But if he had, it is not easy for the United States to discover why they should be called upon to prosecute individuals criminally in the courts of Great Britain for a violation of its municipal law. It was not the punishment of in-

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[1] American Appendix, vol. vi, p. 395.
[2] British Case, p. 87.
[3] Ibid.
[4] British Case, p. 90.
[5] British Appendix, vol. i, p. 188.
[6] Ibid.
[7] British Appendix, vol. i, p. 248.
[8] British Appendix, vol. i, p. 246.

dividuals they sought. They asked the detention of the vessel and by that means the prevention of a crime against the law of nations.

On the same day (the 22d) the affidavits, and the action taken upon them by the board of commissioners of customs, were, by the board, submitted to the lords commissioners of the Treasury, with the suggestion that, if they had any doubt, it might be advisable to take the opinion of the law-officers of the Crown,[1] and at once the Lords Commissioners of the Treasury transmitted to the Foreign Office copies of the papers received from the commissioners of customs, with a statement that the vessel was "nearly ready for sea."[2]

Proof submitted to the treasury, July 22.

On the same day (the 22d) Mr. Adams transmitted to Earl Russell copies of the same affidavits "tending," as he said, "to establish the character and destination of the vessel."[3] Upon the 23d the papers from the commissioners of customs were sent from the Foreign Office to the Law-Officers, with a request for consideration and an opinion at their "earliest convenience."[4]

Also, to Earl Russell.

On the 23d, also, the Consul and his solicitor, having heard from the assistant solicitor of the customs that the previous affidavits were not considered sufficient and that the collector had been directed not to detain the vessel, procured further affidavits from Edward Roberts and Robert John Taylor.[5] They also procured a further opinion from Mr. Collier, predicated upon the eight affidavits which had then been obtained, in which he used this significant language:

Additional proof.

Opinion of Mr. Collier.

> I have perused the above affidavits, and I am of opinion that the collector of customs would be justified in detaining the vessel. Indeed, I should think it his duty to detain her; and that if, after the application which has been made to him, supported by the evidence which has been laid before me, he allows the vessel to leave Liverpool, he will incur a heavy responsibility, a responsibility of which the board of customs, under whose directions he appears to be acting, must take their share. It appears difficult to make out a stronger case of infringement of the foreign-enlistment act, which, if not enforced on this occasion, is little better than a dead-letter. It well deserves consideration whether, if the vessel be allowed to escape, the Federal Government would not have serious grounds of remonstrance."[6]

The additional affidavits were on the same day presented by Mr. Squarey, with the opinion of Mr. Collier, to the commissioners of the customs, with a letter in which he said:

Presented with affidavits to the customs, July 23.

> I learned this morning from Mr. O'Dowd that instructions were forwarded yesterday to the collector at Liverpool not to exercise the powers of the act in this instance, it being considered that the facts disclosed in the affidavits made before him were not sufficient to justify the collector in seizing the vessel. On behalf of the Government of the United States, I now respectfully request that this matter, which I need not point out to you involves consequences of the gravest possible description, may be considered by the board of customs on the further evidence now adduced. The gunboat now lies in the Birkenhead Docks, ready for sea in all respects, with a crew of fifty men on board; she may sail at any time, and I trust that the urgency of the case will excuse the course I have adopted of sending these papers direct to the board, instead of transmitting them through the collector at Liverpool, and the request which I now venture to make, that the matter may receive immediate attention.[7]

The Board on the same day referred all the papers to their solicitor, whose assistant reported that he could not concur in the views of Mr. Collier, but "adverting to the high character

Action of the board.

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[1] British Case, p. 91.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Dudley to Seward, British Appendix, vol. i, p. 245; Squarey to Gardner, Ibid., p. 194.
[6] British Appendix, vol. i, p. 196; British Case, p. 93.
[7] British Appendix, vol. i, p. 194.

which he bears in his profession, I submit that the Board might act judiciously in recommending the Lords of the Treasury to take the opinion of the Law-Officers of the Crown."[1] On the same day (the 23d) the papers were sent from the Foreign Office to the Law-Officers, with a request for an opinion at their earliest convenience.[2] On that day also Mr. Squarey called at the Foreign Office and, ascertaining that the papers had been sent to the Law-Officers, but that an opinion had not up to that time been received, obtained from the Under Secretary, upon his "representation of the extreme urgency of the case," a promise that the opinion should be sent for at once.[3]

Further evidence submitted by Mr. Adams.

On the 24th Mr. Adams also transmitted to Earl Russell copies of the same additional affidavits and the opinion of Mr. Collier.[4] Mr. Collier was also retained by the Consul to institute proceedings for condemnation in case the seizure was made.[5]

On the 25th another affidavit was presented by Mr. Squarey to the customs authorities, from whom it found its way on the 26th through the Foreign Office to the Law-Officers, the opinion of the solicitor of the customs being still adverse to the detention.[6] On the 26th also, Mr. Squarey again called the attention of the secretary of the customs to the matter, and said he "had hoped that, ere this, the decision of the Lords Commissioners of Her Majesty's Treasury might have been made known particularly, as every day affords opportunities for the vessel in question to take her departure." To this the secretary replied that, "in the absence of instructions from their lordships, the board are unable to give any directions in regard to the gun-boat in question."[7]

Thus, on the 26th, ended the labors performed by the representatives of the United States. The Consul, in making his report to the secretary of state of his Government, after detailing what had been done by him and those with whom he had been associated, said, "I have done about all that I can do to stop this vessel; much more, I think, than this Government ought to require any friendly government to do. My counsel say I can do no more."[8] The United States confidently believe the Arbitrators will concur in this opinion of the Consul.

The entire proof was in the possession of the Law-Officers of the Crown on the 26th. Substantially it was all there on the 23d. The affidavit of Redden, presented after that date, simply confirmed the already existing proof. That it was sufficient is shown by the opinion of the Law-Officers of the Crown, given as soon as it was examined. Even the first letter of the Consul, written on the 21st of June, and considered by the Law-Officers on the 30th, was sufficient to show that "grounds of reasonable suspicion" existed at that time and called for an inquiry into the truth. After that followed the letter of the 9th of July, with its more particular statement of details; then the affidavits of the 21st; then the affidavits of the 23d, and the pointed opinion of the most eminent counsel; then the affidavit of the 24th; and at all times cautions by the officers of the United States against delay and representations of the extreme urgency of the case. The vessel was in the dock. From the commencement, the builders were not disposed to reply to any question with reference to her destination after she left Liverpool. As early as the 21st of

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[1] Brit. Case, p. 94.
[2] Ibid.
[3] Brit. App., vol. i, p. 248.
[4] Brit. App., vol. i, p. 246.
[5] Brit. Case, p. 94.
[6] Brit. Case, 95.
[7] Am. App., vol. vi, p. 405.
[8] Brit. App., vol. i, p. 246.

July it was known to the collector she had her coal on board, and might leave any hour she pleased.[1]

On the 23d the commissioners of customs were advised "that she was ready for sea in all respects, with a crew of fifty men on board; she may sail at any time."[2] On the 28th she was moved from the dock into the river; the men had taken their clothes and beds on board, and received orders to hold themselves in readiness at any moment. She had no register or clearance, but the collector said that was not necessary and that she could go anywhere without.[3] She remained at anchor in the river until 11 or 12 o'clock of the 29th and "was seen from the shore by thousands of persons."[4] The customs officers were on board when she started, and only left her when the tug left.[5]

Her Majesty's government agree to keep a watch on the vessel.

During all this time Her Majesty's Government was under its promise to Mr. Adams, made as early as the 4th of July, that "the officers at Liverpool will keep a strict watch on the vessel, and that any further information that may be obtained concerning her will be forthwith reported."[6]

The law-officers think the vessel should be detained.

After the vessel had sailed, but not before, the Law-Officers announced their opinion that, upon the evidence furnished by the United States, she should be detained.[7] At what hour in the day this opinion was actually given does not appear, but it was agreed upon on the evening of the 28th, the same day that the papers were considered.[8] It was said by Earl Russell to Mr. Adams at a conference on the 31st of July that a "delay in determining upon it [the decision] had most unexpectedly been caused by the sudden development of a malady of the Queen's advocate, Sir John D. Harding, totally incapacitating him for the transaction of business. This had made it necessary to call in other parties, whose opinion had been at last given for the detention of the gunboat."[9] And in the British Case it is said: "One of Her Majesty's ordinary legal advisers, the Queen's Advocate, now deceased, was at that time seriously ill of a malady from which he never recovered, and this was mentioned at the time (on the 31st July, 1862) by Lord Russell to Mr. Adams, as a circumstance which had occasioned some delay."[10]

Illness of Sir John Harding.

The United States find among the documents and evidence furnished by Her Majesty's Government for the information of the Arbitrators eight opinions, given by the Law-Officers of the Crown previous to the 29th of July. Of these, all before that which was given on the 30th June, upon the representation of Mr. Adams under date of the 23d, were signed by Sir John D. Harding, the Queen's advocate, Sir William Atherton, the Attorney-General, and Sir Roundell Palmer, the Solicitor-General, or by the Attorney-General alone. That of the 30th of June was signed by the Attorney-General and the Solicitor-General. From this circumstance the United States infer that the Queen's Advocate was unable to attend to his duties as early as that date, (the 30th June,) and that then the opinion of the other distinguished gentlemen who were the legal advisers of Her Majesty was considered sufficient; and they also infer that it

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[1] Edwards to Commrs. of Customs, Brit. App., vol. i, p. 188.
[2] Squarey to Gardner, Brit. App., vol. i, p. 194.
[3] Dudley to Adams, Am. App., vol. vii, p. 76.
[4] Mr. Laird in the House of Commons, Am. App., vol. v, p. 694.
[5] Ibid., Am. App., vol. iv, p. 528; Hansard, vol. clxx, p. 90.
[6] Brit. Case, p. 84.
[7] Ibid., p. 95.
[8] Sir Roundell Palmer in the House of Commons, Aug. 4, 1871, Am. Case, p. 373.
[9] Adams to Seward, Brit. App., vol. i, 249.
[10] Page 118.

was not necessary on the 23d of July to call *in* new parties, but only to call *upon* the old. The opinions previous to June 30th will be found in British Appendix, vol. ii, pages 2, 16, 32, 98, 100, 138; that of the 30th June, in vol. i, page 181.

On the 28th of July the solicitor of the Consul wrote the secretary of the commissioners of customs that he had every reason to believe the vessel would sail on the 29th; and on the morning of the 29th telegraphed him she had gone. The letter reached the secretary before the telegram.[1]

Escape of the Alabama.

When this information was received, therefore, by the commissioners of customs, the vessel could not have been far from Liverpool, perhaps not yet out of sight of some of "the thousands of persons" who "from the shore" had seen her "anchored in the river." Yet no order was given for her pursuit. In another case it *might*, but in the present the United States are inclined to think it *will not*, surprise the Arbitrators to learn that the opinion of the Law-Officers of the Crown advising the detention of the vessel, delivered at the Foreign Office on the 29th, was not made known to the commissioners of customs "until 4 p. m. on the 31st of July, or two days after the Alabama had left the Mersey, and twelve hours after she had finally sailed from Moelfra Roads."[2]

She was accompanied as she left Liverpool by the tug Hercules, which "kept in sight of her until she lay to, about a mile off the Bell Buoy, and about fourteen miles from the Canning Dock." The tug returned to Liverpool about 7 p. m. of the 29th, bringing back from the "new gun-boat" "some of Mr. Laird's workmen and riggers."[3]

Inefficiency of the subsequent proceedings.

On the morning of the 30th, the Consul called in person upon the collector and informed him that the tug was then in port, having returned from the Alabama the evening previous; that she reported the Alabama cruising off Port Lynas, and that she (the tug) was then taking on board men and equipments to "convey down to the gun-boat."[4]

The collector sent the surveyor to the tug and he reported that he found a considerable number of persons on deck, "some of whom admitted to me that they were a portion of the crew and were going to join the gun-boat." He also informed the collector that it was said she had cruised off Port Lynas the night before.[5]

After this the Hercules left Liverpool and went to the Alabama, finding her at Beaumaris Bay about 3 o'clock in the afternoon of the 30th, She remained with her until about midnight and then returned to Liverpool."[6]

The tug was not followed. Her movements were not watched. No telegrams were sent to the customs officers or any other representative of Her Majesty's Government at Port Lynas, Beaumaris, or any other station or district in the vicinity of where the Alabama was known to have been. She arrived near Port Lynas, at Moelfra Roads, at 7.38 in the evening of the 29th, and remained there at anchor until 3 o'clock in the morning of the 31st.[7]

This was ascertained by the collector at Beaumaris, and reported by him to the secretary of the customs on the 2d of August, in reply to a telegram addressed to him on the 1st. Had such telegram been sent

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[1] Brit. Case, p. 96.
[2] Report Commrs. Customs, Brit. App., vol. i, p. 226.
[3] Brit. Case, p. 97.
[4] Brit. Case, p. 96; Am. App., vol. vi, p. 407.
[5] Brit. Case, p. 97.
[6] Ibid.
[7] Ibid., p. 98.

on the 30th, when the Consul informed the collector at Liverpool of what had been learned from the tug, the vessel might have been stopped. At least she could not have communicated with the tug. This is apparent from what was done by the collector at Beaumaris on the 1st, when he did receive his instructions.[1]

Nothing was done until the 31st of July, when there was suggested to the Duke of Newcastle the propriety of sending the Governor of the Bahamas a copy of the report of the Law-Officers of the Crown of the 29th;[2] and at 7.30 p. m. a telegram was sent to the customs officers at Cork to seize her if she arrived at that port.[3]

On the 1st of August similar orders were sent to the officers at Beaumaris and Holyhead, the instructions to send them not having been given the evening before until after the telegraph offices to those places had been closed.

The first telegram to Cork was sent more than thirty hours after the collector had been advised by the surveyor of the port, who had obtained his information from the master of the tug, that the Alabama had been the night before cruising off Port Lynas, and that the tug was about to start from Liverpool to meet her. The excuse for sending to Cork was that Mr. Squarey on the 29th had advised the collector he had reason to believe she had gone to Queenstown;[4] but mention is omitted of the fact that afterward advice had been received that, up to the time of the departure of the Hercules, on the 30th, she was at some point nearer to Liverpool, at which she was to receive her crew and supplies from the tug.

In view of these facts, the United States believe the Arbitrators will have no difficulty in agreeing with Earl Russell in his opinion, as subsequently expressed to Mr. Adams, and reported by himself to Lord Lyons on the 27th of March, 1863, that "the cases of the Alabama and the Oreto were a scandal, and in some degree a reproach to our laws."[5] This opinion he repeated on the 16th of February, 1864, in the House of Commons, when he said:

Earl Russell thinks this a scandal.

> I say that here as I said it in that dispatch; I say that, having passed such a law in the year 1819, it is a scandal and a reproach that one of the belligerents in this American contest has been enabled, at the order of the confederate government, to fit out a vessel at Liverpool in such a way that she was capable of being made a vessel of war; that, after going to another port in Her Majesty's dominions to ship a portion of her crew, she proceeded to a port in neutral territory, and there completed her crew and equipment as a vessel of war, so that she has since been able to capture and destroy innocent merchant-vessels belonging to the other belligerent. Having been thus equipped by an evasion of the law, I say it is a scandal to our law that we should not be able to prevent such belligerent operations.[6]

The Arbitrators will also readily find that the scandal was not the fault of the *law*, but of its *execution*.

As was truly said by Mr. Cobden in the House of Commons, on another occasion, July 23, 1863, in reference to the iron-clads:

Mr. Cobden's views.

> I do not think it is very difficult to find out for what government any vessel which is being built in this country is intended, if it be intended for a government which can legitimately come to this country to buy a vessel.[7]

And the same distinguished statesman, on the same occasion, said, and said truly:

> I perceive a fallacy which runs through Lord Russell's dispatches and the solicitor-

[1] Brit. Case, p. 98.
[2] Brit. App., vol. i, p. 202.
[3] Ibid., p. 205.
[4] Brit. App., vol. i, p. 203.
[5] Am. App., vol. i, p. 585; Brit. Blue Book, (North America,) No. 1, 1864, p. 2.
[6] Am. App., vol. v, p. 528; Hansard's Parliamentary Debates, vol. clxxiii, pp. 634, 634.
[7] Am. App., vol. v, p. 690.

general's speeches. They constantly confound two very different things, namely, the evidence necessary to detain a vessel and the evidence necessary to convict a vessel. The consequence is that we refuse to interfere until Mr. Adams has brought forward conclusive evidence on oath that is sufficient to convict. * * * The departure of that privateer [the Alabama] might have been prevented. That vessel, according to Lord Russell's dispatch, left the port of Liverpool without a clearance, clandestinely * * * but the government might have prevented that. They had grounds for suspicion and might have said to the collector for the port: "Before this vessel leaves or has her clearance we must be satisfied on these points;" and to prevent her leaving without a clearance, they might have put custom-house officers on board. I maintain that you have power to do that under your customs consolidation act.[1]

Want of due diligence: in what it consisted.

That act provides (section 13) "that the commissioners of customs, or the collector or comptroller of any port under their directions, may station officers on board any ship while within the limits of any port in the United Kingdom;" and (section 145) that "before any ship shall depart in ballast from the United Kingdom for parts beyond the seas, not having any goods on board except stores from the warehouse borne upon the victualling bill of such ship, nor any goods reported inward for exportation in such ship, the collector or comptroller shall clear such ship in ballast, by notifying such clearance and the date thereof on the victualling bill, and deliver the same to the master of such ship as the clearance thereof, and the master of such ship shall answer to the collector or comptroller such questions touching her departure and destination as shall be demanded of him." And again, (section 146,) "Any officers of customs may go on board any ship after clearance outward within the limits of any port in the United Kingdom, or within four leagues of the coast thereof, and may demand the ship's clearance."[2] It is true, there is no provision for a forfeiture of the ship, and perhaps at that time there was no penalty imposed upon a master for a failure to comply with these provisions, but when Her Majesty's Government enacts that "before any ship shall depart" from the United Kingdom certain things shall have been done, there will be found somewhere, the United States believe, some power by which she can be detained until such things are done.

Subsequently, in the case of the Laird iron-clads, the law as it stood when the Alabama escaped, was used and made effectual. When the Government was afterward called upon in the House of Commons to answer for the seizure of those vessels, and inquired of as to the authority by which it was made, an elaborate and conclusive reply was given by the Attorney-General in a speech from which extracts have already been presented for the consideration of the Arbitrators.[3]

Now, what was done in the case of the iron-clads? Earl Russell requested the secretary of the treasury to "move the Lords Commissioners of the Treasury to desire that those vessels may be prevented from leaving the port of Liverpool until satisfactory evidence can be given as to their destination; or, at all events, until the inquiries which are now being prosecuted with a view to obtain such evidence shall have been brought to a conclusion."[4]

In consequence of this request, one of Her Majesty's ships of war was

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[1] Am. App., vol. v., p. 693.

[2] Am. App. Counter Case, 1158, 1165, 1166.

[3] Ante, pp. 78, 88.

[4] Brit. App., vol. ii, p. 352. On the 26th October, 1863, the law-officers of the Crown, on being inquired of as "to the course which, under the circumstances, * * should be adopted" by Her Majesty's Government in respect to these iron-clads, replied, "We are of opinion that it is competent to them to direct those vessels to be detained in any place which the commissioners of Her Majesty's customs may think fit to order under section 223 of 16 and 17 Vict., cap. 107, (the customs law consolidation act,) which is incorporated by reference into the foreign-enlistment act, 59 Geo. III, cap. 69, sec. 7." Brit. App., vol. ii, p. 419.

placed on the watch, and the vessels did not leave port. Had the law been executed in the same manner with respect to the Alabama, the present Tribunal would never have been called upon to consider the subject now under discussion. When the builders appeared not disposed to reply to any question with reference to her destination after leaving port, there were reasonable grounds for supposing that the destination was an illegal one, and the Lords Commissioners of the Treasury could and should have been moved to prevent her leaving until satisfactory evidence was given that it was lawful.

Much stress is laid in the Case presented by Her Majesty's Government upon the fact, that while the attention of Mr. Adams and the Consul had long been given to the vessel and she was launched as early as the 15th of May, no representation had been made to Earl Russell in respect to her until the 23d of June, and this is considered of sufficient importance to be made the subject of a second reference in the Counter Case.

The 23d of June, the Arbitrators will notice, was more than one month before she sailed; sufficient time certainly to have enabled the Government to detain her, if it had been so inclined, upon information after that time obtained. But it will also be remembered that the vessel had not escaped the notice of the customs officers,[1] and they took no action, although it was but a few weeks before that the Oreto had been permitted to escape, and was then known to have arrived at Nassau, a port entirely inconsistent with an innocent destination. In fact, on the morning of the 28th of July, the day before the Alabama sailed, and before she was moved out of the dock into the river, the Journal of Commerce, one of the public prints at Liverpool, contained an account of the proceedings which were being carried on against the Oreto at Nassau.[2]

It was not *time* for action which the officers of the Government required, but *inclination*.

Again, it is said she was not overtaken by the Tuscarora, which had been brought to Southampton by Mr. Adams for the very purpose of intercepting her; nor by any other of the vessels of war of the United States until finally destroyed by the Kearsarge. No better answer to this can be given than in the words of Sir Thomas Baring in the House of Commons, on the 13th of May, 1864, when he said, that "even with our cruisers afloat it would not be easy to pick up an Alabama;"[3] or in those of Mr. Cobden, in the same debate:

> Perhaps nothing is more difficult, not to say impossible, than to find a ship on the ocean after she has once got out of sight. Nelson himself passed many months trying to find a fleet of five hundred sail going from France to Egypt. You may find a vessel in a harbor just as Nelson found the French fleet at the Nile; but even if you should find an American cruiser in a harbor, by your own rules you must allow her to escape, because you say she must have a start of twenty-four hours.[4]

The latter gentleman on another occasion, July 23d, 1863, also said:

> Now, when still the great bulk of our commerce is carried on by sailing-vessels, two or three steamers, built especially for speed, may harass, and, in fact, may render valueless, the mercantile marine of a whole nation. I have heard it said, "O, if it were our case, we should soon catch those vessels." * * I have four times crossed the Atlantic, and sailed for two thousand miles without seeing a strange sail. The ocean is a very wide place. You cannot follow a vessel when it has once got out to sea with any chance of catching it. You have no stations where you can hear of it, and no road which you can follow with the chance of catching it.[5]

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[1] Brit. Case, p. 83.
[2] Am. App., vol. vii, p. 76.
[3] Am. App., vol. v, p. 579.
[4] Ibid., p. 593.
[5] Am. App., vol. v, p. 690.

Especially does this difficulty exist if the laws and regulations of neutrality are not strictly enforced. In January, 1863, Commodore Wilkes, of the United States Navy, wrote to the Secretary of the Navy of his Government:

> The fact of the Florida having but a few days' coal, makes me anxious to have our vessels off the Martinique, which is the only island they can hope to get any coal or supplies at, the English islands being cut off under the rules of Her Majesty for some sixty days yet, which precludes the possibility, unless by some chicanery or fraud, the hope of their getting coal and comfort there; therefore the island of Martinique it seems to me to be the only one to which they will attempt to resort.[1]

The Florida did get coal at Barbados, an English island, and the plans of Commodore Wilkes failed.

The Alabama having escaped, the British steamship Bahama cleared on the 13th of August from Liverpool for Nassau with her armament, shipped by Fawcett, Preston & Co.[2] The Bahama also had on board Captain Raphael Semmes, who afterward commanded the Alabama, and some officers and seamen, as passengers.[3] The English bark Agrippina also cleared from London in August for Demerara with a cargo of coal and munitions of war.[4]

Armament from the Bahama.

At Angra Bay, in the Azores, which "had been used and abused by corsairs and pirates during centuries,"[5] on the 22d and 23d of August, this armament, coal, ammunition, and stores, and these officers and seamen, were transferred, under the British flag, from these vessels to the Alabama. On the 24th, Captain Semmes, with his officers, took possession of the Alabama and mustered the crew, eighty-four in number and mostly British subjects.[6] The English ensign was hauled down and the flag of the insurgents hoisted.[7] Thus armed, manned, and equipped, the Alabama sailed from the Azores as a cruiser of the insurgents.

On the 18th of November she arrived at Martinique, and anchored in the harbor of Fort de France.[8] She went there to coal, arrangements having been made to meet the bark Agrippina, (the same that had taken part of her outfit to Angra,) which had arrived about one week previous with a cargo of coal from an English port.[9] On the 5th of September Mr. Adams had forwarded to Earl Russell a letter from the consul at Liverpool, stating that the Agrippina was to carry out another cargo of coal to the Alabama. On the 25th the commissioners of customs informed the lords commissioners of the treasury that they had no power to interfere.[10]

At Martinique.

The Agrippina left port upon the order of Captain Semmes to get under way forthwith and proceed to a new place of rendezvous, as "it would not do for him to think of coaling in Martinique under the circumstances."[11] Martinique was under the jurisdiction of the French Government and not under that of Her Majesty.

On the evening of the 19th the Alabama herself left port, the United States steamer San Jacinto having appeared in the offing.[12] On the afternoon of the 20th she joined the Agrippina, and the two ran together

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[1] Am. App., vol. vi, p. 338.
[2] Brit. Case, pp. 100, 101, 104.
[3] Ibid., p. 104.
[4] Ibid.
[5] Am. App., Counter-Case, p. 1013.
[6] Brit. Case, p. 105.
[7] Brit. App., vol. i, p. 214; Brit. Case, p. 105.
[8] Brit. Case, p. 107.
[9] Brit. App., vol. i, p. 257; Am. App., vol. vi, p. 491.
[10] Brit. App., vol. i, p. 213.
[11] Am. App., vol. vi, p. 491.
[12] British Case, p. 107.

to their concerted anchorage in Blanquilla, "one of those little coral islands that skirt the South American coast, not yet fully adapted to the habitation of man."[1]

They remained there five days, the Alabama coaling and making other necessary preparations for sea, when the coal-ship, which had still another supply of coal on board, was dispatched to another rendezvous, the Arcas, little islands in the Gulf of Mexico, off the coast of Yucatan.[2] This new rendezvous was reached by both vessels on the 23d of December.[3] The Alabama remained at the Arcas a week, coaling, repairing, and refitting. At the end of that time the Agrippina was put under sailing orders for Liverpool to report to Captain Bullock for another cargo of coal, to be delivered at Fernando de Noronha, another rendezvous agreed upon.[4]

On the 11th of January Captain Semmes engaged and sunk the United States gun-boat Hatteras twenty-five miles southeast of Galveston, Texas, one of the ports of the insurgents. In the engagement the Alabama received "six large shot-holes at the waterline."[5]

Destroys the Hatteras.

On the evening of the 20th she arrived at Port Poyal, in the island of Jamaica, and within the jurisdiction of Her Majesty's Government, "to repair damages sustained in the action," and to land prisoners.[6] The distance from the place of the engagement to Jamaica was about fifteen hundred miles. On arriving Captain Semmes applied to the naval officer in command at the station for permission to land his prisoners, repair damages, and to receive coal and supplies, stating it was absolutely necessary the damages "should be repaired before he could proceed to sea with safety."[7] This was the first British port the vessel had visited after her escape from Liverpool.

At Jamaica, January 20, 1863, repairs and lands prisoners.

In this connection it will be recollected by the Arbitrators that on the 31st of July, after her escape, Earl Russell suggested to the Duke of Newcastle "the propriety of a copy of the inclosed report (that of the Law-Officers, of the 29th of July) being sent to the Governor of the Bahamas."[8]

On the 16th of September, after the receipt at London of information of the release of the Oreto at Nassau, the Law-Officers were inquired of whether it would be "necessary to modify the instructions sent to the Governor of the Bahamas" for the detention of the Alabama,[9] and on the 25th they replied that they were of "the opinion that if the vessel 290 should put into Nassau, she ought to be there seized and proceeded against, provided that there be nothing in the condition of the vessel when at Nassau tending to rebut the inference which the law-officers drew from the facts laid before them with respect to the vessel when she lay at Birkenhead."[10]

This was after it was known that the Alabama had been armed and equipped and had started on her cruise, as that fact was communicated by Mr. Adams to Earl Russell on the 4th of September.[11]

After the necessary correspondence between the naval officer at Jamaica and the Lieutenant-Governor of the island, the permission to repair asked for by Captain Semmes on his arrival was granted.[12] This was reported to the Government of Her Majesty, and on the 14th of February Earl Russell informed the Duke of Newcastle that, in his

[1] Am. App., vol. vi, p. 491.
[2] Ibid.
[3] Ibid.
[4] Am. App., vol. vi, pp. 492, 493.
[5] Brit. App., vol. i, p. 264.
[6] Brit. App., vol. i, p. 267.
[7] Ibid., p. 264.
[8] Ibid., p. 202.
[9] Ibid., p. 211.
[10] Ibid., p. 212.
[11] Ibid., p. 209.
[12] Ibid., p. 264.

opinion, the proceedings of the Governor should be approved, but he trusted "the Alabama has been warned to depart as soon as the necessary repairs are finished."[1]

When the Alabama arrived at Jamaica, although she had on board the officers and men of the Hatteras as prisoners, four officers of Her Majesty's ship Challenger, four of the Cygnet, and one of the Greyhound, went on board of her upon visits of courtesy,[2] and the band played the tune called *Dixie's Land* as a compliment to her, "because it is the ordinary usage and custom among the navies of civilized nations to play complimentary tunes to each other on such occasions."[3] It may have been done by the junior officers, "entirely from thoughtlessness," and that the "inconsiderate young man who ordered *Dixie's Land* to be played" was "severely reprimanded;" yet it was done, and the most cordial relations were at once established between the officers of all these ships (the English squadron) and those of the Alabama."[4]

"The fractures made by six large shot or shell near the water-line * * required extensive repairs, which could not be completed by the unskillful workmen hired here before late in the afternoon of the 25th, and the Alabama sailed at 8.30 of the same evening." She "was treated * * exactly as I [the naval commander at the station] shall act toward any United States man-of-war that may hereafter call here."[5] Why she did not remain longer may be inferred from what Captain Semmes said to the Vice-Admiral on his arrival, which was, "If I remain here an hour more than can be avoided I shall run the risk of finding a squadron of my enemies outside, for no doubt they will be in pursuit of me immediately."[6]

She arrived at the harbor of Rata Island near the island of Fernando

At Rata Island.

de Noronha,[7] in the jurisdiction of His Majesty the Emperor of Brazil, on the 4th of April, expecting there to meet the Agrippina with coal. That vessel did not arrive and Captain Semmes supplied himself from one of his prizes taken on the day before he entered the port.[8]

While at these islands waiting for his coal, Captain Semmes cruised in the neighborhood and captured two vessels near the shore, and, as was claimed, within the territorial waters. He was entertained by the governor and provided with horses to go about the island. The Governor returned his official visit in uniform. Upon this becoming known to the president of Pernambuco, he "dispatched an officer in the Brazilian steam-vessel Mamanguape to inquire into these statements, to require Captain Semmes to leave the island within twenty-four hours, and to supersede the Governor if what had been asserted should prove to be true."[9]

The inquiry was made, the Governor dismissed, and the Alabama ordered to leave the islands.[10]

This action of the President of the Province was approved by the Government of His Majesty the Emperor.[11]

On the 11th day of May, the Alabama arrived at Bahia. The bark Castor was also there with coal, but the Government, "taking into consideration the circumstances of suspecting that the

At Bahia.

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[1] Brit. App., p. 268.
[2] Ibid., p. 269.
[3] Ibid., p. 270.
[4] Am. App., vol. vi, p. 493.
[5] Brit. App., vol. i, p. 269.
[6] Ibid., p. 264.
[7] Ibid., p. 276.
[8] Am. App., vol. vi, p. 493; Brit. App., vol. i, p. 272.
[9] Brit. App., vol. i, p. 272.
[10] Ibid.
[11] Ibid.

bark had gone direct to that port by preconcerted agreement, refused permission decisively to the commander of the Alabama, who had asked to be permitted to receive the coal from on board the bark."[1]

Is excluded from Brazilian ports for violation of sovereignty of Brazil.

She arrived at Bahia after the proceedings were commenced to investigate the facts imputed to her at Fernando de Noronha, but before their conclusion. Upon their conclusion an order was made that "the Alabama shall no more be admitted in any port of the empire. She would have suffered the same exclusion from Bahia if she had not presented herself at that port even before proof of her culpability could be obtained, and before the Imperial Government, surprised by such audacity, could have been enabled to take measures concerning the penalty which in such cases ought to be applied."[2]

At Cape Town.

On the 29th of July the Alabama appeared in Saldanha Bay, in the Cape Colony, and thus came once more within the jurisdiction of Her Majesty's Government.[3] On the 1st of August, Captain Semmes availed himself of "an opportunity offered by the coasting schooner Atlas to communicate with the Cape," and informed the Governor that he had arrived in the bay "for the purpose of effecting some necessary repairs."[4] On the 4th of the same month the Consul of the United States also informed the Governor of the presence of the Alabama in the bay, and asked that she "should be at once seized and sent to England, from whence she clandestinely escaped."[5] The Governor caused a reply to be sent on the next day to the effect that he "has no instructions, neither has he any authority, to seize or detain that vessel."[6]

At two o'clock in the afternoon of the same day (the 5th) she appeared off Cape Town, and, at the entrance of Table Bay, within sight of the town and hundreds of persons, captured the American bark Sea Bride.[7]

This was made known to the Governor at once by the United States consul, who claimed that the capture was "clearly within British waters."[8] The Governor caused inquiries to be made of the captain of the Alabama and also of the port-captain and other persons, and satisfied himself that "the vessels were not less than four miles distant from land."[9] It was not denied, however, that this was in full sight from the town. Indeed, that was shown to be the case by the statements of all who were inquired of by the Governor.[10]

After this capture on the 5th, the Alabama came into Table Bay, and Captain Semmes at once announced to the Governor that he had come in for "supplies and repairs," and asked leave to "land prisoners." On being inquired of by the Governor as to the "nature and extent of supplies and repairs" required, he replied: "I shall need some provisions for my crew; * * * and as for repairs, my boilers need some iron work to be done, and my bends require calking, being quite open. I propose to take on board the necessary materials here, and to proceed with all dispatch to Simon's Bay for the purpose of making these repairs."[11]

At Simon's Bay.

The vessel remained at Table Bay three days and then went to Simon's Bay, also in Her Majesty's dominions, to calk and refit, arriving there on the 9th. On the way over Captain Semmes chased and captured another American vessel, but, "on

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[1] Brit. App., vol. i, p. 293.
[2] Brit. App., vol. i, p. 299.
[3] Brit. Case, p. 111.
[4] Brit. App., vol. i, p. 308.
[5] Ibid., p. 301.
[6] Ibid.
[7] Ibid.
[8] Ibid., p. 312.
[9] Ibid., p. 313.
[10] Ibid., pp. 318, 319.
[11] Ibid., p. 314.

my pointing out to him," says Rear-Admiral Walker, "that he had done so in neutral waters, he assured me that it was quite unintentional, and, being at a distance from the land, he did not observe that he had got within three miles of an imaginary line drawn from the Cape of Good Hope to Cape Hanglip, but on discovering it, he did not detain the vessel." This explanation was considered sufficient.[1]

After the capture of the Sea Bride, she was brought within a mile and a half of the shore.[2] Upon the representation of this fact by the Consul of the United States to the Governor, he immediately replied that he did not feel warranted in taking steps to remove the prize crew,[3] upon the ground, as he afterward said, that the vessel was brought in through "inadvertence."[4]

The Tuscaloosa.

After his arrival at Cape Town on the 5th, Captain Semmes "mentioned to the Governor" that he left outside one of his prizes previously taken, the Tuscaloosa, which he had equipped and fitted as a tender, and had ordered to meet him in Simon's Bay, as she also stood in need of supplies."[5]

On the 8th this vessel arrived at Simon's Bay. She was "a bark of five hundred tons, with two small rifled twelve-pounder guns and ten men, and was captured by the Alabama on the 21st of June last, off the coast of Brazil, cargo of wool still on board."[6] She had never been condemned by a prize court, but had been commissioned by Captain Semmes on the high seas as a tender to his ship, one of his lieutenants having been placed in command.[7] The Attorney-General of the Colony was of the opinion that "if the vessel received two guns from the Alabama, or other Confederate vessel of war, or if the person in command of her has a commission of war, or if she be commanded by an officer of the Confederate Navy, in any of these cases there will be a sufficient setting forth as a vessel of war to justify her being held to be a ship of war." And she was admitted into the harbor as such.[8]

The Tuscaloosa remained at Simon's Bay until the morning of the 14th, and the Alabama until noon of the 15th.[9] The Tuscaloosa went to Saldanha Bay, where she found the Sea Bride, driven there, *as was said*, by stress of weather. Both vessels remained two days, then proceeded to Angra Pequena on the west coast of Africa, where they were afterward joined by the Alabama. On leaving the bay they were communicated with by a steamer. The Sea Bride and her cargo were sold at Angra Pequena to an English subject who resided at Cape Town. The Tuscaloosa also landed there her cargo of wool.[10]

The Tuscaloosa and Sea Bride were ordered to Angra Pequena by Captain Semmes. "The object of sending the Tuscaloosa there was to get wool taken out of her and replaced by ballast. * * * Captain Semmes had previously had an offer for the Sea Bride, which he resolved to accept. * * * A day was fixed for both the Tuscaloosa and Sea Bride to be at anchor in the harbor of Angra Pequena. Upon that day Captain Semmes took in the Alabama, met the parties who had made him the offer for the Sea Bride, and completed the sale of her. * * * The wool was taken out of the Tuscaloosa and landed, * * * and is now (September 19) on its way to market."[11]

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[1] Brit. App., vol. i, p. 307.
[2] Ibid., p. 316.
[3] Ibid., p. 317.
[4] Ibid., p. 329.
[5] Brit. Case, p. 113.
[6] Brit. App., vol i, p. 310.
[7] Ibid., p. 308.
[8] Ibid., p. 311.
[9] Brit. Case, p. 113.
[10] Forsyth to Walker, Brit. App., vol. i, p. 324; Walker to Admiralty, ibid., p. 325.
[11] Am. App., vol. vi, pp. 454, 455.

The account of the transaction, as given by Captain Semmes himself, is as follows:

The Tuscaloosa went to sea at daylight on the 14th, and we followed her in the Alabama the next day. The former was to proceed to Saldanha Bay, and thence take the Sea Bride with her to one of the uninhabited harbors, some distance to the northward, and the Alabama was to follow her thither after a cruise of a few days off the Cape. At length, when I supposed the Tuscaloosa and the Sea Bride had reached their destination, I filled away and followed them. On the morning of the 28th of August we sighted the land, after having been delayed by a dense fog for twenty-four hours, and in the course of the afternoon we ran into the bay of Angra Pequena and anchored. This was our point of rendezvous. I found the Tuscaloosa and the Sea Bride both at anchor. I had at last found a port into which I could take a prize. I was now, in short, among the Hottentots, no civilized nation claiming jurisdiction over the waters in which I was anchored. When at Cape Town an English merchant had visited me, and made overtures for the purchase of the Sea Bride and her cargo. He was willing to run the risk of non-condemnation by a prize-court, and I could put him in possession of the prize, he said, at some inlet on the coast of Africa without the jurisdiction of any civilized power. I made the sale to him. He was to repair to the given rendezvous in his own vessel, and I found him here, according to his agreement, with the stipulated price—about one-third the value of the ship and cargo—in good English sovereigns, which, upon being counted, were turned over to the paymaster for the military chest. The purchaser was then put in possession of the prize. I had made an arrangement with other parties for the sale of the wool still remaining on board the Tuscaloosa. This wool was to be landed at Angra Pequena also, the purchaser agreeing to ship it to Europe, and credit the Confederate States with two-thirds of the proceeds.[1]

On the 16th of September the Alabama again arrived at Simon's Bay.[2] Upon his arrival Captain Semmes immediately waited upon Rear-Admiral Walker and "frankly explained" to him, as the Admiral reported to the Secretary of the Admiralty on the 17th, his proceedings at Angra Pequena.[3] On the 19th a full account, as given by Captain Semmes to a reporter on the 18th, was published in the Cape Town Argus.[4]

At Simon's Bay.

Captain Semmes returned to the port at Simon's Bay "for coal, some provisions, and to repair her condensing apparatus."[5] He would not have come back there, "but his condensing apparatus got out of order."[6]

The Alabama remained in port until 3 p. m. of the 24th, when, having completed her repairs and taken on a supply of coal, she sailed for the Indian seas. "The officers of the station were as courteous" as before, and Captain Semmes renewed his "very pleasant intercourse with the Admiral's family."[7]

On the 22d of December she arrived at Singapore, also within the jurisdiction of Her Majesty's Government, and was supplied with coal and provisions. While there, some of the crew having deserted, Captain Semmes "permitted half a dozen picked fellows to come on board, to be shipped as soon as we should get out into the strait."[8]

At Singapore.

On the 20th of March the Alabama again arrived at Simon's Bay. Captain Semmes was "permitted to receive a supply of coal, and complete provisions," after which he put to sea on the 25th.[9] From there she proceeded to Cherbourg in France, at which place she arrived on the 11th of June. On the 19th she left that port to engage the United States steamer Kearsarge, and was sunk in the engagement, many of her officers escaping to Great Britain in an English yacht which came out from Cherbourg to witness the action.[10]

At Simon's Bay: coals and provisions.

Is destroyed by the Kearsarge, June 19, 1864.

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[1] Am. App., vol. vi, p. 498.
[2] Brit. Case, p. 115.
[3] Brit. App., vol. i, p. 325.
[4] Am. App., vol. vi, p. 453.
[5] Brit. App., vol. vi, p. 325.
[6] Am. App., vol. vi, p. 455.
[7] Ibid., p. 499.
[8] Ibid., p. 501.
[9] Brit. App., vol. i, p. 372.
[10] Brit. Case, p. 116.

Reasons why Great Britain is responsible for acts of.

Thus it will be seen that in a cruise of about two years, the Alabama received all her repairs, previous to her arrival at Cherbourg, (except such as could be made in the open sea or at anchorages found in uninhabited islands,) in the ports of Great Britain. She was supplied with coal from Great Britain exclusively, except once when it was taken from one of her prizes and once at Bahia. This last would not, however, have been allowed, had the facts in relation to her conduct in the waters of His Majesty the Emperor of Brazil been known at the time. Having made "Rata Island the base of her operations, for to that place she carried prizes, and from thence proceeded to make others, which she ordered to be burnt, after having kept them there some days at the anchorage place of that island," His Majesty the Emperor of Brazil "ordered that the said steamer be no more received in any port of the Empire."[1]

The "toleration" of such abuses was, in the opinion of His Majesty, "equivalent to permitting the ports of the Empire to serve as bases for operations for the belligerents."[2] Therefore, this first "disrespect to the sovereignty" of that Empire was followed, as soon as discovered, by a peremptory order of banishment.

The United States ask the Arbitrators to contrast this conduct with that of the Government of Her Majesty.

This vessel was built and specially adapted to warlike use in Great Britain, and in violation of the laws of that sovereignty. She sailed from a port in that sovereignty, unarmed, but fitted in all respects to receive her armament; she escaped after her detention by the Government had been determined upon; her armament was constructed in Great Britain; her ammunition, stores, and crew were all provided there; these were shipped by the insurgents on board of English vessels in English ports, transported to the waters of another Government, under the English flag, and there transferred. After her cruise commenced, her coal was supplied from Great Britain in English vessels dispatched from English ports, with instructions to proceed to places of rendezvous arranged by "preconcerted agreement" through agents of the insurgents, having their places of business, and carrying on the operations of their government, upon English soil.

She sailed a distance of more than fifteen hundred miles to reach an English port after an engagement with the enemy only twenty-five miles from one of her own ports, in order to repair damages and refit. While cruising along the coast, going from one port to another in British jurisdiction, within cannon-shot of the shore, and in sight of the town in which was located the seat of the colonial government of Her Majesty, she captured an innocent merchantman and "inadvertently" brought it within the territorial jurisdiction of Her Majesty. While again coasting between other ports of Her Majesty's dominions she again chased and detained another merchantman, but upon being informed by one of the officers of Her Majesty's Navy that this was within the jurisdiction of Her Majesty the captain again put in a plea of "inadvertence" and released his prize.

She brought an uncondemned prize into a port of Her Majesty under pretense of a commission as a tender; her officers there made contracts for the sale to Her Majesty's subjects of the prize cargo of this so-called tender, and of the prize vessel and cargo taken within sight of the land; and, in pursuance of an arrangement made in port, proceeded to an unfrequented island, and completed the sale of the uncondemned prizes

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[1] Brit. App., vol. i, p. 295.

[2] Ibid., p. 294.

by delivery and receipt of the purchase-money; and afterward, in an English port, her captain "permitted" a few picked fellows to come on board for "shipment" outside of the jurisdiction.

All these facts, save perhaps the last, were made known to Her Majesty's Government as soon as they occurred, yet no "disrespect to the sovereignty" of Her Majesty was discovered; such practices were "tolerated;" the vessel, with her officers, was at all times and on all occasions admitted without hesitation to the hospitalities of all British ports, and "treated exactly as any United States man-of-war would have been." In short, she was permitted at all times to do, in the ports of Great Britain, what, in the opinion of His Majesty the Emperor of Brazil, was "equivalent" to their use as the bases of belligerent operations. During all this time no instructions were ever issued from the home Government which could, in any manner whatever, embarrass the operations of a vessel whose Government had so persistently abused and insulted the power and sovereignty of Her Majesty.

As to the vessel, therefore, the United States believe the Arbitrators will find that she was not only constructed and specially adapted to warlike use within Her Majesty's jurisdiction, and that due diligence was not used to prevent her departure therefrom, but that after her departure she was permitted to use the ports and waters of Her Majesty as a base of naval operations against the United States.

As has been seen, the Tuscaloosa was commissioned as her tender. Before her arrival within the jurisdiction of Her Majesty's Government at the Cape of Good Hope, she had captured and released upon ransom-bond one vessel. After her visit and supplies there, on the 13th of September, 1863, she captured and destroyed one more. As to her, Great Britain permitted her ports to be used as a base of belligerent operations. In addition to this, having been commissioned by the Alabama, her acts are to be treated as the acts of her principal.

VIII.—THE GEORGIA.

The Georgia at Glasgow.

This vessel was built at Dumbarton, on the Clyde, a few miles below Glasgow, by William Denny and Brothers.[1] She was launched on the 10th of January, 1863, and was then called the Virginia. A Miss North, daughter of Captain North, of the insurgent States, was prominent at the launch and gave the ship her name.[2] All this was reported by the consul at Glasgow to Mr. Seward on the 16th of January.[3] On the 9th of October, 1862, Mr. Adams communicated to Earl Russell a copy of an intercepted letter from the insurgent secretary of the navy to Captain North, which fully explained the position that gentleman occupied toward the insurgents.[4]

Notoriety of the construction and purposes of the Georgia.

On the 12th of February an article in the form of a communication appeared in the London Daily News addressed to Lord Palmerston, then at the head of Her Majesty's Government, in which the attention of his lordship was particularly called to the great activity in the ship-building yards for the construction of a fleet of war-steamers alleged to be for the "Emperor of China." Among others, mention was specially made of the two "iron-clads" in the yard of the Messrs. Laird, and also of a steam ram, afterward the Pampero, (or Canton,) being built by Thompson Brothers, at Glasgow, where they were subsequently, when they were approaching completion, seized and detained by the Government. In this article it is expressly stated that, "the term 'Chinese' is in general use in the building-yards of the Clyde and the Mersey, to designate the Confederates, and the 'Emperor of China' has no other signification, in this connection, than to personify Jefferson Davis."[5]

The Virginia is also specially mentioned as one of this class of vessels, and it is then stated that "the Government, indeed, professes a policy of non-interference; but such a profession is neutralized by the moral support which the noble lord, the Secretary of Foreign Affairs, lends to the rebellion, when, in his place in Parliament, he expresses the view that the 'subjugation of the South by the North would be a great calamity.'" On the 17th of February, another article appeared as a communication in the same paper, addressed in the same form, in which this language is used: "It is simply incredible that it (the Government) alone is not cognizant of facts notorious in commercial circles, and the evidence of which is more easily accessible to its agents than to lookers on."[6]

It is quite true that these were anonymous communications in a newspaper, but the newspaper was one of a large circulation and important political influence in London, and the articles professed to state facts. One of these facts was that many vessels were being built in Great Britain, intended for vessels of war; and another, that it was pretended they were for the Emperor of China.

The Oreto and the Alabama had, before that time, escaped from Eng-

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[1] Brit. App., vol. i, p. 423.
[2] Am. App., vol. vi, p. 503.
[3] Ibid.
[4] Brit. App., vol. i, p. 216.
[5] Am. App., vol. vi, p. 505.
[6] Ibid., p. 509.

lish ports under pretense of being intended for foreign governments. They were then under the flag of the insurgents, engaged in the destruction of the commerce of the United States.

It now appears that Her Majesty's Government had ample means within its own control of determining which of the vessels referred to in these articles was and which was not intended for "the Emperor of China." The real Chinese Government had an "agency" at "6 Little George street, Westminster, London." As early as the 10th of September, 1862, Earl Russell caused a letter to be addressed to Mr. Lay, "inspector-general of Chinese customs, then on leave in England,"[1] in which it was said:

> It appears to Her Majesty's Government that, unless you are already provided with a written authority from the Chinese Government for the steps which you are taking to provide that Government with naval assistance, you should procure such authority; and I am accordingly to request that you will take steps for obtaining such authority as soon as possible, although, in the meanwhile, Her Majesty's Government are prepared to act on the assurances of Mr. Bruce, and not interpose any delay in your proceedings.[2]

The Mr. Bruce referred to in this letter, the United States infer from the correspondence which afterward occurred, to have been Sir Frederick Bruce, who was at that time the representative of Her Majesty's Government at Pekin, and who subsequently succeeded Lord Lyons at Washington.

On the 9th of October, Mr. Lay addressed a letter to the Foreign Office from the "Chinese government agency, 6 Little George street, Westminister," a copy of which is as follows:

> My absence from England has prevented my receiving before yesterday your letter of the 10th September. With reference to Earl Russell's desire that I should obtain a written authority from the Chinese government for the steps I am taking to provide it with naval assistance, I have the honor to state that I hold such written authority, dated the 15th March, 1862, from my *locum tenens*, Mr. Hart, to purchase and equip a steam fleet, in accordance with instructions from the imperial government. I have since received regular remittances from the foreign customs for that purpose, by direction of Prince Kung. I may add for his lordship's information, that on the 28th of June last I received, through Mr. Hart, a dispatch from the Chinese Foreign Office relative to the proposed fleet. This dispatch prays the inspector-general of customs in earnest terms to use the utmost dispatch in procuring the vessels. It repeats the instructions issued to the governors of various provinces as to the amounts to be contributed by them toward the cost of the fleet; refers to the Emperor's anxiety that no time be lost; and closes with a second earnest appeal to the inspector-general for these reasons "not to lose a day." With respect to the flag for the fleet, I have written for precise authority. As soon as I receive it, I will not fail to apprise Earl Russell of the fact.[3]

The subsequent correspondence preceding the 17th February, 1863, is not given by Her Majesty's Government in the documents and evidence presented for the consideration of the arbitrators; but it is stated in the British Case, on page 47, that "in March, 1862, the Chinese Government gave authority to Mr. Lay, inspector-general of Chinese customs, then on leave in England, to purchase and equip a steam fleet for the Emperor's service, and a sum of money was placed at his disposal for the purpose. Mr. Lay accordingly entered into an agreement with Captain Sherard Osborn, an officer in Her Majesty's navy, according to which the latter was to take command-in-chief of the fleet, receiving orders from the Chinese Government through Mr. Lay. Her Majesty's Government, by orders in council, gave permission to enlist officers and men for this service."

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[1] Brit. Case, p. 47. [2] Brit. App., vol. ii, p. 681. [3] Ibid., p. 681.

The United States cannot state with certainty that such was the fact, but they have reason to believe that some of the vessels mentioned in the first article above referred to, published in the London Daily News, were, in fact, being built under the above-mentioned arrangement, and were, in fact, intended for the "Emperor of China." But it is certain that all were not so intended, and particularly was this the case with the Laird iron-clads, the Pampero (or Canton) and the Virginia, (or Georgia.) It is also certain that the steps "taken to provide the Chinese Government" with "naval assistance" were made use of by the insurgents as a cover to their transactions, and that this was so notorious in commercial circles as to have become the subject of newspaper comment.

When a foreign government comes to the ship-yards of Great Britain to replenish or strengthen its navy, it has, or should have, no concealments. If at peace, it is lawfully there, and Her Majesty's subjects may and do invite contracts for that kind of work; but in such case, the representative of the government should do as was done during the war in the United States by the representative of the Danish government, who, "wishing to spare Her Majesty's Government all the embarrassment possible, came forward and gave the fullest information that a vessel was being constructed for the Danish Government."[1]

When, therefore, as in this case, vessels suspected to be for warlike use against a nation with which Great Britain was at peace, were being constructed in the ship-yards of the subjects of Her Majesty, and it was said that they were for the use of a nation which could lawfully contract for their construction, Her Majesty's Government had the right, and it became its duty at once, to demand the "fullest information." Answers from a nation that could lawfully contract would be prompt and direct. There would be no necessity for concealment, and consequently none would be attempted.

If Inspector-General Lay, or Captain Osborn, had been requested by Her Majesty's Government to name the vessels actually being constructed under their supervision for the Emperor of China, a prompt and truthful answer might have been expected and would doubtless have been given. So far as appears, no such request was ever made, and the insurgents enjoyed the full benefit of the omission.

It is quite true, that neither Mr. Adams nor any other representative of the United States, at any time brought his suspicions as to the Virginia to the special attention of Earl Russell, or any other officer of Her Majesty's Government, before she left the Clyde. The Consul at Glasgow had strong suspicions as to her character and destination, but he had not and could not, with his means of information, produce "such evidence of the fact as would support an indictment for the misdemeanor;" and nothing short of that, Mr. Adams had been informed in July previous, in the case of the Alabama, would, in the opinion of the solicitor of customs at London, furnish "justifiable grounds of seizure."[2]

The building of vessels for the insurgents upon the Clyde had but just commenced. The consul at Glasgow had not then perfected his arrangements for procuring information, as had been done at Liverpool, where the operations of the insurgents began, and had been continued with so much activity. Consequently the United States could not then comply with the rules that had been already prescribed, and so strenuously insisted upon, in previous cases, for the guidance of the officers of

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[1] Mr. Layard in the House of Commons, March 7, 1864, Am. App., vol. iv, p. 499.
[2] O'Dowd's Opinion, Brit. Case, p. 90.

Her Majesty's Government in such matters. Such, however, was not the case with Her Majesty's Government itself. It had in full operation all the machinery by which for years it had been accustomed to carry on its police and revenue departments. It needed only to put this machinery into operation, and suspicions could be raised to the dignity and importance of evidence, or set aside as unfounded.

This was never done. "Facts notorious," "the evidence of which was more easily accessible to the agents of the Government than to lookers on," were passed by without the notice of the government, and this vessel was permitted to escape.

But it is said that, "when surveyed by the measuring surveyor, she presented nothing calculated to excite suspicion; that she had the appearance of being intended for commercial purposes, her framework and plating being such as are ordinary in trading-vessels of her class."[1]

The surveyor's certificate bears date February 4. He commenced his survey on the 17th of January, seven days after her launch, and he visited her on two separate occasions afterwards for the purpose of completing his survey.[2] These visits must, therefore, have all been made previous to the date of his certificate, (February 4.) She was not registered until the 20th of March, nor cleared until the 1st of April, and did not sail until the 2d. The evidence presented is, therefore, only of her appearance on the 4th of February. Her Majesty's government does not appear to have caused any examination to be made after that time; or if it did, it has not seen fit to furnish the arbitrators with the result.

Registry, clearance, and departure.

It is true that after she had sailed and it was known she had already been converted into a cruiser, the collector of the port did say, in a report to the commissioners of customs then called for, that the "officer who performs the tide surveyor's duty afloat, and who visited her on the evening of the 1st instant, to see that the stores were correct, informs me he saw nothing on board which could lead him to suspect that she was intended for war purposes." He also said that he, himself, could "testify that she was not heavily sparred; indeed, she could not spread more canvas than an ordinary merchant steamer."[3]

But this can hardly be looked upon as having the effect of an examination actually made.

On the 14th of February, eight days after the certificate of the surveyor, the first article above referred to appeared in the Daily News. Three days after, on the 17th, the next appeared. The vessel remained in port for nearly two months after these suspicions assumed shape and became "notorious in commercial circles."

That she was specially adapted to warlike use when she left port, is proven by the fact that, as soon as the armament was transferred to her, off the coast of France on the 9th, she set forth as a vessel of war, complete and ready for active service. She needed, when she left Greenock, nothing but arms and ammunition. Those were soon obtained out of Her Majesty's dominions, and without entering any port she commenced her work of destruction.

She was registered on the 20th of March, in the name of one "Thomas Bold, a merchant residing at Liverpool," [4] as the owner. He was a relative of Lieutenant Maury, her commander.[5] On the 27th she commenced shipping her crew at a shipping office and before a shipping

[1] Brit. Case, p. 122.
[2] Ibid.
[3] Ibid.
[4] Ibid., p. 123.
[5] Dudley to Seward, Am. App., vol. vi, p. 519.

master in Liverpool for a voyage "from Greenock to Singapore and Hong-Kong, (with liberty to call at any port or ports on the way, if required,) and after arrival there to be employed in trading to and from ports in the China and Indian seas, the voyage to be completed within two years by arrival at a final port of discharge in the United Kingdom."[1] Her crew left Liverpool for Glasgow on the 30th March,[2] and they went on board the vessel whilst lying in the Clyde, off the port of Greenock.[3] On the 1st April she cleared from Greenock in ballast for Hong-Kong.[4]

It is said in the British Case, page 123, that "the men believed that this was the real destination of the ship." The United States will reply in the language of one of the distinguished gentlemen who now compose this honorable Tribunal, the Lord Chief Justice of England, on the trial, in 1864, of the parties indicted for procuring the enlistment of the men, and say, "No doubt it was possible they might have been under the delusion that the ship was engaged for a voyage to China;"[5] but they think that, after a consideration of the affidavits and correspondence, found in vol. i, pages 412 to 415, 430 to 439, and 443 of the Brit. App., the Arbitrators will conclude that such a delusion was hardly *probable*. One witness, Thomas Matthews, said in his affidavit, "I understood that the vessel was not going to China, although she would be entered out for that place;"[6] and it is hardly possible to believe that many of the crew did not, when they shipped, have the same understanding.

The Alar.

The steamer Alar cleared from the port of Newhaven on the 4th of April, for Alderney and St. Malo, under circumstances which attracted the attention and excited the suspicions of the collector there. The same night, after her clearance, about thirty men, twenty of whom appeared to have been British sailors, and ten mechanics, arrived by train. Her agent admitted she had munitions of war on board.[7] She took to the Japan her armament and equipment, which were transferred to her off the coast of France, near to Brest. This transfer was completed on the evening of the 9th. On the 6th the collector at Newhaven addressed a letter to the commissioners of customs advising them of the circumstances of suspicion attending the clearance of the Alar, and adding, "leaving no doubt on my mind nor on the minds of any here, that the thirty men and munitions of war are destined for transfer at sea to some second Alabama."[8]

Armament of the Georgia.

Mr. Adams gives information to Earl Russell.

On the 8th, Mr. Adams, in behalf of the United States, addressed a note to Earl Russell calling his attention to the Virginia [Japan] and the circumstances of her escape, as well as to the fact that the Alar, loaded with guns, shells, shot, powder, &c., intended for her equipment, was then on the way to her. This note was received at the *foreign office* at 12.45 p. m. of the day of its date.[9] At that time it was supposed by Mr. Adams that the vessels would proceed to, and meet at, the island of Alderney. Instructions were immediately sent, on the request of Earl Russell, to the officers of the Government at that station to take such steps in the matter as they might be advised to do by their legal advisers.[10] No instructions were sent to the naval officers at Plymouth or Portsmouth. No cruisers were sent out.

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[1] Brit. App., vol. i, p. 426.
[2] Dudley to Seward, Am. App., vol. vi, p. 509.
[3] Brit. Case, p. 123.
[4] Brit. App., vol. i, p. 407.
[5] Am. App., vol. iv, 567.
[6] Brit. App., vol. i, p. 443.
[7] Report of collector, Brit. Case, p. 123.
[8] Brit. Case, p. 123.
[9] Brit. App., vol. i, p. 399.
[10] Arbuthnot to Hammond, ibid., p. 401.

The Alar was of only eighty-five tons burden.[1] Of course she could not be expected to take her cargo a great distance. The place from which she cleared was given by Mr. Adams in his letter to Earl Russell. The letter from the collector of customs to the commissioners of customs reached that department of the Government in London on the 7th, and was at once transmitted to the lords commissioners of the treasury.[2] When the letter of the collector reached the treasury, the Alar was "lying to," not having yet reached the Japan. When Mr. Adams's letter reached the Foreign Office, the two vessels had but just joined each other and the transfer of armament had not been commenced.[3]

The Government, however, acted only on the suggestion of Mr. Adams that the vessels were to meet at the island of Alderney. It originated no plans of its own. It did not institute any inquiries for itself; it did not even pay any attention to the suspicions of its own officers. The consequence was that the vessel escaped; and thus Great Britain furnished the insurgents with another completed, equipped, and manned vessel of war ready to prey upon the commerce of the United States. The Navy of the insurgents by this addition was increased to three effective and powerful vessels, only one of which had ever entered their ports, but all of which had proceeded from the ports of Great Britain, with no attempt on the part of Her Majesty's Government to prevent their departure. All these vessels, too, were freely admitted into the ports of Great Britain as vessels of war set on foot legitimately, and without any insult to the sovereignty of Her Majesty.

Insufficient action of Her Majesty's government.

All the facts in relation to the escape of the Japan (afterwards the Georgia) were made known to Earl Russell by Mr. Adams on the 16th of April, through affidavits of two men who had left her at Brest.[4]

After her armament she first made the port of Bahia, on or about the 11th of May, where she went to "meet her coal-ship," the Castor, which had been ordered there from England;[5] but, after taking in a part of her supply, she was "stopped by the authorities," and compelled to get the remainder from the shore.[6] This the United States suppose was for the same reason which was assigned by the Brazilian Government at the same time for refusing to permit the Alabama to coal from the same vessel, to wit, "the circumstance of suspecting that the bark had gone direct to that port by preconcerted agreement." His Majesty the Emperor of Brazil had determined that his ports should not be made a place of rendezvous by belligerents from which to carry on their hostile operations. Banishment, as has been seen, was his penalty for a violation of his neutrality.

At Bahia.

Leaving Bahia the Georgia next stopped at a desolate island called Trinadi, where it had been arranged to meet the English bark Castor, for coal. She remained there about a week waiting for her tender, but, it not arriving, she sailed and captured a vessel which she had sighted from port. The prize was a vessel laden with coal, from which a supply was taken, and the Georgia proceeded on her cruise.[7] Her next port was Simon's Bay, in Cape Colony, in Her Majesty's dominions, where she arrived

At Trinadi.

At Simon's Bay.

[1] Brit. App., vol. i, p. 406.
[2] Gardner to Hamilton, Brit. App., vol. i, p. 405.
[3] Statement of the master of the Alar, Brit. Case, p. 125.
[4] Brit. App., vol. i, p. 412.
[5] Cruise of Alabama, Am. App., vol. vi, p. 493.
[6] Affidavits, Am. App., vol. vi, pp. 522, 524, 527, &c.
[7] Am. App., vol. vi, pp. 523, 525, and 528.

on the 16th of August, requiring "coals, provisions, and calking."[1] She remained there about two weeks, receiving all she needed without objection on the part of the authorities,[2] and then started north. She coaled at Teneriffe about the 10th of October, and arrived at Cherbourg, in France, on the 28th of the same month.[3] There she was admitted into the Government docks, but "her repairs were inconsiderable."[4] She left the roads and sailed from Cherbourg on the 16th of February, 1864. In the mean time she was in constant communication with Great Britain. Recruitment of men for her account was going forward in Liverpool.[5]

At Cherbourg.

During her cruise after leaving Cherbourg no prizes were made, and on the 2d of May she found her way back to Liverpool. She had not been a successful cruiser. Her commercial value in money was worth more to the insurgents than her powers as a vessel of war, and, on her arrival, she was dismantled and offered for sale. Great Britain made no objection to the use of her ports for such a purpose. Her Majesty's Government contented itself with a simple notice to the purchaser that he must purchase at his own risk. This notice may have reduced the amount of the proceeds of the sale, but it kept open the ports of Great Britain to the insurgents as a base for their naval operations. They had no ports of their own. The right of a belligerent to make use of the ports of a neutral for the sale of its ships of war was, to say the least, doubtful. Great Britain had been accustomed to resolve all doubts in favor of the insurgents. This new experiment was therefore tried; a sale was effected, and the proceeds went into the treasury of the insurgents.

At Liverpool.

Sale.

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[1] Brit. App., vol. i, p. 307.
[2] Am. App., vol. vi, p. 525.
[3] Brit. App., vol. i, p. 441.
[4] Ibid.
[5] Affidavit of Shanley, Brit. App., vol. i, p. 448; affidavit of Matthews, ibid., p. 443; Queen *vs.* Campbell, Am. App., vol. iv, p. 613.

IX.—THE SHENANDOAH.

General review of facts establishing want of due diligence.

Open hostilities were commenced by the insurgents against the Government of the United States on the 12th of April, 1861, by an attack on Fort Sumter, in the harbor of Charleston and State of South Carolina, Previous to that time, W. L. Yancey, P. A. Rost, and A. Dudley Mann had been appointed by the insurgent president "a commission" to the Government of Her Britannic Majesty. They proceeded to London, and on the Saturday previous to the 11th day of May (being the 4th) were admitted by Earl Russell to an informal interview.[1]

On the 30th of April, Fraser, Trenholm & Co., a branch at Liverpool of the commercial house of John Fraser & Co., at Charleston, became the "financial agents and depositaries" of the insurgent Government, through whom "contracts required abroad" were to be carried out.[2]

On the 10th of May the insurgent congress authorized the president "to cause to be purchased, if possible, otherwise to be constructed, with the least possible delay, in France or England, one or two war-steamers of the most modern and improved description, with a powerful armament and fully equipped for service."[3] On the same day another act was passed making an appropriation "to enable the Navy Department to send an agent abroad to purchase six steam propellers, in addition to those before authorized."[4] Of the sums appropriated by these acts and others which had preceded them, "six hundred thousand dollars" were placed at once in England and agents dispatched abroad to purchase gun-boats.[5]

On the 1st of July the insurgent secretary of war, in a letter of instruction to a Mr. Charles Green, who had been appointed to go to London and act with Captain Huse and Major Anderson in the purchase of arms, &c., desired him to give or cause to be given special attention to the shipments. It is then said, "in this connection it is proper to remark that Captain North, of the Confederate States Navy, is now in Europe to purchase vessels for this Government, and it is probable that, being a British subject, you might secure the shipments under British colors."[6]

About the same time James D. Bullock was appointed "head agent of the confederate navy in England."[7] He immediately went to England and established his "headquarters" at Liverpool, in one of the rooms of the office of Frazer, Trenholm & Co., the "financial agents and depositaries."[8]

As early as the 4th of July the Consul of the United States at that port (Liverpool) informed the head constable of the city and the collector of customs of the port that he had reason to believe Bullock had "come to England for the purpose of procuring vessels to be fitted as

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[1] Russell to Lyons, Am. App., vol. i, p. 37.
[2] Am. App., vol. vi, pp. 29 and 182.
[3] Am. App., vol. vi, p. 29.
[4] Ibid., p. 30.
[5] Ibid., p. 31.
[6] Ibid., p. 30.
[7] Testimony of Prioleau, Am. App., vol. vi, p. 186.
[8] Ibid.

privateers to cruise against the commerce of the United States, and that he will make Liverpool the scene of his operations."[1]

On the 14th of August, the above-named commissioners, having on "two different occasions" before "verbally and unofficially informed" Earl Russell of their appointment, took occasion to address to him a formal communication in writing, and in that communication, among other things, said "this Government [that of the insurgents] commenced its career entirely without a navy. * * The people of the Confederate States are an agricultural, not a manufacturing or a commercial, people. They own but few ships. * * But it is far otherwise with the people of the present United States. * * They do a large part of the carrying trade of the world. Their ships and commerce afford them the sinews of war, and keep their industry afloat. To cripple this industry and commerce, to destroy their ships or cause them to be dismantled and tied up to their rotting wharves, are legitimate objects and means of warfare."[2]

On the next day (the 15th) Mr. Adams addressed Earl Russell as follows:

> From information furnished from sources which appear to me entitled to credit, I feel it my duty to apprise Her Majesty's Government that a violation of the act prohibiting the fitting out of vessels for warlike purposes is on the point of being committed in one of the ports of Great Britain, whereby an armed steamer is believed to be about to be dispatched with the view of making war against the people of the United States. It is stated to me that a new-screw-steamer, called the Bermuda, ostensibly owned by the commercial house of Frazer, Trenholm & Levy, of Liverpool, well known to consist in part of Americans in sympathy with the insurgents in the United States, is now lying at West Hartlepool, ready for sea. She is stated to carry English colors, but to be commanded by a Frenchman.[3]

To this Earl Russell replied on the 22d of the same month that he had been advised by the Law-Officers of the Crown "there is not sufficient evidence to warrant any interference with the clearance or the sailing of the vessel."[4]

This vessel turned out to be only a "transport," and not an "armed vessel of war;" and the United States admit that the evidence, then in the possession of the two Governments, might not have been sufficient to justify her condemnation by the courts upon the proper proceedings instituted for such purpose; but they insist that the complaint of Mr. Adams, following so closely as it did upon the remarkable communication of the insurgents already quoted, was worthy of being kept in the remembrance of Her Majesty's Secretary of Foreign Affairs. As has been seen, Bullock contracted in Liverpool, shortly after his arrival, for the construction of the Florida; not long after a contract was made for the Alabama; and later still, others for the Alexandra and the Laird iron-clads at Liverpool, and for the Georgia and Pampero, (or Canton,) at Glasgow. A purchase was also made of one of Her Majesty's cast-off gun-boats, the Victor, afterward known as the Rappahannock.[5] The Florida, Alabama, and Georgia (the first two after having been made the subject of special complaint by the United States to Her Majesty's Government) escaped from the ports of Great Britain, and their ravages upon the commerce of the United States formed the subject of much correspondence between the two governments. As early as the 20th November, 1862, Mr. Adams called the attention of Earl Russell to this subject by letter, and in so doing said:

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[1] Am. App., vol. vii, p. 72.
[2] Am. App., vol. i, p. 336.
[3] Brit. App., vol. ii, p. 133.
[4] Brit. App., vol. ii, p. 138.
[5] Am. App., vol. vi, p. 174.

"I have the honor to inform your lordship of the directions which I have received from my Government to solicit redress for the national and private injuries already thus sustained, as well as a more effective prevention of any repetition of such lawless and injurious proceedings in Her Majesty's ports hereafter."[1]

The Alexandra was made the subject of judicial proceedings, and Her Majesty's Government, through the inefficiency of its laws as actually administered, was compelled to pay the insurgents damages and costs for the detention.

The iron-clads were detained, and, to avoid another Alexandra experience, were purchased from the insurgents by Her Majesty's Government at a price which, the United States have reason to believe, did not entail a pecuniary loss upon the sellers. The Pampero (or Canton) was seized, and, by arrangement with the builders, a decree of forfeiture obtained, which was never enforced except for the detention of the vessel until the final defeat of the insurgents. The Rappahannock escaped, but was detained by the Government of France and was never made available against the United States. But she became a subject of annoyance and vexation to Her Majesty's Government, and furnished additional proof that, in the midst of the state of feeling which surrounded Her Majesty's courts of justice in England, her laws could not at all times be made available there to enforce her international obligations and protect her from liability for national wrongs.

An offending officer acquitted by a jury on a trial before a judicial tribunal, was punished by the Government by being put on half-pay for life.

The Navy Department of the insurgents had and maintained its headquarters at Liverpool. Bullock, the "head agent," issued his orders and commissioned his officers from these headquarters. His seamen were recruited there; his officers congregated there, waiting the preparation of the vessels on which they were to cruise, and when the vessels got out of port, clandestinely or otherwise, had no difficulty in finding the means to reach them. Bounties, advances, half-pay notes, and wages were made payable and paid there. When a ship went out of commission or enlistments expired, officers and other seamen made their way back there to the "Department."

In the mean time the British flag was allowed to cover cargoes, contraband of war, intended to pass a blockade maintained by the United States and supply the insurgents with the means of carrying on their operations. Ships were purchased by the insurgents intended for and maintained as "transports," all which were permitted to and did sail under the British flag. Constant complaint of this was made by the United States to Her Majesty's Government, and the reply uniformly came back that international obligations did not make it incumbent upon Her Majesty to interfere.

In the fall of 1864 the insurgents were again without any available Navy. The Florida and the Alabama had been sunk; the Sumter and the Georgia had been dismantled and sold in British ports to British subjects, the proceeds of the sales finding their way from thence into the Treasury of the insurgents. The Tallahassee had succeeded in running the blockade and in making a port of the insurgents after her short though destructive career, but was then held by the blockade maintained by the United States. The Rappahannock was held firm in the hands of the Government of France, and the Chickamauga, although

[1] Adams to Russell, Nov. 20, 1862, Am. App., vol. i, p. 666.

commissioned, was still detained by the blockade. In the mean time the commerce of the United States had largely disappeared. Nearly two hundred vessels, with their cargoes, had been committed to the flames.[1] Over seven hundred, with an aggregate of nearly half a million of tonnage, had been transferred for self-preservation from the flag of the United States to that of Great Britain.[2] All or nearly all of this had been caused by vessels fitted out in the ports of the Clyde or the Mersey. They had been manned and supplied from Great Britain. Their commissioned officers were chiefly from the insurgents; but they were commissioned in Great Britain and took their orders and departure there.

But there was still left in the frozen seas of the North Pacific a little fleet of vessels from which it was supposed the flag of the United States could be floated with safety. This fleet was largely owned, and entirely officered and manned, by bold and daring seamen who made the Arctic seas their home in order that they might supply the inhabitants of more favored regions with such necessaries as those seas alone produced. This little fleet destroyed, and the commerce and carrying trade of the United States would be substantially gone. This "legitimate object and means of warfare," so early brought to the attention of Earl Russell by the "commission" sent from the insurgents, would then have fully accomplished its work. No vessels or cargoes had been condemned as prize and sold, but all had been destroyed.

To accomplish this further destruction a Navy must be provided. It need not be large, but still something must be had. It could not be obtained from France, because "no violation of its neutrality would be permitted,"[3] and work upon vessels of war would not be allowed there unless the builders could satisfy the Minister of Foreign Affairs that they "were honestly intended" for a government other than that of the insurgents.[4] The minister of marine there had also declared that suspected vessels "should not be delivered to the Confederates."[5]

The hospitalities of the ports of Great Britain had never been refused to a ship having a commission of the insurgents. Her Majesty's Government had acknowledged the inefficiency of her laws as enforced in her courts and executed by her officers, yet Her Majesty's prime minister had declared, from his place in the House of Commons, that the Government and people of the United States "must not imagine that any cry which may be raised will induce us (Her Majesty's Government) to come down to this House with a proposal to alter the law."[6]

If by chance a vessel was detained, no pecuniary loss to the insurgents would be likely to follow, for the money invested would be paid back, and, possibly, a profit be added. The "navy agent" and the only efficient "Navy Department" of the insurgents were still tolerated and permitted to maintain "headquarters" at the principal commercial port of the Empire. Great Britain had never yet resented an insult to her neutrality by the insurgents. There never had been so great activity in the construction and purchase of steamers in Great Britain for "transports" as at this time.[7]

Consequently the Navy Department, located in Great Britain, sought there to obtain its means of operation. A vessel known as the Sea King, which, while building at Glasgow, a year previous, had attracted

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[1] Am. App., vol. iv, p. 446.
[2] Brit. App., vol. i, p. 504.
[3] Am. App. Counter Case, p. 897.
[4] Ibid., p. 904.
[5] Am. App. Counter Case, p. 916.
[6] Am. App., vol. iv, p. 531.
[7] Bullock to Memminger, and other correspondence, August 23, 1864; Am. App., vol. vi, p. 169.

the attention of the officers of the United States as suspicious, was found in port on her return from a voyage to the East Indies. On the 20th September, 1864, she was purchased and a bill of sale given of her to the father-in-law of the managing partner of the firm acting in Liverpool as "financial agents" of the insurgents.[1] This bill of sale was registered in a public office of Her Majesty's Government on that day.[2]

Purchase of the Sea King.

On the 5th October a crew for that vessel was shipped, at a shipping-office in London, and before a shipping-master, for "a voyage from London to Bombay, (calling at any ports or places on the passage that may be required,) and or any other ports or places, in India, or China or Japan, or the Pacific, Atlantic, or Indian Oceans, trading to and from as legal freights may offer, until her return to a final port of discharge in the United Kingdom, (or Continent of Europe, if required;) voyage not to exceed two years."[3]

The Arbitrators will in all this see a striking resemblance to the circumstances attending the purchase and sending forth of the Georgia eighteen months before. On the 7th October, at 3 p. m., a certificate of sale was filed in the office of the registrar of shipping, in accordance with section 76 of the merchant-shipping act, 1854,[4] by which the owner empowered the master to sell the ship at any port out of the United Kingdom, for not less than £45,000, within six months from the date of the certificate.[5] Her master was Peter S. Corbett, who had previously commanded the insurgent transport Douglass, afterward known as the Margaret and Jessie.

The Sea King was cleared and sailed from London on the 8th of October, with a cargo of coal. She commenced engaging her crew as early as the 25th September.[6]

Her departure.

On the 7th of October, the attention of the Consul at Liverpool was drawn to some suspicious circumstances connected with a screw-steamer called the Laurel, which he understood had been recently purchased by the insurgents,[7] but his knowledge was not such as to justify a presentation of the case to Her Majesty's Government, under the rules prescribed for the action of its officers. Therefore, no report was made by Mr. Adams to Earl Russell. She was cleared from Liverpool on the 8th of October for Matamoros, &c.[8]

As early as the 12th October, an article appeared in the Liverpool Journal of Commerce announcing her sailing and using this language:

Departure of the Laurel with her crew and armament.

> Her cargo is of such a mixed nature that no belligerent State would have the slightest doubt as to its usefulness. * * * But the Laurel must not be supposed to be intended for a cruiser; she is merely a tender, and carries out to a certain latitude guns and ammunition for a new screw-steamer of which Captain Semmes is to take command. * * * To show that Captain Semmes does not go unattended, we may here state that he took with him on board the Laurel eight officers and one hundred men, most of whom served with him on board the Alabama.[9]

There were errors in the statements contained in this article, but the very errors show that the air was at that time filled with rumors, and that intelligent action at the proper time by the Government might have traced these rumors to their source, and, in all probability, prevented this new escape.

The Laurel did, however, clear with the armament of the Sea King

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[1] Am. App., vol. vi, p. 560.
[2] Brit. App., vol. i, p. 495.
[3] Ibid., p. 496.
[4] Am. App. Case, p. 1144.
[5] Brit. App., vol. i, p. 495.
[6] Brit. App., vol. i, p. 486.
[7] Am. App., vol. vi, p. 556.
[8] Brit. App., vol. i, p. 492.
[9] Am. App., vol. vi, p. 558.

as cargo, and with all, save one, of her officers (twenty-four) and some (seventeen) seamen as passengers.[1]

Of these officers, five had previously served on the Alabama alone, two on both the Alabama and Sumter, one on the Georgia alone, one on both the Rappahannock and Georgia, and two on the Rappahannock alone; and of the men, five had served on the Alabama. Three of the officers had avoided capture at the time the Alabama was sunk in the engagement with the Kearsarge, by escape upon the English yacht.[2]

Armament of the Shenandoah.

On the 17th October the two vessels, the Sea King and the Laurel, met at the island of Madeira. They proceeded from thence to the island of Desertas, where the armament, and the officers and seamen who came as passengers, were transferred to the Sea King. No bill of sale was ever given by the captain under the certificate of sale. No purchase money was paid there. The certificate of sale was never returned to the office of the registrar in Great Britain as was required by section 81 of the merchant-shipping act, 1854,[3] and the registered British character of the Sea King remained during her whole career. But the armament transferred, in the same manner as had previously been done in the cases of the Alabama and Georgia, the Sea King became the Shenandoah, an insurgent cruiser. She had, however, no sufficient crew. Of officers and men she mustered not to exceed forty-four. All the seamen were, however, British subjects, and the officers came together on British soil to be placed on board the new cruiser under the protection of the British flag. If a ship of war of the United States had met the Laurel on her passage and taken these officers from her deck, Great Britain would have considered her neutrality violated, and demanded their return amidst the most active preparations for war, as had been previously done in the case of the Trent.[4]

It may be admitted that if the Shenandoah at this point in her history stood alone, and there had been no other cause of complaint against Her Majesty's Government, the United States could not now hold Great Britain responsible for her original escape and armament. But this vessel was purchased in, and armed from, Great Britain, three years and a half after the insurrection in the United States had put on the form of war. The insurgents had found the laws and the Government of Great Britain favorable to their operations. They had, under those laws and under that Government, availed themselves of the "ports of the Clyde and the Mersey," (their only ports,) and made a navy. Under the warfare of that navy, the commerce of the United States, which at the commencement rivalled that of Great Britain, had been transferred to the English flag. Her Majesty's Government had never punished the insurgents for any violation of her neutrality. It had not then even remonstrated. On the contrary, it had tolerated and thus encouraged violations. It seems never to have conceived the idea which was so significantly promulgated by His Majesty, the Emperor of Brazil, that toleration of abuse was "equivalent to permitting the ports of the empire to serve as bases for operations."[5]

The negligence which enabled the Florida and the Alabama to escape fastens itself upon the Shenandoah. The excessive hospitality which had always been extended gave the insurgents to understand, as they rightfully might, that the ports of Her Majesty's dominions could be

[1] Brit. App., vol. i, p. 477.
[2] See Temple's affidavit, Brit. App., vol. i, p. 701; inclosure No. 2, in Mr. Adams to Earl Russell, ibid., 379.
[3] Am. App. Counter Case, p. 1145.
[4] Am. Case, p. 82.
[5] Brit. App., vol. i, page 294.

made the bases of their naval operations, and in consequence they operated from there, and from there alone.

When the commander of the Shenandoah left Liverpool to join her, and take command, he had in his possession a letter from Bullock, bearing date of October, 1864;[1] and when he returned in November, 1865, he addressed Earl Russell as follows:

> I commissioned the ship in October, 1864, under orders from the naval department of the Confederate States; and, in pursuance of the same, commenced actively cruising against the enemy's commerce. My orders directed me to visit certain seas in preference to others; in obedience thereto I found myself in May, June, and July of this year, in the Okhotsk Sea and the Arctic Ocean.[2]

Thus she started, under orders issued from Great Britain, to reach the most distant commerce of the United States.

Her first point of destination on the course she was ordered to make was Melbourne, in Her Majesty's dominions. To that port a transport, bearing the name of John Frazer, (one of the firm of John Frazer & Co., at Charleston, of which Frazer, Trenholm & Co., the Liverpool depositary, was a branch,) was sent from England by the insurgent Navy Department with her supply of coal.[3]

Her Majesty's Government received notice of the equipment of the Shenandoah, and its attending circumstances, on the 12th November. It came in the form of a report from the Consul of Her Majesty at Teneriffe, and was accompanied by the captain of the Sea King, under arrest, and affidavits of witnesses detailing the facts.[4]

On the 18th Mr. Adams also communicated the same information to Earl Russell, with additional affidavits.[5]

The November mail from Europe, which arrived at Melbourne about the middle of January, carried there the news of her departure and her conversion into a vessel of war.[6]

After starting upon her cruise she "boarded at sea the galley Kebby Prince, from Cardiff, to the port of Bahia;" and in such act her commander opened the manifest of such "galley, breaking the seal of the Brazilian Consulate." For this offense His Majesty, the Emperor of Brazil, true to his principles of enforcing neutrality, as well as proclaiming it, promulgated an order in the official gazette at Rio Janeiro, on the 21st of December, prohibiting "the entrance into any port of the empire of said steamer, or of any other vessel commanded by the said Waddell."[7]

On the 25th of January, 1865, she arrived at Hobson's Bay, near Melbourne, and asked leave to coal and repair. Commander King, of Her Majesty's ship Bombay, then at that station, in reporting to Commodore Wiseman, under date of the 26th, said: Arrives at Melbourne.

> The crew at present consists of only seventy men, though her proper complement is one hundred and forty. The men almost entirely are stated to be either English or Irish. Captain Waddell informed me that the Shenandoah is fast under canvas, and steams at the rate of thirteen knots; that she is fourteen months old, and was turned into a man-of-war on the ocean. He also told me that he had lately destroyed nine American vessels. It is suspected that the Shenandoah was lately called the Sea King, and that remains of the old letters are still perceptible; but of that I cannot speak from personal observation. * * * * From the paucity of her crew at present she cannot be very efficient for fighting purposes.[8]

The Governor of the Colony also, in reporting to Mr. Cardwell under

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[1] Brit. App., vol. i, p. 667.
[2] Ibid., p. 667.
[3] Brit. App., vol. i, p. 696: Am. App., vol. vi, p. 698.
[4] Brit. App., vol. i, p. 477.
[5] Brit. App., vol. i. p. 484.
[6] Blanchard to Seward, Brit. App., vol. i, p. 584.
[7] Am. App., vol. vi, p. 588.
[8] Brit. App., vol. i, p. 499.

the same date, says: "Since closing my dispatches for the mail, a Confederate States steamer of war, called the Shenandoah, but supposed to have been formerly the Sea King, has anchored in Hobson's Bay."[1] She had then on board four hundred tons of coal remaining of her original supply on leaving London,[2] which was a full cargo of eight hundred and fifty tons.[3]

Permission to coal and make repairs granted.

Upon his arrival on the 25th, Lieutenant Waddell asked permission of the Governor to make the necessary repairs and supply himself with coals to enable him to get to sea as soon as possible; also to land prisoners.[4] He also, as he came into the bay, informed the tide-inspector that his object in visiting Port Phillip was to have some machinery repaired, and to procure coals and provisions.[5]

Thus the officers of Her Majesty's Government at Melbourne were at once, upon the arrival of the vessel, informed that the Sea King, which the November mail from Europe, received a few days before, advised them had left England with the intention of being converted into a vessel to carry on war against the commerce of the United States,[6] was then in port short-handed, asking permission to repair, provision, and coal. The request of Lieutenant Waddell was taken under consideration by the governor, who informed him that it should receive early attention and be replied to the next day.[7] On the next day the executive council was specially summoned by the Governor and under their advice the permission asked for was granted.

Protest of the consul.

Against these hospitalities the Consul of the United States protested on the 26th, and in so doing called the attention of the governor to the circumstances under which she had been armed and equipped, and of her identity with the English vessel Sea King. His protest was repeated on the 27th and 28th, but on the 30th his excellency replied that after advising with the law-officers of the Crown he had "come to the decision that, whatever may be the previous history of the Shenandoah, the Government of this Colony is bound to treat her as a ship of war belonging to a belligerent power." It now appears also that the advisers of his excellency tendered to him their opinion that it would not be expedient to call upon the lieutenant commanding to show his commission from the Government of the Confederate States authorizing him to take command of that vessel for warlike purposes.[8]

Against this decision the Consul most earnestly protested, and notified his excellency that "the United States Government will claim indemnity for the damages already done to its shipping by said vessel, and also which may hereafter be committed by said vessel * * upon the shipping of the United States of America, if allowed to depart from this port."[9]

Unfriendly conduct of the colony.

The commander of the Shenandoah having received his permission to repair, provision, and coal, had leave to take his vessel into the public docks, which were at the time controlled by private parties as lessees. The vessel and her officers were received with open arms by the people of Melbourne. The Governor of the Colony did not dine with or participate in the public or private hospitalities to the

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[1] British App., vol. i, p. 500.
[2] Am. App., vol. vi, p. 698.
[3] Ibid., p. 630.
[4] Brit. Case, p. 144.
[5] Brit. App. Counter Case, vol. v, p. 68.
[6] Am. App., vol. vi, pp. 589 and 659.
[7] Brit. App., vol. i, p. 500.
[8] Brit. App., vol. i, p. 515; Brit. Case, p. 146.
[9] Brit. App., vol. i, p. 594.

officers of the vessel, but the mayor of Melbourne and its inhabitants did.[1] Crowds of people flocked to obtain sight of the "stranger," which bore the flag of insurgents that were supposed to have the sympathies of the English people at home; and the officers of the ship, "whose history was so brief, but so brilliant," could remember gratefully "the hospitalities of Melbourne and Ballarat.[2]

In short, at Melbourne, "in Australian waters, where a vessel of war belonging to the Confederate States" had never before been seen, the feeling which at home had permitted a Florida and an Alabama to escape, was found to exist in all its English vigor. The insurgent flag was hospitably received and courted there, as for nearly four years it had been in the ports of other British Colonies, and of the United Kingdom itself.

But the Consul of the United States having failed, upon the proof furnished by him, to induce the Governor of the Colony and his executive council to act as other nations had acted, and refuse the Shenandoah the hospitalities of the port, set himself about finding other testimony, and that which would be more effective.

The vessel came into the port short-handed, and "at present she could not be very efficient for fighting purposes."[3]

When she arrived at Liverpool, after her career was ended, her complement of officers and men, according to the report of Captain Paynter of Her Majesty's ship Donegal, was one hundred and thirty-three.[4] Her officers numbered twenty-six, leaving for her crew one hundred and seven. Temple, in his affidavit, makes the total number of enlistments on board the vessel, during her entire cruise, one hundred and eleven. Of these, two deserted at Melbourne and two died on the cruise, leaving the number of men on board when she arrived at Liverpool the same as stated by Captain Paynter. According to the same affidavit, the total crew on board, when the Laurel left her at Desertas, including those that originally came on the Sea King and those upon the Laurel, was nineteen. Twelve joined her from the crews of the captured vessels previous to her arrival at Melbourne; but two of these deserted there, leaving, as the aggregate of her crew on her arrival, and before any new recruitment, only twenty-nine men, and with the officers then on board, fifty-four. The officers which left Liverpool on the Laurel numbered twenty-four. One, Lieutenant Whittle, went by the Sea King, and one joined from a whaling-vessel captured in the Arctic Ocean, giving her, when she finished her cruise, twenty-six.[5]

Recruitment of men at Melbourne.

As has been seen, Commander King, when he visited her upon her arrival at Melbourne, reported her as having seventy men. Of course he got his information from the officers, who were not likely to give the number smaller than it actually was. It would not do to make it much too large, because "the paucity of the crew" was such as to attract the attention of the officer.[6]

The Consul at Melbourne, in writing to Mr. Adams on the 26th of January, the day after her arrival, mentioned the fact that her crew, all told, consisted of seventy-nine men.[7] But his knowledge at that time must have been derived from rumors in circulation; he had no means of verifying the statement himself. On the 10th February, Captain Payne, secretary of the naval board at Melbourne, who visited her at the request of the Governor, said in his report, "there appeared to me

[1] Brit. App., Counter Case, vol. v, p. 61.
[2] Am. App., vol. vi, p. 697.
[3] Brit. App., vol. i, p. 499.
[4] Ibid., p. 675.
[5] Brit. App., vol. i, p. 701.
[6] Ibid., p. 499.
[7] Ibid., p. 589; Brit. Case, p. 156.

to be about forty to fifty men on board, slouchy, dirty, and undisciplined. I noticed also a great number of officers, and could not help remarking that the number appeared out of all proportion to the few men I saw on board."[1]

Silvester, in his deposition, as printed among the documents submitted in evidence, says that when the Laurel left her the crew, including officers, consisted of twenty-three men.[2] This is undoubtedly a mistake. It may have been a clerical error in the original draught of the deposition or in transcribing.

It is clear, therefore, that when the Shenandoah reached Melbourne she was short-handed, and that an increase of her crew was absolutely necessary to make her an efficient vessel of war. Even after the additions she received at Melbourne she continued short-handed. Captain Nye, the master of the ship Abigail, captured on the 27th of May, says:

> The Shenandoah, at the time I was taken on board, had a full complement of officers, but was very much in want of seamen. * * * At two different times during the first ten days that I was on board, all hands, and my own crew besides, were obliged to be up all night working the ship in the ice. The officers and crew complained of being short-handed, and my own men were urged to join her.[3]

Thirty-eight men were shipped from the crews of vessels captured after leaving Melbourne, and seventeen of these were from the Abigail.[4] These made part of the one hundred and seven on board when the Shenandoah arrived at Liverpool.

As early as the 1st of February the Consul set about bringing the fact that she was short-handed to the knowledge of the government, and he commenced procuring affidavits, and employed his counsel.[5]

The colonial authorities informed of the contemplated recruitments, and do not prevent them.

On the 2d of February he left with the chief clerk of the law-office of the Crown, in the absence of the Attorney-General and the Minister of Justice, affidavits of three persons; on the next day he called in person, with his solicitor, upon the Crown Law-Officers; on the next day, the 4th, he handed in two other affidavits; and on Monday, which was the 6th, he and his solicitor called again, in pursuance to an appointment made, and produced seven additional affidavits.

In nearly every one of these affidavits, among the other important facts developed, is the one that during the entire cruise previous to her arrival at Melbourne, great efforts were made by the officers of the Shenandoah to increase their crew by the enlistment of men from the prisoners taken on the different prizes. For that purpose such as would not join were put in irons.[6]

At this interview the Consul was given to understand, in fact, as he said in his dispatch to Mr. Seward subsequently, the Law-Officers "seemed to admit that she would be liable to seizure and condemnation if found in British waters; but would not admit that she was liable to seizure here, unless she violated the neutrality proclamation while in this port, and if she did they would take immediate action against her."[7]

From this it appears that the same doctrine prevailed among the Law-

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[1] Brit. Case, p. 155.
[2] Brit. App., vol. i, p. 598.
[3] Am. App., vol. vii, p. 93.
[4] Temple's affidavit, Brit. App., vol. i, p. 702.
[5] Am. App., vol. vi, p. 590.
[6] See protest Captain Nichols, Brit. App., vol. i, p. 589; affidavit, Bruce, ibid., p. 594; Colby, ibid., p. 597; Silvester, ibid., p. 598; Jones, ibid., p. 599; Ford, ibid., p. 601; Brackett, ibid., p. 602; Bollin, ibid., p. 603; Sandall, ibid.; Scott, ibid., p. 604; Lindborg, ibid.
[7] Am. App., vol. vi, p. 530; Brit. App., vol. i, p. 585.

Officers of the Crown at Melbourne, which had permitted the escape of the Florida at Nassau.

Although that doctrine is now repudiated by Her Majesty's Government, it was known at the Foreign Office as early as the 16th of September, 1862, that the Florida had been released at Nassau upon that ground, and that ground alone. It was a doctrine that had a most important bearing upon the constantly recurring attempts at the evasion of the laws of Her Majesty by the insurgents; but it does not appear to have been considered of sufficient importance to justify instructions from Her Majesty's Home Government to any of the numerous Law-Officers of the Crown upon whom the responsibility of these prosecutions "in so great a measure rested."

The United States agree with Her Majesty's Government when it says, as it does in its Counter Case, that it should not be, and they hope it is not, in the power of Her Majesty's Government to instruct a judge, whether in the United Kingdom or in a colony or dependence of the Crown, how to decide a particular case or question. No judge in Her Majesty's dominions should submit to be so instructed; no community, however small, should tolerate it; and no minister, however powerful, should ever think of attempting it.[1]

But the United States cannot but think the Law-Officers of the Crown occupy a different position, and that when Her Majesty's Government sees so striking an error prevailing among those whose duty it is to conduct the judicial proceedings, by means of which international obligations are to be enforced, it is not only the right of the Government, but its imperative duty, to correct the error, and see to it that such important rights are not again "admitted" away, to the great injury of a nation with which Her Majesty was at peace. A judge whose duty it is to decide may not be instructed; but a mere agent whose duty it is to present a case for decision may be. If such an agent fails in his duty or errs in his opinion, and such error or such failure in duty is likely to be repeated by the same or other agents, it is neglect in a government if it fails to attempt, at least, to prevent the repetition, and if the repetition should affect other nations the government must answer for the consequences.

But accepting this doctrine of the Law-Officers for the time being, the Consul on the 9th of February forwarded to the Governor the affidavits which he had already presented to the Law-Officers; and on the 10th he sent the affidavit of John Williams, who swore that on the 6th February, when he left the ship, "there were fifteen or twenty men concealed in different parts of said ship, who came on board since said Shenandoah arrived in Hobson's Bay; and said men told me they came on board said Shenandoah to join ship. That I cooked for said concealed for several days before I left. That three other men, in the uniform of the crew of the said Shenandoah, are at work on board of said Shenandoah, two of them in the galley, and one of them in the engine room. That said three other men in uniform also joined said Shenandoah in this port. That I can point out all men who have joined said Shenandoah in this port." This was received by the Governor at 3.30 p. m. of the 10th, and he made an order that it be referred to the Attorney-General."[2]

On the same day Captain Payne, who had been instructed by the Governor to report upon the vessel, among other things, informed him that there appeared "to be a mystery about her fore-hold, for the fore-

[1] Brit. Counter Case, p. 77.
[2] Brit. App., Counter Case, vol. v. pp. 107. 108.

man of the patent slip, when asked to go down to that spot to measure her for the cradle, was informed he could not get to the skin at that place. The hatches were always kept on, and the foreman states that he was informed they had all their 'stuff' there."[1]

On the 13th February the following reports were forwarded to the "honorable the chief secretary" of the Colony:

Detective Kennedy reports, in reply to certain questions submitted to him for inquiry on the 11th instant:

First. That twenty men have been discharged from the Shenandoah since her arrival at this port.

Second. That Captain Waddell intends to ship forty hands here, who are to be taken on board during the night, and to sign articles when they are outside the Heads.

It is stated that the captain wishes, if possible, to ship foreign seamen only; and all Englishmen shipped here are to assume a foreign name.

McGrath, Finlay, and O'Brien, three Melbourne boarding-house keepers, are said to be employed in getting the requisite number of men, who are to receive £6 per month wages and £8 bounty, &c.

Peter Kerr, a shipwpight, living in Railway Place, Sandridge, stated about a fortnight ago, in the hearing of several persons, that Captain Waddell offered him £17 per month to ship as carpenter. A waterman named McLaren, now at Sandridge, is either already enlisted or about to be so.

The detective has beeu unable, up to the present, to collect any reliable information as to whether ammunition, &c., has been put on board the Shenandoah at this port, or whether arrangements have been made with any person for that purpose.

(Urgent.) For the chief commissioner's information. C. H. Nicholson, superintendent.

Mr. Scott, resident clerk, has been informed, in fact, he overheard a person represented as an assistant purser state, that about sixty men engaged here were to be shipped on board an old vessel, believed to be the Eli Whitney, together with a quantity of ammunition, &c., about two or three days before the Shenandoah sails. The former vessel is to be cleared out for Portland or Warrnambool, but is to wait outside the Heads for the Shenandoah, to whom her cargo and passengers are to be transferred.

C. H. NICHOLSON,
Superintendent.[2]

After these reports, on the next day, there came to the Attorney-General of the Colony the following communication from Lieutenant Waddell, very significant when read in connection with the previous report from the police. "Be pleased to inform me if the Crown claims the sea to be British waters three miles from Port Philip Head lights, or from a straight line drawn from Point Lonsdale and Schanck."[3]

Upon the reception of this, the Attorney-General sent a note declining to give the information asked for. On presentation of the note to Lieutenant Waddell, he handed it "back to the messenger with the simple answer that it was not what he wanted, that it had better be taken back with his compliments."[4]

Their inefficient proceedings.

On the 13th of February, a warrant was issued by a magistrate for the arrest of one of the men charged to have been enlisted;[5] and it was at once placed in the hands of the superintendent of police for service. This officer went the same evening on board the vessel to execute his warrant, and on the next day made the following report:

I have the honor to inform you that, acting on your instructions, I proceeded last evening to the Confederate war-steamer Shenandoah, with a warrant for the arrest of a man known as Charley, stated to have illegally engaged himself on board the vessel. I asked for Captain Waddell, but was informed that he was not on board. I then asked for the officer in charge, saw him, and obtained permission to go on board. I told the officer my business, and requested that he would allow me to see the men on board, in order that I might execute my warrant. He refused to allow me. He then showed me the ship's articles and asked me to point out the name of the man, which I

[1] Brit. Case, p. 155.
[2] Brit. App., Counter Case, volv, p. 108.
[3] Brit. App., vol. i, p. 646.
[4] Brit. App., vol. i, p. 647.
[4] Brit. App., vol. i, p. 536

was unable to do. I showed him my warrant, which he looked over, and returning it to me he said, that is all right, but you shall not go over the ship. He told me I had better return when the captain was on board; but as he could not say at what hour he would probably return, I told him that I would see the captain the following day. This morning I went again to the Shenandoah, and after stating my business was allowed on board. I told Captain Waddell that I was informed he had persons on board who had joined his vessel here, and that, informations having been sworn to that effect, I had a warrant with me. He said, I pledge you my word of honor as an officer and a gentleman that I have not any one on board, nor have I engaged any one, nor will I while I am here. I said I understood that the persons I wanted were wearing the uniform of the Confederate States, and were working on board. This he distinctly denied. He offered to show me the ship's articles but I declined, and told him that I had seen them last evening. I then asked him to allow me to go over the ship, and see if the men I wanted were on board. This he refused to do. I said I must try to execute my warrant, even if I had to use force. He said he would use force to resist me, and that if he was overcome he would throw up his ship to the government here and go home and report the matter to his government. He said that he dare not allow me to search his ship; "it was more than his commission was worth, and that such a thing would not be attempted by the Government to a ship of war of another country." He said "it was only by courtesy that I was allowed on board," and that he considered "a great slight had been put upon him by sending me to the ship with a warrant." He said he thought that his "word should have been taken in preference to that of men who had probably deserted from the ship, and had been put up to annoy him by the American consul." He said that if I took one man, I might come afterwards and take fifteen or twenty, and that the American consul would perhaps lay an information against him as being a "buccaneer or pirate." He said he thought that he had been very badly treated here by the police refusing to assist him in arresting his deserters. Before leaving I asked him again if he refused to allow me to look for the man for whom I had a warrant in my hand. He replied yes, that he did refuse, and that he would fight his ship rather than allow it. I then left.[4]

On the day of its receipt this report was submitted by the Governor to the executive council. In pursuance of the advice of the council, the secretary of the commissioners of trade and customs addressed a letter to Lieutenant Waddell, appealing "to him to reconsider his determination," and informing him that pending such further information the permission to repair and take in supplies was suspended.[2] The answer to this letter was dispatched by Lieutenant Waddell at five minutes before ten o'clock on the evening of the 14th,[3] and in it he says:

I have to inform his excellency the governor that the execution of the warrant was not refused, as no such person as the one therein specified was on board; but permission to search this ship was refused. According to all the laws of nations, the deck of a vessel of war is considered to represent the majesty of the country whose flag she flies, and she is free from all executions, except for crimes actually committed on shore, when a demand must be made for the delivery of such person, and the execution of the warrant performed by the police of the ship. Our shipping articles have been shown to the superintendent of police, all strangers have been sent out of the ship, and two commissioned officers were ordered to search if any such had been left on board. They have reported to me that, after making a thorough search, they can find no person on board except those who entered this port as a part of her complement of men. I, therefore, as commander of this ship, representing my government in British waters, have to inform his excellency that there are no persons on board this ship, except those whose names are on my shipping articles, and that no one has been enlisted in the service of the Confederate States since my arrival in this port, nor have I in any way violated the neutrality of the port. And I, in the name of the Government of the Confederate States of America, hereby enter my solemn protest against any obstruction which may cause the detention of this ship in this port.[4]

At about 10 o'clock p. m. of that day, four men left the Shenahdoah in a boat pulled by two watermen.[5] They were arrested, and one of them was identified as the man for whose arrest the warrant was issued.

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[1] Brit. Case, p. 150.
[2] Brit. Case, p. 151.
[3] Brit. App., Counter Case, vol. v, p. 110.
[4] Brit. App., vol. i, p. 647.
[5] Brit. Case, p. 152; Brit. Counter Case, p. 96.

On the same 14th day of February the Consul forwarded to the Governor two other affidavits, in one of which, that of Hermann Wicke, the following statement is made:

Further proof of recruiting furnished the authorities.

That the rations in Hobson's Bay are served by the master-at-arms, (I believe named Reed,) who gives the rations to Quartermaster Vicking, and this latter brings the rations to the galley to be cooked by the cook, known by the name of "Charley;" that said cook Charley was not on board the Shenandoah on her arrival in the bay; he went on board since her arrival, and he told me he would join the ship as cook; that he dared not do it in the port, but that he would do it when proceeding outwards; that I also saw said cook take rations to a number of men who were concealed in the forecastle, who went on board since her arrival in Hobson's Bay. That on Saturday, 11th February, 1865, when working and cleaning the Shenandoah, three boys, who came on board the Shenandoah since her arrival in this port, assisted in painting between decks, whereas the number of men so concealed (as mentioned above) worked on deck; that the said men so concealed, in number about ten, received rations cooked in the same cooking apparatus and served in the same way as the regular crew on board; they eat out of the ship's plates in the forecastle, such as were used by the prisoners while on the cruise; that they sleep on board, one part in the forecastle, the other part between decks. That the cook Charley and another, which I could identify if seeing him again, wore sometimes the ship's uniform.[2]

And in the other, that of F. C. Behucke, the following appears:

That before I left the said steamship I saw about ten men concealed in said Shenandoah. Some of said men told me they came on board to join. That several of the said men were at work with me on Saturday last with the knowledge of the officers; that one of the said men told me th at he could not sign articles in this port, but was going to do so as soon as he got outside; that one man in the galley, who came on board at this port, wears the uniform and performs his duty in the said uniform; that said man in the galley has been wearing the uniform for about eight or ten days; that I heard said man in the galley called Charley; that all the said men who came on board since we arrived in Melbourne have been rationed from the said ship Shenandoah; that I have seen the master-at-arms serve out their provisions to Vicking; that after the provisions are cooked I have seen Quartermaster Vicking take it to them from the galley while concealed in the forecastle.[3]

All these communications were, on the 15th of February, submitted by the Governor to his executive council.[3]

From this it appears that on the 15th of February the Governor and his council knew from the statement of an officer in command of one of Her Majesty's ships that the ship, from the "paucity of her crew," was not in condition for a ship of war; that one witness, who was still within the reach of the judicial process of the Colony, had stated, under oath, that there were fifteen or twenty men concealed in different parts of the ship who came on board to join; that an officer of the Government, whom the Governor had sent on board to examine the vessel, reported that "there appeared to be a mystery in the fore-hold," and no one had been admitted there; that the police officers of the Government, who had been directed to ascertain the facts, had reported that it was the intention of the commander to ship forty hands, and that some men had been engaged, and arrangements had been made for the engagement of others; that upon an order being issued upon the sworn testimony of a complainant for the arrest of a man who had enlisted to serve upon this vessel, the officer whose duty it was to make the arrest reported that he had been probibited by an inferior officer of the ship and by the officer in command, each acting separately, from serving the process on board the vessel, the principal officer in command declaring upon his honor as an officer and a gentleman there was no such person on board; that upon an "appeal" to the commander for a reconsideration of his decision he replied that no such person was on board at the time the request for permission to serve the process was made, when the falsehood of his statement was proven by the arrest of the man, who left the vessel at

[1] Am. App., vol. vi, p. 626.
[2] Am. App., vol. vi, p. 627.
[3] Brit. App., vol. i, p. 526.

or about the time the letter was being written, and which was more than twenty-four hours after the attempt to serve the process was made;[1] and that, after this statement of the commander, the Consul of the United States produced the affidavits of the other persons, who declared positively that there was a large number of men still concealed on board to enlist when the ship got out of port.

The authorities parley with the commander of the Shenandoah in place of acting.

Notwithstanding all this, however, upon the assurance of the commander, made after after the arrest of the four persons who escaped, "that there were no persons on board his ship whose names were not on the shipping articles," and that no one had enlisted "in the service of the Confederate States since his arrival in port," the order suspending permission to repair and take on supplies was unconditionally rescinded, and the ship released from the surveillance of the police who had been placed around her. No promise was exacted for the future; no officer was placed on board; no watch maintained, but the full and untrammeled hospitality of the port was granted to a ship whose commander had not scrupled to "state upon his honor" that which the Governor knew to be false.

After the release was ordered, and notice thereof given to Lieutenant Waddell, his excellency caused to be addressed to him a letter as follows:

I am directed by his excellency the Governor to further acknowledge your communications of the 13th and 14th instant, in which, alleging that the vessel under your command had been seized, you ask whether the seizure be known to his excellency the governor, and if it meets his approval.

I am to inform you, in reply, that this Government has not directed or authorized the seizure of the Shenandoah.

The instructions to the police were to see that none of Her Majesty's subjects in this Colony rendered any aid or assistance to, or performed any work in respect of, your vessel, during the period of the suspension of the permission which was granted to you to repair and take in supplies pending your reply to my letter of yesterday's date in regard to a British subject being on board your vessel, and having entered the service of the Confederate States, in violation of the British statute, known as the foreign-enlistment act, and of the instructions issued by the Governor for the maintenance of the neutrality by Her Majesty's subjects. In addition to evidence previously in possession of this government, it has been reported by the police that about ten o'clock last night four men, who had been in concealment on board the Shenandoah, left the ship, and were arrested immediately after so leaving by the water police.

It appears from the statements of these men that they were on board your vessel both on Monday and Tuesday, the 13th and 14th instant, when their presence was denied by the commanding officer in charge, and by yourself subsequently, when you declared that there were "no persons on board this ship, except those whose names are on our shipping articles." This assertion must necessarily have been made by you without having ascertained for yourself by a search that such men were not on board, while at the same time you refused permission to the officer charged with the execution of the warrant to carry it into effect.

Referring to that portion of your communication of the 14th instant in which you inform his excellency the Governor, "that the exeution of the warrant was not refused, as no such person as the one specified therein was on board," I am in a position to state that one of the four men previously alluded to is ascertained to be the person named in the warrant.

I am also to observe, that while at the moment of the dispatch of your letter it may be true that these men were not on board the Shenandoah, it is beyond question that they were on board at the time it was indited, your letter having been dispatched at five minutes before ten o'clock.

It thus appears plain, as a matter of fact, that the foreign-enlistment act was in course of being evaded. Nevertheless, inasmuch as the only person for whose arrest a warrant was issued has been secured, and as you are now in a position to say, as commanding officer of the ship, and in behalf of your Government, whose faith is pledged by the assurance, that there are "no persons on board this ship except those whose names are on our shipping articles, and that no one has been enlisted in the service of the Confederate States since my arrival in this port," his excellency the Governor has been pleased to revoke the directions issued yesterday, suspending permission to

[1] Speech of McCullock in the colonial assembly, Am. App., vol. vi, 666.

British subjects to aid and assist you in effecting the necessary repairs, and taking in supplies.

I am to add, it is expected that you will exercise every dispatch, so as to insure your departure by the day named in your first letter of yesterday, viz, Sunday next.[1]

To this the lieutenant commanding replied on the 16th, and in so doing took occasion to say:

In conclusion, sir, allow me to inform you that I consider the tone of your letter remarkably disrespectful and insulting to the Government I have the honor to represent, and that I shall take an early opportunity of forwarding it to the Richmond Government.[2]

But he accepted the privileges granted. The disrespect and insult consisted, as the Arbitrators will readily perceive, in intimating somewhat distinctly to the commander, that the Governor accepted statements made "upon honor," which he knew to be false in spirit, if not in letter.

On the 16th of February an examination was had of the parties arrested while leaving the ship, before one of Her Majesty's justices of the peace for the Colony. The witnesses, whose affidavits had been taken and presented to the Governor, were examined orally in court. Every fact stated in the affidavits was proven, and the accused were identified as the parties who were on the ship. One of them (Charley) was not only on the ship, but in the uniform of the ship performing the duties for which he had enlisted, or at least had agreed to enlist. Upon this testimony the persons arrested were all, on the 17th, committed for trial, and two were subsequently convicted.[3] But one was afterward discharged by the Attorney-General on account of his youth, and another for want of proof as to his nativity. The next day the officers of the vessel appealed to the public through the newspapers. They there stated, "upon their honor," to protect themselves, and secure the escape and increased efficiency of their ship, what they dared not state, "under oath," to protect the ignorant men whom they allowed to suffer for their own crime.[4]

Immediately after the order permitting the repairs and supplies to be continued was made known, the Consul addressed another communication to the Governor, which he closed by saying: "I trust, therefore, that upon further reflection, your excellency will reconsider your decision regarding this vessel, against which I have felt constrained to protest so earnestly."[5]

This communication must have come into the hands of the Governor not long after he had received the somewhat pointed letter of the commander of the vessel; but neither the representations of the Consul, the result of the examination of the men who had been persuaded by the real offenders to become criminals, the insolence of the commander of the vessel, nor anything else, could induce the authorities composing Her Majesty's Government at this Colony even to put the vessel under further surveillance.

"Further information of contemplated recruitments.

On the 16th of February, the consul placed in the hands of the Attorney-General a further affidavit of Michael Cashmore, a citizen of Melbourne, stating that he had, on the 2d of February, seen on the Shenandoah a man in the uniform of the "ship, who was sitting with the other sailors eating soup," and who told him he had joined the ship that morning; and also an affidavit from the captain of a vessel in the port in which it was stated that fourteen

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[1] Brit. App., Counter Case, vol. v, p. 112.
[2] Ibid., p. 113.
[3] Brit. App., vol. i, p. 596.
[4] Ibid., p. 546.
[5] Ibid., p. 614.

days before he had gone on board the ship and inquired of the commanding officer if he had any chronometers for sale; that he was directed to a person in the uniform of an officer; that he had made a selection from five or six chronometers handed him by the officer and bought and paid for one which he described.[1] These affidavits were procured and placed in the hands of the Law-Officer of the Crown just after the vessel had been launched from the slip.

On the 16th of February, Lieutenant Waddell informed the governor, that every dispatch was being used by him to get the Shenandoah to sea at the earliest possible moment;[2] and on the 17th, it was reported by the tide-inspector that she had taken on coals during the night, and was reshipping stores from a lighter.[3] It must have been apparent to all she would remain in port but a short time longer.

Refusal of the colonial authorities to act.

At 5 o'clock in the afternoon of the 17th, the Consul received other information to the effect that men were being enlisted to increase the crew. He went at once with his new witness, Andrew Forbes, to the Crown Solicitor, by whom he was sent to some of the "plenty of magistrates;" then he went to the office of the chief commissioner of police, who was not in; then to the Attorney-General, who wanted an affidavit taken; then to the office of the detective police, but the chief of that office must have a warrant before he could act, and advised him to go to the police justice for that purpose; then to the police justice, who could not take the responsibility of granting a warrant upon the evidence of one man alone, but advised him to go to a magistrate at Williamstown, about four miles distant, who, perhaps, might have corroborative testimony. It was, by this time, half-past seven o'clock in the evening. At this hour the Consul took the affidavit of the witness, which he sent by private hand to the attorney-general, and started himself for Williamstown. The witness, however, being afraid of personal harm, refused to go with him, and the affidavit did not reach the attorney-general on account of the lateness of the hour.[4] The Consul did, however, send a messenger to the water-police, at Williamstown, who reported to them the shipping of the men, but they said they were powerless to interfere without directions from the head authorities at Melbourne.[5] In view of this state of facts the United States believe the Arbitrators will not agree with Her Majesty's Government when it says, as it does in the Counter Case, on page 97, that the Consul was "certainly more justly chargeable with a want of due diligence than those" to whom he applied for assistance.

The United States in this connection also ask the attention of the Arbitrators to the following statement in the Counter Case, presented by Her Majesty, on page 98:

> Such, as far as is known to Her Majesty's Government, is all the information which the authorities of Melbourne were able to obtain as to the alleged shipment of men from the Colony on board the Shenandoah. It was furnished, for the most part, to the police by the boatmen who had been employed in putting the men on board, on the understanding that they should not themselves suffer on account of what had been done.

But on the 16th, more than twenty-four hours before she left port, it was demonstrated there was evidence enough to convict four men who had enlisted before the vessel had sailed, and before she went to the docks. That information was not obtained from boatmen. Everything transpired under the eyes of the police themselves, and the conviction followed from their testimony, connected with that which had

[1] Brit. App., vol. i, p. 615.
[2] Ibid., p. 621.
[3] Ibid, p. 532.
[4] Lord Blanchard, Brit. App., vol. i, p. 617.
[5] Affidavit of Robbins, Am. App., Counter Case, p. 115.

been furnished by the Consul. It was what they knew before the vessel left port which should have compelled them to act, not what came to them after. The United States have never asked for the conviction of the boatmen. What they wanted was the detention of the vessel, or, at least, the adoption of such measures as would prevent the augmentation of her warlike force.

Large recruitments of men; departure from Melbourne.

The Shenandoah left her anchorage early on the morning of the 18th and proceeded to sea unmolested. The "guns were all loaded before the vessel went outside of the Heads."[1] The chief commissioner of police says, on the 26th October, 1871, that "no visitors were allowed on board the Shenandoah under any pretense for three days before she sailed, and, in the absence of any of Her Majesty's ships in our waters at the time, the efforts of the water-police were necessarily of little avail."[2] The same officer says, in the same report: "Had the Shenandoah been afloat in the bay at the time, I am convinced that any attempts on the part of the police to search her, or to execute warrants for the apprehension of persons illegally enlisted, would have been violently resisted." If this was understood at the time, the United States are at a loss to know why it was she was permitted to get afloat until her officers had allowed their vessel to come under the surveillance of the Government, or until some means had been devised by which a fresh violation of the neutrality of the waters might be prevented. Her Majesty's ship Bombay was in port when the Shenandoah arrived, and the United States can hardly believe she had been permitted to leave the harbor entirely unprotected while so troublesome a visitor remained. At so important a station there must have been some vessel of Her Majesty's powerful Navy that could be called upon by the Governor of the Colony for assistance in case it became necessary. At any rate the Shenandoah could have been held upon the dock until a ship of war was found to watch her if the authorities had been so disposed.

As soon as the Shenandoah got outside of the neutral waters an addition was found to the complement of her men. They may not have been added to her crew in form, by actual enlistment, but they were recruited; and with the men on board the enlistment was easily accomplished. In this way forty-two men were added to the crew, as will appear by the affidavit of Temple, in which names are given.[3] Among these names the Arbitrators will find, as master-at-arms, "Charles McLaren." His name also appears in the report of the chief detective at Sandridge, made on the 13th of February, where it is said: "A waterman named McLaren, now at Sandridge, is either already enlisted or about to be so."[4] It also is found in the report of the same detective on the 21st, as McLaren, "who stated openly a short time back to a waterman named Sawdy and others, that he was about to ship on the Shenandoah."[5] They will also find the names of Thomas Evans, Robert Dunning, and William Green, which also appear in the affidavit of Forbes,[6] the witness who went with the consul on the 17th when he endeavored to obtain some action by the officers.

As soon as the vessel had escaped, it was easy for the authorities to satisfy themselves that large additions had been made to the crew.

The 18th, the day on which she sailed, was Saturday. The papers published on Monday morning all make mention of the increase of her crew. The Herald has the following notice:

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[1] Brit. App. Counter Case, vol. v, p. 120.
[2] Ibid., p. 121.
[3] Brit. App., vol. i, pp. 701, 702.
[4] Brit. App. Counter Case, vol. v, p. 108.
[5] Ibid., p. 117.
[6] Brit. App., vol. i, p. 616.

The Confederate cruiser Shenandoah left Hobson's Bay at about 6 a. m. on Saturday, and was seen during the afternoon outside the Heads by the schooners Sir Isaac Newton and Zephyr. She steamed up to the former and hoisted an English ensign, which on being answered with a like flag she stood off again; when the Zephyr saw her at a later hour of the day she was hove to off Cape Schanck. Several rumors are afloat that the Shenandoah shipped or received on board somewhere about eighty men just prior to leaving. We have since been informed that she took away a large number, but not equal to that above stated.[1]

In the Argus it was said:

It is not to be denied, however, that during Friday night a large number of men found their way on board the Shenandoah, and did not return on shore again.[2]

Another paper said:

There is no doubt that she has taken away with her several men from this Colony; report says eighty, but that is probably an exaggeration. The neglect of the Attorney-General in not replying to Captain Waddell's question as to the extent of the neutral limit, has apparently absolved that commander from responsibility so far as carrying on hostile operations outside Fort Philip Heads is concerned, for, according to our shipping report, the Shenandoah steamed up to the schooner Sir Isaac Newton, evidently with the intention of overhauling her had she happened to be a Yankee vessel.[3]

And the Age said:

The Shenandoah left Hobson's Bay at 6 o'clock on Saturday morning. It is currently reported that she shipped some eighty men just prior to leaving. At a late hour on Saturday she was hove to off Cape Schanck. The police on Saturday received the following information relative to an attempt made to enlist men for the confederate service on board the confederate steamer Shenandoah. About half past 4 o'clock on Saturday afternoon, a man who gave his name and address as George Kennedy, 125 Flinders Lane, east, called at the police office in Russell street, and stated that, having seen an advertisement in the Argus, he called on the advertiser, Powell, with whom was another man whose name he did not know. He remained in their company for several hours, during which time they supplied him with drink, and endeavored by every kind of persuasion to induce him to join the confederate service on board the Shenandoah, for which purpose they also conducted him to the wharf, and desisted from their efforts only when he openly stated his intention of reporting the matter to the authorities. Kennedy further stated that when the men were using their endeavors to get him to join the Shenandoah there were several other persons present who accepted their offers, and whom he now believes to be on board that vessel.[4]

On the 21st, the senior constable of the water-police reported "that at about 9 o'clock p. m. on the 17th instant, [the evening before she sailed,] when on duty at the railway pier, Sandridge, he observed three watermen's boats leave that pier, and pull toward the Confederate States steamer Shenandoah, each boat containing about six passengers; observed likewise a person who the constable believed to be an officer of the ship in plain clothes, superintending the embarkation of the passengers; saw the same boats returning in about half an hour afterward, midway between the Shenandoah and the pier, with only one man in each of them; on returning to the pier at about midnight, was informed by the constable on duty there (Knox) that during the absence of the police boat, three or four boats had left the pier for the Shenandoah, containing in all about twenty passengers. Have made inquiries relative to the persons conveyed on board, and find that the parties named in the margin were seen on board at one o'clock in the morning of the 18th instant."[5]

George W. Robbins also stated to the police that "he passed across the bay on Friday night last, with a message from the American Consul to the police, to the effect that the Shenandoah was shipping men on board. On his way he saw a boat pulled by Jack Riley and a man named Muir; they had about twelve men in a boat. On his return,

[1] Am. App., vol. vi, p. 683.
[2] Ibid., p. 684.
[3] Ibid.
[4] Ibid., p. 685.
[5] Brit. App. Counter Case, vol. v, p. 119.

Riley and Muir being alone, pulled up from the Shenandoah, and hailed Robbins. Robbins did not reply."[1] The report of this last statement was made on the 22d.

But the United States ask the attention of the Tribunal to another fact connected with the treatment of the Shenandoah at Melbourne.

She was a "full-rigged ship of superior build, and with good winds she was a fast sailer, but with light breezes she was only ordinary. She also had steam-power auxiliary, with a propeller that could be used at pleasure, and which, when not in use, could be hoisted up, so as not to interfere with her sailing. During the days before named, she sailed more than two thousand miles, and only used her steam-power twice, once in going through the straits and again in clearing Behring's Island."[2] She only used steam-power two days during the thirty preceding her arrival at Melbourne.[3] Steam was rarely used except in making captures.

Her repairs were only necessary to make her steam-power effective.

Excessive repairs at Melbourne.

The board of inspectors appointed by the Governor to ascertain what repairs were needed, reported that she was not "in a fit state to proceed to sea as a steamship;" and all the particular repairs specified by them, and by the firm employed by Captain Waddell, related to her steam-power alone. Not a word is said of any repairs to her hull, and it does not appear that any were made except calking.

As has been seen, when she arrived she had on board four hundred tons of coal.[4] This fact was made known to Governor Darling by the United States Consul on the 17th of February.[5] But he must have been made acquainted with the same fact from other sources. Captain Waddell asked leave to land his "surplus stores."[6]

Coaling then excessive.

On the 7th the tide inspector reported that she "on Monday was lightening, preparatory to being taken on the slip, by discharging stores and coals into the lighters near the breakwater."[7] On the same day the harbor-master reported "the crew and a party of men from the shore are now employed in discharging coals and stores into lighters. * * I have been given to understand, if she be sufficiently lightened, and weather permitting, she will be taken into the slip to-morrow afternoon."[8] Again, on the 8th, the tide inspector reported, "The Shenandoah continued to discharge stores into lighters yesterday, but little progress was made, owing to the boisterous state of the weather."[9] And on the 9th, the harbor-master reported "that the persons in charge of the patent slip, on placing the Shenandoah on the cradle yesterday, found she was drawing too much water to admit of the vessel being taken up with safety. The crew and men from the shore are lightening her abaft, preparatory to another trial to get her up to-day at high water."[10] It will be borne in mind that she was a vessel of war without cargo, except coal. She was lightened, therefore, by taking out coals and supplies only.

On the 17th the Consul protested to the Governor against her being permitted to take in coals, adding, "I cannot believe Your Excellency is aware of the large amount of coal now being furnished said vessel;"[11] but the Governor "acquainted" him in reply, on the same day, that a ship of war of either belligerent is, under Her Majesty's instructions, allowed

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[1] Brit. App. Counter Case, vol. v, p. 120.
[2] Affidavit of Captain Nye, Am. App., vol. vii, p. 92.
[3] Affidavit of W. G. Nichols, Am. App., vol. vii, p. 102.
[4] Am App., vol. vi, p. 698.
[5] Brit. App., vol. i, p. 614.
[6] Ibid., p. 520.
[7] Ibid., p. 529.
[8] Brit. App., vol. i, p. 530.
[9] Ibid.
[10] Ibid.
[11] Ibid., p. 615.

to take in coal sufficient to carry such vessel to the nearest port of her own country or to some nearer destination."[1]

Thereupon, when the vessel was launched from the slip, she was hauled alongside the John Frazer, and took in three hundred tons of coal, which, with the four hundred she already had on board, gave an ample supply for the contemplated cruise.[2] It is now said by the collector of customs that "two hundred and fifty tons of coals were transshipped to her from the John Frazer."[3] It matters but little which of these amounts was actually taken, for, after a cruise of nine months and her destructive work among the whaling fleet in the Arctic seas, she arrived, on the 6th of November, at Liverpool, with one hundred and thirty tons remaining on board, according to the report of Captain Paynter, of Her Majesty's ship Donegal, to the Comptroller General of the Coast-guard.[4]

Notwithstanding the protest of the Consul, no account seems to have been required of the actual amount on hand, and from all that appears an unlimited permit was granted.

She was also permitted to take on board supplies for her cruise. The extent of these supplies does not appear.

On the 30th of January the Commissioner of Trade and Customs informed Lieutenant Waddell that "it will be necessary that a list of the supplies required for the immediate use of your vessel * * * should be sent in for the guidance of His Excellency."[5]

On the same day Lieutenant Waddell replied, "I have to state the immediate supplies required for the officers and crew under my command consist of fresh meat, vegetables, and bread daily; and that the sea supplies required will be brandy, rum, champagne, port, sherry, beer, porter, molasses, lime-juice, and some light materials for summer wear for my men, &c."[6]

It will be noticed that the quantities required are not stated; but on the next day the commander was notified that "permission is conceded for you to ship on board the Shenandoah, in such quantities as may be reasonably necessary, the provision and supplies enumerated in your communication under reply."[7]

If any further list was furnished, Her Majesty's Government has not seen fit to present it for the consideration of the Arbitrators.

The permit for general supplies appears, therefore, to have been as unlimited as that for coal.

Without these additions to her steam-power, crew, and supplies, she never could have accomplished the objects of her cruise. Although "a fast sailer in a strong wind, with a light breeze, she could not have outsailed the average of the whalers."[8] It is the firm opinion of Captains Nye, Hathaway, Winslow, Wood, and Baker that if she had not used her steam-power, she could never have captured the larger portion of the whaling fleet. She waited for a calm before attacking the whaling vessels, in order to prevent their escaping into the ice, and then made chase under steam.[9] And she could not have been safely handled in the Arctic seas if she had not obtained the additions to her crew at Melbourne. Even with these additions it was often necessary, as has been seen, to call on the prisoners to assist in working the ship.

The United States believe that after this statement of the occurrences

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[1] Brit. App., vol. i, p. 617.
[2] Am. App., vol. vi, p. 698.
[3] Brit. App. Counter Case, vol. v, p. 85.
[4] Brit. App., vol. i, p. 674.
[5] Ibid., p. 640.
[6] Brit. App., vol. i, p. 517.
[7] Ibid., p. 641.
[8] Am. App., vol. vii, p. 97.
[9] Affidavits collected in Am. App., vol. vii, pp. 92 *et seq.*

at Melbourne, the Arbitrators will be surprised to find in a report of the Governor of the Colony to the Home Government, detailing the facts substantially as they are now given, the following passage:

I will not close my report of these transactions without assuring you that nothing could be further from my intention or that of my advisers than that the letter of the Commissioner of Trade and Customs of the 15th instant should be justly open to the charge of being disrespectful and insulting to the Government at Richmond. A clear recapitulation of the facts appeared to be expedient, if not necessary, for reasons which I have already stated; while the reference to that Government was a direct and natural consequence of the declaration in Lieutenant Waddell's letter of the 14th instant, then under reply, that he had written as commander of the ship representing his Government in British waters. Nor can I omit to observe that it would have been more consistent with the representative character in which Lieutenant Waddell thus declared himself, if, possessing, as he did throughout, ample power and means to ascertain that his ship had not become a place of concealment for British subjects seeking to violate or evade the law, he had employed that power and those means more effectively before committing himself to a solemn assertion, which eventually proved incorrect, and if, upon the discovery that these men were on board his ship,(assuming that discovery to have been made as he affirms it was after he had dispatched his letter of the 14th,) he had immediately apprised the Government of the mistake he had committed, instead of leaving it to be brought to light by the apprehension of the culprits themselves, and through the medium of a police examination.[1]

In less than sixty days after this report was written, and before any advices of what had been done could have reached Richmond, there was no "Government" there to be insulted, or to which representations could be made. The armies of the insurgents had surrendered, and those who had administered the Government were fugitives.

Only ten days before the date of that report, and after it was apparent to all that the struggle of the insurgents was nearly at an end, Her Majesty's Secretary of State for Foreign Affairs addressed the first remonstrance of his Government to the agents of the insurgents, and after stating that the "unwarrantable practice of building ships in this country to be used as vessels of war against a State with which Her Majesty is at peace still continues," says, "Now, it is very possible that by such shifts and stratagems the penalties of the existing laws of his country, nay, of any law that could be enacted, may be evaded; but the offense thus offered to Her Majesty's authority and dignity by the *de facto* rulers of the Confederate States, whom Her Majesty acknowledges as belligerents, and whose agents in the United Kingdom enjoy the benefit of our hospitality in quiet security, remains the same. It is a proceeding totally unjustifiable and manifestly offensive to the British Crown."[2]

It is a source of pleasure to the United States to learn that at last Her Majesty's Government did realize that the practices of the agents of the insurgents, which had been continued for so many years, were "manifestly offensive." It would have been more gratifying, however, if this manifestation had been noticed at a somewhat earlier date.

The Consul of the United States, in reporting the facts to his Government on the same day that the Governor reported to the Government of Her Majesty, uses the following language:

What motives may have prompted the authorities, with evidence in their possession as to the shipment of large numbers of persons on board said vessel, substantiated by the capture and commitment of some escaping from said ship, to allow the said vessel to continue to enjoy the privileges of neutrality in coaling, provisioning, and departing, with the affidavits and information lodged and not fully satisfied, I am at a loss to conceive. Was it not shown and proved that the neutrality was violated? And yet she was allowed her own way unmolested, thus enabling her to renew her violations of neutrality on a larger scale. There are eyes that do not see and ears that do not hear, and I fear that this port is endowed with such a portion of them as may be required to

[1] Brit. App., vol. i, p. 509.

[2] Am. App., vol. i, p. 631.

suit the occasion; for in what other way can my unsuccessful attempts to obtain the assistance of the authorities on the evening of the 17th instant be explained?[1]

The United States believe the Arbitrators will agree with the Consul in all that he has said.

Contrast between the course of Brazilian and of British authorities.

And here again the United States must ask the Arbitrators to contrast the conduct of Her Majesty's Government with that of His Majesty the Emperor of Brazil, who, as early as June 23d, 1863, upon much less provocation from these same belligerent insurgents, caused, among others, the following salutary rules to be promulgated for the guidance of the presidents of his several provinces:

6. Not to admit in the ports of the Empire the belligerents which may once have violated neutrality.

7. To cause to retire immediately from the maritime territory of the Empire, without furnishing them with any supplies whatever, the vessels which attempt to violate neutrality.

8. Finally, to make use of force, or in default, or by the insufficiency of the same, to protest solemnly and energetically against the belligerent, who, being warned and intimated, does not desist from violating the neutrality of the Empire.[2]

From Melbourne the Shenandoah made her way to the Island of Ascension, where, about the 4th of March, she destroyed four whaling vessels at anchor in the harbor. One of these vessels was from Honolulu, under the Honolulu flag, and commanded by a citizen of Honolulu. She remained at this island until about the 14th of March, and then cruised for nearly a month off the coast of Japan. The latter part of May she arrived in the Ochkotsk sea, where, on the 27th of May, she captured and destroyed the whaling ship Abigail, Captain Nye. She then sailed for Cape Thaddeus, a place much frequented by whaling ships, and arrived there about the 20th of June. Between that time and the 28th she captured twenty-four whaling vessels with their cargoes and outfit, and destroyed all except one, the largest number having been taken on the 28th. The United States believe the Arbitrators will find from the testimony of Captain Nye, Captain Hathaway, and W. H. Temple,[3] that most, if not all of these captures were made after Lieutenant Waddell had received news that the war had ended.

It is true it is said in the British Case, "that the commander of the Shenandoah positively affirmed that he had, on receiving intelligence of the downfall of the Government by which he was commissioned, desisted instantly from further acts of war,"[4] but it must be borne in mind that the same commander had previously made some "positive" statements at Melbourne which were afterwards found by Her Majesty's officers there not to have been in all respects true, and under these circumstances the United States believe that, if it becomes material, the Arbitrators will give more credence to the affidavits of the intelligent captains than to the assertions of the late commander. Although the testimony of Temple was severely criticised by the attorney of the commander at the time it was presented, all his statements, material to this question, have been fully sustained by the testimony of the other witnesses obtained since that time.

The insurrection came to an end in the month of April, 1865. On the 20th of June, Mr. Mason, one of the agents of the insurgents in London, addressed a note to Earl Russell in which he said:

It being considered important and right, in the present condition of the Confederate States of America, to arrest further hostile proceedings at sea in the war against the United States, those having authority to do so in Europe desire as speedily as practicable to communicate with the Shenandoah, the only remaining Confederate ship in commission, in order to terminate her cruise. Having no means of doing this in the

[1] Am. App., vol. vi, p. 595.
[2] Brit. App., vol. i, p. 295.
[3] Am. App., vol. vii, pp. 94, 95. Brit. App., vol. i, p. 693.
[4] Brit. Case, p. 157.

distant seas where that ship is presumed now to be, I venture to inquire of your lordship whether it will be agreeable to the Government of Her Majesty to allow this to be done through the British consuls at ports where the ship may be expected.[1]

Mr. Mason inclosed an "order" from Bullock, written at Liverpool, and addressed to Lieutenant Waddell, in which the following appears:

I have discussed the above circumstances fully with the Hon. J. M. Mason, the diplomatic representative of the Confederate States in England, and in accordance with his opinion and advice I hereby direct you to desist from any further destruction of United States property upon the high seas, and from all offensive operations against the citizens of that country.[2]

This order of Bullock was sent through Earl Russell to the consuls of Her Majesty at the points where it was expected the Shenandoah might appear.

Shenandoah at Liverpool.

On the 6th of November she again arrived at Liverpool, and her officers and men were landed there and discharged.

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[1] Brit. App., vol. i, p. 653.

[2] Ibid.

X.—THE SUMTER, THE NASHVILLE, THE RETRIBUTION, THE TALLAHASSEE, AND THE CHICKAMAUGA.

The attention of the Arbitrators has thus far been directed, in the progress of this investigation of facts, to vessels which left Great Britain to receive their armament, and which were afterward, without having been engaged in any other service, actually armed for war.

The United States claim, however, that Great Britain failed to fulfill its duties toward them in respect to certain other vessels, to wit, the Sumter, Nashville, Retribution, Chickamauga, and Tallahassee. The facts upon which a claim is predicated for compensation on account of the acts committed by these vessels have already been stated in the Case which the United States have had the honor to present for the consideration of the Tribunal. Her Majesty's Government has, however, in its Case and Counter Case, submitted some new evidence which makes it proper for the United States to present in this argument, as briefly as is possible, a summary of the material facts in respect to these vessels as they now appear from the evidence and allegations submitted by both the parties.

THE SUMTER.

The Sumter.

This vessel was originally in the merchant service of the United States, and, at the outbreak of the rebellion, was employed as a packet between New Orleans and Havana. Soon after the blockade of the port of New Orleans, she was fitted and armed for a vessel of war, and, having escaped on the 30th of June, 1861, through the blockade at the mouth of the Mississippi River, appeared, on the 6th of July, at the port of Cienfuegos, in the island of Cuba, with six prizes which she had captured on her voyage thither.[1] The prizes were detained in port upon the order of the Captain-General of the island, and subsequently, on the 28th of the same month, "unconditionally" released "in consequence of investigations made by the authorities of Cienfuegos concerning their capture."[2] The Sumter, during her stay, was permitted by the local authorities at the port to take coal and water.[3] No application was made to the Governor-General for that purpose.[4] She went to sea in the evening of the 7th of July,[5] having remained in port about twenty-four hours.

At Curacoa.

On the 17th of July she arrived at Curaçao, in Dutch Guiana, where she was permitted to supply herself with coal and provisions.[6] She next appeared at Puerto Cabello, in the republic of Venezuela, on the 26th of July, with a prize, but being ordered to "take her departure within four and twenty hours," left, without coaling, at daylight on the 27th,[7] and arrived at a British port in the

[1] Brit. App., Counter Case, vol. vi, p. 101.
[2] Ibid., p. 108.
[3] Ibid., p. 104.
[4] Ibid., p. 105.
[5] Ibid., p. 104.
[6] Ibid., p. 69.
[7] Cruise of Alabama and Sumter, p. 27.

island of Trinidad, on the 30th. Here she was "supplied with a new main yard, eighty tons of coal and provisions," and sailed in the evening of the 5th of August.[1] She next appeared at Paramaribo, in Dutch Guiana, on the 19th of August, and purchased and received coals without objection on the part of the authorities. Remaining at this port until the 31st,[2] she appeared at the Brazilian port of Maranham, on the 6th of September, "to coal and procure supplies."[3]

At Trinidad.

From this port she went to Martinique, where she also received coal and supplies, and from there to Cadiz, at which place she arrived on the 4th of January, 1862.[4] Here she was permitted to go into dock and make some slight repairs.[5] "The captain of that vessel [the Sumter] asked for reparations in her upper works and in her decks, but after a scientific survey scrupulously executed, it was found that such reparations were not necessary, and only those which were justified by an imperious necessity have been authorized."[6] She was ordered away from Cadiz on the 17th.[7] The Minister of the United States at Madrid, in reporting to Mr. Seward, said: "I ought to say, perhaps, that if it had not been for the example of what had taken place with the Nashville in an English port, I am confident that the Sumter would have been forced to go to sea from Cadiz as she came."[8] From Cadiz she went direct to Gibraltar, at which place she arrived on the 18th of January, 1862.

At Martinique.

At Cadiz.

At Gibraltar.

On the 28th of August, 1861, the United States complained to the Government of the Netherlands of the treatment of the Sumter at Curaçao,[9] and on the 8th of October made similar complaint as to the conduct of the colonial authorities on the occasion of her subsequent visit at Paramaribo.[10]

On the 15th of October the Minister of Foreign Affairs advised the Minister of the United States at the Hague, "that the Government of the Netherlands, wishing to give a fresh proof of its desire [to avoid] all that could give the slightest subject for complaint to the United States, has just sent instructions to the colonial authorities, enjoining them not to admit, except in case of shelter from stress (*relâche forcée,*) the vessels of war and privateers of the two belligerent parties, unless for twice twenty-four hours, and not to permit them, when they are steamers, to provide themselves with a quantity of coal more than sufficient for a run of twenty-four hours."[11]

On the 30th of September, 1861, Mr. Adams made complaint to Earl Russell of the manner in which the Sumter had been received at Trinidad, but as early as the 29th of August the Duke of Newcastle had transmitted to the Foreign Office a report from the Governor of the island to the Colonial Office, and which was, of course, in the possession of Earl Russell when he received the communication from Mr. Adams. In that report of the Governor this passage occurs:

> A great deal of trade goes on between Trinidad and the northern ports of North America, and Captain Semmes, I imagine, has not failed to take this opportunity of obtaining information with regard to the vessels employed under the flag of the United States in this traffic. Fears are entertained with regard to one or two now expected. It is to be hoped that the presence of the Sumter in these waters will soon be made generally known, and that, while the civil war continues, the lumber and provision trade, any interruption of which would cause serious embarrassment to this community, will be carried on in British bottoms.[12]

[1] Brit. App., vol. ii, p. 5.
[2] Ibid., p. 81.
[3] Ibid., p. 1.
[4] Ibid., p. 114.
[5] Ibid., p. 116.
[6] Brit. App., vol. vi, p. 119.
[7] Adams to Seward, Am. App., vol. ii, p. 579.
[8] Brit. App., vol. vi, p. 119.
[9] Ibid., p. 69.
[10] Ibid., p. 81.
[11] Ibid., p. 84.
[12] Brit. App., vol. ii, p. 1.

On the 4th of October Earl Russell informed Mr. Adams, "the Law Officers of the Crown have reported that the conduct of the Governor was in conformity to Her Majesty's proclamation."[1]

On the 1st of November the Minister of the United States at Rio Janeiro complained to the Government of His Majesty the Emperor of Brazil of the conduct of the provincial authorities during the stay of the Sumter at Maranham.[2] A long correspondence ensued, connected with the visit of this vessel and those of other insurgent cruisers subsequently, which resulted in the promulgation of the instructions to the presidents of the provinces of the Empire, under date of the 23d of June, 1863, to which reference has already been made.[3]

It is sufficient for the purposes of this Argument for the United States to say, that during the contest between them and the insurgents, abuse of neutrality was never tolerated in the ports of the Netherlands or Brazil, and these ports were never suffered to be used, by either of the belligerents, "as the base of their operations against the commerce of the adverse party."

It is true that, on the 31st of January, 1862, certain "orders to be observed in all the ports of the United Kingdom, and those of Her Majesty's transmarine territories and possessions," were issued by Her Britannic Majesty's Government,[4] and that, by the "first and second of the * * * orders, belligerent vessels were absolutely excluded from the ports, roadsteads, and waters of the Bahama Islands, except in case of stress of weather, or of special leave granted by the lieutenant-governor." It is also true that, "to vessels of the Confederate States it [access to these islands] was of great importance, the harbors of these States being generally, though not always, effectively blockaded."[5] But the United States have not yet been able to discover that the "special leave" required by the orders was ever, during the entire contest, withheld by the Lieutenant-Governor from any insurgent vessel of war, and that, too, notwithstanding the long-continued and flagrant abuses of the hospitalities of British ports, to which the attention of the Arbitrators has already been directed.

The Sumter went to Gibraltar for coal. The Consul of the United States was enabled to prevent her obtaining a supply from the merchants at that port, until the arrival of certain vessels of war of the United States in the adjoining waters of Spain, and, after that time, her movements were so closely watched by these vessels, that she was never able to escape in the character of a ship of war.

Her crew was discharged and paid off in April,[6] and previous to the 8th of December, while she was yet in port fully armed, a private contract was made by the insurgents for her sale for £4,000. The purchasers were ready with the money to pay for her, and receive the bill of sale, but "all the papers required by them could not be produced by the officer in charge, * * * who, it appears, holds a power of attorney from a certain Bullock, who styles himself senior naval officer in the Confederate service in Europe, and, I am told, is at present in England, giving his attention to what relates to the marine service of the rebel States."[7] In consequence of this informality, the sale was not consummated, and on the same day, the 8th, she was advertised to be sold at public auction.[8] The Consul of the United States protested

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[1] Brit. Case, p. 14.
[2] Brit. App., vol. vi, p. 5.
[3] *Ante*., p. 287.
[4] Brit. Case, p. 15.
[5] Ibid., p. 17.
[6] Brit. Case, p. 18.
[7] Sprague to Adams, Am. App., vol. ii, p. 507.
[8] Ibid., p. 509.

against such sale being allowed in the port, stating, among other things, that it was being "made for the purpose of avoiding a capture by the cruisers of the United States."[1] It seemed to the commander of the United States war-vessel Kearsarge that "the sale of so-called Confederate war-vessels in British ports is an act as unfriendly and hostile to our [his] Government, as the purchase of war-vessels in their ports by the same party."[2] He therefore advised the consul to enter his protest against the sale.

On the 19th, the form of a sale was gone through with, but the nominal purchaser was M. G. Klingender, intimately connected with the firm of Frazer, Trenholm & Co.[3] She afterward received a British registry, and went to Liverpool under British colors, and from that time was used as an insurgent transport.

At Liverpool.

On the 14th of October, 1863, the following significant letter was written by Prioleau, of the firm of Frazer, Trenholm & Co., at Liverpool, to Major Huse, which explains itself:

> Touching the Gibraltar, formerly Sumter, did you not advise the government that you had taken her for the war department? They do not understand it out there, and you must come here and settle it somehow as early as you conveniently can. I will adopt either of three courses which you may prefer: To ignore our ownership altogether, and consider her always the property of the government. 2d. To sell her to the government at a fair valuation on her leaving here. 3d. To keep her as our own from the time of purchase in Gibraltar, and charge you the regular rate of freight for the voyage to Wilmington, say £60 per ton. The first is the best plan, I think. Certainly for the government it is. Of course you know that it was *not* she that was sunk in this harbor. She was at Wilmington lately, and before she *is* lost or returns here, the matter ought to be arranged.[4]

As has been seen, the sale of the Georgia was afterward permitted in the port of Liverpool. After that, but not until the 9th of September, 1864, an order was promulgated by Her Majesty's Government, that "for the future no ship of war belonging to either of the belligerent powers of North America shall be allowed to enter, or to remain, or be in any of Her Majesty's ports, for the purpose of being dismantled or sold."[5]

When this order was made the insurgents had no armed ship of war to be dismantled or sold.

THE NASHVILLE.

This vessel, like her predecessor, the Sumter, had, previous to the outbreak of the rebellion, been employed in the merchant service of the United States as a packet running between New York and Charleston. She passed the blockade at the latter port, on the night of the 26th of August, having been lightened for that purpose,[6] and arrived at the port of St. George, in the island of Bermuda, on the 30th, a little more than three days after leaving her home port.[7]

The Nashville.

At Bermuda.

She presented herself at Bermuda as a vessel of war.

Governor Ord, in his report to the Duke of Newcastle, says: "I have

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[1] Brit. Case, p. 18.
[2] Am. App., vol. ii, p. 510.
[3] Ibid., p. 515.
[4] Am. App., vol. vii, p. 71.
[5] Brit. App., vol. iii, p. 20.
[6] Bernard's Neutrality, p. 267.
[7] Brit. Case, p. 20.

the honor to acquaint your excellency that these islands were visited, on the 30th ultimo, by the Confederate States paddle-wheel steamer Nashville, commanded by Lieutenant Peagram."[1] The Duke of Newcastle, in sending this report to the Foreign Office, describes her as the "Confederate States steam-vessel Nashville."[2] In point of fact her character as a ship of war is conceded in the British Case, as on page 20 it is stated "that she was commissioned as a ship of war," and that "her commander applied for leave to draw a supply of coals," &c. And in the letter of Earl Russell to Mr. Adams, replying to the claim by Mr. Adams, that she was not a vessel of war, found on page 21, it is said, "The undersigned has to state that the Nashville appears to be a Confederate vessel of war; her commander and officers have commissions in the so-styled Confederate Navy."

She was allowed to coal at Bermuda, and it was known to Governor Ord, when he saw her taking on coal, as he did, that, when she left Charleston, "it was intended to coal at Bermuda."[3] He also knew that she was a vessel of war, and that she was on her way to England, for he says, "She has every chance of reaching England unmolested by the United States vessels of war."[4]

She could not run the blockade with a full supply of coal, as she had been compelled to diminish her draught for that purpose; therefore, she was short of effective power as a vessel of war when she left her home port. An increase of her supply of coal, beyond what she had originally on leaving Charleston, would augment her naval force, and if she left her home port with the intention of thus augmenting her power when she arrived at Bermuda, and the Governor, with a knowledge of that intention, allowed it to be done, he did suffer the insurgents to make use of that port of Her Majesty's dominions as a base of naval operations against the United States.

The run from Charleston to Bermuda, as has been seen, occupied but little more than three days. On arrival, her supply of coal was exhausted. Her voyage from Bermuda to Southampton lasted from the 4th to the 21st of November, or between seventeen and eighteen days. To enable her to make that voyage, she had permission to take on board six hundred tons of coal.[5] It now appears she only took four hundred and forty-two and a half, or four hundred and seventy-two and a half tons;[6] but it matters little whether this was the true amount, or that which was originally supposed and reported by the Governor. Either was sufficient to enable her to reach and destroy the Harvey Birch on the 19th, within two days' run of Southampton. Without this supply that capture could not have been made.

In the British Counter Case it is said, "No act appears to have been done by the Governor, and no permission asked or granted."[7] Therefore, it is claimed there was no permission given to coal. At the same time it is admitted the Governor suffered the taking on of an unlimited supply.

After leaving Nassau, and after the destruction of the Harvey Birch, she arrived at Southampton, and was permitted to repair and coal. On her way from Southampton to a port of the insurgents, she stopped again at Bermuda from the 20th to the 24th of February, and took on coal from the British ship Mohawk.[8] At Southampton.

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[1] Brit. App., vol. ii, p. 87.
[2] Ibid.
[3] Ibid., p. 88.
[4] Ibid.
[5] Gov. Ord to Duke of Newcastle, Brit. App., vol. ii, p. 87.
[6] Brit. App., Counter Case, vol. v, p. 13.
[7] Page 70.
[8] Brit. App., vol. ii, p. 128.

This was only a few days after the Governor had informed the Consul of the United States that it had been "decided not to allow the formation, in any British colony, of a coal depot for the use of" the vessels of war of the insurgents or the United States.[1] After leaving Bermuda, and before attempting to enter any port of the insurgents, she destroyed one vessel.

From this it will be seen that the Nashville received her entire supplies, during her career as a vessel of war, from the ports of Great Britain.

THE RETRIBUTION.

The Retribution.

This was a sailing vessel of about one hundred tons measurement,[2] with one small gun on deck,[3] which, early in the year 1863, cruised for a short time about the Bahama Banks. Her first officer was Vernon Locke, who either had been, or afterwards became, a clerk for Adderley & Co., at Nassau.[4]

It does not appear, from the evidence furnished by either of the Governments, when or where she was armed or commissioned. She was originally a steam-tug, and employed at Buffalo, in the State of New York, upon Lake Erie. Just before the outbreak of the rebellion, she was taken into the service of the United States and brought to the Atlantic coast. Being driven by stress of weather into Cape Fear River, she was, just previous to the attack on Fort Sumter, seized by the insurgents.[5] The United States have no knowledge of the use made of her after that time, until she appeared upon her cruise.

About the 28th of January, 1863, she captured the schooner Hanover, which was taken by Locke, the first officer of the Retribution (as is supposed) to Long Cay, a small island of the Bahamas. She was accompanied to that island by the schooner Brothers, owned by the Messrs. Farrington, doing business at that place. Locke, on his arrival, assumed the name of the master of the Hanover, consigned, as it appeared upon her papers, to Mr. Richard Farrington."[6] His object was to sell the cargo, and he made a statement of the reasons which induced him to come into port, which Farrington said he "doubted," but "did not see any impropriety in his acting as the captain's agent," "inasmuch as the captain came to him properly documented."[7] A part of the cargo was sold at Long Cay, and a part was shipped on the schooner Brothers to Nassau, and there placed in charge of James T. Farrington, esq., sen., one of the magistrates of Fortune Island, (Long Cay.)[8] The Hanover was at the same time loaded with salt and sailed for one of the ports of the insurgents.[9]

Complaint as to these transactions was made to the Governor of the Bahamas on the 11th of March, and he requested the advice of the Attorney-General as to "what steps ought to be taken."[10] The Attorney-General replied, on the 16th, "that the collector of the revenue, if he had any cause to suspect the character of the vessel and cargo, should at once have arrested both."[11] On the 20th of April, a Mr. Burnside, a magistrate of Inagua, made a statement of facts, as he had ascertained them upon an inquiry instituted for that purpose.[12] This statement was

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[1] Am. App., vol. vi, p. 213.
[2] Brit. App., Counter Case, vol. v, p. 193.
[3] Ibid., p. 190.
[4] Ibid., p. 196.
[5] Am. App., vol. vi, p. 736.
[6] Brit. App., Counter Case, vol. v, p. 168.
[7] Ibid., p. 168.
[8] Ibid., 165, 189.
[9] Brit. App., Counter Case, vol. v, p. 165.
[10] Ibid.
[11] Ibid., p. 166.
[12] Ibid., p. 167.

laid before Mr. Seward by Lord Lyons, and, on the 24th of June, Mr. Seward took occasion to say to his lordship, that "the information thus communicated is acceptable, so far as it goes, but is not deemed altogether conclusive. There still remains a painful doubt on the mind of this Government whether the authorities and others at Long Cay were, as Mr. Burnside thinks, ignorant that the Hanover was a prize to the Retribution. I shall be happy if the inquiry shall be prosecuted so far as may be necessary to show that the undoubted just intentions of Her Majesty's Government have been obeyed."[1] Lord Lyons, on the 30th of June, informed Mr. Seward that he should "lose no time in communicating this request to Her Majesty's Government and to the governor of the Bahamas."[2] The inquiry does not, however, seem to have been prosecuted, or, if it was, the United States have not been advised of the result.

In May the Attorney-General caused Locke to be arrested for the offense committed by his personation of the master of the Hanover, and, upon a preliminary examination of the charge before a police magistrate, about the 26th of July, it appeared that the business at the customs at Long Cay was transacted principally by Mr. Richard Farrington, who was the agent or consignee, and who, when examined and confronted by the defendant, "could not swear to his being the person who represented himself as * * * the master of the schooner * * * but believed him to be the person."[3] The police justice, in reporting upon the case, at the request of the colonial secretary, on the 10th of March, 1864, says Farrington "would" not swear to the identity.[4] After this the accused was let to bail, in the sum of £100, for his appearance at court for trial.[5] He was tried in the following May at Nassau, but acquitted, as the evidence was not sufficient to satisfy a jury, selected from that locality, of his identity.[6] An examination of the testimony, however, as it is found reported in the British Appendix, Counter Case, vol. v, pp. 188 *et seq.*, will,we think, hardly satisfy the minds of the Arbitrators that "the authorities and others at Long Cay were ignorant that the Hanover was a prize to the Retribution." It may, however, show why it was that the inquiry suggested by Mr. Seward had not ben prosecuted.

On the 19th of February the American brig Emily Fisher, on a voyage from Guantonomo, Cuba, to New York, while near Castle Island, one of the Bahamas, and in British waters, was boarded by the British wrecking-schooner Emily Adderley. What then occurred is told in the affidavit of the master of the brig, as follows:

> That having questioned the captain of the said vessel [Emily Adderley] closely, he was told that there were no privateers, or steamers, in the passage; that soon afterward the schooner hauled down the British flag and then hoisted it again; that at the same time he saw a schooner coming out from under the land, but was told that she was a wrecking-schooner; that soon after this said schooner came under the lee of the brig and sent a shot across her bows, at the same time running up the rebel flag; that she then sent a boat with eight men well armed on board, and ordered him on board the schooner with all his papers; that on arriving on board, the captain, after examining his papers, told him that he was a prize to the confederate schooner Retribution, and ordered him and his crew to be put into irons, which was done; that at noon the irons were removed from himself and the first officer, and they were allowed the privilege of the cabin; that all this time the brig was working up under the land, where five British wrecking-schooners were anchored; that the privateer anchored about one and one-half miles from the shore, when, at about 3 p. m., a wrecker's boat came alongside; that after some conversation with the crew in a loud voice, the captain of the privateer told them in an undertone to have two vessels alongside the brig that night;

[1] Brit. App., Counter Case, vol. v, p. 170.
[2] Ibid.
[3] Ibid., p. 175.
[4] Ibid., p. 177.
[5] Ibid.
[6] Ibid., p. 188.

that at about 5 p. m. they ran the brig on shore, and ten or twelve wreckers' boats went alongside of her; that at 6 p. m. Mr. Grey, the officer in charge of the brig, came on board the privateer, and the deponent was then told he could have his boat to go on board the brig and take what personal property Mr. Price might see fit to give him; that he found two wrecking-schooners alongside and about one hundred men on board the brig; that having taken the personal effects into the boat he landed on Acklin's Island, made a tent, and passed the night; that the next day the wreckers were still alongside; that he went on board the brig, she being then afloat, and made a claim on the wreckers for the brig and cargo. He was told he could not have her, and that if the anchor was lifted the privateer would sink her; that he then protested against removing any more of the cargo, as the brig was afloat and was in British waters, but the protest was disregarded; that the next day the wreckers had an interview with the captain of the privateer, and at 1 p. m. sent him word that they were going to a port of entry and that the deponent and his crew could go with them; that at 2 p. m. the privateer, the brig, and all the wreckers started for Long Cay, and arrived there about 8 p. m. the same day; that the wrecker, on board which were deponent and his crews, was anchored under the guns of the privateer, which kept a guard all night, while Mr. Grey and Mr. Price, two officers, went over to town; that on Monday, 23d, the deponent went also to town, and after making inquiry, found that the captain of the privateer would not allow him to go on board the brig; and that the deponent was told by the authorities that though the law would not allow the privateer to touch the brig, if he wished to do so they had no means of preventing him; that the deponent was not able to obtain possession of the brig until after he had bargained with the wreckers to pay them 50 per cent. on the cargo, and 33⅓ per cent. on the vessel, when, after making affidavit of his being the master, he was placed in possession by the collector and went on board; that he found the hull, spars, and rigging in good order, but everything movable, on and under deck, stolen; that on the next day, 24th, he commenced receiving sugar from the wreckers, and on the 25th found on board eighty-three hogsheads, five tierces, and four barrels, the balance of cargo having been taken ashore by the wreckers; that the wreckers stove hogsheads and barrels, and passed the sugar into their boats, and landed it on the beach; that the captain of the privateer told him, the deponent, that he had given the cargo to the wreckers, as he wanted the brig; that he was going to put his guns on board of her, and destroy his schooner; that he further told the deponent that the wreckers were to pay him something handsome, and that the deponent believes they did so; that deponent was obliged to accept the wreckers' terms at the port of entry, because the brig lay under the guns of the privateer, and the authorities declared their inability to protect him. And the deponent further says, that the capture of his vessel and the destruction of her cargo were brought about by and with the connivance and assistance of the captains and crews of the British wrecking-schooners, and within the jurisdiction of the British government, where he was entitled to protection, but could not obtain it until he had submitted to the terms of the wreckers, all of whom were British subjects, through whose connivance the vessel had been stranded and the cargo destroyed.[1]

After this, (the 19th of February,) and before the 8th of March, the Retribution entered the port of Nassau as an insurgent vessel of war.[2] The "special leave" called for by the regulations of the British Government, under date of January 31st, 1862,[3] seems never to have been asked for or granted. Her commander was not even called upon for his commission. All that occurred upon her arrival is thus stated by the pilot:

She had a small gun on deck. The captain told me he was from Long Cay. I asked the captain where he was from. He answered, "Long Cay." I saw from the look of the vessel and the appearance of the crew, their clothing, that she was likely to be an armed vessel. I then asked him if she was a vessel of war. I begged him to excuse my being so particular, as I was instructed to do so, to put such questions. He told me she was an armed vessel."[4]

On the 3d of March, which was eight days before the complaint was made to the Governor on account of the capture of the Hanover, and two weeks after the transactions with the Emily Fisher, in which the "wrecking-schooner Emily Adderley" took so prominent a part, Henry Adderley & Co. sold, or pretended to sell, the Retribution, in the port of Nassau, at public sale, to C. R. Perpall & Co., for £250. On the 26th

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[1] Brit. App., Counter Case, vol. v, p. 190.
[2] Brit. App., Counter Case, vol. v, p. 196.
[3] *Ante*, p. 296.
[4] Am. App., vol. vi, p. 738.

of the same month, Perpall & Co. sold her for the same amount to Thomas Stead, and he, on the 10th of April, obtained for her a register as a British ship.[1] Previous to her sale she was condemned by a board of survey,[2] Perpall, the ostensible purchaser, being one of the board.[3]

THE TALLAHASSEE.

The Tallahassee.

It will be remembered by the Arbitrators that, when presenting for their consideration the facts connected with the claim of the United States for acts committed by the Shenandoah, we had occasion to call their attention to a letter written by the insurgent Secretary of the Navy to a Mr. Charles Green, bearing date as early as the 1st of July, 1861, in which, referring to the purchase of vessels to be used as transports, and the shipment of arms, &c., from England for the use of the insurgents, it was said: "It is probable that, being a British subject, you might secure the shipment under British colors."[4] Less than fifty days after the date of that letter, Mr. Adams, in addressing Earl Russell upon the subject of the "transport Bermuda, and the information he had obtained as the ground for an application for a prompt and effective investigation of the truth of the allegations whilst there is time," called his lordship's attention to the fact that "she is stated to carry English colors."[5] From that time until the end of the rebellion, the fact that the blockade-running, and the transportation of articles contraband of war, for the use of the insurgents, was carried on, almost exclusively, under the protection of the English flag, became very frequently the subject of direct complaint by Mr. Adams to Earl Russell.

The correspondence upon this subject will be found collected in volume I of the American Appendix, pages 719 to 785, and it shows conclusively that the insurgent Government was in the constant practice of procuring a British registry, and of using the British flag, for all or nearly all transports. We also claim that it shows that this practice was tolerated by Great Britain.

As late as the 20th of January, 1865, the Lieutenant-Governor of Bermuda, in communicating with the home government, took occasion to say: "I would further state that the Chameleon's register is Confederate States. Hence there is another legal question to which I should be glad to have an answer, viz, is a merchant-ship, sailing under the flag of, and registered by, an unrecognized nation, to be received in our ports on the same terms as a trader under a recognized flag? I find that this is not the first instance of a ship trading hither with a confederate register, though most of the blockade-runners are British."[6]

On the 31st of March, 1864, the Consul of the United States at London informed Mr. Seward that "on the Thames their activity in forwarding all enterprises in aid of the Confederacy is kept up with nearly as much vigor as on the Clyde. Another double screw, called the Atlanta, similar in most respects to those which have preceded her, has her sails bent, coals and supplies in, appears quite ready to leave."[7]

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[1] Brit. App. Counter Case, vol. v, p. 190.
[2] Ibid., p. 196.
[3] Ibid., p. 191.
[4] *Ante*, p. 236.
[5] *Ante*, p. 238.
[6] Brit. App., Counter Case, vol. v, p. 151.
[7] Am. App., vol. vii, p. 727.

Again, on the 1st of April, he says: "The double screw is called the Atlanta. Her sails are bent, and she appears quite ready for sea. I consider the Edith and her the finest ships of the whole batch of double screws."[1]

On the 8th of April, it was reported to the Consul that "this double screw [the Atlanta] left the docks on Sunday last, adjusted compasses same day, and sailed on the 4th of April from Greenhithe, and arrived at Falmouth on the next day. She cleared for Bermuda in ballast, (coal.)"[2]

On the 20th she arrived in Bermuda, making the passage in eleven days. The Consul at Bermuda says, in his report to Mr. Seward: "This vessel is undoubtedly faster than any heretofore here. She is to be under the command of Captain Horner, formerly of the Flora, and recently in the Index. He is an Englishman by birth."[3]

Again, on the 30th of May, he says: "The following steamers [six in all] have left here to run the blockade, probably for Wilmington. * * * May 24, Atlanta, Horner, master."

On the 6th of August the Atlanta, with her name changed to the Tallahassee, left Wilmington, North Carolina, armed as a vessel of war, and ran the blockade of that port. On the 18th of the same month she arrived at Halifax, Nova Scotia, for coal, having, in the mean time, destroyed a large number of vessels.[4] She remained in port about forty hours, and, having supplied herself with coal for her return, sailed on the 19th, and again reached Wilmington through the blockade on the 26th.[5]

The United States, having had reason to believe she had been armed at Bermuda, complained to the Government of Great Britain. The matter was referred to the authorities at Bermuda, and on the 14th of November, 1864, the Lieutenant-Governor reported:

> The Atlanta was reported here from Wilmington, with cargo, on the 6th of last July, and she was cleared on the 11th of July for Nassau, with a cargo of seven hundred cases of preserved meats, and fifty casks of bacon; she left under British certificate of registry, and carrying British merchandise. All the requisites to a regular clearance were fulfilled. If she went to Wilmington, as is probably the case, notwithstanding her having cleared for Nassau, she would have reached that port about the 15th or 16th of July, between which dates and the 1st of August she probably took in her armament. Everything, except direct testimony, is against the belief that the Tallahassee was armed at Bermuda.[6]

The Tallahassee remained in commission until the 15th of December, 1864,[7] and cruised for a short time off the coast, in the early part of November, under the name of the Olustee. On this cruise she made a few captures, and returned to Wilmington.[8]

After her armament was removed she was loaded with cotton, and, on the 27th of December, under the name of the Chameleon, left Wilmington, for Bermuda. At that port she was loaded with a return cargo for Wilmington, but, being unable to run the blockade, proceeded to Nassau. From there she attempted to get into Charleston, but, being prevented in this, returned to Bermuda; and from there went to Liverpool, consigned to Frazer, Trenholm & Co.[9]

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[1] Am. App., vol. vii, p. 727.
[2] Ibid.
[3] Am. App., vol. vii, p. 728.
[4] Brit. App. Counter Case, vol. v, p. 144.
[5] Am. App., vol. vi, p. 726.
[6] Brit. App. Counter Case, vol. v, p. 150.
[7] Am. App., vol. vi, p. 726.
[8] Ibid., p. 733.
[9] Brit. App. Counter Case, vol. v, p. 161.

THE CHICKAMAUGA.

This vessel was formerly the blockade-runner Edith. The consul of the United States at London, in writing Mr. Seward on the 11th of March, 1864, said: "The steamer Edith, the last double screw completed, left on Wednesday last for Bermuda. The Edith makes the ninth double-screw steamer which has been built for the rebel service in this port."[1] She was employed as a blockade-runner, and as such was once or twice at Bermuda. Having been armed at Wilmington she ran through the blockade on the 28th of October, 1864, as a cruiser, and reached Bermuda in that capacity on the 6th of November. Here she was supplied with coal from the bark Pleiades, and, after remaining nine days, got under way, and returned to Wilmington, where she arrived on the 19th of November. Her armament was then taken out of her, and she was reduced to her original condition as a transport.

The Chickamauga.

[1] Am. App., vol. vi, p. 723.

XI.—CONSIDERATION OF THE DUTIES OF GREAT BRITAIN, AS ESTABLISHED AND RECOGNIZED BY THE TREATY, IN REGARD TO THE OFFENDING VESSELS, AND ITS FAILURE TO FULFILL THEM, AS TO EACH OF SAID VESSELS.

We are now prepared for a definite application of the law and the facts, under which the determination of the Tribunal is to be made, to the question of the duties of Great Britain, in the premises of the Arbitration, and its performance thereof or failure therein.

The ample discussions of pertinent questions and principles of public and municipal law, to be found in the Cases and Counter Cases of the two Governments, and subjected to comment in an earlier part of this Argument, it is not our purpose here to repeat or renew. We shall better observe the requirements of the Argument at this stage of it, by a brief statement of the propositions which should assist and control the judgment of the Arbitrators in deciding the main issue of fact on which their award is to turn, that is to say, the inculpation or the exculpation of Great Britain in the matter of the offending vessels.

PROPOSITIONS OF LAW.

MEASURE OF INTERNATIONAL DUTY.

I. The Three Rules of the Treaty furnish the imperative law as to the obligations of Great Britain in respect of each of the vessels which is brought under review. The moment that it appears that a vessel is, in itself, within the description of the first article of the Treaty, as being one of "the several vessels which have given rise to the claims generically known as the 'Alabama Claims,'" it becomes a subject to which the three rules are applicable.

Rules of the treaty imperative.

II. This primary inquiry of fact, which simply determines that the *jurisdiction* of the Tribunal embraces the vessel, is followed, necessarily, by the further inquiry of fact, whether or no the vessel, in its circumstances, falls within the predicament of either the first clause or the second clause of the first rule. If it does, the Tribunal has further to consider whether Great Britain has used, in regard to said vessel, the "due diligence" which is insisted upon by that rule, and the failure in which inculpates Great Britain, and exposes it to the condemnation of responsibility and reparation therefor to the United States.

Application of the first rule.

III. Whatever may be the scope and efficacy of the second Rule, and of the third Rule, in future or in general, for the purposes of the present Arbitration, the subjects to which either of them can be applied, in reference to the issue of the inculpation or exculpation of Great Britain, must be embraced within the limitation of the first article of the Treaty, and so, connected with some or one of "the several vessels which have given rise to the claims generically known as the 'Alabama Claims.'" But in regard to any such vessel, the

Application of the second and third Rules.

general injunctions of these two Rules furnish, in their violation, a ground for the inculpation of Great Britain, and its condemnation to responsibility and reparation therefor to the United States.

IV. It is not at all material or valuable, in its bearing upon the deliberations or award of the Tribunal, to inquire whether the obligations of duty laid down in the Three Rules are commensurate with the obligations imposed by the "principles of International Law which were in force at the time when the claims mentioned in Article I [of the Treaty] arose." These Rules constitute the LAW of this controversy and of this Tribunal in its jurisdiction of it, by force of the twofold declaration, (1) that, "in deciding the matters submitted to the Arbitrators, they shall be governed" by them, and (2) that "in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these Rules."

These Rules constitute the law of this controversy.

V. The true force of the subordinate provision that, besides the Rules, "such principles of International Law, not inconsistent therewith, as the Arbitrators shall determine to have been applicable to the case," shall govern them in their decision, is, necessarily, to introduce from the general doctrines of International Law whatever may corroborate or increase the vigor of the Rules, and their scope and efficiency, but to admit nothing, from such general doctrines, in reduction or disparagement of the Rules.

Nothing admissible which diminishes their force.

VI. An assent to these indisputable propositions disposes of a very considerable part of the more remote argument of the Case and Counter Case of Her Majesty's Government.

(*a*) The duties in respect of which the conduct of Great Britain, in fulfilling or failing to fulfill the same, is to be judged by the Tribunal, are, by the terms of the Treaty, authoritatively assigned as duties of Great Britain towards the United States, of international obligation. Not only does the Treaty declare that Great Britain was "*bound*" to the fulfillment of these duties, but it further declares that "the Arbitrators should *assume that Her Majesty's Government had undertaken to act*" in obedience to that obligation. All speculations, therefore, of a legal or practical character, presented in the Case or Counter Case, and turning upon the question of the duties here under judgment being duties of Great Britain to its own alws and its own subjects, and its accountability to the United States being only secondary and of comity, seem unprofitable to the present inquiry.

The obligation of Great Britain to observe these rules was an international one.

(*b*) The efforts of the Case and Counter Case to ascribe to, or apportion among, the various departments of national authority, legislative, judicial, and executive, principal or subordinate, the true measure of obligation and responsibility, and of fault or failure, in the premises, *as among themselves*, seem wholly valueless. If the sum of the obligations of Great Britain to the United States was not performed, the Nation is in fault, wherever, in the functions of the state or in their exercise, the failure in duty arose.

This obligation not affected by internal distribution of powers of British government.

(*c*) So, too, the particular institutions or habits of the people of Great Britain, or the motives or policy of its Government in respect of commercial freedom, unrestricted activity, maxims or methods of judicial procedure, limitations of prerogative, and similar internal arrangements of people and Government, cease to have any efficacy in determining the judgment of this Tribunal upon the fulfillment of, or default in, international duty. Domestic liberty, however valuable to, and in, a state, is not a warrant for international

Nor by the institutions or habits of the British people.

license; nor can its advantages be cherished by Government or people at the cost of foreign nations. Indeed, when a special obligation or particular motive induces, and in some sense justifies, failure in international duty, the offending nation assumes the necessary amends and reparation to the foreign state. A notable instance of this is found in the course of the United States toward Great Britain, when the former had failed in what they admitted to be their international duty to prevent the outfit of French privateers, by reason of certain special relations to France. Compensation to Great Britain for injuries by the offending cruisers was conceded.

VII. The preceding observations leave the affirmative statement of the obligations resting upon Great Britain to secure the fulfillment of this international duty to the United States, free from difficulty.

Great Britain should have used seasonable, appropriate, and adequate means to preserve its neutrality.

(*a*) These obligations required that all SEASONABLE, APPROPRIATE, and ADEQUATE means to the accomplishment of the end proposed, should be applied and kept in operation by Great Britain, from the first occasion for their exhibition until the necessity was over.

Which means should have been available as soon as required.

(*b*) As the situation calling for the discharge of these obligations on the part of Great Britain was not sprung upon it unawares, but was created by the Queen's Proclamation, (a measure of state adopted after deliberation in its own Government, and upon conference with another great European power,) the means to meet the *duties* of the proclaimed neutrality should, at once, have been found at the service of the Government, or promptly prepared, if deficient, that no space might intervene between the deliberate assumption of these duties by the Government, and a complete accession of power to fulfill them.

British sympathy with insurgents an element to be considered in preparing means.

(*c*) The dangers and difficulties that would attend and embarrass the Government in the fulfillment of these duties, from the actual disposition of its own people, and the urgent needs of the Rebel belligerents, constituted necessary elements in the estimate of the actual duties the Government must be prepared to fulfill, and in the forecast of the means to meet and cope with such dangers and difficulties. The immense temptation to British interests to absorb the share of the commerce of the world, which its great competitor possessed, the immense temptation to the Rebel belligerents to allure these interests of the British people to an actual complicity in the preparation and maintenance of maritime hostilities, and, finally, to drag the British Government into formal war against the United States, were within the immediate field of observation to Her Majesty's Ministers, and made a principal feature of the situation they had produced, and were required to control. The British Case and Counter Case have given prominence to these considerations, in deprecation of the judgment of this Tribunal against Great Britain for the actual incompetency with which it met the duties of the situation. They tend rather to a condemnation, in advance, for negligence of Great Britain, thus advised of the duty imposed upon it, and failing to meet it successfully.

Other elements to be considered.

(*d*) The aptitude or sufficiency of the system or staff of public officers at the command of the Government for the required service of this international duty to the United States; the possession of Executive power to conduct the duties of the situation of neutrality which it had been competent to create, or the need of recourse to Parliament to impart it; the force and value of the punitive or repressive legislation designed to deter the subjects from complicity in the Rebel hostilities, in violation of the Government's duties to prevent such

complicity;—all these were to be dealt with as practical elements in the demands upon the Government in fulfillment of its duties, and were to be met by well-contrived and well-applied resources of competent scope and vigor.

In view, then, of all these considerations, from the issue of the Queen's Proclamation to the close of the rebellion, the Rules of the Treaty of Washington exact from Great Britain the preparation and the application, in prevention of the injuries of which the United States now complain, of *seasonable*, *appropriate*, and *adequate* means to accomplish that result.

THE MEANS OF FULFILLING INTERNATIONAL DUTY POSSESSED BY GREAT BRITAIN.

I. That Great Britain possessed all the means which belong to sovereignty, in their nature, and, in a measure, of energy and efficacy, suitable to her proud position among the great Powers of the world, to accomplish whatever the will of the Government should decree, has never been doubted by any other Power, friendly or hostile. The pages of the British Case and Counter Case devoted to suggestions to the contrary, will not disturb this opinion of the world, and Great Britain, for the purposes of this Arbitration and the judgment of the Tribunal, must remain the powerful Nation which it is, with the admirable Government which it possesses in all other relations. Whatever infirmity shall have shown itself in the conduct of the Government, in the premises of this inquiry, it is attributable solely to debility of purpose or administration, not to defect of power.

Her Majesty's Government possessed full power to carry out its selected course of action.

II. The whole body of the powers suitable to the regulation and maintenance of the relations of Great Britain, *ad extra*, to other nations, is lodged in the Prerogative of the Crown. The intercourse of peace, the declaration and prosecution of war, the proclamation and observance of neutrality, (which last is but a division of the general subject of international relations in time of war,) are all, under the British Constitution, administered by the Royal Prerogative. Whether, or to what extent, the common or the statute law of England may or should punish, by fines or forfeitures, or personal inflictions, acts of the subjects that thwart or embarrass the conduct by the Crown of these *external relations of the nation*, are questions which belong to domestic policy. Foreign nations have a right to require that the relations of Great Britain with them shall be suitably administered, and defective domestic laws, or their defective execution, are not accepted, by the law of nations, as an answer for violations of international duty.

The Prerogative of the Crown.

We refer to the debates in Parliament upon the Foreign Enlistment Bill in 1819, and on the proposition to repeal the Act in 1823, and to the debate upon the Foreign Enlistment Bill of 1870, (as cited in Note B of the Appendix to this Argument,) as a clear exhibition of this doctrine of the British Constitution, in the distinction between the executive power to *prevent* violations of international duty by the Nation, through the acts of individuals, and the *punitive* legislation in aid of such power, which needed to proceed from Parliament.

We refer, also, to the actual exercise of this Executive power by the Government of Great Britain, without any enabling act of Parliament to that end, in various public acts in the course of the transactions now in judgment before the Tribunal:

Its exercise during the rebellion.

1. The Queen's Proclamation of Neutrality, May 13, 1861.[1]

2. The regulations issued by the Government of Her Britanic Majesty in regard to the reception of cruisers and their prizes in the ports of the Empire, June 1, 1861; June 2, 1865.[2]

3. The Executive orders to detain the Alabama at Queenstown and Nassau, August 2, 1862.[3]

4. The Executive orders to detain the Florida at Nassau, August 2, 1862.[4]

5. The Executive orders to detain the rams at Liverpool, October 7, 1863.[5]

6. The debate and vote in Parliament justifying the detention of the rams by the Government "on their own responsibility," February 23, 1862.[6]

7. The final decision of Her Majesty's Government in regard to the Tuscaloosa, as expressed by the Duke of Newcastle to Governor Woodhouse, in the following words:

> If the result of these inquiries had been to prove that the vessel was really an uncondemned prize, brought into British waters in violation of Her Majesty's orders made for the purpose of maintaining her neutrality, I consider that the mode of proceeding in such circumstances most consistent with Her Majesty's dignity, and most proper for the vindication of her territorial rights, would have been to prohibit the exercise of any further control over the Tuscaloosa by the captors, and to retain that vessel under Her Majesty's control and jurisdiction, until properly reclaimed by her original owners.—November 4, 1863.[7]

8. The Executive order that, "for the future, no ship of war belonging to either of the belligerent powers of North America shall be allowed to enter or to remain or to be in any of Her Majesty's ports for the purpose of being dismantled or sold,"[8] September 8, 1864.

9: The final Executive orders to retain the Shenandoah in port "by force, if necessary," and to "forcibly seize her upon the high seas,"[9] September and October, 1865.

10. The rejection by Parliament of the section of the new Foreign Enlistment Bill, which provided for the exclusion from British ports of vessels which had been fitted out or dispatched in violation of the act, as recommended by the Report of the Royal Commission. This rejection was moved by the Attorney General and made by Parliament, on the mere ground that this power could be exercised by Order in Council.[10]

That these acts were understood by the Government of Great Britain to rest upon the Prerogative and its proper exercise, is apparent from the responsible opinions of the Law Officers given upon fitting occasions.

1. In regard to the Alabama, the Law Officers of the Crown wrote to Earl Russell on July 29, 1862:

> We, therefore, recommend that, without loss of time, the vessel [the Alabama] be seized by the proper authorities; after which an opportunity will be afforded to those interested, previous to condemnation, to alter the facts, if it may be, and to show an innocent destination of the ship.[11]

2. In the case of Laird's rams, the Law Officers of the Crown wrote to Earl Russell, on October 19, 1863:

> We are of the opinion, with respect to the first question submitted to us, that the answer to parties who have a right to make the inquiry should be that the seizure [of the rams] has been made by the orders of Her Majesty's Government under the authority of the provisions of the Foreign Enlistment Act.[12]

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[1] Brit. App., vol. iii. p. 17.
[2] Ibid., pp. 17–22; ibid., vol. v, pp.125–131.
[3] Ibid., vol. i, p. 203.
[4] Ibid., p. 29; ibid., vol. v, p. 55.
[5] Ibid., vol. ii, p. 384, *et. seq.*
[6] Am. App., vol. v, pp. 472-500.
[7] Brit. App., vol. i, p. 327.
[8] Ibid., vol. iii, p. 20.
[9] Ibid., vol. i, p. 657.
[10] Debate in Parliament, Note B, App. to this Argument.
[11] Brit. App., vol. i, p. 200.
[12] Ibid., p. 405.

3. In the House of Commons, on February 23, 1864, the Solicitor General, speaking of the seizure of the rams and defending the action of the Government, said: "We have done that which we should expect others to do for us, and no more."[1]

In the same debate the Attorney General, Sir Roundell Palmer, said:

The honorable gentleman asks what right the Government had to detain the ships. [Mr. Seymour Fitzgerald: "Hear, hear."] The honorable gentleman cries, "Hear;" but I do not hesitate to say boldly, and in the face of the country, that the Government, on their own responsibility, detained them.[2]

He, Sir Roundell Palmer, said further:

In a criminal case we know that it is an ordinary course to go before a magistrate, and some information is taken of a most imperfect character to justify the accused's committal to prison for trial, the prisoner being remanded from time to time. And that course cannot be adopted in cases of seizing of vessels of this description. The law gives no means for that; and therefore it is that the Government on their own responsibility must act, and have acted, in determining that what had taken place with regard to the Alabama should not take place with respect to these ships.[3]

4. In the House of Commons, on the 28th of April, 1864, the Attorney General, Sir Roundell Palmer, defending the action of the Government in regard to the Tuscaloosa, as expressed in the dispatch of the Duke of Newcastle, before quoted, said:

Can it be said that a neutral sovereign has not a right to make orders for the preservation of his own neutrality, or that any foreign power whatever violating these orders, provided it be done willfully or fraudulently, is protected to any extent by international law within the neutral territory, or has any right to complain on the ground of international law of any means which the neutral sovereign may see fit to adopt for the assertion of his territorial rights? By the mere fact of coming into neutral territory in spite of the prohibition, a foreign power places itself in the position of an outlaw against the rights of nations; and it is a mere question of practical discretion, judgment, and moderation, what is the proper way of vindicating the offended dignity of the neutral sovereign.[4]

5. On the 26th of August, 1864, the Attorney and Solicitor General, writing particularly of the proposed executive order before referred to, in regard to the sale of belligerent war vessels in the ports of Great Britain, used these words:

The enforcement of such orders and directions, concerning as they do ships which, on their entrance into any port of Her Majesty, will have the character of public ships of war of a foreign Power, and will not yet have become the property of any of Her Majesty's subjects, does not belong to the municipal law of this country, but to the same branch of the Royal Prerogative, by virtue of which Her Majesty has the power of making peace and war and generally of conducting and controlling the external relations of this country with foreign Governments.[5]

6. On the 21st of April, 1865, the Law Officers of the Crown thus wrote to Earl Russel, in reply to a request for instructions to Governor Darling:

With respect to his Excellency's request that he may receive instructions as to the propriety of executing any warrant under the Foreign Enlistment act on board a Confederate (public) ship of war, we are of opinion that, in a case of strong suspicion, he ought to request the permission of the commander of the ship to execute the warrant; and that, if this request be refused, he ought not to attempt to enforce the execution; but that, in this case, the commander should be desired to leave the port as speedily as possible, and should be informed that he will not be re-admitted into it.[6]

V. That the faculties for this *preventive* service are inseparable from the Executive power of every Government, in the conduct of its foreign relations, is proved by the concurrent evidence furnished in the proofs laid before the Arbitrators, respecting the means possessed by the principal nations of Europe, and by the

Preventive power inseparable from the idea of executive power.

[1] Am. App., vol. v, p. 496.
[2] Ibid., p. 477.
[3] Am. App., vol. v, p. 470.
[4] Ibid., p. 570.
[5] Brit. App., vol. i, p. 465.
[6] Ibid., p. 558.

United States and Brazil as well, for the fulfillment of the international duties of neutrality. The full power was exercised by the administration of President Washington before any such authority was imparted by Congress, and the later explicit communication of such authority by the legislation of the United States rested upon the propriety of corroborating Executive power under a Government without any personal prerogative in its Executive head. This distinction was well understood in the British Parliament, and is insisted upon in the debate upon the Foreign Enlistment Bill of 1819, set forth in Note B of the Appendix to this Argument. It was to this consideration that the *preventive* vigor which constitutes so important a difference between the *statutes* of the United States and Great Britain owes its origin.

Peculiar advantages of Her Majesty's Government for the exercise of Executive power.

VI. The limited territory of Great Britain, its complete system of magistracy, its extensive and ramified organization of commercial and port regulations, for the inspection and control of its immense customs revenue, shipping, and navigation, its network of railroads and telegraphs, which brought every part of its narrow territory under the eye and hand of the central administration, gave to the Government the instant and universal means of executing its purposes of international duty, without chance of miscarriage or need of delay.

Omnipotence of Parliament.

VII. The omnipotence of Parliament, the great principle of the British constitution, was always at the service of the Government, to supply, extend, or confirm its authority in the matter of international duty, and the means and agencies of its prompt, vigilant, and adequate exercise. Parliament was in session at the time of the Queen's Proclamation, and took notice, at the moment, of the effects it had produced in the law of piracy as applicable to the maritime violence it would induce, as well as of the probable maritime instruments that the Rebel interests would press into their service. Parliament was in session, also, when the Florida and Alabama were in course of construction, when the Government was deliberating upon their detention, and when they actually escaped unimpeded. The alacrity with which Parliament could respond with immediate and effective legislation at the call of the Government, and upon the occasion of *opening war* calling into exercise the fulfillment by Great Britain of its international duty of neutrality, is clearly shown by the debate and action of Parliament in the passage of the new foreign-enlistment act of 1870. We refer again to Note B of the Appendix to this Argument.

Upon the whole, then, it is not to be gainsaid that the Government of Great Britain had at its command every means in their nature and in their energy and scope that any Power needs or possesses for the fulfillment of the obligations assigned to it within the premises of this Arbitrati on, by the Treaty of Washington or the law of nations.

THE DUTY OF GREAT BRITAIN IN ITS TREATMENT OF THE OFFENDING VESSELS AFTER THEIR FIRST ILLEGAL OUTFIT AND ESCAPE FROM BRITISH PORTS.

I. This subject, discussed at some length in the British Case and Counter Case, may be disposed of by a few elementary propositions:

The privilege of ex-territoriality accorded to a vessel of war is political and discretionary.

(*a*) It is undoubtedly consonant with principle and usage, that a public-armed vessel of a sovereign power should be accorded certain privileges in the ports and waters of other national jurisdictions not accorded to private vessels. The substance of these privileges is a limited concession of the character

of continued territoriality of the State to which they belong, and a consequent exemption from the *jurisdiction of the courts and process* of the nation whose ports or waters they visit. But the same reason which gives support to this immunity throws them under the immediate political treatment of the hospitable State, as represented by its Executive head, in the conduct of this international, if subordinate, relation. How, under the circumstances of each case calling for Executive action, the vessels are to be dealt with is determined, in the first instance, by the Government having occasion to exhibit the treatment. For its decision, and the execution of it, it is responsible, politically and internationally, and not otherwise, to the sovereign whose public ships have been so dealt with. That, ordinarily, the offense calling for remonstrance or intervention would not be made the subject of immediate and forcible correction, applied to the vessel itself, but would be brought to the attention of its sovereign for correction or punishment and apology, or other amends, may be assumed. But all this is at the discretion of the power having occasion to exert, control, seek redress, or exhibit resentment. The flagrancy or urgency of the case may dictate another course, to be justified to the sovereign affected upon such considerations.

(*b*) When, however, the anomalous vessels of a belligerent *not recognized as a nation or as a sovereign* claim a public character in the port of hospitality, the only possible concession of such character must, in subtracting them from judicial control, subject them to immediate political regulation *applied to the vessels themselves*. There is behind them no sovereign to be dealt with, diplomatically or by force. *The vessels themselves* present and represent at once whatever theoretical public relation exists or has been accepted. To hold otherwise would make the vessels wholly lawless and predominant over the complaisant sovereign, helplessly submissive to the manifold *irresponsibilities* the *quasi* public vessels assume to themselves.

It should not be acceded to a belligerent not recognized as a political power.

(*c*) The necessary consequence is that when the offending vessels of the non-sovereign belligerent have taken the seas only by defrauding or forcing the neutrality of the nation whose hospitality they now seek, such nation has the right, and, as toward the injured nation demanding its action upon the offending vessels, is under the obligation, to execute its coersive, its repressive, its punitive control over the vessels themselves. It cannot excuse itself to the injured nation for omission or neglect so to do by exhibiting its resentment against, or extorting redress from, any responsible sovereign behind the vessels; nor can it resort to such sovereign for indemnity against its own exposure to reprisals or hostilities, by the injured nation, or for the cost of averting them.

The only remedy against such belligerent, in a case like the present, is the remedy against the vessels themselves.

II. Upon these plain principles, it was the clear duty of Great Britain, in obedience to the international obligations insisted upon by the Treaty, and the supporting principles of the law of nations invoked by its requirement, to arrest these offending vessels as they fell under its power, to proscribe them from all hospitality or asylum, and thus to cut short and redress the injury against the United States which it had, for want of "due diligence" in fulfilling its duty of neutrality, been involved in. The *power*, full and free, to take this course is admitted by the British Government in its Case and Counter Case. Whatever motives governed Great Britain in refusing to exercise this power, such refusal, as toward the United States, is without justification, and for the continued injuries inflicted by the offending vessels Great Britain is responsible, and must make indemnity.

Great Britain ought, therefore, to have seized the vessels.

DUE DILIGENCE AS REQUIRED BY THE THREE RULES OF THE TREATY AND THE PRINCIPLES OF INTERNATIONAL LAW NOT INCONSISTENT THEREWITH.

Due diligence.

I. The subject of "due diligence," both in its nature and its measure, as an obligatory duty of Great Britain under the Three Rules of the Treaty, is much considered, upon principle and authorities, in the Case of the United States, and is commented upon, with some fullness, in the British Case and Counter Case. Neither a very technical nor a merely philosophical criticism of this definite and practical phrase, adopted by the High Contracting Parties and readily estimable by the Tribunal, can be of much service in this Argument. Some propositions and illustrations may aid the Arbitrators in applying the obligation thus described to the facts and circumstances under which its fulfillment or failure therein is to be decided by their award.

After proof of hostile acts on neutral territory, the burden of proof is on the neutral to show due diligence to prevent them.

II. The foundation of the obligation of Great Britain to use "due diligence to *prevent*" certain acts and occurrences within its jurisdiction, as mentioned in the Three Rules, is that those acts and occurrences within its jurisdiction are offenses against international law, and, being injurious to the United States, furnish just occasion for resentment on their part, and for reparation and indemnity by Great Britain, *unless* these offensive acts and occurrences shall be affirmatively shown to have proceeded from conduct and causes for which the Government of Great Britain is not responsible. But, by the law of nations, the state is responsible for *all* offenses against international law arising within its jurisdiction, by which a foreign State suffers injury, unless the former can clear itself of responsibility by demonstrating its freedom from fault in the premises.

The High Contracting Parties, mindful as well of this principal proposition of responsibility of a State as of this just limitation upon it, have assigned as the true criterion by which this responsibility is to be judged, in any case arising between nations, the exhibition or omission on its part of "due diligence to prevent" the offenses which, of themselves, import such responsibility. The offenses and the injuries remain, but the responsibility of the one nation and the resentment of the other therefor are averted by exculpation of the State at whose charge the offenses lie, upon adequate proofs to maintain its defense.

The nature of the presumptive relation which the State bears to the offenses and injuries imputed and proved, necessarily throws upon it the burden of the exculpatory proof demanded, that is to say, the proof of due diligence on its part to prevent the offenses which, in fact, and in spite of its efforts, have been committed within its jurisdiction, and have wrought the injuries complained of.

III. It is incumbent, then, upon Great Britain to satisfy the Tribunal that it used "due diligence to prevent" what actually took place, and for which, in the absence of such "due diligence to prevent," the Tribunal will adjudge it responsible. The nature of "diligence," and the measure of it exacted by the qualifying epithet "due," may now be considered.

Diligence not a technical word.

(*a*) The English word *diligence* in common usage, and in the text of the treaty alike, adheres very closely to the Latin original, *diligentia*. It imports, as its derivation from *diligo* (to love, or to choose earnestly) requires, enlistment of zealous purpose toward the object in view, and activity, energy, and even vehemence, in its attainment. It has been adopted both in the civil law and in the common law of England, from common speech, and for this virtue in its

vulgar meaning, which can give practical force and value to the legal duty it is used to animate and inspire. So far, then, from the word bearing a technical or learned sense, in its legal application either to private or national obligations, the converse is strictly true. A definition from approved authorities of the English language, common to the high contracting parties, is the best resort for ascertaining the sense intended in the text of the treaty. Webster defines "diligence" as follows: "Steady application in business of any kind; constant effort to accomplish what is undertaken; exertion of body or mind, without unnecessary delay or sloth; due attention; industry; assiduity." He gives also this illustrative definition: "*Diligence* is the philosopher's stone that turns everything to gold;" and cites, as the example of its use, this verse from the English Scriptures: "Brethren, give *diligence* to make your calling and election sure."

We confidently submit that no appreciation of the sense of this cardinal phrase of the Treaty is at all competent or adequate which does not give full weight to the ideas of enlisted zeal, steady application, constant effort, exertion of all the appropriate faculties, and without weariness or delay, attention, industry, and assiduity.

(*b*) The qualifying epithet "due" is both highly significant and eminently practical. It requires the "diligence," in nature and measure, that is *seasonable, appropriate, and adequate* to the exigencies which call for its exercise. It is to be, in method, in duration and in force, the diligence that is suitable to, or demandable by, the end to be accomplished, the antecedent obligations, the interests to be secured, the dangers to be avoided, the disasters to be averted, the rights that call for its exercise.[1] "*Præstat exactam diligentiam*," a phrase of the civil law, is a just description of the undertaking "to use due diligence." Those who incur this obligation to prevent an injury are excused from responsibility, if they fail only by deficiency of power. "Ceux qui, pouvant empêcher un dommage que quelque devoir les engageait de prévenir, y auront manqué, pourront en être tenus suivant les circonstances."[2]

"Due" implies seasonableness, appropriateness, and adequateness.

(*c*) The British Case and Counter Case attempt to measure "due diligence" in the performance of this international duty to the United States in the premises of this Arbitration by the degree of diligence which a nation is in the habit of employing in the conduct of its own affairs. It is objection enough to this test that it resorts to a standard which is in itself uncertain and fluctuating, and which, after all, must find its measure in the same judgment which is to pass upon the original inquiry, and to which it may better be at once and directly applied. It is quite obvious, too, that this resort can furnish no standard, unless the domestic "affairs" referred to be of the same nature, magnitude, and urgency as the foreign obligations with which they are thus to be compared. Probably, the United States might be well satisfied with the vigilance and activity, and scope and energy of means, that Great Britain would have exhibited to prevent the outfit and escape from port of the Alabama and her consorts, had *her own commerce* been threatened by the hostilities they were about to perpetrate, and her own ships been destined to destruction by the fires they were to light. But this is not the standard which the Arbitrators are invited to assume by this reasoning of the British Case and Counter Case. They are expected to measure the due diligence

Objections to British definition of the term.

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[1] See Webster's Dictionary *in verbo* DUE.

[2] Domat, Lois civiles, liv. ii, tit. 8, § 4, No. 8.

which Great Britain was to use, under the requirements of the Treaty, to prevent the destruction of the commerce and maritime property of the United States by the ordinary system of detection of frauds upon the customs. Even this comparison would not exculpate, but would absolutely condemn, the conduct of Great Britain in the premises; but the standard is a fallacious application of the proposed measure of diligence, and the measure itself, as we have seen, is wholly valueless.

Judicial definitions by British and American courts.

III. The maxims and authorities of the law of "due diligence" in the determination of private rights and redress of private injuries may not very often present sufficiently near analogies, in the circumstances to which they are applied, to the matter here under judgment, to greatly aid the deliberations of the Tribunal. There is, however, one head of the law of private injuries, familiar to the jurisprudence of these two great maritime powers, which may furnish valuable practical illustrations of judicial reason which they both respect, and whose pertinency to certain considerations proper to be entertained by the Arbitrators cannot be disputed. We refer to the law of responsibility and redress for *collisions at sea.*

In the first place, this subject of marine collisions is regarded by scientific writers on the law of diligence as falling within the rules which govern liability for *ordinary negligence*, the position in which the contentions of the British Case and Counter Case seek to place international responsibility of Great Britain to the United States.

In the second place, the controversy between the parties in these cases is admitted to exclude the notion of intent or willful purpose in the injury, an element so strongly insisted upon in defending Great Britain here against the faults laid to her charge by the United States.

In the third place, the circumstances of difficulty, danger, obscurity, uncontrollable and undiscoverable influences, and all possible opportunities of innocent error or ignorance, form the staple elements of the litigation of marine collisions, as they are urged, with ingenuity and persistency, in defense before this Tribunal against the responsibility of Great Britain for the disasters caused to the United States by the means and agencies here under review.

And, lastly, the eminent judges who have laid down the law for these great maritime Nations, in almost complete concurrence, in this department of jurisprudence, have not failed to distinguish between *fault* and *accident*, in a comprehensive and circumspect survey of the whole scene and scope of the occurrences, from the moment that the duty arose until the catastrophe, and through all the stages of forecast, precaution, provision, and preparation, which should precede, and of zeal, activity, promptitude, and competency, which should attend, the immediate danger. We cite a few cases, not dependent upon a knowledge of their special facts for the value of the practical wisdom they inculcate, and taken, with a single exception, from British decisions:

In law, inevitable accident is that which a party charged with an offense could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is, could previous measures have been adopted to render the occurrence of it less probable? (The Virgil, 7 Jur., 1174; 2 W. Rob., 205; Notes of Cases, 499; The Juliet Erskine, 6 Notes of Cases, 633; The Mellona, 3 W. Rob., 13; 11 Jur., 783; 5 Notes of Cases, 450; The Dura, 5 (Irish) Jur., (N. S.,) 384.)[1]

In order to establish a case of inevitable accident, he who alleges it must prove that what occurred was entirely the result of some *vis major*, and that he had neither contributed to it by any previous act or omission, nor, when exposed to the influence of the force, had been wanting in any effort to counteract it. (The Despatch, 3 L. J., (N. S.) 220.)[2]

[1] Pritchard's Adm. Dig., 2d ed., vol. i, p. 133.

[2] Ibid., p. 134.

It is not a *vis major* which excuses a master, that his vessel had caused damages to another in a tempest of wind, when he had warning and sufficient opportunity to protect her from that hazard. (The Lotty, Olcott, Adm., 329.)[1]

It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled the vessel doing the damage to have descried the other vessel in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed. (The Mellona, 11 Jur., 783; 3 W. Rob., 13; 5 Notes of Cases, 450.)[2]

It is necessary that the measures taken to avoid a collision should not only be right, but that they should be taken in time. (The Trident, 1 Spink's Eccl. and Adm. Rep., 222.)[3]

If circumstances arise evidently and clearly requiring prudential measures, and those measures are not taken, and the natural result of such omission is accident, the court would be inclined to hold the party liable, even if such result were only possible. (The Itinerant, 2 W. Rob., 240; 8 Jur., 131; 3 Notes of Cases, 5.)[4]

The want of an adequate look-out at the time on board a vessel at sea is a culpable neglect on her part, which will, *prima facie*, render her responsible for injuries received from her. (The Emily, Olcott, Adm., 132; 1 Blatch. Ct. Ct., 236; The Indiana, 1 Abb., Adm., 330.)[5]

To constitute a good look-out there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty. The George, 9 Jur., 670; 4 Notes of Cases, 161.[6]

IV. In assigning a just force to the "due diligence," upon the presence of which, in the failure of Great Britain actually to prevent the injuries complained of, its exculpation by the tribunal is to turn, we have had no occasion to insist upon any severity or weight of obligation too burdensome for the relation of neutrality to endure. On the contrary, both the sentiments and the interests of the United States, their history and their future, have made, and will make, them the principal advocates and defenders of the *rights* of neutrals before all the world. In pleading before this Tribunal for indemnity at the hands of Great Britain for the vast injuries which its non-fulfillment of neutral *duties* has caused, the United States desire no rule or measure of such duties to be assumed or applied by this tribunal that its enlightened and deliberate judgment would not assign as suitable to govern the conduct of each one of the equal and independent Powers which are represented in this Arbitration. The United States do not themselves undertake to become to other nations *guarantors* of the action of all persons within their jurisdiction, and they assert no such measure of responsibility against Great Britain. They lay no claim to *perfection* or *infallibility* of administration, or security against *imposition*, *misadventure*, *miscarriage*, or *misfortune*, nor would they seek to charge Great Britain, or any other nation, upon any such requirement or accountability. But the United States do maintain that the disposition and action comporting with "due diligence," as reasonably interpreted, are adequate to prevent, and will prevent, but for extraordinary obstacles or accidents, violations, by a powerful State, of its duties to other nations; that when such prevention fails, the proof of this disposition and action toward prevention, and of the obstacles and accidents that thwarted the purpose and the effort, are demandable by the aggrieved nation, and that upon that proof the judgment of exculpation or inculpation is to proceed.

The United States do not desire a severe construction.

They do not propose to become guarantors of their people.

V. In conclusion, we conceive that the Arbitrators are unquestionably the rightful judges of what constitutes "due diligence," in the sense of the Treaty, and that this secures not only to the contending parties, but to the rights, duties, and interests

The Arbitrators the judges of what constitutes due diligence.

[1] Pritchard's Adm. Dig., 2d ed., vol. i, p. 134, note.
[2] Ibid., p. 135.
[3] Ibid., p. 140.
[4] Ibid., p. 141.
[5] Ibid., p. 134, note.
[6] Ibid., p. 143.

cared for by the law of nations, a reasonable, a practical, and a permanent rule and measure of obligation, just in its judgment of the past, and wise and beneficent in its influence on the future. We concur in the final considerations of the British Counter Case on this subject of due diligence, in leaving "the Arbitrators to judge of the facts presented to them by the light of reason and justice, aided by that knowledge of the general powers and duties of administration which they possess as persons long conversant with public affairs."[1]

[1] Brit. Counter Case, p. 125.

XII.—THE FAILURE OF GREAT BRITAIN TO FULFIL ITS DUTIES, AS ESTABLISHED AND RECOGNIZED BY THE TREATY, CONSIDERED UPON THE FACTS.

CONSIDERATIONS OF GENERAL APPLICATION.

It is assumed in the British Case, and argued in addition in the Counter Case, that the only vessels which fall within the description of the first Article of the Treaty as "the several vessels which have given rise to the claims generically known as the "Alabama claims,'" are the Florida, Alabama, Georgia, and Shenandoah. As to these vessels there is no contention in this respect, and they and their history and career are included, indisputably, within the jurisdiction conferred upon the Tribunal by the Treaty of Washington.

The vessels concerning whose acts the contention is.

The Case of the United States sets forth a list of certain other vessels, which they understand to be embraced within the jurisdiction of the Tribunal, and the circumstances of whose dispatch and career bring them within the application of the Rules of the Treaty, and of the condemnation of Great Britain by the Tribunal for failure to fulfill the duties in this regard insisted upon by these Rules, and the principles of International Law not inconsistent therewith. Of these, three, viz, the Clarence, the Tacony, and the Archer, are described as tenders of the Florida; and one, the Tuscaloosa, as a tender of the Alabama. The others, the Sumter, the Nashville, the Retribution, the Tallahassee, and the Chickamauga, are independent vessels. In addition to the evidence furnished by the history of each of these vessels in the Case of the United States, the Counter Case presents special considerations to show that all these vessels fall within the description of the Treaty jurisdiction of the Tribunal.[1]

The specific facts connected with these several vessels have been made the subject of comment in previous pages of this Argument, and they do not need to be further specially noted at present. Undoubtedly the "considerations of fact of general application," which now occupy our attention, have their most important relation to the Florida, the Alabama, the Georgia, and the Shenandoah, the principal agents in the injuries to the United States which enter into the subject of this Arbitration, and any special applicability to the circumstances of the other vessels need not at present attract our attention.

We present now to the notice of the Arbitrators certain GENERAL FACTS which inculpate Great Britain for failure to fulfill its obligations in the premises, as assigned by the Treaty.

Failure of Great Britain to fulfill its obligations.

I. The absolute omission by Great Britain to organize or set on foot any scheme or system of measures, by which the Government should be put and kept in possession of information concerning the efforts and proceedings which the interests of the Rebel belligerents, and the co-operating zeal or cupidity of its own subjects would and did plan and carry out, in violation of its neutrality,

Negligence in obtaining information.

[1] Counter Case of the United States, pp. 3, 4.

is conspicuous from the outset to the close of the transactions now under review. All the observations in answer to this charge, made in the contemporary correspondence, or in the British Case or Counter Case, necessarily admit its truth, and oppose the imputation of want of "due diligence" on this score, upon the simple ground that the obligations of the Government did not require it, and that it was an unacceptable office, both to Government and people.

No general means of immediate action provided.

Closely connected with this omission was the neglect to provide any systematic or general official means of immediate action in the various ports or ship-yards of the kingdom, in arrest of the preparation or dispatch of vessels, threatened or probable, until a deliberate inspection should *seasonably* determine whether the hand of the Government should be laid upon the enterprise, and its project broken up and its projectors punished. The fact of this neglect is indisputable; but it is denied that the use of "due diligence to prevent" involved the obligation of any such means of prevention.

No general instructions to maintain vigilance.

We cannot fail to note the entire absence from the proofs presented to the Tribunal of any evidence exhibiting any desire or effort of the British Government to impress upon its staff of officers or its magistracy, of whatever grade, and of general or local jurisdiction, by proclamation, by circular letters, or by special instructions, any duty of vigilance to detect, of promptitude to declare, of activity to discourage, the illegal outfit or dispatch of vessels in violation of international duty towards the United States.

No officers charged with instituting and maintaining proceedings.

It is not less apparent that Great Britain was without any prosecuting officers to invite or to act upon information which might support legal proceedings to punish, and, by the terror thus inspired, to prevent the infractions of law which tended to the violation of its international duty to the United States. It was equally without any system of executive officers specially charged with the execution of process or mandates of courts or magistrates to arrest the dispatch or escape of suspected or incriminated vessels, and experienced in the detective sagacity that could discover and appreciate the evidence open to personal observation, if intrusted with this executive duty.

It is no answer to the imputation of want of "due diligence" in all this, that Great Britain dispensed with prosecuting officers in its maintenance of public justice, and relied upon the private interests of aggrieved parties to prosecute, at their own charge, and by their own lawyers, for crimes or offenses against the laws. It may be that murder, and burglary, and forgery, and frauds, in Great Britain, can be thus safely left to private prosecutions, because of the common interest and protection of the community securing due attention to the public justice, where *all* are enlisted to punish, and *all* feel the need of protection. But what analogy is there, in this situation, to the case of international obligation, where a foreign nation is the only sufferer, and interest and feeling in the domestic community are, at the best, indifferent and remote from the crime and its consequences? The actual hostile disposition of the population of the ports and emporiums of Great Britain at the time of these international injuries to the United States we need not, for the purpose of this suggestion, insist upon.

No steps taken to break up the hostile system.

The result of all this was that the Government of Great Britain, in the various ways we have suggested, exhibited none of the disposition or action which we have insisted upon as included in the requirement of "due diligence to prevent" the occurrence of the injuries to the United States from the offending ves-

sels of which they now complain. Early advised and persistently reminded by the Minister of the United States of the system and organization introduced within the jurisdiction of Great Britain to prepare, put forth, and maintain from thence maritime war against the United States, the Government of Great Britain took no steps to be informed of, to break up, or to punish this *system*, or preclude or render difficult, in advance, particular projects in aid of this general purpose. It early adopted and steadily adhered to the method (1) of regarding the whole duty as a domestic one of enforcement of municipal law, and (2) of reducing the function of the Executive Government of England to that of a magistrate receiving the complaints of the United States, and, with such legal acumen as it could command, disposing of them upon the sole consideration of the completeness of the offense against the municipal law, and the competency and sufficiency of the proof in hand to secure a conviction, should a prosecution be thought worth while.

The idea of an international duty toward the United States rejected.

This theory and practice of Great Britain, rejecting the international duty and, necessarily, omitting any spontaneous, strenuous, and organized movements, *as a Government*, towards or in the discharge of such duty, were in themselves wholly inconsistent with, and contrary to "due diligence to prevent" the injuries to the United States, for which redress is now asked through the judgment of the Tribunal.

The obligations of Great Britain independent of steps taken by the officers of the United States in Great Britain.

The proposition covers the case of vessels which, in the absence of these necessary means for inspection and scrutiny, escaped the special notice of the Government. That they were not complained of, or discovered by the Minister of the United States, does not relieve Great Britain from its duty of "due diligence" to discover them, and to prevent their escape. The duty would have existed, if misfortune had deprived the United States of such a representative, or if broken diplomatic relations had removed him from the Kingdom. The proposition covers the cases of the Florida and the Alabama, were their more immediate features less obvious, and Great Britain's failure in duty only general. The proposition covers the cases of the Georgia and the Shenandoah, which escaped without attracting the notice of the British government, for the very best reason in the world, that it had taken no means to observe, to detect, or prevent their departure.

The Arbitrators will observe the wide difference from these views and conduct of Great Britain in the estimate which the United States have put upon their duty in these respects, of spontaneous, organized, and permanent vigilance and activity, and in the methods and efficacy of its performance. On all the occasions upon which this duty has been called into exercise, the Government of the United States has enjoined the spontaneous and persistent activity of the corps of District Attorneys, Marshals, Collectors, and the whole array of their subordinates, in the duties of observation, detection, information, detention, prosecution, and prevention.

The Government of United States always earnest to maintain its duties as a neutral.

These chapters in the history of the law of nations, as observed by the United States, need not here be reviewed. The materials in the proofs before the Arbitrators are ample for their examination, if occasion in their delibrations should arise. Whatever actual failures may have occurred in the execution by the United States of this admitted duty, they have been not for the want of, but in spite of, the exhibition and earnest prosecution of these general, spontaneous, and comprehensive means of prevention, the entire absence of which we complain of in the conduct of the Govern-

ment of Great Britain. Nor has the conduct of other great Powers, under a similar obligation of duty, either adopted the theory or followed the methods by which Great Britain governed itself. That the Government, *as such*, should act and continue to act, and have and use the means of acting, and, *in default of so doing*, be responsible for the consequence, is, we submit, the public law of nations as observed by the principal Powers, including Great Britain in other cases than that now in judgment before the Tribunal.

Absence of this earnestness on the part of Great Britain a license for the acts of hostility complained of.

It was the failure of the British Government "to use due diligence" to maintain inviolate its international obligations to the United States, in form, manner, and effect, as above stated, that gave the first warrant and license to the enlistment of the sympathies for the rebels and hostility to the Government of the United States, (which animated such large and influential interests in Great Britain,) in the actual practical service of the Rebellion. It was this absence of an active affirmative *disposition of diligence* in the Government, so apparent to all its subjects, to the Rebel agents, and to the Minister and Consuls of the United States, that threw the whole unchecked freedom of trade and industry, enterprise and appetence of gain, so much insisted upon in the British Case and Counter Case as a necessary part of British liberty, into zealous complicity with, and earnest adhesion to, the maritime war against the commerce of the United States, whose disasters are under review before the Tribunal. In this course of practical non-administration of the duty assigned by the Treaty as *binding* upon Great Britain, we ask the Tribunal to find a definite and substantial failure to fulfill that duty, and to inculpate the Nation accordingly.

As early as August 28, 1861, the principal newspaper of Liverpool (the Post) correctly described the state of feeling in the British community as follows:

> We have no doubt whatever that the vast majority of the people of this country, certainly of the people of Liverpool, are in favor of the cause espoused by the Secessionists. The defeat of the Federalists gives unmixed pleasure; the success of the Confederates is ardently hoped, nay, confidently predicted.

It was an appreciation of this influence prevailing in that community and affecting the local officers of the Government, that prompted Earl Russell to say:

> It appears to me that if the officers of the Customs were misled or blinded by the general partiality to the cause of the South, known to prevail at Liverpool, and that *prima-facie* case of negligence could be made out, Great Britain might fairly grant a sum equivalent to the amount of losses sustained by the captures of the Alabama.[1]

It needs no argument to show that if the Government of Great Britain in 1861 and 1862, when the systematic operations of the Rebel agents, in a community thus enlisted in their cause, were denounced by the Minister of the United States, had used to those agents and that community the language employed by Earl Russell in 1865, and had executed the sentiments thus expressed, there would have been no "Alabama claims" to occupy the attention of this Tribunal. Earl Russell, after stating that "he was sorry to observe that the unwarrantable practice of building ships in this country, to be used as vessels of war against a State with which Her Majesty is at peace, still continues," proceeded to say: "Now, it is very possible that by such shifts and stratagems the penalties of the existing laws of this country, nay, of any law that could be enacted, may be evaded; but the offense thus offered to Her Majesty's authority and dignity by the *de facto* rulers of

[1] Note B of Appendix to this Argument.

the Confederate States, whom Her Majesty acknowledges as belligerents, and whose agents in the United Kingdom enjoy the benefits of our hospitality in quiet security, remains the same. It is a proceeding totally unjustifiable, and manifestly offensive to the British Crown."[1]

Failure to ascertain extent of Prerogative and statutory powers.

II. The next great practical failure to fulfill its duty to the United States, on the part of Great Britain, was in its omission to ascertain its resources of Prerogative and statutory authority for maintaining its neutrality, and to announce to its subjects and to the Rebel agents the possession of these powers and the determination to use them. If an examination had satisfied the Government that it was not endued with the requisite faculties of *prevention*, it should have put them in practice, and scattered the machinations against its peace and honor, and against the maritime interests of the friendly power to which it was so closely engaged to observe its international duty. If, on the other hand, such examination disclosed doubts or defects of *preventive* Power, it should have obtained from Parliament the adequate authority. If the Government received from its principal Law Officers an interpretation of the Prerogative and of the Foreign Enlistment Act, that put at its service the *seasonable*, *appropriate*, and *adequate* means for the prevention of the acts and occurrences within its jurisdiction, which the Rules of the Treaty prescribe, it should have placed the ship-builders of Liverpool and the Clyde in the predicament of open contemners of the laws of the realm, and of actual conflict with the whole power of the Government.

If, on the other hand, these Law Officers advised a corroboration of the preventive power of the Government, it should have been granted by statute. We have searched in vain for any evidence in these regards of "due diligence" on the part of the Government at the opening of the Rebel hostilities. We find inflammation of popular sentiment urging a participation in those hostilities, and instant occasion for the Government to be energetic and alert. We find earnest and persistent appeals to take such a position made to the Government by the representatives of the United States. In 1870, when the war between France and Germany broke out, we find Great Britain enacting a vigorous Foreign Enlistment Statute, and exhibiting zeal and alacrity in the exercise of its new powers, and in putting in motion all the requisite prerogative authority by Orders in Council.

Suppose, for a moment, that in May, 1861, in sequence of the Queen's Proclamation, the Attorney General of England had brought into Parliament a Foreign Enlistment Bill to place at the service of the Executive Government the means of maintaining toward the United States the duties of neutrality which that Government by the Proclamation had assumed—such a Bill as was passed in 1870. Suppose, in so doing, he had, speaking the purposes and motives of the Executive Government, said:

> I think the House will agree that, upon the breaking out of this unexpected and most calamitous war, *Her Majesty's Government would have been very much to blame if they had delayed for a single day to introduce this measure.*[2]

Suppose other members of the Government had supported the Bill by arguments like these:

> He need not adduce arguments to show how unjustifiable and monstrous it would be for British subjects to take part in hostilities, when the avowed policy of the Government was that of perfect neutrality. * * * A similar law existed in the United States; while on the continent, Governments were able to prevent their subjects from violating neutrality.

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[1] Am. App., vol. i, p. 631; cited on p. 309, Case of the United States.

[2] Attorney General Collier in Parliament, August 1, 1870. Note B, Appendix to this Argument.

The measure gave power to the Secretary of State to detain a suspected ship; as also to local officers at the ports, who would report to the Secretary of State, so as to cast on him full responsibility. It embodied all the recommendations of the Report, with the exception of that relating to the reception of vessels into British ports, *and this object could be accomplished by Orders in Council.*[1]

Suppose arguments against its interference with freedom and ship-building had been answered as follows:

The fact that war was raging (on the Continent) was no reason for not amending our municipal law in points where this was notoriously defective. It was *ridiculous* to say that a builder did not know that the vessel he was building was for war purposes; and it was a less evil that the ship-building interest should suffer a little, than that the whole nation should be involved in difficulties.[2]

It would not occur in one case out of a thousand that the builder of a ship would have the smallest difficulty in proving what his contract was, and under what circumstances it was undertaken.

The object of the clause was to prevent the escape of suspected ships from the harbors of the kingdom till the Secretary of State has been communicated with. The clause gave an *ad interim* power of seizure.[3]

The object was to give power to any officer who saw a ship about to escape to prevent such escape.

The officers named would be able to seize a vessel without special instructions, in order that such vessel might not be allowed to escape. It was a most important power.

The clause was copied from the Merchant Shipping Act, which had been in force for twenty years without any complaint.[4]

Suppose all this, and we should have seen a performance by the British Government of the duty of "due diligence" in the particular now insisted upon, for the absence of which we now inculpate that Nation. But we should have seen no Florida, or Alabama, or Georgia, or Shenandoah upon the ocean, and redress for injuries would never have needed to be sought from the justice of this Tribunal by the United States.

But we are not left to argument to show how wide and beneficial would have been the practical effects of such action by the British Government, at the opening of the rebel hostilities, in checking and frustrating the proclivities of British subjects to aid and invigorate the maritime war against the United States, nor how readily the subordinate and local official staff could have worked out these provisions of the law. Some extracts from the correspondence of the German Embassador and the British Foreign Secretary will exhibit this influence and its results in the clearest light. Count Bernstorff, under date of October 8, 1870, wrote to Earl Granville an elaborate representation on the subject of the export of contraband of war, and therein speaks as follows:

According to Your Excellency's own admission the executive has the power to prohibit the export of contraband of war. But you state the practice is to make use of this right only in the interest of England, as in the case of self-defense. A letter of the Duke of Wellington to Mr. Canning, dated the 30th of August, 1825, and reprinted in a London newspaper immediately after the indiscretion of Count Palikao, refutes this assumption, proving that England, as a neutral, has repeatedly prohibited the export of arms by an Order in Council, "according to the usual practice," as the renowned Duke says. In one part of his letter the words occur, "I am afraid, then, that the world will not entirely acquit us of at least not doing our utmost to prevent this breach of neutrality of which the Porte will accuse us."

Practice, consequently, is in itself not opposed to the adoption of a measure desired by us for the prohibition of the sale of arms to our enemy. But the law allows Government a certain latitude of consideration to make use of their power according to circumstances. Your Excellency is, however, of the opinion that the present customs

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[1] Lord Halifax in Parliament, August 8, 1870. Note B, Appendix to this Argument.
[2] Viscount Bury in Parliament, Aug. 1, 1870, ibid.
[3] Solicitor General Coleridge in Parliament, August, 1870, ibid.
[4] Attorney General Collier in Parliament, August 3, 1870. Note B, Appendix to this Argument.

system would require a radical reform in order to prevent the export of contraband of war. I gladly concede that the lax method of dispatch and control on the part of the custom-house authorities which has become usual in the interest of an unfettered commercial intercourse, bars the energetic carrying out of a measure prohibiting the exportation of contraband of war. But, on the other hand, I think the very fact of such laxity tends to show that, for the purpose of rendering an Order in Council effectual, no new organization would be required, but simply more stringent instructions for the customs and harbor authorities, reminding them of the existing regulations.

In concluding his reply under date of October 21, 1870, Lord Granville says:

Your Excellency will, I think, admit that though Her Majesty's Government are not prepared to change the practice of the country in regard to neutrality, they have been vigilant in watching and checking any symptoms of violation by British subjects of existing law. Some weeks before your excellency drew attention to the cases of the Hypatia and Norseman, the proper authorities of this country had been engaged in investigating them, and the *watchfulness shown on those occasions has doubtless been the reason that no attempt has been made to sell or dispatch vessels in contravention of the Foreign Enlistment Act.* A report which had reached Her Majesty's Government that attempts were being made to enlist Irishmen for military service in France was acted upon with the greatest promptitude by the authorities of the Home Office, even at a time when, *as it appears from the note which you addressed to me on the 11th instant, it did not appear to you that much importance was to be attached to the rumors. I can assure Your Excellency that no effort shall hereafter be spared to deal promptly with any actual or contemplated infractions of the law.*

We respectfully submit that, in the failure of the disposition and the action of "due diligence" in the matters insisted upon under this head of the argument, the conduct of Great Britain merits and must receive the condemnation of the Tribunal, and must render that nation responsible therefor to the United States in its award.

III. The next great failure of Great Britain "to use due diligence to prevent" the violation of its neutrality, in the matters within the jurisdiction of the Tribunal, is shown in its entire omission to exert the direct Executive authority, lodged in the Royal Prerogative, to intercept the preparations and outfits of the offending vessels, and the contributory provisions of armament, munitions and men, which were emitted from various ports of the United Kingdom. We do not find in the British Case or Counter Case any serious contention but that such powers as pertain to the Prerogative, in the maintenance of international relations, and are exercised as such by other great Powers, would have prevented the escape of every one of the offending vessels emitted from British ports, and precluded the subsidiary aids of warlike equipment and supplies which set them forth, and kept them on foot, for the maritime hostilities which they maintained. The contention of the British Case and Counter Case on this head is somewhat indefinite and uncertain, but substantially comes to this: (1) a disparagement of the vigor and extent of this Prerogative; and (2) a deprecation of its vigorous or extensive exercise, for reasons of domestic interest or policy.

Failure to exercise the Royal Prerogative.

We have given full consideration to the question of the *possession* of this Prerogative authority under the head devoted to the subject as a *proposition of law*, and have called the attention of the Arbitrators to the resort to it, from time to time, taken by Her Majesty's Government during the progress of the transactions under review. We are unable to see any discrimination between the occasions and the means for direct interposition of this power of the Government, as we insist upon them, and the occasions on, and means by, which it was actually applied by the Government, except as such discrimination was controlled by choice or disposition. We beg the careful attention of the Arbitrators to the debates in Parliament, cited in note B of the Appendix to this Argument, as bearing upon this question of the Prerogative of the Brit-

ish Crown in all matters of international obligation. These debates are not referred to by us for the sake of the individual opinions or reasoning of the eminent members of various British administrations, and of the leading members of Parliament, that took part in them. Each of these debates is upon an occasion of definite *action* by Parliament on the subjects before it, which commits the national will and authority in support of the propositions insisted upon in the debates, and in the sense in which we insist upon them here.

But, manifestly, there is but one answer that this Tribunal can accept for the omission to use the Royal Prerogative in regulation and control of the situation of neutrality, which had been produced by its intervention, either in respect of its debility or the impolicy, for domestic reasons, of resorting to it. This answer is, a supply of the power, thus failing or intermitted, by other forms of accredited and safe authority that was also *seasonable*, *appropriate*, and *adequate*. This brings us to the consideration of the mode in which existing *statutory* powers were wielded, and the plenary authority of Parliament to improve or extend them, was dealt with by Her Majesty's Government.

IV. The insufficiency and inefficacy of the Foreign Enlistment Act of Great Britain, in force during the whole period of the American Rebellion, if it included the whole *preventive* power possessed by Her Majesty's Government for the fulfillment of the duties prescribed by the Three Rules of the Treaty, are both undisputed and indisputable. The absolute omission from its provisions of *all* Executive authority, except in subservience to the judicial proceedings and punitive purposes of the law, furnishes to our minds a strong argument, if any further were needed, that, as was held in the Parliamentary discussion which attended its passage, its provisions were punitive and punitive only, *because* the direct authority of *interception* and *prevention* was possessed by the Crown.

The Foreign Enlistment Act was an insufficient means for performing international duties, and its efficacy was diminished by judicial construction and official requirements.

But if, in addition to this debility of the Statute as a resort for *seasonable*, *appropriate*, and *adequate* means of fulfilling the international duty in question, apparent upon *any* construction of the Statute, we take the Statute, impoverished and emasculated, (1,) by judicial construction of its narrow reach to punish and deter; (2,) by the impossible requirement in the matter of evidence: that is to say, the requirement of *voluntary evidence sufficient to convict*, before accusation or arrest of person or vessel; and (3,) by the timidity, alike of Cabinet Ministers and Custom House Officers, and all intermediate Executive functionaries, in *undertaking* the execution of the law, for fear they should themselves be berated for their audacity, or condemned in damages as trespassers and law-breakers, for daring to interfere with the domestic liberty of British subjects to engage in war against American commerce, while their Government was at peace with the United States—taking, we say, the Statute, as *thus* construed and administered, there can be no pretension that the furnishing of a Government, as the sum of its authority, with powers so *unseasonable*, *inappropriate*, and *inadequate*, for the fulfillment of this international obligation, was compatible with that obligation as enjoined by the Three Rules of the Treaty.

Now, the true measure of the force and value of a statute as an expression of the sovereign's will and purpose, is to be found in its judicial interpretation and its practical execution. Some pains have been taken in the British Case and Counter Case to insist upon the equality with, or perhaps the superiority over, the Neutrality Act of the United States shown in the Foreign Enlistment Act of Great Britain. Compared

upon the text of their provisions, the great feature of *preventive* power in the American statute, stamps with manifest distinction these two systems of legislation. But compared in the practical efficiency which judicial interpretation and administrative execution have imparted to the American statute, as a part of its substantive vigor and value, and in the debility by the same means infused into the British Act, they are scarcely to be recognized as parallel legislation.

Certain great features mark the American Act as a working means to the Government for fulfilling the international obligations within its purview:

Contrast between this act and the American statute as construed and administered.

1. The direct and unlimited administrative power vested in the President as the Executive head of the Government, to intercept, arrest, and prevent, by strong hand, the meditated international injury, by detaining, upon discretion, suspected instruments of such purposed injury.

2. The personal inflictions and the property forfeitures visited upon participation in the offense at any stage, and in any degree, *however far short of completion in fact, or however small in agency*, by the American Act as interpreted and applied, *provided* the project or purpose when completed and combined is illegal, gave the Government the means of *punitive* intervention, with effect and in time, to intercept and frustrate, even by judicial means, the projected schemes.

3. The initiation of judicial proceedings at early stages of illegal enterprise gave at once the opportunity to coerce proof by compulsory process, and made it the necessary interest of the parties interfered with to establish the innocent, or abandon the guilty, design.

4. The American statute stimulated the zeal of direct private interest to the service of conveying information and securing evidence to forfeit the offending vessel, by rewarding this service by the payment of one-half of the forfeiture to the informer. The influence of such a feature in the risk of illegal outfits of great and powerful cruisers, worth hundreds of thousands of pounds, is threefold in its operation: (1) The direct exposure of the enterprise, while in progress, to betrayal and conviction, by this appeal to the interests of some or one of the hundreds of subordinates, in the confidence of the transaction by necessity. (2) The discouragement to the offending belligerent to *undertake* an enterprise, thus in peril up to the moment when it might have absorbed the full investment of its funds. (3) The danger to the neutral ship-builder from this prolonged menace, from the cupidity which might strike him when the blow would fall upon his own capital, wholly uncovered by payments. It is not too much to say that projects of the magnitude, both in value and in length of time, involved in the building of a Florida or an Alabama, were little likely to risk the danger of a casual or a professional informer under such an inflammation to his zeal.

5. The exclusive judicial enforcement of the American Act is confided to the Federal Courts in their admiralty jurisdiction, as courts known to and governed by the law of nations, and not to the local, domestic, and common-law tribunals of the States. The Constitution of the United States, with sagacious comprehension of the duty and the difficulty of maintaining a jurisprudence in questions of international relation, trustworthy to and trusted by the interests of foreigners and foreign States, has vested the exclusive admiralty jurisdiction in the Courts of the United States, and by this jurisdiction the forfeiture of ships under the Neutrality Act is adjudicated.

We refer the Tribunal for a most competent authority on this whole subject of American jurisprudence and its methods of securing the

practical end in view by even judicial means, to the *note* of Mr. Dana, the learned commentator on Wheaton, which is printed in full in vol. VII of the American Appendix, pp. 11–38. We quote a few passages.

Our obligation arises from the law of nations, and not from our own statutes, and is measured by the law of nations. Our statutes are only means for enabling us to perform our international duty, and not the affirmative limits of that duty. We are as much responsible for insufficient machinery, when there is knowledge and opportunity for remedying it, as for any other form of neglect. Indeed, a nation may be said to be more responsible for a neglect or refusal which is an imperial, continuous act, and general in its operation, than for neglect in a special case, which may be a fault of subordinates.[1]

As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, toward such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of preparations, or the extent to which they may have gone, and although his attempt may have resulted in no definite progress toward the completion of the preparations. The procuring of materials to be used, knowingly, and with the intent, &c., is an offense. Accordingly, it is not necessary to show that the vessel was armed, or was in any way, or at any time, before or after the act charged, in a condition to commit acts of hostility.[1]

No cases have arisen as to the combination of materials, which, separated, cannot do acts of hostility, but united constitute a hostile instrumentality, for the intent covers all cases and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory, whether acts of building, fitting, arming, or of procuring materials for these acts, be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise.

As to penalties and remedies, parties guilty are liable to fine and imprisonment; and the vessel, her apparel and furniture, and all materials procured for the purpose of equipping, are forfeited. In cases of suspicion revenue officers may detain vessels, and parties may be required to give security against hostile employment; and the President is allowed to use the army and navy or militia, as well as civil force, to seize vessels, or to compel offending vessels, not subject to seizure, to depart from our ports. What vessels shall be required to depart is left to the judgment of the Executive.[2]

Observe, now, the practical operation of the Foreign Enlistment Act as it was worked by Her Majesty's Government in fulfillment of its obligation "to use due diligence to prevent" the infractions of neutrality practiced to the prejudice of the United States.

1. *All* preventive intervention, in that name and of that design, was excluded from the resources of the law. It was confined to punishment of *committed* offenses. The personal inflictions were not severe enough to deter; and the proceedings to forfeit a guilty vessel for a committed offense might, incidentally, by its judicial arrest, thwart, or delay her injurious cruise; but only incidentally. The punitive prosecution for forfeiture might have place *after*, as well as in anticipation of, the hostile cruise.

2. It was held that *arming the vessel itself within the jurisdiction* was essential to guilt, and that any project for the cruiser that proposed to take out her armament, her munitions, or her men by separate bottoms, like the Alar, or the Hercules, or the Bahama, or the Laurel, or the Prince Alfred, was not within the penalties of the law. These supply-vessels, in turn, were safe under the law, as *they* were not intended "to cruise or commit hostilities against" the United States. Indeed, under this construction of the act, there seemed to be nothing to prevent the intended cruiser from taking in tow the tug which had its armament, its munitions, and its men, for transshipment on the high seas. For this purpose would, if proved, *demonstrate* that the cruiser had not taken,

[1] Page 35. [2] Page 37.

and did not propose to take, any armament, &c., within the jurisdiction, and that the tug was coming back, and had no "intent to cruise or commit hostilities."

3. It was constantly enjoined by the Government upon all officials, that they must be extremely careful not to *attempt* to interfere with the freedom of these suspected enterprises, *unless* they had in hand volunteer evidence sufficient to secure success; for, otherwise, they and their superiors would be exposed to heavy damages for failure.

4. It was made very prominent that demonstration of the warlike build or fitness of the cruiser would not procure a forfeiture without satisfactory proof, *in advance of any act*, of the conscious intent to which a jury could not shut its eyes. It was then held that, when the *intent* was made manifest by the inception of the cruise, as on the trial of the Florida at Nassau, no conviction could take place, because the warlike build and fitments having occurred in the home port of Liverpool, and the demonstration of intent in a colonial port, the actual cruise must be suffered to go on unimpeded. When, however, the principal law-officers of Her Majesty's Government attempted to reform this administration of the law, the principle that the full-blown consummation of the enterprise, by the cruiser's taking the seas under a commission, protected it from any further judicial scrutiny, barred all further proceedings.

We offer to the attention of the Arbitrators some extracts from official papers relating to the cases of the Oreto (or Florida) and Alabama, as instances of the system of the administration of the Foreign Enlistment Act of which we are now complaining, and which we also conecive to furnish a fair illustration of the general ineffectual nature of the action and result in all the attempts to enforce it.

On the 16th of June, 1862, the question being upon the seizure of the Oreto at Nassau, Governor Bayley wrote to Commander Hickley, in part as follows:

The Oreto, as you are aware, has, in deference to your remonstrances and my orders, discharged her cargo of shell, shot, and ammunition, and is ready to clear in ballast. She has thus divested herself of the character of an armed vessel leaving this port for belligerent purposes. I do not think it consistent with law or public policy that she should now be seized on the hypothesis that she is clearing out for the purpose of arming herself as a vessel of war beyond the limits of the harbor. We have done our duty in seeing that she does not leave the harbor equipped and prepared to act offensively against one of two belligerent nations, with each of whom Great Britain is at peace.

And if she has still any such intention, an intention which cannot be fulfilled within the harbor, I think this could be effectually thwarted by giving instructions that the vessels which are supposed to be freighted with her arms, and to be prepared to go out with her, should not leave the harbor within forty-eight hours after the Oreto has left it.[1]

On the 21st of June, 1862, Governor Bayley, after detailing certain incidents which had taken place in regard to the Oreto (Florida) at Nassau, thus reported to the Duke of Newcastle:

7. Throughout these occurrences I was averse from proceeding to extremities. Not that I considered the conduct of the Oreto to be entirely free from suspicion, or indeed from discourtesy to a neutral government. But I was unwilling to assume a hostile air; and, moreover, I felt that, however suspicious appearances were, it might be exceedingly difficult to bring either the Oreto or her crew within the scope of the Foreign Enlistment Act.

8. But when, having been several times dissuaded by me from seizing the vessel, and having, after seizure, released her in deference to my views, Captain Hickley, in his letter of 16th June, reiterated the expression of his professional opinion, not only that the Oreto was equipped as a vessel of war, but that she could be made ready for battle with the enemy in twenty-four hours; that other vessels then in the harbor could steam out with her, and help to arm her within a few miles off this port; and

[1]Brit. App., vol. i, pp. 24, 25.

that her real destination was openly talked of, I thought that a strong *prima-facie case* was made out for a judicial investigation, even although the evidence were insufficient to warrant her condemnation. And I thought it better to sanction an appeal to the law in favor of our neutrality, and in deference to the honest convictions of a gallant and experienced officer, than to allow the Oreto to leave our shores unchallenged and unobstructed on an expedition of pillage, piracy, and destruction.

9. These reflections were strengthened by others. I felt that if the Oreto were allowed to take in arms, ammunition, and a crew here, a similar impunity must be in future conceded to any other vessel belonging to either of the two belligerent states. The consequences of dealing out this even-handed justice would, in the existing state of popular feeling, be highly inconvenient and embarrassing. The boon obtained by a Confederate vessel would be claimed by a Federal vessel. If granted, it would be granted grudgingly and sulkily, and it was more likely that it would not be granted at all; hence would arise disputes, jealousies, and angry altercation. More than this, we have reason to believe that armed Federal vessels are lying at a very short distance from this port. * * * The refusal to accord to northern vessels the same indulgence which has been accorded to those of the South, might, under these circumstances, provoke an affray between the ships of the two contending federations, and involve, not only this colony, but even the mother country in a very serious collision.

12. Your Grace will see that it is easy to do very much in the way of equipping a vessel for hostile purposes, arming her, and enlisting a crew, without establishing a case of such strong testimony as would justify her condemnation by a court of competent jurisdiction; and although it is repugnant both to our policy and our sense of justice to strain the letter of the law, even on the side of a reasonable inference against the rigid rules of technical evidence, yet it is easy to see that a strict adherence to these rules may be suspected to be the result, and may produce the fruits, of a deliberate collusion with the enemies of a State on terms of amity with our own country.[1]

On the 30th of June, 1862, the evidence in regard to the Alabama being under consideration, Mr. Hamel, Solicitor of Customs, thus reported to the Commissioners of Customs:

The officers ought not to move in the matter without the clearest evidence of a distinct violation of the Foreign Enlistment Act, nor unless at a moment of great emergency, the terms of the Act being extremely technical, and the requirements as to intent being very rigid. It may be that the ship, having regard to her cargo as contraband of war, might be unquestionably liable to capture and condemnation, yet not liable to detention under the Foreign Enlistment Act, and the seizors might entail upon themselves very serious consequences.[2]

On the 11th of July, 1863, Consul Dudley's letter in regard to the Alabama being under consideration, Mr. Hamel, Solicitor, thus advised the customs:

There is only one proper way of looking at this question. If the Collector of Customs were to detain the vessel in question, he would, no doubt, have to maintain the seizure by legal evidence in a court of law, and to pay damages and costs in case of failure. Upon carefully reading the statement, I find the greater part, if not all, is hearsay and inadmissible, and as to a part the witnesses are not forthcoming or even to be named. It is perfectly clear to my mind that there is nothing in it amounting to *prima-facie* proof sufficient to justify a seizure, much less to support it in a court of law, and the Consuls could not expect a Collector to take upon himself such a risk in opposition to rules and principles by which the Crown is governed in matters of this na ture.[3]

On the 24th of July, 1862, after the Florida had been seized at Nassau on account of the "due diligence" of Commander Hickley, Vice-Admiral Milne thus wrote to the Secretary of the Admiralty:

I abstain from giving effect to my first intention, which was to express to Commander Hickley my approval of the zeal displayed by him on this occasion, in giving proof that our neutrality between the belligerents was a reality, and that when the occasion offered, Her Majesty's officers were quite ready to accept the responsibility of acting as in this case, wherein it appeared to be notorious, however incapable of legal proof it may turn out to be, that the vessel in question was fitted out in a British port as an armed Confederate cruiser.

Should the Law Officers of the Crown be of opinion that the seizure was illegal; that the very grave suspicion of being intended for employment as a Southern cruiser; the

[1] Brit. App., vol. i, pp. 13, 14.
[2] Brit. App., vol. i, p. 183.
[3] Ibid., p. 187.

fact of the vessel being fitted in every respect like one of Her Majesty's ships, and specially adapted for war; her armament ready to be put on board, with a crew of fifty men, and officers of the Confederate States ready to command her; should these facts be insufficient, in their opinion, to justify legally and technically the seizure, I yet trust their Lordships will see fit to exonerate Commander Hickley from all blame and consequent responsibility.[1]

On August 23, 1862, the Home Government having thought it desirable to send some Custom House Officers from Liverpool to Nasau, who could there give evidence of the facts which had taken place at Liverpool in regard to the Florida, Collector Edwards thus closes a letter to the Commissioners of Customs:

I am satisfied that she took no such [warlike] stores on board, and indeed it is stated, though I know not on what authority, that her armament was conveyed in another vessel to Nassau. The Board will, therefore, perceive that the evidence to be obtained from this port will all go to prove that she left Liverpool altogether unarmed, and that while here she had in no way violated the law.[2]

On the 11th of August, 1862, Governor Bayley, reporting the release of the Oreto, wrote to the Duke of Newcastle in part as follows:

I do not think it likely that we shall ever obtain stronger proof against any vessel than was produced against the Oreto, of an intention to arm as a belligerent. Therefore we may assume that no prosecution of the same kind will be instituted, or, if any be instituted, that it will fail. The natural consequence will be that many vessels will leave England partly equipped as men-of-war or privateers, and intended to complete their equipment here. But the notoriety of this practice will induce Federal men-of-war to frequent these waters, and virtually blockade the islands, in greater force than they have hitherto done; and when they are assembled in numbers, it will be vain to reckon on their observing any respect for territorial jurisdiction or international usage. I should neither be surprised to see Federal ships waiting off the harbor to seize these Confederate vessels, nor to see the Confederate ships engaging with Federal men-of-war within gunshot of the shore. The only means of preserving the peace and neutrality of these waters will be afforded by the presence of an adequate naval force.[3]

On the 23d of September, 1862, Governor Bayley reported in part as follows to the Duke of Newcastle:

I have the honor to inform your Grace that the Oreto, after her liberation by the admiralty court, left this harbor three or four weeks ago; and that she is supposed to have since been finally transferred to the service of the Confederate States. If that is so, she is entirely out of my jurisdiction, and I could no more legally seize her were she to re-enter the port than I could seize any man-of-war belonging to the Government of the United States.[4]

5. Another marked trait of the actual administration by her Majesty's Government of the *punitive* features of the Foreign Enlistment Act, is their failure in the clearest cases to *enforce* a forfeiture. When we consider that the pretensions of efficiency in this act are confessedly put upon its terrors to evil-doers and the dissuasion from illegal projects to be thus accomplished, it is with the greatest surprise that we find *credit* claimed for the British Government for the losses and sacrifices which that Government sustained in its purchases of its own peace from its law-breaking subjects by payment of damages, by *agreement*, for the prosecution of the Alexandra, and by payment in full for the Laird rams, instead of persisting in their forfeiture. Not more intelligible is the claim of *credit* for the course of the Government in the case of the Pampero, where the forfeiture was admitted by the claimants, but was never brought to an actual sale, which would inflict the loss of its value upon the guilty projectors of its intended cruise. Certainly, the British Government accomplished the *detention* both of the Pampero and of the Laird rams, and the United States have never omitted to express their satisfaction at this real benefit which they received from the success of

[1] Brit. App., vol. i, p. 29.
[2] Ibid., p. 34.
[3] Ibid., p. 75.
[4] Ibid.

Her Majesty's Government in these instances. But, that the punitive terrors of this act should have lost the example of actual forfeiture to the Rebel resources, or to the guilty British ship-builders, of the great value invested in them, and that the British Government should have refunded the money, exhausted by the guilty enterprise of the Laird rams, in season for its new use by the Rebel agents and their accomplices in the same illegal service, can never seem to the United States a valuable contribution to the efficiency of the Foreign Enlistment Act as an instrument of *punishment* of these proscribed and dangerous proceedings.

These various traits in the actual dealing of Her Majesty's Government with the Foreign Enlistment Act as an instrument, and as its only instrument, for maintaining its neutral obligations to the United States, became as well known, and were as clearly appreciated by all Her Majesty's subjects, and through all her imperial dominions, as if they had been announced by a Queen's Proclamation. No wonder that a learned judge of one of Her Majesty's superior courts declared that a whole fleet of ships of war could be driven through the statute! That, as matter of fact, a whole fleet of ships of war was driven through that statute, is in proof before this Tribunal.

British reliance upon the Foreign Enlistment Act a failure of due diligence.

Upon the whole proofs, then, and in their application to the cases of all the offending vessels, we confidently submit to the Arbitrators, that the Foreign Enlistment Act, as construed and administered, was not an adequate instrumentality for, and its actual employment by the Government did not amount to, the use of "due diligence to prevent" the violations of the international obligations of Great Britain to the United States, which are now under review.

We have never been able to appreciate the practical difficulties in preventing the emission of these hostile vessels from British ports. They were a long time in course of construction; they were long under the actual notice of the Government; its apparatus and resources for the fulfillment of the required duty were deliberated upon, explored, and understood. In truth, no practical difficulties did exist. But, whether or no this plain and easy execution of the practical duty itself could not become uncertain, difficult, and even impossible, by the adoption of theories and methods and agencies which, framed only *diverso intuitu*, naturally ended in failure, is a very difficult question. These constant failures were never from ignorance, from accident, or misfortune. They were not like the failures which may happen under any Government, where remoteness of ports, impediments of communication, obscurity, and insignificance of the projects and the vessels themselves, give opportunity for concealment and surprise. Such are the instances industriously collected in the British Case and Counter Case from the earliest years of the existence of the Government of the United States, and again in the period of the Spanish-American and Portuguese-American hostilities. The situations are very dissimilar; the conduct of the British Government here, and of that of the United States at those early periods, proceed upon very different systems; the causes of failure, as bearing upon responsibility therefor, are entirely distinct.

It is quite agreeable to be relieved from puzzling over the complexities, and delicacies, and obstacles which seemed to embarrass Her Majesty's Government, under Earl Russell's management of this international duty, in reference to so simple a matter as arresting these great ships of war, the Florida, the Alabama, the Georgia, and the Shenandoah, by the frank and practical view of the duty and the task ex-

pressed by Earl Granville, in Parliament, in the debate on the Washington Treaty. Earl Granville said:

> On the one hand, nothing is so easy as to prevent a vessel of the Alabama class escaping from our shores, and the only loss to the country which would result from such a prevention, would be the small amount of profit which the individual constructing and equipping the vessel might derive from the transaction, which in almost every case is contrary to the Proclamation of the Queen. [1]

Nor are we able to see how Her Majesty's Government can escape from the dilemma which, on its failure to stop the Florida and the Alabama, and its easy success in stopping the Laird rams, was proposed to it by Sir Hugh (now Lord) Cairns, in Parliament.

> What will you say to the American Minister now? Do not you suppose that the American Minister will come to you and say, "You told me last year that unless you had a case for seizure, and proof by proper evidence, you could not arrest a ship at all; that you could not detain her? Although you admitted that the facts I brought before you created very great suspicion, you said that you could not seize the Alabama, therefore you could not touch her. But look at what you did in September. For a whole month you detained these steam-rams in the Mersey, while, according to your own words, you were collecting evidence, and endeavoring to see whether your suspicions were well founded." * * I maintain that when the United States hold this language, either our Government must contend that what they did in September was unconstitutional, or they ought to have done the same with regard to the Alabama, and are liable. [2]

V. Manifestly, if the Foreign Enlistment Act of Great Britain was thus inadequate and unsuitable, as an efficient instrument in the hands of the Government for the fulfillment of its international duty to the United States, it was a failure in the "use of due diligence to prevent" the injuries now complained of, not to obtain from Parliament a suitable and efficient act for the fulfillment of the duty. The demonstration of the existence of this obligation, and of its being early brought to the notice of Her Majesty's Government by the United States, and of the refusal of Great Britain to meet the obligation, is complete. We refer the Tribunal to a statement of the contemporary correspondence on this subject between the Governments, and a memorandum of the action of Great Britain in the matter, *after* the close of the Rebellion, contained in Note C of the Appendix to this Argument.

The neglect to amend the Foreign Enlistment Act a failure of due diligence.

In strong contrast with this inaction of Great Britain, and with its justification by Her Majesty's Government, is the course taken by the Government of the United States in 1793, at the instance of Great Britain, in 1817, at the instance of Portugal, and again in 1838, to meet an exigency in the interest of Great Britain, for the maintenance of its sovereignty over the Canadian provinces.

Contrast between the course of Great Britain and the course of the United States in these respects.

On the 3d of December, 1793, President Washington, in his message to Congress, after stating the means that he had used to maintain a strict and impartial neutrality, said:

> It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure, and it will probably be found expedient to extend the legal code and jurisdiction of the courts of the United States to many cases which, though dependent upon principles already recognized, demand some further provisions.
>
> When individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, or where penalties on violations of the law of nations may have been indistinctly marked or are inadequate, these offenses cannot receive too early and close an attention, and require prompt and decisive remedies.

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[1] Appendix to this Argument, Note B.

[2] Am. App., vol. v, p. 433.

On the 20th of December, 1816, the diplomatic representative of Portugal thus wrote to Mr. Monroe, then Secretary of State:

What I solicit of him (the President) is the proposition to Congress of such provisions by law as will prevent such attempts for the future.[1]

Six days later, President Madison addressed a message to both Houses of Congress in part as follows:

With a view to maintain more effectually the respect due to the laws, to the character, and to neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped, or in course of equipment, with a warlike force, within the jurisdiction of the United States; or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments.[2]

At the same time, Mr. Monroe, Secretary of State, wrote to Mr. Forsyth, chairman of the Committee on Foreign Relations:

I have now the honor to state that the provisions necessary to make the laws effectual against fitting out armed vessels in our ports for the purpose of hostile cruising, seem to be:

1st. That they should be laid under bond not to violate the treaties of the United States under the law of nations, in all cases where there is reason to suspect such a purpose on foot, including the cases of vessels taking on board arms and munitions of war, applicable to the equipment and armament of such vessels subsequent to their departure.

2d. To invest the Collectors, or other Revenue Officers, where there are no Collectors, with power to seize and detain vessels under circumstances indicating strong presumption of an intended breach of the law, the detention to take place until the order of the Executive, on a full representation of the facts had thereupon, can be obtained.

The existing laws do not go to this extent. They do not authorize the demand of security in any shape, or any interposition on the part of the magistracyas a preventive, when there is reason to suspect an intention to commit the offense. They rest upon the general footing of punishing the offense merely where, if there be full evidence of the actual perpetration of the crime, the party is handed over, after trial, to the penalty denounced.[3]

The circumstances under which the temporary Neutrality Act of 1838 was passed, are fully stated in the Case of the United States, (p. 133,) and the act itself can be found in the documents presented therewith.[4]

Not less in contrast with the indifference and obstructions with which Her Majesty's Government met the earnest applications of the Government of the United States, in the stress in which it was placed, for an improvement of the Foreign Enlistment Act, are the solicitude and attention bestowed by Great Britain upon the amendment of this act *after* the rebellion was suppressed. The report of the Royal Commission, appointed to consider the subject, upon the defects of the old law and the necessary amendments to give it due vigor, leaves nothing to be said in condemnation of the persistency with which Great Britain clung to it during the whole period of the Rebellion. The promptitude of Parliament in enacting the new statute upon the breaking out of the recent war between Prussia and France, has already been referred to, and is exhibited in the extracts from the debate on its passage, set forth in Note B of the Appendix to this Argument.

It is unnecessary to argue that the passage of the present Foreign Enlistment Act in May, 1861, following upon the Queen's Proclamation of neutrality, and its reasonable enforcement, would have precluded the scandals deplored by the British Government and the injuries suffered by the United States from the emission of the Alabama and her consorts from British ports. The text of the act carries its own argument.

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[1] Am. App., vol. iii, p. 541.
[2] Ibid., p. 542.
[3] Ibid., p. 542.
[4] Ibid., vol. iv, p. 62.

Well might that eminent publicist, Phillimore, immediately after the passage of this act, "rejoice that the English Government has, by the statute of this year, strengthened the hands of the Executive, and given greater force and prominence to the maxim that, with respect to the external relations of the State, the will of the subject is bound up in that of his Government."[1]

We confidently submit that, in refusing to amend the Foreign Enlistment Act in aid of the fulfillment of the duty prescribed by the Three Rules of the Treaty, Great Britain failed "to use due diligence to prevent" the injuries for which the United States demand redress from the justice of this Tribunal.

VI. We pass now to an examination of the question of "the use of due diligence to prevent" the violation of its international duty to the United States, as exhibited in the course pursued toward the offending vessels by Great Britain, *after* their first escape from British ports, under the circumstances and consequences of inculpation for such escape which have already been considered. Except for the actual violence and depredations committed by the escaped cruisers after their emission from British ports, the injuries to the maritime property of the United States and the enormous connected losses to the national wealth would not have been inflicted. In every view, therefore, the subsequent career of the cruisers becomes of the highest importance to the practical determination by this tribunal of the matters in judgment before it.

Failure in due diligence after the escape of the cruisers.

1. It is indisputable, that if, in respect to any one of the vessels incriminated, the escape of that vessel from the home port should have been shown by Great Britain, to the satisfaction of the Tribunal, to have taken place *in spite* of "the use of due diligence to prevent" it, the principles of the Three Rules and of international law not inconsistent therewith will require that the same inquisition must be applied to any subsequent escape from another port of the British Empire, home or colonial, where the Government had an opportunity to lay hands upon and arrest her.

In not detaining offending cruisers when again in British ports, a want of due diligence.

Thus, suppose, for a moment, that the British Government was not in fault in respect of the first emission of the Florida from the port of Liverpool, her subsequent history at Nassau must then be examined. If her openly allowed departure from Nassau, "on an expedition of pillage, piracy, and destruction," (to quote Governor Bayley again,) was not *in spite* of the use of due diligence "to prevent the departure from its jurisdiction" of a vessel which had "been specially adapted in whole or in part within such jurisdiction to warlike use," such departure is, in itself, a failure by Great Britain to fulfill the duties set forth in the Three Rules of the Treaty, and must be so pronounced by the Tribunal. As the Florida, until after she left Nassau, remained in the same plight of a British vessel as when she left Liverpool, and did not receive a (so-called) "commission," or change her flag until afterward, there is no opportunity for cavil upon this point.

2. If, on the other hand, the original escape of any of the offending vessels from the home port shall inculpate Great Britain under the Rules of the Treaty, it is obvious that the original fault and accountability of Great Britain in the supposed case only enhance the obligation which, we have seen, requires "the use of due diligence to prevent" the subsequent departure from its jurisdiction of a vessel whose original escape from the home port has *not* been imputed to a default in such diligence.

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[1] Phill. Int. Law, (ed. 1871,) p. 28, preface.

3. This obligation, whether in the alternative of the original escape of the offending vessel being for want of, or in spite of, the "use of due diligence to prevent" it, must endure until it has been fully and successfully met by the arrest and detention of the offending vessel, and her "expedition of pillage, piracy, and destruction" brought to a close.

This obligation not determined by commissioning a cruiser.

We have already considered whether this indisputable general proposition needs to be qualified by the impediment insisted upon to its continued application, arising from the (so-called) "commission" as a public ship of a *belligerent not recognized as a nation or a sovereign.*[1] We have shown that, in regard to public ships of recognized nations and sovereigns, this public character by comity withdraws them only from the jurisdiction of courts and process, and leaves them amenable to the political and executive power. We have shown that, in the case of public ships having *no* recognized state or sovereign behind them, the political and executive power deals with them, in its own discretion, with strong hand, in administration of every duty and every right pertaining to itself or owed to another nation. The grounds upon which we put our inculpation of Great Britain for dealing with these Rebel cruisers, as it did, *after* their commission as public ships, do not involve any contention as to whether or not *judicial* control should thereafter have been asserted over them. This domestic question of comity to the Rebel cruisers on their "expeditions of pillage, piracy, and destruction," may be at the discretion of a Government. But the pretensions that the international duty by which Great Britain was "bound" to the United States to use due diligence to prevent these offending vessels of guilty origin from departing from its ports when it was master of the opportunity so to do, was cut short and overmastered by the Rebel "commission," upon the reasons already given, we entirely deny.

4. It is conspicuous upon the proofs before the Tribunal that it was quite in the power of Her Majesty's Government, by arresting these offending vessels at their first, or even later, visits to British ports *after* their successful fraud upon the neutral obligations of Great Britain in their original "escape," to have intercepted these "expeditions of pillage, piracy, and destruction," and at once repaired the misfortune or the failure of duty which had made such "escape" possible, and struck a fatal blow at the systematic project and preparation of such expeditions from the home ports of Great Britain. There was no adequate motive for, or benefit from, these guilty enterprises if the first escape were to leave the vessels homeless and shelterless upon the ocean, with no asylum in British ports except such as mere humanity offers against stress of storm and danger of shipwreck. Such asylum, upon the very motive on which it is yielded, upon the very plea upon which it is begged, the sentiment of humanity, would have exacted the abandonment of the career of violence, meditated or commenced, and a submission to the outraged authority of Great Britain, whose peace and dignity were compromised by the original escape from its ports.

Not excluding escaped cruisers from British ports was a want of due diligence.

It is a notable fact that not one of these offending vessels ever returned to a home port of Great Britain, except the Georgia, to be dismantled and sold, and the Shenandoah to be surrendered to the Government of the United States. The Florida once, and the Alabama once, sought the commercial recruitment which the hospitality of the ports of France conceded them, on the plea of *relâche forcée.* They had not violated the neutrality of France in their original outfit, and had no resent-

[1] *Supra,* pp.

ments or restraints to fear in her ports. But why prefer France to England? Was it on motives of market and convenience? The supplies for these cruisers while in the French ports were sent to them from England. Every interest, every inclination, every motive would have carried them to England, had not some overwhelming reason deterred them from that resort. They had violated her neutrality; they had brought scandal and reproach upon the administration of her laws. They were not lacking in courage or effrontery; but that the government of Great Britain would tolerate their presence in her ports to replenish their resources, and "their expeditions of pillage, piracy, and plunder," was impossible to be conceived, and they avoided the danger. But the wide power of that nation "whose morning drum-beat, commencing with the sun and keeping company with the revolving hours, surrounds the whole earth with one continuous strain of the martial airs of England," does not outrun the obligations of public justice or of international duty. What it would shock the moral sense of Englishmen to deny must have been the action of Her Majesty's Government at home, should have been, but was not, their action throughout their colonial possessions.

On the 26th day of April, 1864, in the debate in the House of Lords on the dispatch of the Duke of Newcastle to Governor Wodehouse, instructing him that he should have detained the Tuscaloosa, Earl Russell, defending this instruction, said in part as follows:

> It must be recollected that all these applications of principles of international law to the contest between the Federal and so-styled Confederate States, have to be made under very exceptional circumstances. It has been usual for a Power carrying on war upon the seas to possess ports of its own in which vessels are built, equipped, and fitted, and from which they issue, to which they bring their prizes, and in which those prizes, when brought before a court, are either condemned or restored. But it so happens that in this conflict the Confederate States have no ports, except those of the Mersey and the Clyde, from which they fit out ships to cruise against the Federals.[1]

In the same debate, the Attorney General, Sir Roundell Palmer, also defending the dispatch, in addition to the words we have quoted *supra*, said:

> By the mere fact of coming into neutral territory, in spite of the prohibition, a foreign Power places itself in the position of an outlaw against the rights of nations, and it is a mere question of practical discretion, judgment, and moderation, what is the proper way of vindicating the offended dignity of the neutral sovereign.[2]

In February, 1864, Mr. Vernon Harcourt thus wrote in a letter to the London Times:

> I think that to deny to the Florida and to the Alabama access to our ports would be the legitimate and dignified manner of expressing our disapproval of the fraud which has been practiced upon our neutrality. If we abstain from taking such a course, I fear we may justly lie under the imputation of having done less to vindicate our good faith than the American Government consented at our instance, upon former occasions, to do.[3]

On the 13th of May, 1864, in a debate relative to the course that should be adopted in regard to the Georgia which had come into Liverpool, the Attorney General said:

> I have not the least doubt that we have a right, if we thought fit, to exclude from our own ports any particular ship or class of ships, if we consider that they have violated our neutrality.[4]

In 1867, Her Majesty's Commissioners having been empowered to report what changes ought to be made in the Foreign Enlistment Act for

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[1] Am. App., vol. v, p. 535.
[2] Ibid., p. 570.
[3] Ibid., vol. iv, p. 204.
[4] Ibid., vol. v, p. 583.

the purpose of giving it increased efficiency and bringing it into full conformity with international obligations, all joined in this report:

> In time of war no vessel employed in a military or naval service of any belligerent which shall have been built, equipped, fitted out, armed, or dispatched contrary to the enactment, should be admitted into any port of Her Majesty's dominions.[1]

That these are not extreme or disputed propositions, is evident from the concurrence therein of Lord Cairns, Baron Bramwell, Sir Roundell Palmer, and Mr. Gregory, as well as Dr. Phillimore, Mr. Vernon Harcourt, Mr. Thomas Baring, and Mr. Forster.

On the 4th of August, 1870, in the House of Commons, the attorney-general, Sir R. P. Collier, having reference to the omission, from the Foreign Enlistment Act, of a clause carrying out the report above cited, said:

> He had to explain that, although the Royal Commissioners made a recommendation to the effect of this clause, they did not intend that it should be embodied in an act of Parliament, but that it should be carried out under the Queen's regulations. The Governor of a Colony would, under this clause, have to determine whether a ship entering his port was illegally fitted out or not, and this was enough to show the object the commissioners had in view could not be carried out by an Act of Parliament. It was intended instead to advise Colonial Governors of the escape of any illegally fitted vessels.[2]

Thus it appears that Her Majesty's Government fully recognizes the power of the Royal Prerogative to exclude from British ports any vessel or class of vessels which has violated its neutrality. Brazil, when the occasion for the exercise of this right was presented, considered it equally a duty, and issued and executed her order, for the exclusion of the Alabama and Shenandoah from any port of the Empire.[3]

Probably, the suppression of the maritime hostilities, from which the United States have suffered, would have followed from the milder measure of proscription from British ports, enforced by arrest and detention, if the prohibition was transgressed. The lead thus taken by Great Britain would naturally, if not necessarily, have been followed by the other powers whose possessions afforded a casual and infrequent resort for the offending vessels. Following, at greater or less interval, as they had, the recognition of belligerency declared by Great Britain, these powers would have admitted the common duty of neutrals, in the peculiar situation of maritime hostilities presented, to accept the denunciation by Great Britain of the escaped vessels as *outlaws* and not belligerents, and denied them further hospitality.

5. Certainly, in the absence of such proscription, it would seem necessary that some representations should have been made by Her Majesty's Government to the persons with whom it was in the habit of communicating as, in some sort, accredited by the Rebel organization for such purpose, concerning the flagrant violations of neutrality in which Great Britian was involved, by the system of operations of the Rebel agents heretofore brought to the notice of the Tribunal.[4]

The representations to insurgent agents respecting these cruisers were so long delayed and so feeble as to amount to want of due diligence.

The Arbitrators will search the British Case and Counter Case, and the body of their appended proofs, in vain, for the least intimation of such representations. But we are not left to inference based upon this state of the evidence. In the American Appendix will be found certain correspondence between Earl Russell and Mr. Mason, (then permanently resident in London,) which exhibits an entire unconcern in

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[1] Am. App., vol. iv, p. 82.
[2] See Appendix to this Argument, Note B.
[3] *Supra*, p. 17, sec. viii.
[4] Am. App., vol. vii, p. 113.

the mind of Her Majesty's Foreign Secretary at the time the escape of the Alabama was a fresh incident at home, and the dealing with the escaped Florida by the colonial authorities at Nassau was under the notice of the Home Administration. During the very period of these two matters of the Florida and the Alabama, which Earl Russell subsequently stigmatized in Parliament as "a scandal and a reproach" to England, a correspondence between the Foreign Secretary and Mr. Mason was in progress, in which the most friendly tone and topics prevailed. This correspondence begins with July 17, and terminated with a letter of Earl Russell, August 2, 1862. This, it will be noticed, runs through the time of the deliberations of the British Government as to the arrest of the Alabama, and beyond the consummation of her successful evasion from Liverpool. But not a word on the subject is found in the correspondence.[1]

Again, at the end of the year 1864, another correspondence between the same writers took place, and that nothing of expostulation or resentment, or exaction of redress for these continuing outrages, finds place in it, may be well inferred from the manner in which Mr. Slidell feels justified in commenting to Mr. Benjamin, of the Confederate Cabinet, upon Earl Russell's concluding letter:

His Lordship voluntarily went out of his way to say the most disagreeable thing, possible to the Northern Government; his reference to the Treaty of 1783 will, I think, be especially distasteful to them, placed in connection with his twice-repeated recognition of the separate existence of the North and South, as never merged in a single nationality. I should be much surprised if this letter does not call forth a universal howl against his Lordship from the Northern press.[2]

That Her Majesty's Government could promptly, and without enfeebling courtesy, discharge this duty of remonstrance to a belligerent against supposed or intended violations of its neutral obligations, is demonstrated by the correspondence of Earl Russell with Mr. Adams in regard to some matters which seemed to Her Majesty's Government to require explanations from the United States.

On the 30th of November, 1863, Earl Russell thus wrote to Mr. Adams in part as follows:

I have the honor to call your attention to the following statements, which have come to the knowledge of Her Majesty's Government, respecting the shipment of British subjects on board the United States ship of war Kearsarge, when in the port of Queenstown, for service in the Navy of the United States.

I need not point out to you the importance of these statements, as proving a deliberate violation of the laws of this country, within one of its harbors, by commissioned officers of the Navy of the United States.

Before I say more, I wait to learn what you can allege in extenuation of such culpable conduct on the part of the United States officers of the Navy, and the United States Consul at Queenstown.[3]

On the 31st of March, 1864, Earl Russell wrote to Mr. Adams as follows:

I have the honor to bring to your notice an account, taken from a newspaper, of what passed at the trial before Mr. Justice Keogh of the British subjects indicted for having taken service in the United States ship Kearsarge, at Queenstown, in violation of the provisions of the Foreign Enlistment Act; and, with reference to the correspondence which has passed between us, I have the honor to request that you will inform me whether you have any explanations to offer on the subject.[4]

On the 9th of April, 1864, Earl Russell, writing to Mr. Adams, said:

I transmit to you herewith extracts from a deposition of one Daniel O'Connell, by

[1] Am. App., vol. i, pp. 416–426.
[2] Am. App., vol. i, p. 619.
[3] Ibid., vol. ii, p. 421.
[4] Ibid., p. 442.

which you will perceive that he was examined and sworn before, or with the knowledge of, officers of the United States ship of war Kearsarge, and furnished with the uniform of a United States sailor.

I know not how these circumstances, occurring on board a ship of war, can have taken place without the knowledge of the captain of the vessel.[1]

So, too, Her Majesty's Government did find occasion and opportunity to address its first remonstrance on the subject of these violations of neutrality to the persons with whom it was in the habit of treating as representatives of the Rebel organization. This was February 13, 1865, just two months before the final overthrow of the Rebellion and the surrender of Richmond. We append the opening and concluding paragraphs of this remonstrance. They form part of the letter from which important citations have been made in this argument, and a considerable extract from which is placed at the head of part v, of the case of the United States. By that extract it appears that "the unwarrantable practice of building ships in this country to be used as vessels of war against a state with which Her Majesty is at peace" was still continued, and formed a main subject of the remonstrance. We quote from Earl Russell's letter:

It is now my duty to request you to bring to the notice of the authorities under whom you act, with a view to their serious consideration thereof, the just complaints which Her Majesty's Government have to make of the conduct of the so-called Confederate Government. The facts upon which these complaints are founded tend to show that Her Majesty's neutrality is not respected by the agents of that Government, and that undue and reprehensible attempts have been made by them to involve Her Majesty in a war in which Her Majesty had declared her intention not to take part.

You may, gentlemen, have the means of contesting the accuracy of the information on which my foregoing statements have been founded; and I should be glad to find that Her Majesty's Government have been misinformed, although I have no reason to think that such has been the case. If, on the contrary, the information which Her Majesty's Government have received with regard to these matters cannot be gainsaid, I trust that you will feel yourselves authorized to promise, on behalf of the Confederate Government, that practices so offensive and unwarrantable shall cease, and shall be entirely abandoned for the future. I shall, therefore, await anxiously your reply, after referring to the authorities of the Confederate States.[2]

We find, too, that in March, 1865, hardly thirty days before the surrender of Richmond, the Colonial Governor at Nassau advised the home Government of the means that had, at last, been found to make the evasion of another Florida impossible. The Governor writes to Mr. Cardwell, a member of the Ministry, as follows:

I take this opportunity of mentioning that for some weeks past I have had a report made to me of every steam-vessel arriving in the harbor, with special notice of anything in the construction or equipment of any which differ from the ordinary blockade-runners, and the officers of customs are on the alert to detect and report any attempts to violate the provisions of the Foreign Enlistment Act.[3]

It is unnecessary to point to the conclusion which the Arbitrators must have anticipated, that these powers of remonstrance and these resources of vigilance, if resorted to in February and March, 1862, would have foreclosed the controversy now in judgment before the Tribunal.

It is easy to see how these manifold failures of Great Britain to fulfill its international duty to the United States led to the enormous injuries, as their necessary consequences, which have constituted the sum of the grievance which, at the close of the Rebellion, the United States had suffered from this friendly power.

By confining attention and efforts to questions of legal conviction for municipal offenses, and becoming helpless in the meshes of lawyers and courts, Her Majesty's Government saw the Florida and Alabama emitted

[1] Am. App., vol. ii, p. 448.
[2] Am. App., vol. i, pp. 630, 631.
[3] Brit. App., vol. ii, p. 589.

from British ports, while they were "watched" by Government officers and debated about by eminent lawyers, and made them but forerunners of like offenders. The domestic law protected their *evasion* and paralyzed the government's *prevention*, and the international obligation had no place or authority at that stage of the transaction. But the moment they were out they were protected in their "expeditions of pillage, piracy, and destruction" by the law of nations, which, it was said, compelled Great Britain to hold her hands, by reason of the respect which international *comity* inspires for the "commission" of even such cruisers.

The British course in these respects voluntary.

It was true that this debility of municipal law, and this homage to comity, were wholly voluntary on the part of Great Britain. The one was curable by Parliament, and the other lay at the discretion of the Crown. But Her Majesty's Government, while the events were in progress, did not find adequate reasons for any action, notwithstanding the wide-spread depredations which these offending vessels were committing.

Exclusion of prizes from British ports no benefit to United States.

There was one measure of restriction upon these depredations which Her Majesty's Government adopted and persevered in, we mean the exclusion of prizes of either belligerent from British ports. This ordinance was consonant with sound principles, and adopted and enforced in sincere good faith. But to this measure we can trace no real benefit in actually repressing the maritime hostilities. On the contrary, its most afflictive feature, the destruction of ships and their cargoes at sea, flowed from the circumstance that the rebels had no ports of their own which the naval power of the United States had not closed, and that their prizes were excluded from neutral ports. This was well pointed out by Earl Russell in parliament, in a passage already referred to.

It was for this reason that the well-meant exclusion of prizes from neutral ports gave to the rebel cruisers enlarged capacity for terror and for mischief, and shocked the civilized world with this spectacle of destructive violence. But the appeal that this consequence was a demonstration that maritime belligerency should never have been granted, and that the true remedy was to withdraw the concession, was not successful.

Under these two measures of homage to the rebel "commission," though it covered a Florida or an Alabama, and of acquiescence in the destruction of enemy's maritime property without adjudication, American commerce was ground to powder, as between the upper and the nether millstone.

Meanwhile no retaliation of prize capture or destruction as enemy's property was possible. The law of contraband and breach of blockade was the only weapon at the command of the United States against the fleet of blockade runners owned and navigated by the Rebel organization, but protected as neutral property by the British flag. This retaliation was, necessarily, submissive to the prize jurisdiction and to condemnation only upon special proofs. It was thus that the whole rebel naval warfare was prosecuted by cruisers of unlawful British outfit, protected by British recognition of the Rebel flag, while the whole Rebel commercial marine was protected by the cover of the British flag. So, too, no opportunity to shut up, or to capture, or to destroy, any vessel in port, was open to the Navy of the United States; every port accessible to such vessel was a neutral port, which the United States could neither blockade nor invade with their hostilities.

We have exposed these peculiar features of intolerable hardship to

The responsibility of Great Britain for these failures in due diligence continued until the end of the career of the cruisers.

the United States in these maritime hostilities, for the bearing they have upon the failure of Great Britain to fulfill its obligations under the Rules of the Treaty in refusing to arrest the offending vessels in its ports, or to exclude them therefrom, *after* their original outfit and escape. We confidently submit that the Tribunal will find in *this* ground of inculpation, (1) a substantive failure of "due diligence," in the sense of the Treaty, and (2) a maintenance of continued responsibility for "all claims growing out of the acts of" these vessels during their career to its end.

It will remain, then, for the Tribunal to consider these various propositions of law and of fact, under which the actual conduct of Her Majesty's Government is now to be judged, and to apply them, so far as they shall approve themselves to the enlightened judgment of the arbitrators, to the exact analysis of the evidence touching each offending vessel, in a previous division of this argument set forth. We gladly recognize the great advantages which the contending parties will derive from the practical and comprehensive estimate of the decisive elements of the controversy, which the experience and sagacity that belong to conversance with public affairs enable the arbitrators to bring to the determination of this controversy.

No evidence of the exercise of due diligence submitted by Great Britain.

We confidently submit that the British Government has not laid before the Tribunal *any* evidence tending to show the exercise of "due diligence," in respect of any one of the offending vessels, to *prevent* the occurrence of the violation of the international obligation imposed by the Three Rules of the Treaty. Indeed, we may safely go further and insist that, while the matters were *in fieri*, Her Majesty's Government did not at any time apply its thoughts or its purposes to the *direct prevention* of such violation. It was wholly engaged in considering what prosecutions for penalties and forfeitures under the Foreign Enlistment Act it could hopefully institute. For the reasons we have pointed out, *this* does not *tend to* make out "due diligence" to *prevent* the violation of the *international* obligation assigned by the Treaty.

A phrase in the first clause of the first Rule speaks of a neutral Government's duty being applicable to "any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace." What attention was ever paid by Her Majesty's Government, in its deliberations, its doubts, and its decisions, about arresting a vessel, to *this* broad criterion? We look in vain for the agitation of any such question in either of its elements, (1) of the subject of belief, or (2) the grounds required to support it. Instead, the whole topic of debate, of advice, and of determination before Her Majesty's Government was (1) of belief that a forfeiture of the vessel could be obtained under the Foreign Enlistment Act, and (2) the support required for such belief was to be *sworn* voluntary evidence in hand sufficient to exclude appreciable risk of failure before a jury and consequent damages. Whenever the United States shall have submitted by Treaty to *this* test of the international obligations of Great Britain, it will be time enough to adjudge the cause by it.

We respectfully submit that there is nothing in the evidence, or argument even, which proves or asserts that the British Government was either without reasonable ground to believe, or did not believe, that the Florida or Alabama at Liverpool, or the Florida on her first visit to Nassau, was not intended to cruise against the United States. The only deliberation and doubt were, as to the prosecution under the foreign-enlistment act offering the means of judicially punishing, and so, incidentally, interrupting, the projected enterprise.

So, too, we confidently submit to the Tribunal that it does not appear on evidence or in argument before the arbitrators that Her Majesty's Government professes or claims to have used "due diligence" within the premises of the Three Rules of the Treaty, unless due diligence to enforce forfeitures and punishments under the Foreign Enlistment Act is equivalent to due diligence to prevent the violation of the international obligation to the United States which is exacted by the Treaty. We have already considered this subject in some detail, but we apprehend that the wide distinction between these two propositions is too plain to require any further emphasis than its statement. All the laborious argument and voluminous evidence to prove due diligence in prosecutions under the Foreign Enlistment Act are but an "*imbelle telum*" against our challenge of due diligence as exacted by the treaty. An illustration of the difference between these two objects and measures of due diligence is presented upon the occurrences of the Florida's first visit to Nassau. Here we have a legal trial of the question whether the forfeiture of the Florida could be obtained under the foreign-enlistment act in the Vice Admiralty Court. This issue was held to exclude all evidence of what had made her a vessel of war before she left Liverpool, and to include only the question of warlike equipment in Nassau as cognizable by the local court. The Vice Admiralty Court held that the evidence did not prove enough within this issue to forfeit the vessel, and judgment was given against the Crown. So much for this disposition of the question of private right involved in this trial in Admiralty.

But Sir Alexander Milne, and Commander Hickley, and Commander McKillop, and other naval officers, concurred in thinking that their duty, and the duty of Her Majesty's Government, required the *prevention*, by strong hand, of the departure of the Florida. Accordingly, Commander Hickley seized her, and Sir Alexander Milne found a warrant for such action in "the very grave suspicion of being intended for employment as a Southern cruiser; the fact of the vessel being fitted in every respect like one of Her Majesty's ships, and especially adapted for war; her armament ready to be put on board, with a crew of fifty men, and officers of the Confederate States ready to command her."[1]

This action, we submit, was such as the facts of the case required to meet the due diligence of the Three Rules of the Treaty. But the maintenance of the Foreign Enlistment Act was suffered to measure and control the international duty of the Government, and the only question left was, whether Commander Hickley should be protected from "blame and consequent responsibility" for his seizure.[2]

In the light of the propositions which we have insisted should govern the examination, we find it impossible to discover, in the proofs exhibiting the conduct of the British Government in respect of the offending vessels, any evidence tending to show the use of due diligence pointed at the fulfillment of the international duty exacted by the Treaty. Indeed, the fact that the Florida and Alabama *escaped*, when, as Lord Granville justly observed in the debate on the Treaty of Washington, "nothing is so easy as to prevent a vessel of the Alabama class escaping from our shores," is conclusive evidence in the absence of countervailing proof that the due diligence of the Treaty was *not* exhibited to prevent the escape. In vain shall we look for evidence of inevitable accident, of imposition, or of misfortune, supervening to thwart or surprise Her Majesty's Government and accomplish the offense, notwithstanding the employment of due diligence to prevent it.

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[1] Brit. App., vol. i, p. 30. [2] Ibid., p. 30.

It has been more or less argued, or intimated, that in the escape of the Alabama from Liverpool, some element of accident or *casus* mixed itself with the transaction, and is to affect the judgment of the Tribunal in inculpating or exculpating Great Britain for her escape.

We will briefly examine this question of supposed accident or *casus*. The Alabama was the subject of attention to Her Majesty's Government, more actively and immediately, from the 23d day of June. The Law Officers on the 30th of that month state that it seemed "evident she must be intended for some warlike purpose," and refer to a statement of Lairds' foreman that the vessel was "intended as a privateer for the service of the Government of the Southern States," and advise that steps be taken by Her Majesty's Government "to ascertain the truth." On the same day the surveyor at Liverpool reports her warlike build, &c., and states the current report that she is built for a foreign Government, and that this is not denied by the Lairds, with whom he has communicated on the subject, but that they decline to answer questions as to her destination.

On the 9th of July, the Collector was informed that the Lairds had said the vessel was for the Spanish Government, but that the Spanish Minister gave a positive assurance that this was not true. On the 21st of July the Collector sent to London the affidavits in the case, with information that he had been requested to seize the vessel, and asked for instructions by telegraph how he was to act, "as the ship appeared to be *ready for sea, and may leave any hour she pleases.*"

Upon the 23d of July, the "extreme urgency" of the case was represented to the Government, and that "the gun-boat now lies in the Birkenhead docks ready for sea in all respects, with a crew of fifty men on board." On the 26th, the decision of the Government was urged, particularly as *every day* afforded opportunities for the vessel in question to take her departure." On the 28th, "she was moved from the dock into the river; the men had their clothes on board, and received orders to hold themselves ready at any moment." She remained in the river "until 11 or 12 o'clock of the 29th, and was seen from the shore by thousands of persons. The customs officers were on board when she left, and only left her when the tug left." As early as July 4 Her Majesty's Government had promised Mr. Adams that "the officers at Liverpool would keep a strict watch upon the vessel." *After* she left, Her Majesty's government gave orders to seize and detain her.

Here was a vessel under inquiry as to probable seizure for forfeiture, carrying the consequence of intercepting her illegal enterprise. She was ready to sail "at any hour," *six days* before she did sail; the Government made no inquiry, demanded no pledge, took no precautions, placed no impediments affecting her entire freedom. The Government was fully informed of the situation, and was entreated to take action. The Alabama had her enterprise before her, and the Government had its duty to defeat it. These objects and interests were repugnant. The Alabama, being wholly unimpeded by the Government, sailed before the arrest was ordered. The Government, knowing all about the situation, did not attempt to interfere with the vessel's movements.

We are not here arguing as to diligence or duty, only as to accident or *casus*. It is said that some fortuitous circumstance retarded the decision of the Government. But the Government were all the while aware that the Alabama could sail when she pleased, and that she was under the most powerful motives to anticipate the adverse action of the Government by sailing. Sail she did; and this may be put to the account of

casus, when pursuing an expected course, under adequate motives, and at the necessary time, is properly described as accidental.

Equally frivolous seems the only instance that is pretended of anything like *imposition* having been practised on Her Majesty's Government in the course of these transactions. The so-called imposition consists in second-hand statements, that the Florida—which was the counterpart of one of Her Majesty's gun-boats, had no storage, and was by no possibility "*ancipitis usûs*"—was not for the Confederate war service, but belonged to a firm of Thomas Brothers, of Palermo, in Sicily. Now, as this firm of British merchants established in Sicily had no recognition of sovereignty, or even of belligerency, it was very plain that this ownership of a war ship was as much a *cover* as John Lairds & Sons', or William C. Miller & Co.'s, would have been. Accordingly, inquiries were addressed for the purpose of learning whether a Government, also suggested as a possible owner of this war vessel, had really any interest in her, and they were answered in the negative.

The worthlessness, as hearsay, of this evidence is as apparent as its falsehood in respect to the fact, and we only recur to the matter as being the single instance of *imposition* which is claimed to have occurred in the long history of "the several vessels which have given rise to the claims generically known as the 'Alabama Claims.'"

In the deliberations of the Arbitrators, which are to guide them to their actual award, they will have occasion to consider the application of the second and third Rules of the Treaty, no less than of the first Rule, to all the situations and propositions of fact and of law that arise for decision. It is not necessary to distinguish in detail the special cases to which one or the other Rule may be exclusively or pre-eminently applicable.

What vessels under the jurisdiction of the Tribunal.

The only further consideration which we need to present, under this division of the argument, has relation to the vessels which properly come within the jurisdiction of the Tribunal.

Observations on this subject in the Case and Counter Case of the United States have been intended to show that the whole list of vessels, for injuries from whose acts claims are presented to the Tribunal, is included within the jurisdiction conferred in and by the first article of the Treaty. We wish simply to add a reference to a passage in the protocol to the Treaty, of May 4, 1871.

A statement is there made which seems to possess much authority in ascertaining the intent of the Treaty on this point. It is found on page 10 of the Case, and reads as follows:

> At the conference held on the 8th of March, the American Commissioners stated * * that the history of the Alabama and other cruisers, which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain, or her Colonies, and of the operations of those vessels, showed extensive direct losses in the capture and destruction of a large number of vessels, with their cargoes, and in the heavy national expenditures in the pursuit of the cruisers, &c.

It is respectfully submitted that this description of the protocol, beyond all controversy, includes the whole list of vessels as insisted upon in the Case and Counter Case.

XIII.—NATURE AND AMOUNT OF DAMAGES CLAIMED BY THE UNITED STATES.

I.—PREFATORY CONSIDERATIONS.

1. The Counsel of the United States assume that, in the foregoing observations, and the proofs which they have adduced and expounded, they have established the responsibility of the British Government in the premises.

General conclusions.

The legal character of this responsibility is defined by the Treaty of Washington. It is matter of express contract between the two Governments.

The contracting parties, in the first place, agree to certain "Rules," by which the conduct of the British Government in the premises is to be judged. These "Rules" constitute the principles, upon which it is to be conventionally assumed that the British Government acts, as to the questions here at issue. These "Rules" profess to define the general obligations of a neutral Government. They expressly set forth to what such a government is *bound*. They are understood by the tenor of the treaty to define expressly what the British Government was bound, in the occurrences debated, to do or not to do with respect to the United States.

2. The Counsel of the United States have applied these Rules to the acts of commission or omission of the British Government, with conclusion as follows:

(*a*) The British Government did not use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of certain vessels, which it had reasonable grounds to believe were intended to cruise or carry on war against the United States.

(*b*) The British Government did not use like diligence to prevent the departure from its jurisdiction of certain vessels to carry on war against the United States, such vessels having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

(*c*) The British Government did permit or suffer the belligerent Rebels of the United States to make use of the ports or waters of Great Bitain as the base of military operations against the United States, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men for naval warfare.

(*d*) The British Government did not use due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the stipulated rules, (Article VI.)

(*e*) Finally, the British Government has failed to fulfill certain duties, recognized by the principles of international law, not inconsistent with the foregoing "Rules."

3. We think we have shown that the British Government is responsible under these Rules for all, or at any rate for certain, of the cruisers in question. If the Arbitrators come to the same conclusion, then they are to award a sum in gross for the claims referred to them, to be paid by Great Britain to the United States; or, after deciding the failure of the British Government to fulfill its duties as aforesaid, they may remit the question of amount to asses-

Great Britain responsible for the acts of the cruisers.

sors to determine what claims are valid, and what amount shall be paid on account of the liability arising from such failure, as to each vessel, according to the extent of such liability, as decided by the arbitrators, (Article X.)

Thus it appears that the Treaty provides, by various forms of expression, that the liability of Great Britain to pay follows on the conviction of Great Britain of failure to perform her duty in the premises, in conformity with the law of nations and the contract "Rules."

4. What is the measure of this liability? Such is the question which remains to be discussed.

Measure of liability considered.

The Counsel of the United States respond to this question in general terms as follows:

The acts of commission or omission charged to the British Government in the premises constituted due cause of war; in abstaining from war, and consenting to substitute indemnity by arbitration for the wrongs suffered by the United States at the hands of Great Britain, the United States are entitled to redress in damages, general and particular, national and individual, co-extensive with the cause of war, that is to say, sufficient to constitute real indemnification for all the injuries suffered by the United States.

The Tribunal, in order to give such *complete* indemnity to the United States, would have to take up and consider each one of the heads of claim set forth in the American Case.

Claims of losses set forth in the American Case.

These are:

(*a*) The claims for private losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.

(*b*) The national expenditures in pursuit of those cruisers.

(*c*) The loss in the transfer of the American commercial marine to the British flag.

(*d*) The enhanced payments of insurance by private persons.

(*e*) The prolongation of the war, and the addition of a large sum to the cost of the war, and of the suppression of the Rebellion.

5. All these claims are, as we conceive, clearly comprehended in the positive terms of the Treaty.

These claims all comprehended in the terms of the Treaty.

Whether any of such claims, or any part of them, are so remote in their nature in relation to the acts of the Confederate cruisers as to demand rejection by application of the rule of ordinary law, "*Causa proxima, non remota spectatur*," is a juridical question to be argued as such before the tribunal on the facts, not a question of the tenor of the Treaty.

6. All the claims enumerated are of losses "growing out of the acts" of the Confederate cruisers; all of them are the actual consequences of those acts; whether to be allowed as *proximate* consequences, or to be disallowed as *remote* consequences, it is for the Tribunal to decide.

Such comprehensiveness of the Treaty is, in the opinion of the Counsel of the United States, the apparent meaning of the Treaty; it is the only grammatical meaning, it is the logical meaning, it is the true meaning of the Treaty.

The Treaty, in words of unmistakable universality, submits to the Tribunal all *differences*, *all claims*, *all questions* growing out of the acts of the cruisers under consideration.

The language is unequivocal. There is no exception of any particular class or speciality of "difference," "of claim," of question, "growing out of the acts of such cruisers." Not a word is said of direct claims, or of indirect claims. If any such exception were contemplated or intended by either party, he abstained from inserting it, or any hint of it, in the Treaty itself.

II.—QUESTION OF JURISDICTION.

The Agent of the British Government, by a letter communicated to the Arbitrators on the 15th of April, informed them that a misunderstanding had arisen between the two Governments as to "the nature and extent of the claims referred to the Tribunal;" and the Agent of the United States in reply reserved to his Government the right to vindicate the disputed jurisdiction of the Tribunal before the Arbitrators. This we shall now proceed to do.

Great Britain contends that the claims styled "indirect" are not within the scope of the Arbitration.

1. The British Government contends that certain so-called "indirect claims" are not included in the Arbitration. We contend that the Treaty itself contains no sentence, expression, or word, to justify this assumption. On that point we appeal to the text, inspection of which is decisive and conclusive of the question.

The term "indirect" not found in the Treaty.

2. The British Government in effect seems to admit that the text of the Treaty is all-comprehensive in description of the nature of the claims, as claims growing out of the acts of certain vessels, and leaving no subject of inquiry, save in the descriptive words "generically known as Alabama claims," that is, by reference to the principal vessel of the class.

But this expression, "generically known as Alabama claims," does not involve any question of "direct" or "indirect." No such distinction is implied in the words themselves, or in the context.

Rejoinder of the United States to the British assumption.

3. Accordingly, the British Government insists, not so much on the language of the Treaty, as what they *intended* when they assented to it.

To this assumption it is obvious to reply, first, that no such intention is expressed in the Treaty; that such intention was not the understanding of the United States; that if Great Britain had any such intention she should have insisted on its insertion in the Treaty; that as both parties used the same language, there could be no room for misapprehension in this respect; that the intention of parties to a contract is recorded in the contract; and that if, by reason of equivocal language, any doubt arises, it is not for either of the parties to assume to decide the question, but it is a question for the decision of the Tribunal.

The Counsel of the United States are, however, prepared to show that Great Britain had ample notice of the extent of the submission as it was understood by the United States; that is to say, the claims of the United States, in the whole extent of the American Case, were again and again presented to the consideration of the British Government, both before and during the negotiation of the Treaty, as appears by the documents annexed to the Case. This we shall presently proceed to show.

"Indirect," as used in this controversy, is equivalent to "national."

4. Before doing this, we call more particular attention to the equivocal nature of the expression "indirect damages" or "direct damages," as employed by the British Government.

To what injuries or losses do these words refer? Remote consequential injuries or losses? By no means; but chiefly to the immediate *national* injuries suffered by the United States.

The discussions on the part of the British Government are founded upon the assumption that the injuries which one nation does to another as a nation are indirect injuries. We think that such injuries are, on the contrary, emphatically direct in their very nature.

5. To the specification of such claims, when they come to be considered in detail, objection may be made, that such or such particular loss is re-

mote and not proximate; but that is a question which arises in the consideration of the facts. It in no respect affects the generality or comprehensiveness of the expression "all claims growing out" of certain acts.

6. In order to demonstrate that the British Government ought not to have been ignorant of the precise claims now objected to, under whatever name the subject of negotiation, we now proceed to cite the documentary proofs.

(*a*) The Joint High Commissioners, in their negotiations which preceded the Treaty of Washington, made use of the terms "indirect losses" and "direct losses," and these terms were subsequently transferred from the protocols of the conferences of the negotiations to the American Case.

The word "indirect" used in the negotiation which resulted in the treaty.

(*b*) In the public discussions which have since arisen, the terms have apparently been received in a different sense from that in which they were employed by the negotiators, and accepted by the two Governments.

Used in the same sense in this discussion.

It has been assumed by many persons, who were but partially acquainted with the history of the negotiations, that the United States are contending before this Tribunal to be indemnified for several independent series of injuries; whereas they do, in fact, ask reparation but for one series of injuries, namely, those which they, as a Nation, either directly or through their citizens, and the persons enjoying the protection of their flag, have suffered, by reason of the acts committed by the several vessels referred to in their case, which are generically known as the Alabama claims. When the Treaty was signed, both parties evidently contemplated a discussion before the Arbitrators of all the damages which could be shown or contended to have resulted from the injuries for which the United States were seeking reparation.

(*c*) In order to bring any claim for indemnity within the jurisdiction of the Tribunal, the United States understand that it is necessary for them to establish: 1st, that is a claim; 2d, that at the date of the correspondence between Sir Edward Thornton and Mr. Fish, which led to the Treaty, it was generically known as an Alabama claim; and, 3d, that it grows out of the act of some one of the vessels referred to in their Case. They also understand that the Tribunal of Arbitration has full jurisdiction over all claims of the United States which can be shown to possess these three attributes.

What claims are within the jurisdiction of the Tribunal.

A review of the history of the negotiations between the two Governments prior to the correspondence between Sir Edward Thornton and Mr. Fish, will show the Tribunal what was intended by these words, "*generically known as the Alabama claims*," used on each side in that correspondence.

Resume of negotiations respecting Alabama claims.

(*d*) The correspondence between the two Governments was opened by Mr. Adams on the 20th of November, 1862, (less than four months after the escape of the Alabama,) in a note to Earl Russell, written under instructions from the Government of the United States. In this note Mr. Adams submitted evidence of the acts of the Alabama, and stated: "I have the honor to inform your Lordship of the directions which I have received from my Government to solicit redress for the national and private injuries thus sustained."[1]

Mr. Adams, November, 1862, asks "redress for private and national injuries."

Thus the Government of the United States in the outset notified Her Majesty's Government that it would expect indemnification from Great Britain for both the national and the individual losses, and Lord Russell met this notice on the 19th of December, 1862,

Liability denied by Great Britain.

[1] American Appendix, vol. iii, pp. 72, 73.

by a denial of any liability for any injuries growing out of the acts of the Alabama.[1]

United States refuse to relinquish their claims.

When this decision was communicated to the Government of the United States, Mr. Seward informed Mr. Adams that that Government did "not think itself bound in justice to relinquish its claims for redress for the injuries which have resulted from the fitting out and dispatch of the Alabama in a British port." This statement could have referred only to the claims for national and for individual redress which had been thus preferred and refused.

Many claims lodged during the war, but discussion deferred.

As new losses from time to time were suffered by individuals during the war, they were brought to the notice of Her Majesty's Government, and were lodged with the national and individual claims already preferred; but argumentative discussion on the issues involved was by common consent deferred.[2]

In the course of these incidents, Mr. Adams had an interview with Earl Russell, (described in a letter from Lord Russell to Lord Lyons, dated March 27, 1863,) in which, referring to the well-known and permitted conspiracy organized in Great Britain to carry on war against the United States through a naval marine created in British waters, and to the means ostentatiously taken to raise money in London for that purpose, he said, that there was "a manifest conspiracy in this country [Great Britain] to produce a state of exasperation in America, and thus bring on a war with Great Britain, *with a view to aid the Confederate cause.*" And on the 23d of October in the same year, (1863,) Mr. Adams proposed to Earl Russell for the settlement of these claims "some fair and conventional form of arbitrament or reference."[3]

Reasons for calling all the claims "Alabama claims."

It does not appear that during the war the exact phrase "Alabama claims," was used in the correspondence between the two Governments. But it does appear that, in the note in which the claims of the United States for the injuries growing out of the acts of the Alabama itself were first preferred, the United States presented the claims of their citizens for the losses in the destruction of the Ocmulgee, and some other vessels, by the Alabama, and also their own claim for *national injuries* caused by the acts of the same vessel; and that liability for all such injuries being denied by Great Britain, and re-asserted by the United States, the discussion was reserved for a more convenient time by common consent.

When, as already stated, new injuries were received from the acts of other vessels, as well as from acts of the Alabama, claims therefor were added to the list to be all taken up together when the time should arrive. The fact that the first claim preferred grew out of the acts of the Alabama explains how it was that all the claims growing out of the acts of all the vessels came to be "generically known as the Alabama claims."

In April, 1865, United States renew discussion.

On the 7th of April, 1865, the war being virtually over, Mr. Adams renewed the discussion. He transmitted to Earl Russell an official report showing the number and tonnage of American vessels transferred to the British flag during the war. He said, "The United States commerce is rapidly vanishing from the face of the ocean, and that of Great Britain is multiplying in nearly the same ratio." "This process is going on by reason of the action of British subjects in co-operation with emissaries of the insurgents, who have

[1] American Appendix, vol. iii, p. 83.
[2] Mr. Adams to Earl Russell, Am. App., vol. ii, p. 641.
[3] Am. App., vol. ii, p. 182.

supplied from the ports of Her Majesty's Kingdom all the materials, such as vessels, armament, supplies, and men, indispensable to the effective prosecution of this result on the ocean." He asserted that "Great Britain, as a national Power, was fast acquiring the entire maritime commerce of the United States by reason of the acts of a portion of Her Majesty's subjects, engaged in carrying on war against them on the ocean during a time of peace between the two countries;" and he stated that he was "under the painful necessity of announcing that *his Government cannot avoid entailing upon the Government of Great Britain the responsibility for this damage.*"[1]

Responsibility of Great Britain re-asserted.

Lord Russell evidently regarded this as an unequivocal statement of a determination to hold Great Britain responsible for at least a portion of the national injuries growing out of the acts of the cruisers. He said, in reply, "I can never admit that the duties of Great Britain toward the United States are to be measured by the losses which the trade and commerce of the United States have sustained."[2]

Denial of liability

Mr. Adams, in his reply on the 20th of May, repeated the demand. He referred to the destruction of individual vessels and cargoes, and said that, "in addition to this *direct* injury, the action of these British built, manned, and armed vessels has had the *indirect* effect of driving from the sea a large portion of the commercial marine of the United States, and to a corresponding extent enlarging that of Great Britain." He declared that "the very fact of the admitted rise in the rate of insurance on American ships only brings us once more back to look at the original cause of the trouble;" and he again said, that "*the injuries thus received are of so grave a nature as in reason and justice to constitute a valid claim for reparation and indemnification.*"[3]

May, 1865, the United States classify claims as "direct" and "indirect," and demand reparation for all.

It will be observed that the attention of Her Majesty's Government is thus called in terms to a distinction, which has since become the subject of some controversy, between what were styled "direct" and what were styled "indirect" injuries, and that it was made clear beyond a question that the United States intended to claim remuneration for all.

Lord Russel so understood it, and said in reply:

> It seems to Her Majesty's Government that, if the liability of neutral nations were stretched thus far, this pretention, new to the law of nations, would be most burdensome, and indeed most dangerous. A maritime Nation, whose people occupy themselves in constructing ships and cannon and arms, might be made responsible for the whole damages of a war in which that Nation had taken no part.[4]

Great Britain denies liability for indirect and refuses arbitration for direct claims.

Referring to the offer of arbitration, made on the 26th day of October, 1863, Lord Russell, in the same note, said:

> Her Majesty's Government must decline either to make reparation and compensation for the captures made by the Alabama, or to refer the question to any foreign State.[5]

(*c*) This terminated the first stage of the negotiations between the two Governments. They commenced with the demand on the part of the United States for remuneration for national and for individual losses growing out of the acts of the Alabama, and a denial of the liability on the other side. This was followed up by similar demands for injuries growing out of the acts of other vessels, and by a proposal to submit the claims to arbitration.

The negotiations were closed by the repudiation of any possible lia-

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[1] Am. App., vol. i, p. 290; vol. iii, p. 522.
[2] Ibid., vol. i, p. 526.
[3] Am. App., vol. iii, p. 553.
[4] Ibid., p. 361.
[5] Ibid., p. 562.

bility of Great Britain for *national* injuries, as being a doctrine "most dangerous" to neutrals, and by the refusal to arbitrate the question of the captures of vessels and cargoes of individuals made by the Alabama.

It will be observed that Lord Russell here uses the word "Alabama" in a generic sense. The note of Mr. Adams to which he was replying complained of "the burning and destroying on the ocean a large number of merchant-vessels and a very large amount of property belonging to the people of the United States by a number of British vessels."[1] The Parliamentary paper from which this extract is cited is styled "Correspondence respecting the Shenandoah." Mr. Adams's note refers to the acts of the Shenandoah, the Florida,[2] and the Alabama.[3] Lord Russell's note also refers to the Oreto[4] and the Shenandoah.[5] It is evident therefore that when he denies liability and refuses the arbitration as to the acts of the Alabama, he uses the word "Alabama" in a generic sense.

Lord Russell the author of the term "Alabama claims."

The conclusion is irresistible either that the Alabama then stood as the generic representative of all the vessels, or, on the other hand, that Lord Russell first endowed the word Alabama with a generic sense.

(*d*) The evidence before the Tribunal does not show the use of the exact expression "Alabama claims" before October 4, 1866. It then appeared in a leader in the London Times, in the course of which, after referring to the "so-called Alabama claims," it is said: "The loss occasioned by American commerce in consequence may be *damnum sine injuriâ*, and therefore no ground of a legal action, and yet it may be a wise act of courtesy to waive the benefit of this plea." It follows from this, that at that early day the phrase "Alabama claims" had become so well known as to be styled "so-called."

This term well known in October, 1866.

Great Britain having thus possessed herself of a large part of the American commercial marine, through the acts of the cruisers dispatched from her ports to carry on war against the United States, and having refused not only to make indemnity therefor, but also to submit the question of her liability to arbitration, Lord Russell next proposed, with what makes approach at least to audacity, "the appointment of a commission to which shall be referred all claims arising during the late civil war, which the two Powers shall agree to refer," excluding of course the Alabama claims; in other words, that the extravagant claims of British subjects upon the United States should be recognized, while the grave injuries to the United States and their citizens should be ignored. Great Britain also proposed to guard against a possible retransfer of the commercial marine to the United States under the same circumstances, when England should be a belligerent and the United States should be neutral, by letting "by-gones be by-gones," "forgetting the past," and, "as each had become aware of defects that existed in international law," "attempting the improvements in that code which had been proved to be necessary."[6]

Lord Russell proposes to let by-gones be by-gones.

Mr. Seward in reply said:

> There is not one member of this Government, and, so far as I know, not one citizen of the United States, who expects that this country will waive, in any case, the demands that we have heretofore made upon the British Government for redress of wrongs committed in violation of international law. I think that the country would be equally unanimous in declining every form of negotiation that should have in view merely prospective regulations of national intercourse, so long as the justice of our existing claims for indemnity is denied by Her

United States decline to waive any of their claims.

[1] Brit. App., vol. iv, paper v, p. 10.
[2] Ibid., p. 11.
[3] Ibid., p. 12.
[4] Ibid., p. 22.
[5] Ibid., p. 3.
[6] Lord Clarendon to Sir F. Bruce, Brit. App., vol. iv, paper 5, p. 164.

Majesty's Government, and these claims are refused to be made the subject of friendly but impartial examination." [1]

(*e*) In the summer of 1866 a change of Ministry took place in England, and Lord Stanley became Secretary of State for Foreign Affairs in the place of Lord Clarendon. He took an early opportunity to give an intimation in the House of Commons that should the rejected claims be revived, the new Cabinet was not prepared to say what answer might be given them; in other words, that, should an opportunity be offered, Lord Russell's refusal might possibly be reconsidered.

The Stanley-Johnson convention.

Mr. Seward met these overtures by instructing Mr. Adams, on the 27th of August, 1866, "to call Lord Stanley's attention, in a respectful but earnest manner," to "a summary of claims of citizens of the United States, for damages which were suffered by them during the period of the civil war," and to say that the Government of the United States, "*while it thus insists upon these particular claims*, is neither desirous nor willing to assume an attitude unkind and unconciliatory toward Great Britain." He also said that he thought that Her Majesty's Government could not reasonably object to acknowledge the claims.[2]

Lord Stanley met this overture by a communication to Sir Frederick Bruce, in which he denied the liability of Great Britain, and assented to a reference, "provided that a fitting Arbitrator can be found, and that an agreement can be come to as to the points to which the arbitration shall apply.[3]

A long negotiation ensued. In the course of it Mr. Seward wrote to Mr. Adams thus, on the 22d of May, 1867:

As the case now stands, the injuries by which the United States are aggrieved are not chiefly the actual losses sustained in the several depredations, but the first unfriendly or wrongful proceeding of which they are but the consequences.

(*f*) These negotiations were conducted in London, partly by Lord Stanley and partly by Lord Clarendon, on the British side, and partly by Mr. Adams and partly by Mr. Reverdy Johnson, on the American side. In Washington Mr. Seward remained the Secretary of State. Great Britain was there represented, first by Sir Frederick Bruce, and afterward by Sir Edward Thornton.

(*g*) As the first result of these negotiations, a convention known as the Stanley-Johnson convention was signed at London on the 10th of November, 1868. It proved to be unacceptable to the Government of the United States. Negotiations were at once resumed, and resulted on the 14th of January, 1869, in the Treaty known as the Johnson-Clarendon convention.

The Johnson-Clarendon convention.

(*h*) This latter convention provided for the organization of a mixed commission with jurisdiction over "all claims on the part of citizens of the United States upon the Government of Her Britannic Majesty, including the so-called Alabama claims, and all claims on the part of subjects of Her Britannic Majesty upon the Government of the United States which may have been presented to either Government for its interposition with the other since the 26th July, 1853, and which yet remain unsettled." [4]

Lord Granville subsequently said, in the House of Lords, of these two conventions, "the former convention provided (Article IV) that the Commissioners shall have the power to adjudicate upon the class of claims referred to in the official correspondence between the two Governments as the Alabama

Lord Granville thinks it admits unlimited argument as to the extent of Alabama claims.

[1] Mr. Seward to Mr. Adams, Feb. 14, 1866, vol. iii, Am. App., p. 628.
[2] Am. App., vol. iii, pp. 632–636.
[3] Ibid., p. 652.
[4] Am. App. vol. iii, pp. 752, 753.

claims. The latter (Article I) provided that all claims on the part of subjects of Her Britannic Majesty upon the Government of the United States, and all claims on the part of the citizens of the United States upon the Government of Her Britannic Majesty, including the so-called Alabama claims, shall be referred to commissioners, &c. Both conventions purposely avoided defining what constituted the Alabama claims, and admitted almost unlimited argument as to what the Alabama claims were. Both conventions were also open to the objection (at that time unavoidable) that there was no check on the award of the final Arbitrator, who might have given damages to any amount."[1]

It is clear, therefore, that up to the conclusion of the Johnson-Clarendon treaty in January, 1869, there was no doubt in England that the term "Alabama claims" was understood as including the claims for the national injuries.

The convention not acceptable to the United States.

(*i*) It was supposed in America that it was not stated in sufficiently unequivocal terms in the Johnson-Clarendon Treaty that the national claims should be considered by the Arbitrators; and there were many signs that the Treaty, in consequence of that belief, would not receive the assent of the Senate. Mr. Reverdy Johnson, hearing of this, wrote an elaborate defense of himself, which has been seized upon by Her Majesty's Government as proof that the United States had at no time claimed to receive indemnity for the national injuries which they have suffered. But the foregoing *résumé* of correspondence between the two Governments shows that, if Mr. Johnson made such a statement, he did it under a misapprehension.

Mr. Johnson informs Lord Clarendon that the United States have claims of their own on Great Britain

The error was never communicated to Her Majesty's Government. On the contrary, only a few days later he wrote to Lord Clarendon in exactly the opposite sense. He said, referring to a claims convention between the two Governments in 1853, "At that time neither Government, as such, made a demand upon the other; but that, as my proposition assumes, is not the case now. The Government of the United States believes that it has in its own right a claim upon the Government of Great Britain."[2]

(*j*) Her Majesty's Government also received the same intelligence about that time from other sources.

Its Minister at Washington, on the 2d of February, 1869, communicated to it the action of the Senate Committee on Foreign Relations. "Mr. Sumner," he said, "brought forward the above-mentioned convention, and after making a short comment upon its contents, and stating that it covered none of the principles for which the United States had always contended, recommended that the committee should advise the Senate to refuse their sanction to its ratification. Mr. Sumner was authorized to report in that sense to the Senate."[3] On the 19th of April Mr. Thornton also advised Lord Clarendon of the rejection of the Treaty. "Your Lordship perceives," he said, "that the sum of Mr. Sumner's assertion is that England * * * is responsible for the property destroyed by the Alabama and other Confederate cruisers, and even for the remote damage to American shipping interests, including the increase in the rate of insurance; that the Confederates were so much assisted by being able to get arms and ammunition from England, and so much encouraged by the Queen's Proclamation, that the war lasted much longer than it would otherwise have done, and that we ought therefore to pay imaginary additional expenses imposed upon the United States by the prolongation of the war."[4]

Sir Edward Thornton advises Lord Clarendon that the convention is rejected because it is thought that it does not include the indirect claims.

[1] Hansard, *ubi supra*.
[2] Am. App., vol. iii, p. 780.
[3] Ibid., p. 772.
[4] Ibid., p. 784.

(*k.*) This may be called the end of the second stage of the history of the negotiations. It commenced with an intimation from Great Britain that a proposal from the United States would be listened to. In its progress negotiations were opened, which ended in a convention providing for the submission of claims of citizens of the United States against Great Britain, including the Alabama claims. This convention, in the opinion of Lord Granville, admitted unlimited argument as to what the Alabama claims were. The Treaty was rejected by the Senate of the United States, because, although it made provision for the part of the Alabama claims which consisted of claims for individual losses, the provision for the more extensive national losses was not satisfactory to the Senate. It is clear that, by this time, if not before, the phrase "Alabama claims" was understood on both sides as representing all the claims against Great Britain, "growing out of" its conduct toward the United States during the insurrection. A portion of these claims had been, throughout the discussions by Mr. Seward and Mr. Adams, grounded on the unnecessary Proclamation recognizing the insurgents as belligerents. The remainder rested on the acts of the cruisers. All were alike known as Alabama claims.

At this stage of the history, General Grant became President.

Mr. Motley informs Lord Clarendon that the United States do not abandon the national claims.

On the 15th of May following Mr. Fish instructed Mr. Motley to say to Lord Clarendon that the United States in rejecting the Treaty "abandoned neither *its own claims* nor those *of its citizens.*"[1] Again, on the 25th of the following September, Mr. Motley was instructed by Mr. Fish in a dispatch, of which a copy was to be given to Lord Clarendon, to say that the President concurred with the Senate in disapproving the convention which had been rejected; that "he thought the provisions of that convention were inadequate to provide reparation for the United States, in the manner and to the degree to which he considered the United States were entitled to redress;" but that "he was not prepared to pronounce on the question of the indemnities which he thought due to individual citizens of the United States * * * nor of the reparation which he thought due by the British Government for the larger account of the vast *national* injuries it had inflicted on the United States."[2]

And that the Johnson-Clarendon convention did not afford sufficient redress for the national injuries.

The indirect claims as considered by Lord Clarendon.

In an elaborate paper styled "Observations" upon Mr. Fish's dispatch to Mr. Motley, of the 25th of September, 1869, which was appended to Lord Clarendon's dispatches of November 6, 1869, to Sir Edward Thornton, the subject of the national, now called indirect, claims was fully considered in a way which must satisfy the Arbitrators that the British Government understood the nature, character, and extent of those claims. It is difficult when reading these observations, and the dispatch which called them out, to understand how Lord Granville could commit himself to the statement, in one of his recent dispatches, that "*There was not a word in any letter preceding the Treaty to suggest any indirect or constructive claims; and the only intimation the British Government had had was from the speech of Mr. Sumner.*"[3]

It seems to us that these incidents are decisive of the whole controversy.

(*l*) In the following December the President thus alluded to the subject in his annual message to Congress:

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[1] Am. App., vol. vi, p. 1.
[2] Ibid., p. 13.
[3] Appendix to British Case, vol. iv, No. 1, p. 19.

President's message to Congress, December, 1869.

The provisions [of the Treaty] were wholly inadequate for the settlement of the grave wrongs that have been sustained by this Government as well as by its citizens. The injuries resulting to the United States by reason of the course adopted by Great Britain during our late civil war; in the increased rates of insurance, in the diminution of exports and imports, and other obstructions to domestic industry and production; in its effects upon the foreign commerce of the country; in the decrease of the transfer to Great Britain of our commercial marine; in the prolongation of the war; and the increased cost (both in treasure and lives) of its suppression; could not be adjusted and satisfied as ordinary commercial claims which continually arise between commercial nations. And yet the convention treated them simply as such ordinary claims, from which they differ more widely in the gravity of their character than in the magnitude of their amount, great as is that difference.

Same in 1870.

And still again, in his annual message to Congress in December, 1870, the President referred to the subject with similar precision and particularity of statement, as cited in a previous part of the present Argument.[1]

In January, 1871, the words Alabama claims were understood to include all claims of the United States against Great Britain, both national and individual.

It cannot, therefore, be doubted that, in the beginning of the year 1871, it was well understood by both Governments that the United States maintained that Her Majesty's Government ought, under the laws of nations, to make good to them the losses which they had suffered by reason of the acts of all the cruisers, typically represented by the Alabama—whether those losses were caused by the destruction of vessels and their cargoes; by the prolongation of the war; by the transfer of the commerce of the United States to the British flag; by the increased rates of insurance during the war; by the expense of the pursuit of the cruisers; or by any other of the causes enumerated in the President's message to Congress in 1869. Nor can it be doubted that they intended to reserve the right to maintain the justice of all these claims when opportunity should offer, nor that they regarded all these several classes of losses as embraced within the terms of the general generic phrase "Alabama claims." It is also equally clear that the claims for compensation founded upon the Queen's Proclamation were abandoned by President Grant.

Negotiations opened at Washington.

(*m*) At that time, the condition of Europe induced Her Majesty's Ministers to consider the condition of the foreign relations of the Empire. They found that their relations with the United States were not such as they would desire to have them; and they induced a gentleman, who enjoyed the confidence of both Cabinets, to visit Washington for the purpose, in a confidential inquiry, of determining whether those relations could be improved.[2]

Reasons which induced those negotiations.

(*n*) It was not the first time that Great Britain had had cause solicitously to ask herself whether she might not have need of the good will of the United States.

At the opening of the war between France and Great Britain on the one hand, and Russia on the other, the Emperor Napoleon found himself greatly embarrassed by England's traditional attitude of exigency toward neutrals, so contrary to the traditional policy of France. The Foreign Minister, M. Drouyn de Lhuys, labored in correspondence with the British Government to induce the latter to relinquish her own policy and accept that of France. To effect this object, the great lever employed by M. Drouyn de Lhuys was the apprehension entertained in Great Britain of the possible attitude of the United States. He explains the matter as follows:

Ce qui touchait particulièrement le gouvernement anglais, c'était la crainte de voir l'Amérique incliner contre nous et prêter à nos ennemis le concours de ses hardis vo-

[1] *Ante*, p. 18. [2] Statement by Lord Granville, Hansard, vol. ccvi, p. 1842.

lontaires. La population maritime des États-Unis, leur marine entreprenante, pouvaient fournir à la Russie les éléments d'une flotte de corsaires, qui, attachés à son service par des lettres de marque, et couvrant les mers comme d'un réseau, harcèleraient et poursuivraient notre commerce jusque dans les parages les plus reculés. Pour prévenir ce danger, le cabinet de Londres tenait beaucoup à se concilier les bonnes dispositions du gouvernement fédéral. Il avait conçu l'idée de lui proposer, en même temps qu'au gouvernement français et à tous les états maritimes, la conclusion d'un arrangement, ayant pour but la suppression de la course et permettant de traiter comme pirate quiconque, en temps de guerre, serait trouvé muni de lettres de marque. Ce projet, qui fut abandonné dans la suite, témoigne de l'inquiétude éprouvée par les Anglais.[1]

How M. Drouyn de Lhuys worked on this state of mind of the British Government appears by the following extract from a dispatch from him to the French Minister at London, M. Walewski:

Les États-Unis enfin sont prêts, je ne saurais en douter, à revendiquer le rôle que nous déclinerions et à se faire les protecteurs des neutres, qui eux-mêmes recherchent leur appui. Le cabinet de Washington nous propose en ce moment de signer un traité d'amitié, de navigation et de commerce, où il a inséré une série d'articles destinés à affirmer avec une autorité nouvelle les principes qu'il a toujours soutenus et qui ne diffèrent pas des nôtres. Le principal secrétaire d'état de sa Majesté britannique comprendra que nous n'aurions aucun moyen de ne pas répondre favorablement à l'ouverture qui nous est faite, si la France et l'Angleterre, bien que se trouvant engagées dans une même entreprise, affichaient publiquement des doctrines opposées. Que les deux gouvernements, au contraire, s'entendent sur les termes d'une déclaration commune, et nous pouvons alors ajourner l'examen des propositions des États-Unis. Il me paraît difficile que ces considérations ne frappent pas l'esprit de Lord Clarendon.[2]

These and like representations on the part of M. Drouyn de Lhuys, induced Great Britain to come to an arrangement with France.

(*o*) Not insensible to such motives, Lord Granville, pending the late war between France and Germany, dispatched a confidential agent to America to re-open negotiations with the United States.

This gentleman arrived in Washington early in January, 1871, and found the Government of the United States so disposed to meet the advances of Her Majesty's government that, before the end of the month, Sir Edward Thorton was able to propose to Mr. Fish "the appointment of a Joint High Commission" to "treat of and discuss the mode of settling the different questions which have arisen out of the fisheries," &c.[3]

Preliminary proposals and correspondence.

Mr. Fish replied, accepting the proposition upon condition that "the differences which arose during the Rebellion in the United States, and which have existed since then, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama claims,'" should also be "treated of by the proposed Joint High Commission."[4]

The proposed commission to treat of the Alabama claims.

Sir Edward Thornton, on the 1st of February, answered that "it would give Her Majesty's Government great satisfaction if the claims were submitted to the consideration of the same High Commission."[5]

The President of the United States, under the provisions of the Constitution, nominated to the Senate for its approval five commissioners to serve in the Joint High Commission on the part of the United States, and transmitted to the Senate the correspondence between Mr. Fish and Sir Edward Thornton, to explain the proposed duties of the nominees. Upon this explanation the Senate gave its assent to the several appointments; and thereupon the appointees each received a commission authorizing him "to treat and discuss the mode of settlement of the different ques-

United States commissioners appointed and confirmed on the correspondence, and their powers limited by it.

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[1] Drouyn de Lhuys, *Les neutres pendant la guerre d'Orient*, p. 14.
[2] Ibid., p. 28.
[3] Brit. App., vol. iv, paper ii, p. 1.
[4] Ibid.
[5] Ibid., p. 3.

tions which shall come before the said Joint High Commission."[1] The British Commissioners received a broader power, which was stated to be conferred upon them "for the purpose of discussing in a friendly spirit" "the various differences which have arisen" between Great Britain and the United States, "and of treating for an agreement as to the mode of their amicable settlement."

Taking these powers and the correspondence between Mr. Fish and Sir Edward Thornton together, it is evident that each Government contemplated that all the differences between the two Governments within the range of the correspondence were to be discussed with a view to reaching a mode of settlement.

Among the Commissioners named on the part of the United States was Mr. Fish, the Secretary of State, one of the parties to the preliminary correspondence which led to the Treaty; and among those on the part of Great Britain was Sir Edward Thornton, the other party to that correspondence.

The Alabama claims.

(*p*) The subject of the Alabama claims was opened at the fourth conference by an elaborate statement from the American commissioners.[2]

The American commissioners state their understanding of the meaning of those words.

They stated that "in consequence of the course and conduct of Great Britain during the Rebellion" the United States had sustained a great wrong, and had also suffered "great losses and injuries upon their material interests." Thus, in the outset, they drew a distinction between certain political differences which had been the subject of some correspondence between the two Governments, and the material losses and injuries which could be estimated and indemnified by pecuniary compensation. They then went on to state their views more in detail as to such losses and injuries.

In order to bring them within the letter of the correspondence, and to define their understanding of the meaning of the language there used by Mr. Fish and by Sir Edward Thornton, they began by tracing these losses and injuries to the Alabama and the other cruisers. They said that "the history of the Alabama and other cruisers which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain, or in her 'colonies,' showed the losses and injuries for which they are claiming indemnification."

They then said that the damage which they had suffered from these injuries was two-fold: 1st. That which had proximately resulted from the acts of the cruisers, "the capture and destruction of a large number of vessels with their cargoes," and "the heavy expenditures in the pursuit of the cruisers;" and 2d, other injuries resulting less directly, though not less certainly—namely, "the transfer of a large part of the American commercial marine to the British flag," "the enhanced payments of insurance," "the prolongation of the war," "and the addition of a large sum to the cost of the war, and the suppression of the rebellion."

Thus Mr. Fish, one of the parties to the preliminary correspondence, and his colleagues, explained to Sir Edward Thornton, the other party to the correspondence, and to his colleagues, that the history of the cruisers showed all these losses and injuries; in other words, that they all grew out of the acts of those cruisers.

The American Commissioners next expressed their conviction that the history of the cruisers showed "that Great Britain, by reason of failure in the proper performance of her duties as a neutral, had become justly liable for the acts of those cruisers and of their tenders."

[1] Brit. App., vol. iv, paper xii, p. 6.

[2] Ibid., p. 8.

They then turned to the consideration of the damage which the United States had suffered from this class of injuries. They stated the amount of the claims for the destruction of private property which had up to that time been presented. They indicated a manner in which the amount of the expenses for the pursuit of the cruisers could be ascertained. They added that they had not yet made an estimate of the other damages less proximately resulting from the injuries complained of, because they "hoped for an amicable settlement." This, however, was not to prejudice them "in the event of no such settlement being made." They thus distinctly declared that these classes of injuries also were capable of being estimated and pecuniarily indemnified; and they reserved the right to claim such indemnity.

They propose a mode of ascertaining the amount of the damages.

They closed their elaborate statement by proposing that the desired amicable settlement should be made within the walls of the room in which the conference was held, by means of an agreement "upon a sum which should be paid by Great Britain to the United States in satisfaction of all the claims and interest thereon."

And that payment thereof should be made.

Such an arrangement, in connection with the other provisions of the Treaty, would indeed have constituted a settlement, and an amicable one. It would have been a settlement, because, being a discharge of the obligation, it would have ended all controversy. It is not an amicable settlement, it is not in any sense a settlement, to engage in a protracted lawsuit, as the two Governments have been constrained to do, in consequence of the British Government refusing to enter into the amicable arrangement proposed by the United States.

This would have been an amicable settlement;

It has been asserted that this proposal was a "waiver" of the claims classed as "indirect." So far from that being the case, the proposal contemplated that the payment of a gross sum was to be made and accepted as a "*satisfaction of* ALL *the claims.*" Such a payment and such an application of the payment are utterly inconsistent with the idea of a waiver of any of the claims.

But no waiver of any class of claims.

The attitude of Mr. Fish on this occasion, and of the other American Commissioners, was in perfect accord with the constant previous attitude of the American Government, as explained by Mr. Seward in his dispatch to Mr. Adams of January 13, 1868.[1]

> Lord Stanley seems to have resolved that the so-called Alabama claims shall be treated so exclusively as a pecuniary commercial claim as to insist on altogether excluding the proceedings of Her Majesty's Government in regard to the war from consideration in the Arbitration which he proposed. On the other hand, I have been singularly unfortunate in my correspondence if I have not given it to be clearly understood that a violation of neutrality by the Queen's proclamation, and kindred proceedings of the British government, is regarded as a national wrong and injury to the United States.

The British commissioners without delay declined the American proposal for an amicable settlement.

The proposal declined;

Sir Edward Thornton, the other party to the preliminary correspondence, and his colleagues, listened without objection to Mr. Fish's definition of the sense in which the phrase "Alabama claims" had been used in that correspondence; nor did they at any time take exception to it, or propose to limit it. On the contrary, they expressly declined to reply in detail to the statement of the American Commissioners.

Without exception to the definition of the term "Alabama claims."

[1] Am. App., vol. iii, p. 688.

After rejecting the "amicable settlement," proposed by the American Commissioners, the British Commissioners next suggested the substitution of a litigious "mode of settlement" in its place, viz, a lawsuit or arbitration, wherein all liability to the United States for the injuries complained of should be denied and contested.

A reference proposed by Great Britain.

The American Commissioners regarded this as a very different adjustment from the one which they had proposed. They unwillingly, and under conditions, accepted the British suggestion to refer to Arbitrators the full statement of injuries which they had just made, and which the British Commissioners had received without cavil.

Unwillingly accepted by the United States.

(*q*) After a discussion of several weeks the Joint High Commissioners agreed upon a Treaty.

The Treaty of Washington.

The preamble of this instrument recites that "the United States of America and Her Britannic Majesty, being desirous to provide for an amicable settlement of all causes of difference between the two countries, have for that purpose appointed their respective plenipotentiaries."

Meaning of "amicable settlement"

This statement is recitative and historical, and must be taken to be strictly true in the sense in which it was written.

It therefore does not lie in the mouth of either party to the Treaty to deny that each Government, in appointing its Commissioners, desired to provide for an amicable settlement of the San Juan water boundary, of the navigation of the Saint Lawrence, of the Canadian fisheries, of the navigation of Lake Michigan, of the use of the navigable rivers in Alaska, and of the claims of British subjects for losses arising out of acts committed against their persons or their properties, as well as of the Alabama claims.

But when it is attempted to confine the words of this preamble to a single one of the subjects grouped in the Treaty, and to transfer the operation of its language from the Governments of whom the affirmations are made to subjects disposed of in the treaty, it is an evident perversion of the purpose which the parties had in view. For the Treaty itself immediately makes it clear that the parties did not understand that the arragement as to the Alabama claims was an "amicable settlement."

It is declared that the agreements in this respect are made in order "*to provide for the speedy settlement of such claims.*" If an "amicable settlement" of these claims had just been made, it is not to be supposed that the parties would enter into a formal agreement for their "speedy settlement" in the future.

The means for reaching this speedy settlement form the subject of the enacting clause of the Treaty. It is there provided "that all the said claims growing out of the acts of the aforesaid vessels, and generically known as the 'Alabama claims,' shall be referred to a Tribunal of Arbitration."

Claims for reference under the Treaty.

This language is nearly identical with the language of the correspondence between Mr. Fish and Sir Edward Thornton; by referring to what has preceded the Arbitrators will see that the change is one of taste, not of sense; of form, not of substance.

The same which were described in preliminary correspondence.

We look in vain in it for a waiver of any of the demands made by Mr. Fish at the fourth conference. If the parties, after such specific notice, had intended to withdraw from the scope of the Arbitration any of those demands, or to provide that any of the injuries

No waiver of indirect claims.

to the United States growing out of the acts of the cruisers were not to be considered by the Arbitrators, the limitation would undoubtedly have found a place in this part of the Treaty. It is clear, therefore, that there was no such purpose.

Having provided a manner for giving the Tribunal jurisdiction over the subject of the reference, the Treaty next defines the extent of that jurisdiction.

The Arbitrators are to determine, 1st, whether the United States have suffered any of the specified injuries, that is, any injuries growing out of the acts committed by the cruisers; 2d, whether Great Britain is liable to indemnify the United States for any of those injuries, and if so, for which ones; and, 3d, it is provided that, in case the Tribunal finds that Great Britain has failed to fulfill any duty or duties as aforesaid, it may, if it thinks proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; but it is nowhere stated or intimated that in reaching that gross sum any part of the injuries to the United States which may be shown to grow out of the acts of the cruisers are to be or may be disregarded by the Arbitrators. Mr. Montague Bernard in his lecture on the Treaty has fairly admitted this. He says:

Powers of the Tribunal.

Power to assess damages not limited.

> The Treaty of Washington is carefully framed to embrace only specific claims, such as had previously become known to both Governments under the name of the "Alabama claims," for losses and damages caused by the acts of certain vessels, of which the Alabama was the typical instance; further, the losses must be such as can be fairly ascribed to some failure of duty on the part of England in respect of these vessels; and in making an award each vessel is to be taken separately. *But, beyond this, the Treaty does not define, by express words of limitation, the nature of the losses on account of which compensation may be awarded, should the Arbitrators decide that any compensation is due. On this single point a disagreement has arisen between the two Governments.*[1]

Views of Mr. Bernard.

That is true; the Treaty does not contain any express words of limitation. Nor does it contain any words to imply or suggest limitation. On the contrary the words are unequivocally and explicitly general, not to say universal, as comprehending *all* claims of the "specific" class; that is, "Alabama claims." The assumption that there is such limitation is a contradiction of the express language and the plain meaning of the Treaty.

It appears from all this that the Arbitrators received by the Treaty full jurisdiction over all the claims presented and defined by the American Commissioners at the opening of the fourth conference. This conclusion receives a significant support from the twelfth article of the Treaty. That article provides for the creation of another and an independent Tribunal, which is also to have juridical powers for finding injuries and awarding damages. The claims to be submitted to such Tribunal are defined to be "claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty," and "claims on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States." Great care is thus taken to limit the jurisdiction of the tribunal created by Article XII to the consideration of injuries suffered by individuals, companies, or corporations. But the Tribunal of Arbitration at Geneva is invested by the terms of Article I with the jurisdiction over "*all the claims on the part of the United States* growing out of the acts" committed by the cruisers. The limitation to individual claims which is found in the twelfth article, is not found in the first article. On the contrary

Twelfth article of the treaty.

[1] Lecture on the Washington Treaty, May 28th, 1872, London Times, 29th May, 1872.

the language widens out with the evident purpose of enabling the court to become possessed of complete jurisdiction of the case.

(r) Four of the five British Commissioners have made public statements regarding these negotiations. No two of them agree.

Sir Stafford Northcote for instance has said, that "the Commissioners were distinctly responsible for having represented to the Government that they understood a promise to be given that these claims were not to be put forward, and were not to be submitted to Arbitration."[1]

Sir Stafford Northcote.

But Lord Ripon says:

Lord Ripon.

If Her Majesty's Commissioners had been induced by any such understanding to employ language which in their judgment admitted these claims, they would be liable to just and severe blame.[2]

And yet Mr. Montague Bernard says, as if in apology for the language of the Treaty:

Mr Bernard.

It is often necessary for the sake of agreement to accept a less finished or even less accurate expression instead of a more finished or more accurate one, and which must be construed liberally and reasonably, according to what appears to be the true intention of the contracting parties.[3]

All reasoning from recollections and understandings ought to disappear in reading the protocol of the second conference of the Joint High Commission, where it is stated that "at the commencement of the conference the United States High Commissioners called attention to the provision in the Constitution of the United States, by which the advice and consent of the Senate is required for the ratification of any Treaty which may be signed under the authority of the President."

Evidence from Protocol II.

It ought not to be credited that Her Majesty's High Commissioners, after such a notice, would have been content to rely upon any promise of the American Commissioners to protect Great Britain against a class of claims which, without such promise, were apparently included in the operative words of the Treaty sent to the Senate for its constitutional action. This conclusion is strengthened by the fact that Lord Ripon, Sir Stafford Northcote, and Mr. Montague Bernard left the United States before the Senate had acted upon the Treaty, and had no opportunity to know what affected the action of that body.

They proceeded to England. Soon after their arrival there the Treaty became the subjectof discussion in each House of Parliament.[4]

Debate in Parliament.

Earl Granville, in the House of Lords, made a speech, in which he used expressions which have since been much commented upon. He said that "the pretensions" advanced by Mr. Fish "en-

Lord Granville.

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[1] London Times May 28, 1872. Sir Stafford Northcote explains his meaning in a note read by Lord Derby in the House of Lords, and printed in the London journals of the 9th of June, 1872:

"It has been supposed, and you seem to have supposed, that I said that an understanding existed between the British and the American negotiators that the claims for indirect losses should not be brought forward, and it has been inferred from this that we, relying upon that understanding, were less careful in framing the Treaty than we should otherwise have been.

"That is incorrect. What I said was that we had represented to our Government that we understood a promise to have been given that no claims for indirect losses should be brought forward. In so saying I referred to the statement voluntarily and formally made by the American Commissioners at the opening of the conference on the 8th March, which I for one understood to amount to an engagement that the claims in question should not be put forward in the event of a Treaty being agreed on."

[2] London Times, June 5, 1872.

[3] London Times, *ut supra*.

[4] House of Lords, Hansard, N. S., vol. 206.

tirely disappear under the limited reference which includes merely complaints arising out of the *escape of the Alabama*." Could anything have been more inaccurate than this brief, even bald, expression? We shall soon notice this speech further. At present it is sufficient to say that Lord Granville himself probably would not now contend that it was in any sense a correct statement of the effect of the operative clause of the first article of the treaty. Lord Cairns immediately challenged it. He said:

Lord Cairns says the indirect claims included in the treaty

I quite concur in the opinion that, under the Arbitration proposed by my noble friend, the late Foreign Secretary, and Lord Clarendon, it was quite possible for the United States to have made extravagant claims. But what is there in the present Treaty to prevent the same thing? I cannot find one single word in these protocols or in these Rules which would prevent such claims being put in and taking their chance, and under the Treaty proposed by my noble friend they could do more. There is this difference in a controversy of this kind between leaving all questions open to an Arbitrator or Arbitrators in whom you have confidence, and in referring these questions to these arbitrators with certain cut and dried propositions unfavorable to your views of the case. Suppose I charge a man with burning my house, and tell him that I hold him answerable for all the damages that ensue; and he said, "You have no power whatever. I happened to be passing at the time, and I saw a great number of men attacking your house and burning it. It was not in my power to prevent them doing it. I am sorry to see what happened, and I will refer the whole question to Arbitration." I should be quite willing to say, I am perfectly prepared to refer the question to Arbitration if there is an article in the agreement providing that any person passing by while other persons were setting fire to my house, and did not stop them, is answerable for all the civil consequences of the house improperly being destroyed. Of course, if a man is so foolish as to consent to such an arrangement, he must not be surprised when he is made responsible for all the damage.

His construction not questioned

These remarks of Lord Cairns were the only ones made during that debate which can aspire to be regarded as a criticism upon the operative part of the first section of the Treaty. They were full, precise, learned, and not open to doubt. Lord Ripon, who had negotiated the Treaty, was present at that debate. Lord Granville, who had from day to day, through the Atlantic cable, instructed Lord Ripon and his colleagues in the course of the negotiations, was also present. The Duke of Argyll, the Lord Chancellor, and Lord Kimberley, all Cabinet Ministers, were there. Did any or either of them dissent from Lord Cairns's opinions? If they did, the official records of the debates do not show it, although all of them spoke in the debate.

Lord Ripon's views.

So far as the views of Lord Ripon can be gathered from a speech made by him in the same debate, they were in accord with those of the United States. He said:

Now, so far from our conduct being a constant course of concession, there were, as my noble friend behind me (Earl Granville) has said, numerous occasions on which it was our duty to say that the proposals made to us were such as it was impossible for us to think of entertaining. Nothing can be more easy than to take the course adopted by my noble friend opposite, (the Earl of Derby,) and to say that all the demands we resisted were so preposterous that it would have been absurd to entertain them, while those upon which concession was made were the only ones really in dispute. My noble friend says that no Arbitrator would have entertained a claim for what the Americans term our premature recognition of belligerent rights and the consequent prolongation of the war. That may be true; but in the convention to which my noble friend appended his name, it would have been open to the Americans to adduce arguments on that point.

Is it not the fair, is it not the only conclusion to be derived from this language, that, while in the Treaty the United States abandoned their "claims for *the premature recognition of belligerent* rights, and the *consequent* prolongation of the war," they adhered to *all* the claims growing out of the acts of the cruisers as they had been defined in the protocol? *Expressio unius, exclusio alterius.*

In the debate in the House of Commons, on the 4th of August, Sir Stafford Northcote spoke. His speech was reported in the Times of the next day. He said, regarding the previous conventions:

Sir Stafford Northcote.

> They [the United States] might have raised questions with regard to what they called England's *premature recognition of belligerency*, and the *consequential* damages arising from the prolongation of the war, and with regard also to other questions which this country could not have admitted. Instead of this being the case, however, the Treaty, as actually concluded, narrowed the questions at issue very closely by confining the reference solely to losses growing out of the acts of particular vessels, *and so shutting out a large class of claims* upon which the Americans had heretofore insisted.

Thus, according to Sir Stafford Northcote, also, the claims abandoned by the United States were those "growing out of" "the premature recognition of belligerency." He evidently did not think that they had abandoned any of their claims "growing out of the acts of the vessels;" otherwise he would have said so. On the contrary, he said that the "large class of claims upon which the Americans had heretofore insisted" were to be "shut out," not because they were expressly excluded by the terms of the Treaty, but because, "by confining the reference solely to losses growing out of the acts of particular vessels," the parties had, in his judgment, made it impossible for the United States to connect the objectionable claims with what the treaty pointed out as the only cause of the injuries which the Arbitrators could regard.

The United States thought that it was possible to make such a connection, and so they stated in their Case. The conflicting revelations of the several Commissioners which have followed, justify Sir Stafford Northcote in his remark, that "in order to maintain a thorough good feeling between the two countries, it was better * * * that the public of England and America should see the result at which the Commissioners had arrived, without going into all the questions raised and discussed in the course of the negotiations."

More than that, they show the wisdom of the decision of Her Majesty's Government, announced by Lord Granville in his speech in the following language:

> At their very first meeting the American and the British Commissioners came to an agreement that they would keep secret their discussions, and that, though accounts of them would be communicated to their respective Governments, yet they were to be considered as confidential, and not to be published. I may add, that I have not the lightest doubt of the wisdom of the course pursued by the British and American Commissioners. They had thirty-seven long sittings; and I will venture to say that if every one of the ten Commissioners—not to mention the two able secretaries—had thought it incumbent upon them to show their patriotism and power of debate for the admiration of the two hemispheres, the thirty-seven sittings would have been multiplied by at least ten times, while the result of their deliberations would have been absolutely *nil*. I think the Commissioners on both sides acted advantageously to their respective Governments. The representations of both displayed great zeal, ability, patience, temper, and an honest desire to come to some compromise, even though the difficulties appeared at first sight to be irreconcilable. The noble earl (Earl Russell) thinks that whenever the Americans proposed anything it was immediately accepted. This, however, was by no means the case. The fact is, that the Americans, in perfect good faith, laid down a great many conditions which the British Commissioners at once declined to accede to, and even refused to refer for consideration to the Government at home. Many other propositions that were made were referred back to Her Majesty's Government, the commissioners thinking it their duty to inform Her Majesty's Government that upon their answer in the affirmative or negative the continuance of the negotiations might depend. In considering several of those questions Her Majesty's Government felt that there would be a great responsibility in breaking off the negotiations, and that in such an event ridicule almost would be brought upon the Commissioners and ourselves. Nevertheless, we at once declined to yield in every case where we deemed it our duty not to yield. With regard, however, to other points, such as those relating to forms of expression, and which did not conflict with the real objects of the Treaty, we willingly either acquiesced in the proposal or else made counter proposals, which were met in the same spirit of fairness by the American Commissioners.

When Lord Cairns heard this statement he said, this is "a Treaty upon which the Government did not merely give a final approval, but for the daily composition of it they were virtually responsible." The Counsel of the United States, therefore, feel themselves justified in asssuming that such masters of the English language as Mr. Gladstone, Lord Granville, the Lord Chancellor, the Duke of Argyll, and other members of the British Cabinet, must have been aware of the extent of the operative words of the first article of the Treaty, and must have seen that it contained no waiver of the indirect claims, or limitation of the powers of the arbitrators. They did not object to it, and it must have been because they felt that they had protected Great Britain by the condition which they had imposed upon the United States, obliging them to trace all their complaints of injury to the acts of the cruisers as the originating cause of the damage.

Conclusions.

(*s*) The signature of this Treaty terminated the third stage of the negotiations between the two Governments. It left the Parties solemnly bound to invite other Powers to join them in creating a Tribunal to take jurisdiction of "*all* the said claims growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama claims.'"

To bring a complaint within that definition, it must be a *claim;* that is, an injury for which the United States demand pecuniary compensation. The evidence is overwhelming that from the commencement they have demanded compensation for their national injuries, as well as for the injuries to their citizens, growing out of the acts of the vessels.

It must also have been generically known as an Alabama claim. The evidence is equally conclusive that the American Commissioners understood that the national and private injuries set forth in the American statement at the fourth conference were so generically known, and that Her Majesty's Commissioners, to say the least, ought to have known it.

The claim must also grow out of the acts of the cruisers. That is a fact which the United States will be held bound to establish in these proceedings to the satisfaction of the Arbitrators.

(*t*) The United States, without suspicion that this palpable sense of the Treaty would be called into question, prepared and presented their Case to the Tribunal in December, on that theory.

The American Case stated the claims in the language of the joint high commissioners.

After stating in that document in detail the principal reasons which induced them to think that Great Britain is justly liable to them for the injuries growing out of the acts of the cruisers, they presented the statement of those injuries in the precise language and form in which their Commissioners had stated them to the British high Commissioners, introducing nothing new, and varying in no respect from what had already been introduced and agreed upon.

They offered evidence which might enable the Arbitrators to determine the amount of the injuries which they had suffered by reason of the loss and capture of the vessels and cargoes belonging to their citizens, or by reason of the increase in the rates of insurance, or by reason of the expense to which they had been put in the pursuit and capture of the vessels.

As to the transfer of their commercial marine to the British flag, they offered no evidence; but they said that they "asked the Tribunal to estimate the amount which ought to be paid to them" for that transfer.

Neither did they offer evidence of the damages to them from the prolongation of the war. They said "it is impossible for the United States to determine; it is, perhaps, impossible for any one to estimate with accuracy the vast injury which these cruisers caused in prolonging the war." They

contented themselves, therefore, with stating reasons why (should the Tribunal hold that Great Britain is liable to make compensation to them for this class of injuries) the month of July, 1863, should be taken to be the time from which the war was prolonged by the acts of the cruisers; and they added that the Tribunal would be thus "able to determine whether Great Britain ought not, in equity, to reimburse to the United States the expenses thereby entailed upon them."

Long delay in objecting to it by Great Britain.

(*u*) Fifty days after Her Majesty's Government was made acquainted with the interpretation of the Treaty set forth in the American Case, it took exception, and averred that it had not expected to find claims preferred against it for increased rates of insurance, for the transfer of the commercial marine, and for the prolongation of the war.

The United States had no intelligence before the 3d of February of this construction of the Treaty by Her Majesty's Government. They think it fair to argue that a long silence on so vital a question as the extent of this submission implies some doubt in the mind of the parties remaining silent as to the justice of their conclusions. In a similar case between private parties, it might well be assumed that so long a delay in communicating the views of a party situated as Her Majesty's Government was, after full knowledge of the views of the other party, would be deemed to be a waiver of the right to object.

Supposed concessions to the United States in the treaty.

(*v*) It has been said that the Treaty of Washington involved several concessions on the part of Great Britain, which were the supposed price paid for the abandonment of the national claims of the United States.

The rules.

1. It has been assumed that the declaration of certain principles to govern the Tribunal was a concession to the United States. But, unfortunately for this theory, it is stated in the British Case that these principles are "in substantial accord with the principles" of the general system of international law; and further, Lord Ripon, the chief of the British High Commissioners, has said that "Great Britain accomplished a signal benefit in binding the American Government by rules" from which "no country on the face of the earth is likely to derive so much benefit as England."

Expression of regret.

2. It is said that the expression of regret for the escape of the cruisers was a concession; but it cannot be supposed that in the friendly expression of regret for the escape of the cruisers Her Majesty's Government *bargained* for the withdrawal of claims which they regarded as dangerous to them.

Fenians.

3. Acquiescence in the refusal to consider the Fenian claims in the Joint High Commission has been put forward as another concession. But the evidence shows that this class of claims was not embraced in the correspondence on which the Joint High Commission was founded, and therefore could not be considered, although in presenting it Her Majesty's Government recognized the propriety of presenting claims for national as distinguished from claims for private injuries.

In fact, Fenian claims for national injuries were presented by the British Commissioners. They are thus defined in the instructions to the British Joint High Commissioners:

> In connection with the claims of British subjects, there is a claim on the part of the dominion of Canada for losses in life and property, and *expenditures* occasioned by the filibustering raids on the Canadian frontier, carried on from the territory of the United States in the years 1868 and 1870.[1]

[1] Brit. App., vol. IV.

The presentation of these claims to the Joint High Commissioners of the United States is recorded in the following words in the protocol:

> At the conference on the 4th of March, * * the British Commissioners proposed that the Joint High Commission should consider the claims for injuries which the people of Canada had suffered from what were known as the Fenian raids.
>
> At the conference on the 26th of April, the British Commissioners again brought before the Joint High Commission the claims of the people of Canada for injuries suffered from the Fenian raids. They said they were *instructed to present these claims*, and to state that they were regarded by Her Majesty Government as coming within the class of subjects indicated by Sir Edward Thornton in his letter of January 26th as subjects for the consideration of the Joint High Commission.[1]
>
> The American Commissioners replied that they were instructed to say that the Government of the United States did not regard these claims as coming within the class of subjects indicated in that letter as subjects for the consideration of the Joint High Commission, and that they were without any authority from their Government to consider them. They therefore declined to do so.
>
> At the conference on the 3d May, the British Commissioners stated that they were instructed by their Government to express their regret that the American Commissioners were without authority to deal with the question of the Fenian raids, and they inquired whether that was still the case.
>
> The American Commissioners replied that they could see no reason to vary the reply formerly given to this proposal.
>
> The British High Commissioners said that, under these circumstances, they would not urge further that the settlement of these claims should be included in the present treaty. And that they had the less difficulty in doing this *as a portion of the claims were of a constructive and inferential character.*

No argument, therefore, can be drawn from any supposed concessions by Great Britain, to justify that power in denying the jurisdiction of this Tribunal over the national claims which were presented, and persisted in, by the United States. Nor can it be assumed that Her Majesty's Government objected on principle to a class of claims which, in a parallel case, Commissioners were presenting and urging upon the United States.

(*w*) Whatever doubt, if any, may ever have existed, or have been set up on the part of Great Britain, as to the true tenor of the *written Treaty*, no such doubt can reasonably exist at the present time. Conclusions.

While Mr. Gladstone, in the House of Commons, was asserting in such positive terms that the so-called indirect claims are excluded by the unequivocal and positive language of the Treaty, and denying that the Treaty could possibly receive any other construction, Lord Derby, in the other house, admitted that the Treaty was susceptible of the construction placed upon it by the United States; and in a later debate both Lord Derby and Lord Cairns in unequivocal language supported the same views.

All delusion on that point is now dispelled. No statesman in Great Britain would probably now make the assertion made by Mr. Gladstone, in February, in the House of Commons.

The Treaty speaks for itself. It is universally conceded that its natural construction is that put upon it in the American Case. Discussion of the subject has advanced so far at least towards dispelling misapprehension.

(*x*) Neither the hypothesis of Mr. Bernard, nor that of Sir Stafford Northcote, is produced in the celebrated debate in the House of Lords, which has already been alluded to, and which has been adduced by the

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[1] Sir Edward Thornton, in his note of the 25th of January, proposed a settlement of the questions "with reference to the fisheries on the coast of Her Majesty's possessions in North America, and as to any other questions between them which affect the relations of the United States towards those possessions."

British Government as notice to the United States, because of the alleged presence of Mr. Schenck, the American Minister.

In the first place, the expressions of Lord Granville on that occasion did but very obscurely refer to the question of the so-called indirect claims. He said:

Lord Granville's speech.

The noble Earl said that the United States has made no concessions; but in the very beginning of the protocols, Mr. Fish, renewing the proposition he had made before to much larger national claims, said:

"The history of the Alabama and other cruisers which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain or in her colonies, and of the operations of those vessels, showed extensive direct losses in the capture and destruction of a large number of vessels with their cargoes, and in the heavy national expenditures in the pursuit of the cruisers; and indirect injury in the transfer of a large part of the American commercial marine to the British flag, in the enhanced payments of insurance, in the prolongation of the war, and in the addition of a large sum to the cost of the war and the suppression of the Rebellion; and also showed that Great Britain, by reason of failure in the proper observance of her duties as a neutral, had become justly liable for the acts of those cruisers and of their tenders; that the claims for the loss and destruction of private property which had thus far been presented amounted to about $14,000,000 without interest; which amount was liable to be greatly increased by claims which had not been presented." [1]

These were pretensions which might have been carried out under the former Arbitration; but they entirely disappear under the limited reference which includes merely complaints arising out of the escape of the Alabama. [2]

Now there are some things quite remarkable in this part of Lord Granville's speech—the only part which refers to the subject.

In citing the statement made by the American Commissioners, (not Mr. Fish,) which appears in the protocol of May 4, 1871, he stops at the word "presented," noted with a period, as if it were the conclusion of the statement of the American Commissioners; while in the text there is a semicolon after the word "presented;" and the sentence concludes with the following words:

That the cost to which the Government had been put in the pursuit of the cruisers could easily be ascertained by certificates of Government accounting officers; that in the hope of an amicable settlement, no estimate was made of the indirect losses, without prejudice, however, to the right to indemnification on their account in the event of no such settlement being made.

Now the concluding words of the sentence, thus omitted by Lord Granville, contradict the intention which is ascribed to the American Commissioners, and thus annihilate the foundation for the subsequent remarks that these "pretensions entirely disappear under the limited reference which includes mere complaints arising out of the escape of the Alabama."

Lord Granville does not say, with Mr. Bernard, that the supposed limitation of the reference consists of *inaccurate* language, purposely used in the spirit of diplomacy; nor does he say, with Sir Stafford Northcote, that the limitation is to be found in some unrecorded understanding of Commissioners; but he assumes to find the limitation in the express words of the Treaty.

This is done by assuming that the Treaty itself "*includes merely complaints arising out of the escape of the Alabama.*" This assumption is entirely unfounded; for the Treaty submits "all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama claims;'" which is a very different thing from the recital in Lord Granville's speech.

Indeed, taking that speech as a whole, it is by no means clear that Lord Granville intended to set up any other limitation in the Treaty than such as would exclude claims on account of premature recognition of the

[1] Parl. Paper, No. 3, (1871,) p. 8.

[2] Hansard, vol. ccvi, p. 1851.

belligerence of the Confederates by Great Britian. This hypothesis would explain his reference to claims connected with the cruisers.

We have sufficiently demonstrated, we think, that neither this phrase, nor any other contained in the Treaty, justifies the construction put upon it by Lord Granville.

In comparing what was said in this debate in the House of Lords by Lord Granville and Lord Cairns, with what is said by Sir Stafford Northcote in his speech, and Mr. Bernard, in his lecture, we think we see the explanation of all misconceptions respecting the scope of the treaty prevailing in Great Britain. Explanation of the misunderstanding.

The Johnson-Clarendon Treaty did not exclude from consideration, at least by words of express exclusion, claims of the United States on account of the premature recognition by Great Britain of the insurgents. Undue generality of language was imputed to that Treaty by members of either house of Parliament. When the Treaty of Washington came under discussion in Parliament, Lord Granville said, and said truly, that in this respect the Treaty of Washington had advantages over the Johnson-Clarendon Treaty. The former did not, like the latter, comprehend the belligerency question as a ground of claim. Lord Granville proved this by reference to the protocols and also to the Treaty, which in terms confines the American reclamation to losses growing out of the acts of cruisers of the Confederates designated by the typical name of the Alabama.

Mr. Bernard spoke in the same sense when he said in the remarks already quoted that the claims submitted were *specific*, (which is true,) as they are only the class of claims which grew out of the acts of the cruisers.

When Sir Stafford Northcote speaks of an "understanding" or a "promise" in limitation of the American claims, he confounds the two totally distinct questions of claim on account of the Queen's Proclamation and the national injuries occasioned by it, and the claims on account of the insurgent cruisers and the national injuries occasioned by their acts. It was understood, and it is understood, that the former class of injuries are not comprised in the Treaty, but are in effect excluded by the express language of the Treaty, which confines reclamation to acts of the Confederate cruisers. It was understood, and it is understood, that the claims of the United States under the Treaty are co-extensive with losses growing out of the acts of the Confederate cruisers *without limitation*, because such is the express stipulation of the Treaty. Sir Stafford Northcote's memory is at fault in suggesting that any understanding existed, or that any promise was ever made to prevent the United States from presenting claims for national injuries in this behalf. These, and the claims of private persons, are two classes of claims which had been previously presented by the American Government, and had been insisted on by it, in all the correspondence and acts associated with the Treaty of Washington.

(*y*) We think the Arbitrators must conclude that Her Majesty's Government is in error in assuming that this august Tribunal is excluded from the consideration of any class of claims brought before it by the Case of the United States. The previous negotiations of the parties, the history of the cliams, the explicit declarations of the American negotiators in the conferences of the Joint High Commission, the proceedings in both Houses of Parliament, the long delay of the British government in acting upon the American Case after they knew its contents, the natural and only reasonable construction of the language of the Treaty itself—all strengthen this belief. Resume.

(*z*) When two Nations have agreed by Treaty to submit to arbitration a question of national wrong between them, such agreement takes the place of war. If therefore it could by ingenious reasoning be made to appear (which we deny) that the British construction of this Treaty might possibly be maintained as plausible, yet we conceive that this Tribunal will, in the general interest of peace, feel itself not only authorized, but required, to so construe the Treaty as to take to itself the decision of every question pertinent to the issues, which, left unsettled, could lead to war.

Arbitration takes the place of war.

The Tribunal the judge of its own powers.

(*a a*) Pradier Fodéré, in one of his notes to Vattel, makes the following observations:

Pradier Fodere.

L' arbitrage, très-usité dans le moyen-âge, été presque entierement négligé dans les temps modernes; les exemples d'arbitrages offerts et acceptés sont devenus de plus en plus rares, par l'experience des inconveniénts qui semblent être presque inséperables de ce moyen, ordinairement insuffisant par le défaut d'un pourvoir sanctionateur.

Los que les grandes puissances constituent un tribunal arbitral, ce n'est ordinairement que pour des objets d'intérêt secondaire.[1]

Yet all men are of accord to look to international Arbitration as one of the means of diminishing wars, and much had been expected as an example from the present Arbitration.

The principle of international arbitration is well defined by Calvo, as follows:

Calvo.

L'arbitrage international dérive de la même cause et repose sur les mêmes principes que l'arbitrage privé en matière civile ou commerciale. Il en diffère en ce que celui-ci est susceptible d'homologation par un tribunal ordinaire, qu'il est absolument obligatoire et que l'exécution en peut être toujours suivie par les voies de droit commun. Entres les états, le principe de souveraineté et d'indépendance réciproque n'admet en cette matière qu'une obligation morale de s'incliner devant les résultats de l'arbitrage sollicité; aussi, avant de recourir à ce mode de solution et pour mieux assurer le but définitif que l'on poursuit, est-il d'usage que les parties en présence signent ce qu'en langage de droit ou appelle un *compromis*, c'est-à-dire, une convention spéciale qui précise nettement la question à débattre, expose l'ensemble des points de fait ou de droit qui s'y rattachent, trace les limites du rôle dévolu à l'arbitre et, sauf les cas d'erreur matérielle ou d'injustice flagrante, implique l'engagement de se soumettre de bonne foi à la décision qui pourra intervenir.[2]

Neither party loses anything by such good faith. The nature of the contract of international arbitration affords perfect remedy to either party, in the contingencies in which either is wronged, namely:

1°. Si la sentence a été prononcée sans que les arbitres y aient été suffisamment autorisés, ou lorsqu'elle a statué en dehors ou au-delà des termes du compromis;

2°. Lorsque ceux qui ont rendu la sentence se trouvaient dans une situation d'incapacité légale ou morale, absolue ou relative, par exemple, s'ils étaient liés par des engagements antérieurs ou avaient dans les conclusions formulées un intérêt direct ignoré des parties qui les avaient choises;

3°. Lorsque les arbitres ou l'une des parties adverses n'ont pas agi de bonne foi;

4°. Lorsque l'un ou l'autre de états intéressés dans la question n'a pas été entendu ou mis à même de justifier de ses droits;

5°. Lorsque la sentence porte sur des questions non pertinentes;

6°. Lorsque sa teneur est absolument contraire aux règles de la justice et ne peut, dès lors, faire l'objet d'une transaction.[3]

Conspicuous among causes of exception, is the case of "a *sentence* which bears on questions not pertinent." But neither party can anticipate that the arbiters will undertake to decide any question beyond their competency.[4]

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[1] Vattel, Droit des gens, éd. P. Fodéré, tom. ii, chap. xviii, sec. 329, note.

[2] Calvo, Droit international, éd. fr., 1870, tom. i, p. 791.

[3] Calvo, ibid., p. 766. Compare Heffter, Droit international, liv. ii, s. 109; Bluntschli, Code de Droit international, liv. i, s. 667.

[4] Pradier Fodéré, La Question de l'Alabama et le Droit des gens; Pierantoni, Gli arbitrati internazionali e il trattato Washington.

(*b b*) Great Britain entered into an engagement to submit all the points in question to the Tribunal. We only ask the Tribunal to exercise the measure of jurisdiction which has been conferred upon them.

We assume that the Arbitrators have the power in the first instance to judge of their own competency, both in point of the scope of the Treaty and of the possible action of either Government.

The effect of the Treaty is to create a tribunal with complete jurisdiction of the *subject-matter*. It differs from a tribunal established by municipal law in two respects: first, that as Arbiters they do not possess the power of causing the execution of their sentence;[1] and, secondly, that constituting an international tribunal, no such authority exists to enforce their sentence as in the case of arbitration under municipal law.

In fact, the *sanction* of the acts of the Tribunal is the faith of the Treaty.

(*c c*) That the Tribunal possesses power to pass on the question of its competency is a conclusion of general law; otherwise it would be a council of mediation, not a tribunal of arbitration. It is a conclusion also from the tenor of the particular Treaty, which commits to the Tribunal, not only "all differences" and "all claims," but "all questions" submitted by either Government.

This conclusion is in perfect consonance with pure reason. We shall not assume that either Government maintains that, where one of the parties to a contract suggests doubt as to the meaning of some clause, such expression of doubt dissolves the contract. That is contrary to law and to reason. If it were admitted between individuals, no man could ever be compelled to execute a contract. If it were admitted between nations, it would be idle to enter into treaties; for then, if, after treaty concluded, one power regrets its engagement, it needs only to proclaim a difference of intention, and thus to frustrate the rights of the other Power.

(*d d*) Indeed, if we may regard the pertinent explanations of Mr. Bernard, there is general reason for submitting the construction of treaties to the judgment of arbiters, and special reason in regard to the present Treaty. He says of treaties generally: Mr. Mountague Bernard.

> I may be permitted to observe, in passing, before taking leave of this part of the subject, that a treaty is an instrument which you cannot send to be settled in a conveyancer's chambers, nor commit to a knot of wrangling attorneys; no, not even to the family solicitor. It is an instrument in the framing of which the sensitive and punctilious self-respect of governments and nations has to be consulted, and discussion must never be suffered to degenerate into altercation; in which it is often necessary, for the sake of agreement, to accept a less finished or more accurate one; and which must be construed liberally and reasonably, according to what appears to be the true intention of contracting parties. In all this, there is no excuse for equivocal expression, and no defense of such ambiguities can be founded on it; but of apparent faults of expression it has often been, and often will be, the unavoidable cause.[2]

These expressions seem to be introduced as an apology for some intentional obscurity of language in the present Treaty. We do not so regard the matter. The history of the negotiations in this case abundantly shows that every word of the Treaty was well weighed by the British Ministers before it was signed by their Commissioners.

However this may be, if, as Mr. Bernard says, in order to conform to the delicacies of diplomatic intercourse and of international negotiation, it was necessary to employ in the Treaty *unfinished* language, *inaccurate* language, "faults of expression," to say nothing of *equivocal* language, then there is all the more reason why the United States should

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[1] Mellii, Institutiones juris civilis Lusitani, lib. i, tit. 4, sec. 21.

[2] Lecture on the Treaty of Washington, May 28, 1872, London Times, May 29, 1872.

ask the Tribunal to dispel the doubts which were created by the British Commission, for the benefit of the British Government.

If, contrary to our belief, the language of the Treaty be vague or equivocal, or if it rests on understandings unwritten, the question should be judged by the Tribunal, in whose judgment both parties ought to have implicit confidence. Should the judgment involve any act *ultra vires*, then will be the time for the injured party to refuse to accept such judgment, if the injury is great enough to justify so extreme a remedy.

(*e e*) The United States therefore adhere to the Treaty as of their own right; they adhere to it as the greatest, perhaps, of all modern efforts, to establish the principle of international arbitration; and they adhere to it in the sentiment of profound consideration for this august Tribunal, and for the sovereign States which have been pleased to accept their delicate duties in this behalf at the common solicitation of Great Britain and the United States.

And here we dismiss all considerations of this order, and, maintaining the competency of the Tribunal, we proceed to the question of the amount of damages claimed by the United States.

III.—MEASURE OF DAMAGES.

Rules for measuring damages.

The responsibility of the British Government having, as we think, been established as law and as fact, we shall assume also, in what follows, that that responsibility has been proved to be co-extensive with the wrong; that is, it is a responsibility for the acts of the Confederate cruisers in question to the extent of the provisions of the Treaty.

1. The next inquiry is of the application of this responsibility to the facts, and the induction of the amount of damages for each specific head of injury.

We submit the following rules of judgment in this respect:

Severity to be shown to the wrong-doer in claims founded on torts.

(*a*) When the demand of damage is founded on a tort, as distinguished from a contract, severity is to be shown toward the wrong-doer, and the losses which the injured party has suffered are to be appreciated with liberality for the purpose of indemnification.

Infractions of contract are to be anticipated, in view of the too prevalent carelessness of men in this respect, the possibility of which will, therefore, have been foreseen and taken into consideration by the other party.

But when there is violent wrong, it is a fact beyond prevision, which of course occasions more perturbation and derangement of the affairs of the injured party, and which has a character of perversity more grave than that involved in the mere non-execution of a contract. Of course, reparation should be exacted with more rigor.

The animus of the wrong-doer an element of damage.

(*b*) When the damage claimed is founded on a tort, the culpable animus of the wrong-doer constitutes an element of the question of damage. In such cases the injured party is entitled to damages beyond the amount of actual loss, in the nature of exemplary or punitive damages.

The doctrine in this respect, as understood in Great Britain and the United States, is stated by an American author as follows:

"In these actions all circumstances of aggravation go to the jury.

"The necessary result of this rule is that all the attendant circumstances of aggrava-

tion which go to characterize the wrong complained of may be given in evidence; and so it has been held, both in England and in this country. Indeed, it may be said that in cases of tort, where no fixed and uniform rule of damages can be declared, the functions of the court at the trial of the cause are mainly to the reception and exclusion of evidence when offered either by way of aggravation or mitigation, and to a definition of the line between direct and consequential damage."[1]

On this point there is unanimity of opinion among jurists, both of the common law, as in Great Britain and the United States, and of the civil law, as in the countries of the Roman law in Europe and America.[2]

The illustration of this rule, as among private persons, also applies to governments.

"In fact," says Mayne, "if any other rule existed, a man of large fortune might, by a certain outlay, purchase the right of being a public tormentor. He might copy the example of the young Roman noble mentioned by Gibbon, who used to run along the Forum, striking every one he met upon the cheek, while a slave followed with a purse, making a legal tender of the statutory shilling."[3]

(*c*) Distinctions arise in regard to the relation of the loss or damage and the act of injury, by reason of which reparation is demanded, which require attention, especially in view of the question of whether direct or indirect damages, which figures in the present case.

The relation between the injury and its cause.

This distinction is raised in various forms of expression, the party of whom damages are demanded seeking to diminish the amount by alleging that they are consequential or remote, or indirect or not immediate.

All damages are claimed as a consequence of the act of wrong, and in that sense consequential, and therefore discussion necessarily ensues as to the more or of less remoteness, or indirectness, or immediateness of the consequence.

(*d*) But each of these conditions is, of itself, uncertain, vague, and sometimes incapable of precision, which has led to the endeavor to state the doctrine with more exactness, as calling for the inquiry whether the damage complained of is the natural and reasonable result of the wrong-doer's act; and it is settled that it may be deemed of that character if it can be shown to be such a consequence as, in the ordinary course of things, would follow from those acts.[4]

Whether the natural result of the wrong-doer's act.

In truth, every cause has a series of effects; or, to speak more accurately, each effect becomes itself a cause; and so on, from cause to effect, in a longer or shorter series of alternations between cause and effect, according to the particular circumstances.

(*e*) If law-givers and jurists had been able to say that all damages for wrong should stop at the *first* effect of the cause, the definition of the rule would be less vague than it is in the common expression; but even then it would be necessary to reflect that the cause does not necessarily operate in a single line only, but frequently in several lines: it may operate in diverse directions, and produce many immediate and direct effects, as by radiation from the common centre of the *causa causans*, like a stone cast into water.

Of course, the solution of the problem becomes more and more difficult in proportion to the multiplicity of these different lines of action in which the primitive causes operate to produce effcts, which are them-

[1] Sedgwick on the Measure of Damages, p. 528.
[2] Sourdat, Traité de la Responsabilité, tom. i, p. 97; Sedgwick on Damages, ch. xviii.
[3] Mayne on Damages, p. 14. [4] Ibid., p 15.

selves new causes, and all of them the natural, not to say necessary, consequences of the one definite act of wrong.

(*f*) As a given event may be, and often is, produced by a plurality of causes working together, so may a wrong be the effect of the action of two or more persons. In such case, the injured party has right of redress against all and each of the wrong-doers, although neither of them may be morally accountable for all the injury, and some one of them may have contributed to the injury in a comparatively small degree. But it is no defense for any of the wrong-doers to say, "I did but co-operate with others, and that in a comparatively small degree, to inflict the injuries."

Whether the effect complained of be or not directly connected with the cause, whether it be proximate or remote, whether the reputed injury be or not the natural and logical consequence of the alleged act of wrong, all these are in part questions of fact, which cannot be reduced to absolute precision, but of which the competent tribunal must judge.

Thus, in the example so much discussed by writers on the civil law, suppose that the buildings, cattle, and horses of a cultivator are destroyed by the malicious or culpable negligence of another, so as to establish the right of indemnity against the author of the conflagration, how far shall the demand of damages extend?

Reparation must at least comprehend all which it costs to rebuild the farm-buildings and to procure the same number and quality of cattle and horses, and the personal inconvenience and derangement caused by the conflagration.

But the destruction of the buildings and cattle has interrupted cultivation and deprived the proprietor of his expected crop. Shall this, too, be included in the indemnity?

And the interruption of culture and the losses incidental thereto embarrass the proprietor, so that, in the course of the expenditure to which he is subjected in the purchase of materials of construction and cattle and horses, he becomes indebted; the failure of his crop deprives him of the expected means of payment; his creditors come upon him and seize and sell whatever he has, and thus he becomes ruined and reduced to absolute destitution.

All these disasters are the manifest consequence and effect of the acts of the incendiary. Is the incendiary responsible for them all? Or is he only responsible for the value of the things consumed? Are the subsequent losses, which are confessedly the natural consequences of the act of wrong, so remote or indirect as to relieve the incendiary of responsility therefor?

The law does not require that the damage recoverable shall be the *necessary* effect of the cause,—that is, an effect *impossible* to prevent; it does not require that the damage recoverable shall be the *first* effect of the cause,—but only that the damage shall have efficient cause in the act of wrong.

And the party injured is not to be deprived of redress, if he failed to employ *extraordinary* means to arrest the progress of his losses and diminish their amount, provided he took the *ordinary* steps of prudence to that end.[1]

All these, we repeat, are considerations of fact, which the competent tribunal judges according to the circumstances and which do not admit of absolute legal conclusions of law.

(*h*) Damages, reparation, indemnity, all these are terms to describe

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[1] Sourdat, De la Responsabilité, tom. i, p. 96.

the same thing. Indemnity includes both *lucrum cessans* and *damnum emergens*. It includes also *moral* as well as material damage.[1] And it involves injury to persons as well as things.

Damages should be an indemnity.

But, in all cases, the question of the amount of damage and its equivalent in pecuniary reparation becomes one of fact for the consideration and the equitable determination of the competent tribunal, as illustrated by the numerous cases, especially at common law, in which revision of sentence is called for on account of erroneous verdicts of damage.

Whether so or not a question of fact.

2. We proceed to apply these considerations to the several heads of injury to the United States growing out of the acts of the Confederate cruisers *sub lite*, and the consequent damages due by Great Britain, discussing these points in the order in which they appear in the American Case.

Application of principles.

(*a*) The United States claim indemnity for actual *property* of the Government in vessels destroyed, and for immediate *personal injuries* to the officers and crews, caused by the Confederate cruisers, the responsibility for whose acts we have in previous discussion attached to Great Britain.

As to personal injuries.

In our enumeration of the particular facts, we have considered the case of each cruiser in respect of which we claim; we have proceeded to connect each of those cruisers with the British Government, so as, in our opinion, to establish its failure to fulfill the Rules of the Treaty in regard to the several cruisers; and we have treated fully the question of diligence as to each of these cruisers, as required by the Treaty Rules.

(*b*) The property destroyed consisted, first, of vessels, with their apparel, equipment, and armament, belonging to the Government of the United States.

As to property of the United States destroyed.

Statements in detail of the losses of this class, officially certified either by the Secretary of the Treasury or the Secretary of the Navy, according as the vessels appertained to one or the other branch of the public service, appear in the appendix to the American Case.

There is no question here of *indirect* or *direct* damages, notwithstanding some vague suggestions to that effect in the British Counter Case.

If a ship destroyed at sea is not a case of *direct loss*, then there is no sense in language and no reason in law.

What amount of damage is due in such a case? Surely the value of the thing destroyed is the minimum of such amount, even throwing out of question the element of wrong and looking at it as one of simple negligence.

How shall the value of the thing destroyed be ascertained? We present official certificates of the value, and we confidently submit, as between governments, that such official statements are to be received as fact. The British Counter Case undertakes to contradict such official certificates by means of *opinions* of the British Admiralty. We reject all such opinions. We refuse to recognize them as available in any sense to detract from the authentic proof contained in the authoritative documents offered by the American Government.

(*c*) The United States claim indemnity in like manner for vessels and other actual property of private citizens of the United States destroyed, and for immediate personal injuries to the officers and crews, caused by Confederate cruisers, the responsibility of whose acts we have, as we think, already attached to the British Government.

As to property destroyed and injuries inflicted upon citizens of the United States.

[1] Sourdat, De la Responsabilité, tom. i, p. 224.

The nature of these reclamations is explained in the American Case and in the appendix thereto, especially in the seventh volume, and in supplementary documents there will be found detailed statements, made on oath, with valuations and other particulars, for the information of the Tribunal.

The British Counter Case undertakes to control the facts thus set forth, and to do so by means of *estimates*, made by British subjects at the request of the British Government.

The Counsel of the United States respectfully submit that the claims of the United States in this behalf, vouched as they are, cannot be met by any such conjectural estimates as are put in by the British Government.

The United States, in those documents, have exhibited the value of the property captured or destroyed as the primary element and lowest measure of damage and of consequent reparation. Justice, we conceive, and the universal practice of nations, demand thus much, at least, of indemnity for wrong.

As to expenses in pursuit of the cruisers.

(*d*) The United States also claim payment of the expenses incurred by the Government in pursuit of the Confederate cruisers in question; of which expenses an account is given under the authority of the proper department of the United States.

In this case, as in that of public vessels captured, we deny that the authentic accounts of the American Government can be controlled, as the British Counter Case undertakes to do, by conjectural estimates of officers of the British Government.

We conceive this damage to come within the most rigorous rules of direct damage.

Indeed, Mr. Gladstone himself, in specifying the contents of the two classes of damage, direct and indirect, as he regards them, places the cost of pursuit in the first category.[1]

We disregard the suggestion, offered in the Counter Case of the British Government, that the United States are in fault for not having sooner captured the Alabama and Florida, or having failed to capture other cruisers of the Confederates. The injured party, as we have already argued, is not held to take *extraordinary* measures to counteract the wrongful acts of the injuring party, but only ordinary measures. The evidence in the American Case and Counter Case shows that the United States did make great efforts and a diversion of forces for suppression of the Rebellion, at a large expense, for the pursuit of the Confederate cruisers in question; but if they had made none the omission could not be justly alleged in defense by Great Britain. This very objection on the part of the British Government confirms our claim of indemnity in this behalf. If it was the duty of the United States to pursue a Confederate cruiser, this duty being imposed upon us by the culpable conduct of the British Government, surely we have a perfect right to call on Great Britain to pay the expenses of such pursuit, in which we were only protecting ourselves against the effects of the delinquencies of the British Government.

The British Counter Case argues at some length against all claims on the part of the United States on account of the Confederate cruisers, even conceding that by failure to use due diligence Great Britain shall have incurred the culpability contemplated by the Treaty Rules.

To much of this argument we have already replied, either in the statement of general propositions or in particular commentary. We proceed to make other appropriate comments thereon.

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[1] See Mr. Gladstone's speech, London Times, February 7, 1872.

In reading this denial in the British Counter Case of any responsibility on the part of Great Britain, notwithstanding there should be established *legal* responsibility, we could not but reflect on what has been admitted in this respect by most intelligent members of Parliament, including successive Cabinet Ministers.

Mr. Cobden's memorable remarks on this point, while the occurrences were passing, are quoted in the American Case. We reqnote only his statement as to actual losses by capture as follows:

"You have been carrying on hostilities from these shores against the people of the United States, and have been inflicting an amount of damage on that country greater than would be produced by many ordinary wars. It is estimated that the loss sustained by the capture and burning of American vessels has been about $15,000,000, or nearly £3,000,000 sterling. But that is a small part of the injury which has been inflicted on the American marine."[1]

That was in 1864. Several years afterward, when there had been time for reflection, Lord Stanley said:

I have never concealed my opinion that the American claimants, or some of them at least, under the reference proposed by us, were very likely to make out their case and get their money. To us the money part of the affair is inappreciably small, especially as we have on our side counter claims, which, if only a small portion of them hold water,—and you can never tell beforehand how these matters will turn out,—will reach to a considerable amount, and form a by no means unimportant set-off to the claims preferred against us. But, I think, if matters were fairly adjusted, even if the decision went against us, we shonld not be disposed to grudge the payment. *The expense would be quite worth incurring, if only in order to obtain an authoritative decision as to the position of neutrals in future wars.*[2]

Mr. Forster said, in the same debate:

"They should further consider whether arbitration was the means of settling the matter. Tremendous injury had been inflicted on American citizens by means of the attacks upon their ships, and if the present misunderstanding was not settled upon a principle which would carry with it the feeling and moral sense of both countries, there was reason to fear that whenever we engaged in war we would suffer in the same way."

Earl Russell has himself said, in a passage hereinbefore quoted from the preface to the edition of his speeches:

"Great Britain might fairly grant a sum equivalent to the amount of losses sustained by the captures of the Alabama."

Will strict juridicial inquiry into the law and facts sustain the seopinions of Lord Stanley, Mr. Forster, and Lord Russell? We think it will.

First. The Treaty itself seems to require an award of pecuniary reparation. It stipulates that—

In case the Tribunal find that Great Britain has failed to fulfill any duty or duties as aforesaid, it may, if it thinks proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it, (Article VII.) It further stipulates that in case the Tribunal finds that Great Britain has failed to fulfill any duty or duties as aforesaid, and does not award a sum in gross, the High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States, on account of the liability arising from such failure, as to each vessel, according to the extent of such liability as decided by the Arbitrators. (Article X.)

All these expressions, we submit, imply an award of substantial damages and satisfaction of all losses growing out of the acts of the Confederate cruisers, provided the finding of the Tribunal, on the question of fulfillment or non-fulfillment of duty, be adverse to Great Britain.

We dismiss, therefore, the question whether or not a conviction of guilty conduct is to go without any responsibility in damages, as argued by the British Counter Case, and we do not perceive any legal force in the arguments which the Counter Case adduces to this effect.

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[1] Hansard, third series, vol. clxxv, p. 496; App. to American Case, vol. v, p. 509.
[2] Hansard, vol. cxc, p. 1150; App. to American Case, vol. v, p. 708.

The captures, it is said, were made by citizens of the United States. Of what avail here is that fact? Does the British Government intend to be understood as maintaining that all violations of neutrality on behalf of Rebels are taken out of the grasp of the law of nations? Is that to be held as the deliberate thought of Great Britain, the mistress of so many millions of discontented inhabitants of conquered States?

Alleged condonement by the United States.

Next, it is said that the United States have condoned the wrongs done to them by their Rebels, and "that they have been re-admitted to their former full participation in the rights and privileges of the Federal Constitution."

How does Great Britain know that, what right has she to know it, in a matter of Treaty obligations between the two Governments? If the consideration is of any force whatever, it strikes at the question whether Great Britain is responsible to the United States in case she did, or omitted to do, any of the actions forbidden or commanded by the Rules of the Treaty of Washington.

The Treaty does not provide by way of exception that if such acts done or committed in violation of neutral duty are done or omitted on behalf of Rebels, they shall involve no responsibility to the legitimate sovereign, or that such responsibility shall be measured by the more or less severity with which that sovereign shall see fit to treat his Rebels. On the contrary, the Rules are absolute in their terms, and adopted with specific reference to the questions of neutrality violated to the advantage of Rebels and the disadvantage of their sovereign.

Great Britain can set up no such defense. It involves considerations which she ought to have reflected on when she hastened to raise the Confederates into the status of international belligerents. In so doing she gave to them the means of doing injury to their sovereign, it is true, but for which that sovereign could and did take redress against them, when he saw fit, by exercise of the rights of war as well as the rights of sovereignty.

But Great Britain, by the course of policy she adopted, chose a condition, in which, whatever wrongs she or her subjects might suffer at the hands of the Confederates, she had no possible recourse, either against them or their sovereign; but in which she herself was responsible to that sovereign for whatever she might do in aid of such rebels, in violation of the law of nations or of Treaty.

Great Britain placed herself in that condition of her own free election, and against the will of the United States. She must take the consequences.

Her acts of actual or constructive complicity with the Confederates gave to the United States the same right of war against her as in similar circumstances she asserted against the Netherlands.

The arbitration substitutes damages in the place of reparation by war.

We, the United States, holding those rights of war, have relinquished them to accept instead the arbitration of this Tribunal. And the Arbitration substitutes correlative legal damages in the place of the right of war.

This proposition is unequivocally admitted in the Counter Case as follows:

Reply to arguments in the British Counter Case.

> Her Majesty's Government readily admits the general principle that, where an injury has been done by one nation to another, a claim for some appropriate redress arises, and that it is on all accounts desirable that this right should be satisfied by amicable reparation, instead of being enforced by war. All civil society reposes on this principle, or on a principle analogous to this; the society of nations, as well as that which unites the individual members of each particular commonwealth.[1]

[1] Page 130.

The principle being thus admitted, no casuistry can serve to prevent its application to the present claims of the United States.

That, as the Counter Case suggests, the instruments of the injury done were the cruisers and their officers and crews, is immaterial to the question. Responsibility for the acts of those cruisers, by the very terms of the Treaty, is imposed on Great Britain, if she be found in fault according to the agreed Rules.

If it were otherwise, then no responsibility could ever devolve on any Government for breaches of neutrality produced by its neglect; for the Government is not *in its own person* the actual cruiser which sinks and burns; it is, however, the constructive captor by the spirit and the letter of the Treaty.

The British Counter Case argues that Great Britain ought not to be held responsible for all the acts of the cruisers during the entire voyage of each, because they enjoyed hospitality in ports of other countries. Unfortunately for the argument, Great Britain never did anything to stop the cruisers, as she did in the affair of Terceira; she continued to allow them to obtain supplies in her ports to the last, without which they could not have kept the seas; and although with knowledge of the positive guilt of the cruisers, by reason of their violation of her laws, she persisted in treating them as legitimate cruisers, when she might and should have arrested them whenever they entered into her jurisdiction, or have forbidden them to re-enter and practically outlawed them, as Brazil did, to punish the lesser act of abusing the hospitality of the Empire. But the neglect of duty on the part of Great Britain continued as to most, if not all, the cruisers of the Confederates to the very end.

The Counter Case argues that losses and specific captures, actually suffered by the United States, are not to be indemnified, because the liability of Great Britain disappears "among the multitude of causes, positive or negative, direct or indirect, distant or obscure, which combine to give success to one belligerent or the other." If this argument were adduced to the question of the responsibility of Great Britain to the United States for the prolongation of the Rebellion, we could comprehend its meaning without admitting its application or force. But as applied to actual captures, and the loss thereby produced, the argument seems to be destitute of reason. On such premises no belligerent could be held to restitution of a wrongful capture, and no neutral could ever be held responsible toward either belligerent; for a "multitude" of secondary facts always enter into every discussion of responsibility for wrong, and especially for wrongs in time of war. The common sense of mankind oversteps all such immaterial incidents, and goes direct to the prime *author* of the wrong; the Government which wrongfully did, or wrongfully permitted, the act impugned, the expedition from her ports of the "floating fortress," as the Counter Case properly calls the wrong-doing instrument of the guilty Government.

Claims like the present, says the Counter Case, have rarely been made, and, as the British Government thinks, never conceded or recognized.

It might suffice to reply that no such case, on so large a scale, has ever occurred, except in the controversy between Great Britain and France in 1776, and then Great Britain declared war. But the precise question arose and was duly adjusted between the United States and Spain. And the relations of Governments do not depend on mere precedent, but still more on right.

The Counter Case deprecatingly doubts whether "the greatness of the loss is to be regarded as furnishing the just measure of reparation without regard to the venial character of the default."

We deny that there is here any *actual* question of default of "venial character." The defaults charged, and, as we think, the defaults proved, are grave, serious, *capital.* And we deny that there is any *possible* question of the "venial character of the defaults," or that the loss can be measured by any such consideration. Punishment by penal laws may be graduated in this way, according to the greater or less degree of guilt; but indemnity for wrong cannot be: if you destroy my ship, my house, or my horse, by culpable carelessness, it is no answer to say that you might have been more careless—nay, that you might have acted with deliberate malice.

Indemnity should follow injury.

If there be responsible wrong, whether it be the greatest possible wrong, or a degree less than the greatest possible, still the indemnity follows as a legitimate and just consequence. Such, indeed, is the tenor of the Treaty, which attaches responsibility to mere want of "due diligence," and does not require that Great Britain should have been guilty of the utmost conceivable degree of willful negligence which could by possibility be committed by any Government.

Award of a sum in gross.

(*f*) The Case of the United States desires the Tribunal to award a sum in gross in reparation of the losses complained of; and the Counsel request this, assuming the Tribunal shall be fully satisfied that the said losses are properly proved indetail, and that the sum total thereof, as claimed, is due by Great Britain.

It should include interest.

In that contingency the Counsel assume that interest will be awarded by the Tribunal as an element of the damage. We conceive this to be conformable to public law, and to be required by paramount considerations of equity and justice.

Numerous examples of this occur in matters of international valuation and indemnity.

The case of the Canada.

Thus, on a recent occasion, in the disposition by Sir Edward Thornton, British Minister at Washington, as umpire, of a claim on the part of the United States against Brazil, the umpire decided that the claimants were entitled to interest by the same right which entitled them to reparation.[1] And the interest allowed in this case was $45,077, nearly half of the entire award, ($100,740.)

Award under the Treaty of Ghent.

So in the case of an award of damages by the Emperor of Russia in a claim of the United States against Great Britain, under the Treaty of Ghent, additional damages were awarded in the nature of damages from the time when the indemnity was due.[2] In that case Mr. Wirt holds that, according to the usage of nations, interest is due on international transactions.

Award under the Jay treaty.

In like manner, Sir John Nicholl, British Commissioner in the adjustment of damage between the United States and Great Britain, under the Jay Treaty, awards interest, and says:

> To re-imburse to claimants the original cost of their property, and all the expenses they have actually incurred, *together with interest on the whole amount*, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations for losses, costs, and damages occasioned by illegal captures.[3]

Contingent reference to assessors.

(*g*) If the Arbitrators are not satisfied with the proofs presented by the United States, and entertain doubt as to the sums to be awarded in each case of private loss occasioned by Confederate cruisers, as to which the responsibility of the British Government

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[1] Indemnity case of ship Canada, United States Documents, December 15, 1870, p. 153.

[2] Opinion of Attorney-General of the United States, vol ii, p. 20.

[3] Ibid., p. 31. See also Story, Conflicts of Laws, § 307.

attaches according to the Rules of the Treaty, then the Counsel of the United States respectfully submit that it may be the duty of the Tribunal, after finding the fact of the fault of Great Britain in the premises, to refer the assessment of the damages to the Assessors provided for by Article X of the Treaty, with such instructions as to the extent of the liability as the Tribunal shall see fit to give to such Assessors.

We cannot admit that Great Britain shall appoint *ex-parte* Assessors to control the statements and proofs of the United States. That she in effect undertakes to do in the arbitrary estimates of officials or private persons contained in her Counter Case, as in the nature of proofs contradictory of the official statements and private affidavits or other proofs presented by the United States. If these formal statements on the part of the United States do not suffice, and estimates are needed, the Counsel of the United States respectfully insist that such assessments must be made by the official Assessors of the Treaty.

(*h*) In the Appendix to this Argument will be found special discussion of the merits of these claims of private persons with reference to the criticism of the British Counter-Case thereon, to which we respectfully solicit the attention of the Tribunal. (See Appendix to this Argument, Note D.)

Claims of private persons.

We come now to the class of claims, some private, some general, which in recent discussions between the two Governments are objected to by Great Britain as being "indirect."

The indirect claims.

These are:

(1) The enhanced rates of insurance in the United States, occasioned by the Confederate cruisers in question, involving great pecuniary loss to the citizens of the United States.

Enhanced rates of insurance.

Certain it is, this injury was actual, and a loss "growing out of the acts" of the Confederate cruisers by necessary relation of cause and effect, and it followed immediately on the appearance of those cruisers.

(2.) Transfer of the maritime commerce of the United States to Great Britain.

Transfer of United States commerce to British flag.

This was a *national* loss "growing out of the acts" of the cruisers, and having them for its distinct and sole cause.

It was a loss to the United States constituting gain to Great Britain. We do not say that she was culpably negligent of the obligations of neutrality *in order* that she might thus gain thereby, but we do say that the loss to us, and the gain to her, were the necessary and immediate effect of her negligence in that respect.

(3.) The prolongation of the war of Rebellion in the United States.

Prolongation of the war.

The admitted gravity of the injury thus suffered by the United States, and the supposed enormous magnitude of the sum requisite to indemnify the United States in the premises, have caused this head of claim, as stated in the American Case, to be conspicuous in the recent discussions between the two Governments, and to become the subject of special commentary on the part of eminent publicists and public men in Europe.

It is the claim which presents itself to the minds of all as the "indirect claims" of the United States.

Whatever we may further have to say regarding the distinction of *indirect* and *direct*, in the consideration either of the general or of the particular question of damages, we desire to have regarded as applicable mainly to this claim.

In stating our views of the general subject of damages we frankly recognized the existence of the distinction in law between damages

proximate or direct and damages remote or indirect, admitting the force and the validity of the distinction.

But we took care to state at the same time that the distinction is altogether uncertain, not to say, in many cases, shadowy; that the dividing line can no more be drawn in the abstract than the line between the contiguous colors of the spectrum; and that in private controversies the attempt to make the discrimination generally results in a question of fact for the determination of the competent tribunal.

Whether too remote for consideration to be determined by the tribunal.

The idea is well expressed by Mr. Pradier Fodéré, as follows:

Views of M. Pradier Fodere.

> Mais l'élévation des primes d'assurance amenée par les déprédations certaines et répétées de corsaires, mais la prolongation de la guerre due aux succès de ces derniers, pourraient être, sans trop forcer l'appréciation, considérées comme des suites prochaines, et, sinon nécessaires et uniques, du moins naturelles, de la faute du neutre. Il y a là, du reste, une série de considérations à peser, à étudier. La règle absolue, c'est qu'on ne peut équitablement et raisonnablement imposer la responsabilité des dommages indirects. Mais étant donnés tels dommages causés et éprouvés, quels d'entre eux sont directs, quels sont indirects? On ne peut pas le dire d'avance: c'est une question à examiner, en descendant dans les détails et en discutant les causes de chaque dommage.[1]

What M. Pradier Fodéré says in this respect is fully justified by all the special discussions of the question in the jurisprudence of Great Britain and the United States, as well as of other countries of Europe and America. The well-considered treatise of Mr. Mayne, and the still ampler and more complete treatise of Mr. Sedgwick, contain abundant proof on this point.

The Counter Case of the British Government exhibits an apt illustration of this point, in arguing that even the claims for property actually destroyed by the Alabama are indirect claims, and therefore to be rejected by the Tribunal. It is not worth while to add to what we have already said on that argument. We suppose it assumes that negligence is the cause and *escape* the direct effect, so that the captures are the indirect effect; which is equivalent to saying that he who by malice or gross negligence discharges a loaded gun into a crowd is not responsible for the deaths or wounds he inflicts, because the injury done is the effect of the action of the ball, which is a secondary cause, and not of the act of negligence or malice which did but apply a match to the gun.

The Counsel of the United States would not need to have recourse to any such subtleties to show that the acts of the Confederate cruisers inflicted an injury on the United States in contributing to the prolongation of the war, and that such injury was a direct injury of Government to Government. Nor would it be any answer to say that this injury was but a contributing fact among other and even greater causes of the damage.

General considerations.

Nor would it suffice to reply that the exact amount of the damage is difficult to fix. When a traveler is injured by reason of want of due diligence on the part of the managers of a railroad, it is no defense to say that it is difficult to fix the true value of his arm or his leg, or the money compensation of a long fit of sickness. That is a problem, like others of the same nature, which finds its solution every day in the ordinary courts of justice of all countries.

One nation invades another, and inflicts losses by acts of war on land. If they choose to make peace on the condition of the invader indemnifying the losses of the invaded, the sum which ought to be paid is debatable; but certainly it can be determined. So if two co-operating nations invade another, the sum of injury done by one of them as dis-

[1] Pradier Fodéré, *La question de l'Alabama*, p. 37.

tinguished from the other is determinable, if not with exactness, yet approximately, like most other unliquidated damages; to say nothing of the question of exemplary damages in the cases of tort, which run together in the discretion and conscience of the competent tribunal.

But there is war on sea as well as on land. A war may be exclusively maritime, like that between France and the United States. Such a war consists in the combat or capture of ships. Yet such a war inflicts national injuries and losses independent of the value of vessels destroyed, and if terminated by the payment of indemnities for the cost of the war, either by one or by several parties belligerent, the sum of the reparation can be calculated and determined.

Such is the relative predicament of Great Britain and the United States. We have been injured as a nation by acts of a maritime war happening, as the Counsel think they have proved, by the culpable and responsible negligence of the British Government. The wrong is direct as between the two nations.

We think we have distinct right of substantial indemnity in this behalf.

When a nation inflicts a wrong on a nation, is it due reparation to pay the price of certain ships destroyed? Surely not, any more than the fine paid by the wealthy Roman to repair the insults he inflicted on every person he met in the forum.

But considerations of large import in the sphere of international relations, of which the Government of the United States is the rightful judge, forbid their Counsel to press for extreme damages on account of the national injury thus suffered by the nation itself, through the negligence of Great Britain. Nevertheless, holding that in view, we have maintained in this Argument the plentitude of the jurisdiction of the Tribunal, because, in the judgment of the United States, such is the tenor and intent of the Treaty of Washington; and because they desire the judgment of the Tribunal on this particular question, for their own guidance in their future relations with Great Britain.

United States do not desire extreme damages.

The jurisdiction of the question belongs to the Tribunal.

They contend that the question of damages, as whether direct or indirect, is a juridical one, not one of the Treaty.

The United States did not insist on the absolute generality of scope which distinguishes the Treaty, with unreasonable expectations of having extravagant damages awarded by the Tribunal. Their object was a higher one, and one more important to them, and, as they conceived, to Great Britain.

It is not for their interest to exaggerate the responsibilities of neutrals; but only, in the sense of their action in this respect throughout their whole national life-time, to restrain the field of arms and enlarge that of peace, by establishing the rights and the duties of neutrality on a basis of truth and justice, beneficial in the long run to all nations.

If, as a juridical question under this Treaty, the Tribunal shall conclude that Great Britain is not bound to make reparation to the United States for general national injuries occasioned by the negligence of the British Government to fulfill neutral obligations in the matter of Confederate cruisers, it will say so; and, in like manner, if, as a juridical question, under the Treaty, the Tribunal shall conclude to the contrary and award damages in the premises, the United States will accept the decision as a final determination of the fact and the public law of the questions arising under the Treaty.

The United States desired that the Treaty should be a full and final

Without an adjudication upon it there will not be a full settlement of all differences.

settlement of all differences between the two nations, which it would not have been if the larger national claims, so long and so steadily insisted on by us, had been excluded from the scope of the Treaty, and so left to be a recurring subject of grief and offense in the minds of the people of the United States. They desired also that great principles of neutral obligations and neutral duty should issue from this High International Tribunal, representing five great Constitutional Nations, to serve as instruction and example to all nations, in the large interests of civilization, of humanity, and of peace.

We, the Counsel of the United States, have acted accordingly, in the advocacy of the rights of the United States; earnestly and positively maintaining the principles involved in this Arbitration, but regarding the mere question of the amount of *national* damages to be awarded as secondary to the higher consideration of the welfare and the honor of the United States.

Conclusion.

We now bring to a close this Argument on behalf of the United States, "showing the points and referring to the evidence" which we think should lead to an award by the Tribunal of reparation and indemnity from Great Britain, commensurate with the injuries the United States have suffered and the redress they are entitled to demand.

We shall not find in recent history any example of two powerful nations, with so weighty a matter of difference between them, submitting the measure of right and wrong, of injury and redress, in the great controversy, to any intermediary arbitrament. When their own reason and justice did not enable them to concur in accepting a fit solution of the grave dispute it has too often been left to work ill-will and estrangement between them, or led to open rupture of their peace.

The benevolent and sagacious counsels of the two governments have triumphed over the obstacles and resisted the dissuasions which have heretofore proved too strong to be overcome, and the success of this great example, so full of promise of peace and justice among nations, now rests with the Tribunal.

In the wise administration of this elevated and benign trust, for the welfare of the world confided to this august Tribunal, the Arbitrators will find no surer guide or support than a consideration of the ill consequences which would follow from a disappointment of the high hopes which, on all sides, attend this great experiment.

So far as the parties to this controversy are concerned, they are equally interested that the award should receive the moral acceptance of the people of both nations, as an adequate and plenary settlement of the matter of difference between them.

The people of the United States have definitely formed their opinions as to what the action of Her Majesty's Government, now under judgment, was, as matter of fact, and as to the magnitude and permanence of the injuries which they, their property, and their prosperity, have suffered therefrom. They naturally look, therefore, with chief interest to the award of this Tribunal as a decision upon the question of the *rightfulness* of such action of Her Majesty's Government, and by consequence of the rightfulness of such action in the future, should occasion arise for its imitation by the United States or other Powers.

This principal question having been determined, if Great Britain is held responsible for these injuries, the people of the United States expect a just and reasonable measure of compensation for the injuries

as thus adjudicated, in the sense that belongs to this question of compensation, as one between nation and nation.

The disposition of this controversy by the Tribunal upon principles adequate to its profound interest to the Parties, and in the observant eyes of other nations, gives the best hope to the civilized world of a more general adoption of the arbitrament of reason, instead of force, in the disputes of nations.

And for the rest, the permanent and immutable principles of JUSTICE are adequate for this, as for every other, situation of human affairs; for this, as for every other, Tribunal instituted in its name and for its maintenance. Justice—universal, immutable Justice—is wholly indestructible by the changing fortunes of States or by the influence of all-devouring time,

Casibus haec nullis, nullo delebilis aevo.

In this spirit we humbly submit the whole subject to the enlightened judgment of the Tribunal.

C. CUSHING.
WM. M. EVARTS.
M. R. WAITE.

APPENDIX.

NOTE A.—OBSERVATIONS ON CERTAIN SPECIAL CRITICISMS IN THE BRITISH COUNTER CASE ON THE CASE OF THE UNITED STATES.

I.—THE BRITISH FOREIGN ENLISTMENT ACTS.

British Foreign Enlistment Acts.

On the eighth page of the British Counter Case it is said: "The following sentence is given as a quotation from a dispatch signed by Earl Russell: 'That the Foreign Enlistment Act, which was intended in aid of the duties * * * of a neutral nation,' &c. What were the words of Earl Russell? They were these: 'That the Foreign Enlistment Act, which was intended in aid of the duties *and rights* of a neutral nation, can only be applied,' &c. The meaning of the sentence is altered by leaving out two of the most important words."

The Counsel of the United States are unable to discover how the insertion of the omitted words would increase or decrease, modify or affect, the proposition that the Foreign Enlistment Act was intended in aid of the duties of a neutral nation as represented by the United States.

On the same page of the British Counter Case it is further said:

"The report of the Commission appointed in 1867 to consider the laws of Great Britain available for the Enforcement of Neutrality is thus referred to: 'The Tribunal of Arbitration will search the whole of that Report and of its various appendices in vain to find any indication that that distinguished body imagined or thought or believed that the measures which they recommended were not in full conformity with international obligations. On the contrary, the Commissioners say that so far as they can see, the adoption of the recommendations will bring the municipal law into full conformity with the international obligations.' Viewing their acts in the light of their powers and their instructions, the United States feel themselves justified in asking the Tribunal to assume that that eminent body regarded the acts which they proposed to prevent by legislation as forbidden by international law. What is the passage which the Government of the United States have referred to, but have refrained from extracting? It is this: '*In making the foregoing recommendations we have not felt ourselves bound to consider whether we were exceeding what could be actually required by International Law*, but we are of opinion that if those recommendations should be adopted, the municipal law of this realm available for the enforcement of neutrality will derive increased efficiency and will, so far as we can see, have been brought into conformity with your Majesty's international obligations.' Thus by leaving out the words in which the Commissioners observe that their recommendations may exceed the requirements of International Law, and by using in one sense words which (as the context proves) they employed in another, they are represented as saying the very thing which they expressly guarded themselves from being supposed to say, namely, that all the acts which they proposed to prohibit were, in their judgment, already forbidden by international law."

The United States accept without hesitation the issue thus raised by Her Majesty's Government, and they maintain that the language quoted in the British Counter Case does not justify the statement that the Commissioners observe, that their recommendations "*may exceed the requirements of international law.*"

The Commissioners did not say this, nor anything which in any "sense" gathered from the "context," by any rule of interpretation, can be construed into the meaning which is attributed to it in the British Counter Case. They did use the exact language quoted in the American Case. They said that, if their recommendations should be adopted, the municipal law of Great Britain would, so far as they could see, have been brought into conformity to international obligations. They also said that, in making those recommendations, they had not felt themselves bound to consider whether they were exceeding what could be actually required by international law. In other words, they said that although it seemed to them that, while the proposed recommendations were in harmony with existing international obligations, yet they did not found the recommendation on that fact, but on its own intrinsic merits. The Arbitrators will judge whether this is not the fair and reasonable construction of the language.

II.—AMERICAN NEUTRALITY IN 1793–'94.

American neutrality in 1793–'94.

It is said on page 10 of the British Counter Case that "it is pleaded that in 1793, during General Washington's Administration, the representative of Great Britain in the United States pointed out to Mr. Jefferson, who was then Secretary of State, acts '*which were deemed by Her Britannic Majesty's Government to be breaches of neutrality* done in contravention of the President's Proclamation of Neutrality,' and he invited the United States to take steps for the repression of such acts, and for the restoration of the captured prizes," and that "it appears that the United States complied with these requests." It will be seen that the representations then made on the part of this country to the United States were founded on the character of the acts themselves, which were deemed by the British Government to be breaches of neutrality, and not upon the fact that they were prohibited by the President's Proclamation."

The letter from Mr. Hammond to Mr. Jefferson, which will be found on pages 240–41 (No. 6) of the fifth volume of the British Appendix is the best reply to this averment. The Minister of Her Britannic Majesty says to the American Secretary of State that he "does not deem it necessary to enter into any reasoning upon these facts, as he conceives them to be breaches of that neutrality which the United States profess to observe, *and direct contraventions of the proclamation which the President issued on the 22d of last month.*" The United States submit that this letter is a complete justification of this allegation in their case which is contested by Her Majesty's Government.

Again, on page 29 of the British Counter Case, referring to the commission appointed under the seventh article of "Jay's Treaty," to ascertain the amount to be paid to Great Britain by the United States, it is said:

"Three leading decisions pronounced by them will be found in the Appendix to this Counter Case. By these decisions it was ruled:

"1. That according to the true construction of Article VII of the Treaty, *coupled with Mr. Jefferson's letter*, no claim could be made on account of a capture made before the 5th of June, 1793.

"Hence, compensation was refused in the case of a British vessel which had been captured on the 8th of May, by the Sans-Culottes, a privateer fitted out in Charleston, and had been openly brought by her captors into the port of Philadelphia.

"2. That no compensation would be made by vessels illegally fitted out within the jurisdiction of the United States, unless the prizes had been subsequently brought into an American port. The owners, therefore, of a vessel which the captors had destroyed at sea were entitled to no compensation.

"3. That where the prize has been brought in, no compensation could be claimed, if the claimant had not taken proceedings in a District Court of Admiralty, and proved his case there by sufficient testimony, or if there had been any negligence or any delay in instituting or carrying on such proceedings, or in enforcing the judgment if obtained.

"And it is said, on page 31, referring to what had been said by the United States in this case concerning this precedent: 'Her Majesty's Government deems itself entitled to ask whether these are correct representations of the facts stated in the foregoing pages.'"

The first point referred to in the Counter Case of Her Majesty's Government is, it will be perceived, an adjudication by the tribunal as to the extent of its jurisdiction, *i. e.*, that it did not extend to cases arising before the 5th day of June, 1793. The United States did not suppose that this point would be questioned by Her Majesty's Government. They are at a loss to understand exactly what is intended by Her Majesty's Government in its remarks in respect to this point. The United States, in their Case, (on page 129,) say that Mr. Hammond was informed on the 5th of June, 1793, that "*as to restoring the prizes it* could not be done;" and on page 130, it is said that the United States Government also determined at that time as to the fitting out of privateers, that "it was its duty to repress them *in future*," and "to restore prizes that might be captured," &c., "or if unable to restore them, to make compensation for them."

The reasons for this distinction drawn between acts committed before, and those committed after, June 5, 1793, were fully and fairly stated by Lord Tenterden in his memorandum which is to be found in the third volume of the British Appendix, and the United States had supposed that no historical fact was better settled than that the British Government at that time and ever since had acquiesced in the propriety and the justice of the distinction drawn by General Washington.

When the United States made their statement now challenged, although they took the precaution to indicate that it referred to captures made after June 5, 1793, they might have assumed that it would have been so construed without that precaution.

The second proposition, on the twenty-ninth page of the British Counter Case, is to be taken in connection with the other controlling and limiting remarks in the statement of the commissioner who rendered the decision.

There was in the Case no allegation of permission or neglect by the Government of the United States as to the arming of the French cruiser. The commissioner said:

"The Counsel for the claimant seemed to suppose that the obligation to compensate arose from the circumstance of the privateer having been originally armed in the United States. But as there is not the smallest evidence to induce a belief that in this or in any other case the Government permitted, or in any degree connived at, such arming, or failed to use all the means in their power to prevent such equipment, there is no ground to support a charge on the fact that the armament originated in their ports."

In view of the fact that this very material qualification of the doctrines laid down in the case of the Jamaica is excluded from the British Counter Case, the United States think they are justified in repeating as to the statements in the British Counter Case, the question there propounded by Her Majesty's Government, whether these are correct representations of the facts.

As to the third proposition, on the twenty-ninth page of the British Counter Case, the United States refer to the opinion in the case of the Elizabeth, (British Appendix, volume v, pp. 319–328,) upon which it is said to be founded, which in the opinion of the United States forms no adequate or just foundation for the assertion that it was there decided that no compensation could be claimed "if there had been *any negligence or any delay* in instituting or carrying on proceedings in a district court of admiralty," or if *the claimant* "had not proved his case there by sufficient testimony," or if there had been "delay in enforcing a judgment if obtained." The Tribunal will also judge whether this is a correct representation of the facts.

III.—THE UNITED STATES AND PORTUGAL.

United States and Portugal.

On pages 32 and 33 of the British Counter Case will be found an extract from a letter from Mr. da Serra, Portuguese Minister at Washington, to the Secretary of State of the United States, dated November 23, 1819; and, commenting upon this extract, it is said on page 33 that—

"In the Case of the United States, the Minister who writes thus earnestly and vehemently is represented as attaching little or no importance to the matter. The reason given is that he has chosen the moment to make a visit to Brazil. But in the sentences which precede and follow, and of which no notice is taken in the Case of the United States, he has explained why he chose to leave his post at that particular time, namely, that until, by amendment of the law or otherwise, the proper means should be found for putting an end to this 'monstrous conspiracy,' he found by experience that complaints were useless, and should refrain from continuing to present them without positive order."

The statement in the Case of the United States which is thus commented upon was the following:

"On the 23d of November, 1819, the Minister again complained. He says: 'One City alone on this coast has armed twenty-six ships which prey upon our vitals, and a week ago, three armed ships of this nature were in that port waiting for a favorable occasion of sailing for a cruise.' But he furnishes no facts, and he gives neither proof nor fact indicating the city or the district which he suspected, and nothing to afford the Government any light for inquiry or investigation. On the contrary, he says: '*I shall not tire you with the numerous instances of these facts;*' and he adds, as if attaching little or no real importance to the matter, 'relying confidently' on the successful efforts of this Government, I choose this moment to pay a visit to Brazil." (American Case, p. 143.)

The first fact that will strike the Tribunal is that in this statement assailing the fairness of the analysis of this letter which is given by the United States, the extract at the close of the United States analysis is not to be found. In fact, the British Counter Case omits the following paragraphs of Mr. da Serra's letter, which, in the judgment of the United States, are the paragraphs the most essential in this controversy:

"The Executive, having honorably exerted the powers with which your Constitution invests him, and the evil he wished to stop being found too refractory, it would be mere and fruitless importunity if I continued with individual complaints except by positive orders. This Government is the only proper judge of what constitutional depositions or arrangements may be established for the enforcement of the laws, and he alone has the means of obtaining them, which are constitutionally shut to any foreign minister. I trust in the wisdom and justice of this Government that he will find the proper means of putting an end to this monstrous infidel conspiracy, so heterogeneous to the very nature of the United States.

"Before such convenient means are established, the efforts of a Portuguese Minister on this subject (the only one of importance at present between the two nations) are of little profit to the interests of his Sovereign. Relying confidently on the successful efforts of the Government to bring forth such a desirable order of things, I choose this moment to pay a visit to Brazil, where I am authorized by His Majesty to go. My age

and my private affairs do not allow much delay in making use of this permission, and I intend to profit by the first proper occasion that may offer." (British Appendix, volume iii, page 155.)

The United States submit to the Arbitrators that the letter of Mr. da Serra, when completed by adding the passage omitted in the British Counter Case, justifies the statement made in their Case.

1. It refers to representation made "during more than two years" previously. This reference to what had already been noticed in the analysis in the American Case it was not necessary to repeat.

2. It makes an averment as to twenty-six ships armed in one city, and as to three armed ships which were said to be in that port the previous week. This averment is given in the American Case in Mr. da Serra's own language.

3. It says that Mr. da Serra will not tire Mr. Adams with the numerous instances of the facts, but he gives a reason for this which is omitted in the British Counter Case, namely, that while he is sick of receiving communications of Portuguese property stolen, he recognizes that the Government of the United States has been sincere in its desire to suppress what he complained of, and has exerted itself as much as it could to that end.

4. The United States cannot be said to have represented Mr. da Serra as attaching little or no importance to the matter. "What they actually said was," he adds, *as if* attaching little or no importance to the matter, "relying confidently on the successful efforts of this Government, I choose this moment to pay a visit to Brazil," and they submit that he certainly did not do what it said in the British Case that he did do, "Explain why he chose to leave his post at that particular time, namely, that until, by the amendment of the law or ortherwise, the proper means should be found for putting an end to this 'monstrous conspiracey,' he found by experience that complaints were useless, and should refrain from continuing to present them without positive orders."

IV.—NASSAU IN DECEMBER, 1861, AND JANUARY, 1862.

On page 62 of the British Counter Case, it is said:

"It may, however, be convenient, since the Government of the United States has charged Earl Russell with having neglected to make inquiry and contented himself with announcing 'a condition of affairs at Nassau' which was 'imaginary,' to state what was actually done by Earl Russell upon the receipt of Mr. Adams's representation, what had been previously done, and what were the facts existing at the time." Nassau.

The allegation that "the United States have charged Earl Russell with having neglected to make inquiry, and contented himself with announcing a condition of affairs at Nassau which was imaginary," is itself an imagination. The United States did not deny that Earl Russell made an inquiry. They said that had Earl Russell *seriously* inquired into the complaints of Mr. Adams, a state of facts would have been disclosed entirely at variance with the report which Earl Russell, on the 8th day of January, 1862, sent to Mr. Adams as a correct statement of what was taking place at Nassau, and that that statement was imaginary. The facts which are shown prove this. Mr. Adams, on the 8th day of October, 1861, transmitted to Earl Russell a letter showing that "a quantity of arms and powder," for the use of the insurgents, was "to be shipped to Nassau," consigned to Henry Adderley. Earl Russell answered this complaint on the 8th day of January, 1862, by saying that the Lieutenant Governor of the Bahamas had received a letter from Mr. Adderley denying the allegations brought against him, and that the receiver-general at Nassau said that no warlike stores had been received at that port. The United States proved in their Case that on the 8th day of January, warlike stores had arrived in Nassau, and had been transshipped. Her Majesty's Government, in its Counter Case, has since proved the same thing more in detail. On the 12th December, Lieutenant Governor Nesbitt knew of the consignment. (British Appendix, vol. v, p. 27, No. 8.) On the 28th December, he knew of the transshipment. (Same, No. 9.) It is clear, therefore, that the averment of the United States that the "condition of affairs at Nassau," as announced by Earl Russell on the 8th of January, was "imaginary" is correct. Whether the inquiries of Earl Russell were "seriously" prosecuted, the United States leave to the Arbitrators to decide, on a comparison of dates. The complaint by Mr. Adams was made on the 1st of October, 1861. (United States Evidence, vol. i, p. 520.) The instructions to the Lieutenant Governor to make the investigation were dated the 15th October. (British Appendix, vol. v, p. 26.)

The inquiry of Adderley was made on the 16th November, and the answer communicated to London on the 20th November. On the 9th day of December the Gladiator arrived, with palpable proof that the answer of the 20th November had misinformed Her Majesty's Government. Between that day and the 8th January, the date of Earl Russell's note to Mr. Adams, there was plenty of time to have given Her Majesty's Government correct information, which was not "imaginary." That was either not done, or if done it was never communicated to the Government of the United States.

On page 65 it is said:

"It might have been reasonably supposed, therefore, that the course pursued by the authorities at Nassau in the case of the Flambeau and her coal ships, would have merited the approval of the Government of the United States instead of being denounced as a violation of neutrality. * * What, then, is the grievance of the United States? It is that the United States cruisers were precluded from using the Bahamas for belligerent operations."

The United States cannot permit themselves to characterize this statement as it deserves. They do not complain that they were "precluded from using the Bahamas for belligerent operations," but they do complain, and they assert that they have proved, that the insurgents were encouraged to use all the British ports for such operations.

NOTE B.—EXTRACTS FROM VARIOUS DEBATES IN THE PARLIAMENT OF GREAT BRITAIN REFERRED TO IN THE FOREGOING ARGUMENT.

I.—THE FOREIGN-ENLISTMENT ACT OF JULY 3, 1819.

Debates in Parliament on the passage thereof.

In the House of Commons, 15th May, 3d, 10th, 11th, and 21st June, 1819. (See Hansard's Parliamentary Debates, first series, vol. xl, pp. 362–374, pp. 867–909, pp. 1084–1117, pp. 1118–1125, pp. 1232–1285.)

Foreign Enlistment Act of July 3, 1819.

In the House of Lords, 28th June, 1819. (See ibid., pp. 1317–1416.)

On May 13, 1819, the Attorney General moved for leave to bring in a bill to prevent enlistments and equipments of vessels for foreign service. He said:

"He wished merely to give this country the right which every legitimate country should have, to prevent its subjects from breaking the neutrality existing toward acknowledged states, and those assuming the power of any states. It was in the power of any state to prevent its subjects from breaking the neutrality professed by the Government, and they were not to judge whether their so enlisting would be a breach of neutrality or not." (Pp. 362, 363.)

He said further:

"The second provision of this bill was rendered necessary by the consideration, that assistance might be rendered to foreign stafes through the means of the subjects of this country, not only by their enlisting in warfare, but also by their fitting out ships for the purpose of war. It was extremely important for the preservation of neutrality, that the subjects of this country should be prevented from fitting out any equipments, not only in the ports of Great Britain and Ireland, but also in the other ports of the British dominions, to be employed in foreign service. The principle in this case was the same as in the other, because by fitting out armed vessels, or by supplying the vessels of other countries with warlike stores, as effectual assistance might be rendered to a foreign power as by enlisting in their service." (P. 364.)

Sir James Mackintosh, opposing the bringing in of the Bill, said:

"It was impossible to deny that the sovereign power of every state could interfere to prevent its subjects from engaging in the wars of other states, by which its own peace might be endangered, or its own interests affected. His Majesty could command his own subjects to abstain from acts by which the relations of the state with other states might be disturbed, and could compel the observation of peace with them." (P. 366.)

Lord Castlereagh, favoring the bringing in of the Bill, said:

"It now became us to adopt a measure by which we might enforce the common law against those whose conduct would involve us in a war, and to show that we were not conniving, as we were supposed, with one of the parties." (P. 369.)

Leave was given to bring in the Bill. (P. 374.)

On June 3, 1819, the Attorney moved the second reading of this Bill, and said:

"Such an enactment was required by every principle of justice; for when the state says, 'We will have nothing to do with the war waged between two separate powers,' and the subjects in opposition to it say, 'We will, however, interfere in it,' surely the house would see the necessity of enacting some penal statutes to prevent them from doing so; unless, indeed, it was to be contended that the state and the subjects who composed that state might take distinct and opposite sides in the quarrel. He should now allude to the petitions which had that evening been presented to the house against the bill; and here he could not but observe that they had either totally misunderstood or else totally misrepresented its intended object. They had stated that it was calculated to check the commercial transactions and to injure the commercial interests of the country. If by the words 'commercial interests and commercial transactions' were meant 'warlike adventures,' he allowed that it would; but if it were intended to argue that it would diminish a fair and legal and pacific commerce, he must enter his protest against any such doctrines. Now, he maintained, that as war was actually carried on against Spain by what the petitioners called commercial transactions, it was the duty of the house to check and injure them as speedily as possible." (P. 875.)

Mr. Denman, opposing the bill, said:

"He was perfectly at a loss to conjecture by what ingenuity the honorable and learned gentleman could torture this argument into a denial of the power of the sovereign and the legislature." (P. 877.)

On June 10, 1819, the Attorney General moved the order of the day for going into committee on this bill.

Sir James Mackintosh, opposing the bill, said:

"The right honorable gentleman had observed that such a measure as the present had been introduced by the Government of the United States and acceded to by Congress. The United States, said the right honorable gentleman, concluded a treaty with Spain, and Congress passed an act to carry that treaty into effect. And why did they do so? Because, though the common law in England was sufficient for the required purpose, in America it was not. The power of making war and peace was not vested in the President of America as it was in the King of England. In America, therefore, a legislative act was necessary. But as His Majesty's proclamation of 1817 was still in force, how could any legislative measure be necessary in this country?" (P. 1094.)

Mr. Canning, supporting the bill, said:

"The house had to determine, first, if the existing laws of the country would enable her to maintain her neutrality; secondly, if the repeal of those laws would leave the power of maintaining that neutrality; and thirdly, if both the former questions were negatived, whether the proposed measure was one which it was fit to adopt." (P. 1104.)

He said further:

"Was there, he would ask, anything incompatible with the spirit of liberty in enabling a government to lay such a restraint on the action of its own subjects as might insure the observance of perfect neutrality toward two belligerents? If there was, how happened it that the honorable and learned gentleman approved so cordially of the proclamation of 1817? In that proclamation, which was the only public act of the British government on the subject, a spirit of strict impartiality had been exhibited. Contemplating the character of that proclamation, what right had any man to infer that the feelings and opinions of government had undergone a change on the subject?" (P. 1104.)

He said further:

"It surely could not be forgotten that in 1794 this country complained of various breaches of neutrality (though much inferior in degree to those now under consideration) committed on the part of subjects of the United States of America. What was the conduct of that nation in consequence? Did it resent the complaint as an infringement of its independence? Did it refuse to take such steps as would insure the immediate observance of neutrality? Neither. In 1795, immediately after the application from the British government, the legislature of the United States passed an act prohibiting, under heavy penalties, the engagement of American citizens in the armies of any belligerent power. Was that the only instance of the kind? It was but last year that the United States passed an act, by which the act of 1795 was confirmed in every respect, again prohibiting the engagement of their citizens in the service of any foreign power; and pointing distinctly to the service of Spain, or the South American provinces." (P. 1105.)

He said further:

"If a foreigner should chance to come into any of our ports and see all this mighty armament equipping for foreign service, he would naturally ask, 'With what nation are you at war?' The answer would be, 'With none.'

"'For what purpose, then,' he would say, 'are these troops levied, and by whom?' The reply of course must be, 'They are not levied by government; nor is it known for what service they are intended; but, be the service what it may, government cannot interfere.' Would not all that give such a foreigner a high idea of the excellence of the English constitution? Would it not suggest to him that for all the ordinary purposes of a state there was no government in England? Did the honorable and learned gentleman not think that the allowing of armaments to be fitted out in this country against a foreign power was a just cause of war?" (P. 1106.)

He said further:

"It was the doctrine laid down by the English government itself that was now on its trial. This country was now called upon to say whether it would act on its own asserted principles. Those acts, which the bill under the consideration of Parliament tended to repress, were acts which in the document put forth by England forty years ago were termed a 'manifest breach of the law of nations.'" (P. 1107.)

On June 11, 1819, Lord Castlereagh, in answer to an inquiry made in the debate on the bill, said: "That His Majesty's government had issued a prohibition against the exportation of arms or warlike stores to Cuba, or any of our West India islands, for the purpose of being sent to the service either of the provinces in insurrection, or of those continuing within the allegiance of Spain. They had taken precautions to guard against our own islands being made the means of thwarting the views of the parent state." (P. 1124.)

On June 21, 1819, the order of the day being for the third reading of the Foreign Enlistment bill, Sir W. Scott, supporting the bill, said:

"It was quite unnecessary for him to argue that it was just and proper to preserve a strict neutrality between a country and its colonies, when that country was bound to

us in the ties of amity, by existing treaties. When he said a strict neutrality, he meant a neutrality which consisted in a complete abstinence, not only from absolute warfare, but from the giving of any kind of assistance to either one side or the other." (P. 1232.)

He said further:

"There could be no solecism more injurious in itself, or more mischievous in its consequences, than to argue that the subjects of a state had a right to act amicably or hostilely with reference to other countries, without any interposition of the State itself. It was hardly necessary for him to press these considerations, because all the arguments that he had heard on the subject had fully admitted that it was the right of States, and of States only, to determine whether they would continue neutral or assume a belligerent attitude—that they had the power of preventing their subjects from becoming belligerent, if they pleased to exert it. In the next place, it was fully admitted that the government of this country possessed that right, which was essential to its safety and sovereignty." (P. 1233)

Mr. Robert Grant, supporting the Bill, said:

"Why, Sir, what sort of neutrality is this, which, while it operates only as a more subtle sword of annoyance against the passive party, throws an impenetrable ægis over the assailant? A neutrality which completely protects the aggressions of the power who has stipulated to observe it, while it leaves the power to whom the stipulation has been given, only tenfold more exposed and defenseless. Let the matter next be tried on a somewhat broader ground. Every government, in its foreign relations, was the representative of the nation to which it belonged, and it was of the highest importance to the peace of nations that government should be so considered. Nations announced their intentions to each other through the medium of their rulers. Hence every state knew where to look to expressions of the will of foreign nations, where to learn whether war or peace was intended, where to demand redress for injuries, and where to visit injuries unredressed. But all this system was inverted and thrown into confusion, if the government might act in one way and the nation in another. All this system was at an end if, while we were professedly at peace with Spain, she was to be attacked by a large army of military adventurers from our own shores, a sort of *extra-national* body—utterly irresponsible, utterly invulnerable, except in their own persons—for whose acts no redress could be demanded of the British government—who might burn, pillage, and destroy, then find a safe asylum in their own country and leave us to say, 'We have performed our engagements—we have honorably maintained our neutral character.'" (P. 1243.)

He said further:

"It was, besides, to be remembered, that an exact precedent for the present measure was supplied by the act to which the honorable gentleman opposite (Mr. Scarlett) had referred: the act for preventing the exportation of arms and ammunition without the royal license. There, as here, the Crown possessed a prerogative by the common law, and there, as here, you added facilities for the exercise of that prerogative by statute." (P. 1250.)

When the House divided, there appeared, ayes, 190; noes, 129.

On June 28, 1819, upon his motion to commit the bill, Earl Bathurst, supporting the bill, said:

"The supplying belligerents with warlike stores, and equipping vessels for warlike purposes, were also prohibited. With respect to this part of the bill, he had heard no objection from any quarter. The evils experienced in commerce from vessels roaming over the seas, under unknown and unacknowledged flags, had been too generally felt to suppose that British merchants would be much dissatisfied with the regulations provided by this part of the bill." (P. 1380.)

He said further:

"Looking, then, to the principles and grounds of general policy, he would say: that he should scarcely look for any other definition of a state incapable of maintaining the relations of peace and amity with other powers than this, that its subjects made war at pleasure upon states with whom their government was at peace, and without any interruption from that government to their pursuits. And yet such had been for some time the actual situation of this country." (P. 1380.)

He said further:

"What would the British merchants, who petitioned against this bill, say if they saw expeditions sailing from French ports to attack the sources of our commerce in every quarter of the world? He was afraid we should not be much benefited by its being left to the option of French officers to engage on either side, according to their individual opinions." (P. 1383.)

Lord Holland, opposing the bill, said:

"As an argument in favor of the present bill, the noble lord has said, that if it was not passed we could not preserve our neutrality. Now, he (Lord Holland) would, on the contrary, maintain, that the existing laws were sufficient for that purpose. He

would even run the hazard of standing up for the prerogative in this case against the noble lord." (P. 1391.)

He said further:

"A sovereign might be called upon by one belligerent party, with whom he was in alliance, to prevent his subjects from entering into the service of its enemy, so as to be employed against it. The sovereign might issue his proclamation prohibiting his subjects from enlisting; and if they did so after that proclamation, they would be guilty of a high misdemeanor and might be punished accordingly. But this was all that a belligerent state could ask. It could not demand from the sovereign a change in the municipal laws of his dominions, or a modification of them, to suit its convenience. The noble earl had said: 'Look to the United States, and see what they have done;' but he had not adverted to the difference between the power of the executive in this country and the American Union. The President of the United States had not the power, like the sovereign of England, of making peace and war; and, therefore, as the executive had not the right of enforcing peace, a foreign state had the right of demanding a law from the legislature to prevent war. The example of the United States was, therefore, no precedent for us, where the prerogative already possessed the right which a particular law was there requisite to confer." (P. 1391.)

The bill on this day went through the committee.

II.—LORD ALTHORP'S MOTION FOR THE REPEAL OF THE FOREIGN ENLISTMENT ACT.

Motion to reveal the Foreign Enlistment Act.

Debate in the House of Commons, on the 16th day of April, 1823. (See Hansard's Parliamentary Debates, second series, vol. viii, pp. 1019–1059.)

Mr. Canning, opposing the motion, said:

"Sir, the act is divided into two plain and distinct parts; the one prohibiting British subjects from entering into the military service of belligerent states; the other forbidding the fitting out of privateers for the service of those states, in British ports, with British means and money, or which are to be manned with British seamen." (P. 1052.)

He said further:

"If I wished for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality; and orders were issued prohibiting the arming of any French vessel in American ports. At New York, a French vessel fitting out was seized, delivered over to the tribunals, and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports, for the purpose of cruising against English vessels, was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain. Here, sir, I contend, is the principle of neutrality upon which we ought to act. It was upon this principle that the bill in question was enacted." (P. 1056.)

He said further:

"While we declare ourselves neutral, let us avoid passing the strict line of demarkation. When war comes, if come it must, let us enter into it with all the spirit and energy which becomes us as a great and independent state. That period, however, I do not wish to anticipate, and much less desire to hasten. If a war must come, let it come in the shape of satisfaction to be demanded for injuries—of rights to be asserted—of interests to be protected—of treaties to be fulfilled. But, in God's name, let it not come on in the paltry pettifogging way of fitting out ships in our harbors to cruise for gain. At all events, let the country disdain to be sneaked into a war. Let us abide strictly by our neutrality, as long as we mean to adhere to it; and by so doing we shall, in the event of any necessity for abandoning that system, be the better able to enter with effect upon any other course which the policy of the country may require." (P. 1057.)

When the House divided there appeared for the motion, 110; against the motion, 216.

III.—THE AFFAIR AT TERCEIRA.

Terceira.

Debate in the House of Commons on the 28th of April, 1830. (See Hansard's Parliamentary Debates, New Series, vol. xxiv. pp. 126–214.)

The resolutions before the house were as follows:

"That prior to the 12th of December, 1828, Her Majesty the Queen, Donna Maria II, had been recognized by His Majesty, and the other great powers of Europe, to be legitimate Queen of Portugal; and that at the period above named the said Queen was

residing in this country and had been received by His Majesty with the accustomed honors of her royal rank.

"That on the said 12th of December the island of Terceira, part of the dominions of the Queen of Portugal, was governed by authorities, civil and legal, in allegiance to Her Majesty.

"That on the said 12th of December instructions were given by the Lords Commissioners of the Admiralty, stating that a considerable number of Portuguese soldiers and other foreigners were about to sail in transports from Plymouth to Falmouth, and it is supposed they intend making an attack on Terceira or other of the Western Isles; and His Majesty having been pleased to command that a naval force should be immediately dispatched to interrupt any such attempt, you are hereby required and directed to take ship and sloop named in the margin under your command and to proceed with all practical expedition to Terceira; and having ascertained that you have succeeded in reaching that Island before the transports alluded to, you will remain yourself at Ongra or Praia, or cruising close to the island in the most advisable position for intercepting any vessels arriving off it, and you will detach the other ships as you shall deem best for preventing the aforesaid force from reaching any of the other islands.

"That on the arrival of the naval force sent to Terceira, in pursuance of these instructions, the commanding officer found that island in possession of, and governed by, the authorities above mentioned.

"That in the beginning of January, 1829, a number of Portuguese subjects or soldiers of her said Majesty, voluntarily left this country with a view of repairing to the said island, and that their departure and destination were known to His Majesty's Government; that they appear to have embarked and sailed in unarmed merchant-ships, to have been unaccompanied by any naval force, and themselves without any arms or ammunition of war.

"That these unarmed merchant-ships and passengers were prevented by His Majesty's naval forces, sent for the purpose, from entering the harbor of Porto Praia; and that after they had been fired into and blood had been spilled they were compelled, under threat of the further use of force, again to proceed to sea, and warned to quit the neighborhood of Terceira and the rest of the Azores, but that they might proceed wherever else they might think proper.

"That the use of force in intercepting these unarmed vessels, and preventing them anchoring and landing their passengers in the harbor of Porto Praia, was a violation of the sovereignty of the state to which the Island of Terceira belonged; and that the further interference to compel those merchant-ships or transports to quit the neighborhood of the Azores was an assumption of jurisdiction upon the high seas neither justified by the necessities of the case nor sanctioned by the general law of nations." (Pp. 126, 127).

During the debate Mr. Secretary Peel, speaking against the resolutions, said:

"The next question for consideration was the character of the expedition, and his right honorable friend contended that, going unarmed from our shores, the refugees were not to be considered as a military body, and that their conduct was no breach of our neutrality. Was it then to be contended that no expedition was a military expedition except the troops had their arms on board the same vessels with them? If they were on board one vessel, and their arms in another, did that make any difference? Was such a pretense to be tolerated by that common sense to which the Honorable Baronet had appealed," (P. 198.)

He said further:

"Arms were already provided for them at Terceira; the men were proceeding thither for the purpose of using the arms, and no person could for one moment doubt what was the real nature and character of the expedition." (P. 198.)

He said further:

"It was not necessary, he believed, further to discuss the question whether the expedition were or not a breach of our neutrality; and conceiving that it was, the next question which required to be settled was, whether or not we were justified, after the expedition had left our ports, in preventing it from reaching the place of its destination. On that point, he thought, a complete answer to the statement of his right honorable friend who opened the debate, had been given by his right honorable friend who sat near him. The Portuguese refugees and their leaders had throughout been guilty of the grossest deception toward the British Government. It had been such as to justly subject them to the treatment they had received." (P. 200.)

He said further:

"Were the Government of this country to allow itself to be deceived in the way these refugees had deceived it, the ports of England would be selected by all the discontented people of Europe to fit out and prepare expeditions against their governments; or even expeditions to plunder and devastate other countries. It might be true that we had no right to punish the Portuguese for their fraud, but we had a right to prevent them profiting by their fraud, particularly when doing what might have

involved us in a contest with another power on account of the breach of our neutrality committed by these people." (P. 200.)

He said further:

"Neutrals shall not suffer themselves or their possessions to be made instrumental in doing injury to other nations. There is no law of nature or of nations—no obligation of justice—which condemn us to be the dupes of those who would lead us into such wrong. That was the doctrine he would apply to the present case—we were not to be made the dupes of these people, to commit wrong against another power. But the consequences, he believed, of such proceedings, did we permit them, would be fatal to ourselves. If we supported or allowed fraud we should have no remedy but to submit to it when our own rights were in question. If we allowed one hostile expedition to be prepared within our territory, ten years would not elapse, to use the remarkable words of Mr. Canning in the debate on the Alien Bill, 'before this country will be made the work-shop of intrigue, and the arsenal of every malcontent faction in Europe.' Placed, as this country is, on the confines of the Old World and the New, possessing such facilities in her manufactures and in her natural advantages, and above all, in her free institutions, for the purposes of hostility, it becomes her to watch with the narrowest scrutiny that the facilities she affords are not abused to her own injury." (P. 201.)

He said further:

"He remembered that when he was sitting by the side of Mr. Canning, as his colleague in office, that it was stated by that right honorable Gentleman, shortly before the Alien Act was brought forward, and when Ministers were considering of the propriety of abandoning it altogether, that information had been obtained, and he knew it to be correct, that the Spanish constitutionalists—the martyrs to liberty, as the honorable baronet called them—had resolved to foment internal disorders in the dominions of Spain. Mr. Canning stated in the House that he did not allow a day to elapse, after learning this fact, without notifying to the persons carrying on these intrigues that 'the Government would not allow them to desecrate the asylum they had chosen for their protection,' and at the same time he gave information to the Governor of the Spanish province threatened by these machinations of what was going on. Mr. Canning said that it was ridiculous to suppose that if we authorized such a line of conduct we should not have to pay the penalties of hostility. For the interest and peace of this country—not less than for the interest and peace of other countries—he enforced on all those who resided here the strictest neutrality. 'God knew,' he said, 'when we should see the end of the prevailing agitation, when the struggle of opinions would terminate; and no man could wish for it more than he did; but he claimed these bills in order that we might not be fooled, gulled, bullied, cheated, or deceived into hostilities into which we never intended to enter.'" (P. 201.)

He said further:

"As long as England remained at peace, she might be an asylum to the unfortunate, a refuge to the distressed, and a retreat to those who were weary and heavily laden, where they might lay down their burden and be at rest. But to maintain our independence, to preserve the power of being this place of refuge, it was necessary, to use the words of Mr. Canning, that 'we should not be fooled, gulled, bullied, cheated, or deceived into hostilities;' and in order to prevent such a result, he hoped the house would join with him in rejecting the resolutions which had been proposed, and which were neither more nor less than a severe censure on the conduct of those who had prevented England from being cheated into hostilities." (P. 202.)

Mr. Huskisson, speaking in favor of the resolution, said:

"But having evaded our laws, we had no right to punish them; we might have some authority over them as long as they were within our jurisdiction, but the complaint made against them proved that they had escaped beyond the limits which the laws of nations recognized as the limits of our power." (P. 208.)

When the House divided there appeared for the motion 78; against it, 191; majority, 113. (P. 213.)

IV.—THE FOREIGN ENLISTMENT ACT OF AUGUST 9, 1870.

Debates in Parliament on the passage in the House of Commons, 1st, 3d, 4th, and 5th August, 1870. (See Hansard's Parliamentary Debates, third series, vol. cciii, pp. 1365–1381, pp. 1502–1513, pp. 1550–1556, p. 1592.)

Foreign-enlistment act of 1870.

In the House of Commons, 8th August, 1870. (See ibid., pp. 1676–1680.)

On 1st August, 1870, on the order for the second reading of the bill,

The Attorney General, Sir R. P. Collier, said:

"I think, however, the house will agree that, upon the breaking out of this unexpected and most calamitous war, Her Majesty's Government would have been very much to blame if they had delayed for a single day to introduce this measure." (P. 1367.)

He said further:

"I now come to deal with the question of the equipment and fitting out of vessels,

with respect to which there has been so much litigation. To this section of the old Act a very important addition has been suggested by the Commissioners, to the effect that it should apply not merely to the arming and equipping, but to the building of a ship. That recommendation was made by all the Commissioners, with the exception of my honorable and learned Friend the Member for Oxford, (Mr. Vernon Harcourt,) for whose authority I have the greatest respect, although I think that he, in the present instance, was wrong, and that the majority of the Commissioners were right. If such a provision were contained in the existing act, the Alabama could not have escaped and the Alexandra must have been condemned. It obviously is very unsatisfactory for a Government to be aware that a vessel is being built for a belligerent, to know her destination, to have to wait day after day till she is completed, and then one fine morning to find that she is gone. Now, that has more than once occurred, and it is desirable that it should not occur again. There is also a provision in this section which touches the case of the mere dispatches of a vessel, and a clause containing a provision to the effect that if it is shown that a vessel has been ordered to be built for a belligerent, and is supplied to that belligerent and used for warlike purposes, that shall be held to be *prima-facie* evidence that she was built for the warlike service of the belligerent, unless the innocent destination of the vessel can be established. In a provision of that kind there is, I apprehend, no hardship." (P. 1368.)

He said further:

"I have now to call attention to a very important power which we propose to give by the bill. It is the power which it confers on the Secretary of State, on his being satisfied that a vessel is being built or equipped for the service of a foreign belligerent, and is about to be dispatched, to issue his Warrant ordering her to be seized and detained, which Warrant is to be laid on the Table of the House. It is further provided that the owner of a vessel may apply to the Court of Admiralty for her release, which he may obtain if he satisfies the Court that her destination was lawful, and not only may he obtain her release but damages for her retention. In order to prevent any hardship, there is, moreover, a provision that the Admiralty shall release the vessel on a bond being given that she is not to be employed on any illegal adventure. There is another provision in respect to which the Bill, I admit, goes beyond the recommendation of the Commissioners. It gives power to the local authorities named in it to seize a vessel if they have reason to suppose she is about to escape, but then they will have to report immediately the seizure to the secretary of state, who will be empowered at once to release her should he be of opinion that there were not sufficient grounds for the seizure, and assuming the vessel to have been seized without reasonable cause, and released by the Secretary of State, the owner will be entitled to claim damages for the detention. These are the provisions by which we propose to attain the object which we have in view, and to render extremely difficult, if not almost impracticable, the escape of any such vessel as the Alexandra or the Alabama in future." (P. 1369.)

Mr. Stavely Hill, supporting the bill, said:

"It was very necessary to prevent the recurrence of what happened during the American War, when this country was made a starting point for a ship of war which, as had been aptly remarked, was an expedition in itself." (P. 1372.)

Mr. Vernon Harcourt, supporting the bill, said:

"The present law for enforcing neutrality was utterly insufficient. No one could dissent from Lord Russell's description of the case of the Alabama—that it was a scandal to the law of this country, and that the persons who were concerned in that disastrous fraud upon the laws of this country committed one of the most unpatriotic acts of which an Englishman had ever been guilty." (P. 1374.)

He said further:

"But he would venture to say, what he was sure would be confirmed by his honorable and learned Friend the Member for Richmond, (Sir Roundell Palmer,) and by the Vice-President of the Council, both of whom were members of the Commission, that the opinion of that body was that what was required was to extend and enlarge the preventive power of the law rather than to aggravate its punitive provisions. There were two objects—to prevent the offense, and to punish it when committed. The use of punishment was small save so far as it would act as a deterrent." (P. 1374.)

He said further:

"He regretted that the punitive clauses, which, in certain states of public feeling, could not be carried out, had been multiplied, and that the strength of the Bill had not been thrown into the preventive clauses." (P. 1375.)

He said further:

"The Attorney General had stated that it was his intention to strike out clause 11, which was intended to prevent the hospitality of their ports being extended to vessels that had illegally left that country, on the ground that he thought its object would be better carried out by means of a regulation to be enforced by the Executive. He (Mr. Vernon Harcourt) entirely agreed with the necessity that existed for the enforcement of some such regulation, because he believed that had the Alabama been excluded from our ports after she had escaped from this country the difficulties that had arisen

between this country and America, in reference to that vessel, would have been avoided." (P. 1378.)

Mr. Rathbone, supporting the bill, said:

"In the name of the mercantile community, he thanked the Government for introducing this Bill, which only carried out the policy which the ship-owners of Liverpool pressed on the Government of the day very soon after the escape of the Alabama." (P. 1380.)

Viscount Bury said:

"He could not agree with the honorable Member (Mr. Bourke) in regarding this as an inopportune moment for bringing forward this Bill. The fact that war was raging on the Continent was no reason for not amending our municipal law in points where this was notoriously defective. It was ridiculous to say that a builder did not know that the vessel he was building was for war purposes; and it was a less evil that the shipbuilding interest should suffer a little than that the whole nation should be involved in difficulties." (P. 1381.)

On 3d of August, 1870, upon the order for committee on the bill, the solicitor-general, Sir J. D. Coleridge, said:

"It would not occur in one case out of a thousand that the builder of a ship would have the smallest difficulty in proving what his contract was and under what circumstances it was undertaken." (P. 1510.)

He said further:

"The object of the clause was to prevent the escape of suspected ships from the harbors of the kingdom till the secretary of state had been communicated with. The clause gave an *ad interim* power of seizure." (P. 1512.)

The Attorney General, Sir R. P. Collier, said:

"The object was to give power to any officer who saw a ship about to escape to prevent such escape." (P. 1512.)

The Attorney General said further:

"The officers named would be able to seize a vessel without special instructions, in order that such vessel might not be allowed to escape. It was a most important power but it was only to be used in case of emergency, and if any wrong was done by the seizure there would be compensation." (P. 1512.)

Mr. Whalley said:

"He wished to ask, was such stringent legislation in practice in any country of the world?"

The Attorney General said:

"The clause was copied from the merchant-shipping act, which had been in force for twenty years without any complaint." (P. 1512.)

On the 4th of August, 1870, the bill being under consideration, the Attorney General, Sir R. P. Collier, said:

"He would propose to omit clause 11. This clause provided in effect that no war vessel employed in the military or naval service of any belligerent which should have been built, equipped, fitted out, armed, or dispatched contrary to this enactment should be admitted into any port of Her Majesty's dominions." (See the Report of the Commission, documents with the United States Case, vol. iv, p. 82.)

Mr. Dickinson said:

"He hoped this would not be done, otherwise vessels corresponding with the Alabama could be succored in our colonial ports."

The attorney-general said:

"He had to explain that, although the royal commissioners made a recommendation to the effect of this clause, they did not intend that it should be embodied in an act of Parliament, but that it should be carried out under the Queen's regulations. The governor of a colony would, under this clause, have to determine whether a ship entering his ports was illegally fitted out or not; and this was enough to show the object the commissioners had in view could not be carried out by an act of Parliament. It was intended, instead, to advise colonial governors of the escape of any illegally-fitted vessel."

Clause struck out. (P. 1555.)

Mr. Candlish said:

"He wished to call attention to clause 21. It provided that any custom-house officer might detain a suspected ship, so that the power would be vested in a tide-waiter who received, perhaps, 18*s.* a week. This was an extraordinary power to vest in such hands, and he would propose that the power should be only exercised by the chief officer of customs in any port of the United Kingdom." The honorable member concluded by moving his amendment. (P. 1555.)

Amendment proposed, in page 8, line 7, "to leave out the word 'any,' and insert the words 'the chief,'" (Mr. Candlish) instead thereof. (P. 1556.)

Mr. Alderman Lusk said:

"He questioned the propriety of giving so much power to custom-house officers of the lower class, as was proposed by this bill to confer on them."

The attorney-general, Sir R. P. Collier, said:

"Those officers of customs were, in fact, the police of ports and harbors. No more power was conferred on them by the bill than was already exercised by every parish constable throughout the kingdom. If the power of acting under the bill were confined to the chief officer of customs, as was proposed, it might happen that in a case of emergency that officer would be absent, and serious inconvenience would be the result. The principle of the clause was in operation in the merchant-shipping act and in all the prize acts. He quite admitted that the issue was more important than any that could be raised on the merchant-shipping act, but it was because it was more important that greater restrictions should be used. The great thing was to prevent the departure from our ports of any ships of the Alabama *character*."

"Question. That the word 'any' stand part of the bill" put and *agreed* to. Amendment *negatived*. (P. 1556.)

On the 8th of August, 1870, the House of Lords, being in committee on the bill, Viscount Halifax said:

"He had refrained from entering into any explanation of the object and provisions of the bill on occasion of the second reading, on account of the small attendance which could be expected at a Saturday sitting, but he would do so very shortly. The bill repealed the existing law, re-enacting it with such improvements as experience had shown to be desirable. It prohibits subjects of Her Majesty, without license from the Crown, from taking any part in hostilities between two countries with which Her Majesty was on friendly terms. He need not adduce arguments to show how unjustifiable and monstrous it would be for British subjects to take part in hostilities, when the avowed policy of the government was that of perfect neutrality; but it was a question not of international, but of municipal law—not between this country and foreign countries, but between the Crown and the subjects of the Crown. A similar law existed in the United States, while, on the continent, governments were able to prevent their subjects from violating neutrality. The principal objects of the bill were to prohibit any subject from enlisting or inducing others to enlist in the service of a belligerent power, and from fitting out, equipping, or arming any vessel for such service. During the American war, the powers of the government in this matter were found to be insufficient. In the case of the Alabama, that vessel left this country before the order of the government, issued as soon as they had sufficient evidence before them, reached the port; she left our port as an unarmed ship, and only received her armament at sea, beyond our jurisdiction, so that no blame could attach to the government; and in the case of the Alexandra and of the rams, proceedings before legal tribunals resulted in a proof that the government had not sufficient power in the matter. They were therefore glad to buy the rams in order to avoid any difficulty. This defect would be removed by the present bill, which was based on the report of a commission presided over by the late Lord Cranworth, and composed of other distinguished men." (Pp. 1678, 1679.)

He said further:

"The measure gave power to the secretary of state to detain a suspected ship; as also to local officers at the ports, who would report to the secretary of state, so as to cast on him full responsibility. It embodied all the recommendations of the report, with the exception of that relating to the reception of vessels into British ports, and this object could be accomplished by orders in council." (P. 1679.)

Lord Redesdale "thought the late introduction of this bill was excusable, as the exigency which called for it had only just arisen." (P. 1680.)

V.—THE TREATY OF WASHINGTON.

In proposing a question in regard to the "Alabama claims," in the House of Lords, May 12, 1871—(See Hansard's Parliamentary Debates, hird series, pp 698–701)— Treaty of Washington.

Lord Redesdale said:

"The Southern States built and fitted out the Alabama. They ordered and paid for the ship. Their agents took her out of the Mersey, and equipped her in a foreign port, and the injury to the trade of the North was committed by their officers and the crews under their command." (P. 698.)

On moving an address to Her Majesty in regard to the Treaty of Washington on the 12th of June, 1871, in the House of Lords—(See Hansard's Parliamentary Debates, third series, vol. ccvi, pp. 1823–1901)—

Earl Russell said:

"These were my words, in December, 1862:

"'With regard to the claim for compensation now put forward by the United States Government, it is, I regret to say, notorious that the Queen's proclamation, of the 13th of May, 1861, enjoining neutrality in the unfortunate civil contest in North America, has in several instances been practically set at naught by parties in this country.'

"That, at all events, was a fair principle on which to proceed, and the cause came

to a point which may fairly be considered by the arbiters. Mr. Laird undertook to build a vessel for the confederate government. Mr. Adams complained that it was building, and that it was intended to be fitted out and equipped for the confederates. I replied, as I believe any secretary of state would have done, 'We must refer this to the board of customs and see whether they can obtain evidence by which the owners can be convicted.' It was referred to the legal advisers of the board, and on the 1st of July I was able to inform Mr. Adams that the board held there was not sufficient evidence that the ship was fitted out with the view of making war upon the commerce of a power on friendly terms with Her Majesty, and accordingly I deemed myself unable, on that statement, to direct a prosecution." (P. 1831.)

"On the 23d of July, Mr. Adams informed me that additional evidence had been procured that the ship was equipped so as to be fitted for warlike purposes, for he had obtained the evidence of a man named Passmore, who said it had been proposed to him by the captain of this vessel, '290,' that he should go to sea with him and make war on the commerce of the United States. That evidence was at once submitted to the law-officers of the Crown, who, on the 29th, informed me that there was a case for detaining the vessel and instituting a prosecution. On that very morning, however, she escaped, and it remains a question which may fairly be submitted to any arbitrators, whether I was justified or not, on the 24th or 25th, seizing the ship, afterward well known as the Alabama. Mr. Adams stated in one of his letters that sufficient promptitude had not been used; but Sir Roundell Palmer, speaking on the 27th of March, 1863, said:

"'The United States Government have no right to complain if the act in question (the foreign-enlistment act) is enforced in the way in which English laws are usually enforced against English subjects—on evidence and not on suspicion; on facts and not on presumption; on satisfactory testimony and not on the mere accusations of a foreign minister or his agents.' [3 Hansard, clxx, 47.] That remark, moreover, had been quoted by a noble and learned lord opposite (Lord Cairns) when the Alexandra case was argued, and Sir Roundell Palmer at once adopted it, and said he still held the same opinion. It is, therefore, a very fair question for the arbitrators, whether those five days between the 24th and 29th were lost by want of due diligence, whether the law-officers were entitled to take the time for considering the matter; and whether an order to detain the vessel should have been at once sent down." (P. 1831.)

During the same debate, Earl Granville said:

"We were in this position—that we were bound by the act; but the American Government were not bound in the least in regard to the future, and I defy any one to say there is any country which has a greater interest than we have in escaping such depredations as were committed by the Alabama. We have agreed to principles which we think are just and right; we have agreed to arbitration to settle details by arbitration, and we have agreed that our subsequent legislation shall be judged by them. According to the treaty, we are to be liable to the consequences of not using 'due diligence.' The obligation to use 'due diligence' implies that the government will do all in its power to prevent certain things, and to detain vessels which it has reasonable ground for believing are designed for warlike purposes." (P. 1850.)

"There is one proposal which was made by my noble friend (Earl Russell) so late as last year. After quoting the opinion of an individual who took a very strong part in the controversy, he said:

"'It appears to me that if the officers of the customs were misled, or blinded by the general partiality to the cause of the South, known to prevail at Liverpool, and that a *prima-facie* case of negligence could be made out'—[not an ascertained case after due inquiry and investigation]—'Great Britain might fairly grant a sum equivalent to the amount of losses sustained by the captures of the Alabama.'

"That passage occurred in the introduction of the noble earl to his published speeches." (P. 1850.)

During the same debate, the Earl of Derby said:

"The matter is one on which I hardly like to trust to the recollection of the moment, but I do not think that any one who has been concerned in these negotiations, however much he may have justified the conduct of the government of the day, denied that the escape of the Alabama was a regretable proceeding."

During the same debate Lord Cairns said:

"In the first article the duty of the neutral is qualified in this way. The neutral is 'to use all diligence to prevent the fitting out, &c., of any vessel' it has reasonable ground to believe is intended to carry on war against a belligerent. I want to know why these words 'which has reasonable ground to believe' are not repeated in the second rule. Why is the phraseology so entirely different in the first and second parts of the clause? The only explanation hitherto given us is that given by the president of the council, who says that the charge against us is that we did not use that due diligence which was incumbent upon us as neutrals. But the words 'due diligence' occur in the first part of the clause just as much as they do in the second; and if due diligence is enough, and would prevent the question arising as to whether you had rea-

sonable ground for believing, why should they not be sufficient in the first part as well as in the second? But the question would be one of the first to arise under the second part of the clause. When you urge that you had no reasonable ground for believing that a vessel leaving your ports was intended to cruise or carry on war against a power with which you were at peace, it may be said that you ought to have known it and would have known it if you had used due diligence. Therefore, I think it most important that, through what I may call an oversight on the part of those who constructed this clause, those qualifying words which were our only protection were omitted from the second part." (P. 1887.)

He said further:

"Any one of your lordships who considers the sentence will see that the point turns upon the words 'due diligence;' a neutral is bound to use 'due diligence.' Now, the moment you introduce those words, you give rise to another question, for which I do not find any solution in this rule. What is the standard by which you can measure due diligence? Due diligence by itself means nothing. What is due diligence with one man, with one power, is not due diligence with another man, with a greater power. Now this becomes much more important when you introduce in connection another consideration. The rule I have read is to be a rule of international law, and if there is one thing more clear than another in international laws, it is this, that as between two countries, it is no excuse where an international obligation has been broken for one country to say to another that its municipal law did not confer upon its Executive sufficient power to enable it to fulfill its international duty." (P. 1888.)

During the same debate, the Lord Chancellor, Lord Hatherley, said:

"In the first place, it was well said that there is no correlative connection between international and municipal law in the abstract; that a foreign nation has nothing to do with the municipal law of another nation, but has a right to meet a statement that in any country with which it has dealings there exists no such law as would prevent the acts complained of, with the reply that it ought to have such a law, and that international law alone must settle the question between them—this being the line taken by the United States in reference to the Alabama." (P. 1890.)

The Marquis of Salisbury said:

"We have not been told what is to be the standard of 'due diligence' for us. A neutral will now be bound to adopt a system of espionage in order to ascertain whether any vessel is intended for a hostile cruise. It will be bound to increase its police, that it may have full information of all such undertakings. It will be bound to interfere with its subjects, to make minute inquisitions, to take an enormous number of costly and laborious precautions which before this treaty it was not bound to take."

On the 29th of June, 1871, in the House of Lords, in reference to a motion for an Address to Her Majesty in regard to the Treaty of Washington, (see Hansard's Parliamentary Debates, third series, vol. ccvii, pp. 729–741,) Earl Granville said:

"On the one hand, nothing is so easy as to prevent a vessel of the Alabama class escaping from our shores; and the only loss to the country which would result from such a prevention would be the small amount of profit which the individual constructing and equipping the vessel might derive from the transaction, which in almost every case is contrary to the proclamation of the Queen." (P. 741.)

NOTE C.—MEMORANDUM OF CORRESPONDENCE AND DOCUMENTS RELATIVE TO THE AMENDMENT OF THE ENGLISH FOREIGN-ENLISTMENT ACT, 1861'-71.

On the 7th of September, 1861, Mr. Seward, writing to Mr. Adams, said:

"I do not think it can be regarded as disrespectful if you should remind Lord Russell that when, in 1838, a civil war broke out in Canada, a part of the British dominions adjacent to the United States, the Congress of the United States passed, and the President executed, a law which effectually prevented any intervention against the Government of Great Britain in those internal differences by American citizens, whatever might be their motives, real or pretended, whether of interest or sympathy. I send you a copy of that enactment. The British Government will judge for itself whether it is suggestive of any measures on the part of Great Britain that might tend to preserve the peace of the two countries, and, through that way, the peace of all nations." (Am. App., vol. i, p. 102, 660.)

On the 28th of November, 1861, and, as it appears, before Mr. Adams had taken the direct action indicated in the dispatch of Mr. Seward above quoted, Lord Russell wrote to him as follows:

"Having thus answered Mr. Adams upon the two points to which his attention was called, the undersigned has only further to say that if, in order to maintain inviolate the neutral character which Her Majesty has assumed, Her Majesty's Government should find it necessary to adopt further measures, within the limits of public law, Her Majesty will be advised to adopt such measures." (Am. App., vol. i, p. 661.)

On the 27th of March, 1862, Lord Russell wrote to Mr. Adams in part as follows:

"I agree with you in the statement that the duty of nations in amity with each other is not to suffer their good faith to be violated by evil-disposed persons within their borders merely from the inefficacy of their prohibitory policy." (Am. App., vol. ii, p. 602.)

On the 20th of November, 1862, Mr. Adams, in accordance with explicit instructions from Mr. Seward, wrote to Lord Russell, submitting to his consideration a large number of papers, establishing the fact that the Alabama had destroyed a number of United States vessels, and so was actually carrying out the intention which Mr. Adams alleged that she had prior to her departure from the ports of Great Britain, and in the conclusion of the letter Mr. Adams said:

"Armed by the authority of such a precedent, having done all in my power to apprise Her Majesty's Government of the illegal enterprise in ample season for effecting its prevention, and being now enabled to show the injurious consequences to innocent parties, relying upon the security of their commerce from any danger through British sources ensuing from the omission of Her Majesty's Government, however little designed, to apply the proper prevention in due season, I have the honor to inform your lordship of the directions which I have received from my Government to solicit redress for the national and private injuries already thus sustained, as well as a more effective prevention of any repetition of such lawless and injurious proceedings in Her Majesty's ports hereafter." (Am. App., vol. iii, p. 72; vol. i, p. 666. Brit. App., vol. iv, p. 15.)

On the 19th of December, 1862, Lord Russell in part replied to Mr. Adams as follows:

"As regards your demand for a more effective prevention for the future of the fitting out of such vessels in British ports, I have the honor to inform you that Her Majesty's Government, after consultation with the Law-Officers of the Crown, are of opinion that certain amendments might be introduced into the Foreign-Enlistment Act, which, if sanctioned by Parliament, would have the effect of giving greater power to the Executive to prevent the construction in British ports of ships destined for the use of belligerents. But Her Majesty's Government consider that, before submitting any proposals of that sort to Parliament, it would be desirable that they should previously communicate with the Government of the United States, and ascertain whether that Government is willing to make similar alterations in its own Foreign-Enlistment Act; and that the amendments, like the original statute, should, as it were, proceed *pari passu* in both countries.

"I shall accordingly be ready at any time to confer with you, and to listen to any suggestions which you may have to make by which the British Foreign-Enlistment Act, and the corresponding statute of the United States, may be made more efficient for their purpose." (Am. App., vol. i, p. 667; vol. iii, p. 888; Brit. App., vol. iv, p. 25.)

On the 25th of December, 1862, this reply of Lord Russell was forwarded by Mr. Adams to Mr. Seward, (Am. App., vol. iii, p. 87,) and on the 19th of January, 1863, Mr. Seward wrote to Mr. Adams, replying to the suggestions of Lord Russell, in part as follows:

"It is not perceived that our anti-enlistment act is defective, or that Great Britain has ground to complain that it has not been effectually executed. Nevertheless, the proposition of Her Majesty's Government that the two Governments shall confer together upon amendments to the corresponding acts in the two countries evinces a conciliatory, a liberal, and just spirit, if not a desire to prevent future causes of complaint. You are, therefore, authorized to confer with Earl Russell, and to transmit for the consideration of the President such amendments as Earl Russell may in such a conference suggest, and you may think proper to be approved.

"You will receive herewith a copy of some treasonable correspondence of the insurgents at Richmond with their agents abroad, which throws a flood of light upon the naval preparations they are making in Great Britain. You will use these papers in such a manner as shall be best calculated to induce the British Government to enforce its existing laws, and, if possible, to amend them so as to prevent the execution of the unlawful designs which will thus be brought to their notice in a manner which will admit of no question in regard to the sufficiency of evidence." (Am. App., vol. iii, p. 113; vol. i, pp. 546, 667.)

On the 9th of February, 1863, Mr. Adams wrote to Lord Russell, transmitting the "treasonable correspondence of the insurgents at Richmond with their agents abroad," and said in part as follows:

"These papers go to show a deliberate attempt to establish within the limits of this kingdom a system of action in direct hostility to the Government of the United States. This plan embraces not only the building and fitting out of several ships of war under the direction of agents especially commissioned for the purpose, but the preparation of a series of measures under the same auspices for the obtaining from Her Majesty's subjects the pecuniary means essential to the execution of those hostile projects." (Am. App., vol. i, p. 562.)

On the 13th of February, 1863, Mr. Adams having had a personal interview with Earl Russell, wrote to Mr. Seward as follows:

"In obedience to your instructions contained in dispatch No. 454, I called the attention of Lord Russell, in my conference of Saturday, to the reply made by him to my note of the 20th of November last, claiming reparation for the damage done by No. 290, and security against any repetition of the same in future. I observed that my Government had not yet authorized me to say anything in regard to the answer on the first point; but with respect to the second, his lordship's suggestion of possible amendments to the enlistment laws in order to make them more effective had been received. Although the law of the United States was considered as of very sufficient vigor, the Government were not unwilling to consider propositions to improve upon it.

"To that end I had been directed to ask whether any such had yet been matured by Her Majesty's Ministers; if so, I should be happy to receive and to transmit them to Washington. His lordship, repeating my remark that my Government considered its present enlistment law as efficiently effective, then added that since his note was written the subject had been considered in the cabinet, and the Lord Chancellor had expressed the same opinion of the British law. Under these circumstances he did not see that he could have any change to propose.

"I replied that I should report this answer to my Government. What explanation the Government was ready to give for its utter failure to execute a law confessed to be effective did not then appear." (Am. App., vol. i, p. 668.)

On the 14th of February, 1863, Lord Russell reported this same interview, as follows, in a dispatch to Lord Lyons:

"I had a conversation a few days ago with Mr. Adams on the subject of the Alabama.

"It did not appear that this Government desired to carry on the controversy on this subject from Washington; they rather left the conduct of the argument to Mr. Adams.

"On a second point, however, namely, whether the law with respect to equipment of vessels for hostile purposes might be improved, Mr. Adams said that his Government was ready to listen to any propositions Her Majesty's Government had to make, but they did not see how their own law on this subject could be improved.

"I said that the cabinet had come to a similar conclusion; so that no further proceedings need be taken at present on this subject." (Am. App., vol. i, p. 668. Brit App., vol. i, pt. i, p. 48.)

On the 2d of March, 1863, on receipt of Mr. Adams's dispatch of the 13th of February, Mr. Seward wrote to Mr. Adams in part as follows:

"It remains for this Government, therefore, only to say that it will be your duty to urge upon Her Majesty's Government the desire and expectation of the President that henceforward Her Majesty's Government will take the necessary measures to enforce the execution of the law as faithfully as this Government has executed the corresponding statutes of the United States." (Am. App., vol. i, p. 669.)

On the 27th of March, 1863, Lord Russell, reporting to Lord Lyons a conversation which Mr. Adams had had with him the day before, and after the receipt of the dispatch last quoted, wrote in part as follows:

"Mr. Adams said there was one thing which might be easily done. It was supposed the British Government were indifferent to these notorious violations of their own laws. Let them declare their condemnation of all such infractions of law.

"With respect to the [enlistment] law itself, Mr. Adams said either it was sufficient for the purposes of neutrality, and then let the British Government enforce it; or it was insufficient, and then let the British Government apply to Parliament to amend it.

"I said that the cabinet were of opinion that the law was sufficient, but that legal evidence could not always be procured; that the British Government had done everything in its power to execute the law; but I admitted that the cases of the Alabama and Oreto were a scandal, and, in some degree, a reproach to our laws." (Am. App., vol. i, p. 670; vol. iii, p. 122. Brit. App., vol. iv, pt. ii, p. 2.)

On the 27th of March, 1863, the neutrality laws of Great Britain being under consideration, in connection with the escape of the Alabama, the Solicitor-General, Sir Roundell Palmer, said:

"The United States Government appear to have a more convenient method than ours. Their customs authorities have a court always sitting, ready to deal with such matters; but in this country the customs authorities would have had to seize the ship, without any order of the court, on the responsibility of the Government; and it would be a direct violation of the law to do that, unless there was a justifying cause for doing so." (Am. App., vol. iv, p. 522.)

In the same debate, he said further:

"And if our law is defective, it is for this House to consider whether it ought to be amended. If Her Majesty's Government thought it was so, they would be willing, in concert with the American Government, to consider how it might be amended. But they could not think it would be acting prudently or safely to come down to Parliament and propose an alteration in our law, unless they had reason to believe that the American Government were prepared to take some steps to place their law also on the same basis." (Am. App., vol. iv, p. 523.)

In the same debate, Lord Palmerston said:

"But if this cry is raised for the purpose of driving Her Majesty's Government to do something which may be contrary to the laws of the country, or which may be derogatory to the dignity of the country, in the way of altering our laws for the purpose of pleasing another Government, then all I can say is, that such a course is not likely to accomplish its purpose.

* * * * * * *

"I think that the House at least will see that the statement of my honorable and learned friend proves that we have, in regard to enforcing the Foreign-Enlistment Act, done all that the law enabled or permitted us to do.

* * * * * * *

"The law is in this case of very difficult execution. This is not the first time when that has been discovered. When the contest was raging in Spain between Don Carlos and Queen Isabella, it was my duty, the British Government having taken part with the Queen, to prevent supplies from being sent to Don Carlos from this country. There were several cases of ships fitted out in the Thames; but, though I knew they were intended to go in aid of Don Carlos, it was impossible to obtain that information which would have enabled the Government to interfere with success.

* * * * * * *

"I do hope and trust that the people and Government of the United States will believe that we are doing our best in every case to execute the law; but they must not imagine that any cry which may be raised will induce us to come down to this House with a proposal to alter the law. We have had—I have had—some experience of what any attempt of that sort may be expected to lead to; and I think there are several gentlemen sitting on this bench who would not be disposed, if I were so inclined myself, to concur in any such proposition." (Am. App., vol. v, pp. 530, 531.)

On the 9th of June, 1863, certain merchants of Liverpool addressed a memorial to Lord Russell, in part as follows:

"Your memorialists, who are deeply interested in British shipping, view with dismay the probable future consequences of a state of affairs which permits a foreign belligerent to construct in, and send to sea from, British ports vessels of war in contravention of the provisions of the existing law.

"That the immediate effect of placing at the disposal of that foreign belligerent a very small number of steam cruisers has been to paralyze the merchant marine of a powerful maritime and naval nation, inflicting within a few months losses, direct and indirect, on its ship-owning and mercantile interests which years of peace may prove inadequate to retrieve.

* * * * * * *

"Your memorialists would accordingly respectfully urge upon your lordship the expediency of proposing to Parliament to sanction the introduction of such amendments into the Foreign-Enlistment Act as may have the effect of giving greater power to the Executive to prevent the construction in British ports of ships destined for use of belligerents." (Am. App., vol. i, p. 672.)

On the 24th of June, 1863, the Lord Chief Baron, in charging the jury in the Alexandra case, said:

"Gentlemen, I must say, it seems to me that the Alabama sailed away from Liverpool without any arms at all, merely a ship in ballast, unfurnished, unequipped, unprepared, and her arms were put in at Terceira, not a port in Her Majesty's dominions. The Foreign-Enlistment Act is no more violated by that than by any other indifferent matter that might happen about a boat of any kind whatever." (Am. App., vol. v, p. 129.)

On the 6th of July, 1863, Mr. Hammond, by the direction of Earl Russell, replied to the memorial of the Liverpool merchants, in part as follows:

"In Lord Russell's opinion the Foreign-Enlistment Act is effectual for all reasonable purposes, and to the full extent to which international law or comity can require, provided proof can be obtained of any act done with the intent to violate it.

"Even if the provisions of the act were extended, it would still be necessary that such proof should be obtained, because no law could or should be passed to punish upon suspicion instead of upon proof." (Am. App., vol. i, p. 673.)

On the 16th of July, 1863, Mr. Adams, transmitting to Mr. Seward copies of the memorial of the Liverpool merchants, and of the reply to the same, wrote in part as follows:

"It may be inferred from this that the Government will persist in their efforts to enforce the provisions of the Enlistment Act through the Courts, reserving to themselves an avenue of escape, by reason of any failure to be supplied with evidence of intent to violate them. Whether they expect the duty of looking this up to be performed by us, or they design to seek it also from other sources, does not clearly appear." (Am. App., vol. i, p. 671.)

On the 16th of September, 1863, Mr. Adams, in a letter to Earl Russell, while describing the great danger threatening the United States in the building of the rams by the Lairds at Liverpool, said in part as follows:

"And here your lordships will permit me to remind you that Her Majesty's Government cannot justly plead the inefficacy of the provisions of the enlistment law to enforce the duties of neutrality in the present emergency as depriving them of the power to prevent the anticipated danger. It will doubtless be remembered that the proposition made by you, and which I had the honor of being the medium of conveying to my Government, to agree upon some forms of amendment of the respective statutes of the two countries, in order to make them more effective, was entertained by the latter, not from any want of confidence in the ability to enforce the existing statute, but from a desire to co-operate with what then appeared to be the wish of Her Majesty's Ministers. But, upon my communicating this reply to your lordship, and inviting the discussion of propositions, you then informed me that it had been decided not to proceed any further in this direction, as it was the opinion of the Cabinet, sustained by the authority of the Lord Chancellor, that the law was fully effective in its present shape." (Am. App., vol. ii, p. 378; vol. vi, p. 673. Brit. App., vol. ii, p. 364.)

On the 25th of September, 1863, Earl Russell replied to Mr. Adams in part as follows:

"There are, however, passages in your letter of the 16th, as well as in some of your former ones, which so plainly and repeatedly imply an intimation of hostile proceeding toward Great Britain on the part of the Government of the United States, unless steps are taken by Her Majesty's Government which the law does not authorize, or unless the law, which you consider as insufficient, is altered, that I deem it incumbent upon me, in behalf of Her Majesty's Government, frankly to state to you that Her Majesty's Government will not be induced by any such consideration either to overstep the limits of the law, or to propose to Parliament any new law which they may not, for reasons of their own, think proper to be adopted. They will not shrink from any consequences of such a decision." (Am. App., vol. i, p. 674; vol. ii, p. 384. Brit. App., vol. ii, p. 374.)

On the 16th of February, 1864, Earl Russell spoke in the House of Lords in part as follows:

"Referring again to the Alabama, the noble earl seems to be much shocked because I said that that case was a scandal, and in some sense a reproach upon British law. I say that here, as I said in that dispatch. I do consider that, having passed a law to prevent the enlistment of Her Majesty's subjects in the service of a foreign power, to prevent the fitting out or equipping, within Her Majesty's dominions, of vessels for warlike purposes without Her Majesty's sanction; I say that, having passed such a law in the year 1819, it is a scandal and a reproach that one of the belligerents in this American contest has been enabled, at the order of the confederate government, to fit out a vessel at Liverpool in such a way that she was capable of being made a vessel of

war; that, after going to another port in Her Majesty's dominions to ship a portion of her crew, she proceeded to a port in neutral territory and there completed her crew and equipment as a vessel of war, so that she has since been able to capture and destroy innocent merchant vessels belonging to the other belligerent. Having been thus equipped by an evasion of the law, I say it is a scandal to our law that we should not be able to prevent such belligerent operations. I venture to say so much, because at the Foreign Office I feel this to be very inconvenient. If you choose to say, as you might have said in former times, 'Let vessels be fitted out and sold; let a vessel go to Charleston, and there be sold to any agent of the confederate government,' I could understand such a state of things. But if we have a law to prevent the fitting out of warlike vessels, without the license of Her Majesty, I do say this case of the Alabama is a scandal and a reproach. A very learned judge has said that we might drive, not a coach and six, but a whole fleet of ships through that act of Parliament. If that be a correct description of our law, then I say we ought to have the law made more clear and intelligible. This law was said to be passed to secure the peace and welfare of this nation, and I trust it may be found in the end sufficient for that purpose. I say, however, that while the law remains in its present state its purpose is obviously defeated, and its enactments made of no effect by British subjects who defy the Queen's proclamation of neutrality." (Am. App., vol. v, p. 528.)

On the 30th of August, 1865, the British Foreign-Enlistment Act remaining unchanged, and the rebellion in the United States having been crushed, Earl Russell wrote Mr. Adams in part as follows:

"You say, indeed, that the Government of the United States altered the law at the urgent request of the Portuguese minister. But you forget that the law thus altered was the law of 1794, and that the law of 1818, then adopted, was, in fact, so far as it was considered applicable to the circumstances and institutions of this country, the model of our Foreign-Enlistment Act of 1819.

"Surely, then, it is not enough to say that your Government, at the request of Portugal, induced Congress to provide a new and more stringent law for the purpose of preventing depredations, if Great Britain has already such a law. Had the law of the United States of 1818 not been already, in its main provisions, adopted by our legislature, you might reasonably have asked us to make a new law; but, surely, we are not bound to go on making new laws *ad infinitum* because new occasions arise.

"The fact is, this question of a new law was frequently discussed; but the conclusion arrived at was, that unless the existing law, after a sufficient trial, should be proved to be practically inadequate, the object in view would not be promoted by any attempt at new legislation." (Am. App., vol. i, p. 677; vol. iii, p. 562.)

On the 18th of September, 1865, Mr. Adams replied to Earl Russell in part as follows:

"The British law is, as your lordship states, a re-enactment of that of the United States, but it does not adopt all of 'its main provisions,' as you seem to suppose. Singularly enough, it entirely omits those very same sections which were originally enacted in 1817, as a temporary law on the complaint of the Portuguese minister, and were made permanent in that of 1818. It is in these very sections that our experience has shown us to reside the best preventive force in the whole law. I do not doubt, as I had the honor to remark in my former note, that if they had been also incorporated in the British statute, a large portion of the undertakings of which my Government so justly complains would have never been commenced; or, if commenced, would never have been executed. Surely it was not from any fault of the United States that these effective provisions of their own law failed to find a place in the corresponding legislation of Great Britain. But the occasion having arisen when the absence of some similar security was felt by my Government to be productive of the most injurious effects, I cannot but think that it was not so unreasonable, as your lordship seems to assume, that I should hope to see a willingness in that of Great Britain to make the reciprocal legislation still more complete. In that hope I was destined to be utterly disappointed. Her Majesty's government decided not to act. Of that decision it is no part of my duty to complain. The responsibility for the injuries done to citizens of the United States by the subjects of a friendly nation, by reason of this refusal to respond, surely cannot be made to rest with them. It appears, therefore, necessarily to attach to the party making the refusal." (Am. App., vol. i, pp. 679, 680.)

On the 2d of November, 1865, Earl Russell wrote to Mr. Adams in part as follows:

"Yet it appears to me, I confess, that as neither the law of the United States nor our own Foreign-Enlistment Act have proved upon trial completely efficacious, it is worth consideration whether improvements may not be made in the statutes of both nations, so that for the future each government may have in its own territory as much security as our free institutions will permit against those who act in defiance of the intention of the sovereign, and evade the letter of its laws." (Am. App., vol. iii, p. 588.)

On the 18th of November, 1865, Mr. Adams replied to the Earl of Clarendon, successor of Earl Russell, in part as follows:

"Yet with regard to the proposition immediately before me, I cannot forbear to observe that it is predicated upon an assumption that the legislation of the two countries

is now equally inefficacious, which I cannot entertain for a moment. On the contrary, the necessity for some action in future seems to me to be imperative, because that legislation, as it now stands, is not co-extensive.

"For it is hardly possible for me to imagine that the people of the United States, after the experience they have had of injuries from the imperfection of British legislation, and a refusal to amend it, would be ready cheerfully to respond to another appeal like that made in 1855, by Her Majesty's representative, to the more stringent and effective protection extended by their own." (Am. App., vol. iii, p. 621.)

On the 14th of December, this last dispatch having been transmitted to Mr. Seward, he wrote Mr. Adams in part as follows:

"I am directed by the President to approve of the views which you have expressed in regard to a proposition made by Earl Russell for a concurrent revision by the two Governments of their legislation upon the subject of the neutrality laws. You will, therefore, inform Lord Clarendon that the United States do not incline toward an acceptance of Earl Russell's proposition." (Am. App., vol. iii, p. 625.)

On the 30th of January, 1867, a Commission was appointed by the Queen—

"To inquire into and consider the character, working, and effect of the laws of this realm, available for the enforcement of neutrality during the existence of hostilities between other states with whom we are at peace; and to inquire and report whether any and what changes ought to be made in such laws for the purpose of giving to them increased efficiency, and bringing them into full conformity with our international obligations." (Am. App., vol. iv, p. 79.)

During the year 1868, the Commission reported that in their opinion the Foreign-Enlistment Act "might be made more efficient by the enactment of" certain provisions. See the report. (Am. App., vol. iv, p. 80.)

The British Foreign-Enlistment Act of August 9, 1870, which was passed just after the breaking out of the Franco-Prussian War, essentially embodies all the recommendations of the Commission. (See the Act, Am. App., vol. vii, pp. 1–9. See also extracts from the debates at the time of its passage, *ante*.)

NOTE D.—CONSIDERATION OF THE CLAIMS ARISING IN THE DESTRUCTION OF VESSELS AND PROPERTY BY THE SEVERAL CRUISERS.

The United States presented to this Tribunal, on the 15th of December last, a detailed printed statement of all the claims for the destruction of vessels and property by the several cruisers that had, down to that date, come to their knowledge in time to be so presented. The United States then declared that this statement showed the cruisers which did the injury, the vessels destroyed, the several claimants for the vessel and for the cargo, the amount insured upon each, and all the other facts necessary to enable this Tribunal to reach a conclusion as to the amount of the injury committed by the cruiser; and further, that it showed the nature and character of the proof placed in the hands of the United States by the sufferers.

Detailed statements have been presented.

In accordance with its right, the United States again, on the 15th day of April last, presented to this Tribunal a revised statement of claims containing those mentioned in the previous statement, as well as others which had been received by the Government of the United States subsequent to the printing of the previous statement and prior to the 22d of March, 1872, at which time it was necessary to conclude the printing of the revised list in order that it might reach Geneva in season for presentation with the Counter Case of the United States. (See Revised List of Claims, p. 335.)

With the evidence furnished by the claimants to support them.

These claims do not appear as claims audited by the United States, but in the form and supported by the evidence in which the claimants have presented them to the Government of the United States.

In his Annual Message in December, 1870, President Grant recommended that Congress should authorize the appointment of a Commission to take proof of the amounts and the ownership of these several claims on notice to the representative of Her Majesty at Washington; and also that authority should be given for the settlement of these claims by the United States, so that the Government might have the ownership of the private claims as well as the responsible control of all demands against Great Britain. A Bill had been introduced into Congress for carrying out this recommendation of the President, when the negotiation and ratification of the Treaty under which this Tribunal is now assembled, prevented the proposed legislation. Otherwise these claims might now have existed as so many millions of dollars which the United States had paid to its citizens for injuries which it believed to have been inflicted upon them by Great Britain.

Recognizing the situation in which these and other claims of the United States existed, the Treaty provided that under certain conditions this Tribunal might "proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it;" and further, that in case the Tribunal "should not award a sum in gross," then that "a board of assessors" should be appointed to ascertain and determine what claims are valid, and what amount or amounts should be paid by Great Britain to the United States on account thereof, under the decision of this Tribunal.

The United States desire an award of a sum in gross on the evidence presented.

The United States, however, for reasons stated in its Case, (p. 480,) earnestly expressed the hope that the Tribunal would exercise the power conferred upon it to award a sum in gross to be paid by Great Britain to the United States, believing that it would be unjust to impose further delay and the expense of presenting claims to another tribunal, if the evidence which the United States has the honor to present for the consideration of these Arbitrators shall prove to be sufficient to enable them to determine what sum in gross would be a just compensation to the United States for all the injuries and losses of which it complains. In the opinion of the United States, the evidence presented does furnish all the facts necessary to enable the Tribunal to reach such a conclusion. The United States has not, however, thought it necessary to print all the memorials and documents presented by the several claimants, and referred to in the two lists of claims; nor, in the absence of any expressed desire on the part of this Tribunal, has it produced, as it offered to do, if desired, the original evidence.

British criticisms on this evidence.

Her Majesty's Government has, in vol. vii of the Appendix, presented with the Counter Case a report of a committee of two persons, Messrs. Cohen and Young, appointed by the Board of Trade to investigate the claims presented on behalf of the United States Government.

This committee felt it to be its duty to sift and analyze these claims, to state the amounts which, in its opinion, should be considered to constitute a fair and proper

compensation for the losses in respect to which these claims are put forward, and to explain the reasons upon which its conclusions were founded.

Their report is said to cover all the claims contained in the printed list, exclusive of the claims for interest and the claims relating to increased war premiums. And in the British Counter Case (p. 134) it is stated that "a reference to this report will convince the Arbitrators that no reliance can be placed on the estimates presented of alleged private losses, and that were the Tribunal to hold Great Britain liable in respect to any one or more of the enumerated cruisers, and to decide on awarding a gross sum for compensation, these estimates could not safely be accepted as furnishing even a *prima-facie* basis for the computation of such a gross sum."

The Government of the United States, on the other hand, holds that the statement of claims presents all the facts necessary to enable the Tribunal to reach a conclusion as to the amount of injury committed by each cruiser, not with that exactness which would be necessary if the Tribunal were asked to assess the damages caused to each claimant, but with sufficient exactness to enable the Tribunal "to award a sum in gross to be paid by Great Britain to the United States for all the claims."

The answer to these criticisms

The United States cannot recognize the report of Messrs. Cohen and Young as any basis for the estimate or computation of indemnity by this Tribunal. To that committee as a Board of Assessors the United States have not referred these claims, neither has this Tribunal sought the report of those gentlemen as the opinion of experts.

The Counsel of the United States will, however, call the attention of this Tribunal to some of the general characteristics of these claims as they appear in the lists of claims, and at the same time will note certain comments made thereon by Messrs. Cohen and Young.

The claims now under discussion (excluding those for increased war premiums) may be divided into two general classes:

1. Claims for the alleged value of property destroyed by the several cruisers.
2. Claims arising from damages in the destruction of property, but over and above its value.

Under the first class would be included, (*a*) owners' claims for the values of goods destroyed; (*b*) merchants' claims for the values of goods destroyed; (*c*) whalers and fishermen's claims for the values of oil or fish destroyed; (*d*) passengers, officers, and sailors' claims for the values of personal property destroyed; (*e*) the claims of insurance companies, for the values of property destroyed for which they had paid the owners the insurance.

Under the second class of claims would be included, (*a*) owners' claims for the loss of charter-parties, freights, &c.; (*b*) merchants' claims for the loss of expected profits on goods; (*c*) whalers and fishermen's claims for the prospective catch of oil or fish; (*d*) passengers' claims for various injuries other than in the loss of baggage; (*e*) officers' and sailors' claims for wages and expenses until their arrival home.

As to this first general class of claims, the Counsel believe that the Tribunal will find that they are fairly stated by the claimants. It was possible, doubtless, for Messrs. Cohen and Young to find therein some claims which seemed to them to have been exaggerated; but certainly as to the value of property this Tribunal must regard the sworn valuation of men who owned the property destroyed, and who made their estimates at or about the time of its destruction, rather than the estimates of Messrs. Cohen and Young, who have no knowledge of the property destroyed, except that the claimants say it was of a certain value.

The owners of vessels have generally sought to establish their claims by a sworn memorial setting forth the facts, describing the vessel, and stating her value. In some instances they have presented the certificate of underwriters or ship-builders in support of their statement. An examination of their several claims will show that the owners have by no means given such values to their vessels as would show them to have been of an equal value per ton. But this is no evidence of exaggerated value, as Messrs. Cohen and Young would seem to imply, but, rather, being correspondent with the fact, namely, that the vessels are not of equal value per ton, indicates that the owners have placed a fair valuation upon their property.

Messrs. Cohen and Young have made some investigations from which they have concluded that the price of $40 per ton is a liberal estimate of the average market price of the merchant vessels destroyed by the Alabama and other cruisers, and it may be well to notice how they arrived at this conclusion; for it will then appear how little value can be put upon the same. They say, vol. vii, Appendix, British Case, p. 22, "We have been at some pains to ascertain the average price per ton which was realized, shortly before the time of the captures, in the ports of Liverpool and London by a sale of a very large number of vessels belonging to the United States, and it seems to us to be a fair inference from the fact of these sales being effected in England, that the prices obtained here did not fall short of the market value in America."

Injustice of the British estimate of the value of the vessels destroyed.

The Counsel maintain that no average price or no conclusion could be more unjust

Prices obtained under forced sales no criterion.

than this. The fact being that British-built cruisers were destroying every United States vessel they could find, led some United States citizens to sell their ships to Englishmen, who could fly over them a flag that would save them from this destruction. Under these circumstances, it has probably been possible for Messrs. Cohen and Young to find at Liverpool and London the record of the terms of transfer of many ships of the United States to British subjects. But if this Tribunal shall find that Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in the three rules, or recognized by the principles of international law, not inconsistent with such rules, and shall certify such fact as to the Alabama and each of the other cruisers, certainly it will not then proceed to award that Great Britain shall pay for those vessels which the Alabama destroyed at the low rate at which Englishmen were enabled to buy other vessels of the United States, which were sacrificed rather than to run the risk of their capture by the same cruisers. And further, the value to a citizen of the United States of a ship in London, under the British flag, is not the same as her value to him under the flag of the United States.

By the laws of the United States, certain privileges are given to vessels built in the United States and owned by citizens of the United States, and practically no vessel can carry the flag of the United States unless it was built in the United States. The object of this law is to encourage ship-building in the United States, and the effect of it is to make ships built in the United States more valuable to citizens of the United States than similar ships built out of the United States would be to citizens of the United States, or than the same ships would be to any persons not citizens of the United States. Therefore, the price at which a United States ship can be sold in Great Britain is by no means the representative of her value to a citizen of the United States, for the United States citizen, while he owns her, is able to employ her in certain trade and commerce in which the British subject cannot employ her. Consequently, but few United States vessels have ever been sold in England, except when the Alabama and her consorts were burning all vessels that carried the flag of the United States. Certainly those United States citizens who lost their vessels by the Alabama must not be paid for them at the rate at which other citizens of the United States sacrificed their property through fear of the same danger. The fact that a large number of vessels were transferred to the British flag, though it has destroyed the commerce of the United States, may have saved Great Britain from the liability of paying for the absolute destruction of the vessels transferred. But it cannot, in justice, be held to present a standard of value for others, not sacrificed through fear of burning, but actually burned.

The owners have estimated the round value of their property as vessels of the United States to citizens of the United States, and at that rate it must be estimated in the award of any gross sum.

Whaling and fishing vessels.

What has been said in regard to the estimate put upon the merchant vessels by Messrs. Cohen and Young will also apply to their estimate put upon the whaling and fishing vessels. They say, page 18:

"The inquiries that we have instituted convince us that an average rate of $100 per ton will amply represent the value of the whalers," and the context shows that this estimate includes the outfit also.

From page 17 of their report it appears that the average rate of the claims for outfits, (32 in number,) which are made distinctly and separately from the claims for the value of the vessel, is at the rate of $88 per ton.

The Counsel ask the Tribunal to assume that these claims for outfits are strictly correct. The owners of each vessel keep a separate and accurate account of all the expenses in outfitting each vessel, and when they made their claim for the loss of a vessel and her outfits, as far as the claim for outfits was concerned, they simply copied from their books the statement there contained for moneys expended in her outfits, and by which they can establish the claim for the same if ever they are called upon to do so.

Taking, then, this statement of outfits as correct and true, the estimate of Messrs. Cohen and Young leaves only $12 per ton as the average value they would place upon the whaling vessels, which value is by their own estimate only about one-quarter of the price at which vessels of the United States were sacrificed in England, and a much smaller proportion of what the same vessels were worth to citizens of the United States, provided they could have carried the flag of the United States free from the danger of being destroyed by the Alabama and other British-built cruisers.

Letter of Mr. Crapo.

In this connection, and as contrasted with the estimates of Messrs. Cohen and Young the Counsel refer to the following contract of a letter from Mr. Wm. W. Crapo, a very intelligent and respectable gentleman, under whose direction most of the claims for the destruction of the whaling vessels were prepared. (See his letter to the Secretary of State, vol. vii, U. S Doc., p. 103.)

He says:

As the attorney for numerous claimants, I have prepared and forwarded to the

State Department of the United States memorials and claims, setting forth the destruction, by Confederate cruisers, of a large number of ships and their cargoes, owned by merchants by New Bedford and its vicinity, and praying for suitable compensation for the loss of their property and the damages resulting therefrom. The claims thus prepared and forwarded represent nearly forty ships in number, with their whaling outfits and cargoes. The aggregate amount claimed by these persons for property destroyed is very large, and I beg leave to state the mode adopted in fixing values and estimating damages. Many of the ships, especially those burned by the Alabama, had but recently sailed from their home ports when destroyed. The values claimed for ship and outfits in such cases were based upon the actual cost and present worth of the property, as can be abundantly and conclusively proved when the occasion requires.

"The large number of whale-ships, for which claims have been presented by me, were destroyed by the Shenandoah in the Arctic Ocean. In computing the damage sustained by this destruction, prices were placed upon each vessel and its outfit which represented their value as they were in that distant ocean, and at a sum less than the cost of replacing them. The more valuable ships, with their outfits, were estimated as worth $60,000 each. This was the sum at which they were insured, in cases where insurance had been effected. This sum was less than the actual cost to the owners in replacing them at the home port, by vessels and outfits of equal quality. An appraisal of the several vessels by ship-builders and ship-brokers, and the vouchers for purchased outfits, will confirm the justness of the valuations made by the claimants."

In view of this letter of Mr. Crapo the Counsel maintain that this Tribunal ought not to make any diminution in the value placed upon these vessels and their outfits by the owners thereof.

Property destroyed.

The second division of claims under what has been called the first class, is the claims of merchants for the values of goods destroyed.

How proved.

An examination of the list of claims will show that these claims are generally proven by the sworn memorial of the merchant, setting forth that he owned them, that they were on board the vessel destroyed, and that they were of a certain value, which memorial is accompanied by the bill of lading and invoice, the one confirming the statement that they were on board the vessel, and the other the statement that they were of a certain value.

Though some few of these claim may have been increased by including in them the expected profits on the goods and the insurance on the same, as well as on the profits, (of the right to include which profits and insurance in all the claims, mention will be hereafter made,) yet we are confident that the true value of the goods represented in this class of claims is the price named in the claims; the claimants have made their claims expecting at some time to be called upon to prove the value of the property destroyed, by the production of the invoices which will show the prices paid for them. We cannot, therefore, in any way admit that Messrs. Cohen and Young are right in stating that they are confident that they are considerably overestimating the value of the goods at the port of shipment, by assuming such value, together with the interest up to the time of capture, to be only 12 per cent. less than the aggregate amount claimed in respect to the cargoes. (See vol. vii, British Appendix, pp. 25, 28.)

Oil or fish destroyed on whalers and fishing vessels.

Another division of claims under the first class embraces the claims of the owners of whaling and fishing vessels for the value of oil or fish on board, and destroyed at the time of their capture. These claims Messrs. Cohen and Young propose to estimate very easily by ignoring all claims made by the owners for secured earnings, and by allowing interest at the rate of 25 per cent. per annum on the value of the ship and outfit, and in addition 5 per cent. per ton per day to meet expenditures on account of wages and other disbursements. Such an easy calculation as this enables them to decide that the secured earnings of the forty-one whale-ships destroyed by the several cruisers, together with the wages of the officers and crews, and all other disbursements, amounted to but $301,759. Taken as a sample of other estimates made by Messrs. Cohen and Young after "careful consideration," (p. 18,) it may be well to examine this estimate a little more closely. Their estimate in round numbers is that the forty-one whalers, down to the time of their capture, had earned for their owners, their officers and crews, the sum of $301,759. The officers and crews of these whaling vessels, on an average, consist of at least twenty-five persons, and there were on board these forty-one whalers more than a thousand persons, captains, officers, and sailors, whose earnings and expenses in this most hazardous, but at that time most lucrative employment, are estimated at one-quarter of $301,759, (see p. 18 of report of Messrs. Cohen and Young,) or at about $75,000, which divided proportionately would give to each man not more than $75. When it is remembered that very few of these men had been away from home for less than six months, and that many of them had been away for two and three years, it is easy to see that the estimates made would not cover their expenses, much less their earnings.

Under these circumstances, knowing well the large profits that our hardy seamen have made in whaling voyages, we must earnestly protest against their claims for

actual earnings being so reduced, and farther on we shall again call the attention of this Tribunal to the claims of officers and sailors.

The proposal to substitute the estimate of Messrs. Cohen and Young seems by no means necessary or just in view of the facts, as stated by Mr. Crapo.

He says, (U. S. Doc., vol. vii, p. 104,) "Oil and bone on board, and destroyed with the ships, have been made the subject of claim. The quantity has been stated upon the sworn evidence of the masters and officers of the respective vessels, and the value has been ascertained by the current market quotations at the time when said oil and bone would, if not destroyed, have found a market and sale."

We are confident that enough has been stated to convince the Tribunal that the sworn statement of the masters and officers must be taken as better evidence of what was on board the whale-ships destroyed by the Alabama and Shenandoah than the so-called estimate of Messrs. Cohen and Young, who would make it appear that they have been able to arrive at the percentage which that oil and bone bear to the value of the vessels and outfits as again estimated by Messrs. Cohen and Young, and under these circumstances the attention of the Tribunal is particularly directed to the fact that this percentage is made to apply by Messrs. Cohen and Young, not to the whole length of the voyage of the several whalers, but in many instances only from the date when the ship sailed from Honolulu or some other port at which it had last touched.

Personal effects.

In regard to the claims of passengers, officers, and sailors for the values of personal property destroyed, Messrs. Cohen and Young estimate it at the rate of $5 per ton on the vessels captured by the Shenandoah, (see p. 17, Brit. App., vol. vii,) and at the rate of $3 per ton on some of the vessels captured by the other cruisers, (see pp. 17, 28, Brit. App., vol. vii,) and on other individual vessels they have chosen to make certain deductions, as to them seemed best.

Messrs. Cohen and Young state as a fact that the claims for personal effects, &c., on board vessels destroyed by the Shenandoah are made at the average rate of $8 per ton. Thinking this to be excessive, they give their opinion that if the loss of personal effects in the case of the Shenandoah "be estimated at the average rate of $5 per ton of the captured vessel, adequate compensation will be provided, especially as it appears from Captain Semmes's journal, and other sources of information, that in many cases the masters and crews had ample opportunity of saving a considerable part of their property." Messrs. Cohen and Young may have found the above statement to be satisfactory to themselves; but we do not expect that this Tribunal will find in the journal of Captain Semmes, who probably never even saw the Shenandoah, any evidence as to the value of the personal effects of the passengers, officers, and crew of the vessels burned by that cruiser.

Possibly some of the claims of this class may be exaggerated. But, on the other hand, a large quantity of personal property was destroyed on board these vessels, which, though small in the amount belonging to each individual, was large in the sum total, and for which no claim has yet been made. And further, as to some of the claims made for personal property on board the whaling vessels destroyed by the Shenandoah, the officers and captains had with them articles of various kinds, and of considerable value, for the purpose of trading with the natives; and it is for such kind of property that we understand that the claims of the master and two of the crew of the Abigail were made, as also the claim of the master and mate of the Gipsey.

If the estimates of Messrs. Cohen and Young cannot be depended upon when made as an average, still less can they be when an attempt is made to estimate particular claims. (See p. 25, Brit. App., vol. vii.) Remembering that Messrs. Cohen and Young have no other knowledge of the claimants, or of what property they have lost, than can be obtained from the list of claims, we are at a loss to know why these gentlemen should decide that the claims of the captains of the Brilliant and C. Hill should be made to be equal to each other, or why the claim of the chief officer of the Express seems to be excessive, or why any of the other deductions proposed should be made, unless, as in the case of the Alina, the value of the personal effects of the captain seems by them to have been considered as having some ratio to the tonnage of the vessel.

Claims of insurance companies.

The claim of insurance companies for the value of property destroyed, for which they have paid the owners the insurance, is the last division under the claims of the first class.

No double claims supported by the United States.

We readily admit that, whenever the owner puts forward a claim for his loss at the same time that the insurance company also claims the money paid by them in respect of the same loss, then only one value of the property destroyed can be allowed; but we insist that, in all such cases, the award should be equal to the full value of the property destroyed.

It was the intention of the United States, in preparing the list of claims, to indicate whenever double claims of this class occurred, when it was evident, upon a simple examination of the papers, that such double claims were made, and it will be found that very few, if any, of such claims exist, except in the case of some of the whaling vessels which were destroyed by the Shenandoah, there being none of this class of double claims in the case of merchant ships, or property destroyed on merchant ships.

As to the claims of the second class for the loss of charter-parties or freights, it is possible that in a certain sense double claims may, in a few instances, have been made by the owners of the ship, and by the charterers; but these double claims are of an amount almost inappreciable as compared with the sum total.

Charter-parties or freights.

There may also be some claims of the second class for the loss of profits on goods and other merchandise which do include the freight and insurance paid on these goods. But we believe that these claims should be allowed to the full extent of the freight and insurance paid, for, at the time the goods were destroyed, they had cost the merchant what he had paid for them, together with the freight and insurance he had paid upon them, and certainly the value of those goods to him cannot be considered as less than this aggregate.

Loss of profits.

Claims have been advanced for what may be considered as prospective losses in the loss of the voyage of a chartered ship, in the destruction of goods shipped to be sold at a large profit in a distant part, or in the breaking up of a whaling season which has just begun in a remote sea.

All claims of this kind Messrs. Cohen and Young think should be absolutely rejected; but we maintain that such a rejection would be directly contrary to the general language of the Roman law: "Quantum mea interfuit; id est, quantum mihi ab est quantumque lucrari potui," and would also be contrary to the existing rule of the common law, which is thus stated in the last edition of Sedgwick on Damages, page 86, note:

"It may now be assumed to be the general rule that in actions of tort, where the amount of profits of which the injured party is deprived, as a legitimate result of the trespass, can be shown with reasonable certainty, such profits constitute to that extent a safe measure of damages. In these cases the rule adopted with reference to certain breaches of contract which makes the offending party liable for the loss of profits, so far only as he foresaw, or should have foreseen that particular consequence of his act, does not apply. He who commits a trespass must be held to contemplate all the damage which may legitimately follow from his illegal act, whether he might have foreseen it or not, and, so far as it is plainly traceable, he should make compensation for it. To this extent the recovery of a sum equal to the profits lost while fairly within the principle of compensation, is also within the limits which exclude remote consequences from the scale in which the wrong is weighed."

Loss of profits a part of the damages in actions in tort.

It may be true that in some instances the courts of the United States and England, bound down by the rules of law in previous cases, have reduced the award for prospective damages in the destruction of a vessel and her cargo, to the low and average rate of interest upon loaned money; and thus, though it is well known that the profits for maritime and mercantile adventures are generally much greater than those obtained from the loan of capital at the ordinary rate, the injured party has been made to suffer from the inability of the court, who, though they recognize the justice of the claim, are limited by the checks on their power to estimate. In regard, however, to the claims presented to this Tribunal for damage by the loss of profit, we confidently expect that an award will be made which will bear a due relation to the great actual damage caused.

What has been already said as to the loss by the breaking up of a merchant voyage, or by the destruction of goods, applies much more strongly to the breaking up of a whaling or fishing voyage. Writing of vessels engaged in these voyages, Mr. Crapo says, (7 U. S. Docs., p. 194:)

Breaking up voyages of whaling vessels.

"The vessels destroyed had entered upon their cruises, and were engaged in the prosecution of their whaling voyages. Most of the ships had sailed many thousands of miles from their North Atlantic home ports, around Cape Horn, and, traversing the length of the Pacific Ocean, had reached their whaling-grounds in the Arctic. Many months had been consumed in the passage. The ships engaged in this business leave home in the months of September and October, and reach their cruising-grounds the following May, and then entering the ice of that northern ocean, penetrating it as it breaks up in summer, commence their whaling in June, and continue the taking of their cargoes until the storms of September compel them to make their way out of Behring's Straits, whence they proceed to recruit for another season's work, or for the passage home. When the Shenandoah destroyed the twenty-six whale-ships in the North Pacific and Arctic, these vessels had entered upon the portion of their voyages which was to remunerate them for the long passage from home and the long passage back again, which passages would add little or nothing to their cargoes. Hence, the portion of the voyage which brings to the owners and crew a return for their capital and labor is embraced in a few months of summer whaling. The great expense involved in sailing these vessels into distant seas had been incurred when the Shenandoah came upon them and burned them. If they had not been molested, they would have obtained their accustomed catch, and the owners and crews would have received the usual return for their outlay and labor. If, then, the claim of a merchant-vessel for the freight-money she would have earned upon the delivery of her cargo, if she

had not been destroyed, is a just and legitimate one, and recognized as one for compensation, then the claim for 'prospective catch' is equally just and legitimate.

"Another consideration for the allowance of 'prospective catch,' which presents itself with much force, is the interest which the captured seamen have in it. The masters, officers, and crews of whale-ships are not paid by monthly wages, as in the merchant marine, but by 'lays' or shares in the oil and bone taken. Their proportion of these catchings amounts to a percentage varying from 30 to 40 per cent. of the whole cargo. These men encounter the dangers and toil of this peculiarly hazardous business, and their remuneration for the support of themselves and families is dependent upon the catch of whales during the short season of summer. If no allowance is made for prospective catch, these men receive nothing for their many months of toil and exposure. This business, when undisturbed by violence, is sure of a return. As certain as the harvest to the farmer, is the catch of oil to the whaleman. The average catch of whales is well known and understood by the merchant and the seaman. Upon this knowledge of probable average catch the sailor readily procures an advance before sailing, and his family obtain necessaries and a support during his absence. In case of his death or disability during the voyage, and before any cargo has been obtained, he or his family share in the whole catch of the voyage, in the proportion of his term of service to the entire period of the voyage. By the burning of the Arctic fleet, Captain Waddell, of the Shenandoah, left these men utterly helpless thousands of miles away from their homes, and with no means of returning to them. He destroyed not only all their personal effects, but he destroyed also the earnings of a whole year of service, and burdened them with the debts contracted at home for the support of their families during their absence.

"Whatever money is obtained from the English Government for loss of prospective catch, is, under the provisions of the shipping articles, subject to division among the officers and crews, in the proportion of their respective 'lays.' Hence the amount embraced in this item of the claims is not entirely profits of the owners, but represents damage to officers and crew, as well as loss of outlay and capital, and the expenses incident to this business.

"In preparing the claims which have been presented to you, the claimants have varied in the amounts for which they ask compensation under the item of prospective catch. This variation arises from the fact that whale-ships are fitted for voyages of from three to five years in duration, and while some of the ships destroyed had partially completed their voyages, others were upon their first season. The estimates of oil and bone have been based upon the average takings of these and other vessels engaged in such voyages as they were prosecuting. Carefully prepared, accurate, and reliable statements have yearly been collected by those interested in these fisheries, which exhibit the total quantities of oil and bone taken, and the number of vessels employed, both in the sperm and right-whale fisheries. An examination of these yearly statements will demonstrate that the claims for prospective catch are not fictitious or excessive.

"The prices affixed in these estimates of 'prospective catch' have mostly been determined by ruling rates for oil and bone where the same is marketed, at times when the same would have found a market."

We are confident that if this Tribunal shall determine to award a sum in gross, it will find, in the facts above stated, and in the general principles of equity and justice, abundant ground for making an estimate in that award of damages which claimants have sustained in the loss of profits on goods in freight, or for merchant voyages, but above all for those great losses which owners, officers, and crew have experienced in the sudden breaking up of the long-continued but yet just begun whaling voyage.

Claims of the officers and crews.

On page 471 of the Case of the United States, it is stated that "it is impossible at present for the United States to present to the Tribunal a detailed statement of the damages or injuries to persons growing out of the destruction of each class of vessels. Every vessel had its officers and its crew, who were entitled to the protection of the flag of the United States, and to be included in the estimate of any sum which the Tribunal may see fit to award. It will not be difficult, from the data which are furnished, to ascertain the names and the tonnage of the different vessels destroyed, and to form an estimate of the number of hardy, but helpless, seamen who were thus deprived of their means of subsistence, and to determine what aggregate sum it would be just to place in the hands of the United States on that account. It cannot be less than hundreds of thousands, and possibly millions of dollars."

To this statement, and to this class of claims, we again call the attention of the Tribunal, feeling confident that Her Majesty's Government will agree that they are just, being in accordance with a recent decision of Sir Edward Thornton, one of Her Majesty's High Commissioners in the making of the Treaty under which this Tribunal is now sitting, which decision was given in July, 1870, when he was acting as arbitrator on a question that had arisen between the United States and Brazil, as to the liability of Brazil to make compensation to the United States for the loss of the whale-ship

Canada, of New Bedford, through what was alleged to have been the improper interference of certain officers of the Government of Brazil. In that case, Sir Edward Thornton decided that the Government of Brazil was responsible for the damage caused by the loss of the Canada, and in his award said: "Certain expenses incurred for the maintenance and passage home of the crew, as also three months' wages to each of the crew, being the amount which all owners of vessels of the United States are bound to pay to seamen discharged abroad, the undersigned considers to be justly due;" and in his award allowed for these items, estimating the wages of the mate at $100 per month, the wages of the second mate at $75 per month, the wages of the third mate at $60 per month, the wages of the fourth mate at $50 per month, the wages of the four boatswains at $40 per month, the wages of four other boatswains at $30 per month, and the wages of fourteen men, sailors, &c., at $12 per month, thus awarding over $3,000 for the three months' wages, and for the expenses home of the officers and crew.

We do not desire in any way to be understood as restricting the damages which they claim in behalf of the officers and crews of the vessels destroyed by the Alabama and other cruisers, either to the limits of length of time or of wages per month as given by Sir Edward Thornton. But we have referred to his opinion principally as evidence that such claims are "justly due." It will be for this Tribunal, taking into its consideration the distant places in which many of the vessels of the United States were burned, to determine what reasonable estimates shall be made of the damages caused to the officers and sailors.

The Counsel desire here to call the attention of the Tribunal to the revised List of Claims which was filed with the Counter Case of the United States, from an examination of which it will appear that the amount of the claims filed for injuries from the captures made by the several cruisers has been considerably increased, and that the sum of such claims without interest was $19,739,094.81.