Argument of Her Britannic Majesty's Counsel on the Points mentioned in the Resolution of the Arbitrators of July 25, 1872.

CHAPTER 1.—ON THE QUESTION OF "DUE DILIGENCE," GENERALLY CONSIDERED.

1. On the sources of the obligation.

WHEN the inquiry is, whether default has been made in the fulfilment of a particular obligation, either by a State or by an individual, it is first necessary to have an accurate view of the ground, nature, and extent of the obligation itself.

The examination of this question will be simplified by considering, in the first instance, such a case as that of the Alabama, at the time of her departure from Great Britain; namely, a vessel built and made ready for sea, with special adaptation for warlike use, by British shipbuilders in the course of their trade, within British territory, to the order of an agent of the Confederate States, but not armed, nor capable of offence or defence at the time of her departure.

Any obligation which Great Britain may have been under towards the United States, in respect of such a vessel, could only be founded at the time when the transaction took place; (1) upon some known rule or principle of international law; or (2) upon some express or implied engagement on the part of Great Britain.

The three Rules contained in the VIth Article of the Treaty of Washington become elements in this inquiry solely by virtue of the declaration made in that Article, that:—

"Her Majesty's Government cannot assent to the foregoing Rules as a statement of principles of International Law which were in force at the time when the claims mentioned in Article I arose; but that Her Majesty's Government . . . . agree 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 those Rules.'

In order rightly to understand the effect of the agreement embodied in this declaration, it is important to see how the question between the two Governments would have stood without it.

I.—*As to the Rules and Principles of International Law.*

2. Source I. Rules and principles of International Law.

These must be obtained from the authorities which show what had previously been received and understood among nations, as to the obligations of neutral States towards belligrents; remembering always, that what is called international law (in the absence of particular compacts between States) is imposed only by the moral power of the general opinion and practice of civilized nations; that (in the words of Lord Stowell, quoted with approval by the great American jurist, Wheaton, "Histoire des Progrès du Droit des Gens," vol. i, p. 134) "une grande partie du droit des gens est basée sur l'usage et les pratiques des nations. Nul doute qu'il a été introduit par des principes généraux (du droit naturel); mais il ne marche avec ces principes que jusqu'à un certain point; et s'il s'arrête à ce point nous ne pouvons pas prétendre aller plus loin, et dire que la seule théorie générale pourra nous soutenir dans un progrès ultérieur."

In a case in which no active interference in war is imputed to a neutral State, international law knows nothing of any obligation of that State towards a belligerent, as such, except to preserve its neutrality. To constitute a merely passive breach of neutrality on the part of such a State, some act must have been done by, or in aid of a belligerent, for the purposes of the war, which, unless done by the permission of the neutral State, would be a violation of its territory, or of its sovereignty and independence within that territory, and such act must have been expressly or tacitly permitted on the part of the neutral Government. For acts done beyond the neutral jurisdiction by subjects of the neutral Power, to the injury of a belligerent, the law of nations has appropriate remedies;