"'For the rest,' says a distinguished French jurist, treating of this subject in connection with privat law, 'for the rest, whether the obligation in question is for a thing to be given, or for one to be done, the imputation of default is, in practice, hardly a question of law. The question of fact is always the dominant point, even if it is not the sole one.'—(Larombière, 'Theorié et Pratique des Obligations,' vol. i, p. 417.)"

The Counsel of the United States, accepting the doctrine laid down by England, have replied as follows:—

"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 the knowledge of the general powers and duties of administration which they possess, as persons long conversant with public affairs.'"—(British Counter-Case, p. 125. Argument of the United States, p. 342.)

We remain of this opinion: we refuse to retrace our steps and to discuss afresh questions completely exhausted long ago, and which have been even admitted to be inopportune by both parties.

3. I recognize no diligence but the diligence prescribed by the Treaty. The Counsel of Great Britain appears to endeavour to establish rules of due diligence outside of the Treaty. It is too late to enter on this path. After the progress which the Tribunal has already made in its labours, it is no longer worth while to re-embark on the open sea, the vague* region of international law outside of the Treaty. We take our stand on the explicit words of the Treaty, which subordinates general international law to the compact of the three Rules—which is retrospective—and which expressly applies due diligence to the special cases and objects contemplated by those Rules.

For this last reason I refuse to follow the Counsel of Great Britain in his discussion on the question of the difference, if any, according to international law, between the duty of neutrals with regard to armed vessels and their duty with regard to vessels equipped for war but not yet armed.

The Treaty cuts this question short. It is sufficient to call attention to the first Rule:—

"A neutral Government is bound—

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruize or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruize or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use."

Note the three first conditions clearly laid down by the Rule—"the fitting out" (which has been omitted, without sufficient reason, in the English translation), "arming," "or equipping."

Note also the two following conditions, which are equally clear, "any vessel intended to cruize or carry on war," or "any vessel having been specially adapted in whole or *in part* to warlike use."

Looking to these conditions, so precise and definite, to which the diligence of the Treaty is to be applied, and considering the manifest uselessness of any discussion outside of these three Rules, it may well be suspected that the object of the Counsel of Great Britain in thus digressing from the Treaty, was to make a fitting preface to the observations which follow, designed to weaken, if possible, the force of the words of Sir Robert Phillimore and Sir Roundell Palmer quoted in the Argument of the United States.

### *Sir Robert Phillimore.*

We have quoted from Sir Robert Phillimore's Commentaries on International Law the following passages:—

"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.

* * * * * *

"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 interna-

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* There is a play on the words "la vague" and "la vague" in the original which cannot be translated.