THE INDIRECT CLAIMS

A CHAPTER IN THE

ARGUMENT

FOR

THE UNITED STATES

SUBMITTED TO THE TRIBUNAL OF ARBITRATION

AT GENEVA

JUNE 15th, 1872.

REPRINTED WITH A NOTE

PARIS

PRINTED BY DUBUISSON AND CO.

5, RUE COQ-HÉRON, 5

1872

THE INDIRECT CLAIMS

to be considered in detail, objection may be made, that such or such particular loss is remote 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.

(*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.

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. 2nd. 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, 3rd. 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.

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.

(*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 Gov- "ernment to solicit redress for the National and private "injuries thus sustained."[1]

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, by a denial of any liability for any injuries growing out of the acts of the Alabama.[2]

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

[1] Am. Appendix, vol. III, pp. 72-3.
[2] *Ibid.*, p. 83.

national and for individual redress which had been thus preferred and refused.

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.[1]

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, 27th, 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 23rd 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 refer-"ence."[2]

It does not appear that during the war the exact

[1] Mr. Adams to Earl Russell, Am. App., vol. II, p. 641.
[2] Am. App., vol. II, p. 182.

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."

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 com-
"merce 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 supplied from "the ports of Her Majesty's kingdom all the materials, "such as vessels, armament, supplies and men, indis- "pensable 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 Govern-* "*ment of Great Britain the responsibility for this damage.*"[1]

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 to- "wards the United States are to be measured by the "losses which the trade and commerce of the United "States have sustained."[2]

Mr. Adams, in his reply on the 20th of May, repeated the demand. He referred to the destruction of individ-

[1] Am. App., vol. I, p. 290; vol. III, p. 522.
[2] *Ibid.*, vol. I, p. 526.

ual 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 commer- "cial 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 in- "surance 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.*"[1]

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 "in- "direct" injuries, and that it was made clear beyond a question that the United States intended to claim re- muneration for all.

Lord Russell 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 preten- "tion, new to the law of nations, would be most burden- "some, and, indeed, most dangerous. A maritime nation, "whose people occupy themselves in constructing ships

[1] Am. App., vol. III, p 553.

"and cannon and arms, might be made responsible for "the whole damages of a war in which that nation had "taken no part."[1]

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."[2]

(*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 liability 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

[1] Am. App., vol. III, p. 361.
[2] *Ibid.*, vol. III, p. 562.

"burning and destroying on the ocean a large number "of merchant vessels and a very large amount of pro- "perty 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 "Cor- "respondence respecting the Shenandoah." Mr Adams' 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 arbitration as to the acts of the Alabama, he uses the word "Alabama" in a generic sense.

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 conse- "quence may be *damnum sine injuriâ*, and therefore no "ground of a legal action, and yet it may be a wise act

[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.

"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."

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 re-transfer of the commercial marine to the United States under the same circumstances, when England should be a Belligerent and the United States should be a Neutral, by letting "bygones be bygones," "forgetting the past," and, "as each had become aware of defects that existed in in-"ternational law," "attempting the improvements in "that code which had been proved to be necessary."[1]

[1] Lord Clarendon to Sir F. Bruce, Brit. App., vol. IV paper 5, p. 164

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 "the redress of wrongs committed in violation of inter- "national law. I think that the country would be "equally unanimous in declining every form of negotia- "tion that should have in view merely prospective regu- "lations of national intercourse, so long as the justice of "our existing claims for indemnity is denied by Her "Majesty's Government, and these claims are refused to "be made the subject of friendly but impartial examina- "tion."[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 to them; in other words, that, should an opportunity be offered, Lord Russell's refusal might possibly be reconsidered.

Mr. Seward met these overtures by instructing Mr. Adams, on the 27th of August, 1866, "to call Lord

[1] Mr. Seward to Mr. Adams, Feb. 14, 1866, vol. III, Am App., p. 628.

"Stanley's attention in a respectful but earnest man-
"ner," to "a summary of claims of citizens of the United
"States, for damages which were suffered by them dur-
"ing 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 unconcilia-
"tory towards Great Britain." He also said that he thought that Her Majesty's Government could not reasonably object to acknowledge the claims.[1]

Lord Stanley met this overture by a communication to Sir Frederic 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.[2]

A long negotiation ensued. In the course of it Mr. Seward wrote to Mr. Adams thus, on the 2nd 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

[1] Am. App., vol. III, pp. 632-636.
[2] *Ibid.*, p. 652.

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 afterwards 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. I 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.

(*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, includ- "ing 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 of July, 1853, and which "yet remain unsettled."[1]

Lord Granville subsequently said, in the House of Lords, of these two Conventions, "the former Convention "provided (Article IV) that the Commissioners shall

[1] Am. App., vol. III, pp. 752, 753.

" have power to adjudicate upon the class of claims re-
" ferred to in the official correspondence between the two
" Governments as the Alabama Claims. The latter (Art. 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, etc. Both Conventions
" purposely avoided defining what constituted the
" Alabama Claims, and admitted almost unlimited argu-
" ment 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.

(*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

[1] Hansard, *ubi supra*.

not receive the assent of the Senate. Mr. Reverdy Johnson, hearing of this, wrote an elaborate defence 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 had 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. 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."[1]

(*j*) Her Majesty's Government also received the same intelligence about that time from other sources.

Its Minister at Washington, on the 2nd of February, 1869, communicated to it the action of the Senate Committee of Foreign Relations. "Mr. Sumner," he said, "brought forward the above mentioned Convention, and "after making a short comment upon its contents, and

[1] Am. App., vol. III, p. 780.

"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."[1] 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 Confe- "derate 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 ammuni- "tion 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 im- "posed upon the United States by the prolongation of the "war."[2]

(*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 provid-

[1] Am. App., vol. III, p. 772.
[2] *Ibid.*, vol. III, p. 784.

ing 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 towards 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 recognising 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.

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

[1] Am. App., vol. VI, p. 1.

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."[1]

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*

[1] Am. App., vol. VI, p. 13.

"*intimation the British Government had had, was from the "speech of Mr. Sumner.*" [1]

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: "The provisions [of the Treaty] were wholly "inadequate for the settlement of the grave wrongs that "had 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 pro-"duction; in its effects upon the foreign commerce of "the country; in the decrease and 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 con-"tinually 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."

[1] Appendix to British Case, vol. IV, No. 1, p. 19.

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]

It cannot, therefore, be doubted that, in the beginning of the year1871, 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.

[1] *Ante*, p. 30.

(*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 at 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.[1]

(*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 towards 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

[1] Statement by Lord Granville, Hansard, vol. CCVI, p. 1842.

" anglais, c'était la crainte de voir l'Amérique incliner " contre nous et prêter à nos ennemis le concours de ses " hardis volontaires. 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 pa- " rages 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 sup- " pression 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 aban- " donné dans la suite, témoigne de l'inquiétude éprou- " vée 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

[1] Drouyn de Lhuys, *les Neutres pendant la guerre d'Orient*, p. 14.

" 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 prin- " cipal secrétaire d'État de S. M. Britannique compren- " dra que nous n'aurions aucun moyen de ne pas répon- " dre favorablement à l'ouverture qui nous est faite, si " la France et l'Angleterre, bien que se trouvant enga- " gées dans une même entreprise, affichaient publique- " ment des doctrines opposées. Que les deux gouver- " nements, 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."[1]

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 Janu-

[1] Drouyn de Lhuys, *les Neutres pendant la guerre d'Orient*, p. 28.

ary, 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 Thornton 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, etc." [1]

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."

Sir Edward Thornton, on the first 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." [2]

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.

[1] Brit. App., vol. IV, paper II, p. 1.
[2] *Ibid.*, p. 3.

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 settle-"ment of the different questions which shall come be-"fore the said Joint High Commission."[1] The British Commissionners received a broader power, which was stated to be conferred upon them "for the purpose of "discussing in a friendly spirit" "the various differ-"ences 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.

[1] Brit. App., vol. IV, paper XII, p. 6.

(*p*) The subject of the Alabama Claims was opened at the fourth conference by an elaborate statement from the American Commissioners.[1]

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 in-"demnification."

They then said that the damage which they had

[1] Brit. App., vol. IV, paper XII, p. 8.

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 expendi- "tures in the pursuit of the cruisers;" and 2nd, 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 per- "formance of her duties as a Neutral, had become justly "liable for the acts of those cruisers and of their "tenders."

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 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."

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.

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.

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 Jan. 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 corres-
"pondence, if I have not given it to be clearly understood
"that a violation of neutrality by the Queen's Proclama-
"tion, and kindred proceedings of the British Govern-
"ment, is regarded as a national wrong and injury to
"the United States."

[1] Am. App., vol. III, p. 688.

The British Commissioners without delay declined the American proposal for an amicable settlement.

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.

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.

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.

(*q*) After a discussion of several weeks the Joint High Commissioners agreed upon a Treaty.

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 plenipo- "tentiaries."

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 St. 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 arrange-

ment 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."

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.

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 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; 2nd, whether Great Britain is liable to indemnify the United States for any of those injuries, and if so, for which ones; and 3rd, it is provided that in case the Tribunal finds that Great Britain has failed to fulfil 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:

"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 compensa- "tion is due. On this single point a disagreement has arisen "between the two Governments.*"[1]

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 12th Article of the Treaty. That article provides for the creation of another and an independent Tribunal, which is also to have

[1] Lecture on the Washington Treaty, May 28th, 1872, London *Times*, 29th May, 1872.

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 a 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 12th Article, is not found in the 1st Article. On the contrary, 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 arbitra- "tion."[1]

But Lord Ripon says: "If Her Majesty's Commis- "sioners 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: "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]

[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 Amer.- "can negotiators that the claims for indirect losses should not be "brought forward, and it has been inferred from this that we, rely- "ing 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 confere..ce "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] *Ibib., ut supra.*

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 Commisioners called attention to "the provision in the constitution of the United States, "by which the advice and consent of the Senate is re- "quired for the ratification of any Treaty which may be "signed under the authority of the President."

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 subject of discussion in each House of Parliament.[1]

Earl Granville in the House of Lords made a speech, in

[1] House of Lords, Hansard, N. S., vol. 206.

which he used expressions, which have since been much commented upon. He said that "the pretensions" advanced by Mr. Fish "entirely 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:

"I quite concur in the opinion that, under the arbitra-
"tion 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 Arbi-
"trator or Arbitrators, in whom you have confidence,
"and in referring these questions to these Arbitrators
"with certain cut and dried propositions unfavourable
"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 ques-"'tion to arbitration.' I should be quite willing to say, "'I am perfectly prepared to refer the question to arbi-"'tration 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."

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' opinions? If they did, the official records of the debates do not show it, although all of them spoke in the debate.

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 con- "cession, 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. Noth- "ing 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 bellige- "rent 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 pre-* "*mature recognition of belligerent* rights, and the *conse-* "*quent* 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, "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 pro- "longation 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, with- "out 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 re-
" spective Governments, yet they were to be considered
" as confidential, and not to be published. I may add,
" that I have not the slightest doubt of the wisdom of the
" course pursued by the British and American Commis-
" sioners. They had thirty-seven long sittings, and I
" will venture to say that if every one of the ten Commis-
" sioners—not to mention the two able Secretaries—had
" thought it incumbent upon them to show their patriot-
" ism 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 advan-
" tageously to their respective Governments. The re-
" presentations of both displayed great zeal, ability,
" patience, temper, and an honest desire to come to
" some compromise, even though the difficulties ap-
" peared at first sight to be irreconcilable. The noble
" Earl (Earl Russell), thinks that whenever the Ameri-
" cans 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 Commis-
" sioners at once declined to accede to, and even
" refused to refer for consideration to the Govern-
" ment at home. Many other propositions that were

"made were referred back to Her Majesty's Govern-
"ment, the Commissioners thinking it their duty to in-
"form 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 assuming 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.

(*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 com- "mitted 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 in question, prepared and presented their Case to the Tribunal in December, on that theory.

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 heir 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 im- "possible 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 Bri- "tain ought not, in equity, to reimburse to the United "States the expenses thereby entailed upon them."

(*u*) Fifty days after Her Majesty's Government was mad acquaintede 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 3rd of February of this construction of the Treaty by Her Ma-

jesty'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.

(*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.

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."

2. It is said that the expression of regret for the escape of the cruisers was a concession; but it cannot be sup-

posed 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.

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]

The presentation of these claims to the Joint High Com-

[1] British Appendix, vol. IV.

missioners 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's Government "as coming within the class of subjects indicated by Sir "Edward Thornton in his letter of January 26th as sub-"jects for the consideration of the Joint High Commis-"sion."[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

[1] Sir E. 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."

"Government to consider them. They therefore declined "to do so."

"At the Conference on the 3rd May, the British Com- "missioners 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 diffi- "culty 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.

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 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:

"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 des- "'truction 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 of dollars, "'without interest; which amount was liable to be greatly "'increased by claims which had not been presented.'"[1]

[1] Parl. Paper, No. III (1871), p. 8.

"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."[1]

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 ascer-"tained 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

[1] Hansard, vol. CCVI, p. 1851.

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 the Commissioners; but he assumes to find the limitation in the express words of the Treaty.

This is done by assuming that the Treaty itself "*in-*"*cludes 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 generi-"cally 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 belligerence of the Confederates by Great Britain. 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.

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 cor-

respondence 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 claims,—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.

(*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 interests 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.

(*a a*) Pradier Fodéré, in one of his notes to Vattel, makes the following observations :

" L'arbitrage, très-usité dans le moyen-âge, a été " presque entièrement négligé dans les temps modernes; " les exemples d'arbitrages offerts et acceptés sont de- " venus de plus en plus rares, par l'expérience des in- " convénients qui semblent être presque inséparables de " ce moyen, ordinairement insuffisant par le défaut d'un " pourvoir sanctionnateur.

" Lorsque les grands puissances constituent un tribu- " nal 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 :

" 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 tri- " bunal ordinaire, qu'il est absolument obligatoire, et que " l'exécution en peut être toujours suivie par les voies de

[1] Vattel, *Droit des gens*, éd. P. Fodéré, tom. II, chap. xviii, sec. 329, note.

" droit commun. Entre les États, le principe de souve-
" raineté 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 re-
" courir 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."[1]

Neither party loses anything by such good faith. The nature of the contract of international arbitration affords perfect remedy to either party, in the contigencies 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 sta-
" tué en dehors ou au delà des termes du compromis ;

" 2° Lorsque ceux qui ont rendu la sentence se trou-
" vaient dans une situation d'incapacité légale ou
" morale, absolue ou relative, par exemple, s'ils étaient
" liés par des engagements antérieurs ou avaient dans

[1] Calvo, *Droit international*, éd. Fr., 1870, tom. I, p. 791.

" les conclusions formulées un intérêt direct ignoré des " parties qui les avaient choisis ;

" 3° Lorsque les arbitres ou l'une des parties adverses " n'ont pas agi de bonne foi ;

" 4° Lorsque l'un ou l'autre des 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." [1]

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.[2]

(*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

[1] Calvo, Droit international, p. 766. Compare Heffter, *Droit international* liv. II, s. 1095. Blantscht, Code *Droit international*, liv. I, s. 667.

[2] Pradier Fodéré, *la Question de l'Alabama et le Droit des gens*; Pierantoni, *gli Arbitrati internationali e il Trattato Washington.*

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

1 Mellii, Institutiones Juris Civilis Lusitani, lib I, tit. 4, sec 21.

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:

"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 solici-"tor. 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 defence of such am-

"biguities can be founded on it; but of apparent faults "of expression it has often been, and often will be, "the unavoidable cause."[1]

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 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 understanding 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 re-

[1] Lecture on the Treaty of Washington, 28 May, 1872, London *Times*, 29th May, 1872.

fuse 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 teh 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.

NOTE.

OPINIONS OF STATESMEN, MAGAZINES AND JOURNALS OF GREAT BRITAIN AND THE CONTINENT ON THE CONSTRUCTION OF THE TREATY OF WASHINGTON.

I.

Extracts from Speeches made in a Debate in the House of Lords, 4th of June, 1872.

From the *Times* of June 5th, 1872.

The EARL OF DERBY rose and said:

". . . . Everybody knows that we put one construction on the Treaty and that the American negotiators put another. The noble earl [Earl Granville] stated that he conceived the Indirect Claims were excluded by the Treaty as it stands. Now, that matter has been abundantly discussed in both Houses, in every newspaper, in every private society, and I think the very utmost for

which any one unconnected with the Government has ever contended is this, that the language of the Treaty was so vague, so ambiguous, so uncertain, that it may be construed either way, and, therefore, our construction was as admissable as that put upon it by the other side. Now I do not think that in a matter of such enormous importance, after the plain warning which had been given us by the speech of Mr. Sumner, after the evidence we had had of the immense consequence which the American Government and people attach to these Indirect Claims, and the pertinacity with which they had urged them, I do not think it is at all unreasonable to say that in a matter of that kind uncertainty and ambiguity in the language of the document to which you must appeal as the supreme authority upon the matter are not likely to inspire confidence. I will not go into the controversy raised by my noble friend. He says, the Indirect Claims, even if in the Treaty, are waived in the protocol, and he referred to the question which has often been discussed as to the meaning of the words 'amicable settlement.' Now, the obvious answer to that has often been given. An arbitration is not an amicable settlement. It is a means by which an amicable settlement may be arrived at, but it is not itself a settlement. I do not want to go into that question, for it is enough for my argument to say that in a matter of this kind, with the full knowledge that we have had of what was claimed by the other side, and considering the immense importance of the matter at issue, there ought to have been no doubt or uncertainty."

LORD CAIRNS said:

. . . . . "We have had conflicting views as to the construction of the Treaty fully before us; and now I tell the noble earl that I accept his reference to judicial claims as no compliment, accompanied, as it is, with a sneer that I am capable of making a construction of a document in one place differ from that I should give in another. (Loud cheers.) My lords, I will tell the noble earl something more. He says he talked with a judge half an hour before he entered this House, and he said that the In-

direct Claims were clearly inadmissible. The noble earl speaks of what has been said by very learned persons in this country and elsewhere, but he quite misunderstands what those learned persons spoke about. What I understand them to be talking about—and I quite agree with them—I believe that no judge would say that these Indirect Claims could be admitted for a moment; but that is not the question: the question is, whether the hands of the Tribunal at Geneva are sufficiently tied and bound so that they would not be the judges to say whether these are good claims or bad claims. (Hear, hear.) That is what we want to know—that is what my noble and learned friend, who spoke last but one, put very fairly. He said, with regard to the Supplementary Article, that what the Commissioners ought to have done, if they had understood their business, was to have added a new article to exclude these claims. I agree that the claims are preposterous, and that the country and the Government never meant to entertain them. But the question is, what ought to be our view as to the construction of this Treaty? The noble marquis, the President of the Council, taunted the noble marquis behind me with having thought it consistent with his duty to make observations which were highly in favor of the American view of the case.

"I dare say I shall be taunted, perhaps, in the same way. But I will tell the noble marquis what I consider consistent with my duty. I consider it consistent with my duty to speak the truth—(cheers)—and I don't care whether it chimes in with the views of the Government of the United States or the Government of this country. (Hear, hear.) The noble earl opposite taunted me with having an opinion on this subject which I am afraid to express. I go further, and say that in my belief the strong argument with the United States is not to insist, as the Government have insisted, that the construction of this Treaty is free from all ambiguity. The Government never made a greater mistake than when they went to the United States in the first instance, and said to them,

'You are making claims not only against all principle, but in flagrant opposition to the Treaty.'

"I say, generous and high-spirited men could not have endured language of that kind without making a contest and struggle against it. (Hear, hear.) Now, I tell the noble earl my view about the construction of this Treaty. The Prime Minister says there is no ambiguity; that no sane person could have ever entered into a Treaty which had such a construction as America had put on it. The noble earl himself, I believe, in his despatches uses language peculiarly strong in regard to the construction of the Treaty. The Commissioners tell us they were responsible for having represented to the Government that they understood a promise to be given that these claims would not be put forward by the United States, and to-night the noble earl said that on a particular day the Government received a communication from the Commissioners saying that the claims were not to be put forward.

"What is the meaning of this? Why were the Commissioners to write to the Government and say that a promise was given that these claims would not be put forward if the Treaty was free of ambiguity? The two things cannot stand together. Take which you like—the Treaty is unambiguous, or admit that it is not clear, and rest on the promise given by the Commissioners; but you cannot have both. I believe that if you refer any breach of duty to the decision of a tribunal, that tribunal, unless you tie up its hands, will have the right to say what are the extent and the amount of the damage done . . . . .

"I admit that in Mr. Adams' time, the Indirect Claims had not been distinctly stated; but in 1868-9 we had distinct authority as to what had become known as the Alabama Claims. That authority is the noble earl opposite, who, last year, before this controversy had arisen, described to the House what the Alabama Claims had by official correspondence come to mean. Commenting on the terms of the Stanley-Johnson and Clarendon-Johnson Conventions, the noble earl said the claims of the Amer-

ican Government had come to conclude everything, and, therefore, that under the reference proposed in those conventions, almost unlimited damages might have been awarded to the American Government. How then can it be said that the Alabama Claims represented a bundle of strictly defined claims, and that the term could not possibly be extended beyond these? The next argument is that the Protocol of the 4th of May contains a waiver by the American Government of the Indirect Claims. I wish I could find it to be so; but I do not find that the American Government waived anything. (Hear, hear.) The American Commissioners simply said they wanted us to give them a lump sum; and in the hope of our doing so, they would not estimate for the present the amount of the Indirect Claims.

"After referring to the indirect injury accruing from the transfer of the British flag of a large part of the American mercantile marine, enhanced rates of insurance, the prolongation of the war, and the large sum necessarily required for this and for the suppression of the rebellion, the protocol says: 'In the hope of an amicable settlement (meaning the payment of a lump sum), no estimate was made of the indirect losses, without prejudice, however, to the right of indemnification in the event of no such settlement being made.' In this I can see no waiver whatever. I have no fault to find with the manner in which the noble earl conducts the argument on this point in his correspondence. The whole of the case on this subject is stated by him with great fairness and frankness, and it is surely better to be frank and fair than, ostrich-like, to run our heads into the sand and fancy that this secures our safety. The noble earl's argument is that the waiver of the Indirect Claims in the event of the amicable settlement proffered by the American Commissioners was a waiver which applied to any form of amicable settlement, and, therefore, applied to the form proposed by the British Commissioners, and accepted by the United States. That is the whole argument on this part of the case. The

American Commissioners, in the hope of an amicable settlement, by the payment of a gross sum, made no estimate of the indirect losses; the British Commissioners declined such a mode of settlement, and Her Majesty's Government maintain that the Americans were bound not to put forward those claims, whatever the form of settlement. . . . . .

"I believe the first copy of the American Case was furnished to the Foreign Office on the 17th of December, and that twelve additional copies were supplied on the 19th of that month. We all know that the noble earl opposite was suffering from illness at the time; and I am sure that there is no one among us who would impute to him that there was any unnecessary delay on his part, or who does not sympathise with him in the position in in which he was placed. That, however, is not the question. I do not know whether many of your lordships have looked at the Case of the American Government. There is an old saying, which is applicable to it, to the effect that he who runs may read. You could see from the very title page of their case that they were making these claims. And who were at the Foreign Office at the time? There was Lord Tenterden, who as the noble earl said, was one of the very few men in England who were thoroughly acquainted with this question. There was also Mr. Hammond, at the Foreign Office, and I confess I can hardly believe that when Lord Tenterden or Mr. Hammond opened the first copy of the American Case, either could have failed to see in the course of five minutes that the United States' Government were making those claims—claims, the surrender of which was proclaimed by the noble earl opposite to be the price of the Treaty. (Hear.) A month after this, on the 18th of January, the Cabinet sat, and although I can imagine that the falling of a bombshell could scarcely have created greater surprise and consternation among them than the American Case, yet some considerable time was allowed to elapse before anything was done, although the matter lay on the surface. The question

was one not so much for the law advisers of the Crown as for the ministers who had negotiated the Treaty, and who had informed the country that its price was the surrender of the Indirect Claims. Well, January was not very far advanced when the Press got hold of this question. The various newspapers then began writing very forcible and strong articles with respect to it, expressing with great moderation, but at the same time with great firmness, the course which it became the duty of the country to take. Then came the meeting of Parliament, when a declaration was made by the Prime Minister, who committed himself to a statement which gave great offence across the Atlantic, and which was to the effect that nobody with any sense could have entered into a Treaty which was capable of a construction such as that which was put upon the Treaty of Washington by the Government of the United States."

II.

Extract from Fraser's Magazine

March, 1872.

. . . . . We cannot but deeply regret the whole course of procedure which has been pursued by us, both in official and non-official quarters, since the publication of the American case. Whatever "blundering" may have been evinced in the drawing up of the unfortunate Treaty, there has been much more, and more unseemly and perilous blundering since, in the Babel of clamour and denunciation with which the pretensions put forward in the American Case, founded upon it, have been received. In this remark we refer not so much to the press, which is "nothing if not critical," and which, having no recognized authority, incurs none of that responsibility which attaches to authority. We utterly reject and discountenance the unworthy suggestion put forth by some American journals, that the meaningless and ignoble cry of distress and remonstrance which broke out from "the usual organs of public opinion" on this subject at the beginning of the year, was instigated by Her Majesty's Ministers, with a view of diverting attention from other disagreable questions which they felt to be impending over their nads, or even of removing from their own shoulders the weight of any odium which might

attach to all who had had any part in this unfortunate affair of Washington; but we at the same time think it to be a circumstance much to be deplored, that those Ministers should have so far forgotten the dignity of their station, and that of the Sovereign whose servants they are, as to allow themselves to follow, and to drag the crown with them in the wake of such a miserable escapade. The conduct of Ministers, instead of being such as to reassure public feeling, and to support the character of the country before surrounding nations, has been undignified, and full of inconsistencies, as well as being, as we believe, utterly without precedent in the history of international relations. It was without precedent, without justification, and at the cost of infinite inconvenience and scandal, that the Government introduced into the Queen's Speech any reference at all to matters in dispute, which had been formally delegated to the discretion of a Tribunal of Arbitration.

It was a still greater violation of the rules of etiquette, applicable in such cases, as well as a derogation of the dignity of the nation, to add that 'a friendly communication" had been made to the Government of the United States, with a view, as was understood, of inducing them to withdraw from and recall part of the 'Case' which they had in due form, and according to the provisions of the Treaty, placed before the Tribunal. But, in truth, whatever hope there might have been of extracting anything from the generous humour of the Government on the other side of the Atlantic, though this humiliating appeal was, on the very evening when the fact was announced, dashed to the ground by the violent, dogmatic, and offensive language of the intractable Premier, who, far from imitating the judicious reserve of the noble lord, his colleague, at the head of the Foreign Office, noisily challenged the whole world to dispute his own construction of the terms of the Treaty as being 'the meaning, the only meaning, the rational meaninh, the direct grammatical meaning.' Now, to any one with more discriminating perceptions than Mr. Gladstone, such a declaration as this could only imply

that the Government of the United States, supposing it to be gifted with ordinary intelligence, must have been guilty of deliberate dishonesty and attempted extortion, in putting forward demands which were to be thus emphatically repudiated by the right hon. gentleman. Could it be wondered at if the latter Government, in the full consciousness of the additional strength which its opponent's fatuous display of weakness has afforded them, should, without betraying any show of irritated feeling, simply reply to our 'friendly communication' by announcing their determination to leave the whole matter, upon its merits, in the hands of the Arbitrators? This we are inclined to believe that they actually did 'by return of cable,' though Mr. Gladstone, in reply to an enquiry a few days ago, stated that the Government had not received any official reply, and did not expect to receive one till the 1st of March; which would thus enable them and the country to tide over the 'Thanksgiving Day' in peaceful insouciance.

But, indeed, even had Mr. Gladstone, doing violence to his nature, been ever so courteous and conciliatory in tone, and the Washington Government ever so generously disposed, how could the latter, with any regard to their responsibilities and the dignity of statesmanship, make any other reply than we presume them to have done? Individuals acting on their own account, and rulers of States, having the interests of their constituent members in their hands, are very differently situated, and must act upon different principles in respect of enforcing claims, or demanding reparation for injuries—a subject very clearly treated of by the highest juridical authorities An individual, acting on his own account, may permit motives of kindness, or weakness, to influence him in abstaining from pressing to the fullest extent his just claims, and even in pardoning an injury received. But the Sovereign of a State, who is but the trustee of the rights of his subjects, may not exercise a discretion of this sort, unless justified by special considerations, rendering it, in his opinion, expedient in the general interests

of the State. There is always, in the case of States, in addition to the consideration of the simple material advantages in dispute, the character of the nation for honour and magnanimity, which must not be suffered to be brought in question.

And this brings us to the reflection that there are other parties besides the actual litigants who are entitled to honorable consideration in this matter, but who, unfortunately, have been by implication, subjected to unexampled indignity through the irregular discussions which have been permitted to take place,—namely, the worthy members of the Geneva Court of Arbitration, and the Sovereign States who, at the joint request of the contending parties, have nominated them.

It need scarcely be pointed out, that in matters in litigation before an ordinary tribunal the discussion of a case out of court is justly visited and resented as an act of 'contempt.' Sovereign States cannot commit one another to 'durance vile' for breach of discipline; and so long as the discussions of the points of disagreement in the Washington Treaty were confined to the columns of the newspapers, the members of the Geneva Arbitration Court had, perhaps, nothing to complain of, or at any rate, no ground of complaint upon which they would deem it necessary to seek redress. But the case is different when the legislature of one of the States in disagreement takes up the discussion, and when the Prime Minister of that State insists upon laying down the law in the case, and, by necessary logical interference, precluding the Court of Arbitration from giving any decision other than that which he has dictated. It is, moreover, a flagrant breach of the good faith which should exist between States, to even hint at retiring from an arbitration, or repudiating its award, in case it should be in any way at variance with one's own notions. There is no department of its functions in which a Sovereign State takes more pride than in the exercise of its 'good offices,' whether in the way of mediation or arbitration and any show of recusancy against them, once they have

been accepted, becomes a grave offence before the world, susceptible of being visited by any form and any amount of resentment.

"As the case stands, the country is clearly in the hands of the Arbitrating Powers, to abide their award, whatever it may be. And however stupid, however 'scandalous' in 'blundering,' our representatives may have been in drawing up this dismal Treaty, let up hope, in Mr. Gladstsne's despite, that there may be sufficient 'ambiguity' in it to enable the Arbitrators, having regard to the rules which regulate the reasonable and equitable interpretation of treaties, having regard also to the supreme interest of peace, of which they are guardians, to give an award favorable to, or at least not so disastrously prejudicial to us as has been anticipated by alarmist speculators, who, there is too much reason to apprehend have not been altogether free from stock-jobbing influences."

III.

Extract from Fraser's Magazine.

June, 1872.

. . . . . All the vast social power which the governing classes of England possess was thrown into the scale against whatsoever remained of the American Republic, and in favor of those who were striving to bring part of it at least into accordance with the decrees of that Providence in which governing classes believe.

There has always been a tendency to take the prattle of London society, and the prating of the press which delights to repeat it, as the public opinion of the country. It is not surprising, therefore, that the Government of the day should have been affected by this influence. But what is surprising is, that they should have shown such utter recklessness and want of caution in publishing to the world their appreciation of the merits of the struggle, and their opinion as to its issue. That Mr. Gladstone who had adopted Mr. Jevon's opinion that coal was coming to an end in England, should have adopted society's opinion that the republic was coming to an end in America, is not strange; but it is strange that he did

not keep his opinion a little more to himself. How positive he was in the matter may be judged from these words, uttered by him in October, 1862:

"There is no doubt that Jefferson Davis and other leaders of the South have made an army. They are making, it appears, a navy; *and they have made what is more than either—they have made a nation*. We may anticipate with certainty the success of the Southern States so far as regards their separation from the North. I cannot but believe that that event is as certain as any event yet future and contingent can be."

Mr. Gladstone was still of this opinion in June, 1863, when he said:

"I do not believe that the restoration of the American Union by force is attainable. . . . . I do not believe that a more fatal error was ever committed than when men—of high intelligence, I grant, and of the sincerity of whose philanthropy I for one will not venture to whisper the smallest doubt—came to the conclusion that the emancipation of the negro race was to be sought, although they could only travel to it by a sea of blood."

There spoke the spirit of the Liverpool slave trader, and the Confederate bond holder, rather than of the English statesman and Chancellor of the Exchequer. Lord Russell had already said, in October, 1861: 'We now see the two parties (in the United States) contending not upon the question of slavery—though that I believe was probably the original cause of the quarrel—but contending, as so many States in the Old World have contended, the one side for empire, and the other for independence.' These speeches have, no doubt, since been repented of, but they are good evidence to show the views which existed at that time in the Cabinet. Not that they existed alone either. Sir George Cornewall Lewis, Mr. Charles Villiers, and Mr. Milner Gibson, had from the first struggled against them, and had been regarded with the respectful pity accorded to clever men for once in the wrong. They were, however in a hope-

less minority of three out of fifteen, and it is not too much to say, that as a body the Government looked, and was known to look with confidence and without displeasure to a disruption of the American Union. . . . .

. . . . At the Conference of March 8th, the American Commissioners formally advanced their claim for losses both direct and indirect, stating, however, that 'in the hope of an amicable settlement no estimate was made of the indirect losses, without prejudice, however, to indemnification on their account, in the event of no such settlement being made.' And they proposed that the Joint Commission should 'agree upon a sum which should be paid by Great Britain to the United States in satisfaction of all the Claims." This offer, if accepted, would have effectually and for ever ended the whole matter; it was, however, refused, and the English Commissioners renewed their proposal for arbitration. Now, it has been said that, in proposing arbitration, they did, in effect, assent to an 'amicable settlement,' and that the Treaty is in fact that, and nothing more. To which the reply is obvious, that the payment which the Americans proposed was an absolute settlement, whereas the Treaty settles nothing absolutely, providing only machinery for an amicable wrangle, in order to a settlement.

The difference is obvious. In making an 'amicable settlement' as proposed, we must have admitted our faults and paid for them; in agreeing to the Treaty we admitted no fault, and merely exposed ourselves to the risk of payment in case the Arbitrators decided against us. In the first case the United States would have gained everything; in the second they run the risk of losing everything. The Americans agreed, however, to arbitration on condition that the principles to govern the arbitrators should be laid down. Thereupon were elaborated the famous three rules as to which the British Government is made in the Treaty to assert that they were first invented for this occasion, and are not a correct 'statement of the principles of international law.' The most careful

examination of the rules fails, however, to show in what they differ from those principles as universally enunciated, and as admitted by England at the time. The second rule indeed, apparently, extends the obligations of the neutral Power to the extent of requiring it *absolutely* 'not to permit or suffer' the use of its ports or waters as a base of naval operations, or for the renewal or augmentation of military supplies or arms; but this must be read by the light of the third, which prescribes '*due* diligence' as the measure of fulfilment of the obligations in question. The fact is that these rules are so hopelessly vague that they would cover almost any view of international law ever propounded, and the danger of them is that they may easily be so interpreted as to increase to an unendurable extent the obligations of neutral Powers. This, however, is a small matter compared with what follows.

Having committed their country to judgment by principles declared to be false, the Commissioners probably asked themselves to what subject those principles were to be applied. This brings us to the question of the national or indirect claims. Those claims were well known to the Commissioners to exist. They had been made not once or twice but repeatedly. They had been advanced by Mr. Adams as early as 1862, by Mr. Seward in 1863, and more distinctly by Mr. Reverdy Johnson, by Mr. Motley and by Mr. Fish, in 1869. They had been commented upon by Lord Clarendon. The absence of any provision for them had been made the ground of rejection of the Johnson-Clarendon convention.

They had been presented to the Commissionors themselves as a distinct special point. They could not be disregarded; nay, they alone were worth regarding at all for they were then *the sole and only point in dispute*. The course of action upon everything else was already decided. England had already agreed to refer the direct claims to arbitration, and had signed a convention for that purpose. America had already agreed to leave out of consideration the question of recognition of Southern belligerency. There remained absolutely nothing but

these national claims on which any agreement was necessary. The whole question was here; the one point on which it was absolutely indispensable to be precise and clear was this; for failing precision and clearness here, the whole matter would be left no further advanced than it already was. If national claims were to be excluded, it was necessary that they should be excluded by the Treaty: if not excluded by the Treaty, it was manifest that they would have to be met under it.

The English Commissioners, however, knew that they were expected to return with a treaty in their pockets, and either they did not understand what they were about, or they determined to return with a treaty leaving the one material point doubtful rather than with none at all. They did not, however, even succeed in leaving the point only doubtful, for they agreed to a definition which, if there is any sense in words, *does* cover the indirect claims. It is declared in the first Article that 'in order to remove and adjust ALL complaints and claims on the part of the United States' . . . . . 'the high contracting parties agree that ALL the said claims, growing out of acts committed by the aforesaid vessels' shall be referred. How it can be said that 'in all the claims' those called indirect are not included, is a mystery. Nevertheless, the English Commissioners, it would appear, say it and believe it still, for as late as the 23d of April last, we have Sir Edward Thornton telling the Americans at a public dinner that 'he believed no one supposed that the British Joint High Commissioners had any idea — the slightest idea — that the indirect claims were included in the Treaty.' After this confession it is superfluous to ask what title those gentlemen have to be considered men of ordinary intelligence and judgment. It has, indeed, been whispered that they had at the last moment doubts as to this point, and that, in answer to their questions upon it, the English Government telegraphed 'Sign at once.' If so, Sir Edward Thornton's declaration does some injustice to himself and his colleagues.

IV.

Extract from the Pall Mall Gazette

February 2nd, 1872.

"Now if we look at all this fairly, and in due order, we shall see that it establishes the following points:

"1. That the American Commissioners did formally set forth a demand for indirect damages, and that they preferred it in the very language of the Case subsequently drawn up for the Court of Arbitration.

"2. That at the same time and in the same breath they offered to present no estimate of damage for indirect loss, in hope that an amicable settlement would be made for certain direct losses; this amicable settlement being explained (or explainable) as meaning the concession of an expression of regret, and that the Joint Commission should proceed to agree upon a lump sum to be paid in satisfaction of all the claims (meaning direct claims) with interest. Further that in this suggestion the withdrawal of claims for indirect loss was stated to be "without prejudice" to their revival.

"3. That the British Commissioners made no protest against the demands on account of indirect loss, nor in any way attempted to separate that class of claims from the other class, nor in any way manifested hostility to the presentation of those claims; but refusing to admit responsibility on account of all the claims without distinction, they offered, for the sake of maintaining friendly relations with the United States, to adopt the principle of arbitration in disposing of the claims.

"4. That the American Commissioners then, 'expressed their regret at this decision;' thereby showing or seeming to show that in their minds a distinct proposal had been considered and rejected. Having thus expressed regret, they consented to submit the question of our 'liability' to arbitration, on condition that certain Rules were drawn up and agreed to for the guidance of the Arbitrators. That after demur and reference to the British Government this condition was accepted. That accordingly Rules were drawn up by the American Commissioners (apparently), and that after some points had been referred by the British Commissioners to their Government, these Rules were agreed to as binding on the Court of Arbitration.

"Next, (though that does not appear in that we have quoted above) the Joint High Commissioners 'proceeded to consider the form of submission,' and the formation of a Tribunal.

"Subsequently, the apology, or expression of regret was asked for and conceded. And then at various sittings those articles of the Treaty were agreed to which refer to the settlement by Arbitration of 'all the said claims growing out of acts committed by the aforesaid (i.e. several) vessels, and generically known as the Alabama Claims.'

"It is of the utmost importance that in dealing with so critical a matter as this, we allow no prejudice nor any sense of wrong to operate in our minds unfairly; and

that we make no attempt to misread facts and statements upon which the other side can even plausibly rely. Therefore it is that we print this recital. It should be added, perhaps, that the statement above quoted was drawn up conjointly, and is signed by both parties.

V.

Extracts from the American Register.

Paris, Februa y 17, 1872.

The Continental press, with an unexampled unanimity sustains the American Government in its claim to bring before the Geneva Tribunal the dispute as to the construction of the Treaty of Washington.

Our readers will doubtless themselves separate this question from the further question of the probable result of the submission of those claims, in case the Tribunal should take jurisdiction of them.

We produce only a few of the many similar statements that we find from every quarter of Europe, except the Insular Kingdom :

—

" Neither in the course of the debates on the Joint High Commission, which sat for two months, nor in any of the clauses of the Treaty intended to define the mode of the proceedings and the functions of the Tribunal of Arbitration, as well as the principles, to guide it in its

decision, has England raised the least objection against any of the clauses of reclamations presented by the United States. She has rejected all, in the same way, without making any distinction, and has declared herself ready to refer to the decision of a Tribunal."—*Mémorial Diplomatique.*

—

"The fact is that the pretensions of America were perfectly well known. Mr. Gladstone, with his habitual want of foresight, counted upon luck to relieve him from the embarrassments in which the future might entangle him."—*Gazette de France.*

—

"We can say without separating ourselves from the truth, that there is no inconvenience in submitting the American claims for indirect damages to the Tribunal of Arbitration at Geneva. No one doubts that they are exaggerated in the American Case; but their introduction into pleadings is not contrary to the text of the Convention of Washington."—*Moniteur.*

—

"It is not, we hasten to say, that the calculations of the American authorities are not marked with a certain exaggeration; but the essential point to discover is whether the arrangements preparatory to the assembling of the Tribunal of Arbitration at Geneva exclude the question of indirect damages. We think that they do not exclude them."—*Soir.*

—

"The text of the Treaty is formal, and the protocols leave still less doubt than the Treaty, as to the understanding of the claims and the principle by the United States. The Tribunal will decide what claims are presentable and what are the questions to be discussed. The American Government demands neither more nor

less. It has stated its claims before the Court, and awaits the decision. England had better do the same. Her irritation is that of a bad pleader who doubts his own right and the impartiality of the Court."—*Journal de Paris.*

—

"It is evident that the actual state of the question does not so much concern the nature of the pretentions of the United States, as the refusal of England to submit to the Arbitrators *all* the complaints and *all* the claims, as the terms of the Treaty of Washington seem to require."—*Liberté.*

—

"It is our opinion, given with the utmost impartiality, that there are wrongs on both sides. The Government of the United States attempts to introduce into international law an unacceptable doctrine, that of making the costs of war obligatory upon the powers which are not responsible for it, and which are even the first victims of it in their interests. We understand very well that it is not necessary to take in earnest the pecuniary claims presented by the Americans for the prolongation of the war, for the increased rates of insurance, and other pretexts equally elastic and equally impossible to calculate, claims which exceed the amount we owe to a victorious foe. The Americans understand perfectly the value of these claims, and have not the slightest idea of pressing them. But, at the same time, they insist, and with a show of reason, upon their right to interpret the Treaty, and it must be acknowledged that the English Government has entered upon this affair with a degree of imprudence and of levity which may soon react upon it, and produce a change of Ministry."—*Journal des Débats.*

—

"Does this Treaty authorize the American Government to submit to the Tribunal at Geneva the claim for in-

demnity for indirect losses? The Americans say yes; the English say no. Impartial persons say that the clause in the Treaty does not exclude the American interpretation, and, therefore, they are of the opinion that the difference ought to be brought before the Tribunal. . . . The refusal of England to accept arbitration on all the American demands, implies a doubt in the justice of her cause, or in the impartiality of the Arbitrators."—*Constitutionnel.*

—

"The wisest course to adopt is to abide by the decision of the Geneva arbitration. It is disinterested in the matter, and it can thus re-establish harmony and peace between the parties better than the parties themselves."—*Indépendance Belge.*

—

"The stipulations of the Treaty leave no one to doubt that the American Commissioners expressly reserve the right to present such claims, although nothing was said about the amount of the claims, the decision in that respect being left to the Tribunal of Arbitration."—*Allgemeine Zeitung.*

—

"If this Tribunal is incompetent to decide without the advice of the newspapers whether or not the American demands are preposterous and absurd, then its appointment was a mistake. It is, however, not to be supposed that such one-sided and ill-timed arguments would exert any influence upon it."—*Basler Nachrichten.*

—

"The general opinion that the American demands were absurd has changed, and people are commencing to see that they are justified in the Treaty, and the storm is now turning against the British Commissioners."—*Basler Nachrichten.*

—

"The Treaty justifies in a formal manner the Tribunal at Geneva, in which, as we know, Switzerland is represented by Mr. Stampfli, in considering all the claims, of whatever kind, growing out of the acts of the cruisers. The question is only to know to what point the Tribunal will admit these claims, and if England will abide by its decision."—*Berner Helvétie.*

—

"The British cabinet led by national pride and governed by popular opinion, have changed their entire opinion of the question, and put matters in such a light, that all that remains for the Tribunal to do is to return home. The Washington Treaty expressly states in regard to the Tribunal that they settle *all* claims, and supports the American position. Why England acts thus we do not see. Probably she thinks the Tribunal is about to give judgment against her."—*Vienna Neue Freie Press.*

—

"England knew that demands were made not only for the acts of the vessels but also for indirect loss. One treaty, as she knew, had been rejected because it had no provision as to this. If the Joint Commissioners had meant to exclude these claims they might have used language clearly stating it, but on the contrary the language is such as to include them."—*Deutsch Amerikanischer Æconomist.*

—

"The general European tone is one of warning to England not to break the treaty. What if America has let the affair slumber until Russia declared itself ready. Cannot the people on the Thames see how strong the bonds between America and Russia must be when the insult to the Russian Minister not only has not broken but has not even loosened these ties. If this is behind the Alabama question, the Government at the Foreign Office must bestir itself."—*Neue Badische Lands-Zeitung.*

VI.

Extracts from the American Register.

Paris, February 24, 1872.

We continue our extracts from the articles of the Continental journals on this all engrossing subject. They seem to exercise a cooling influence on our English contemporaries, and therefore we think it due to them not to suspend the dose.

—

"The moment England admits the discussion before the Tribunal of Arbitration of the claims growing out of the acts of the Alabama and other corsairs, she recognizes the right of the United States to make, by reason of the acts of these corsairs, all possible demands of damages, direct or indirect. She authorises, in one word, the list of injuries, and the formidable account upon which the arbitrators will pronounce, but which it is difficult to avoid by the preliminary question."—*Le Soir*.

—

"This declaration of Mr. Gladstone, although contained in a letter of an entirely private character, addressed to the correspondent of the *New York World* in London,

deserves attention. It proves that the English Government has not formed the design of cutting short all discussion, and that they consider the subject as still open for debate.

"It is important that these intentions should be understood and thoroughly appreciated, and that, on both sides, men with moderate views may strive to effect a reconciliation so much desired. It appears that an effort in that direction has already been made in England. Thus a part of the press of that country, the *Pall Mall Gazette* for example, suggests the idea of referring to a new arbitration the disputed question of the interpretation of the Treaty. The *Mémorial Diplomatique* recalls in relation to this proposition, a precedent which it will be possible to invoke. It is that of a Treaty which has been executed, of June 15, 1846, growing out of the dispute between England and the United States, in regard to the frontiers of their respective possessions in the North-Western part of the New World. Now this Treaty contained, as does the Washington Treaty, a real mistake, and it is for that reason that, at this very moment, it is submitted to the arbitration of the Emperor of Germany. Could not as much be done for the convention of May 8, 1871, to determine what interpretation it ought to receive by means of a distinct arbitration."—*Journal des Débats.*

—

"Can any one to-day go ask the Tribunal to suspend its work until the extent of its jurisdiction shall be determined by a third party? Would it not find itself greatly prejudiced by such a decision intervening at so late a period? Finally, is it not fair to believe that the Tribunal is itself the best judge of the extent of its powers?

"These are considerations of a delicate nature, which the English Government ought carefully to weigh before making a decision which might perhaps alienate the Arbitrators, and which would, after all, only defer the solution of the matter without lessening its gravity.

"We persist in believing that the wisest policy and that most in conformity with the true interests of England, and of Europe, would be to let the affair take its course, to leave it entirely to the enlightened and impartial decision which the five eminent statesmen, who have been entrusted with the high mission of solving the dispute, will surely render."—*Mémorial Diplomatique.*

—

"Since it became known that the North American Cabinet had brought forward claims for indirect damages for the consideration of the Geneva Tribunal, a panic has arisen in England, and now they wish to have nothing further to do with this Tribunal. It cannot be shown that the United States have broken the Treaty. It may be said that the Union is shameless in her demands, and that her claims exceed proper bounds; but the wording of the Treaty does not prevent her in any manner from bringing forward claims for indirect as well as direct damages. Therefore the English statesmen have been able to find no escape except that of an appeal to their personal interpretation of the Treaty."—*Frankfurter Zeitung.*

—

"The demands of America were known to England from the first, and her representatives did not object. They contented themselves by indicating that England could not be held liable for damage done the United States by cruisers of the Confederate States, as proper diligence had been exercised to prevent their being armed and fitted out in English ports, and these representatives simply referred all the claims of North America, having the action of these cruisers for a basis, to a Tribunal of Arbitration. Article I of the Treaty of Washington distinctly declares: Now, 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 which are not admitted by Her Britannic Majesty's Government, 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."—*Der Bund.*

—

"One sees," continues the writer, "that the whole thing is aimed at the Tribunal more than at the other party, for the latter is willing to leave to the Tribunal of Arbitration the question of its own jurisdiction, while England denies its right to decide upon its own powers a question which every court of justice maintains as a preliminary. In England the right is assumed to withdraw from a Treaty as soon as it appears that there is a difference of opinion with regard to its construction. According to this, the Treaty must fall through, for to ensure its fulfilment, or the fulfilment of an eventual sentence of the Arbitrators, there is but the compulsion of national honor, or of war."—*Neue Zuriche Times.*

—

"The Washington Treaty plainly indicates that all the losses growing out of the acts committed by the aforesaid vessels are to be submitted to the Tribunal of Geneva, which will be called upon to prove whether England violated the rules prescribed by the Treaty for the government of Neutrals, and if so, what sum she must pay to the United States in compensation for the injuries inflicted. He demonstrates that the British-Case admits the submission of direct as well as indirect claims, and that it denies all liability, claiming that England fulfilled all its duties as a neutral, and that the idea of calling in question the submission of indirect claims to the Geneva Tribunal, only arose when, 'on the eve of the opening of Parliament the Tories assumed a threatening position, and the non-conformists began to hold indignation meetings.'"—*Vienna New Fremden Blatt.*

—

"Gladstone may assert a hundred times that the

grammar as well as the spirit of the Treaty admits but one meaning, and that of the English, he will not entice the Americans from their position. His countrymen, and the papers most devoted to him, must confess that the wording of the Treaty allows of the American as well as of the English interpretation, that the construction is vague, and loose. On the other side is the intention of the framers of the Treaty. Both must be considered. And appeal to the preamble and protocol is not sufficient to clear up the mistakes. A refreshing result may be obtained from this war of words. Long and tedious interchanges of despatches must be expected; perhaps, after all, the annulling of the Treaty with all the fair hopes attached to it. We shall hope that no war will grow out of it, however, in consequence of the still pending San Juan Boundary and Fishing questions." — *Vienna Neue Freie Press.*

—

"Our London Correspondent writes us: The Atlantic cable works merrily to bring us the utterances of the *New York Herald*, as to the Alabama quarrel, which has arisen with new power. The *New York Herald* sounds the war trumpet, some small followers second it; the more intelligent portion of the press, however, which preserves a moderate attitude, maintains not less the view that the American Government cannot withdraw her claims already presented, because it belongs to the Geneva Tribunal alone, and not to England, to decide upon their submission. The view of the press is, after all, as was well-known, that of the American Government, and thereby the fatal point of the situation is well indicated. Gladstone's expressed hope that his demonstration would convert the Americans to the English view, would hardly mislead any one. One may discuss the right or wrong on either side as one pleases, the one fact cannot be denied, that in the wording of the Washington Treaty the indirect claims of the American Government,

if not expressly agreed upon, are not expressly excluded. The Americans do not offend against the wording of the Treaty, therefore, whereas they submit them to the Tribunal of Arbitration. Whoever denies this assumes an untenable position, and in beginning this monstrous piece of awkwardness Gladstone has prepared not only for himself, but for England, many sad hours. He must hear to-day from his old admirers in Parliament and in the press the bitter truth, repeated on all sides, that the means he has selected for his own defence are the most unfortunate, the most untenable, and the most wanting in tact of all others. For through his assertion of the absolute clearness of the Treaty in every respect, he shuts the door against further friendly explanations; he tacitly accuses the American Government of having intentionally given a wrong meaning to something that was perfectly unequivocal, and thereby makes, in the highest degree, difficult any friendly yielding on the part of that Government. After he had ventured so far there remained for the Washington Government, which has also its own position to defend, only this answer: Will you, if every interpretation but yours is absolutely impossible, leave the decision in security with the Tribunal? Since you are so firmly convinced, you have nothing to risk by so doing.

And how could Gladstone reply? Either by a categorical No, which would expose him to ridicule, and must lead to the breaking off of all further negotiations; or by a Yes, in which case he would confess the truth of that which until now England has always declared to be untrue."—*Kolmischer Zeitung.*

VII.

Extracts from the American Register.

Paris, March 2nd, 1872.

We continue our extracts from the European journals on the great question of the day. Amongst them will be found several from the leading London journals, which show their construction of the Treaty before they had resolved to force their government to move for its abrogation or amendment.—

"From whatever point of view the subject be considered, there exists no justification for England to withdraw from the treaty concluded at Washington. Be the demands of America ever so extravagant, there is yet nothing in the treaty itself, and nothing in the general principles of international law to justify the withdrawal of the decision on those demands from the Tribunal of Arbitration. It would, in fact, be deeply to be regretted if the Geneva Court of Arbitration, the establishment of which is undoubtedly to be regarded as an essential progress in the life of international law, should not reach the normal development of its activity. We rather on this occasion give expression to the most earnest wish that this procedure may lead to a further development of international law."—*Neue Preussische Zeitung.*

"It must be acknowledged, on an impartial review of the dispute, that these demands, however extravagant they may be, are by no means new; and when Gladstone and Granville maintain that the protocols of the Commission show that only those losses directly derived from the capture of American ships were spoken of, everyone can convince himself from the protocols of the contrary. America had made these indirect claims not only in despatches and occasional declarations; the treaty of January 19, 1869, was, on Sumner's report, rejected, because it offered no assurance of indemnification for the indirect injury suffered by America through the cruisers. With these antecedents, the greatest caution was in any case prescribed to the English negotiations; but their instruction referred them in regard to the Alabama claims, almost solely to the diplomatic correspondence about them. . . . . But not a word in the instruction says that only direct claims shall be admitted to discussion, and just as little does the cited Treaty of 1869 contain anything about them; that treaty speaks of 'all claims, including the so-called Alabama Claims.' If we look at the protocols of the Joint High Commission, we find on the first page that the Americans enumerate in their fullest extent the claims now raised in the complaint, and then declare that in the hope of an amicable settlement, no estimate was made of indirect losses, without prejudice, however, to the right to indemnification on their account, in the event of no such settlement being made. As such a settlement they then propose to agree upon a sum in gross, which England shall pay with interest to America in satisfaction of all claims.

"The English Commissioners declined this proposal, because they could not admit that England had failed to discharge toward the United States the duties imposed on her by the rules of international law, and proposed the principle of Arbitration. With this refusal of the American proposal of an agreement on a sum in gross for all claims, the liberty was given back to the Americans which they had expressly reserved. The Americans

then on their side accepted the Court of Arbitration, on the condition that certain rules be given to it for the consideration of the facts to be brought forward. England yielded and the articles of the Treaty were adopted. In the first article, it is stated that 'the differences growingout of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama Claims,' shall be referred to a Tribunal of Arbitration.'"—*Hamburgisher Correspondent.*

—

"The safest, as well as the most dignified course, is therefore, to stand upon what we conceive to be sound, legal principles, and to demur to any such claims for in direct damage."—London *Times*, Jan. 2, 1872.

—

"What that full extent may be we are not expressly told; in fact, the computations of the United States Government itself have not yet reached the mighty sum. It is easy to see, however, that upon the principles put forward by the United States Government, the total might easily be carried to an amount as startling as that of the French indemnity. The American Government asks that a gross sum may be awarded it, and that to the amount thus given may be added interest at the rate of 7 per cent. from the 1st day of July, 1863. Happily claims such as these are no longer matter of controversy between England and the United States. Confident in our own rectitude, and in the substantial justice of our cause, we have consented to refer it to a tribunal so constituted as to secure the confidence of the world."—The London *Daily News*, Jan. 3, 1872.

—

"It may be that an agency is for the first time tried in Geneva, which will do much to arrest that class of wars, by no means co-extensive with all wars, which arrive from definite grievances, rather than from dynastic or

national passions. It may also be, that litigant nations, when they are unsuccessful, will refuse to submit to an authority which has no power to coerce them, and that an arbitration is no more than a useless postponement of recourse to older and more familiar methods of decision. The issue may well be awaited with the keenest interest and even anxiety; but there is no solid ground for the anticipations of disaster which have been abroad for the last day or two."—London ***Pall Mall Gazette***, Jan. 4.

—

"It is scarcely necessary to say that our liability would only extend to the direct consequences of our own acts. If, for example, it were held that it was through our fault that the Alabama went to sea, we would be justly held responsible for the depredations which she committed. But, there, in accordance with every principle, not only of international, but of municipal law, our liability should end. That the agent of the Government of the United States should contend, in the case he has presented, that we should also be responsible for the expenditure occasioned in the pursuit of the cruisers, for the loss by the transfer of the American commercial marine to the British flag, the increased rates of insurrance, and even for the prolongation of the war, is not surprising, since he speaks as an advocate. But no judges could, for an instant, entertain such claims."—London ***Morning Post***, Jan. 4, 1872.

—

"If they did so couch their demands we should not think of re-echoing the absurd alarms of some writers here at the exorbitant character of the new Alabama claim. It must be borne in mind that President Grant seeks re-election, and that it would be very unfortunate for him if his Sumnerite or other foes could say, with any appearance of truth, 'He has injured our case against the Britishers by not asking enough.' Therefore he has re-

solved to work the statesmanlike treaty in a popular way, and to cover the act of submitting the affair to arbitration by Yankee flourishes of the most extravagant kind. If it amuses his countrymen it may serve him; it certainly does not hurt us."—London *Telegraph*, January 6.

—

"What shall we do? Our first duty both to the United States and to ourselves is to demur to the consideration of the claim for indirect damages put forward in the case submitted by them; and to crave a decision upon our protest by the Tribunal of Arbitration before consenting to carry the reference to subsequent stages. We gave great confidence that our view would be approved, but, however painful it might be, we ought not to hesitate to retire altogether from the Case if the Tribunal did not hold itself free to reject the consideration of indirect claims."—London *Times*, January 29.

VIII.

Extract from the Journal des Débats.

Paris, June 6, 1872.

Les réclamations pour 'dommages indirects' que les Etats-Unis voulaient soumettre au Tribunal arbitral de Genève seront probablement écartées. Les Etats-Unis semblent avoir enfin cédé sur ce point important, et cependant, à considérer l'affaire au point de vue des principes du droit et en laissant de côté les grosses exagérations de leur Mémoire, ils soutenaient une thèse juste, ils étaient dans le vrai sous le rapport juridique. De quoi s'agit-il en effet? Quelle accusation élèvent-ils contre l'Angleterre? Ils l'accusent, en premier lieu, de n'avoir pas empêché ses armateurs de fournir aux confédérés des navires de guerre; en second lieu, d'avoir par malice ou négligence permis aux corsaires confédérés de se servir de ses ports et de ses eaux comme d'une base d'opérations ou de ravitaillement. Par le fait de ce manquement aux obligations de la neutralité, ajoutent-ils, qu'est-il arrivé? C'est d'abord que les confédérés ont armé un plus grand nombre de corsaires qu'ils n'auraient pu le faire si l'Angleterre avait

strictement observé ses obligations de puissance neutre; c'est ensuite que les corsaires confédérés, trouvant des refuges et des points de ravitaillement dans les ports et les eaux britanniques, ont pu multiplier leurs déprédations en raison de ce concours qui leur était indûment accordé. Or n'est-il pas juste que l'Angleterre soit rendue responsable des dommages causés aux intérêts américains par ces deux sortes de manquements à ses devoirs de neutre, en admettant, bien entendu, que les griefs formulés contre sa connivence ou sa négligence soient fondés?

Cette argumentation est irréprochable, et l'Angleterre l'a reconnu, tout en se défendant d'avoir failli à ses obligations dans les différents cas qui font l'objet des réclamations américaines; elle est tombée d'accord avec les Etats-Unis qu'elle pourrait leur devoir des dommages-intérêts, et elle s'est résignée à accepter sur ce point la décision d'un Tribunal d'arbitres dont la mission consistera : 1° à constater si l'Angleterre a manqué, dans la guerre de la Sécession, à ses obligations de puissance neutre, et dans quelle mesure; 2° à reconnaître et à évaluer les dommages causés par le fait de ce manquement et à fixer le chiffre du dédommagement. Seulement après s'en être remise entièrement au Tribunal pour résoudre la première question, l'Angleterre semble avoir craint de se mettre à sa discrétion pour la seconde; elle a imposé des limites à sa compétence, en établissant une distinction entre les 'dommages directs,' qu'elle reconnaît, et les 'dommages indirects' qu'elle ne reconnaît pas. Cette distinction est-elle fondée en droit ou en raison?

Consultons, à cet égard, les faits, et voyons ce qui ressort de l'examen et de l'analyse du cas en litige. Les corsaires confédérés ont donné la chasse aux navires de commerce américains; ils en ont capturé un certain nombre, confisquant ou détruisant vaisseaux et cargaisons. Voilà une première catégorie de dommages directs. Il y en a une seconde : 'Les États du Nord ont été obligés de surveiller et de poursuivre les corsaires du Sud; ils ont employé à cette destination une partie de leur flotte de guerre, d'où un double dommage consistant :

1° dans les frais occasionnés par la poursuite des corsaires; 2° dans la privation subie par les États-Unis d'une partie de leur flotte qui aurait pu leur rendre d'autres services. Est-ce tout....? Non. La seule annonce de l'apparition des corsaires du Sud a suffi pour créer un 'risque de guerre' qui est venu immédiatement s'ajouter aux risques maritimes ordinaires. Ce risque extraordinaire n'a pu être couvert que par une prime correspondante et dont le taux s'est élevé avec lui. On a donc vu s'établir une différence entre les primes d'assurance des navires et cargaisons américains et celle des neutres. Les armateurs et les négociants qui ont payé cette différence ou ce supplément de prime n'ont-ils pas subi un dommage aussi réel que ceux dont les navires et les marchandises ont été capturés? La perte a été, sans doute, infiniment moindre pour chacun; en revanche, cette perte ne s'est-elle pas multipliée par le nombre des navires composant la marine marchande américaine? Puis, qu'est-il arrivé? C'est que l'existence de ce risque particulier et l'obligation de le couvrir par une prime supplémentaire ont fait abandonner les navires américains pour les neutres: anglais, hollandais, danois, etc. Nouveau dommage auquel les armateurs américains n'ont pu se soustraire qu'en faisant passer d'une manière réelle ou fictive, mais en tous cas non sans frais, leurs navires sous pavillon étranger. D'un autre côté, n'est-il pas vraisemblable que les armements en course des États du Sud ont contribué, dans une certaine mesure, à la prolongation de la lutte, soit en affaiblissant les ressources des États du Nord, soit en soutenant le moral des confédérés; et n'en est-il pas résulté une augmentation des frais de la guerre? Voilà bien toute une série de dommages qui ont été engendrés par le fait de l'existence des corsaires du Sud. On peut les analyser et les grouper, appeler ceux-ci *directs*, ceux-là *indirects*, quoique ces deux caractères soient loin d'être toujours clairement marqués; mais on ne peut les séparer, on ne peut même les concevoir les uns sans les autres. Ils forment un ensemble naturel, et c'est par un triage tout à fait arbi-

traire, que l'Angleterre a reconnu les ' dommages directs,' et repoussé les ' dommages indirects.'

Dira-t-on que les dommages indirects, par leur étendue même comme aussi par leur caractère vague et incertain, échappent à une évaluation rigoureuse? Qu'il est impossible, par exemple, d'apprécier dans quelle mesure les armements en course des confédérés ont pu contribuer à la prolongation de la guerre? Cette objection est assurément des mieux fondées; mais quoi! appartient-il bien aux parties en cause de trancher la difficulté qu'elle soulève? N'est-ce point l'affaire du Tribunal de décider non-seulement ce qui lui semble légitime ou illégitime dans les réclamations portées devant lui, mais encore ce qui lui paraît échapper à la possibilité d'une évaluation? N'est-ce pas empiéter sur sa compétence et ses attributions que de limiter d'avance son verdict? Sied-il bien surtout à la partie inculpée de lui dire : ' Voici un dommage que l'on m'accuse d'avoir causé et pour lequel j'invoque votre arbitrage, mais je n'entends point vous accorder le droit de le reconnaître et de l'apprécier dans toute son étendue réelle, car je n'ai qu'une foi limitée dans la rectitude de votre jugement : je crains que vous ne sachiez pas discerner ce qu'il y a de faux ou d'exagéré dans les reclamations qui sont portées devant vous, et je ne veux pas m'exposer sans réserves aux conséquences d'un verdict qui me condamnerait, ou, si vous l'aimez mieux, je ne me soucie pas de réparer tout le dommage que j'ai causé.'

Tel est pourtant l'attitude que l'Angleterre a prise dans cette affaire. D'accord avec les Etats-Unis, elle convoque un Tribunal d'arbitres, puis aussitôt voici qu'après avoir pris connaissance du Mémoire de la partie adverse, la tête lui tourne, elle prend peur, elle établit des distinctions entre les grosses réclamations et les petites, admettant la compétence des arbitres pour celles ci, la rejetant pour celles-ci, comme si elle se défiait du tribunal, comme si elle craignait qu'il ne se laissât influencer par les arguments américains, au point de la condamner à quelque dédommagement formidable, ou simplement

comme s'il elle craignait qu'il ne l'obligeât à payer *tout* ce qu'elle pourrait devoir pour avoir manqué à ses obligations de puissance neutre. Cette défiance est assurément peu flatteuse pour le tribunal, et on peut douter qu'elle le dispose favorablement à l'égard de l'Angleterre, en admettant même qu'il consente à rendre un jugement dans les limites étroites et arbitraires qui lui sont assignées.

IX.

Extract from "La Question de l'Alabama et le Droit des Gens," by M. Pradier-Fodéré.

Le texte du traité n'a point distingué entre les réclamations ; il les a toutes soumises au tribunal arbitral, pour être *réglées*. Ni dans le cours des débats de la Haute Commission mixte, qui siégea pendant deux mois, ni dans aucune des clauses du traité, destiné à fixer la procédure et les attributions du tribunal arbitral, ainsi que les principes qui doivent le guider dans son jugement, l'Angleterre n'a pas élevé la moindre objection sur l'une quelconque des catégories de réclamations présentées par les États-Unis ; elle les a toutes repoussées au même titre, sans faire de distinction, et ce n'est que plus tard, en présence des prétentions des Etats-Unis, qu'elle a fait ses réserves sur la nature de certaines réclamations déterminées, en ne contestant pas la compétence des arbitres pour les autres.

Or, les négociateurs anglais du traité de Washington devaient s'attendre à ce que la prétention relative aux dommages indirects pourrait se produire. Ils savaient qu'un premier traité avait déjà été préparé et conclu, il y a quelques années entre les deux gouvernements, pour

le règlement des réclamations, et que le Sénat de l'Union avait rejeté ce traité, précisément parce qu'on ne pouvait y faire entrer les réclamations pour dommages indirects.

Ils étaient donc avertis. Comment expliquer leur silence à cet égard pendant la négociation du second traité? Pourquoi cette mention si générale, si élastique, de ' toutes les plaintes,' de ' toutes les réclamations,' lorsqu'ils pouvaient insérer dans le traité une clause spéciale excluant formellement les dommages indirects? Uniquement préoccupés de faire valoir l'idée que l'Angleterre n'avait point violé les devoirs de la neutralité, ils ont négligé de spécifier les réclamations sur lesquelles les arbitres auront à se prononcer. Ils les ont *toutes* comprises dans la compétence du tribunal arbitral, et maintenant qu'il est possible de pressentir l'éventualité d'une condamnation à une réparation pécuniaire, le gouvernement de la Reine et la nation anglaise viennent dire : ' Nous n'avons entendu déférer aux arbitres que la question des dommages directs!'

. . . . . .

A nos yeux, l'affaire internationale qui préoccupe si vivement aujourd'hui les deux mondes n'est nullement compliquée, pourvu qu'on l'isole de la politique et qu'on la maintienne dans son domaine naturel : le droit des Gens.

Il n'y a pas de contestation sur les dommages causés aux États-Unis par les corsaires sudistes, dont la fuite hors des ports anglais a été regrettée par Sa Majesté Britannique. Il n'y a guère plus de controverse sur la responsabilité que cette fuite et ces déprédations ont fait peser sur la Grande-Bretagne. Les Anglais, du reste, sont disposés à régler le différend des dommages directs.

Que reste-t-il donc?

Un tribunal d'arbitrage institué par un traité conclu dans un esprit amical, et dont la conclusion a été saluée, dans le principe, par les applaudissements de la nation anglaise;

Un exposé des États-Unis demandeurs, qui est essentiellement une pièce de procédure;

"Un débat ouvert, dans lequel l'Angleterre pourra faire valoir ses moyens de défense, et repousser des conclusions qui seraient manifestement contraires au droit, à la justice et à la raison.

" Les arbitres, enfin, dont on ne pourrait suspecter l'impartialité, sans commettre une grave offense contre leur personne et les gouvernements qui les ont choisis.

" Il reste quelque chose de plus encore: l'obligation pour les États qui veulent tracer un sillon profond dans le champ de la civilisation, de respecter les traités.

" A propos du conflit anglo-américain, on a parlé de la force primant le droit; mais il y a une iniquité internationale non moins funeste: c'est l'infidélité se jouant de la foi jurée. Pour les États, comme pour les particuliers, tout se tient en fait de moralité. L'oubli de la parole engagée conduit à la violence. Les peuples commencent par éluder leurs engagements et finissent par opprimer les faibles."

X.

"*Quelques mots sur la phase nouvelle du différend Anglo-Américain,*" *by G. Rolin-Jacquemyns.*

"Le traité rend la commission compétente pour statuer sur les *Alabama Claims*. Toute la question est donc de savoir si ces conclusions sont, en tout ou en partie, étrangères aux *Alabama Claims*. Or nos lecteurs auront déjà fait le rapprochement entre les conclusions et la déclaration faite par les commissaires américains au début de la conférence du 8 mars. Non-seulement l'esprit, mais le texte en est *identique*... Dans l'une, comme dans l'autre, les cinq points sont formulés et dans le même ordre! La déclaration de retrait *conditionnel* des demandes pour dommages indirects n'est faite que pour le cas où, l'Angleterre aurait accepté le paiement d'emblée de la somme demandée pour dommages directs. M. Gladstone a, nous l'avons vu, prétendu le contraire.... mais nous croyons que c'est à tort. En effet:

"*A*. Il résulte de la lecture du procès-verbal que les termes (amicables settlement) [1] ne s'appliquent qu'au

[1] "That in the hope of an amicable settlement, no estimate was made of the indirect losses, without prejudice, however, to the right of indemnification on their account in the event of no such settlement being made."

règlement immédiat sans arbitrage. Partout ailleurs il ne s'agit que de settlement, et le traité lui-même ne parle que de *speedy-settlement* (prompt règlement).

"*B.* Le regret exprimé par les commissaires américains du rejet de leur première proposition confirme cette manière de voir :

"*C.* Lorsque dans une négociation une des parties abandonne ses prétentions, c'est généralement contre la reconnaissance formelle de celle qu'elle n'abandonne pas. Sous ce rapport il était naturel que les commissaires américains fussent prêts à renoncer aux dommages indirects comme prix d'un engagement *certain* de payer les dommages directs. Mais il ne l'est plus qu'ils fassent cette renonciation lorsque tout est remis en question par la nomination d'arbitres. Il y aurait là une concession sans réciprocité, un effet sans cause, qui, en l'absence même de toute réserve, ne peut se présumer.

"Nous devons admettre, d'après ce qui précède, que, à en juger par les documents officiels et publics, le Mémoire américain ne soumet aux arbitres aucune prétention qui ne soit de leur compétence, c'est-à-dire qui ne soit dans les termes du compromis. Encore une fois, quelques-unes de ces prétentions peuvent dépasser la mesure commandée par la justice et le bon sens, elles peuvent être en elles-mêmes des actes désobligeants pour l'Angleterre, et constituer une déception pour les négociateurs que cette puissance a envoyés. Mais les arbitres n'ont à consulter que les termes du traité, éclairés, en cas d'obscurité, par les actes qui y sont relatifs. Or le traité ne stipule qu'une chose en matière de compétence, c'est qu'il s'agira d'Alabama claims et il ne stipule pas, ce qui eût été absurde, que ces claims seront raisonnables. Car c'est précisément la question de savoir s'ils sont raisonnables qui est déférée aux arbitres."

XI.

Extract from "gli Arbitrari Internazionali, ed il Trattato di Washington," by Auguste Pierantoni.

"Il Trattato contempla il caso, che tutti i reclami possano essere ammessi, poichè con l'articolo VII, stabilisce che il Tribunale potrà se lo troverà conveniente decretare una somma da pagarsi dall' Inghilterra per tutti i reclami indirizzati.

"Il Trattato considera il caso, in cui alcuni reclami potrebbero per la loro dubbiezza impedire questo modo sommario di decisione, poichè l'art X, stabilisce che, se il Tribunale non decreterà una somma, una volta tanto, si nomini un ufficio di assessori per verificare quali sono i reclami valevoli.

. . . . . .

"I contraenti perciò stipularono reciprocità ed eguaglianza di diritti: all' America il diritto di presentare tutti i reclami, all' Inghilterra la latitudine di respingerli tutti e subordinamente di restringere la misura dei danni.

"Infine le due potenze convennero, mediante l'articolo XI, di considerare le decisioni del Tribunale "come un re-

golamento completo finale, assoluto di tutti i reclami sopra menzionati."

"Il principio di ermencutica legale che tutte le clausole delle convenzioni s'interpretano le une con le altre, dando a ciascuna il senso che risulta dall' altra riconferma la pienezza della volontà delle parti a deferire ai giudici ogni specie di reclamo, indipendentemente dalla loro relativa giustizia, la quale è quistione di merito, che spetta agli arbitri di decidere.

"Ma se i termini del trattato fossero oscuri, sarebbe opportuno di risalire ai motivi della convenzione.

"E volentieri procederò, benanche a tale novella indagine, poichè la è tanto valorosa da dileguare ogni altra possibile obbiezone. Il protocollo riferito nella prima parte del mio scritto avverte che i commissari americani esposero in termini esattissimi tutti i capi dei loro reclami. Essi parlarono di numerose perdite dirette (extensive direct losses) e danni indiretti (indirect injury) risultanti dal passaggio sotto bandiera britannica di una grande parte della marina mercantile americana, dell' aumento dei prezzi d'assicurazione, del prolongamento della guerra e dell' aggiunta di una somma considerevole alle spese occorse per la guerra e per la soppressione della ribellione.

"E questi medesimi capi invariabilmente furono ripetuti nella memoria presentata al Tribunale.

"L'Inghilterra però per la voce di alcuni uomini di Stato e per i clamori della suu reputatissima stampa crede di poter sostenere che una esplicita rinunzia dei danni derivati dalla protatta guerra sia stata fatta nella discussione del trattatto. Che vi ha di essato in questa allegazione?

"Reca il processo verbale che i Commissarii proposero pure che l'altra Commissione s'intendesse interno una somma da pagarsi dalla Gran Bretagna agli Stati Uniti in una volta per tutti i reclami principali ed interessi. Mediante questo regolamento avrebbero rinunziato ai loro reclami per danni indiretti; e dichiararono non esservi pregiudizio tuttavia pel dritto di reclamare pei danni

indiretti, se alcun regolamento di tal genere non fosse conchiuso.

" E certo che se l'Inghilterra avesse allora accettato un regolamento immediato ed il pagamento di una somma fissa non soltanto sarebbe mancato l'oggetto a' reclami, ma l'istesso oggetto de Trattato. Invece i Commissarii inglesi contestarono in genere tute le pretese degli Stati Uniti, si ricusarono al regolamento proposto ed offrirono soltanto di sottomettersi ad un arbitrato, purchè si trovasse un arbitro conveniente e che si convenissero i punti, ai quali l'arbitrato si applicherebbe...

" E gli agenti americani risposero esponendo il loro dolore che fosse andato a monte la proposta di una somma, l'arbitrato non essendo il regolamento amichevole (the amicable settlement) in considerazione del quale avrebbero rinunziato alle loro domande di danni interessi.

" Risulta inoltre dalla lettura del processo verbale che le espressioni amicable settlement furono adoperate per la richiesta di una liquidazione immediata senza arbitrato, e che negli altri luoghi in cui si parlo di accomodamento sotto altre forme si usò la semplice parole settlement o *speedy settlement* (pronta liquidazione). Espressioni, che hanno diverso valore, e che non permettono di dire, come vorebbe sostenere l'Inghilterra, che l'arbitra presente sia lo stesso settlement, di cui fu prima discorso dall' America.

. . . . .

" I commissarii inglesi non dovettero essere sorpresi dagli Americani, poichè eglino sapevano che si potosse elevar pretesa dei danni indiretti.

" L'alta Commissione si riunì à Washington, soltanto perchè non era stato ratificata dal Senato dell' Unione la precedente convenzione. E tra le ragioni del rigetto della medesima non ultima fù quella che non vi erano compresi i reclami indiretti. Se dunque i negoziatori inglesi erano avvertiti, perchè tacquero ? Perchè a fronte delle esplicite riserve e condizioni degli agenti degli Stati

Uniti non usarono alcuna espressione, che significar potesse varietà di pensiero, dimente?

. . . . . .

"L'Inghilterra perciò non può trarre ulcun argomento in favore dal fatto che i Commissarii americani proposero di esser dispoti a rinunziare ai danni indiretti, se amichevolmente e con somma fissa, immediatamente allora si fosse dato fine alla controversia.

"Se pure i Commissarii americani non ne avessero fatto speciale riserva, il loro diritto di presentare la istanza al Tribunale arbitrale di Ginevra per i danni indiretti non sarebbe pregiudicato. Spetta poi al Tribunale di esaminare la giustizia ed il fondamento, cosi di questi, come degli altri danni; ma niun limite alla proposta di domande scaturisce dalla lettera e dalla ragione del Trattato."

. . . . . .

XII.

From the New York Herald,

March 23, 1872

The opinion which seems at present to obtain to some extent in Great Britain, that the submission of what are called the claims for indirect losses are not within the province of the Tribunal of Arbitration, has been reached by a very slow process. The 'Case' of the American Government was officially delivered to the Agent of the British Government at Geneva, in pursuance of the terms of the Treaty, on the 15th day of December last. A dozen or more copies were delivered by General Schenck to the Foreign Office in London, on the 20th day of December, and an additional number within a very few days thereafter; and the leading press in London were furnished with copies about the same time. Copies were freely distributed to those who desired them as soon as they had been given to the Foreign Office. The Case was

therefore in the possession of the British Government on the 15th of December, and fairly before the British public by the 25th or 26th day of December.

It is believed that the first comment on our Case was made in the *Morning Post*, of December 28th. Attention was called to these claims and to their possible magnitude, and the writer closed by saying: 'The extravagant nature of these demands is the best evidence that the Arbitrators, a majority of whom are to make the award, which is to be final, will refuse to entertain them. But that they should be made, when their rejection is certain, is not a pleasant circumstance.' Not one word about the presentation being an infraction of the Treaty. On the contrary, England was to be protected by the rejection of the claim because they were extravagant.

On the 2nd of January the *Times* opened fire. It said: 'The safest, as well as the most dignified course, is, therefore, to stand upon what we conceive to be sound legal principles, and to demur to any such claim for indirect damages . . . . It is fair to notice that they [the rules of the Treaty] are *ex post facto* law . . . and to remember also, that in past wars, when the United States were neutral, their Government is admitted to have acted quite at variance with the loosest construction of such rules. . . . . The very vagueness of these demands, and the impossibility of estimating the damage and apportioning the compensation, show their unsoundness.'

Still not a word denying the right to present the claims. They were to be demurred to, not because they were not within the scope of the Treaty, but because they were vague and impossible to estimate.

The next day the *Daily News* took up the story. It said: 'We have here to do with demands that are capable of boundless expansion . . . . What that full extent may be we are not expressly told; in fact, the computations of the United States Government have not yet reached the mighty sum. . . . . Happily claims such as

these are no longer matter of controversy between England and the United States. Confident in our own rectitude, and in the substantial justice of our cause, we have consented to refer it to a tribunal so constituted as to insure the confidence of the world. We shall not anticipate its decision, but we shall be quite ready to accept its justice.'

It will be observed that this journal, which has been the most rabid in its counsels to break the Treaty, unless the United States will withdraw its case without discussion, in its issue, nearly three weeks after the meeting at Geneva, and a fortnight after General Schenck had begun distributing the Case in London, to whoever wanted it, was of the opinion that the Arbitrators were to pass over these claims.

On the 4th of January, the *Morning Post* was of the same opinion. That the Agent of the Government of the United States, it said, 'should contend, in the case he has presented, that we should also be responsible . . . . even for the prolongation of the war, is not surprising, since he speaks as an advocate. But no judge could for an instant entertain such claims.'

The *Standard* of the same day says, commenting on our case: 'No demand has been advanced for indirect or constructive damages, largely as these have been insisted upon in the argument with which the American representatives have opened their pleadings. . . . The verdict of the Court upon such an issue as that, we shall not attempt to anticipate'

On the same day the *Pall Mall Gazette* gave its view on our Case, which the writer had evidently read. 'The Treaty of Washington would have been almost certainly rejected by the Senate, if it had excluded the Americans from stating their grievances by way of forensic argument as strongly as they had done in diplomatic communication. The real question is whether the Treaty, which is undoubtedly on its trial, has proved a means of

applying to these passionate statements, now seven years old, the criterion of detailed inquiry, settled law and sober reason. . . . The issue may well be awaited with the keenest interest and even anxiety; but there is no solid ground for the anticipations of disaster which have been abroad for a day or two.'

The *Morning Post* and the *Standard* of the 5th, and the *Telegraph* and the *Spectator* of the 6th, each had an article on the subject, showing that the several writers had read our Case, and understood the claim for indirect damages. In none of them is there any evidence of a design to contest our right to present such a claim. The *Spectator*, on the contrary, says that 'the wording of the Treaty does not expressly exclude such demands;' and the *Telegraph* says, he (the President) 'has resolved to work the statesmanlike Treaty in a popular way, and to cover the act of submitting the affair to arbitration by Yankee flourishes of the most extravagant kind.' If it amuses his countrymen, it may save him; it certainly does not hurt us.

To the bilious *Saturday Review* belongs the credit of having invented a plausible way for England to do a dishonorable and a disgraceful act. In its issue of the 6th of January, it says: 'The Treaty was drawn with culpable laxity, but it cannot be strained into an interpretation consistent with American demands. The English agents would have no choice but to withdraw from the arbitration in the improbable event of a consideration by the Tribunal of the claim on account of the imaginary prolongation of the war.' It will be seen that even this unscrupulous writer had not then imagined that the Tribunal itself could not take cognizance of the preliminary question of jurisdiction.

To the honor of the English press it may be said that it was some time in reaching the stand-point of the *Saturday Review*. During the following week the *Times* had articles nearly every day, none of which showed a purpose of removing the subject from the jurisdiction of the Geneva Tribunal. The *Spectator* of the following

Saturday (the 13th) returned to the subject. It could scarcely find language strong enough to express its objection to the claims, but, it added, 'the jurists assembled at Geneva will certainly not forget the tendency of such absurd claims to render international arbitration of this kind altogether hopeless and inoperative in future.' Still, England was to be protected at Geneva, not by her own act.

The *Spectator* of the 20th had another long article entitled, 'The Appearance of Sharp Practice in the American Case,' in which, with the expression of much ill temper, it attempted to show that by a proper construction of the treaty consequential damages ought not to be allowed at Geneva; but it had not then made up its mind that this was a question for Great Britain to determine rather than the Arbitrators.

During the following week the excitement continued to increase in England as the opening of Parliament approached; but it does not appear that the press was even then seriously considering the forcing the ministers to act in the direction of taking the question out of the jurisdiction of the Tribunal.

On the 28th of January (Sunday) the *Observer*, usually a careful journal, said: 'It is better we should say openly and distinctly that we hold ourselves responsible for the direct damages caused by certain particular vessels, but we repudiate all pecuniary liability for the indirect consequences of our national policy.'

The cue thus given was taken up by the press with great unanimity, and has become substantially the position of England.

It will thus be observed that the press, with the exception of an angry diatribe in the *Saturday Review*, was seven weeks and two days in finding out that the claims for indirect damages were not admissible; and it was six days later that Lord Granville and the Ministry, with the fear of Mr. Disraeli before them, following in the

wake of an excited press, wrote their note to General Schenck. It was some days later still that Mr. Gladstone, again goaded by Mr. Disraeli, made the speech which required two explanations on two successive nights on the floor of the House, to say nothing of a subsequent letter to the correspondent of a New York journal.

Printed by DUBUISSON and CO., No. 5, Rue Coq-Héron, Paris.