ARGUMENT OF MR. EVARTS, ONE OF THE COUNSEL OF THE UNITED STATES

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VARIOUS

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OF

MR. EVARTS,

ONE OF THE COUNSEL OF THE UNITED STATES,

ADDRESSED TO THE

TRIBUNAL OF ARBITRATION AT GENEVA

ON THE 5TH AND 6TH AUGUST, 1872,

IN REPLY TO

THE SPECIAL ARGUMENT OF THE COUNSEL

OF HER BRITANNIC MAJESTY.

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ARGUMENT OF MR. EVARTS.

named by the Tribunal, it has been a matter of some embarrassment to determine exactly how far this discussion on our part might properly go. In one sense, our deliberate judgment is, that this new discussion has really added but little to the views or the Argument which had already been presented on behalf of the British Government, and that it has not disturbed the positions which had been insisted upon, on the part of the United States, in answer to the previous discussions on the part of the British Government, contained in its Case, Counter-Case, and Argument.

But to have treated the matter in this way, and left our previous Argument to be itself such an answer as we were satisfied to rely upon to the new developments of contrary views that were presented in this special argument of the British Government, would have seemed to assume too confidently in favour of our Argument, that it was an adequate response in itself, and would have been not altogether respectful to the very able, very comprehensive, and very thorough criticism upon the main points of that Argument, which the eminent Counsel of Her Majesty has now presented. Nevertheless, it seems quite foreign from our duty, and quite unnecessary for any great service to the Tribunal, to pursue in detail every point and suggestion, however pertinent and however skilfully applied, that is raised in this new argument of the eminent Counsel. We shall endeavour, therefore, to present such views as seem to us useful and valuable, and as tend in their

general bearing to dispose of the difficulties and counter propositions opposed to our views in the learned Counsel's present criticism upon them.

The American Argument, presented on the 15th of June, as bearing upon these three points now under discussion, had distributed the subject under the general heads of the measure of international duties; of the means which Great Britain possessed for the performance of those duties; of the true scope and meaning of the phrase "due diligence," as used in the Treaty; of the particular application of the duties of the Treaty to the case of cruisers on their subsequent visits to British ports; and, then, of the faults, or failures, or shortcomings of Great Britain in its actual conduct of the transactions under review, in reference to these measures of duty, and this exaction of due diligence.

The special topic now raised for discussion, in the matter of "due diligence" generally considered, has been regarded by the Counsel of the British Government as involving a consideration, not only of the measure of diligence required for the discharge of ascertained duties, but also the discussion of what the measure of those duties was; and, then, of the exaction of due diligence as applicable to the different instances or occasions for the discharge of that duty, which the actual transactions in controversy between the parties disclosed. That treatment of the points is, of course, suitable enough if, in the judgment of the learned Counsel, necessary for properly meeting the question specifically under considera-

tion, because all those elements do bear upon the question of "due diligence" as relative to the time, and place, and circumstances that called for its exercise. Nevertheless, the general question, thus largely construed, is really equivalent to the main controversy submitted to the disposition of this Tribunal by the Treaty, to wit, whether the required due diligence has been applied in the actual conduct of affairs by Great Britain to the different situations for and in which it was exacted.

The reach and effort of this special argument in behalf of the British Government, seem to us to aim at the reduction of the duties incumbent on Great Britain, the reduction of the obligation to perform those duties, in its source and in its authority, and to the calling back of the cause to the position assumed and insisted upon in the previous Argument in behalf of the British Government, that this was a matter, not of international duty, and not of international obligation, and not to be judged of in the court of nations as a duty due by one nation, Great Britain, to another nation, the United States, but only as a question of its duty to itself, in the maintenance of its neutrality, and to its own laws and its own people, in exerting the means placed at the service of the Government by the Foreign Enlistment Act for controlling any efforts against the peace and dignity of the nation.

We had supposed, and have so in our Argument insisted, that all that long debate was concluded by what had been settled by definitive convention

between the two nations as the law of this Tribunal, upon which the conduct and duty of Great Britain, and the claims and rights of the United States, were to be adjudged, and had been distinctly expressed, and authoritatively and finally established, in the Three Rules of the Treaty.

Before undertaking to meet the more particular inquiries that are to be disposed of in this argument, it is proper that, at the outset, we should take notice of an attempt to disparage the efficacy of those Rules, the source of their authority, and the nature of their obligation upon Great Britain. The first five sections of the special argument are devoted to this consideration. It is said that the only way that these Rules come to be important in passing judgment upon the conduct of Great Britain, in the matter of the claims of the United States, is by the consent of Her Majesty that, in deciding the questions between the two countries arising out of these claims, the Arbitrators should assume that, during the course of these transactions, Her Majesty's Government had undertaken to act upon the principles set forth in these Rules and in them announced. That requires, it is said, as a principal consideration, that the Tribunal should determine what the law of nations on these subjects would have been if these Rules had not been thus adopted. Then it is argued that, as to the propositions of duty covered by the *first* Rule, the law of nations did not impose them, and that the obligation of Great Britain, therefore, in respect to the performance of the duties assigned in *that* Rule, was not

derived from the law of nations, was not, therefore, a duty between it and the United States, nor a duty the breach of which called for the resentments or the indemnities that belong to a violation of the law of nations. Then, it is argued that the whole duty and responsibility and obligation in that regard, on the part of Great Britain, arose under the provisions of its domestic legislation, under the provisions of the Foreign Enlistment Act, under a general obligation by which a nation, having assigned a rule of conduct for itself, is amenable for its proper and equal performance as between and towards the two belligerents. Then, it is argued that this assent of the British Government, that the Tribunal shall regard that Government as held to the performance of the duties assigned in those Rules, in so far as those Rules were not of antecedent obligation in the law of nations, is not a consent that Great Britain shall be held under an international obligation to perform the Rules in that regard, but simply as an agreement that they had undertaken to discharge, as a municipal obligation, under the provisions of their Foreign Enlistment Act, duties which were equivalent, in their construction of the act, to what is now assigned as an international duty; and this argument thus concludes:

"When, therefore, Her Majesty's Government, by the VIth Article of the Treaty of Washington, agreed that the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the Three Rules (though de-