

Great Britain is cited, I must protest against the question being determined not according to 'existing positive law,' but to the opinion of *savans* as to what the law should have been, or should now be made."

Passing over other portions of the argument of the English arbitrator, which are of minor importance and of little or no interest from a legal point of view, we come to that part wherein he defines and explains what constitutes "due diligence." This was the important, the only question of law, under the Treaty, coming within the province of the Geneva Court. It is also a point of deep interest in private jurisprudence; and this consideration, combined with the general attention which the award has attracted throughout the Dominion, has induced the writer to publish the opinions of all the arbitrators on the point.

D. GIROUARD.

Montreal, December 1st, 1872.

"DUE DILIGENCE."

Sir ALEXANDER COCKBURN:—

"I proceed then to consider what is this 'due diligence' which the British Government admits that it was bound to apply to prevent the fitting-out and equipping of the vessels in question. I apprehend that such diligence would be neither greater nor less than any other neutral Government would be bound to apply to the preventing of any breach by its subjects of any head of neutral duty prescribed by International Law. The difficulty of the position is, that the question has not hitherto come within the range of juridical discussion on subjects connected with International Law. Hitherto, where a Government has acted in good faith, availing itself fairly of such means as were at its disposal, it has not been usual to consider it responsible to a belligerent Government for acts of its subjects that might have eluded its vigilance, or to submit the degree of diligence exercised by it to judicial appreciation. And no country has insisted more strongly on this as the limit of national responsibility than that of the United States. We must endeavour to find a solution for ourselves. As I have already observed, I cannot agree that the question of what is 'due diligence' should be left to the unassisted mind of each individual Arbitrator; nor can I agree that the solution is to be found in the facts of each individual Case; and though Judges may be often disposed to apply the maxim, to which our honourable president has more than once referred, *ex facto jus oritur*, it is, I think, one which must not be pushed too far. I agree with M. Troplong, who, writing on this subject with reference to civil law, after referring to the different opinions of jurists on the subject of diligence, says:—