Mr. Evarts.—This executive interception carries no confiscation. It merely detains the vessel, and the owner can apply for its release, giving an explanation of the matter. But the Executive may say, "I am not satisfied with your explanation; if you have nothing else to say, I will keep your vessel;" or he may send it to the Courts to enforce its confiscation.

Sir Alexander Cockburn.—Which does he practically do?

Mr. Evarts.—He practically, when not satisfied to release it, usually sends it to the Court, because the situation admits of that disposition of it. Under the Act of the United States, there is the same actual interception by the Executive which your Act of 1870——

Sir Alexander Cockburn.—Under our Act the Executive has no discretion; it must send it to the Courts.

Mr. Evarts.—Under our Act, we trust the Executive for a proper exercise of the official authority entrusted to him.

In the American Case, some instances of the exercise of this power on a very considerable scale, will be found (page 126 of the French translation). The documents explaining these transactions are collected at length in the Appendix to the American Counter-Case.

Sections 38 to 41 of the special Argument call in question our position as to *onus probandi*. It is said, that we improperly undertake to shift, generally, the burden of proof, and require Great Britain to discharge itself from liability by affirmative proof, in all cases where we charge that the act done is within the obligation of the three Rules. This criticism is enforced by reference to a case arising in the public action of the United States under the Treaty of 1794 with Great Britain.

I will spend but few words here. The propositions of our Argument are easily understood upon that point. They come to this: that, whenever the United States, by its proofs, have brought the case in hand to this stage, that the acts which are complained of, the action and the result which have arisen from it, are violations of the requirements of the law of nations, as laid down in the three Rules, and this action has taken place within the jurisdiction of Great Britain (so that the principal fact of accountability within the nation is established), *then*, on the ordinary principle that the affirmative is to be taken up by that party which needs its exercise, the proof of "due diligence" is to be supplied by Great Britain. How is a foreigner, outside of the Government, uninformed of its conduct, having no access to its deliberations or the movements of the Government, to supply the proof of the *want* of due diligence? We repose, then, upon the ordinary principles of forensic and judicial reasoning. When the act complained of is at the fault of the *nation*, having been done within its jurisdiction, and is a violation of the law of nations, for which there is an acountability provided by these three Rules, the point of determination whether due diligence has been exercised by the authorities of the country to prevent it, or it has happened in spite of the exercise of due diligence—the burden of the proof of "due diligence" is upon the party charged with its exercise.

Let us look at the case of the Elizabeth, which is quoted in section 41. It is a long quotation, and I will read therefore, only the concluding part. It will be found on page 50 of the French translation of the special Argument. The question was as to the burden of proof under the obligation that had been assumed by the United States:—

> "The promise was conditional. We will restore in all those cases of complaint where it shall be established by sufficient testimony that the facts are true which form the basis of our promise—that is, that the property claimed belongs to British subjects; that it was taken either within the line of jurisdictional protection, or, if on the high seas, then by some vessel illegally armed in our ports; and that the property so taken has been brought within our ports. By whom were these facts to be proved? According to every principle of reason, justice, or equity, it belongs to him who claims the benefit of a promise to prove that he is the person in whose favour, or under the circumstances in which, the promise was intended to operate."

A careful perusal of this passage is sufficient to show that the *facts* here insisted upon, as necessary to be proved by the claimant, are precisely equivalent to the facts which the United States are called upon to prove in this case. These facts, as I have before stated, bring the circumstances of the claim to the point where it appears that the responsibility for the injury rests upon Great Britain, *unless* due diligence was used by the Government to prevent the mischievous conduct of the subjects or residents of that kingdom which has produced the injuries complained of. In the absence of this due diligence on the part of that Government, the apparent responsibility rests undisturbed by the exculpation which the presence of due diligence will furnish. The party needing the benefit of this proof, upon every principle of sound reason, must furnish it. This is all we have insisted upon in the matter of the burden of proof.