Of Good Report[1]

I must begin with two confessions.

The first relates to my terms of reference. When your chairman kindly invited me to give this lecture, he generously told me that the choice of subject matter was entirely mine. There was only one condition. The lecture had to relate to a case reported in the official Law Reports. I have, I'm afraid, interpreted that condition with a liberality which would make section 3 of the Human Rights Act look like a mandate for strict construction. I shall in due course produce a rather diminutive fig-leaf, but it can remain on the tree for the moment.

My second confession is that this lecture has – even if only in one respect – the quality of a television soap opera. By that I mean only – I don't want to arouse unrealistic expectations – that it is a continuation of, or a sequel to, another lecture, given about a year ago, which the very curious may find in print, should they improbably wish to do so.[2] This means that there must be a brief recap, so that those who missed the last episode may know who has decided to emigrate, and who has become pregnant by whom.

When the American Civil War broke out in April 1861, the Confederate States faced one heavy disadvantage. They had no navy, no ships and no shipyards. This was a serious strategic weakness, since the Confederates, lacking the manufacturing capacity of the North, had to obtain their guns and ammunition from Europe and would in due course wish to export their cotton crop. But the North had declared a blockade – not a very effective blockade, but a blockade nonetheless – of the long Confederate coastline. So the Confederates had an

[1] I am much indebted to my judicial assistant, Alan Bates, for his valuable help in preparing this lecture.
[2] "The Alabama Claims Arbitration" (2005) 54 ICLQ 1, cited hereinafter as "Claims".

urgent need for ships, to break the blockade, keep their sea lanes open and harry Northern merchant vessels.

To this end they despatched a number of agents to Europe to procure vessels to be used for the belligerent purposes of the Confederate States. Notable among these was Captain Bulloch,[3] formerly an officer of the United States Navy, who within a very short period of time commissioned two new buildings which were, in due course, to become famous. The first of these, known to history as the *CSS Florida*, was built by Miller's yard in Liverpool. The second, in due course known as the *CSS Alabama*, was built by Laird Brothers in Birkenhead.

But the Confederate authorities had a problem. A month after the fall of Fort Sumter, Her Majesty's Government issued a proclamation of neutrality, recognising both sides in the American conflict as belligerents. The effect of this was to limit the extent to which a British citizen could lawfully assist either of them. Bulloch, alive to this problem, obtained very high level legal advice, quite possibly from Sir Hugh Cairns QC and George Mellish QC.[4] The gist of the advice was that ships could lawfully, and without any breach of the neutrality proclamation, be built in this country, even if they were designed so as to be readily adapted as warships, provided they were not equipped, fitted out and furnished as warships in this country. Thus both the *Florida* and the *Alabama* were designed and built in a way which made them quite unsuitable for mercantile service and eminently suitable as warships. But it was not until they had sailed out of the jurisdiction of the United Kingdom that they were supplied with their guns and ammunition. Then they hoisted the Confederate colours and embarked on their careers as destroyers of Northern shipping. They enjoyed very successful

[3] Claims, p 4

[4] Claims, p 4, f.n. 15. Cairns was a rising star, who had been Conservative Solicitor General in 1858-1859. Mellish, later a Lord Justice, took silk in 1861.

careers. The *Florida* sank or captured some 38 Northern vessels, the *Alabama* about 64.[5]

The destination and intended use of the *Florida* and the *Alabama* were known to the United States Consul in Liverpool well before they were launched. He passed on this information to the US Minister in London, Charles Francis Adams, who put the strongest pressure on the British government to arrest the vessels and prevent them sailing. But the Prime Minister (Russell) told him that there was no evidence to warrant detention of the *Florida*, and although Adams made more headway with the *Alabama* that vessel was allowed to escape from the Mersey, in part because the senior of the three Law Officers (Sir John Harding) was mentally deranged at the time when his opinion was sought.[6]

At the time of these events our domestic law governing our duty as neutrals was contained in the Foreign Enlistment Act 1819. This was a measure introduced by Canning and Castlereagh to restrain support in this country for Spain's South American colonies in their struggles for independence. Britain was not to be a base for hostile activities against Spain.[7] So British subjects were to be prevented from enlisting in the naval or military forces of a foreign state without leave. And, relevantly for present purposes, the Act provided in section 7:

> "And be it further enacted, that if any person, within any part of the United Kingdom, or in any part of His Majesty's Dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out or arm, or attempt or endeavour to equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out or armed, or shall

[5] Claims, pp 5-7.
[6] Claims, pp 4-6.

> knowingly aid, assist or be concerned in the equipping, furnishing, fitting out or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign … state … or with intent to cruise or commit hostilities against any … state …, or against the subjects or citizens of any … state … with whom His Majesty shall not then be at war, … every such person so offending shall be deemed guilty of a misdemeanour … and every such ship or vessel … shall be forfeited; and it shall be lawful for any officer of His Majesty's Customs or Excise … to seize such ships and vessels … and every such ship and vessel … may be prosecuted and condemned in the like manner, and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of Customs and Excise …".

The problem is that the section did not, at any rate expressly, prohibit the construction in Britain of a ship capable of being adapted for the warlike purposes of a foreign power provided the ship was not equipped, furnished, fitted out or armed within the jurisdiction. Doubt whether an information based on the facts of the *Florida* and the *Alabama* would stick goes far to explain the hesitancy of the British authorities.

But as the trail of maritime destruction left behind them by the *Florida* and the *Alabama* became common knowledge, and our relations with the United States, as a result of our role in the commissioning of these vessels, sank towards a point where war was a serious possibility,[8] the resolution of the British authorities was stiffened. When it came to their notice that another vessel, the *Alexandra*,

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[7] Claims, pp 8-9.
[8] Claims, p 8.

was being built at Miller's yard in Liverpool, commissioned by Bulloch, paid for by Confederate agents and intended for warlike service for the Confederacy, they seized and arrested her as she lay in dock on 6 April 1863. An information containing 98 counts was laid against 12 defendants, including the builders, the engineers, the agents and Bulloch, alleging the forfeiture of the ship. The counts were all based on section 7 of the 1819 Act, involving all imaginable permutations on the theme of equipping, furnishing and fitting out, attempting and endeavouring, procuring and knowingly aiding and assisting.

The trial, at which only five of the defendants appeared, opened in the Court of Exchequer at Westminster before Chief Baron Pollock[9] and a jury on Monday 22 June 1863 and lasted for four days. The Crown, taking no chances,[10] were represented by all three Law Officers – the Attorney General, the Solicitor-General and the new Queen's Advocate[11] - supported by another silk and a junior. The defendants (or claimants, since they were seeking recovery of the vessel) were represented by Sir Hugh Cairns, two silks (one of them Mellish) and a junior.

The case is reported as *Attorney-General v Sillim and Others Claiming The "Alexandra"* in 3 Foster & Finlason p 646.[12] Whether the report was handled by Mr T Campbell Foster or Mr W F Finlason, or was a joint production by them both, I do not know. They had interesting careers. Both worked as parliamentary reporters for *The Times* before call to the Bar by the Middle Temple. But Foster acquired the better practice, taking silk, leading for the Crown at the trial of the murderer Charles Peace in Leeds in 1879 and becoming a bencher of his Inn.

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[9] Sir Frederick Pollock had been the Lord Chief Baron for 19 years at this time, and he was aged 75. He retired 3 years later, and died 4 years after that. His many grandchildren included Sir Frederick Pollock, the jurist, and Viscount Hanworth, the Master of the Rolls.

[10] Claims, p 10, f.n. 29.

[11] The Attorney General was Sir William Atherton, who was appointed in 1861, the first Methodist to hold the office. He resigned in September 1863 and died the following January. The Solicitor General was Sir Roundell Palmer, famous in legal and political history as Lord Selborne. The Queen's Advocate, Sir Robert Phillimore, was one of the great civilians, expert in the law of nations, the sea and the church.

Finlason also became a bencher, but as a junior, and having been converted to Roman Catholicism devoted much of his energy to supporting Catholic positions on legal and historical issues. The Oxford DNB records that his law reports were sometimes too florid for the liking of the legal profession. So it may be safe to infer that it was probably he who reported the *Alexandra*.

The headnote addresses the issues in the case, but scarcely articulates a principle of law and proceeds by a series of *quaeres*. It is, however, with the first footnote (which occupies some six pages in volume 176 of the English Reports – that invaluable and accessible compilation - and ten in the original report) that the reporter gets into his stride.[13] He quotes the preamble to the 1819 Act, section 1 and section 7, in each case italicising some phrases to which he attached particular significance. Then the reporter embarks on an essay in interpretation:

> "Such being the text of the statute, what is its construction? If there be any 'golden key' to the construction of a statute, it is surely that offered by Lord Coke, viz., to consider the law before the statute, and the mischief it was proposed to remedy. Now there can be no doubt that before the Act, it was not only not illegal, but was not competent to the Crown to prohibit the building of ships of war (i.e., it is to be presumed, fully equipped) for a belligerent, in a war in which this country was neutral.[14]

For this proposition the reporter cites a wealth of authority, including Fortescue, Coke, Blackstone, Stowell, Vattel, Kent and the Supreme Courts of New York and the United States. But this was all before the 1819 Act. "But if, now," the reporter continues,

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[12] 176 ER 295.
[13] Pages 647 and 296 of the respective reports.

"the armed ship is built by a British shipbuilder, on account of one of the belligerents, whether or not it is to be fully equipped and commissioned by that belligerent in the British harbour, but either immediately after she leaves the harbour or elsewhere in some distant port, the question then is, whether the belligerent employer and the neutral builder have not acted in violation of the provisions of the Foreign Enlistment Act? That is to say, whether the former state of the law was not the very mischief which that Act was intended to remedy ...?"[15]

To that question the reporter's answer was clear:

"Thus, then, the Act, although penal in its form, is really remedial, and its policy is prevention. And its scope is to interpose by prevention as soon as possible, and the moment the intent was shown."[16]

The reporter reviewed both sides of the argument:

"No doubt the mere building of a ship not at all designed for equipment is not prohibited. On the other hand it is not the equipping only which is proscribed, but any assistance knowingly given thereto; and that not merely if with the intent, but in order to the use of the vessel by the belligerent for war: provided only, the assistance is knowingly given in order to that end."[17]

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[14] Pages 649 and 297 of the respective reports.
[15] Pages 652 and 299 of the respective reports.
[16] Pages 653 and 299 of the respective reports.
[17] Pages 654 and 300 of the respective reports.

There is then a detailed discussion of our municipal law on illegality, with much authority cited. This substantial footnote concludes:

> "... and the strict point, therefore, appears to be, whether parties who are engaged in so building a vessel as that it would be able so to receive equipment, and but for whose so building it would not receive it, are not knowingly assisting or concerned in the equipping of the vessel? As the learned Lord Chief Baron gave no specific directions on that point, it must be presumed that he thought the evidence did not raise the point, or that it was not the case of the Crown, or that it was involved in the question he put to the jury; as to which, however, *quaere*, whether it would be so understood."[18]

The opening speech of the Attorney-General is reported with relatively little comment by the reporter.[19] The Crown then called evidence from an eminent shipbuilder, a Royal Navy captain, a carpenter, a former paymaster in the Confederate Navy and a former employee in Miller's yard. The evidence established that the ship was designed and built for military and not mercantile service. The Queen's Advocate, Sir Robert Phillimore, wanted to ask the shipbuilder, as an expert, for what purpose the ship seemed to be intended. Cairns objected, and the Chief Baron ruled the question inadmissible. The reporter was of opinion that the question could have been framed in an admissible way, citing an earlier decision of the Lord Chief Baron.[20]

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[18] Pages 656-657 and 301-302 of the respective reports.
[19] Pages 659-662 and 302-304 of the respective reports.
[20] Pages 663 and 305 of the respective reports.

With the speech of Sir Hugh Cairns for the defence, the reporter assumes the role of Greek chorus. Interpolating the reporter's footnotes into the text, the speech goes like this:

Cairns: "… the Act did not prohibit building ships;"[21]

Reporter: "But building for *equipment*?"

Cairns: "but the question was as to the duty of the subjects of this country, as the subjects of a neutral Power. Enlisting in the army of a belligerent was undoubtedly an offence, but, putting aside for a moment the Foreign Enlistment Act,"

Reporter: "*Sed quaere.* Was not the Act passed to *alter* that?"

Cairns: "beyond all doubt it was the free and undisputed privilege of a neutral Power, there being a war between two belligerents, to trade with either or with both, to sell ships or arms or munitions of war, and every requisite for war which could be supplied."

Reporter: "Was that not the very *mischief* the Act was framed to remedy:"

Cairns: "The intention of the Foreign Enlistment Act never was to fetter or impair *bona fide* commerce in any way."

Reporter: "That is, trade in ships *without* the intent to aid a belligerent".

Cairns: "It was intended to prevent warlike expeditions leaving the ports of this country in a form in which they could do injury to belligerents, and thereby enable one of them to come here and complain that we had permitted ships fully armed to leave our ports ready to make captures. They would say, 'We cannot pursue your ships into your ports to take out a privateer, and yet you allow privateers to go out of your ports.' That was the scope of the Act."

Reporter: "Hardly so, for that was illegal at common law."

Cairns: "And the history of the Act showed that it was so."

Reporter: "Are either the history of an Act, or the ideas or intentions of its framers, at all material as to its legal *construction*?"

Cairns: "The kind of evil to be guarded against was the fitting out of regular expeditions with arms and troops in this country."

Reporter: "But that was illegal at common law. What was not so, was the equipping or assisting to equip."

So the speech, and the commentary, continue. A reference by Cairns to American authority prompts a footnote explaining why that authority is distinguishable.[22]

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[21] Pages 670 and 307 of the respective reports, *et passim*.
[22] Pages 672 and 309 of the respective reports.

When the Chief Baron comes to sum up to the jury, the reporter pursues his role as Greek chorus. We find the following passage, after the Chief Baron has referred to American authorities:

Chief Baron: "These authorities show that when two belligerents are carrying on war, a neutral Power may supply without any breach of international law, and without a breach of the Foreign Enlistment Act, munitions of war – gunpowder, every description of arms or munitions of war. Why should ships be an exception?"[23]

Reporter: "They would not be, of course, but for this Act, which was specially passed with a view to ships."

Chief Baron: "I am of opinion, in point of law, they are not. The Foreign Enlistment Act was an Act to prevent the enlistment or engagement of his Majesty's subjects to serve in foreign armies, and to prevent the fitting out and equipping in his Majesty's dominions vessels for warlike purpose without his Majesty's licence. The preamble of the Act shows that provision is to be made against the equipping, fitting out, furnishing and arming of vessels,"

Reporter: "And 'knowingly assisting or being concerned in the equipping or fitting out'."

Chief Baron: "because it may be 'prejudicial to peace in his Majesty's dominions'."

Reporter: "This was ignored, *vide* [above]."

Chief Baron: "The question I shall put to you is, whether you think that vessel was merely in course of building to be delivered in pursuance of a contract, which, as I explain it to you, would be perfectly lawful,"

Reporter: "That is (it is presumed,) a contract to build a ship *not* fitted for or adapted for warlike equipment, *or* not for a *belligerent*, but if it was both?"

Chief Baron: "or whether there was any intention that, in the port of Liverpool, or any other English port, the vessel should be fitted out, equipped, furnished or armed for purposes of war? If a man may supply any quantity of munitions of war to a belligerent, why not ships? Why should ships alone be an exception?

Reporter: "*Vide* [above], as the question was whether this particular theory was not prohibited by this particular Act ."

Chief Baron: "I asked the Attorney-General, if a man could not make a vessel, intending to sell it to either of the belligerent powers that required it, and which would give the largest price for it, would not that be lawful? To my surprise the learned Attorney-General declined to give an answer to the question."

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[23] Pages 676 and 310 of the respective reports, *et passim.*

Reporter: "The Attorney-General, in effect, answered, that if the ship was *built for the purpose of equipment* for a belligerent, it would not be lawful; if not so built the question was irrelevant. *Vide* [above].

Chief Baron: "But I think it clear that a man may so make a vessel, and offer it for sale. If a man may build a vessel for the purpose of offering it for sale to either of the belligerent parties, may he not execute an order for it? That appears to me to be a matter of course. The statute is not made to provide means of protection for belligerent Powers, otherwise it would have said you shall not sell powder or guns, and you shall not sell arms, and if it had been done so all Birmingham would have been in arms against it."

Reporter: "That may have been a reason for *not* prohibiting the sale of arms, but is hardly an argument to show that the statute does *not* prohibit the making of warlike ships. The plain fact is, the statute does *not* apply to arms and *does* apply to ships."

Chief Baron: "The object of the statute was this – that we should not have our ports in this country made the ground of hostile movements between the vessels of two belligerent Powers, which might be fitted out, furnished and armed in those ports."

Reporter: *Vide* [above].

Chief Baron: "The '*Alexandra*' was clearly nothing more than in the course of building."

Reporter: "But was she not in course of building on a contract for a belligerent?"

Chief Baron: "It appears that, according to Webster's Dictionary, equipping is furnishing with arms, and furnishing is given in other dictionaries as the same thing as equipping."

Reporter: "This ignored the *assisting* to equip, and implied that there must be an intent to arm."

Chief Baron: "It appears to me that if true that the '*Alabama*' sailed away from Liverpool without any arms at all as a mere ship in ballast, and that her armament was put on board at a place which is not in her Majesty's dominions, then the Foreign Enlistment Act was not violated at all."

Reporter: "No doubt this is a clear logical conclusion from the ruling, that there must be the intent of an actual equipping – if not arming – in this country, and was, in substance, a direction to that effect."

Chief Baron: "The question is for you, what was the object with which the vessel was being built? With that view consider the evidence: especially the most important evidence – that given by Captain Inglefield. If you think that the object was to furnish, fit out, equip or arm that vessel at Liverpool, that is an

offence within the Act; but if you think the object was merely to build a ship in obedience to an order, or in compliance with a contract, leaving those who bought it to make what use they thought fit of it, then it appears to me that the Foreign Enlistment Act has not been broken."

Reporter: "*Quaere*, whether, on the whole of the summing up, the question was left to the jury whether the ship was being built for warlike equipment? And whether the evidence raised that question? And whether, if so, such building would be assisting to equip the vessel for warlike use?"

The reporter elaborated these questions by reference to authority, and concluded this footnote:

> "And as the scope of the present Act is prevention, and it aims all through at inchoate acts, does it not embrace any acts of assistance knowingly rendered in this country to the illegal object?"[24]

The Attorney-General tendered a bill of exceptions to the Lord Chief Baron's ruling. But the verdict was, perhaps inevitably in view of the summing up, against the Crown. Sir Roundell Palmer, now promoted to Attorney General on the death of Sir William Atherton, moved for a new trial on grounds of misdirection, non-direction and insufficient direction.[25] The Lord Chief Baron tried to thwart such a challenge. When Palmer made reference to the *Alabama*, the Lord Chief Baron retorted that the *Alabama* had no more to do with the case than

[24] Pages 678 and 312 of the respective reports.
[25] Pages 679 and 312 of the respective reports.

Noah's Ark,[26] which was no doubt very humorous, but absurd since the case had everything to do with the *Alabama*. A rule nisi was however made and a hearing took place over 6 days in the Court of Exchequer in November 1863.

The case is reported in 2 Hurlstone & Coltman 431,[27] at considerable length, running to some 150 pages, much of it summarising the detailed argument on the seven grounds of challenge. There are a number of footnotes, but these largely set out the text of documents referred to and are devoid of argument or comment. Judgment was reserved by the bench of four judges, and was given in January 1864. The Lord Chief Baron, giving the first judgment, upheld the correctness of his own ruling and held that the rule should be discharged. He was followed by Baron Bramwell, who was of the same opinion. Third came Baron Channell. He was of opinion that the verdict was unsatisfactory because it proceeded upon a misapprehension of the law and of the questions to be decided. He held that the rule should be made absolute. The fourth judge, Baron Pigott,[28] agreed with him. So the court was equally divided. The tie was broken by Baron Pigott, as the junior judge, withdrawing his judgment. The rule was therefore discharged.

The Crown sought to appeal to the Court of Exchequer Chamber against this decision, but Sir Hugh Cairns objected that that court had no jurisdiction to hear the appeal since the Barons of the Exchequer had had no power to make a rule purporting to grant a right of appeal. Argument on this point took place before a bench of seven judges in February 1864.[29] The result was again a cliffhanger. With six judgments delivered, three judges had held that there was

[26] Claims, p 10 f.n. 34.
[27] 159 ER 178.
[28] The Oxford DNB records that he was "distinguished for his strict impartiality and conscientiousness rather than for any special abilities." Late in life he joined the Plymouth Brethren and his eldest son prevented the Anglican burial service being read over his coffin, an act for which he was fined £1 with costs.

jurisdiction to hear the appeal (Mr Justice Willes, Mr Justice Williams and Chief Justice Erle) and three that it had not (Mr Justice Mellor, Baron Blackburn and Mr Justice Crompton). So all depended on the opinion of Lord Chief Justice Cockburn. He ruled that there was no jurisdiction. So the defendants, for the third time, prevailed, this time by a margin of 4-3.

The Crown did not give up, and challenged this decision on jurisdiction in the House of Lords. But they failed again, by what in the context of this case must be regarded as the comfortable margin of 4-2. In judgments given on 6 April 1864, the Lord Chancellor, Lord Westbury, supported by Lords St Leonards, Chelmsford and Kingsdown, agreed with the majority in the Court of Exchequer Chamber. Lords Cranworth and Wensleydale dissented.[30] Thus one might have supposed that the litigious career of the *Alexandra* in the English courts would have come, at last, to an end.

It will not, of course, have escaped this, of all, audiences that the events I have narrated were taking place at the very time when the great revolution in English law reporting which led to establishment of the Incorporated Council was in train. The highly influential paper of Mr W T S Daniel QC which really set the ball rolling was dated 18 May 1863,[31] in the month after the seizure of the *Alexandra* and the month before the trial began. Among those prominent in pressing for change were the Lord Chancellor, Lord Westbury, and (in particular) Sir Roundell Palmer who, first as Solicitor General and then as Attorney General,[32] represented the Crown throughout the *Alexandra* forfeiture proceedings. Also prominent were Sir Robert Collier, Palmer's successor as Solicitor General, who appeared in the later phases of the *Alexandra*, the new Queen's Advocate, Sir

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[29] 2 H&C 581, 159 ER 242.
[30] 10 HLC 704, 11 ER 704.
[31] See W T S Daniel, *The History and Origin of the Law Reports* (William Clowes & Sons, 1884)
[32] See Lindley, "The History of the Law Reports", (1885) 1 LQR 137 at 139.

Robert Phillimore, Sir Hugh Cairns and George Mellish. It seems clear that, among the Inns, it was Lincoln's Inn which powered the movement for change. Palmer was treasurer in 1864, and all the important meetings took place there. It was at a meeting of the Bar in the Great Hall on 28 November 1864 that a resolution was carried for establishment of the Council in very much its present form.[33] Serjeant's Inn at first declined to respond to the new proposal, and the benchers of Gray's Inn resolved on 25 January 1865 that they had not sufficient confidence in the scheme to induce them to join in it,[34] even though their contribution was to be only half that of the other Inns, with the exception of Serjeant's Inn.[35] But both Serjeant's Inn and Gray's Inn fell into line fairly quickly, although not before publication began on 2 November 1865.[36]

There were, as one would expect, a number of reasons why reform of law reporting was felt to be urgently necessary. The most powerful of these, reflecting the central importance of judicial decision-making as a source of law in our constitutional system, was that as matters stood potentially important decisions were either not reported at all or, if reported, were inadequately or unreliably reported. One of the examples given, in a pamphlet addressing the evils of the existing system, related to the *Alexandra*:

> "In the important proceedings relating to the *Alexandra,* at this moment pending in the Court of Exchequer, the only decision referred to on the construction of the Foreign Enlistment Act was one by the late Mr Justice Coltman fourteen years ago – and of this no other than a newspaper report could be found. The Court, after vain efforts to obtain a note of the decision by any Judge, barrister,

[33] See Daniel, *op. cit.*, p 197.
[34] See Daniel, *op. cit.*, pp 246, 151.
[35] See Daniel, *op. cit.*, p 152.
[36] See Daniel, *op. cit.*, pp 295-296.

> or short-hand writer, was compelled to resort to a subterfuge to avoid infringing the rule against receiving newspaper reports as authorities, by asking Mr Baron Martin, who had been engaged as counsel in the case, to refer to *The Times* of July 6, 1849, and, after thus refreshing his memory, to say whether the decision there reported was pronounced. See *The Times*, November 12, 1863."[37]

The proliferation of reports was also a source of complaint: in addition to the "authorised reports", of which there were sixteen sets in 1863,[38] there were a number of other series, sometimes described as "irregular" or "unauthorised". Since the well-armed practitioner was hesitant to ignore even the unauthorised reports, the cost to the profession was considerable.[39]

The establishment of the official Law Reports mitigated but did not cure the problem of proliferation. A proposal that no report in any other series should be cited if the case was reported in the official series was not carried,[40] and the authority of other reports continued to cause trouble for many years.[41] But financially the new venture was a great success, and within twenty years it proved possible to reduce the annual subscription from five guineas to four.[42]

Of the formerly authorised reporters all accepted appointment by the new Council except Beavan in the Rolls Court, Best and Smith in the Queen's Bench and Hurlstone and Coltman in the Exchequer. It seems likely that both Smith and

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[37] See Daniel, *op. cit.*, p 87, f.n.(2).
[38] See Daniel, *op. cit.*, p 35.
[39] See f.n. 42 below.
[40] See Lindley, "The History of the Law Reports" (1885) 1 LQR 137 at 142; Daniel, *op. cit., p 214.*
[41] See Megarry, "Reporting the Unreported" (1954) 70 LQR 246.
[42] See Daniel, *op. cit.*, pp 317, 322. A set of the authorised reports had previously cost £30 p.a., unbound.

Coltman would have been willing to serve had their senior partners not declined on their behalf, and Hurlstone tried to retract his refusal, but too late.[43]

Foster and Finlason, whose critical footnotes to the report of the *Alexandra* jury trial I have cited at some length, were not authorised reporters before 1865 and were not employed by the Council after that date. These footnotes, learned and not unpersuasive as they were, would have made an admirable article in an academic law journal. But they would seem quite out of place in what purported to be a report of forensic argument and judicial decision. I cannot trace that the problem of the opinionated or intrusive reporter was one which exercised practitioners in the debate which preceded establishment of the Council. But the unthinkability of a law report appearing in such a form since 1865 is compelling testimony to the professional and scholarly standards which the Council has successfully and consistently inculcated since then.

What, then, of the *Alexandra*, following the unappealable decision of the Court of Exchequer in favour of the claimants? She left England in April 1864, after the House of Lords decision on jurisdiction, changed her name to the *Mary*, sailed to the Bahamas and was seized again, in Nassau in December 1864. The Crown's charges against the ship again failed, but the trial was not held until 22-23 May 1865, by which time the American Civil War had ended. So when she was released she was of no use to the Confederacy, which had ceased to exist. But even this did not end her litigious career. For the United States, as successor to the Confederate States, claimed possession of the ship in the English Admiralty Court, the personal defendant, a former Confederate agent and former *Alexandra* defendant, resisting and claiming that he had good grounds of defence on the merits. It was agreed that the United States, as a foreign plaintiff, should give security for the defendant's costs, but the defendant sought security for damages

[43] See Daniel, *op. cit.*, pp 274-275, 299, 294.

also. This was an order which Dr Lushington, having reserved judgment, refused to make. The United States then sought to interrogate the defendant, contending that his alleged title to the vessel was tainted with mala fides and fraud. He resisted the interrogatories, contending that his answers would tend to incriminate him by showing that he had been guilty of a breach of the Foreign Enlistment Act 1819, and therefore subject him to penalties. The Admiralty judge was Sir Robert Phillimore, who as Queen's Advocate had represented the Crown in the *Alexandra* proceedings. He concluded that he should allow the interrogatories, but that if the defendant stated upon oath his belief that an answer to any particular interrogatory would subject him to the penalties of the Foreign Enlistment Act, he should not be compelled to answer that interrogatory.

It was a sorry story. After two years of vigorous interlocutory activity the judge ordered that the vessel, still called the *Mary*, be sold and the proceeds brought into court. She was accordingly sold, and the gross proceeds of sale amounted to £910. But the Admiralty Marshal's fees were £521-0-1, leaving only £388-19-11 for the defendant if he established title to the vessel. The judge, however, dismissed the cause by consent, condemning the defendant to pay the plaintiff's costs of £1000. So the defendant lost his ship and his money.

But even this was not the whole tale. For the dismissal of this action was part of a global settlement of $150.000 reached in a US District Court between the United States and the Confederacy's former agents in Liverpool. Comprised in the settlement were not only an American action and the Admiralty action concerning the *Mary*, but also four Chancery actions. One of these raised the issue whether the United States of America could sue as plaintiff, the contrary being argued by a team of counsel who included Judah P Benjamin, now remembered as *Benjamin on Sale of Goods*, then perhaps more prominent as the Confederacy's former Secretary for War and Secretary of State. But for present purposes these cases

have a different significance. Two interlocutory decisions concerning the *Mary* are reported in LR (1867) 1 A & E 335 and LR (1868) 2 A & E 319. And there are three reports of the Chancery litigation: *Prioleau v United States and Andrew Johnson* (1866) LR 2 Eq 659 and *United States of America v Wagner* (1867) LR 3 Eq 724 and (1867) LR 2 Ch App 582. All these are in the official Law Reports. Such, then, is my figleaf.[44]

[44] The full account of the later litigation concerning the *Mary* is to be found in the Admiralty records in the National Archives: HCA 19/429 and National Archive Call No HCA 27/20. Details of the global settlement are also to be found.