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JUDAH P. BENJAMIN AND THE PURSUIT OF CONFEDERATE ASSETS ABROAD

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Judah Philip Benjamin is a mysterious and legendary figure in political and legal history, not to mention American history in general.[1] He was leader of the Bar in New Orleans with a national practice and a United States Senator from Louisiana from 1853 to 1861, followed by four years as a high official in the Confederate States government. After the fall of Richmond in the early Spring of 1865, Benjamin fled to England, arriving after a nearly four-month journey alone in August 1865.

This article primarily explores the substance of early client representations in litigation for Confederate States assets undertaken by Judah P. Benjamin after his admission to the English Bar in 1866. Intending to be retained to conduct commercial litigation for businesses in the port city of Liverpool, he became substantially engaged in defending aggressive lawsuits brought in London by representatives of the victorious United States government – and in one case by a supplier to the Confederate government – to obtain the substantial Confederate assets which remained in England at the close of the Civil War, cases in which Benjamin repeatedly defeated or outmaneuvered his adversaries. In these and other types of cases he on occasion enlisted the assistance of pre-war political allies in the United States.

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1 "The hidden fire burst into flame once more". John George Witt, *Life in the Law* (London, n.d. [1906]), p. 160, describing Benjamin's speech at the farewell dinner given him by the Bar in London on 30 June 1883. Witt subsequently served as Benjamin's executor.

Born in St. Croix in 1811, Benjamin came to the United States with his parents as a child. He entered Yale University at age 14, left without graduating in circumstances which remain unclear, and settled in New Orleans, where he rose rapidly to the first rank of the Bar, practicing and publishing law books with Thomas Slidell (c. 1807-1864), a future Chief Justice of the Louisiana Supreme Court.

Benjamin served in the Louisiana state legislature in the 1840s, and in September 1850, he refused a commission as the first United States district judge for the northern district of California, a position to which he had been nominated by President Millard Fillmore (1800-1874) and confirmed by the Senate the next day. He would do the same two years later, in 1853, declining President Fillmore's nomination as an Associate Justice of the Supreme Court of the United States.

Instead he continued in the term of service as a United States Senator for Louisiana, to which he had been elected first in 1852 and again in 1858. During his entire eight-year period in the Senate, his colleague from his home state was John Slidell (1793-1871), brother of Benjamin's law partner Thomas Slidell and a future Confederate States Commissioner in Paris. On 4 February 1861, Benjamin and John Slidell gave successive speeches in the Senate as they followed Louisiana out of the Union.[2]

Benjamin was promptly appointed Attorney General of the Confederate States and without a break served thereafter as Confederate Secretary of War and Secretary of State, leaving with Jefferson Davis (1808-1889) and other cabinet members at the end of March 1865 as Richmond fell. Traveling alone via Nassau, Benjamin reached London at the end of August 1865.

Benjamin immediately set to work to qualify as a barrister, entering Lincoln's Inn January 1866; he was admitted to practice specially, with ceremonial preliminaries waived, in June 1866. To establish and support himself he shortly began writing his celebrated *Treatise on the Law of the Sale of Personal Property*, which was first published in London in 1868. As he had in Louisiana, Benjamin rose to the top of the English Bar, retiring in 1883 and joining his wife in Paris, where he died in 1884.

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[2] Thomas Martin Ricaud, *The Great Parliamentary Battle and Farewell Addresses of the Southern Senators on the Eve of the Civil War* (New York, 1905), pp. 89, 215.

There have been seven book-length studies devoted to Benjamin's life, the first two of the greatest value; the last two were published in 2021.[3] Other literature about aspects of his life and legal career in Great Britain has permitted further observations on aspects of the cases which he handled.[4] Two in which he prevailed, one in Louisiana[5] and one in England,[6] have been the subject of substantial publications.

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[3] Pierce Butler, *Judah P. Benjamin* (Philadelphia, 1907); Robert Douthat Meade, *Judah P. Benjamin, Confederate Statesman* (Oxford, 1943); Rollin Osterweiss, *Judah P. Benjamin – Statesman of the Lost Cause* (New York, 1933): Simon L. Neiman, *Judah P. Benjamin* (Indianapolis, 1963); Eli N. Evans, *Judah P. Benjamin, the Jewish Confederate* (New York, 1988); James Traub, *Judah Benjamin, Counsel to the Confederacy* (New Haven, 2021); William C. Gilmore, *The Confederate Jurist – The Legal Life of Judah P. Benjamin* (Edinburgh, 2021).

[4] A. L. Goodhart, "Judah Philip Benjamin, 1811-84", in *Five Jewish Lawyers of the Common Law* (Oxford, 1949), pp. 4-15; Judah Best, "Judah P. Benjamin: Part 1: 'that Little Jew From New Orleans', Part II: "The Queen's Counsel", *Supreme Court Historical Society Quarterly,* XXXIII, no. 2 (2011), p. 6; no. 3, p. 7; David Lynch, "Judah P. Benjamin's Career on the Northern Circuit and at the Bar of England and Wales", ibid., no. 4, p. 10; Ruth Bader Ginsburg, "From Benjamin to Breyer: Is there a Jewish Seat ?", *Supreme Court Historical Society Quarterly,* XXIV, no. 3 (2003), p. 1; Suman Naresh, "Judah P. Benjamin at the English Bar", *Tulane Law Review*. LXX (1996), p. 2487; Robert Aitken, "The Unusual Judah P. Benjamin", *Litigation*, XXII, no. 3 (1996), p. 49; J. M. Maguire, "Book Review: Judah P. Benjamin. By Robert Douthat Meade", *Harvard Law Review*, LVII (1943), p. 113; Laurie H. Riggs, "The Strange Career of Judah P. Benjamin", *Law Library Journal,* XXXVI, no. 2 (1943), p. 57; James H. Winston, "Judah P. Benjamin, Distinguished at the Bars of Two Nations" (1930); *American Bar Association Journal,* XV (1929), pp. 519, 525; [Charles Pollock], "Reminiscences of Judah P. Benjamin", *Green Bag*, I, no. 9 (1889), p. 365.

[5] *McCargo v. The New Orleans Insurance Co.*, 10 Rob.202, 334 (1845); Arthur T. Downey, *The Creole Affair, The Slave Rebellion that led the U.S. and Great Britain to the Brink of War* (Lanham, Md., 2014); Jeffrey R. Kerr-Richie, *Rebellious Passage – The* Creole *Revolt and America's Coastal Slave Trade* (Cambridge, 2019). George and Willene Hendrik, *The Creole Mutiny – A Tale of Revolt Aboard a Slave Ship (*Chicago, 2003).

[6] *R v. Keyn* , 2 Ex.D. 63, 13 Cox C.C. 403 (1876); "The Ideal of the Rule of Law: *Regina v. Keyn* (1876), in A. W. Bryan Simpson, *Leading Cases in the Common Law* (Oxford, 1996), pp. 227-258; Geoffrey Marston, "The

A leading academic scholar on Benjamin's career, Catharine Macmillan of King's College London, has published two essays which address the origins of his legal career in England. The first[7] says in pertinent part:

> Even the intention to practise law seemed optimistic as he presented himself in a common law country having trained and practised in America's civil law jurisdiction. Appearances were deceptive and Benjamin made the most of any advantage offered. He began by utilizing the network he had established as Confederate Secretary of State …
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> Benjamin again employed Confederate links by choosing the Northern Circuit to practice; this included Liverpool where his knowledge of mercantile trade in American commodities was useful. As an anonymous American wrote, 'he seems properly to have joined the Northern Circuit, and the secessionist sympathizers at Liverpool ought to give him good business.' *The Law Reports* indicate that this is what happened as Benjamin was soon representing firms involved in the cotton trade.

Her second essay puts it this way:

> Once called, Benjamin chose the Northern Circuit which included Liverpool. This was another port city which, like New Orleans, was dependent upon the shipment of trans-Atlantic commodities. It meant that the legal work in the two cities shared many of the same issues and would allow Benjamin to utilise the network of knowledge he had built up in his Louisiana legal practice. And it also allowed him to work for a network of clients who were themselves sympathetic to the Confederacy and American clients who had resumed their English trade. His progress at the English Bar was followed by American lawyers with the observation that Benjamin 'seems properly to have joined the Northern

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Centenary of the Franconia Case - The Prosecution of Ferdinand Keyn", *Law Quarterly Review*, XCII (1976), p. 93; Dwight Foster, "The Case of the 'Franconia'", *American Law Review,* XI (1876), p. 625.

[7] Catharine MacMillan, "Judah Benjamin: Marginalized Outsider or Admitted Insider," *Journal of Law and Society,* XLII (2015), pp. 150, 165, 167.

> Circuit, and the secessionist sympathizers at Liverpool ought to give him good business.'[88] It would appear that this tart observation was an accurate one. Benjamin began his English legal career representing former Confederate agents. [8]

MacMillan's analysis follows the line that Benjamin himself took,[9] but the full scope of his activities was significantly wider. First, a granular examination of Benjamin's immediate postwar behavior and the early cases which followed – one to which MacMillan did not subject her readers – demonstrates that his selection as counsel was not simply a choice by Confederate sympathizers to support him with legal employment. Rather, his engagements were to defend individuals and entities – formerly actively engaged on behalf of the Confederate Government – against claims, vigorously pursued in court by the Government of the United States and others, to Confederate property in his clients' possession, to which the United States asserted ownership as a victorious belligerent and other plaintiffs a superior legal right of ownership.

In actuality, during the more than one-year period between his flight from Richmond and his admission to the English Bar, Benjamin himself, seemingly still somehow asserting continuing governmental authority derived from his position as Confederate Secretary of State,[10] had with some success approached former

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[8] C. MacMillan, "Trans-Atlantic Connections – The Many Networks and the Enduring Legacy of Judah P. Benjamin" in Michael Lobban and Ian Williams (eds.), *Networks and Connections in Legal History* (Cambridge 2020) 210, 227. She cites at note 88: "See, for example, *United States of America v. McRae* (1867) LR 4 Eq 327 and *United States of America v. Wagner* (1867) LR 2 Ch App 582". A fascinating section entitled "Judah Benjamin – The Living Transplant", in MacMillan, *Mistakes in Contract Law* (Oxford, 2010), pp. 123-136, discusses other issues.

[9] Butler, note 3 above, p. 381; Gilmore, note 3 above, p. 97 & n.11.

[10] One of Benjamin's early biographers quotes a letter written by Louis Wigfall (1816-1874), who had fled to England after serving successively as Senator from Texas in both the United States Senate and the Confederate States Senate, and a long-time enemy of Benjamin's:

> "He also drew from the Confederate agent on the Islands between 3 & 4 hundred pounds on his way here. On his arrival here he reported himself authorized by the President to take charge of financial matters & my belief is he and the agents here divided among themselves all that was left of Confederate funds."

senior Confederate operatives in several countries for the same purpose – to take possession of financial assets of the Confederate government which they continued to hold at the end of the Civil War and to dispose of those assets in the interests of the survivors of the Confederate States government. In a direct and immediate sense, in defending the London lawsuits by the United States against former Confederate agents to recover Confederate government assets they retained, Benjamin was also establishing legal precedents shielding his personal participation in the collection and distribution of such assets after the Civil War was over, as well as protecting his former comrades-in-arms; indeed, assuming the accuracy of the testimony of a close ally of Benjamin in one of these cases – with Benjamin in the room acting as his counsel – this aspect of Benjamin's postwar activities was much greater than has previously been known. For Benjamin, this motivation may have been at least as significant as any sympathy for the South in Liverpool or fees he benefited from as counsel defending other Confederates in English courts. And in the same vein, Benjamin also defended those "legitimately" asserting of ownership of Confederate property against specious competing claims by other former Confederates agents.

Second, although the scholarly accounts of Benjamin's early days in England correctly recognize Liverpool as the primary source of his professional engagements in his early days and attribute it to his British clients' wartime Confederate government employment, commercial relations or at least sympathy, they never mention, as a continuing network Benjamin remained part of, the three prominent *Americans* with whom Benjamin had close personal, financial and political relationships – as did they with each other – before, during and after the Civil War: James Asheton Bayard, Jr. (1799-1880) and Thomas Francis Bayard (1828-1898), father and son, successively and as Democratic United States Senators from Delaware in the 1850s and 1860s, with Thomas subsequently serving as Ambassador to Great Britain and Secretary of State; and Samuel Latham Mitchill Barlow (1826-1889), an attorney

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Meade, note 3 above, p. 343. See, generally, the excellent Edward S. Cooper, *Louis Trezevant Wigfall – The Disintegration of the Union and the Collapse of the Confederacy* (Madison, 2012), p. 165 & note 2.

headquartered in New York City.[11] To do any of them full justice would consume an article intended to be about Benjamin.

(a) Samuel Latham Mitchell Barlow

The convenient place to start this brief introduction to their shared relationships is in the 1850s, in the biography of President James Buchanan (1791-1868) by George Ticknor Curtis (1812-1894), brother of sometime Supreme Court Justice Benjamin Robbins Curtis (1809-1874). In June 1856, the convention of the Democratic Party in Cincinnati abandoned the sitting President, Franklin Pierce (1804-1869), and nominated James Buchanan, formerly Secretary of State and Minister to Great Britain, as its presidential candidate. In Buchanan's biography, Curtis explains how this came about by extensively quoting "an account of what took place" received from "my friend, Mr. S. L. M. Barlow of New York", referred to in the introduction as "my own valued friend of many years, Samuel L. M. Barlow, Esq. of New York".[12]

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[11] Benjamin's biographers only mention Barlow's name as an attorney consulted by Benjamin in 1861 in connection with a defamatory publication concerning his departure from Yale without graduating: (Butler, note 3 above, p. 28; Meade, note 3 above, pp. 25-26; Osterweis, note 3 above, p. 38 – "Northern lawyer"; Neiman, note 3 above, p. 107); the Cincinnati convention of 1856: ("a New York politician temporarily in Cincinnati" (Meade, note 3 above, p. 105); "a friend [who]…wrote from New York to complain he could not get proper coffee" (Traub, note 3 above, p. 38); the recipient of Benjamin's 9 December 1860 letter on secession (Traub, note 3 above, p. 74; Gilmore, note 3 above, p. 45). Contrast this with Barlow's introduction in a recent book with wider scope:

> New York had long been the center of Democratic politics, dating to the heyday of Martin Van Buren. And for the political insider, no one symbolized the smoke-filled rooms shaping party politics more than Samuel L. M. Barlow. Barlow, a prominent lawyer who built his wealth from mining and railroad interests, seemed to know all the city's most powerful political players, as well as an impressive array of key men – especially Democrats – scattered across the country.

J. Matthew Gallman, *The Cacophony of Politics – Northern Democrats and the American Civil War* (Charlottesville, 2021), p. 26.

[12] George Ticknor Curtis, *Life of James Buchanan, Fifteenth President of the United States* (New York, 1883), II, pp. 169-173; I, ix. The quotations referred to by Curtis are not Barlow's only contribution to the Buchanan biography. Having read it in draft, in a letter Barlow told Curtis to excise the bulk of what he had written about the bachelor-President's long-

According to Barlow's account, in February 1856, while living in the same hotel in London as Buchanan and dining with him regularly, he had renewed their acquaintance and "became much interested in his nomination for the Presidency". Barlow returned to New York in the early part of May, "and shortly afterwards went to Cincinnati, upon business connected with an unfinished railroad, in which I was interested …" and where the Democratic convention would soon be held. Concerned that Buchanan's supporters were disorganized:

> I had taken a large dwelling-house in Cincinnati for my own temporary use, and shortly before the meeting of the convention, I wrote to my political friends in Washington who were friendly to him, telling them the condition of things, and that unless they came to Cincinnati without delay, I thought Mr. Buchanan stood no chance for the nomination. Among others I wrote to Mr. Slidell, Mr. Benjamin, Mr. James A. Bayard and Mr. Bright, all of whom were then in the United States Senate. I promised them accommodations at my house, and, much to my gratification, they all answered that they would make up a party and come to Cincinnati, to reach there the day before the meeting of the convention.

Their efforts enabled Buchanan to secure the nomination. According to Barlow:

> There can be little doubt that this result was achieved almost wholly by the efforts of the friends of Mr. Buchanan, who were induced at the last moment to come to Cincinnati. Our house became the headquarters of all the friends of Mr. Buchanan, Every move that was made emanated from some one of the gentlemen there present …

The key phrase in these quotations, describing much but not all of Barlow's activities is "… an unfinished railroad, in which I was

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concealed, frustrated romance with Miss Ann Coleman, adding: "In this view, Mrs. Barlow agrees completely". Samuel Barlow to George Ticknor Curtis, 17 October 1881, Archives and Special Collections, Waidner-Spahr Library, Dickinson College, Carlisle, Pa. This earned for Mrs. Barlow 91 years later a remarkable rejoinder in a novel by the celebrated John Updike: "Oh, Mrs. Barlow, what a toad you are, lurking in the garden of history"! *Memories of the Ford Administration* (New York, 1992), p. 74.

interested ...". Building and running railroads seems to have been among Barlow's principal activities,[13] and in the 1850s Benjamin had also been involved in extensive but unsuccessful efforts to build a railroad across the Tehuantepec Peninsula in Mexico.[14] Barlow was president of the Ohio and Mississippi Railroad of Illinois, the charter of which permitted counties on its route to invest in the construction of the railroad upon a majority vote by its inhabitants. After a favorable vote had been taken and an agreement to subscribe had been made by the Commissioners of Daviess County, the Indiana Constitution was modified to limit county investments to those made in cash. An action by the Railroad to enforce the obligation as entered into by the County divided the United States Circuit Court and was appealed to the Supreme Court of the United States. On 16 January 1860 the case was argued for the Railroad by Benjamin, who had the unpleasant duty of reporting to Barlow on February 10:

> We lost your case on a point not made by deft – I heard the opinion imperfectly, but it seems to be on the ground that the contract we relied on is not *such a contract* as the constitution intended to protect – I confess I don't exactly understand it, but perhaps when the opinion is printed it may be more intelligible.[15]

As the events leading to secession and then the outbreak of the Civil War proceeded, Benjamin wrote increasingly gloomy letters to

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[13] Barlow was also one of the executors for John Sanford. See *Chouteau v. Barlow*, 110 U.S. 238 (1884), who, with his last name misspelled, was the respondent in *Dred Scott v. Sandford,* 60 U.S. 393 (1857). Although Barlow is said to have claimed ownership of Dred Scott, it appears that Scott died in 1858 and Sanford in 1859.

[14] An extensive puff piece 300 pages long ends with an argument for the legal status of the railroad signed by Benjamin as "Chairman of the Tehuantepec Railroad Company". *The Isthmus of Tehuantepec: Being the Results of a Survey for a Railroad to Connect the Atlantic and Pacific Oceans, Made by The Scientific Commission Under the Direction of Major J. G. Barnard. U.S. Engineering* (New York, 1852), pp. 287-295. The family firm of Peter Amidie Hargous (1798-1864), a major financier of the Tehuantepec Railroad, was represented in the 1850s by Barlow.

[15] Barlow Papers, Huntington Library. The case, *Aspinwall et al. v. Commissioners of the County of Daviess,* as initially reported in 63 U.S. 364, names Barlow in the caption as "Samuel L. M. Barbour".

Barlow, first from Washington, D.C., then New Orleans, and finally from the Confederate Attorney General's Office in Montgomery.[16] But the outbreak of warfare seems not to have affected their personal loyalty to each other, and their correspondence[17] continued candidly as the nation fractured and the fighting began.[18]

Benjamin and Barlow had both formal and informal relationships during the Civil War. One of the earliest disputes between the belligerents arose from the capture in early June 1861 of a Northern merchant ship by the *Savannah*, a civilian vessel based in Charleston which had been formally commissioned as a Confederate privateer. The *Savannah* was in turn captured the next day by a U.S. Navy warship, its crew taken to prison in New York and soon afterwards indicted in nine counts for piracy, conviction on any one of which carried a death sentence. Jefferson Davis, in a letter to President Abraham Lincoln (1809-1865), claimed they were prisoners of war, not pirates, and threatened to execute a like

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[16] These are now among the Barlow papers at the Huntington Library. A 4 March 1861 letter from Samuel Cutler Ward (1814-1884) to William H. Seward also related information Barlow had received in a letter from Benjamin in Montgomery. Kathryn Allamong Jacob, *King of the Lobby: The Life and Times of Sam Ward, Man-about-Washington in the Gilded Age* (Baltimore, 2010), p. 50.

[17] For example, Benjamin to Barlow from Washington, D.C., 9 December 1860: "I sicken to contemplate the pain and desolation thus gratuitously inflicted on my country by the blind and insane fury of a fanaticism which contemplates with callousness and even with complacency the reduction of 15 states where civilization now flourishes, into a new Haiti …".

[18] Barlow, a Democrat who stayed North, corresponded with high officials on the Union side, such as George B. McClellan (1826-1885), for whom Barlow had secured a high executive position at the Ohio and Mississippi Railroad which McClellan left in 1861 to become General-in-Chief of the Union army and later commander of the Army of the Potomac. McClellan favored states rights but not at the expense of the Union, and he was the Democratic party's presidential candidate, promoted by Barlow, whom Lincoln defeated in 1864. Frank van der Linden, *The Dark Intrigue, A True Story of a Civil War Conspiracy* (Golden, 2007), pp. 74-76. His correspondence with Barlow peppers Stephen W. Sears (ed.), *The Civil War Papers of George B. McClellan – Selected Correspondence 1860-1865* (New York, 1989). McClellan concluded a letter to Barlow dated 8 November 1861: "Do write me often, & don't get mad if I delay replies – for I am rather busy". Ibid., pp. 127, 128.

The Democratic Party ticket in the 1864 election. From left to right, General George B. McClellan, Presidential candidate, his running mate George H. Pendleton, U.S. Congressman from Ohio, and Samuel L. M. Barlow.

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number of Union prisoners to retaliate. Algernon Sydney Sullivan (1826-1887), who would later found Sullivan & Cromwell, formally requested assistance from the Confederate government in obtaining testamentary evidence of its political status; Benjamin rejected the request as futile, and Secretary of State William Henry Seward (1801-1872) had Sullivan locked up until just before the trial began in October.[19]

Barlow did not participate in the courtroom, although Jeremiah Larocque, a partner in his firm, then named Bowdoin, Larocque and Barlow, did appear for the Captain of the *Savannah*. However, earlier in the proceedings, Barlow corresponded publicly with Benjamin about the prisoners' status, with Barlow admonishing Benjamin to provide better conditions of imprisonment for Union prisoners and Benjamin declining to do so until the North stopped treating Confederate sailors as pirates.[20]

Before the war began both Benjamin and Barlow had been members of the prominent Union Club in New York City. With the hostilities Benjamin ceased paying his dues as a club member, but Barlow and two other members paid Benjamin's dues in his stead. So displeasing was this to many other members that they resigned and formed the Union League Club. Both continue to thrive in New York City.[21]

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[19] For the story of the case, see John D. Gordan, III, "The Trial of the Officers and Crew of the Schooner *"Savannah"*, *Yearbook, Supreme Court Historical Society* (1983), p. 31.

[20] *The War of Rebellion – A Compilation of the Official Records of the Union and Confederate Armies*, Series II (1898), III, pp. 162, 780. Benjamin characteristically began his letter with reference to the ongoing prosecution of the *Savannah* privateers:

> I had noticed and appreciated the generous spirit with which your firm as well as other members of the New York bar had volunteered their services in defense of the prisoners taken by your Government from the privateer Savannah, but my intimate acquaintance with yourself and partners had led me to expect such action on your part and it excited no surprise. It only served to add to the esteem in which I had always held you.

[21] Le Grand B. Cannon, *Personal Reminiscences of the Rebellion 1861-1865* (New York, 1895), pp. 184-186. Barlow was also a member of the New York Democratic Vigilance Committee, which in 1860 attacked Gerrit Smith, an attorney, former Congressman and prominent, wealthy New York abolitionist, as a supporter of John Brown's raid at Harper's

According to his obituary in the *New York Times*, "Barlow was a Democrat in politics, and was so during and before the war, when he was an apologist for slavery".[22] His wartime behavior excited suspicion in some parts of the Government, and when the *New York World*, in which he had a substantial ownership interest, was one of the newspapers tricked in to publishing a false report of Union failure on the battlefield, Secretary of State Seward and Secretary of War Edwin McMasters Stanton (1814-1869) prevailed on President Lincoln to shut down those newspapers and to arrest persons associated with them, including Barlow.[23]

(b) James A. Bayard Jr. and Thomas F. Bayard

James and Thomas Bayard were father and son, both lawyers and each a United States Senator from Delaware, as James A. Bayard Sr. (1767-1815) had been before them.

James Jr. served in the Senate from 1851 to January 1864, when he resigned in protest after taking the required Test Oath. In April

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Ferry, leading Smith to sue Barlow for libel. See *Gerrit Smith and the Vigilant Association of the City of New York* (New York, 1860).

[22] 11 July 1889.

[23] William Marvel, *Lincoln's Autocrat – The Life of Edwin Stanton* (Chapel Hill, 2015), pp. 334-335; David Black, *The King of Fifth Avenue-The Fortunes of August Belmont* (New York, 1981), pp. 219-220, 241-243. Barlow's cultural life after the war was more benign. He was a founder and early board member of the Metropolitan Museum of Art and the New York Historical Society, to which he made contributions in cash and in kind. He also maintained a world-class book collection, later damaged by fire, but the catalog of the remainder of which survives. Albert V. House, "The Samuel Latham Mitchill Barlow Papers in the Huntington Library", *Huntington Library Quarterly*, XXVIII, no. 4 (August 1965), p. 341; Joseph Rosenblum, "Two Americanists: Samuel L. M. Barlow and Henry Harrisse", *American Book Collector*, VI, no. 2 (1985); James Osborne Wright, *Catalogue of the American Library of the Late Samuel Latham Mitchill Barlow* (New York, 1889). His art collection was extensive in size and variety and contained paintings attributed to Titian, Bellini, Constable, and Poussin, among others. *Catalogue of the Art Collection Formed by the Late Samuel Latham Mitchill Barlow* (New York, 1890), pp. 60-64. When he died, a poem was published in his memory by none other than his friend George Ticknor Curtis. "Samuel L. M. Barlow – In Memoriam". See *The Magazine of American History with Notes and Queries*, XXII, no. 4 (October 1889), p. 310.

1867, he resumed the position he had resigned when his replacement died, and completed the term in March 1869. At that time, his son Thomas became a United States Senator and continued in that position until March 1885, when he resigned to become Secretary of State.

James Jr. "was an ardent Democrat with warm Southern sympathies. Jefferson Davis, Judah P. Benjamin and John Slidell were his intimate friends…".[24] As secession spread, in Spring 1861 James Jr. took a month-long trip South to Mobile and Montgomery, then the capitol of the Confederacy; according to a letter written from Montgomery by Benjamin to Barlow dated 16 April 1861, just after the attack on Fort Sumter: "Bayard has just gone to N.O. after spending a couple of days with me".[25] From Spring 1861 until his resignation he spoke out strongly on the Senate floor against the measures taken by the federal government against the seceded states: Special Session (20 March 1861) "Executive Usurpation";[26] (28 February 1863) Speeches in Opposition to the Conscription Bill, (3 March 1863) "the Bill to Appoint a Dictator" entitled "An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases"; and (19 January 1864) "The Validity of the Test-Oath, Prescribed July 2, 1862" and resignation speech 25 January 1864. Thomas Bayard supported his father's position: the seceding states should allowed to go their own way in peace.[27]

In the first months of 1861 Benjamin was incensed about a newspaper publication claiming that he had been expelled from Yale and sought legal advice about the response he should make. His method was to use Barlow to secure advice from Charles O'Conor (1804-1884), the New York attorney who would later represent Jefferson Davis in his treason prosecution. O'Conor's advice via Barlow was to do nothing, and that advice was shared approvingly by Benjamin in correspondence with Thomas Bayard. Indeed, it seems that Thomas Bayard became Benjamin's principal

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[24] Charles Callan Tansill, *The Congressional Career of Thomas Francis Bayard 1869-1885* (Washington, D.C, 1946), p. 3.

[25] Barlow Papers. James Bayard would later visit Jefferson Davis as a prisoner in Fortress Monroe in August 1866. Linda Lasswell Crist, et al. (eds.), *The Papers of Jefferson Davis* (Baton Rouge, 2008), XII, p. xlii.

[26] *The Congressional Globe,* 20 March 1861, pp. 1477-1483.

[27] Harold Hancock, "Civil War Comes to Delaware", *Civil War History*, II, no. 4 (December 1956), pp. 29, 43-44.

Bayard correspondent as the war proceeded, but there is no doubt that politically both Bayards thought as one and shared a loyalty to Benjamin which he reciprocated.[28]

BENJAMIN'S POST-WAR EFFORTS TO MARSHALL CONFEDERATE ASSETS IN EUROPE

On 15 February 1864, the Congress of the Confederate States of America approved an appropriation of $5 million "in addition to the sum already appropriated for secret service, to be expended under the direction of the President".[29] In the spring, Jefferson Davis dispatched Jacob Thompson (1810-1885), Secretary of the Interior under President James Buchanan, and Clement Claiborne Clay (1816-1882), sometime United States Senator from Alabama, to Canada to supervise secret service activities there, which were funded with $900,000 of the secret service appropriation.[30] Benjamin gave Thompson his marching orders and staffed the operation.[31] The Confederates in Canada launched a number of dramatic operations, among them the St. Albans, Vermont, raid and bank robbery on 19 October 1864, the attempt, also on 19 October, led by John Yates Beall (1835-1865) to capture a U.S. Navy gunboat to liberate Confederate prisoners at Johnson's Island on Lake Erie, and the firing of New York hotels and other structures on 25 November 1864.[32]

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[28] Edward Spencer, *An Outline of the Public Life and Services of Thomas F. Bayard: Senator of the United States from the State of Delaware, 1869-1880* (New York, 1880).

[29] "No. 72. An Act making additional appropriation of secret service money". Charles W. Ramsdell (ed.) , *Laws and Joint Resolutions of the Last Session of the Confederate Congress (November 7, 1864 – March 18, 1865) Together with the* Secret Acts *of Previous Congresses* (Durham, 1941), p. 170.

[30] James M. MacPherson, *Battle Cry of Freedom* (Oxford, 1988), pp. 762-763. This figure may be $100,000 too low. See note 33 below.

[31] John W. Headley, *Confederate Operations in Canada and New York* (New York, 1906), p. 210; Butler, note 3 above, pp. 345-348.

[32] Headley, *passim.* See also *St. Albans Raid; or, Investigation into the Charges against Lieut. Bennett H. Young and Command, for Their Acts at St. Albans, Vt., on the 19th October, 1864* (Montreal, 1865); *Trial of John*

A single report of these activities survives, made from Toronto by Thompson to Benjamin under date of 3 December 1864, and endorsed by Benjamin as received on 13 February 1865. In addition to the initiatives already mentioned and a few less dramatic ones, Thompson reported to Benjamin on financial expenditures:

> Including the money turned over to Mr. Clay, all of which he has not yet expended, the entire expenditures as yet, on all accounts, are about $300,000. I still hold three drafts for $100,000 each, which have not been collected. Should you think it best for me to return, I would be glad to know in what way you think I had best return with the funds remaining on hand. [33]

Thompson did not know when he wrote the letter that Benjamin was beginning the process of replacing him with General Edwin Gray Lee (1836-1870), a cousin of Robert Edward Lee (1807-1870), who brought Thompson a letter from Benjamin instructing him to brief Lee, relinquish the Government funds he had, and return to the Confederacy. Nevertheless, as Lee established himself in Montreal, Thompson remained active in Toronto, sending Benjamin several dispatches in the month of January.

Benjamin wrote again to Thompson on 2 March 1865, instructing him to apply $10,000 of the funds he held to assist Confederate soldiers return home, to pay $20,000 to an unnamed person[34] previously identified in a late December dispatch "to be used by him in his discretion in our service" with more available if requested, to reserve an amount needed for his expenses to return to

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Y. Beall, as a Spy and Guerillero, by Military Commission (New York, 1865). See also *Memoir of John Yates Beall* (Montreal, 1865).

[33] *Official Records of the Union and Confederate Navies in the War of the Rebellion* (Washington D.C., 1896), Series 1, III, pp. 714, 719; Butler, note 3 above, pp. 346-347. No explanation has been found for the absence from this account of the additional funds which were provided in gold to Thompson in late April, 1864; the original account books for secret service funds show an initial $100,000 in gold paid on 27 April, and Benjamin forwarded a further payment of $900,000 in gold two days later. William A. Tidwell, *April '65: Confederate Covert Action in the American Civil War* (Kent, Ohio, 1995), p. 21.

[34] Apparently General E. G. Lee. Alexandra Lee Levin, "This Awful Drama", in *General Edwin Gray Lee, C.S.A., and His Family* (New York, 1987), pp. 142-143.

the Confederacy as soon as he could , via Havana and Matamoros, and to:

> V. Remit the entire remainder in your hands to Messrs. Fraser, Trenholm & Co. of Liverpool, to be placed to my credit, in a separate account to be called "Secret Service Account." Make this remittance as soon as possible and let me know the amount of it, as we are in pressing need of these funds abroad for important service there.[35]

At the end of March Benjamin, along with Jefferson Davis and other members of the Confederate cabinet, were on a railroad train leaving Richmond and heading south as General Lee retreated.[36] On 1 April Benjamin drew $1500 in gold from the secret service fund.[37] In early May, with the Confederacy in its death throes, Benjamin separated from the presidential party and set off alone, first in small open boats and later on a burning steamship, on a dramatic four-month journey to England via Havana and Nassau, reported in letters reprinted by his biographers; federal forces captured the presidential party on 10 May.

Thompson was already gone, having departed Canada for England and then France. On 2 May 1865, President Andrew Johnson (1808-1875) issued a proclamation offering rewards for the apprehension of persons believed to have been involved in the assassination of President Lincoln: after Jefferson Davis, the second person named in the proclamation was Thompson, with a price of $25,000 on his head. Both were named as conspirators in the charges that went to trial against Mary Surratt (1823-1865) and the other Lincoln assassination defendants before a military commission a few days later. By September, Thompson was ensconced at the Hotel Castiglione in Paris, more or less across the street from the Elysee Palace.

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[35] Douglas Southall Freeman, *A Calendar of Confederate Papers* (Richmond, 1908), pp. 190-191.

[36] Headley, note 31 above, p. 426. Headley, who had been Thompson's subordinate, saw and spoke with Benjamin at a station nine miles outside Richmond in the early morning of 1 April.

[37] Tidwell, note 33 above, p. 18. As Benjamin fled through Georgia he arranged for $900 in gold he was carrying to be sent to relatives who had fled from New Orleans. Butler, note 3 above, p. 365.

In correspondence in late September 1865 from 17 Savile Row, a London residence of Colin John McRae (1812-1877), the Confederacy's Treasury Agent in Europe, and the office of Henry Hotze (1833-1887), a propagandist who had been employed by the Confederate government,[38] Benjamin reported that he had arrived at Southampton in England on 30 August 1865.[39] Two days later he wrote to General Edwin Gray Lee in Montreal:

> I have just arrived in London and find the public affairs of the Confederacy in lamentable disorder – I am closing up the accounts of all agents of the Department and collecting the funds remaining on hand to pay the most sacred claims against the Government, among which the first and most pressing is that of the President and his family, and as I know that Mrs. Davis is entirely without resources –
>
> I have therefore to beg that you will as speedily as possible forward me your account, and remit the unexpended balance of the funds I sent you in Canada.
>
> I remain
>
> Yours very truly,
>
> J. P. Benjamin
>
> Sec. of State[40]

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[38] Renata Eley Long, *In the Shadow of the* Alabama*: the British Foreign Office and the American Civil War* (Annapolis, 2015), p. 67. See generally, Lonnie A. Burnett, *Henry Hotze, Confederate Propagandist: Selected Writings on Revolution, Recognition, and Race* (Tuscaloosa, Ala., 2008).

[39] Meade, note 3 above, p. 315; Butler, note 3 above, pp. 370-373.

[40] The letter is quoted from an image of it posted on its website by the Raab Collection, autograph dealers in Ardmore, Pa. (last visited 30 April 2023). Levin, note 34 above, pp. 174, 219, note 11, refers to this letter and Lee's payment of £923/12/2 on 12 October 1865 in response to it, and quotes from Benjamin's reply from Paris on 29 October 1865:

> You have, in appropriating portions of the money in your hands for such sacred purposes as endeavoring to save the life of Beall, aiding Gen'l Lee, and sending relief to our destitute officers and soldiers in Virginia, made a use of the funds confided to you in a manner that is warmly approved by me and would I am sure be commended by

> P.S. Write me under envelope to "John K. Gilliat & Co., Bankers, 4 Crosby Sq. E.C. London".[41]

That same day, 1 September, Benjamin wrote a long letter to Varina Davis, Jefferson Davis's wife:

> I only arrived here night before last , and … learned with satisfaction that ample means have already been provided for defraying all expenses that could be incurred in behalf of Mr. Davis, as well as the defense of those unfortunate gentlemen who were associated with us in the administration of the government and are now in the hands of the Federal authorities …
>
> Knowing as I did how completely your resources had been exhausted before my departure from Georgia, I consulted with Mr. Mason and Mr. McRae, stating that I considered yours was the first and most sacred claim and that one year's salary ought to be placed at your disposal by sending to you a letter of credit on a London banker. It is but bare justice to both these gentlemen to say that…they heartily concur in the justice and propriety of this …
>
> The money now placed at your disposal, my dear Mrs. Davis, is your husband's: it is money of the government paid to you on his behalf. …
>
> You can use it without any scruple of delicacy. I beg however that you will not apply any of it toward the personal use of Mr. Davis or any expenses of his trial and defence; for I *know, I am absolutely certain,* that a very large sum, five times as much as will probably be wanted, is already placed in perfectly safe hands, to be used solely for his service, and

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> our beloved and honored President if his voice could now be heard. Your whole conduct in your agency has been extremely satisfactory to the Government and honorable to yourself, and it will give me great pleasure at any time to bear testimony to this effect.

[41] J. K. Gilliatt & Co. was a financial firm in London which made a £150,000 loan to the Confederacy to acquire ships in 1864. *The War of the Rebellion: Official Records of the Union and Confederate Armies*, Series IV (1900), III, p. 525 (1900); John D. Bennett, *The London Confederates* (Jefferson, 2008), pp. 102, 107, 157.

> for the expenses of his defence and that of other prisoners, until his release from captivity.[42]

Just two days later, on 3 September, Benjamin wrote to Jacob Thompson in Paris:

> I shall have the pleasure, I hope, of seeing you in Paris next week and talking over all our matters – In the mean time I am very busy here in settling the affairs of the Department with its different agents and shall leave this evening for Liverpool to close the a/c with Fraser Trenholm & Co. – I am endeavoring to gather all the remnants of the funds for the purpose of paying the most sacred claims against the government, among which the first and most pressing is that of the President and family, as I know Mrs Davis was utterly destitute of resources when I left.
>
> I write now to beg that you will make up your accounting with the Department, so that I may make use of any unexpended balance in yr hands – In doing so, I recognize in advance yr right, (and the propriety and justice of your exercising it) to retain such amounts as should be necessary to your own maintenance while proscribed by the Federal Government for your actions as a Servant of the Confederacy – We will talk over all matters however, when we meet –
>
> I am not at all sorry to learn that you suspended yr remittances to Fraser Trenholm & Co. for reasons which I will give you when we meet –
>
> With best regards,
>
> Yrs very truly
>
> J. P. Benjamin[43]

Fraser, Trenholm & Co in Liverpool, of which more later, was the Confederacy's financial depository in England, receiving and selling its cotton, and banking or applying the proceeds of those

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[42] Hudson Strode, "Judah P. Benjamin's Loyalty to Jefferson Davis", *The Georgia Review*, XX (1966), pp. 251-254.

[43] Jno. B. Castleman, *Active Service* (Louisville, 1917), reproduction following pp. 200, 201.

sales and other moneys received for the Confederacy's benefit on instructions both from the government in Richmond and from its local representatives in England and France. It had partners in common with John Fraser & Co. of Charleston, one of whom, George Alfred Trenholm (1807-1876), left the firm in 1864 to become Secretary of the Treasury of the Confederacy. The member of the Liverpool firm most active in Confederate affairs in England was Charles Kuhn Prioleau (1827-1887), an American who had become a British subject.[44]

The likely reason for Benjamin's acquiescence in Thompson's disobedience of these instructions was the assertion Fraser, Trenholm began to make in early 1865 that the Confederacy's accounts with the firm were overdrawn and the Confederacy owed the firm money.[45] On 21 February 1865, Charles K. Prioleau of Fraser, Trenholm provided an extended financial analysis to Caleb Huse (1831-1905), in charge of purchasing arms for the Confederacy in Europe,[46] advising: "The [Confederate] Government is now in debt to us for cash advances of £224,125/0/0 and we are advised of [illeg. words] actually issued in addition amounting to £645.550 without counting those held now by Gen'l McRae, the amount of which is unknown to me".[47]

Benjamin's two letters to Lee and Thompson were directed to them as successive Confederate Commissioners in Canada, where, Benjamin had reason to know, substantial funds had been sent on his orders in the last year of the Civil War. It appears to have been

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[44] See Stephen R. Wise, *Lifeline of the Confederacy – Blockade Running During the Civil War,* (Columbia, 1988), pp. 46-65; Richard Cecil Todd, *Confederate Finance* (Athens,1954), p. 22; Ethel Nepveux, *George A. Trenholm – Financial Genius of the Confederacy* (1999); Nepveux, *George Alfred Trenholm and the Company That Went to War, 1861-1865* (1973).

[45] Charles S. Davis, *Colin J. McRae, Confederate Financial Agent* (Tuscaloosa, 1961; reprinted with additional material by J. Barto Arnold III: College Station, Texas, 2008), p. 75.

[46] Dave Stevens, *Dancing with the Philistines*: *The Life and Times of Colonel Caleb Huse* (2015).

[47] Letterbook, Fraser, Trenholm & Co. Archives, Maritime Archives and Library Merseyside Maritime Museum, Liverpool.

a perception shared among senior Confederate refugees abroad that Thompson was holding back substantial Confederate funds.[48]

Benjamin's earliest biographer's description of these activities leaves out the financial portion:

> Arriving in London, one of his first cares, with Mr. Mason and others, was what one might call completing the obsequies of the Confederacy, counseling with them as to winding up the affairs of their offices, disposing of papers, etc.[49]

But Benjamin's unmentioned collection efforts were entirely consistent with those a month earlier by John Cabell Breckinridge (1821-1875), the last Confederate Secretary of War and, earlier, Vice President of the United States under James Buchanan, the only other Confederate Cabinet member to escape capture and imprisonment by United States forces at the close of the Civil War.

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[48] After it was publicly announced that Charles O'Conor, a prominent New York lawyer with Southern sympathies and a Southern following, had agreed to represent Jefferson Davis without a fee, John Murray Mason (1798-1871), who had been the Confederate Commissioner in London, wrote to him from there under date of 19 June 1865:

> I venture to address you, as you will perceive, in the hope that you will be counsel for President Davis and his associates. I am aware that to conduct the defense properly, expense must be incurred, besides the fees of counsel, in preliminary preparation as regards obtaining rebutting or other evidence, etc….
>
> If thus you are at liberty to act, I beg to say, that your draft on Messers. John K. Gilliat & Co., No. 4, Crosby-Square, London, for Five hundred (L500) pounds sterling to be applied to the purposes mentioned, will be honored on presentation… .
>
> I know of none other, in the disastrous condition of my country, who can come to the aid of these gentlemen, unless it should be Mr Jacob Thompson, late an agent of the Confederate Government in Canada – and I have not his address to communicate with him….

Dunbar Rowland (ed.), *Jefferson Davis – Constitutionalist: His Letters, Papers and Speeches* (Jackson, 1923), VII, pp. 30-32. Nor was the perception unwarranted: a teller at the Ontario Bank in Montreal on 20 May 1865 testified before the Military Commission trying those accused of assassinating President Lincoln that Thompson's account at his bank had had "an aggregate amount of credits" of $649,873.28. Benn Pittman, *The Assassination of President Lincoln and the Trial of the Conspirators* (Cincinnati and New York, 1865), p. 45.

[49] Butler, note 3 above, p. 374

Breckinridge reached Havana and London just a few weeks before Benjamin but left London for Canada a week before Benjamin arrived. Although not mentioned in his full-length biography of Breckinridge, in a separate, more general volume the same author says: "That call was all he could do here in Cuba, other than close affairs with the Confederate consul in Havana and direct that the remaining funds in his hands be held for Davis's defense".[50] Similarly, in the full-length biography, Breckinridge's motive for traveling to England is explained:

> Since the only way from Cuba to Canada was by way of England, he could also contact prominent southern agents and diplomats along the way, doing what he could in closing the affairs of the Confederacy and raising more funds to aid Davis and other political prisoners.[51]

However, "On reaching England Breckinridge attempted to settle remaining Confederate affairs, finding them so heavily in debt that little was left to aid Davis's defense …"[52], or, as his biographer later put it:

> After he got to London, he hurriedly sought out the leading Confederates to offer his services in concluding their affairs. He met with James M. Mason, diplomat and commissioner to Great Britain during the war, as well as General Colin P. McRae and Caleb Huse, purchasing agents. From Mason and McRae he received the dismaying news that the Confederacy actually died in debt to many of its agents.[53]

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[50] William C. Davis, *An Honorable Defeat – The Last Days of the Confederate Government* (New York, 2001), p. 389. According to Davis, "The Conduct of 'Mr. Thompson'", *Civil War Times Illustrated*, IX, no. 2 (May 1970), pp. 4, 6:

"Other Confederate agents … among them Charles Helm in Cuba and Thomas Hines in Canada, promptly prepared and submitted their accounts to their superior, Secretary of State Judah P. Benjamin. In addition, they freely offered Confederate funds remaining in their hands for use in the defense of Jefferson Davis".

[51] William C. Davis, *Breckinridge – Statesman, Soldier, Symbol* (Lexington, 2010), p. 548.

[52] Davis, note 50 above (2001), p. 391.

[53] Davis, note 51 above, p. 549. According to Robert W. Young, *Senator James Murray Mason – Defender of the Old South* (Knoxville, 1998), pp.

Whatever his success in his other collection efforts,[54] Benjamin may have done poorly with both Fraser, Trenholm and Thompson, although it is not easy to tell. On 13 September, while in Paris to see his wife and daughter for the first time since the beginning of the Civil War, Benjamin wrote to Thompson:

192, 265 note 72:

> While he remained in Britain, Mason busied himself with the loose ends of the late Confederate States of America. Bulloch and other southern agents continued to require help in money matters. With virtually all former Confederate officials faced with belt-tightening in the wake of Richmond's defeat, Mason joined Benjamin and McRae in distributing the remnants of the Confederacy's funds in Europe.

A footnote explains: "The trio arranged for the disbursement of money in the remaining Confederate bank accounts to the various commissioners and agents for expenses and services rendered …". A letter from Freeman Harlow Morse (1807-1891), U.S. Consul in London, to Secretary of State Seward, dated 26 May 1866, casts further light on Mason's efforts:

> At a meeting of several confederates in London, to confer on the probability of the creditors of the confederacy securing any funds or property belonging to the rebel government at the time of its decease, in payment of their claims, at this meeting Mr. Mason stated that [W. L.] Hope and [Beresford] Lindsey had £40,000 to £50,000.
>
> Their plan was, on advice of counsel, to *trustee* the United States as the lawful owner. But for certain reasons they thought it inexpedient to proceed with the case, and gave it up. Mr. Mason then being out of funds and unable to procure a supply from the holders of confederate money above named, manifested a willingness to aid in having it restored to its rightful owner, if subpoenaed as a witness, but wanted his own time to make the development. As time passed on he was less inclined to do so, or say anything about it, and last week went to Canada, and it is said will soon go to Virginia. … I presume Mr. Mason will have business at the pardoning bureau before he returns to Virginia. Permit me to suggest the expediency of first obtaining from him his affidavit of all facts and circumstances known to him, in reference to the above or other funds or property held in this country….

Message from the President of the United States, Ex. Doc. 63, H. Rep., 39th Cong,, 2d Sess. (28 January 1867), p. 2.

[54] After his return from Paris, writing to his family in New Orleans on 29 September 1865, Benjamin explained: "I am now back in London partly on public and partly on private business". Butler, note 3 above, p. 371.

> I have been in Liverpool and Messrs. Fraser, Trenholm & Co. refuse to pay the draft of £25,000 drawn by me as secretary of state in favor of John K. Gilliat & Co. although they admit receiving remittances from you of more than £103,000 sent from Canada in compliance with my instructions to you in March last. They base their refusal on the ground that the treasury department was indebted to them and that they had the right to retain the whole sum received on account of the state department as an offset, although this remittance was made specifically to cover the bill for £25,000. I learn, however, from them that you did not remit the entire sum in your hands as directed, and this is very fortunate for the balance can be applied toward the payment of the bill of exchange held by Gilliatt & Co. as was directed from Richmond. I therefore request that you will hand me over the balance of the funds you were then ordered to remit …".[55]

Benjamin appears to have seen Thompson the same day as he wrote that letter to him, accompanied by John Slidell, who had been Confederate Commissioner to France and was the brother of Benjamin's law partner in New Orleans before the Civil War. He left with a bill of exchange drawn on a London bank for L12,000 "to be applied to the partial payment of a bill of Exchange for twenty-five thousand pounds, now in the hands of John K. Gilliat & Co., and for which the said Jacob Thompson was directed to make remittances to Fraser, Trenholm & Co., the drawees, by letter addressed to him from Richmond in March last" by Benjamin. In exchange, Benjamin released all remaining claims "of the Confederate Government on account of the undersigned as secretary of state…".[56]

Thompson gave his version of his meeting with Benjamin and Slidell in a letter he wrote to Breckinridge on 14 September 1865, the day after the meeting. He claimed to have "paid over to him the Confederate money in my hands" and to have received "his receipt in full for all the monies in my hands, or which I had had", based upon Benjamin's alleged denial of "my right in law to appropriate what money I had in my hands in payment of c laims due me from the Confederate Government. He says he drew drafts before the

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55 Castleman, note 43 above, p. 202.

56 Ibid.

evacuation of Richmond against the funds in my hands. I was bound to take his statement".[57]

Benjamin described the meeting quite differently in his 30 November 1865 letter to Breckinridge:

> According to my calculations Mr. Thompson should have accounted to me for £35,000. He claimed the right to retain all the money in his hands as due him by the Government for his "cotton burnt". This money he had been ordered to remit, and £25,000 of it had been appropriated (by orders sent before we left Richmond) to the payment of a bill of exchange drawn by the State Department and held by a London banker. This bill was protested in consequence of Thompson's failure to remit. I had a somewhat stormy interview with him, at which Mr. Slidell was present, and finally was forced to compromise by taking £12,000 which were at once remitted to the London banker …
>
> Thompson said that he had paid or become responsible for some money to be expended for the use of Mr. Davis, but he gave me no account and I know from previous professional advice received here that by law I could not force him to pay the money to Confederate creditors, and that it would all go into Yankee hands, if the Federal officials learned of its existence.[58]

Not all the Confederates abroad had to be approached by senior officials to turn over their funds for Jefferson Davis's legal representation. Colin McRae, mentioned earlier in the context of such activities by Secretary of War Breckinridge after his arrival in England, had been the senior fiscal agent of the Confederacy in Europe, having been sent to Paris first in 1863 to review the purchasing activities of Major Caleb Huse – to whom he gave a clean bill of health – and having been created Confederate Treasury agent and placed in overall control in 1864.[59] Upon learning

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[57] Davis, note 50 above (1970), p. 43.

[58] Ibid.

[59] David Burt, *Major Caleb Huse C.S.A. & S Isaac Campbell & Co* (Milton Keynes, 2009). "One of the Gulf Coast's most successful businessmen …", at the start of the Civil War McRae was a financier and commission merchant and represented Alabama in the Confederate

that Jefferson Davis, confined to Fortress Monroe, was being represented by Charles O'Conor, on 20 June 1865, McRae wrote to James Murray Mason, that "he had deposited £500 with John K. Gilliat & Company, 4 Crosby Square, London and wished to add £10,000 more for O'Conor's use in defraying the expenses of the trial and for attorneys' fees".[60]

The secondary materials are ambiguous about the application of payments to O'Conor for his defense of Jefferson Davis. Citing a letter O'Conor wrote to Mason on 9 July 1865, Mason's biographer asserts that "O'Conor refused any money, having volunteered for the good of his country".[61] Nevertheless, that O'Conor and Varina Davis (1826-1906) received substantial further payments from McRae is disclosed in correspondence sparked by Jefferson Davis's release from confinement nearly two years after his capture. In mid-May 1867 McRae wrote Davis via O'Conor and Mason that he had sent Mrs. Davis £200 via Duncan Farrar Kenner (1813-1887), a sometime Confederate Commissioner in Europe, and had paid her drawing on him of £2500, adding that "I have also sent Mr. O'Conor £3000 with instructions to pay to you any balance that might be left after defraying the expenses of your trial".[62] Despite the large amount of these remittances, McRae wrote, "At one time I

Provisional Congress. Crist, note 25 above, VIII, p. 333 n.17; Wilfred Buck Yearns, *The Confederate Congress* (1960), pp. 9, 241.

[60] McRae said that "… I shall feel that I have done right whether speculating creditors of the C. S. [Confederate States] be paid in full or not". McRae's biographer continues with the supposition that: "It is presumed that this money came from the sale of Confederate property under McRae's control which had escaped seizure by the United States, although he had previously stated that his books had been audited and that his funds were exhausted". Davis, note 50 above, p. 87, note 12. At the end of July, Mason proposed that McRae open an account to fund payments to O'Conor. Young, note 53 above, p. 190. Under date of 16 August 1865, O'Conor wrote to Mason: "As far as I can judge at present the £500 for which I hold a letter of credit will exceed all pecuniary needs. I have before indicated a disinclination to purchase professional aid". Rowland, note 48 above, VII, p. 38.

[61] Young, note 53 above, pp. 190, 264 n. 59.

[62] *The Papers of Jefferson Davis* (2008), XII, p. 200. According to the editors, "The funds were undoubtedly those of the Confederacy …". Ibid., p. 229 note 4.

hoped to have it in my power to have made larger provision for you. But circumstances have prevented me from doing so".[63]

On 9 July 1867, Davis wrote an astonishing letter to McRae, chiding him for the quoted language of his 18 May letter, which Davis had apparently come to believe implied that Davis had solicited a donation of McRae's "private property" rather than what Davis had assumed: "In placing funds in the hands of my counsel to defray the expenses of my trial, and instructing him to pay to me any balance which remained, I supposed you acted as the financial agent of the Confederate states". Mason tried to intervene with Davis:

> I have yours of the 8th inst- returning McRae's letter – the extract you give me from his to you, was never intended to convey the idea, that *what he did* was in any manner instigated by request, or intimation from you – a construction you say in your note accompanying the extract, might be put on it – I know it was the suggestion of his own mind, to come to your aid, as soon as he heard of your arrest – and you[']r[e] right, that the instruction to O'Connor [sic] was, to extend that aid as Counsel, as well to members of the Cabinet and others of like grade under arrest, as to yourself …[64]

Not surprisingly, the editors of the *Papers of Jefferson Davis* note that "[t]his is the last known communication between Davis and McRae".[65]

When Davis wrote, McRae was preparing to leave England to settle in British Honduras, now Belize, returning neither to England or to the United States. At the time he was the defendant in a lawsuit brought by the United States in the Chancery Court in London, in which he was represented by Judah P. Benjamin.

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[63] By letter of 12 June 1867, Davis acknowledged receipt of the copy of McRae's 18 May letter sent through Mason. O'Conor wrote to Davis acknowledging the receipt of the £3000 in accepted bills of £500 each and acknowledged having cashed two of them, realizing $7000. Ibid., pp. 211, 217-219. Further correspondence between McRae and Davis via Mason ensued to replace the £2000 in remaining bills, which appear to have been drawn on funds that were not available.

[64] Rowland, note 48 above, VII, pp. 119-120.

[65] Ibid., pp. 228-229 & note 4.

LAWSUITS SEEKING CONFEDERATE ASSETS BROUGHT BY THE UNITED STATES IN ENGLAND

These efforts by Benjamin to amass the remnants of the Confederate assets in England were not part of a legal practice; he was not called to the Bar until 6 June 1866, joining the Northern Circuit, having been specially relieved of the obligation to eat dinners for several years at Lincoln's Inn, which he had earlier entered in January 1866 as a pupil of Charles Edward Pollock (1823-1897), son of Lord Chief Baron Jonathan Frederick Pollock (1783-1870) of the Exchequer and uncle of the great academic, Sir Frederick Pollock (1845-1937).[66]

The bulk of his professional activities for the first two years after his admission were in matters connected with the affairs of the Confederacy in England during the Civil War, and the clients he defended were principally Fraser, Trenholm or Colin McRae. The best known of these cases, *Attorney General v. Sillem* – the seizure of the cruiser *Alexandra* – was initiated and prosecuted unsuccessfully by the British Government in 1863 at the behest of the United States while Benjamin was still serving as Secretary of State of the Confederacy; however, the ship returned to England after the war and was arrested again on application of the United States. The United States' first suit against Fraser, Trenholm – to seize Confederate cotton –was filed in the Chancery Court in July 1865, while Benjamin was making his way from Bimini to Nassau by sea; it was instigated by Thomas Haines Dudley (1819-1893), the United States Consul at Liverpool, a vigilant observer of the activities of Confederate supporters there and particularly of Fraser, Trenholm's.[67] The second and third suits were filed in August 1866, a few weeks after Benjamin's call to the Bar: one was a proceeding in the Admiralty Court to seize seven blockade runners and the other, as Dudley later described it, was "a suit for discovery and general account, involving all Fraser, Trenholm & Co.'s dealings

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[66] The circumstances of Benjamin's admission, and the ambiguous stature he achieved by his subsequent elevation to the rank of "Palatine silk", are analyzed in R. E. M[egarry], "Note: Palatine Silk", *Law Quarterly Review*, LXXXVII (1971), p. 477. See also A. L. Goodhart, note 4 above, pp. 12-13.

[67] Coy F. Cross II, *Lincoln's Man in Liverpool – Consul Dudley and the Legal Battle to Stop Confederate Warships* (DeKalb, 2007).

and transactions with the so-called confederate government, from the commencement of the rebellion down to the time of filing the bill…".[68] A similar suit was filed against McRae in June 1866. Finally, in 1867 the *Alexandra*, having eluded the seizure after a trial in 1863, returned to Liverpool after an unsuccessful run abroad, and was arrested at the behest of the United States Government. In all five suits the United States was the plaintiff.

What follows is the status of the cases up to the point that Benjamin entered his appearance in them, the first being over for the time being:

[1] *The Attorney General v. Sillem and others, claiming the Vessel "Alexandra" under the Foreign Enlistment Act* (Exchequer, 25 May 1863)

On 25 May 1863, this action was commenced in the Court of the Exchequer to seize the vessel *Alexandra,* a warship then under construction for the Confederacy in Liverpool. The American authorities were livid at the British Government's hands-off attitude toward shipbuilding for the Confederacy in Liverpool, and particularly the earlier escape of the *Alabama*, a predator wreaking havoc on United States shipping on the high seas.

Faces that will become more familiar first appear here. At the trial which began 23 June 1863, the prosecution was led by the Attorney General and the Solicitor General, the latter Sir Roundell Palmer (1812-1895), a frequent combatant with Benjamin and the future Lord Selborne, the Lord Chancellor.

Charles K. Prioleau and James Thomas Welsman as partners of Fraser, Trenholm were defendants in the action. The firm was mentioned several times in the Attorney General's opening, first as "merchants at Liverpool, very much engaged in the interest and for the purposes of the Confederate Government … mixed up particularly with the pecuniary arrangements and the discharge of the pecuniary obligations of the Confederate States in that port…". In completing his opening the Attorney General said:

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[68] *Message of the President*, Ex. Doc. No. 63, H. Rep., 39th Cong., 2d Sess. (28 January 1867), p. 26 ("Message of the President").

> What business had any member of the firm of Fraser, Trenholm and Company, with that ship? I cast about in vain for an answer to the question.
>
> I can only answer it in one way. I can only answer it in one way, that they had a like interest which they or others like them had in the construction and arrangement of the precursor of the "Alexandra", the "Alabama", that is to say, that interest which belonged to them as agents of the Government for whose warlike purposes this ship was built and intended.

The British Government had little evidence to support the contention that the *Alexandra* was being built as a warship; it was obliged to call adverse witnesses involved in the construction of the vessel whose answers were terse and unhelpful. Its evidence against Fraser, Trenholm was that the vessel was being built for the firm, that Welsman was seen in the shipyard, that Prioleau had a Confederate flag on his desk at Fraser, Trenholm, and that James Dunwoody Bulloch (1823-1901), the Confederate Naval agent in England, held meetings at Fraser, Trenholm.[69]

The *coup de grace* was delivered by Lord Chief Baron Pollock, then over 80 years old, who charged the jury that for the statute to apply the vessel had to have been armed or was intended to be armed in Liverpool, which was not the plan (nor had the *Alabama* been), and who, when his charge was excepted to by the Solicitor General after a defendants' verdict, denied that he had said any such thing.[70] An effort by the British Government to obtain a new trial was hamstrung by technical issues on appeals led by Sir Roundell Palmer, now Attorney General, to the Exchequer Chamber and the House of Lords.[71]

The *Alexandra* was released but she would return.

[2] *United States v. Charles Kuhn Prioleau, Theodore Dehon Wagner. James Thomas Welsman, William Lee Trenholm, et al.,* (Chancery Court, filed 18 July 1865)

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69 *The Attorney General v. Sillem and Others, Claiming the Vessel "Alexandra" seized under the Foreign Enlistment Act: Report of the Trial* (London, 1863), pp. 14, 18, 88, 90, 108.

70 Ibid., pp. 232-235.

71 The Attorney General v. Sillem, 2 H & C. 31, 581, dism. 10 H.L C. 703 (1864).

Shortly after the Civil War ended, United States Consul Dudley initiated a lawsuit in the name of the United States against Fraser, Trenholm in the Chancery Court to seize a shipment of 1356 bales of Confederate government cotton originating from Galveston and recently arrived in Liverpool aboard the *Aline*, which had left Havana for Liverpool flying British colors on 10 June 1865. The complaint (at paras. 7-8) claimed that the cotton "is now the absolute property of the Plaintiffs, all public property having been ceded to the United States when the Confederacy surrendered".

An amended complaint was filed on 24 July 1865 and two days later the parties were before Vice-Chancellor William Page Wood (1801-1881) on the application by the United States for an injunction against any delivery of the cotton to Fraser, Trenholm or its transfer by that firm to any other party.[72] The *Aline* was one of eight ships which Fraser, Trenholm were to arrange to build pursuant to a contract made on 7 July 1864, with Colin McRae, acting as agent on behalf of the Confederate States. The ships were to carry Confederate cotton to Liverpool consigned to, and to be sold by, Fraser, Trenholm; half the proceeds of those sales, after deducting the expenses of the voyages, were to be applied to the cost of the vessels and the other half as McRae should direct, the vessels to be transferred to the Confederacy when fully paid for. [73]

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[72] The Vice-Chancellor was a future Chancellor, Lord Hatherley. The representation of United States was led by the Attorney General, a position to which Sir Roundell Palmer had succeeded in October 1863, following the completion of proceedings in the trial court in the *Alexandra*. He was supported by George Markham Giffard, Q.C. (1813-1870), a future Vice-Chancellor and Lord Justice of Appeal. The defendants were represented by Sir John Rolt, Q.C (1804-1871). who would become Attorney General in 1866 and briefly a Lord Justice of Appeal; his second was William Milbourne James (1807-1881), like Giffard a future Vice Chancellor and Lord Justice of Appeal.

[73] Under date of 4 July 1864, McRae wrote to Secretary of War Seddon:
> I have since made arrangements with Messrs. Fraser, Trenholm & Co. to furnish the Government with eight first class steamers, to be purchased by or built under the direction of Captain Bullock. Two of these steamers, the Bat and the Owl, have already been purchased, and will leave for Bermuda on the 1st of August. The six others are contracted for, to be ready for sea, as follows: say, two in November, two in December, and two in April, 1865.

The Vice Chancellor ruled that, having displaced the *de facto* government of the Confederacy, the United States had succeeded to ownership of the cotton, but only subject to the contractual rights of Fraser, Trenholm.[74] The Vice Chancellor appointed Prioleau as receiver of the cotton, reckoned to be worth £20,000; he directed that Prioleau give security for £20,000 or pay the money into court.[75]

The matter came to the Vice Chancellor again on 5 and 6 July 1866, with the same line-up of counsel and without any visible participation by Benjamin. The United States had filed an amended bill in February 1866, in response to which the defendants had filed a cross bill and interrogatories against the United States and to join as a party and take evidence from President Andrew Johnson. The Vice- Chancellor's opinion hinted strongly that the course the defense should have followed was to demur to the original bill filed against them and questioned "whether the United States Government have control over their President or can compel him to produce papers or the like ...", in contrast to the corporate officer cases from which the defendants argued. Accordingly, the Vice-Chancellor refused to order a stay until the President answered, but

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Correspondence Concerning Claims Against Great Britain (Washington D. C., 1871), VI, pp. 163-164.

74 This aspect of the decision infuriated Secretary of State Seward:

> The United States do not admit that the combination of disloyal citizens which has raised the standard of insurrection is now, or has at any previous time been, a government *de facto*, or in any sense a political power, capable of taking, holding, giving, asserting or maintaining corporate rights in any forum, whether municipal or international. It is true that a different view of the character of the insurgents has seemed to find favor with some portion of the British nation, and even with the British government.

William H. Seward to Charles Francis Adams, 10 August 1865. *Executive Documents Printed by order of the House of Representatives*, 39th Cong., 1st. Sess., Vol. 1 (Diplomatic Correspondence) (Washington D. C., 1866), pp. 450-451.

75 *Correspondence Concerning Claims against Great Britain transmitted to the Senate of the United* States (Washington D. C., 1869), IV, Appendix 7, pp. 506-512; The *United States Government v. Prioleau, English Reports*, LXXI, p. 580; *The Law Times - Reports*, XIII (23 September 1865), p. 92.

did halt the proceedings until the United States put in its answer to the cross bill.[76]

[3] *United States v. Theodore Dehon Wagner, James Thomas Welsman, Charles Kuhn Prioleau, and William Lee Trenholm* (Chancery Court**,** filed 18 August 1866)

This was another action filed in chancery by Thomas Dudley, the United States Consul in Liverpool, against the partners of Fraser, Trenholm, the order of defendants presumably changed to distinguish it from the suit for the cotton on the *Aline*. This suit sought an accounting by Fraser, Trenholm "of all moneys and goods and steam-vessels which have at any time come into the hands … of said firm as agents or trustees or otherwise on behalf of the so-called Confederate States and of their dealings therewith", other than the cotton in the earlier suit, and that the defendants be "ordered to pay" to the United States "the moneys which on taking such account may be found in the hands of or due from their said firm Fraser, Trenholm …".

[4] *United States v. Colin J. McRae* (Chancery Court, filed 16 June 1866)

Much like the *Wagner* proceeding, this bill, accompanied by interrogatories, sought an accounting by McRae of all "moneys and goods" which had come into his hands as Treasury Agent for the Confederacy and an order directing him to pay over whatever was in his hands on taking of the account, the appointment of a receiver and an injunction against his parting with any money or goods in his possession as a Confederate agent.

In contrast to the Chancery cases against the Fraser, Trenholm partners, the proceedings against Colin McRae did not originate in Liverpool or with U.S. Consul Dudley. Instead, in a letter to Secretary of State Seward in May 1866, F. M. Morse, the United States Consul in London, proposed the suit against McRae and a

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[76] Transcripts of the oral argument on 5 July and of the Vice Chancellor's decision the following day are in the Fraser, Trenholm archive at the Merseyside Maritime Museum in Liverpool. The decision is also reported at Hemming (ed.), *Equity Cases*, II, pp. 657, 668-669.

separate suit, which was also brought, against James B. Ferguson, a Major in the Confederate Quartermasters Corp, who had first come to England in 1862 and was active in buying supplies of its army. Seward referred Morse's letter to Treasury Secretary McCullough, who responded on 9 June through Seward, authorizing Morse

> … to take such steps as may seem to you proper and necessary to receive and secure, by legal proceedings, voluntary surrender, or compromise, any moneys or other property which was held as belonging to the so-called Confederate States government, and to execute and deliver full and proper receipts and acquittances for the same.[77]

[5] *United States v. Prioleau* (Admiralty Court, filed 2 August 1866)

As reported in *The Law Times* for 29 December 1866:[78]

> On the 2nd of Aug. 1866 the United States commenced proceedings in the Admiralty Court to recover possession of the seven vessels then lying in the Mersey and in the possession of Mr. Prioleau, and on the same day a warrant for the arrest of the vessels was served. An appearance having been entered for Mr. Prioleau, on the 14th Sept., he moved before the Judge of the Admiralty Court in chambers for the release of the vessels without bail. On hearing the motion the judge of the Admiralty Court directed the plaintiffs, the United States, to file their petitions within twelve days, and that the consent of the American Minister or the Consul-General of the United States in this country should first be obtained.

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[77] *Message of the President*, note 68 above, pp. 2-5. Dudley looked into the origin of these claims and determined that "Morse based his suit on information supplied by 'Mr. [C. M.] Fisher an American lawyer [from Vergennes, Vt.] residing in London'. In return for Fisher's help, Morse agreed to pay him 25 percent of all Confederate assets recovered. After Fisher paid his expenses, he and Morse were to split the remainder of the 25 percent". Cross, note 67 above, p. 149. Fisher apparently hung around the Embassy in London looking for opportunities. Sarah Agnes Wallace and Frances Elma Gillespie, *The Journal of Benjamin Moran 1857-1865* (Chicago, 1949), II, p. 1342 & note 7.

[78] XLII, p. 173.

This litigation was also commenced by F. M. Morse, the United States Consul in London.

Benjamin Appears

The *Law Times* of 25 August 1866 reported Benjamin's "first appearance in the Northern Circuit during the assizes just concluded. He appeared at one or two cases at Nisi Prius at Liverpool …".[79] His earliest reported appearance in a case representing Confederate interests was on 2 October 1866, in the Court of Admiralty in this second *Prioleau* case, filed 2 August 1866. The seven ships built since 1863 for Fraser, Trenholm in Liverpool for blockade running had been "seized under warrants from the court, on the application of the Government of the United States … as having belonged to the Confederate States". Prioleau claimed ownership of the vessels, and the proceeding was an application to release the vessels without bail. On a previous application for the same relief, the Court had ordered that the United States itself file a document giving authority to obtain the warrant for arrests, which had been based on an "affidavit of an attorney's clerk".

At the October hearing it appeared that as to four of the vessels – the *Wasp, Badger, Fox* and *Ariel* (sometimes referred to as the *Colonel Lamb*) – such an authority had been filed, and the application was denied. With respect to the other three – the *Owl*, the *Penguin* and one other (the *Bat*) – no such authority had been filed, and the United States abandoned those proceedings. As to the three vessels, the Court stated it would make an order that security for damages and costs be given by the United States, and that counsel for the United States would not be heard until it had.[80]

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[79] XLI, p. 744. One such case is likely *Johnston v. Kershaw,* said to have been tried at the 1866 Liverpool summer assizes in the decision on appeal by the Court of Exchequer Chamber on 11 January 1867, with Benjamin representing the losing defendant. 2 *Bulwer's Exchequer Reports* 82. The action concerned a dispute over a purchase of cotton by Benjamin's client from the plaintiffs, who were merchants in Pernambuco.

[80] *Illustrated London News,* XLVIII (6 October 1866), p. 319; *The Law Times,* XLI (6 October 1866), p. 839; XLII (29 December 1866), p. 173; Joseph McKenna, *British Ships in the Confederate Navy* (Jefferson, 2010), p. 213. Two vessels were still under construction. The *Ariel* seems not to

Although as filed it is not documented by the presence of the name of any counsel, Benjamin's next visible involvement must surely have been in the preparation of the plea of Colin McRae, filed on 17 November 1866, in response to the bill filed against him by the United States. McRae's plea set out in full the text of the United States Confiscation Act of 17 July 1862,[81] and asserted that the same plaintiff, the United States, was conducting proceedings under that statute against McRae's property in Alabama in the United States District Court in Montgomery on the same assertion underlying the English litigation – that he was an agent of the Confederacy. McRae further asserted that in the absence of a pardon and amnesty from the United States and the dismissal of its complaint in Alabama, any response by him to the bill or the interrogatories would expose his property in Alabama to confiscation by the United States and thus barred the litigation brought against him in England. Benjamin's undoubted awareness of the Confiscation Act as a lawyer and a high Confederate official would have been supplemented by its application to his own real property in New Orleans in March 1865.[82]

A Settlement Disavowed

On 10 November 1866, without prior warning to Seward or to Dudley, Morse sent a triumphant letter to Seward announcing his settlement of all claims by the United States against Fraser,

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have been part of the final settlement between Fraser, Trenholm and the United States. Ibid., p. 241.

[81] 12 Stat. 589. See Daniel W. Hamilton, *The Limits of Sovereignty – Property Confiscation in the Union and the Confederacy during the Civil War.* (Chicago, 2007).

[82] See *Day v. Micou*, 85 U.S. 156 (1873); Report No. 389, 44th Cong, 1st Sess. (1876); John Syrett, *The Civil War Confiscation Acts – Failing to Reconstruct the South* (New York, 2005), p. 176. The property of John A. Campbell and John Slidell was also confiscated under the statute. Ex. Doc. 44, 37th Cong., 3d Sess. (1863). *The Confiscation Cases – Slidell's Land* , 87 U.S. 92 (1873). In addition, on 12 September 1861, Benjamin had promulgated the instructions under the Confederate equivalent of the federal Confiscation Acts. *The Sequestration Act of the Confederate States, with the Instructions from the Attorney General of the Confederate States to Receivers under the Act* (Charleston 1861), p. 12.

Trenholm, including those referred to above in which Dudley had initiated litigation.[83] To add insult to injury, Dudley, never consulted or even informed beforehand, first learned of the settlement from Fraser, Trenholm's Liverpool solicitors as a *fait accompli*, and then read an announcement of it in the Liverpool press; on top of that, he considered the settlement totally inadequate.

Some measure of the warmth of Dudley's reaction – also casting light on the origin of the Admiralty Court proceedings against Fraser, Trenholm set out above – appears in Dudley's bitter letter to Morse of 23 November 1866:

> Let us see how the matter stands. I furnished you with a copy of the defendant's answer in the cotton case in chancery, setting out the McRae contract with Prioleau to build the blockade steamers, and told you at the time that all these steamers built under this contract were involved in this suit. Not only this, but I directed my solicitors to let you and your solicitors to have all the papers and pleadings in the case, and informed you that I had so instructed them, and your solicitors availed themselves of the privilege. Yet you, after this, without consulting me, and without giving me the slightest intimation that you contemplated doing anything of the kind, rushed into the high court of admiralty and commenced seven suits against as many steamers lying at Liverpool in the possession of Fraser, Trenholm & Co., three of which had been built under the very contract set out in their answer which I had furnished you with, and even at that time the subject-matter of litigation in that suit and referred to by name in the pleadings. The consequence of this hasty and ill-advised proceeding on your part was that you had to

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[83] The terms of the settlement provided for Fraser, Trenholm to retain Confederate property of £150,000 with the value of any surplus property to be accounted for and paid to the United States. *Message of the President*, note 68 above, p. 10. According to Morse's 17 November letter to Seward:

> They will also turn over to us a complete set of machinery for the manufacture of rifles, which cost over £100,000. This machinery is new, and was manufactured, Mr. Prioleau told me, under the superintendence of Mr. Burton, an American, formerly of the Springfield armory and from the Ames works, and lately superintendent of the Tredegar and other works in the South.

Ibid., p. 8.

> discontinue three of these suits, and you found yourself, as to the other four, without sufficient evidence to maintain them.[84]

The outcome, not surprisingly, was that on 29 November 1866 Seward ordered Charles Francis Adams (1807-1886), the American Ambassador, to disavow the settlement and ordered Morse back to the United States. Morse's letter of authorization from the Treasury Department was promptly revoked.[85] Seward put control of the litigations pending against Confederate interests into the hands of Isaac Fletcher Redfield (1804-1876), a former Chief Justice of the Vermont Supreme Court now acting as "special counsel for the United States in suits now pending in England and France".[86]

Benjamin does not appear by name as an actor in the settlement or its disavowal. But in his letter of 28 December 1866 Charles Francis Adams warned Seward: "I have reason to suspect that Mr. Benjamin is now one of the chief legal advisers of the parties in the suits. All that his ingenuity can do will be exerted, if necessary, to procrastinate and to defeat the course of justice".[87]

United States v. Prioleau (Chancery, 20 December 1866)

This was an application by Prioleau and his partners to discharge his recognizance for £20,000 which the Court had previously ordered. Prioleau's counsel included Sir John Rolt, currently Attorney General, W. M. James, Q.C., and Benjamin; the United States was represented by Sir Roundell Palmer and G. M. Giffard, Q.C.

In his ruling Vice-Chancellor Page Wood noted that no explanation had been given for the annulment by Secretary Seward of the settlement Fraser, Trenholm had negotiated with Morse, although there could have been political reasons for doing so, but

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84 Ibid., p. 27.

85 Ibid., pp. 19, 47.

86 *Message of the President*, note 69 above, p. 47; *Executive Documents Printed by Order of the House of Representatives* (Diplomatic Correspondence), 40th Cong., 2d Sess. (1867-68), I, p. 39. Wheelock G. Veazey, "Isaac Fletcher Redfield, LL.D., Class of 1825", in *Memorials of Judges Recently Deceased – Graduates of Dartmouth College – 1880* (Concord, 1881), p. 95.

87 Ibid., p. 39

no affidavit had been filed disputing that Fraser, Trenholm were due £150,000 as provided in the settlement. Accordingly, the Vice-Chancellor discharged the sureties, retaining only Prioleau's own recognizance.[88] He further pointed out that the United States had yet to file its answer to the cross bill and interrogatories although it had had since May to do so and should have been able to do so by 1 November; Secretary Seward's illness was irrelevant, because the needed information could have been provided by a clerk in the department. If answers were not filed by 15 February, Mr. Prioleau would have leave to move to dismiss the bill for want of prosecution.[89]

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[88] Seward blamed this outcome on Morse's settlement:

> This feature of the pretended agreement had instant effects prejudicial to the United States, for, on the force of it, the Solicitors for Fraser, Trenholm & Co. went before the vice-chancellor, disingenuously representing that the paper implied a balance of L150,000 due to Fraser, Trenholm & Co., and obtained a decretal order discharging the sureties of Fraser, Trenholm & Co. from a bond which had been required of them under the previous injunction order of the vice-chancellor.

Message of the President, note 68 above, p. 49.

[89] *The Daily News*, 21 December 1866, p. 3. The opinion as thus reported begins: "The Vice-Chancellor said that the United States in coming to ask for assistance in this country could only obtain it on the same terms as other suitors" (Other versions of the appearances and the text of the Vice-Chancellor's opinion appear in the *Law Times*, 29 December 1866, p. 173, and a printed transcript of the hearing in the Fraser, Trenholm archive). In light of that comment, and:

> [i]n view of the persistent and partially successful efforts of Messrs. Fraser, Trenholm & Co., in England, to evade any accounting , to embarrass the main suit by vexatious delays, to escape proper responsibility, and otherwise to defeat the just claims of the United States, it was deemed expedient to institute proceedings against Messrs. John Fraser & Co., of Charleston, South Carolina, which consisted, in part or in whole, of the same persons, if not absolutely the same in interest, as in the house of Fraser, Trenholm & Co., in Liverpool … Accordingly, a bill was filed in the circuit court of the United States in the district of South Carolina …

Letter of the Secretary of the Treasury, Ex. Doc. No. 304, H. Rep., 40th Cong., 2d Sess. (17 April 1868), p. 3. See Wise, note 44 above, pp. 222-224.

Extensive answers were filed by the United States on 11 January 1867, but they were not sufficient for Fraser, Trenholm. Although not successful on several of their objections, at a hearing on 28 May 1867, before Vice-Chancellor Page Wood, the defendants, represented by W. M. James, Q.C., Edward Ebenezer Kay, Q.C. (1822-1897), and Benjamin, as plaintiffs in the cross-suit did obtain a ruling requiring the United States, represented by Sir Roundell Palmer and G. M. Giffard, Q.C.s, to take a position on the belligerent status of the State of Texas, from which the cotton on the "*Aline"* shipped. As reported, the Vice-Chancellor's ruled:

> The United States had not answered this interrogatory, and especially that portion of it which related to the relations between the alleged Confederate Government and the State of Texas. This was a most important point for the plaintiffs (in the cross suit) to obtain information upon, as it most materially affected their position in the original suit. He might add that the United States in stating that "of their (State of Texas) pretended quality as a government this court has no lawful power to take judicial cognizance nor can it, according to the established laws of England, enter into any inquiry of fact regarding the same," has framed their answer in a mistake of law, as this court not only might, but must take judicial cognizance for purposes of this suit of whether the Confederate government was or was not a *de facto* government.[90]

United States v. Wagner (27 February, 6 March; on appeal 29 May, 1 and 17 June 1867)

Taking the hint in Vice-Chancellor Page Wood's decision in July in *Prioleau*, the defendants moved to dismiss the bill filed by the United States for failure to name an officer for service of process and discovery on a cross bill. In an extensive opinion the Vice-Chancellor concluded:

> A corporation is only entitled to sue without producing its officer, because the Defendant can make an officer a party

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[90] *The Manchester Courier and Lancashire General Advertiser*, 1 June 1867, p. 6; *The Law Times*, CII (20 March 1897), pp. 472-473.

> to a cross bill. That cannot be done in the case of a body politic of this description, and all I determine is that when the *United States* sue as Plaintiffs they must let the Defendant know from whom he can obtain discovery, and who is the proper officer to put forward if that be his mind or desire. That must be expressed on the bill …

Accordingly, he sustained the demurrer and dismissed the bill.[91]

The United States appealed to the Court of Appeal, and a panel consisting of the Lord Chancellor, Lord Hugh Cairns (1819-1885)[92] and Sir C. J. Turner heard argument on 29 May and 1 June 1867. The same counsel appeared on appeal as in the court below, and Benjamin and others argued for the appellees. On 17 June the Court reversed Vice-Chancellor Page Wood, finding that the discovery needs of the defendants in such a case could be met by a cross bill for discovery requesting the name of a person from whom discovery could be sought.[93] This, of course, was how counsel had first proceeded in *Prioleau.*

United States v. McRae – decision, and appeal 25 November, 3, 4, 10, 13 December 1867)[94]

In June 1867, between the argument and the decision in *Wagner*, the same senior counsel, other than Sir Roundell Palmer, appeared before Vice-Chancellor Page Wood for disposition of the plea McRae had filed against having to give discovery in England on

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[91] *The Law Reports – Equity Cases*, III, pp. 724, 736. At his death it was said of Sir Edward Kay, ultimately a Lord Justice of Appeal:

> His most frequent opponent in the House of Lords and Privy Council, where he was retained in most of the heavy appeals, was the late Mr. Benjamin, whose learning and powers of advocacy were as extraordinary as was his adventurous career. Kay was scarcely the equal of the ex-Confederate statesman, but he was always able by the force of his character to hold his own.

The Law Times, note 90 above.

[92] Sir Hugh Cairns had been the highly-regarded counsel for the claimants in the proceedings concerning the *"Alexandra"*.

[93] (1866-67) L.R. 2 Ch. App. 582

[94] In the *Fraser, Trenholm* cases the instructing solicitors were in Liverpool. In the *McRae* litigation Thomas & Hollams in London were the instructing solicitors.

the same subjects as formed the basis for confiscation proceedings against him by the United States in the federal court in Alabama, McRae's counsel, W. M. James, arguing: "The Plaintiffs cannot 'approbate and reprobate;' they cannot treat the Defendant as guilty of tort, and liable to penalties in one jurisdiction, while they are seeking an account against him in this country in respect of the very same transactions". Summing up the situation before him, the Vice-Chancellor said:

> The Plaintiffs in this case, as was put very concisely and clearly by Mr. Benjamin, say, on the one hand, "Give us all the money which you have acquired by the agency;" and on the other hand, "Give us all your estate and property, because you have acted as agent." That is a state of things which a Court of Equity cannot allow. …I would think that would clearly be one of those cases in which the Court would say, "You must take your choice…".[95]

The plea was allowed.

An appeal by the United States was heard in early December by Lord Frederic Chelmsford (1794-1878), the Lord Chancellor, apparently sitting alone, Palmer and Giffard leading for the United States and W. M. James and Benjamin for McRae.

McRae was no longer in England, having left in the fall of 1867 for Belize, where he remained in exile until his death in 1877.[96] Under date of 11 December 1867, Benjamin wrote McRae on various subjects, one of which was the appeal:

> I have had to go to Manchester on Circuit since you left, but I came back to town to argue your case before the Lord Chancellor, as I learned to my great surprise that the U.S. had taken an appeal from Wood's decision – The argument was closed yesterday & I am going to Liverpool assizes this evening – My impression is that the Lord Chancellor was quite on our side on the main question, though he may make some modification of Wood's decree – The case will be decided by him in a few days and must I think be substantially in our favor.[97]

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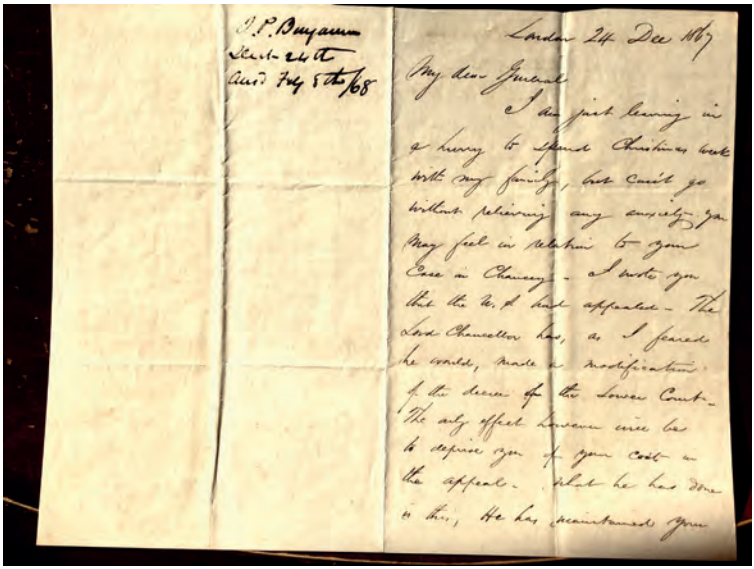
95 Ibid., IV, pp. 327, 333, 340.

96 Davis, note 50 above (2010), pp. 85-86

97 Author's collection.

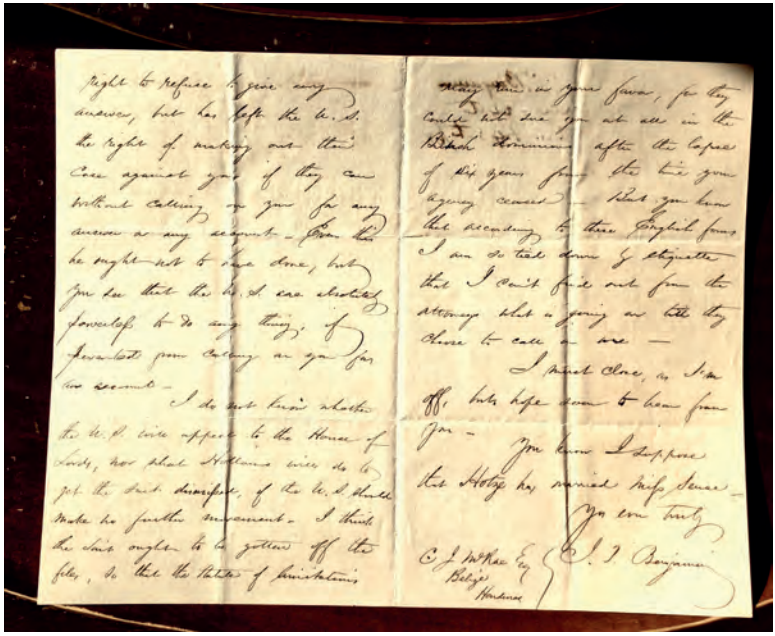


J. P. Benjamin
Sketch of Life
Recd July 5th 68

London 24 Dec 1867

My dear General

I am just leaving in a hurry to spend Christmas with my family, but could go without relieving my anxiety you may feel in relation to your Case in Chancery. I wrote you that the U. S. had appealed. The Lord Chancellor has, as I feared he would, made a modification of the decree of the Lower Court. The only effect however will be to deprive you of your Cost in the appeal. What he has done is this, He has maintained your



right to refuse to give any answer, but has left the U. S. the right of making out their Case against you if they can without calling on you for any answer or any account. How the he might not to have done, but you see that the U. S. are clothed powerless to do any thing, if prevented from calling on you for an account.

I do not know whether the U. S. will appeal to the House of Lords, nor what Holland will do to get the suit dismissed, if the U. S. should make no further movement. I think the suit ought to be taken off the files, so that the matter of limitations

[illegible] in your favor, for they could not sue you at all in the British Dominions after the lapse of six years from the time your agency ceased. But you know that according to their English forms I am so tied down by objections that I can't find out from the Attorneys what is going on but they chose to call on me.

I must close, as I am off. Will hope soon to hear from you.

You know I suppose that Hodge has married Miss Jones.

Yours truly

J. P. Benjamin

C. J. McRae Esq
Belize
Honduras

Letter from Judah P. Benjamin to Colin McRae, December 24, 1867.

The Lord Chancellor's judgment was more nuanced than the Vice Chancellor's, treating the argument arising from the pending federal confiscation proceedings against McRae in Alabama as grounds to preclude the extensive discovery demanded from McRae in the interrogatories accompanying the bill but not to vitiate the prosecution of the claim against him if supported with proof otherwise. The claim of the United States was reinstated but without the right of discovery against McRae.[98]

Benjamin again wrote to McRae on Christmas Eve, 1867:

> I am just leaving in a hurry to spend Christmas week with my family, but can't go without relieving any anxiety you may feel in relation to your case in Chancery – I wrote you that the U.S. had appealed – The Lord Chancellor has, as I feared he would, made a modification of the decree of the Lower Court – The only effect however will be to deprive you of your costs on the appeal – What he has done is this. He has maintained your right to refuse to give any answer, but has left the U.S. the right of making out their case against you if they can without calling on you for any answer or

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[98] *The Law Reports – Chancery Appeals,* III (1867), p. 79. James Ferguson, similarly sued by the United States, was represented by E. E. Kay, who was one of the lead counsel for Fraser, Trenholm but did not participate in the *McRae* litigation. *The Law Times,* XLIII (15 June 1867), p. 88. According to *The Law Journal*, II (21 June 1867), p. 292: "Precisely the same plea would have been available also in the suit of *The United States v. Ferguson*, but the defendant did not there put in this defence, but has filed his answer to the bill". That posture must have changed, as the Secretary of the Treasury's reported to Congress on 17 April 1868, that in the suits "against two of the financial agents of the Confederates, namely: James B. Ferguson and Colin McRae … an important legal question arose, which has served to delay their prosecution. To the bills of discovery and account against them respectively defendants demurred, alleging that they had been or might be prosecuted in the United States under acts of confiscation and forfeiture". After describing the proceedings in *McRae* through the Lord Chancellor's judgment, the report concluded: "It was on account of this decision that the idea was conceived in Congress at this session of the enactment of a law touching discoveries in equity, which was passed some weeks since, and the enactment of which will serve greatly to facilitate the prosecution of these suits in England." *Confederate Property in Europe,* Ex. Doc. No. 304, H. Rep., 40th Cong., 2d Sess., pp. 6-7 (17 April 1868).

> any account – Even this he ought not to have done, but you see that the U.S. are absolutely powerless to do any thing, if prevented from calling on you for an account –
>
> I do not know whether the U.S. will appeal to the House of Lords, nor what Hollams will do to get the suit dismissed, if the U.S. should make no further movement – I think the suit ought to be gotten off the files, so that the statute of limitations may run in your favor, for they could not sue you at all in the British dominions after the lapse of six years from the time your agency ceased – But you know that according to these English forms I am so tied down by etiquette that I can't find out from the attorneys what is going on till they choose to call on me – [99]

At this point McRae and his lawyers were faced with a strategic choice; he and Benjamin appear to have been of one mind. In a letter dated 7 March 1868, Benjamin wrote McRae:

> I sent your note to Hollams, and he sent one of his clerks to confer with me , but I have not heard from him since – There has however hardly been time, and I shall not permit the matter to sleep even if I have to break through their etiquette – If the worst comes to the worst and I find that Hollams won't do any thing, I shall let you know, and then the proper course will be to get another attorney who will follow instructions and get you finally rid of the whole matter, which I think quite easy to do – [100]

On 19 March Benjamin wrote to McRae again:

> I came back to town from Manchester a few days ago and had an interview with Hollams, after which we had a meeting of the counsel, and it was decided that that our best course was not to go to the House of Lords now, but to press the U.S. at

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[99] Author's collection. Hollams was Benjamin's instructing solicitor.

[100] Ibid. (emphasis in original). Benjamin continued:
> I shall have great difficulty in keeping my head above water, until I get some more work at the bar than I have hitherto had – I have had the luck to make a little money since you left by getting Gilliat to help me order some cotton from N. O. when the price went so low that it was less than the cost of production – my profit is equal to about L1000, and this will help me along for a year or two longer –

> once to a trial in the Vice-Chancellor's Court as we are all persuaded that the U.S. will then be compelled to abandon their case, as they can't get along without the power of putting you on oath – This will not deprive us of the benefit of going to the H. of L. hereafter should there be any occasion for it, but I am sure there will not be and that you will get clear of the case very soon and forever – Limitation takes only six years dating from the time each item of receipt came into yr hands – So in a year or two you will be utterly beyond reach, and you may assured after that I will as you ask stand by you to the last at all hazards –
>
> Hollams was again for delay, for letting things sleep, but W. M. James the leader said you were perfectly right and that if he were in your place he would not allow the suit to remain on file, so that Mr. H. "shut up –"[101]

Contrary to Benjamin's expectation, the United States pressed the case forward. Although the replication referred to in the subsequent judgment is not in the file, several affidavits filed by the United States for the hearing of the case on 21 April 1869 remain in the file; nothing is on file for McRae.[102] One was from Thomas Dudley, the U.S. Consul in Liverpool, which averred on information and belief that the Confederate government had seized a large amount of "goods and treasure" belonging to the United States and had employed it in aid of the rebellion. The other affidavits supported a chain of custody of nearly two dozen Confederate government documents, McRae's signature on which were authenticated in a brief "ex parte" affidavit, dated 4 August 1868, by none other than James B. Ferguson, sometime Major in the Confederate Quartermaster's department, who said that he resided in London "doing a little commission business". As to McRae, Ferguson claimed:

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101 Ibid.

102 This is consistent with the summary of the case following the decision on appeal in the report in *The Law Times*, XX (22 May 1869), pp. 476, 477: "The plaintiffs subsequently filed their replication, the plea standing as answer, and the cause now came on for a hearing, the plaintiffs having entered into evidence in support of their case".

> He was regarded here as some sort of treasury agent for the southern confederacy. Sometimes he lived in Paris and sometimes in London. He had an office in London. He has paid me money for purchases I have made on behalf of the confederacy. In round numbers he has paid me about 150000*l*. on that account in different payments perhaps 15 or 20. He cashed at different times a southern treasury warrant which I had received from the quartermaster general's department. The warrant was for about 850000*l*.

There was another change as well, strange to modern eyes. Vice-Chancellor Page Wood, before whom Fraser, Trenholm and McRae had done so well, was elevated to the Court of Appeal in March 1868. G. M. Giffard, the able No. 2 for the United States at the outset, had replaced him as Vice-Chancellor but had also gone to the Court of Appeal after less than a year. The new Vice-Chancellor who decided McRae's case would himself go to the Court of Appeal the next year, but he was none other than the former W. M. James, Q.C., who had led McRae's defense up to his elevation in January 1869.

In deciding the case in favor of McRae on 6 May 1869, the Vice-Chancellor quoted the aphorism he had used as McRae's counsel: "… they cannot in a court of justice approbate and reprobate. They cannot claim from an agent of the Confederate government an account of his agency, and at the same time repudiate all privity of title with him and his former principals". Accordingly, the Vice-Chancellor construed the bill "as based entirely on the paramount title of the Plaintiffs to those moneys and goods which were originally theirs, and in respect of which they could treat the possession of the Defendant as the possession of the agent of public plunderers, or to specific money and goods which had vested in them and … were in the Defendant's actual possession". But as to this there was "absolutely not a tittle of proof"; the proof was only that McRae had possessed large amounts of money belonging to the Confederate government, making him "accountable to his principals for his receipts and payments".[103]

Before rendering judgment, the Vice-Chancellor had asked Sir Roundell Palmer whether the United States would agree to the taking of an account as if between McRae and the Confederate

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103 *The Law Reports – Equity Cases*, VIII, pp. 69, 76-77.

government and make good any shortfall due to McRae. Needless to say, this was rejected out of hand because of its prohibition in what would shortly become the Fourteenth Amendment to the Constitution of the United States.

The Hollams Fairy-Tale

Benjamin's exasperation with his instructing solicitor, John Hollams (1820-1910), shows through in his 1868 letters to McRae. Hollams's memoirs reflect reciprocation:

> I was introduced to him shortly after he became a member of the English Bar, with reference to a suit in the Court of Chancery instituted by the American Government against the agents in this country of the Confederate Government, with respect to the expenditure of the large amount raised in Europe by the issue of Confederate bonds, … The case came on for hearing before Lord Justice James, when Vice-Chancellor, and it appeared to be generally thought that, as usual at the time, a decree would be made directing enquries in chambers. The matter was being so dealt with when Mr. Benjamin, *then unknown to any one in Court*, rose from the back seat in the Court. He had not a commanding presence, and at that time had a rather uncouth appearance. He, in a stentorian voice, not in accord with the quiet tone usually prevailing in the Court of Chancery, startled the Court by saying, "Sir, notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend Sir Roundell Palmer, and to some extent acquiesced in by my learned leader Mr Kay, if, sir, you will only listen to me – if, sir, you will only listen to me (repeating the same words three times and on each occasion raising his voice) I pledge myself you will dismiss this suit with costs." The Vice-Chancellor and Sir Roundell Palmer, and indeed all in Court, looked at him with a kind of astonishment, but he went on without drawing rein for between two and three hours. … In the end the Vice-Chancellor did dismiss the suit with costs, and his decision was confirmed on appeal.[104]

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[104] Sir John Hollams, *Jottings of an Old Solicitor* (London, 1906), pp. 210-212 (emphasis added.)

In his review of Meade's biography of Benjamin,[105] which fixes this episode on the hearing in *McRae* in April 1869, Professor Maguire exposes the absurdity of Hollams's assertion that Benjamin was "then unknown to anyone in Court" by pointing out that the Vice-Chancellor on the bench, W. M. James, had been Benjamin's leader when both argued at the initial adjudication of McRae's plea in 1867 before Vice-Chancellor Page Wood. However, he might have gone much further with familiarity with the other proceedings discussed above, showing that Benjamin was toe-to-toe with Sir Roundell Palmer in both *Prioleau* and *Wagner* even before the first hearing in *McRae* in 1867.

McRae *Sequelae*

McRae's departure from England did not end his relationship with Benjamin or with England.[106] More significantly, his case became a fable.

In 1882 newspapers in England and the United States, including

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105 *Harvard Law Review*, LVII (1943), pp. 113, 115-117.

106 For a period of the time McRae was in Belize he operated a partnership there with Benjamin's younger brother, Joseph, in cattle, mahogany and mercantile businesses.A letter to McRae, dated 20 May 1873, from Benjamin illustrates his efforts to help them:

> Yours of the 5th ult. reached me a few days ago, and you are quite right in charging me with being in arrears in my correspondence, but I have been so all my life and have got too old to change – still I do not at all mean to give up, and now send you the fruit of the thousandth resolution I have made to be very punctual for the future –
>
> Messrs Bute & Co got your letter about the shipment of timber and have answered it I hope to your satisfaction – Long before this, my brother must have received my and their letters on the subject of his proposed purchase, when he anticipated that you would be separated – Bute thinks that money is to be made by the business, but tells me that everything depends on the strictest supervision of the quality, and that frequently shipments lose money instead of making it, by the losses incurred through rotten, shaky and inferior logs, that swallow up all that can be made out of the good wood --
>
> I am very sorry to hear of yr loss by the fire – I take it for granted that the can be no insurance practicable in the business you have been doing, but I hope you will take good care to [torn paper] in advance yr wood shipments so that there will be no risk on them –

the *New York Times*, published a letter from Benjamin, ostensibly

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I have settled up with the Cosmopolitan and stopped the subscription – your a/c with me is this –

Rec'd from Collie		£6.3.6
Paid –	Cosmopolitan	2.8.8
	Last year's Examiner	1.1.6
	" " European Mail	2 –
	This year's do (to 12 Dec)	1.13.4
	This year's Examiner	17.3
	(reduction in this price)	8.0.9
Due Me		£1.17.3

I did not pay Bute & Co the little balance of your a/c as requested, because he begged me not to do so, as they preferred keeping the a/c open on their books in hopes of renewing business with you & this has been realized by your last proposals to them for the wood business –

I am getting on very well in my profession here & hope in a very few years now to be entirely independent – I sincerely hope you in turn may be equally fortunate –

Dick Taylor arrived here a few days ago on business – He gives a most distressing account of the condition of things in Louisiana –

Please give my best love to my brother – yours ever truly (author's collection)

It is difficult to avoid speculating that the "Collie" referred to is Alexander Collie, a London merchant delivering through the blockade and helping to provide vessels to do so, with whom in July 1864, on behalf of the Confederacy, McRae contracted for £150,000 in clothing and quartermaster supplies and four ships to transport them; his bankruptcy in 1875 as a result of such mercantile activities led to litigation reaching the United States Supreme Court. *The War of the Rebellion: A Compilation of Official Records of the Union and Confederate Armies*, Series IV (1900), III, pp. 526-530; *Correspondence Concerning Claims Against Great Britain* (Washington D. C., 1871), VI, pp. 163-166; *Young v. United States*, 97 U.S. 39 (1878); Michael Clark, "Alexander Collie: The Ups and Downs of Trading with the Confederacy", *The Northern Mariner/le marin du nord*, XIX, no. 2 (April 2009), p. 125; Harold S. Wilson, *Confederate Industry – Manufacturers and Quartermasters in the Civil War* (Jackson, 2002), pp. 166-168; Wise, note 44 above, pp. 101-102, 204; Todd, note 44 above, pp. 190-191. Dick Taylor (1826-1879) was a Confederate Lieutenant General, son of President Zachary Taylor (1784-1850) and brother-in-law of Jefferson Davis, who came to London on Samuel Barlow's business. T. Michael Parrish, *Richard Taylor – Soldier Prince of Dixie* (Chapel Hill, 1992), pp. 479-480.

in response to one from Samuel L. M. Barlow, who had inquired about rumors of large Confederate deposits remaining in Europe potentially recoverable by holders of Confederate bonds. Benjamin was emphatically dismissive of the existence of any such hoards, referring to the 1867 insolvency of Fraser, Trenholm, but also to McRae:

> The Confederate Government never had but two means of raising money in Europe. One was by the export of cotton, all of which was consigned to the house of Fraser, Trenholm and Co., of Liverpool; the other was by the loan effected through Messers. Erlanger & Co., and Schoeder & Co., the proceeds of which were all received by Colin J. McRae, the financial agent of the Government. …
>
> At the close of the war the United States Government, claiming the right to receive the entire assets of the Confederate Government, instituted suits against Fraser, Trenholm and Co. and against McRae. After determined and protracted litigation, Fraser, Trenholm and Co. were driven into bankruptcy …
>
> McRae proved in his case that he had rendered a full and faithful account to the Confederate Government of the entire proceeds of the loan in payment of supplies and munitions of war to the various commissariat and quartermaster officers in this country and of the coupons on the bonds; but he was ready to render his accounts over again if the United States would agree to reimburse him any balance found due in his favor. This was declined … Poor McRae, in shattered health and with a few hundred pounds, the wreck of his fortunes, emigrated to Spanish Honduras, where he sought to earn a support on a small stock farm, but he died in considerably reduced circumstances.[107]

It is difficult to reconcile this account of the *McRae* case, if truly written by his trial counsel, with the reports of the decisions in it and still more difficult with their surviving private correspondence, set

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[107] *New York Times*, 20 January 1882; *Washington Post*, 21 January 1882; *The Railway News*, 4 February 1882. Misspellings and slight textual differences among the publications have been disregarded.

out above: Benjamin's strategy enabled McRae to avoid having to prove anything. One can only wonder what Benjamin and Barlow were up to this time.

Back to the Fraser, Trenholm Litigation

United States v. John Fraser and Co., et al. (U. S. Circuit Court, District of South Carolina, 28 May 1867)

In the Fraser, Trenholm archive in Liverpool may be found copies of the bill filed by the United States against Fraser & Co., together with answers by some of the partners. Although earlier described by the government as having been filed in April, these papers reflect that the bill was filed on 28 May 1867, and the district judge issued an injunction the next day prohibiting John Fraser & Co. from disposing of any Confederate property and any property acquired with the proceeds of such property. By then Fraser, Trenholm had suspended payment of its obligations, thought to be in the neighborhood of £4 million, and John Fraser & Co. shortly thereafter followed suit and was wound up; Fraser, Trenholm placed itself in liquidation in November 1867.[108]

According to the Secretary of the Treasury April 1868 report to Congress, the insolvency of Fraser, Trenholm and the litigation against John Fraser & Co. led to an overall resolution of the disputes between the United States and Fraser, Trenholm:

> … the managing partner in England, Charles K. Prioleau, who had conducted the defense against the United States,

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[108] Stevens, quoting John W. L. Tylee Letterbook, 1865-1873, University South Carolina Society (available online); *Ex parte English and American Bank; In re Fraser, Trenholm, & Co., The Law Times*, XLV (25 July 1868), pp. 248-249; *Law Reports – Chancery Appeal Cases*, IV (13 November 1868), pp. 49, 52. Fraser, Trenholm "on the 11th of Nov[ember], 1867, executed a deed of inspection, under which their estate was being wound up". *The Law Times Reports*, XIX (1867), pp. 302-303. Benjamin represented Fraser, Trenholm in a bankruptcy appeal – unsuccessfully – in a case arising out of a cotton transaction both the Liverpool and the Charleston firms had been involved in financing. *Ex Parte English and American Bank, The Law Reports – Chancery Appeals Cases*, IV (1868), p. 49.

> now made a desperate attempt to obtain the dismissal of the bill of the United States there, on the plea of the general bill of discovery in the United States. The effect of this, if done, would be to relieve Mr. Prioleau at the expense of his partners in the United States, to deprive the government of its hold of the property there, and to throw the whole weight of the claims of the government upon the property of the house of John Fraser, Trenholm [*sic*] & Co. of Charleston. [109]

Accordingly, a settlement was entered into on 5 September 1867, "conceived in the idea of the United States receiving, and Fraser, Trenholm & Co. paying, precisely that which the United States may lawfully claim in a court of chancery, neither more nor less ...:

> 1. That in the suit pending in England for the recovery of the cargo of the ship *Aline*, judgment shall be entered for the United States with costs.
>
> 2. That all other specific property of every kind, whether ships or other property, and all moneys belonging to the Confederate States at the time of their dissolution, which at any time after that date came into the possession of Messrs. Fraser, Trenholm & Co., or the proceeds thereof, if sold, shall be delivered up to the United States.
>
> 3. That Fraser, Trenholm & Co. shall consent to a decree in the pending suit for an account to be rendered by them, in due form of law on oath, before a master in chancery, as demanded by the United States, and whatever amount of money such accounting shall show to have been due by the defendants to the Confederate States at the time of their dissolution shall be paid to the United States.
>
> 4. Fraser, Trenholm & Co. are to deliver up, or account for, all ships or other specific property of the Confederate States, unless the same be subject to express legal or equitable antecedent claims of theirs, valid in law, on contracts made during their agency for the confederates.

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[109] No such plea has been identified in the reports or extant files of the United Kingdom litigation.

> 5. That the property of the copartners shall be held by the government under the injunction of the circuit court of South Carolina, and under the statutory lien as security for the foregoing conditions; and if those conditions be not complied with in a reasonable time, then the government shall take judgment against the parties or the property in the United States.[110]

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[110] Ibid., p. 4. The letter of the Secretary of the Treasury continued with a comparison between the settlement just described and the one made by Consul Morse in 1866, which Seward had abjured. As displayed below, the first entry by each number describes the Morse settlement that Seward repudiated, the second the final settlement:

1. A claim by Messrs. Fraser, Trenholm & Co. against certain property of the late Confederate States under their control is agreed at £150,000 (about $1,000,000).

1. No admission is made of any amount of claim whatever of Messrs. Fraser, Trenholm & Co. against property of the Confederate States under their control.

2. All suits now pending in Great Britain or the United States between Fraser, Trenholm & Co., or any of them and the United States, to be abandoned, each party to pay its own costs.

2. The government is to have judgment in England for the cargo of the *Aline*, say L40,000 with costs. The government is to have judgment in England on the bill for an account with costs.

The government is to retain its lien in the United States on all property of the copartners here, as security for judgments recovered in England.

3. Fraser Trenholm & Co. are to *declare* (not on oath) what property they have under their control, and where it is.

3. Fraser, Trenholm & Co. to make discovery on oath as to all property under their control, subject in this discovery to the compulsory powers of the court of chancery.

4. Stipulates that the following ships, namely, the Ruby, the Rosine, the Penguin, the Owl and the Lark, are to be accounted for.

4. Stipulates that the same ships, namely the Ruby, the Rosine, the Penguin, the Owl and the Lark, and in addition to these, the Ariel, the Wasp, the Badger, and the Jose, shall be accounted for.

5. Property claimed by the United States to be held and sold by Fraser, Trenholm & Co.

5. Property to be turned over to the United States in bulk.

6. Fraser, Trenholm to account to the government for any balance of such property, the proceeds of which exceed £150,000.

Both before and after this settlement, there was recourse to the

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6. Fraser, Trenholm & Co. to account for such property without concession of a specific indebtedness to them.

7. Fraser, Trenholm & Co. are to furnish an account to Mr. Morse, with an accountant acceptable to Fraser, Trenholm & Co. to inspect their books.

7. Fraser, Trenholm & Co. are to account under oath in chancery, through the instrumentality of the master in chancery, with inspection of the books by solicitors of the government, and supervision by the court, as practiced in proceedings in equity.

8. Stipulates that information derived from the books of Fraser, Trenholm & Co. shall not be used by any one in any action or proceeding except for the recovery of property.

8. Subjects the books in this respect, as in all others, to any such inspection, generally, as a court of equity may permit.

9. Fraser, Trenholm & Co. are to show how the "balance" in their favor is made out, (without any definition of principle to govern such accounting.).

9. Leaves nothing to the interest or caprice of Fraser, Trenholm & Co. in this respect, but prescribes a peremptory rule of accounting, in conformity with the recognized principles of law.

10. Stipulates for the dismissal of all suits in England, that is, for the surrender to Prioleau of the *Aline's* cotton, and all other property in England without security, [all which, of course, would have been lost by the bankruptcy of Fraser, Trenholm & Co., which soon afterwards followed, and was probably foreseen by Prioleau, and the anticipation of which actuated him at the time.]

10. Maintains the suits in England, secures the judgments thereon, and compels the delivery of other property to the government, as its recognized property, and, of course, not subject to the debts of Fraser, Trenholm & Co.

11. Stipulates for the discontinuance in the United States against John Fraser & Co., [of course, involves the loss of all hold on the property here.]

11. Stipulates to maintain the suits here, and to hold the property as security for judgments in England.

12. Gives up all security in England or the United States, including the Aline's cotton, leaving the United States no means of redress other than a suit for damages on the agreement against the bankrupt firm of Fraser, Trenholm & Co.

12. Retains the hold of the United States on the property in England, including the Aline's cotton, with security for ultimate recovery by means of the injunction suit in the United States.

Chancery Court in the *Prioleau* litigation. On 29 May 1867, Fraser, Trenholm, represented by counsel including Benjamin, prevailed substantially on an application for discovery on its cross bill.[111] On 17 June 1867, an application by the United States to reinstate the bond vacated by the Vice-Chancellor on 20 December 1866 was denied.[112] The final occasion, for purposes not readily discerned, was on 7 February 1870. Prioleau filed an affidavit made the month before with respect to the contract he had entered into 7 July 1864 with Colin McRae on behalf of the Confederacy for the financing the acquisition or construction of eight vessels to carry goods back and forth to the Confederacy and with respect to various components of the cotton of cargo shipped on the *Aline*. The same day United States, in turn, filed six affidavits: three by seamen, sworn in 1866 and 1867, with respect to Fraser, Trenholm vessels involved in blockade running, the *Owl,* the *Wren* and the *Lark,* which a fourth affidavit sworn in June 1866 by the relentless Thomas Dudley, identified as blockade runners built pursuant to the contract Prioleau-McRae contract of 7 July 1864, referenced above, *viz.* the *Lark, Wren, Owl, Bat, Penguin, Albatross, Rosine and Ruby.* The two other affidavits filed, sworn in London in June and July 1866, related to legal issues live in the litigation at the time: one was made by John Dean Caton (1812-1895), sometime Chief Justice of the Illinois Supreme Court, and the other by Richard Henry Dana, Jr. (1815-1882). Their participation in this litigation, on this occasion or any other, remains an unsolved mystery.

Alleged Confederate Ship, the *Mary,* otherwise the *Alexandra*

After the decision in the House of Lords in April 1864, the *Alexandra* left England and traveled via Madeira and Bermuda to Nassau, where in December 1864, under pressure from the United States, the Governor had the ship seized for violation of the Foreign Enlistment statute. After a false start, British officials were able to locate some armament which had been loaded on board in Bermuda, and advice was given on 12 January 1865 by the law-officers of

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111 *Manchester Courier and Lancashire General Advertiser*, 1 June 1867, p. 6.

112 *Morning Post*, 7 (June 18, 1867)

the Crown in London, led by the Attorney General, Sir Roundell Palmer, repeating the same statutory argument that had confused Lord Chief Baron Pollock in 1863.

The result was the same as before, this time in a judgment of the Vice-Admiralty Court of the Bahamas on 30 May 1865. The Court, pointing out that no gunpowder was found on board, on the evidence before it rejected the Crown's contention that the small cache of arms found on the vessel was intended to equip the ship itself to engage in hostilities against the United States, rather than, as the claimants contended, the arms were to be delivered through the blockade to Charleston as part of the commercial cargo carried on the vessel.[113]

Following the *Mary*'s release, the United States had the vessel arrested a third time – in February 1867 – as property of the United States. Charles Prioleau, claiming to be the registered owner of the vessel after transfer from the owner in the Nassau litigation, applied unsuccessfully in 1867 to the Admiralty Court for security for damages; in 1868, under court orders Prioleau answered interrogatories and on 5 May 1869, was cross examined on them in open court as well, admitting that Fraser, Trenholm received, disbursed and accounted for moneys from the Confederate government, which currently owed his firm £250,000, and, specifically, that his firm gave office space to Captain Bulloch and followed orders he gave to pay Confederate officers. Prioleau also testified that while there was no written contract for the construction of the vessel, his understanding with the builder was that it was to be modeled on a gunboat recently built for the Royal Navy, and its price of £32,000 included three guns. However, Prioleau abandoned his plan following the seizure of the vessel in 1863; as the *Mary,* the vessel had been in the London docks since its seizure in February 1867, and was rotting.[114]

Benjamin did not appear in the Admiralty Court proceedings until the cross examination of Prioleau. At the end of that session the Court promised a hearing at an early day, but three days later the

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113 *The Case of Great Britain as Laid Before the Tribunal of Arbitration, Convened at Geneva* (Washington: GPO, 1872), II, pp. 281-355.

114 *The* Mary *or* Alexandra, *The Law Reports – High Court of Admiralty and Ecclesiastical Courts*, I (5 March 1867), p. 335; Ibid., II (27 June 1868), p. 319; *Correspondence Concerning Claims Against Great Britain* (Washington D. C., 1871), VI, p. 181; *The Daily Post*, 13 May 1869, p. 7.

parties were back in court with Benjamin hotly but unsuccessfully contesting an application by the United States for a commission to take testimony in New Providence.[115] A further witness, a former Confederate naval officer about to leave England, was heard in court two weeks later, but on 15 June, Benjamin moved for an order to sell the vessel, and, the United States taking no position, the Court granted the motion.[116]

CONFEDERATE v. CONFEDERATE LAWSUITS – FOR CONFEDERATE PROPERTY[117]

According to Benjamin's second full-length biography:

> Among Benjamin's friends in Richmond during the latter part of the war was Francis Lawley, the Richmond correspondent of the London *Times*. A son of Lord Wenlock and with influential English connections, he became devoted to Benjamin, who doubtless helped to color his vivid dispatches with a sympathetic attitude towards the Confederacy.[118]

Benjamin's first biographer, Pierce Butler, alludes to Lawley's efforts, towards the end of Benjamin's life, to himself write a biography of a resistant Benjamin.[119] But neither of these books,

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115 *The Morning Post*, 15 May 1869, p. 7. As a sop, the Court ordered the United States to post £1000 in security.

116 *The Evening Standard*, 1 June 1869, p. 5; *The Western Daily Press*, 16 June 1869.

117 Omitted from this discussion is the case of *Richard Parham Waller v. Charles Prioleau*, et al., 1865 W. 173, filed 19 July 1865. Waller was a Major in the Confederate Quartermasters' Corps. and its purchasing agent in Nassau. The action arose from the refusal of Fraser, Trenholm to honor drawings in the last weeks of the war on Waller's £60,000 line of credit for supplies purchased for the Confederacy. The Chancery file ends in November 1866, and no reported opinions in the case have been located. There is no indication that Benjamin participated in the case.

118 Meade, note 3 above, p. 284.

119 In the bibliography at the back of the volume, under "Private Sources", Butler referred to a "[c]ollection of manuscript materials made by the late Mr. Francis Lawley, of London, with a view to his writing the life of Benjamin. He completed no more than the bare rough draft of opening chapters, with an outline of the proposed treatment. But the collection includes a number of letters, usually of slight intrinsic value, from Mr.

nor any that have followed, reveal that for several years Francis Charles Lawley (1825-1901) and his brother, an ecclesiastic, were co-defendants with Fraser, Trenholm – represented, as usual, by Judah P. Benjamin – in the longest, oddest and possibly most revealing Confederacy-related litigation in England, which appears to be unreported in the law reports and otherwise almost unknown to historians.

Thomas Greenwood and John Batley vs. Roswell Sabine Ripley, the United States of America, The Honourable Isaac Fletcher Redfield, Charles Kuhn Prioleau, John Richardson Armstrong, The Honourable Francis Lawley[120] *(Chancery Court, 19 June 1868)*

The bill in the Chancery Court in the litigation captioned above was not the opening salvo; the papers have yet to be located, if they still exist. According to that bill (at para. 78), "the defendant Roswell Sabine Ripley on the 29th of May 1868 caused to be issued a writ out of Her Majesty's Court of Queen's Bench and has since delivered his declaration as Plaintiff in such action against the above-named Plaintiffs Thomas Greenwood and John Batley as Defendants ...". The bill in Chancery filed by the defendants at law was in the nature of what would today by called an interpleader, summoning into a single proceeding the competing claimants for a particular property.

In this case the property was the machinery, nearly completed, for the Confederacy to outfit a small arms factory in Macon, Georgia, manufactured by Greenwood & Batley, a heavy equipment manufacturer in Leeds. The contract with Greenfield & Batley had been negotiated by James Henry Burton (1823-

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Benjamin, numerous very valuable special contributions from those who knew Mr. Benjamin in England …, letters, copies of newspaper clippings, copies of his fee-book, contributions of great interest from … persons in America …". Ibid., p. 468. The surviving portion of this compilation is at Tulane University.

120 Defendants added later were Theodore Richard Schweitzer, George Alfred Trenholm, Theodore Dehon Wagner, William Lee Trenholm, James Theodore Welsman, and the Honourable and Reverend Stephen Willoughby Lawley (1823-1905).

1894), a trusted subordinate of Josiah Gorgas (1818-1883), Chief of Ordnance for the Confederacy,[121] an American and earlier chief engineer of the British Government's small arms factory in Enfield – where he had done business with Greenwood & Batley[122] – but presently superintendent of armories for the Confederacy. After the transaction, the price for which was £54,413, had been approved by Caleb Huse in Paris, it was reduced to a written contract between Greenfield & Batley and Fraser, Trenholm on 28 July 1863.[123]

By November 1865, Greenwood & Batley had billed for performance of £46,620 of the work and had received payment from Fraser, Trenholm of £30,950. Although most of the completed machinery remained in Greenwood & Batley's possession in Liverpool or in transit in Nassau, shipments via Bermuda, totaling approximately one-sixth of the contract, began in early 1864 and continued until January 1865; some machinery got through the blockade and some was captured or lost at sea.[124]

With the collapse of the Confederacy in April 1865, the parties sought ways to dispose of the machinery to other potential purchasers. Although Major Huse was involved in those discussions, in August 1865, when Greenwood & Batley suggested that a disagreement between the parties about a delay in completion of the work be referred to Huse, Fraser, Trenholm replied that only their firm had the right to agree to changes in the contractual provisions.[125]

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[121] Frank E. Vandiver, *Ploughshares into Swords – Josiah Gorgas and Confederate Ordnance* (College Station, 1994), pp. 114, 145, 163, 172-176.

[122] Thomas K. Tate, *From Under Iron Eyelids – the Biography of James Henry Burton, Armorer to Three Nations* (Bloomington, 2006), pp. 143-144; Chet Bennett, *Resolute Rebel – General Roswell S. Ripley, Charleston's Gallant Defender* (Columbia, 2017), p. 259. After the war Burton was hired by Greenwood & Batley, returned to England, and became involved in several transactions with that firm and Caleb Huse. Tate, ibid., pp. 302-321.

[123] Correspondence among these parties when the contract was executed is reproduced in *Correspondence Concerning Claims Against Great Britain* (1871), VII, pp. 58-63 (Washington D. C., 1871).

[124] Frank E. Vandiver, "A Sketch of Efforts Abroad to Equip the Confederate Armory at Macon", *Georgia Historical Quarterly*, XXVIII (1944), p. 34; Bennett, note 122 above, pp. 259-262.

[125] This factual recital comes from paragraphs 12-16 of the Chancery bill.

Negotiations with an Italian small arms company led to a December 1865 supplemental agreement addressing further fabrication and payment in that context, reciting that £5,863 in payments remained due under the 1863 contract, half of which (£2931) Fraser, Trenholm paid to Greenwood & Batley on 14 December 1865.[126] In early 1866 arrangements were also made to return to Greenwood & Batley the portions of the machinery that had been shipped to Bermuda; how much remained there was uncertain. The prospective Italian purchase having fallen through, by August 1866, Greenwood & Batley and Fraser, Trenholm agreed to suspend work on the small remaining portion of the machinery under the 1863 contract and to sell "such portions of the said machinery as were then to be disposed of …".[127]

At about this time there appeared on the scene Roswell Sabine Ripley (1823-1887) of South Carolina, formerly a General in the Confederate States Army in charge of the defenses of Charleston, who had traveled to England after the end of the war and was trying to negotiate a purchase of the machinery from Greenwood & Batley at half the original contract price for resale to the French government, supported by Fraser, Trenholm, which claimed the down payment for it.[128] These negotiations came to naught because Ripley required the machinery to be delivered in good condition, and ocean travel had damaged some of it.[129]

At this point Fraser, Trenholm made the November 1866 settlement with the United States which Secretary of State Seward disavowed. According to Consul Morse's initial letter of justification to Seward, part of the settlement consideration was that Fraser, Trenholm "will also turn over to us a complete set of the machinery for the manufacture of rifles, which cost over £100,000. This machinery is new, and was manufactured, Mr. Prioleau told me, under the superintendence of Mr. Burton, an American, formerly of the Springfield armory and from the Ames works … A part of this

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126 Ibid., paras. 17-25.

127 Ibid., paras. 26-29.

128 Ripley had had some experience in the arms trade in England in the 1850s and had collaborated with John Fraser & Co. during the Civil War. He renewed his acquaintance with Burton by a chance meeting on a train to Richmond in February 1865. Bennett, note 122 above, pp. 57, 82-83, 226, 255, 269.

129 Ibid., pp. 30-34.

machinery is now in England, and a part is on its way here from Nassau".[130]

In December £435 worth of the machinery was sold to Caleb Huse with the approval of both Greenwood & Batley and Fraser, Trenholm. Greenwood & Batley acknowledged that from time to time it sold portions of the equipment to other parties in emergency situations but insisted it would be replaced long before performance under the contract was completed.[131]

In February 1867 Burton himself appeared at Greenwood & Batley with letters from Ripley and Fraser, Trenholm announcing that it had sold the entirety of the machinery "to General Ripley and his friends". Greenwood & Batley responded positively to the news, confirmed Burton's inspection, and tendered their statement of account for the final contract balance of £2967.[132]

After further correspondence about an on-account payment Fraser, Trenholm announced on 21 May 1867, that it "temporarily" could not meet its financial obligations.[133] In the meantime Francis Lawley had visited Greenwood & Batley, advising them that he was financially supporting General Ripley's efforts to buy the equipment. In late May Lawley and Ripley wrote separately announcing their readiness to close, Lawley proposing a "outright" purchase to Greenwood & Batley in light of the insolvency of Fraser, Trenholm, with whom he was "in treaty". [134]

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[130] *Message from the President*, note 69 above, p. 8. Greenwood & Batley's bill (at para. 37) asserts the belief that, going forward, Fraser, Trenholm were acting on behalf of the United States Government in dealing with the machinery.

[131] Ibid. paras. 38-39.

[132] Ibid., paras. 40-44.

[133] Prioleau's answer, filed 19 January 1869, stated that the creditors of Fraser, Trenholm decided to liquidate the firm under inspectors, and a bill of inspectorship was filed on 11 November 1867. In the schedule of creditors the remaining debt owed to Greenwood & Batley was listed at £5351, secured by undelivered machinery valued at £15,000.

[134] Ibid., paras. 45-64. A handwritten insert on the bill as held by the National Archives at Kew asserts that by an indenture dated 29 June 1867, Ripley assigned his interest in the machinery with the power of sale to Francis Lawley and his brother Stephen Willoughby Lawley to secure moneys due to them from him and that Francis Lawley had been acting as his brother's agent in these negotiations.

At this point Lawley and Ripley's re-sale arrangements fell through, and there then ensued months of negotiations through February 1868 between Greenwood & Batley, Francis Lawley and his solicitor, George Leeman (1809-1882), and General Ripley. First, it seems, Leeman invited Greenwood & Batley to buy the machinery themselves, which they declined. Leeman then advised the machinery would be sold to other parties.

In March 1868, Greenwood & Batley received letters from both Caleb Huse and Burton, the former prohibiting delivery of the machinery to any party without his consent, the latter requesting that it not be delivered until his £750 claim on it had been satisfied. However, Greenwood & Batley "did not think it necessary" to tell Ripley or Francis Lawley of the Huse letter when received: it was only when Ripley appeared at their offices on 26 May with a letter from Fraser, Trenholm claiming that Ripley was ready to purchase the machinery from them that Greenwood & Batley disclosed the existence of Huse's letter, which they confirmed in writing to Ripley and Leeman the same day, and wrote separately to Fraser, Trenholm and Ripley suggesting they seek a disposition of this dispute in Chancery.[135]

Leeman and Ripley's solicitors responded the next day with angry letters about the concealment of Huse's letter. Ripley's solicitors complained: "You never mentioned his claim either to General Ripley or his mortgagees until yesterday when pressed and obliged to admit you had sold some portions of the machinery", and Leeman asserted: "… I now learn … that you have actually parted with a large portion of the machinery and had done so at the very time your were negotiating with me for yourselves becoming the purchasers from Messrs. Lawley …". On May 28 Ripley took out his writ in the Court of Queen's Bench, claiming to have lost a sale as a result, with damages claimed at £100,000.[136]

Greenwood & Batley, for their part, contacted Isaac Redfield, in charge of the United States' interest in Confederate property, to inquire if Fraser, Trenholm had authority to sell the machinery, and received a letter from him forbidding them to deal with any other party for title or possession of it. The bill closes with an assertion that all Greenwood & Batley wanted was their final payment and

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135 Ibid., paras. 65-74.

136 Ibid., paras. 75-78.

to do the right thing – along with an injunction against any other litigation.

A comprehensive and accurate discussion of the Chancery litigation from this point on is impeded by the large gaps in the court papers held at the National Archives in Kew, even with the substantial supplementation of that record by the Fraser, Trenholm files in Liverpool and newspaper reports of court proceedings. The next proceedings in the case located in the court file were depositions before a "Special Hearing Examiner" based on affidavits filed earlier by the witnesses, as follows:

Witness	**Date Affidavit Filed**	**Date of Deposition**
John Batley	23 June 1868	26 and 29 June 1868
Roswell Ripley	2 July 1868	6 July 1868
Charles Prioleau	2 July 1868	7 July 1868

The transcripts of the testimony appear in the court file but the affidavits referred to are nowhere to be found, nor are the occasional documents marked as exhibits during the examinations.

Not surprisingly, given the factual positions of each side, Batley's examination tested the supervisory authority over the machinery which he ascribed to Huse, emphasized the periodic delivery to other customers of portions of the machinery, and explored his contacts with Burton as Lawley's representative and his discussions with Leeman and Redfield. Ripley's examination focused on his financing by Lawley and the elastic pricing and viability of the back-to-back sale of the equipment to a shadowy figure named Pritchard, proprietor of the Congreve Rocket Co., requiring delivery in fourteen days. Prioleau's examination challenged the right of Fraser, Trenholm to sell the equipment to Ripley in December 1866.

The Fraser, Trenholm files contain a transcription of an oral argument before Vice Chancellor on 16 July 1868, and his opinion from the bench on 20 July 1868, on the motion of Greenwood & Batley to stop a trial on Ripley's writ at the August Assizes in Leeds.[137] Benjamin explained that following the filing of the bill in equity, the defendants to it were required to file an undertaking,

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[137] The proceedings on 20 July 1868 are also reported in *The Mechanics' Magazine,* XX (New Series; 24 July 1868), p. 73.

with the effect of suspending the action at law. In answer to the Vice Chancellor's query whether the case was "a Confederate Government case", Benjamin said: "Not in the least. It is the case of some property belonging to some Gentm. in Liverpool" and explained:

> General Sabine Ripley was a General in the Confederate Service. He comes to this country and after he has been in England for some time – for a year – he buys certain machinery which is in the possession of the plaintiffs and in relation to which they have admitted his title and dealt with it. They afterwards sold secretly and apart from him a part of his machinery and then when he calls upon them for an account and brings an action they treat him with a Bill in Equity.

According to Benjamin and Ripley's other counsel, Greenwood & Batley were unfaithful bailees of the machinery owned by Ripley, selling it off and pocketing the money:

> Mr Benjamin: The cross examination and the affidavits show the fact that the Defts have been dealing with our property, selling it, and putting the money into their own pockets. That is the present condition of things and we are asked to remain quiescent under all that, and give them as much time as they want.

In addition, they were misusing their application to the Court of Equity to avoid filing their answers in Ripley's proceedings at law.

The Vice Chancellor's evident sympathy for Greenwood & Batley's situation at the hearing ripened into real hostility for the defendants' position in his opinion four days later. The Vice Chancellor acknowledged that he had "heard a most able argument … from Mr. Benjamin", but he dismissed Ripley's contract with Pritchard as not only legally insufficient on its face but also specious, Pritchard purporting to commit to pay £40,000 for what Ripley was buying for £20,000 – "… I find myself totally unable to come to the conclusion that the contract was entered into with Mr. Pritchard with the bona fide intention of fulfilling it".[138] He

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[138] Although the record of the case does not reflect it, the Vice Chancellor's skepticism may have arisen from reports in the press that General Ripley had filed in personal bankruptcy in March 1868. See *The*

rejected the argument that Greenwood & Batley were bailees – they were involuntary possessors of equipment that could not be delivered and for the manufacture of which they were still owed more money than they had obtained by following the industry practice of selling portions of it to others in urgent situations and replacing it. Although, the Vice Chancellor concluded, Ripley and his associates were aware that Greenwood & Batley were doing so "from the first date to the last … nothing will satisfy the eager Defendants in Equity, the Plaintiffs at Law but that they must go on and harass these Gentlemen with the most vexatious action in order to see what they may extract from them by the verdict of a Jury at Leeds". But since "[h]owever clearly the Court may be of the opinion that the action is inequitable & unjust, there is no right in this Court to stop it", he gave the defendants in equity until the following Monday to decide whether they would accept his view that they should not force the case forward at Leeds, which he considered impracticable in any event.

Apparently, Benjamin and his colleagues decided to stay the course, because the day after the "following Monday", there was a report of a decision by Vice-Chancellor Richard Malins (1805-1882) on the motion.[139] After a recital of the background, the report continues:

> His Honour was of opinion, upon the evidence which had been laid before him in support of these cases, that the plaintiffs had acted in perfect good faith and that all parties were perfectly cognizant of what had been done, and that the action was most unrighteous and unjustifiable, the alleged sale by Ripley to Pritchard not being, in his Honour's judgment, a *bona fide* transaction, but a merely colourable one to enable them to bring this action against the plaintiffs, who had acted throughout in remarkable good faith and in a manner becoming their high position as manufacturers. He considered General Ripley's action one of the most hopeless and unjustifiable that was ever brought, but it did not follow that because it was hopeless and unjustifiable that the court could interfere to stop it. To justify the court's so doing some

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Law Times, XLIV (20 March 1868), p. 398. He emerged from bankruptcy in May 1869. *The Illustrated London News*, LIV (29 May 1869), p. 542.

139 *Leeds Mercury*, 28 July 1868.

> distinct ground must be shown. That action was founded on a mere breach of contract, or of duties arising out of it; and, with all the inclination to stay proceedings which were so unjustifiable, he was unable to find grounds which would enable him to do so. The motion, therefore, he was sorry to say, must be refused, so far as it sought to restrain the trial, but the case was so extraordinary that he thought the defendant ought not to be allowed to issue execution, in the absence of the other defendant to that case, and he would therefore restrain execution without leave of the court in the improbable event of General Ripley obtaining a verdict.[140]

It appears that the trial did not occur at the Leeds Assizes the following month, or that a trial at law of this dispute was ever held anywhere. Judah P. Benjamin's appearance as counsel is not noted in any of the several newspaper reports of the further or concluding hearings in the Court of Equity, filings in which resumed on 8 August 1868, with an answer by Isaac Redfield for himself and the United States. It acknowledged his consultation by Greenwood in Paris, which he placed in early June 1868, and asserted the legal ownership and right to possession of the machinery by the United States.[141]

Before other answers were filed in the Chancery proceedings, in early 1869, a two-day deposition of Major Caleb Huse was taken on 25 September 1868, as he passed through London from Paris on his way to the United States. It is to be found only in the Fraser, Trenholm files in Liverpool, captioned in the action at law and not part of the Chancery file, which does contain other

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[140] Sir Robert Megarry, "The Vice-Chancellors", *Law Quarterly Review*, XCVIII (1982), pp. 370, 387, says of Malins:

> He detested fraud and oppression , and at times was over-ready to detect it. [footnote omitted]. He strove to give effect to what he saw (at times with some intellectual obstinacy) as the natural justice of the case, regardless of the law; and he would seek to support his conclusions by reasoning that all too often was visibly fallacious.

[141] Redfield also filed a separate bill in the Chancery Court for the United States against the partners of Fraser, Trenholm, pleading the 1867 settlement and accusing Fraser, Trenholm of concealing its possession of the Greenwood & Batley machinery which had been returned from Bermuda after the end of the Civil War. *United States v. Welsman, et al.* 1869 U. No. 46 (16 November 1869).

depositions. After first describing his authority in Europe from the Confederate government, Huse introduced the instructions he and Burton received in 1863 to initiate the transaction and insisted that Fraser, Trenholm had contracted in their own name as agent for the Confederacy to try to protect the machinery from seizure, in return for a commission of 10% of the value of the contract. Huse testified that he considered that even after the collapse of the Confederacy, his authority continued as if that government still existed with respect to any property for which he had been responsible, superior to any claimant's or creditor's, and that such property belonged to him as much as to anybody. He was aware of the Ripley purchase in February 1867 and of the Lawleys' "mortgage", and he felt he was entitled to a 10% commission on any sale of the machinery.

Finally, Huse acknowledged that he had heard that Redfield was inquiring about the machinery and that, on the advice of a friend, in June 1868 he had approached Redfield in Paris and surrendered his interest in the equipment without compensation. He felt no obligation to Fraser, Trenholm's interests because they had purported to surrender the machinery to the United States in the earlier settlement with the United States which Seward had repudiated. Finally, Huse testified that Prioleau claimed at the conclusion of the Civil War that the Confederacy was in debt to Fraser, Trenholm, while Colin McRae, who had had access to Fraser, Trenholm's books, maintained that the opposite was the case.

Prioleau's answer, filed 19 January 1869, explained (at para. 7) that Fraser, Trenholm had entered into the machinery contract with Greenwood & Batley as principals and not as agents for the Confederate States, which he denied had any privity or rights under the contract; instead, Greenwood & Batley "accepted and always treated my said firm as being the only persons liable to them or having any rights against them under the said contract…". The Confederate government had agreed to pay Fraser, Trenholm a 10% commission, but the firm received nothing either toward the cost of the machinery or the commission. Prioleau's answer also denied that Huse had any claim or property interest in the machinery and repeated the text of Fraser, Trenholm's letter of 27 May 1868, to Greenwood & Batley making the same assertion.

General Ripley's answer, filed 16 February 1869, asserted that he had approached Prioleau for a quote on the machinery in early 1866 and been told that it could be purchased for 50% of the

invoice price. Prioleau referred him to Greenwood & Batley, who acknowledged Fraser, Trenholm's ownership of the equipment, but Greenwood asserted that the price requested was too high and that he could acquire the machinery for half that amount. On 1 December 1866, Fraser, Trenholm offered to sell the machinery to Ripley for £20,000 upon receipt of a £5000 deposit, which Ripley promptly provided. Fraser, Trenholm instructed Greenwood & Batley to allow an inspection of the machinery by Ripley, who employed Burton, then in England, for the purpose and received his report in late February 1867. It showed £2200 of equipment yet to be manufactured and £387 of machinery "taken for orders to be replaced".

At the time Ripley was expecting to use the machinery to establish a factory to manufacture rifles for the French government and used Burton as a consulting engineer to deal with Greenwood & Batley about alternations and additions to the machinery that would be needed. On 28 June 1867, Greenwood & Batley inquired when the closing might be, as the liquidators of Fraser, Trenholm had applied to them. However, the disposition intended by Ripley fell through, and he and Lawley attempted to find an alternative transaction. At this point Lawley's lawyer, Leeman, became involved in direct dealings with Greenwood & Batley, suggesting that they buy the equipment themselves for £25,000 and waive their further £5351 completion payment, a proposal which was not accepted. Leeman also let it be known that Ripley and Lawley might dispose of the machinery without further work on it by Greenwood & Batley, leading, in Ripley's speculation, to the claims of Huse and Burton put forward at Greenwood & Batley's behest to sabotage such a sale.

In April 1868 Ripley was introduced to Peter Pritchard, who claimed a willingness to pay the £40,000 Ripley demanded for the "speedy delivery" which he supposed Pritchard was desirous of. On 29 April Greenwood & Batley wrote Ripley that "it is impossible for us to say anything about the delivery of the machinery you refer to at present, as there are important questions to be settled in respect thereof, before any delivery can take place" and, according to a subsequent letter from Pritchard to Ripley, wrote to Pritchard in the same vein as well. Pritchard's response was to demand that Ripley deliver the machinery within fourteen days.

The climax came at a meeting at Greenwood & Batley's offices in Leeds, to which Ripley had gone to inspect the machinery. While

acknowledging that he did not know the basis for Major Huse's direction that the machinery must not be delivered without his order, Batley claimed that he was bound to obey it. Ripley returned to London and took out a writ, believing that part of what lay behind the refusal were undisclosed sales of portions of the machinery, and that concern about a claim by the United States played no role in Greenwood & Batley's refusal, as all payments for the machinery had been made by Fraser, Trenholm out of its own money.

The answer of Francis Lawley, filed four days before Ripley's, covers most of the same issues the same way, but it does include the terms of the agreement under which Francis Lawley, and his brother Stephen, loaned Ripley £2000 and £6000 for the purchase of the machinery.

In July 1870 the case was back before Vice Chancellor Malins twice, again without an appearance for Fraser, Trenholm or Prioleau. At the first hearing, an order having been made to sell the machinery, the Vice-Chancellor deplored the fact that the parties had made no progress in resolving a dispute over the sales price of property of such size and adjourned it for a week to give the parties further time for an amicable resolution.[142] At the second hearing, the following transpired:

> Mr. Glasse, for the plaintiff, moved that the machinery now in the hands of Messrs. Fraser, Trenholme [sic], and Co. should be transferred to the plaintiff, the former having the conduct of the sale; and there should be a direction of the court that the sale should not be effected at less than two-fifths of the contract price. – Mr. Roberts, as assignee for General Ripley, contended that the reserved price was entirely insufficient. – The Vice-Chancellor believed that the machinery would fetch its value, though expedition was essential, as the machinery might otherwise be superseded by other inventions. He would order the sale of the property, without prejudice to the rights of any of the parties, and the question of reserved price should be decided by him in chambers. – Mr. Roberts intimated that General Ripley claimed a very large sum out of the proceeds. – The Vice Chancellor: I have no doubt he

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142 *The Evening Gazette*, 11 July 1870, p. 8.

> does, but it is questionable whether he has a particle of a right. [143]

Plaintiffs' note of issue was filed in November 1870, followed by affidavits by various of the defendants attesting to the truth of their answers in February 1871. On April 12 there was a substantial filing of affidavits by plaintiffs and their witnesses and for the United States, including one by Thomas Dudley, former consul at Liverpool, authenticating the 1867 settlement agreement between the United States and Fraser, Trenholm and attesting to the truth of the allegations in the answer filed for Redfield and the United States and the authenticity of a contemporaneous letter in 1863 from Prioleau to Huse confirming the signing of the contract for the machinery.

Greenwood & Batley filed extensive affidavits by each of its two principals jointly, and by Huse, Burton and three engineers who had inspected the machinery. The joint affidavit denied any reluctance on the part of his firm to contract directly with the Confederate government, pointing out that although Prioleau had signed the original contract, which this affidavit authenticated, its provisions were in Burton's handwriting. It further described the efforts of representatives of the United States to locate the machinery in 1866, including visiting their premises, and Greenwood & Batley's efforts in aid of Fraser, Trenholm to recover the portions which had been shipped across the Atlantic but never delivered to the mainland. It also described in detail Batley's dealings with Francis Lawley and General Ripley, and his final antagonistic meeting with Ripley on 26 May 1868. Finally, the affidavit reviewed the complications added to the situation by the insolvency of Fraser, Trenholm and asserted: "The Defendants Fraser Trenholm & Co. and the United States are in reality the only Defendants who are concerned in or affected by our said lien or account and it does not concern the Defendant Ripley or inasmuch as it has to be satisfied out of 15000*l.* of unpaid purchase money payable by the Defendant Ripley".

Huse's affidavit covered much the same ground as his 1868 deposition, although here he was able to insert such argumentative statements as that in their pre-contract discussions Prioleau had

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[143] *The Leeds Times*, 16 July 1870, p. 5. A subsequent filing states that the order to sell the machinery was dated 18 July 1870.

agreed "on behalf of his firm that they should be nominal principals but in fact as agents for and on behalf of said Confederate government enter into a contract with the Plaintiffs …". Payment to Greenwood & Batley was to come from War Department funds subject to Huse's order in the hands of Fraser, Trenholm, but as early as July 1864 Prioleau advised Huse of a £71,000 deficit in funds in their hands, £40,000 of which was attributable to the Greenwood & Batley machinery but not yet due. However, according to Huse's affidavit:

> At the close of the said war there was as I believe a balance in my favor upon the account between the said Fraser Trenholm & Co. and my department. They did not render to me any account thereof nor did they ever render to me any statement of their general account against the said Confederate government. I am aware that they claim to be entitled to a large sum of money upon the balance of their accounts with the Confederate government, but I know that their accounts have since the close of the said war been examined by Mr. McRae as agent of the Treasury Department of the said Confederate government and since his examination thereof the said Mr. McRae stated to me and from my general knowledge of the transaction I believe it to be true that the said Fraser Trenholm & Co. are not entitled upon the said accounts to any balance whatever as against the said Confederate government. I have heard that they sustained severe losses in some of their latest transactions in connection with the said Confederate government, but I was informed by Mr. McRae that such losses were on their own independent transactions and not chargeable against the Confederate government.

Huse also explained the basis for his claims to the Greenwood & Batley machinery:

> When the Confederate States government came to an end in the spring of the year 1865 I was left in a position of great difficulty and embarrassment deprived of my rank and emoluments and of my means of subsistence and prospects in life unable to return to my native country and with a large family in Europe dependent upon me. … I had large and unsatisfied claims upon the said government for compensation for my time and services… and I considered myself entitled as a creditor in right of such claims to possess myself of

> such Confederate property as I had any title or claim to by reason of having been concerned in the purchase or obtaining thereof and thereby to satisfy myself in respect of my said claims upon the said government. I further considered that I continued to act as agent in respect of all property with which I had been connected as if the Confederate government continued to exist.

Having received a letter from Greenwood & Batley on 2 March 1868, regarding Ripley's intended sale, Huse wrote the letter in contention in the case, dated 4 March 1868, directing Greenwood & Batley to make no delivery without his instructions, and his affidavit disclosed that he had sent them a second letter of the same date, stating in pertinent part:

> After Mr. Prioleau's attempt to throw me overboard when the salvation of the property was due to my action I should rather prefer to meet him than any person who had paid him good money for the property to which he could not give a good title but whoever may come forward as owner of the property will have to satisfy my claim either to me personally or to the United States government, to which I should not hesitate to transfer my claim under circumstances which might arise.

Huse concluded his affidavit with an account of his meetings with Redfield and Greenwood in Paris and his disregard of an effort by Prioleau to meet him in Paris when Ripley took out his writ.

Burton's affidavit echoed Huse's rejection of Fraser, Trenholm's claim of ownership and control of the machinery:

> Although in the said transaction Messrs. Fraser Trenholm and Company were the nominal contractors and principals yet it was well understood and agreed between them and myself and Major Huse that it was only in the financial part of the transaction that they were concerned and that in respect to other conditions of the contract such as times of delivery or substitutions or alterations in the machinery I and Major Huse were the parties to control the execution of the contract and were fully authorized to do so.

With the fall of the Confederacy Burton "considered that I had morally at all events and also probably in law a claim upon or against any property of that government in respect of which I had been employed by and had rendered to service to that government for the purpose of satisfying my claims for compensation against

that government" and so assisted Greenwood & Batley and Fraser, Trenholm in recovering portions of the machinery that had been shipped to Bermuda. He also approached Ripley, who retained him to inspect the machinery in the hands of Greenwood & Batley and subsequently hired him for a one-year term as his consulting engineer. Burton's affidavit and three others justified the practice that Greenwood & Batley adopted of selling and replacing portions of the machinery when needed to accommodate other customers.

Sometime in the next year or so, the Chancery Court must have heard the case on the merits, because in early May nearly identical articles appeared:[144]

> The Vice-Chancellor, in delivering judgment, said: It appears that in this case certain goods were manufactured by the plaintiffs, Thos. Greenwood and John Batley, carrying on business under the name or style Greenwood and Batley, of Leeds, for the Confederate States of America, at a time when they were recognized by this country as belligerents. According to the law of nations the subjects of neutrals are at liberty to supply belligerents with all munitions of war, except armed ships or ships sent out for the purpose of being armed. … The Confederate Government, like the Federal Government, applied to this country for such munitions of war and, I believe, both were liberally supplied by this country, Messrs. Greenwood and Batley, having entered into a lawful contract with agents of the Confederate Government, Messrs. Fraser, Trenholme [*sic*] and Co. In respect of these articles certain sums of money still remain due to Messrs. Greenwood and Batley, and for the money so remaining due to them they have a lien upon the goods, which, by arrangement between the parties, have been sold, and the money brought into Court which now represents the goods. The consequence is that they have as good a lien upon the money in Court as they would upon the goods if the goods had remained unsold. Now comes the question between the United States of America, re-established as the result of the war, and Messrs. Fraser, Trenholme and Co. as to who is entitled to the money – whether they are entitled to it simply

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144 *The Leeds Mercury*, 2 May 1872; *The Leeds Times,* 4 May 1872. The only appearance by counsel identified is Sir Roundell Palmer.

subject to the lien of Greenwood and Batley, or subject to what is due also to Messrs. Fraser, Trenholme and Co. I take it to be perfectly clear upon principle, as well as the two cases that have been cited to me, that the successful belligerents can only take the property of the conquered State which remains after all that is justly due and owing in respect of the property has been paid, which in this case is what remains unpaid to Messrs. Greenwood and Batley, the manufacturers: and secondly, what is due to Messrs. Fraser, Trenholme and Co., the agents of the Confederate Government, for what they have paid in respect of the machinery. Now I do not think it necessary to go into the question of whether they have a lien or not because they have paid for these goods, and the United States in my opinion cannot take these goods without refunding all that has been paid in respect of them. I am of opinion that an account must be directed to ascertain what is due to the plaintiffs, and also what is due to Messrs. Fraser, Trenholme, and Co. in respect of their payments for these goods. His Honor went on to say that he did not consider the technicality raised as to relief between co-defendants would prevent a decree. It seemed, however, clear to his Honour from what has been stated, that it was impossible for anything ultimately to go to the United States, because it had been proved that £14,000 was due to Messrs. Fraser and £5000 to the plaintiffs, and only £14,000 was in court. At the same time the United States were entitled to an inquiry.

The case being stood over to give the learned counsel for the United States an opportunity of considering the expediency of adopting an inquiry, this morning Sir Roundell Palmer, Q,C., stated that his clients desired it. The order as settled ran in these terms: “The Court being of opinion that they are entitled to be paid out of the money in Court representing the proceeds of the machinery (after satisfying the plaintiffs’ claim) what, if anything, may be due to Fraser, Trenholme, and Co. in respect of their payments for the machinery in question; and the United States, by their counsel, desiring an inquiry as to what, if anything, is due to Fraser, Trenholme and Co., directs such inquiry accordingly, not disturbing any settled amounts”. The sale of the machinery remaining could then be directed.

The inquiry authorized by the order appears to have given the United States access to the books and of Fraser, Trenholm and Co. and led to the depositions of Prioleau and Henry Gerard, who from his brief testimony appears to have been knowledgeable about how Fraser, Trenholm kept its accounts.

Prioleau's examination, which occurred on 4, 10, 14 and 18 March 1874, was said to be based on affidavits filed 18 July 1872, 31 December 1872, and 25 July 1873, none of which are in the Chancery file or in the Fraser, Trenholm files in Liverpool. The examination, recorded in a handwritten transcript, ranged over numerous specific transactions and entries reflecting them, including but not limited to the Greenwood & Batley machinery, both during the Civil War and after it had ended. Prioleau was shown many individual documents and entries about which he gave testimony but which are not identifiable now. The transcript recites that he was examined at the behest of Redfield and the United States and cross examined briefly on the last day "on behalf of the defendant C. K. Prioleau and the other partners in Frazer [sic] Trenholm & Co".

The counsel who conducted Prioleau's direct examination is not identified, but the appearance for the Fraser, Trenholm partners is: "Mr. Benjamin, Q.C.". Accordingly, Benjamin must have been present for following colloquy during the direct examination on March 10:

> *Answer* …
>
> In the beginning of 186*7* the Confederate States owed my firm a very large amount of money. [emphasis added]
>
> *Question* How did you come to pay the sum of £25,000 to Mr. Benjamin on the 17th of April 186*7*, if (as you say) the Confederate States were then in your debt? [emphasis added]
>
> *Answer* From the beginning of 1865 every payment we made was made when the Confederate States were in debt to us, and we made no distinction between that payment and any other. The money to meet this draft was specifically remitted to us from Canada. These specific remittances that I refer to are those under date the 30th of March and 5th of April 1865 in folio 31 of C.K.P. 9. The letters will show my authority for saying that the draft of £25,000 was a special charge on those remittances.

> *Question* How did you come to pay on the 6th of May 1865 to Colonel McRae the sum of £21,300.8.4 mentioned at folio 90 C.K.P. 9 if, (as you say) the Confederate States were in your debt?
>
> *Answer* We paid it as we had a special remittance in that amount appearing on the credit side of the same folio under date of 28th Feby. and 6th of May 1865.

Benjamin's brief subsequent examination did not address this payment to him or the others.[145]

The final court proceeding in what the news report ungraciously characterized as "this old suit" was in the Vice Chancellor's Court in July 1875; Benjamin was not among the counsel reported as present.[146] The Vice Chancellor's agreed order was that:

> … after providing for the plaintiffs' lien as unpaid vendors and the costs of the of the suit, the residue of the funds in dispute, about L12,000, should be divided equally between the United States Government and Messrs. Fraser and Trenholme [sic].

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[145] This transaction remains an unsolved mystery. There is no doubt that the date used twice is 1867, just a few days before Fraser, Trenholm declaration of insolvency – perhaps the impetus to get money into Benjamin's hands for whatever reason. The context of the question and answer, however, suggests that the correct date is 1865, and using that date, the transaction sounds remarkably like the one described by Benjamin in his letter to Jacob Thompson of 13 September 1865, except that Benjamin's letter describes a recent *refusal* by Fraser, Trenholm to make the payment which Prioleau's quoted testimony asserts had been already made in April, a representation which Benjamin used to squeeze £12,000 out of a recalcitrant Thompson. If this was some other 17 April 1865 payment to Benjamin, it must be borne in mind that he was at the time in flight in the Carolinas with Jefferson Davis and other members of the Confederate cabinet. Unless it was transmitted to Gilliat & Co., as Benjamin had directed in March 1865, where moneys for Jefferson Davis's defense were accumulated and transmitted to Charles O'Conor, there is no indication how the money was used.

[146] *The Times*, 19 July 1875, p. 11.

Observations

The discussion above may explain an incident years later which invariably appears in Benjamin's biographies, described in Butler as "one little episode [in May 1881] that made a deep impression in England":

> As senior counsel for the appellants in the Lords, Mr. Benjamin insisted on proceeding with his argument as he had planned it, in spite of signs of impatience on the part of the members. At length, upon his stating one of the propositions that he meant to defend, Lord Selborne, the Lord Chancellor, remarked *sotto voce*, but in a tone which reached the counselor's ear: "Nonsense!" … Mr. Benjamin "proceeded to tie up his papers. This accomplished, he bowed gravely to the members of the House, and saying 'That is my case, my Lords,' he turned and left the House".[147]

The British practice to ennoble individuals under new names obscures the fact that Lord Selborne was none other than Sir Roundell Palmer, the Attorney General acting privately for the United States whom Benjamin had bested time and again as a tyro at the British bar. At the farewell party given for Benjamin by the British bar the year before his death, the Lord Chancellor did not sit next to the guest of honor.[148] And in his memoirs, Lord Selborne praised Benjamin's skill in the sort of cases in which he had not opposed him – "[a]s a common-law leader, in mercantile cases especially, he outstripped all competitors" – and otherwise damned him with faint praise:

> As an advocate he could not be called eloquent, but was quick, shrewd and dexterous; not judicially minded, like Mellish, who used to pick out the good arguments and drop the bad; Benjamin did not disdain any sort of argument which an honest man could use, but urged them all with equal courage, to the great satisfaction of his clients.[149]

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147 Butler, note 3 above, p. 404.

148 Ibid., p. 414.

149 Roundell Palmer, Earl of Selborne, *Memorials Part II. Personal and Political 1865-1895* (London, 1898), II, pp. 95-96.

Finally, the records of the *McRae* and *Fraser, Trenholm* cases show that Benjamin was largely successful in thwarting the aggressive efforts of the United States to recover Confederate property in England. Even with Secretary Seward's renegotiation of the settlement with Fraser, Trenholm, at the end of the day in the teeth of that settlement Fraser, Trenholm and the United States split the proceeds of the *Greenwood & Batley* litigation. The key was Benjamin's argument that the United States succeeded to the debts of the Confederacy if it succeeded to its property, which, in turn, backed the United States into the prohibitions of the Fourteenth Amendment. Apparently this outcome had been anticipated by another American lawyer of equal stature, who explained when the issue of Confederate property abroad arose yet again in the Senate in 1888:

> Mr. Evarts: … I desire to say that very early after the close of the rebellion a question was raised as to whether this Government should pursue some considerable masses of property, altogether perhaps in England, that had been and were the property of the Confederate States.
>
> Some very eminent lawyers in the confidence of the administration advised that that course should be taken. I advised against it and refused any countenance whatever to the proceedings. Although efforts were made to draw a distinction between true succession to a decayed and defunct government which would carry obligations for its unsatisfied debts, I was not able to see it and have always advised against it. The experiment was made, however, to a certain extent, under the direction and advice of the lawyers to whom I have referred, and it went through the courts of England with a considerable scrutiny, but as far as I can now recall and as far as the courts proceeded the English tribunals, I think, never went any further than to say that if the United States were the successors to the Confederate States we must pay their debts before we took this property out of England.[150]

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150 *Congressional Record*, XIX (31 July 1888), p. 7079.

THE ATLANTIC & GREAT WESTERN RAILROAD

The story of the Atlantic & Great Western Railroad ("A&GWR") deserves its own book – and not only has one of its own,[151] but figures significantly in books about the industry in that era focus on the Erie Railroad and the financial machinations of its managers.[152] The A&GWR's principal promoters were its owner and builder, James McHenry (1817-1891),[153] and Sir Samuel Morton Peto (1809-1889), an English financier and promoter of major American railroads to English investors whom Peto took on investment trips to the United States in the 1860s.[154] In 1866 Peto published a 428-

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[151] William Reynolds, *European Capital, British Iron and an American Dream – The Story of the Atlantic & Great Western Railroad* (Akron, 2002).

[152] The two most useful for purposes of this essay are Dorothy R. Adler, *British Investment in American Railways, 1834-1898* (Charlottesville, 1970), pp. 100-113, and Edward Harold Mott, *Between the Ocean and the Lakes –The Story of Erie* (London, 1902). A seminal work, John Livingston, *The Erie Railway: Its History and Management, From April 24th, 1832 to July 13, 1875* (New York, 1875), p. 27, says:

> "The A and G.W. Co. is one of the most inflated bubbles of the age; the rottenest and most thoroughly *"financed"* corporation in which English gold has ever been sunk".

[153] "The A&GWR had been built by McHenry, who received all its stocks and bonds in payment for the work. The proceeds of the bonds were not sufficient to complete the road, and McHenry hypothecated stock to a large amount … The stock of the company was taken largely by small foreign investors …". Mott, note 152 above, pp. 151, 181.

[154] Peto has his own biography: Adrian Vaughan, *Samuel Morton Peto – A Victorian Entrepeneur* (Surrey, 2009), and an epitaph from Charles Francis Adams: "It is not worth while, however, to go into the details of the history of stock-watering in England. There it has never been reduced to a science, although Sir Morton Peto carried it to a very creditable degree of perfection". See Charles Francis Adams, *Chapters of Erie and other Essays* (Boston, 1871), p. 373. The *New York Times* for 31 October 1865 reported that at the conclusion of such an investors' junket for the A&GWR, Peto gave a banquet at Delmonico's for 250 guests, including Chief Justice Salmon Portland Chase (1808-1873) [who spoke briefly] and Justices Stephen Johnson Field (1816-1899) and Stanley Matthews (1824-1889), former President Fillmore, the Governor of Massachusetts, Admiral David Glasgow Farragut (1801-1870), General William

page book,[155] in which he extolled the current success and future prospects of the A&GWR:

> People in London are astonished when they hear that the returns of the "Atlantic and Great Western Railway" are every month as great as those of most of the leading English railways. It is difficult to bring them to realize the fact that that line, with many sources of profitable traffic not yet touched, is earning almost as large a sum per mile per week as the London and North Western Railway itself.

and the virtues of James McHenry:

> It is due to my friend James McHenry, that I should state that his countrymen are indebted for this great system of railways entirely to his energy and foresight. In the midst of the Civil War the greater part of the Atlantic and Great Western system was constructed by funds supplied to him by friends having confidence in him and his country …

The structure of the A&GWR was summed up in a letter by Benjamin when his own involvement with its finances becomes visible in the spring of 1869:

> … this Company is formed by the Consolidation of three or four others and that by the acts of Consolidation of the Several States, the Consolidated Company is subject to all the debts, liens &c, &c of the separate Companies – The whole line has been recently leased to the Erie Railway Company, and the rent is vastly more than sufficient to pay the divisional mortgage coupons but Jay Gould has managed in some way to obstruct the payment …[156]

The lease in question had been entered into by the notorious Jay (Jason) Gould (1836-1892), who then controlled Erie, with the A&GWR and McHenry in December 1868 in consequence of the financial condition of the A&GWR, which had been in default since

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Tecumseh Sherman (1820-1891), Cyrus West Field (1819-1892), Horace Greeley (1811-1872) and, of course, Samuel L. M. Barlow.

155 S. M. Peto, *The Resources and Prospects of America, Ascertained During a visit to the States in the Autumn of 1865* (New York and London, 1866), pp. 301-302 & note.

156 Letter dated 31 May 1869 from Benjamin to " Hon. Thos. F. Bayard, U.S. Senator" (author's collection).

April 1867 on the current payments due on the outstanding long-term bonds of its constituent lines and been placed in receivership.

The British investors did not take the default lying down, and bondholder meetings were held in London to discuss competing proposals to resolve the situation. On 8 May 1869 the periodical *Money Market Review* (p. 475) attached the text of a proposal by Samuel L. M. Barlow "to take charge of the case of the Atlantic and Great Western bond and debenture-holders", made on 23 April; in London to a London solicitor who advertised that he was following advice "received for a client of mine by J. P. Benjamin, Esq., (a member of our bar, and now practicing in our courts of law, and late the Attorney General of the Southern States of America) and of S. Barlow, Esq. (a member of the firm of Messrs. Bowdoin, Larocque and Barlow, barristers and solicitors, of New York)." The prerequisites for Barlow's proposal to collect the value of their bonds, including fees, are summarized and then the details are set out *verbatim*:

> 1. to cover the £2000 in expenses which the engagement would generate, he would need a client base with a minimum of £4,000,000 in bonds;
>
> 2. the bonds would have to be deposited with a reputable London banker;
>
> 3. he would be representing all bondholders for "the common good of all".

The fees were to be ten shillings for every $1000 in bonds, payable on deposit, and £5 per £100 commission on all collections, £1 for the banker and £4 for Barlow's law firm.[157] After making the proposal Barlow went to Paris. On April 28 Benjamin sent him an anguished letter that:[158]

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[157] The role Benjamin was to play was set out in a memorandum dated 20 May 1869. He was to receive one quarter of the fees payable to Barlow's firm in "association" with it: "We make this association with you as a member of the American bar, not as an English barrister, and it is to be considered as made in New York, and not in London – You are therefore to have no fees or briefs but are to help us in all professional matters connected with the business as far as you can given your position as an English barrister …".

[158] Barlow Collection, Huntington Library.

> It has become indispensable that you should come here immediately, unless we are to abandon a matter which is on the eve of success, but is arrested by a difficulty that seems too absurd – We have got *everything* arranged; my clients are prepared to carry the whole thing through…
>
> …we can plan on, I think, subscriptions for eight or ten millions … This is quite too big a thing not to merit 48 hours attention.

A further announcement that the bankers were selected and ready for deposits was met by a vicious response to many aspects of the Barlow's proposal, and the qualifications of those making it, by a debenture-holder who signed himself "Lex" and included the following:

> But who are the gentlemen who offer to do the business for £2000 cash down and a commission of 5 per cent. besides, subject to a commission of 1 per cent. to any bank or banker who will act as stakeholder for the bonds and debentures during the proposed litigation; and what are their antecedents, particularly with regard to the Atlantic and Great Western Railway? Mr. Benjamin is a native of the island of St. Croix, where he is registered as a British subject. He emigrated to the State of South Carolina, thence to the State of Louisiana, where he was admitted to the bar. He never practiced his profession in any other American state. The laws of Louisiana are a mixture of French, Spanish, English and American laws, and are as different from the laws of New York, Pennsylvania and Ohio – the States which gave life to the Erie and Atlantic and Great Western – as the laws of Prussia are different from the laws of England. There are thirty-nine different codes of railway law in the United States – one for each State and one for the territories. It is true that Mr. Benjamin was for a few months the "Attorney-General of the Southern States of America", those States being at the time in rebellion without ever having organized a Court. That position did not give him any acquaintance with the laws of the three loyal States above named. Mr. Benjamin's opinion with regard to Louisiana law would in America be received with the greatest respect, but in regard to the laws of the other States his opinion would have no weight whatever. It is not the habit or custom in America to employ lawyers who practice in one State to expound the

> laws of other States. … Mr. Barlow's connexion with the Atlantic and Great Western is even more intimate than that of Mr. Benjamin. Mr. Barlow is the solicitor and confidential adviser of Mr. Thomas W. Kennard, the Engineer-in Chief of the railway… . If Mr. Barlow would undertake the collection of the amount of money which… Mr. Kennard is charged with having failed to account for to the company – viz. 4.000.000 dols. – Mr. Barlow and Mr. Benjamin, Federal and Confederate, might well be entitle to 5 per cent. commission thereon, with a return of 1 per cent to the Consolidated Bank, the institution that gave credit to the debentures by guaranteeing the payment of three years coupons thereon after having received the whole of the amount in advance.[159]

The war between the different classes of investors went on in the *Money Market Review* for the rest of May and into June, but Gould soon repudiated the Erie's lease of the A&GWR. Litigation ensued, Gould was appointed receiver of the A&GWR, McHenry retained Barlow as counsel, and Barlow succeeded in forcing Gould out of the receivership. In 1872, Gould was eliminated as Erie's president after Barlow had obtained a place on its board for himself.[160]

But the arrangement that Benjamin had proposed to Barlow and the world had failed before the end of May 1869. Benjamin then wrote to his friend Thomas Bayard, briefing him extensively on the structure and debt instruments of the component railroads of the A&GWR – of which Benjamin and "some friends" held £875 worth, and asking that Bayard represent them and charge a fee for doing so, noting that "I do not wish my name to be used, nor will this be necessary as all the bonds are payable to bearer, but if a suit should be necessary it may be in the name of Julius St Martin (my brother-in- law) …". Benjamin enclosed with the letter the overdue bond interest coupons "… in which I am largely interested".[161]

During the summer and early fall of 1869 Bayard wrote several times to McHenry of the A&GW but only received in reply requests for further information. Bayard also sought to collaborate with Clarkson Nott Potter (1825-1882), a prominent New York attorney

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159 *The Money Market Review*, 15 May 1869, p. 496.

160 Mott, note 152 above, pp. 181-189; Adler, note 152 above, pp. 109-113.

161 Letter, note 156 above.

representing other bondholders. In the end Benjamin halted Bayard's efforts in order to participate in a proposed reorganization of the A&GWR.[162] Whether Benjamin was ever able to realize value on the bonds and their coupons does not appear;[163] in his letter to Bayard of 19 November 1869, he estimated their value at what would be in $615,000 2022 US dollars.

CONCLUSION

Benjamin's representation in England, in the late 1860s, of former Confederate officials and British business affiliates of the Confederacy centered on more important legal and political purposes than Benjamin's mere pursuit of attorney fees. Indeed, in the existing attorney-client correspondence identified, no mention of attorney fees has been found, and one wonders whether those may have been paid from Confederate assets earlier collected by Benjamin or held by these clients, and particularly Benjamin's mysterious £25,000 payment from Fraser, Trenholm in 1867. At a minimum, it calls into question the assertion in a widely-read history:

> … Benjamin … arrived in England in July [sic] 1865 after a harrowing escape from Florida and retrained as a barrister. He became in expert on commercial law and in 1868 he published a treatise on that topic… . Striving to put the past behind him (and burdened by many secrets), *Benjamin generally avoided the other Confederate exiles* (emphasis supplied).[164]

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[162] Letters from McHenry to Thomas Bayard, 9 and 15 July, and 19 August 1869; letter to Bayard from Clarkson Potter, 22 October 1869; letters to Bayard from Benjamin 11 August and 19 November 1869, and 26 May and 13 July 1870 (author's collection). Benjamin's correspondence includes affectionate references to James Bayard.

[163] As initially proposed in early 1870, the reorganization was "a foreclosure and sale to trustees (General George B. McClellan and S. L. M. Barlow, of New York), who undertake, on completion of the necessary arrangements, to form a new company under a similar title and to issue new securities in the following order…". *Railway News*, 26 February 1870, p. 231.

[164] Amanda Foreman, *A World on Fire – Britain's Crucial Role in the American Civil War* (2010), pp. 791-792 (emphasis supplied).

Also significant to Benjamin's "networking" in England was his continuing close postwar involvement in the United States with Samuel Barlow, whose role in Benjamin's political and professional career has been virtually unnoticed, and to a lesser extent with the Bayards.

Omitted to this point, except for Seward's warning, is notice of Benjamin's ambiguous postwar relationship with the officers of the United States government posted to London. Benjamin's final letter to Thomas Bayard regarding the A&GW coupons identifies his political and, incidentally his financial status, as of 1870 and his asserted ambition to return to the United States for a visit:

> Things turn out very oddly sometimes in this world – Last night I was dining with a number of public men and was seated next to Bernal Osborne M.P. and introduced him at his request to the gentleman on my right who was none other than General Badeau, Grant's aide-de-camp now Consul General here – I had myself been introduced to Badeau only few moments before and he evinced the greatest cordiality – on the other hand a friend told me that Tom Hughes had asked Motley if he would like to meet me at dinner, to which the reply was, "what, I meet that perjured traitor !" – Is not this amusing?
>
> My business at the bar is now rapidly augmenting and I have ceased to feel solicitude about my ability to secure a comfortable living for my family – I do not anticipate any change of life in the future, though I shall as soon as I can manage it, make a visit to your side of the water, from an anxious desire to press once again the hands of old friends, among whom none are more valued than yourself & yr dear father …[165]

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[165] 13 July 1870 (author's collection). "Motley" was "John Lothrop Motley" (1814-1877), then United States Ambassador to England. "Tom Hughes" was Thomas Hughes (1822-1896), a member of Parliament and a Q.C.

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