Sir Stafford Northcote's Ode to the Fourth Article: An Insight into the Negotiation of the 1871 Treaty of Washington

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Abstract

This short note introduces a piece of mild historical interest to international lawyers, namely a lengthy poem written by Sir Stafford Northcote, one of the members of the 1871 Joint High Commission that negotiated the Treaty of Washington that formed the basis of the *Alabama* arbitration. The poem provides some insight into the spirit of the Joint High Commission and the process by which the Treaty—a watershed of international law—was negotiated.

Keywords

American Civil War, History of International Law

1 Introduction

The purpose of this short note is to introduce a piece of mild historical interest to international lawyers, namely a lengthy poem written by Sir Stafford Northcote, one of the members of the 1871 Joint High Commission that negotiated the Treaty of Washington¹ that formed the basis of the so-called *Alabama* arbitration,² inaugurating thereby the

* PhD candidate, Trinity Hall, University of Cambridge (UK). The poem on which this article is based was uncovered in the course of related research on international law during the American Civil War undertaken on behalf of HE Judge James Crawford AC, to whom thanks is owed. The author also wishes to thank the extremely helpful staff at the Concord Free Public Library in Concord, Massachusetts, which maintains the Hoar Family Papers. The usual caveat applies.

¹ Treaty between Great Britain and the United States for the Amicable Settlement of all Causes of Difference between the Two Countries (adopted 8 May 1871, entered into force 17 June 1871) 143 CTS 145, extracted in Christian J Tams and Antonios Tzanakopoulos (eds), *Basic Documents on the Settlement of International Disputes* (Hart Publishing 2013) 7.

² *Alabama Claims (United States v United Kingdom)* (1872) 29 RIAA 125. See generally John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*,

present era of international dispute settlement. The poem in question has, to the author's knowledge, never been published, and provides some insight into the spirit of the Joint High Commission and the process by which the Treaty—a watershed of international law—was negotiated. Moreover, it sheds some light on the *personalities* of the individual members of the Commission and the spirit in which their negotiations were conducted. Although this does little to either enhance or diminish the Commission's work, it serves to highlight the fact—often neglected by lawyers—that the law does not create itself, and that behind its often sterile and forbidding façade lurk the qualities and idiosyncrasies of individual participants in the lawmaking process. To this end, the note does not seek to mount an argument as such, but rather to ensure that Northcote's poem is made known to readers and contextualised against the mass of historical material that already surrounds the *Alabama* arbitration.

2 The cruise of the CSS *Alabama*

Although the facts of the case are notorious, it is worth giving a brief refresher of the subject of the *Alabama* claims, the CSS *Alabama* itself.³ A Confederate commerce raider under the command of Captain Raphael Semmes (remembered as a sort of maritime Robert E Lee), the *Alabama* captured some 62 Union vessels in a little under two years, before being engaged and sunk by the USS *Kearsage* off the coast of Cherbourg (as immortalised by Manet). The *Alabama*'s predations caused considerable friction between the Union and Great Britain due to the fact that she was not constructed in Pensacola or any of the Confederacy's other major shipyards, but in Birkenhead near Liverpool. This situation was rendered necessary by the success of 'Scott's Great Snake', the Northern blockade of the Atlantic and Gulf State ports, designed to slowly choke the life from the South's war machine.⁴ Deprived of access to the sea, the Confederacy sent agents—in particular the ingenious Captain James Bulloch⁵—to Britain to procure the construction of warships, with a view to using a small number of vessels to attack Union commerce at sea.

vol 1 (Government Printing Service 1898) 495–682; Adrian Cook, *The Alabama Claims: American Politics and Anglo-American Relations, 1865–1872* (Cornell University Press 1975); Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 ICLQ 1; Stephen C Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Harvard University Press 2010) ch 10.

³ For an account of these and other Confederate predators, see Raphael Semmes, *The Cruise of the Alabama and the Sumter* (Carleton 1864); Warren Armstrong, *Cruise of a Corsair* (Cassel & Co 1963).

⁴ Abraham Lincoln, 'Proclamation by the President of the United States, declaring the Ports of the Confederates under Blockade' (1861) 51 BFSP 185.

⁵ See generally Captain James D Bulloch, *The Secret Service of the Confederate States in Europe, or How the Confederate Cruisers Were Equipped*, vols 1 and 2 (GP Putnam's Sons 1884). In some sources his surname is spelled 'Bullock'.

There was, however, a problem. Owing to Britain's declared neutrality,⁶ and its willingness to enforce that neutrality through the provisions of the Foreign Enlistment Act 1819,⁷ the Confederate vessels had to be built in secret. To this end, Bulloch (on the instructions of Stephen Mallory, the Confederate Secretary of the Navy) set upon a plan to procure the construction of civilian vessels under false names in shipyards of the Wirral Peninsula and to refit them as commerce raiders at sea. The *Alabama* (to be originally christened the *Enrica*) was not the only vessel built in this way—also commissioned were the CSS *Florida* (originally the *Oreto*) and the CSS *Georgia* (originally the *Japan*). Bulloch also arranged for the purchase of two further vessels and their armament as commerce raiders: the CSS *Rappahannock*, previously HMS *Victor*; and the CSS *Shenandoah*, formerly an East India trader known as the *Sea King*. A number of blockade-runners and other vessels were also procured.⁸ Grouped together, the predations of these vessels would come to be referred to as the *Alabama* claims.

American ire at the procurement of the *Alabama* and her sisters arose through a purported failure of British due diligence. Liverpool and the surrounding area was full of Union spies reporting on Bulloch's activities to Charles Adams, the American Minister in London for most of the Civil War. Adams, in turn, would pass any such information onto Lord Russell, the then-Foreign Secretary in Palmerston's government. The difficulty was that Russell and his colleagues at the Treasury were hamstrung by the wording of the Foreign Enlistment Act, which set an extremely high threshold for seizure.⁹ As such, British authorities were effectively forced to watch as first the *Oreto* and 'hull 490' (the *Enrica*) left port and escaped into the Atlantic, where they were quickly refitted as the *Florida* and *Alabama*, respectively.¹⁰

To Union eyes, British inaction on these points seemed to be negligence at best and tacit support for the Confederate cause at worst.¹¹ Not only had the British allowed the

⁶ HRH Queen Victoria, 'British Proclamation, for the Observance of Neutrality in the Contest between the United States and the Confederate States of America' (1861) 51 BFSP 165.

⁷ 59 Geo 3, c 69. Section 7 of the Act was particularly relevant, forbidding as it did any British national to: equip, furnish, fit out or arm or endeavor to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid or assist, or be concerned in, the equipping, furnishing, fitting out or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince [against a power with which Her Majesty is at peace].

⁸ Montague Bernard, *Historical Account of the Neutrality of Great Britain during the American Civil War* (Longmans, Green, Reader and Dyer 1870) 352–61; Bingham (n 2) 7–8. See further and generally Frank Lawrence Owsley, *The CSS Florida: Her Building and Operations* (University of Pennsylvania Press 1965); Tom Chaffin, *Sea of Gray: The Around the World Voyage of the Confederate Raider Shenandoah* (Hill & Wang 2006).

⁹ Following the conclusion of the Civil War, the Foreign Enlistment Act was the subject of a Royal Commission review that recommended the complete redrafting of the Act: see Letter from Moran to Seward, 3 June 1868, in (1868) I Foreign Relations of the United States 209 ff. The result was the conclusion of the Foreign Enlistment Act 1870, 33 & 34 Vict, c 90, which remains in force today.

¹⁰ Bernard (n 8) 337ff.

¹¹ Certainly, large segments of the British population supported the Confederate cause, such as John Laird, former senior partner of the firm that built the *Alabama*, who later became the Conservative MP for

Alabama and her sisters to escape, it was argued, but they had also displayed insufficient enthusiasm in pursuing the vessels once their escape was made known. In 1865, with the Civil War won, the (re-)United States made very clear that it intended to hold Britain to account, with Moore noting that '[a]t no time since the year 1814 had the relations between the United States and Great Britain worn so menacing an aspect as that which they assumed after the close of the civil war'.¹² After a prolonged discourse,¹³ it was decided that a Joint High Commission composed of American and British delegates would meet to draw up a treaty by which the *Alabama* claims could be submitted to binding international arbitration.

3 The Joint High Commission

3.1 The composition of the Commission

That the Joint High Commission itself was able to meet was itself a minor diplomatic miracle, and the result of some 20 months of secret negotiation—occasionally at arm's length—between Stanley Fish, Secretary of State in the Grant and Rutherford administrations, on the one side, and Gladstone's Foreign Secretary, the Earl Granville, on the other. The principal—and, as it happens, essential—intermediary between the two was the Anglo-American businessman and sometime Canadian Minister of Finance Sir John Rose, who developed the proposal for the Joint High Commission and the appropriate method by which to approach the British government at a dinner with Fish and his Assistant Secretary, John Bancroft Davies, on 9 January 1871.¹⁴

The Joint High Commission convened in Washington, DC, on 8 March 1871. Over nine weeks and 37 meetings, it discussed a wide range of issues connected to the predations of the *Alabama* and other Confederate commerce raiders.¹⁵ Great Britain and

Birkenhead. Laird was cheered when he informed the House in 1863 that he 'would rather be handed down to posterity as the builder of a dozen *Alabamas* than as a man who applies himself deliberately to set class against class and to cry up the institutions of another country': *Parliamentary Debates*, 27 March 1863, vol 170 cc 71–72 (John Laird).

¹² Moore (n 2) 495.

¹³ *ibid* 495–536.

¹⁴ The best extended account of this process appears in Moore (n 2) 507–36. For Bancroft Davies' personal recollections, see John Chandler Bancroft Davies, *Mr Fish and the Alabama Claims: A Chapter in Diplomatic History* (Riverside Press 1893).

¹⁵ Notably the *Florida* and *Shenandoah*. Although the *Georgia* had the potential to be a fearsome predator in her own right, this was never realised. The *Georgia* was not procured by Bulloch, but by her commander, Matthew Fontaine Maury, from builders in Dumbarton. She was not constructed as a warship, but as a new civilian steamship with an iron bottom. As anti-fouling coatings were not yet available, this forced the vessel into dry dock frequently, and made her an inadequate raider, leading to her rather poor record of prizes and her sale in Liverpool in 1864 for £15,000. Shortly after leaving Liverpool, however, she was taken by the USS *Niagara* and condemned by the prize court in Boston: Bingham (n 2) 7.

the United States also took the opportunity to attempt to resolve several other persistent points of controversy involving US-Canadian relations.¹⁶

The American delegation was to be led by Fish, supported by the Democrat Samuel Nelson, the senior associate justice of the Supreme Court. They were assisted by General Robert C Shenk (the American Minister to London), Ebenezer Rockwood Hoar (a former judge, US Attorney-General and Republican nominee to the Supreme Court) and George Williams (formerly Senator for Oregon and soon to be US Attorney-General). The British delegation, for its part, was headed by the Earl de Grey and Ripon (a prominent Liberal politician) and further included Montague Bernard (the inaugural Chichele Professor of International Law at the University of Oxford),¹⁷ Sir John A Macdonald (the inaugural Prime Minister of Canada), Sir Edward Thornton (the British Minister in Washington) and Northcote. The secretaries of the commission were to be Bancroft Davis¹⁸ for the American side, and Lord Tenterden (later Permanent Under-Secretary at the Foreign Office) for the British. Rose, despite being instrumental in the brokering of the Joint High Commission, declined to serve—to the regret of both sides.¹⁹

3.2 Sir Stafford Northcote

It is worth pausing here to provide a more involved biographical note on Northcote.²⁰ Born in London in 1818 to Henry Stafford Northcote and Agnes Mary Northcote (*née* Cockburn), Northcote was educated at Eton and Balliol College, Oxford, where he was affected only marginally by John (later Cardinal) Newman's Oxford Movement, despite his sympathy towards High Church Anglicanism. He graduated in 1839, and entered the Bar at Inner Temple the following year (though he was not formally called until 1847), taking up chambers at 58 Lincoln's Inn Fields (now Garden Court Chambers). In 1843, he married Cecelia Frances Farrer, the daughter of a London solicitor, with whom he eventually had seven sons and three daughters.

In 1842, whilst Northcote was productively occupied at the Bar, Gladstone, then-Vice President of the Board of Trade, wrote to Edward Coleridge, then-headmaster of Eton, asking him to recommend a private secretary from amongst his former pupils. Of the three candidates put forward, Gladstone chose Northcote, largely removing him from

¹⁶ Namely rights to the Atlantic fisheries, questions of riparian navigation between the US and Canada and lumber tariffs, as well as the settlement of the US-Canadian border in Manitoba and what would shortly become British Columbia: Moore (n 2) 539.

¹⁷ Bernard was an intriguing figure in his own right. The year previous, he published *A Historical Account of the Neutrality of Great Britain during the American Civil War* (n 8), which basically served as a blueprint for the British submissions during the *Alabama* claims.

¹⁸ See further Davis (n 14) 70.

¹⁹ Cook (n 2) 170–71. Rose's reluctance was principally due to his fear of being seen—through his wife, friends and other business connections—as partial to the United States.

²⁰ See generally Andrew Lang, *The Life, Letters and Diaries of Sir Stafford Northcote, First Earl of Iddesleigh*, vols 1 and 2 (Blackwood 1890); WD Rubenstein, 'Northcote, Stafford Henry (1846–1911)' in *Oxford Dictionary of National Biography* (online edn, OUP 2009).

the law and placing him on a political path for the rest of his life. He served Gladstone directly until 1850 and rose with him (even as he became increasingly conservative in his views, as Gladstone became increasingly liberal), becoming legal secretary of the Board of Trade in 1845 and a secretary of the Great Exhibition (and a favourite of Prince Albert) in 1850, before penning in 1853 with Sir Charles Trevelyan the famous Northcote-Trevelyan Report that advocated the reorganisation of the British civil service along meritocratic lines.

Northcote entered Parliament as the Member for Dudley in 1855 as a 'Liberal Conservative'. In reality, occupancy of the seat was controlled by Lord Ward, who agreed to Northcote's candidacy on Gladstone's recommendation. In 1857, however, he attempted to escape Ward's influence by standing for the seat of North Devon. He lost this election, and returned to private life until asked by Benjamin Disraeli to stand as a Conservative for the seat of Stafford in 1858. This he duly won, and he became Disraeli's most trusted deputy on financial matters for some 23 years. Though he switched to the seat of North Devon in 1866 and was appointed to the House of Lords as Earl of Iddesleigh and Viscount St Cyres in 1885, he remained in Parliament until his death in 1887. He occupied several high government and private offices in the intervening period, including President of the Board of Trade (1866–67), President of the Hudson's Bay Company (1869–70), Chancellor of the Exchequer (1874–80) and Foreign Secretary (1886–87).

3.3 Northcote and the working of the Commission

Northcote was a somewhat unexpected addition to the Joint High Commission. He was also a late adornment, being appointed on 13 February 1871, after the other British members of the Commission had already departed for Washington.²¹ He left England on the steamer *Russia* five days later, and landed in New York on 1 March, where he was met by the rest of the British representatives.

Northcote's recollections of the Commission reveal an atmosphere of collegiality between the British and American commissioners. When they were not sitting, the British commissioners were entertained by their American counterparts and other officials, filling their time with dinner parties, dances, and a foxhunt in the Virginia countryside.²² Although friction emerged on certain points—notably the question of whether Britain could be held liable for indirect losses resulting from its recognition of Confederate belligerency in 1861²³—the days before signing of the final Treaty on 8 May were accompanied by considerable goodwill, recorded by Northcote as follows:

May 3 (...)—This is a big day with fate. We have this day finally settled the treaty, and have sent it to be engrossed with our signature Monday next. Our part is now nearly done

²¹ Lang (n 20) 1–2.

²² *ibid* 12.

²³ See further Cook (n 2) ch 10.

(...) [I]t is a matter for thankfulness that we have brought it thus far, and we shall at least have the satisfaction of knowing thinking that we have won our spurs as negotiators. De Grey deserves even more credit than he is likely to receive. None but those who have worked with him can appreciate his merits.

May 6—Held our last conference to-day. Confirmed the protocol, and then made flattering speeches to one another. Read over the treaty, and saw the ribbons put in, ready for sealing on Monday. Five ribbons drawn through each copy (red and blue), so that one English and one American commissioner may seal upon each copy. Something like the mode of assigning partners in the cotillion. We all carried off some of the ribbon as a memorial. *Gave Mr Fish a copy of my Ode to the Fourth Article*. Signed a number of copies of our photographs, the Americans signing theirs at the same time. A framed copy of each is to be presented to us.²⁴

The day of the signing itself confirmed the good feelings within the Commission.

May 8—A brilliant morning. Breakfasted at nine, and walked up to the State Department at ten. The American Commissioners had arrived, and we spent some time in talk, and in exchanging a prodigious number of autographs, while the seals were being affixed to the two copies of the treaty,—a slow process, as the unfortunate clerk who prepared them was both awkward and nervous, and Tenterden did not help put him at ease by dropping quantities of burning sealing wax on his fingers. The poor man was so much excited that he burst into tears at the conclusion of the affair. (...) The signing seemed to generate great interest in the department, and all, or almost all, of the employees were present. A great quantity of flowers were sent up by different ladies, and we were abundantly supplied with strawberries and iced cream, with which we relieved our feelings after shaking hands all round. And now the breaking up begins.²⁵

Northcote emerges from the Washington negotiations as an indefatigable supporter of De Grey, confirming the assessment of Disraeli's biographer that he was 'a born second-in-command'.²⁶ There is no doubt that his task was extremely difficult. The British delegation faced greater difficulties than their American counterparts, being forced to play a trilateral or even quadrilateral game. With Fish—who was given a relatively free hand by President Grant—in charge, the American delegation did not need to worry about supervision from further up the political food chain, or deal with dissenting opinions within its own ranks. The British were not so lucky. In the first place, Macdonald, perhaps understandably, campaigned aggressively within the delegation in relation to those issues that touched on Canadian interests and was on occasion opposed by the other British commissioners.²⁷ Aware that strong separatists movements were afoot in the young confederation, Macdonald needed to demonstrate the benefits of unity through a strong showing in the final treaty. This he largely achieved, and whilst there were some cries

²⁴ Lang (n 20) 16–17 (emphasis added).

²⁵ *ibid* 17–18.

²⁶ Robert Blake, *Disraeli* (St Martin's Press 1967) 545.

²⁷ Cook (n 2) 171–72.

of treachery from Nova Scotia in relation to the fisheries settlements contained in the Treaty (articles XVIII–XX), these did not amount to much in the final balance.²⁸

A second problem arose from further afield. In 1866, Isambard Kingdom Brunel's SS *Great Eastern* laid the first enduring transatlantic telegraph cable, to be swiftly followed by duplex and quadruplex counterparts in the early 1870s that permitted multiple messages to be conveyed simultaneously.²⁹ It also permitted Granville to send constant, harrying cables to De Grey demanding updates on the negotiations and attempting to micromanage his delegation. Northcote was known to remark that the British commissioners were unable to respond to the question 'How do you do?' from those opposite without first seeking instructions from London.³⁰ The telegraph bill overall for the nine weeks of the Commission's negotiations reached £5,000—roughly £3.4 million in today's money.³¹ One particularly memorable cable, which came at the end of the negotiations when the text of the agreement was being finalised, instructed De Grey that the Cabinet would not tolerate the inclusion of any split infinitives in the concluded treaty—'[t]he purity of the English language,' Northcote's biographer notes, 'they nobly and courageously defended.'³² Northcote appears to have sympathised with De Grey in this respect, writing a brief poem that summarised his trials:

The US Commissioners give him some trouble;
Don't blame them for *that*—it's their duty, you know;
And his Cabinet colleagues, they give almost double,—
They do it from love, and he likes it—so, so!³³

4 The Fourth Article

The short verse that Northcote penned in support of De Grey was not the only poetic contribution that he made to the Commission. As revealed in his diary entry from 6 May 1871 (extracted above), he also wrote a more extensive poem concerning what he referred to as 'the Fourth Article'. He appears to have been quite proud of his work, and gave a copy of the *Ode to the Fourth Article* to Fish towards the close of the Commission's work. At least one other copy of the *Ode* was made and given to another of the American commissioners, Hoar.³⁴ From there, it found its way into the Hoar family papers, which

²⁸ Margaret Conrad, *A Concise History of Canada* (CUP 2012) 152–53.

²⁹ See generally Arthur C Clarke, *Voice Across the Sea* (Harper 1958).

³⁰ He further hypothesised that the response of Her Majesty's Government was that the preferred response to such a question would be 'Pretty well' as opposed to 'Not at all well': Lang (n 20) 15.

³¹ *ibid* 16.

³² *ibid* 13.

³³ *ibid* (emphasis in original).

³⁴ It is not beyond the realms of possibility that Fish's copy somehow fell into Hoar's hands, making it the sole known reproduction of the poem. The whereabouts of the original are unknown. Lang, Northcote's biographer, was more than willing to extract other samples of his subject's forays into poetry (eg Lang

were gifted to the Public Library in Concord, Massachusetts in 1999³⁵ where it was stumbled upon by the author in the course of related research.

What, then, was the Fourth Article? To understand this, one must examine the final content of the Treaty of Washington, and particularly the content of article VI of the agreement, which set out the rules of international law to be applied by the arbitral tribunal in the determination of the *Alabama* claims. This, in turn, contains three rules of international law:³⁶

A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, or any vessel which it has a reasonable ground to believe is intended to cruise or carry on such war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to war-like use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

These rules are to a large extent based on a proposal made by the American commissioners on 14 March 1871,³⁷ which happened to include an additional, fourth rule, which provided that:

A vessel which has departed from the jurisdiction of a neutral government in violation of the neutrality thereof, if afterward found to be within the jurisdiction of that government, and lawfully commissioned as a public vessel of war, ought to be detained unless she have in the interval been duly and lawfully commissioned as a public vessel of war; but if she have been thus commissioned as a public vessel of war, and be not detained, the national responsibility of such neutral government continues in respect of injuries and losses occasioned to the aggrieved belligerent subsequent to such departure, and until the original offence be deposited by the *bona fide* termination of the cruise.

This provision—the fourth article—was clearly intended to deal with precisely the situation generated by the *Alabama*, that is, where a vessel leaves the port of a neutral state as a putatively civilian vessel in violation of said state's neutrality, but is later

(n 20) 27–28) and the absence of the *Ode* from his account of Northcote's life may mean that it did not find its way into Northcote's collected Iddesleigh papers.

³⁵ Leslie Perrin Wilson, 'Papers of the Legendary Hoar Family Come to the Concord Library', *Concord Magazine* (August/September 1999) <<http://www.concordma.com/magazine/augsept99/hoar.html>> accessed 18 September 2014.

³⁶ Moore (n 2) 543.

³⁷ Extracted in *ibid* 542–43. As noted expressly in art VI of the Treaty of Washington, Britain expressly did not admit that these constituted valid rules of international law at the time of the *Alabama's* career, but nonetheless 'in order to evince its desire of strengthening the relations between the two countries and of making satisfactory provision for the future' agreed to submit to them as the relevant applicable law.

commissioned into the armed forces of a belligerent. In such a case, the article provides, the neutral state is to be held liable for all acts of destruction perpetrated by the escaped vessel, even after it has been commissioned as a naval vessel of a belligerent, until such time as its cruise has ended, such as through calling at a port of her own government. The clear injunction of the article is that it is in the best interests of the neutral state to capture or sink the vessel, as the fact that it has been commissioned at sea (as were both the *Florida* and the *Alabama*) will not serve to sever the thread of liability.

The fourth article, it quickly became apparent, was not acceptable to the British Commissioners. Minor amendments in the interests of clarity followed, and the results were sent to the Cabinet on 14 March.³⁸ Following further deliberation, an alternative was proposed, which read:

Also, that if a vessel has departed from its jurisdiction in violation of the obligation under Articles One, Two, and Three, a neutral government is bound to detain such vessel if afterwards found within any port or place within its jurisdiction if the local authority of such port or place has, upon representation made, reasonable and probable grounds for believing that such vessel has departed as aforesaid, unless such vessel has in the interval been commissioned as a ship of war.³⁹

De Grey presented this alternative to Fish, noting that the changes so made—and the removal of the vital provision that commissioning at sea would not save a recalcitrant state from liability—were designed to remove potential opposition in Parliament. Fish did not take the bait, leading De Grey to comprehend an impasse.⁴⁰ At this point, Granville intervened in order to fight a rearguard action, authorising certain concessions be made in the wording of the first three articles whilst proposing a further amendment to the fourth that abandoned British attempts to remove liability for a commissioned raider calling at a neutral port.⁴¹ Fish more or less accepted this proposal, only to be confronted with a late-breaking concern from Granville that the fourth article did not cover situations in which a neutral state, despite its best efforts, did not possess sufficient manpower to prevent a vessel from leaving. Fish saw here an opportunity, thinking that the United States might do just as well—if not better—if the fourth article were removed entirely, and the first three rules applied globally to a raider's entire cruise. Following the extraction of further concession regarding the first article (the insertion of the term 'specially adapted'), Fish agreed to scupper the fourth.⁴² By 4 April, the most contentious aspect of the Treaty of Washington—the rules to be applied by the tribunal—was settled.

Northcote, apparently motivated by these exchanges, penned his *Ode* as a memorial, and in so doing wove in the wider narrative of the *Alabama*'s escape. One suspects his efforts were a tongue-in-cheek attempt to celebrate the fact that the most difficult part

³⁸ Cook (n 2) 181.

³⁹ *ibid* 182.

⁴⁰ *ibid*.

⁴¹ *ibid* 183.

⁴² *ibid* 184.

of the negotiation was behind the Commission, and to send up the sense of seriousness that whilst temporarily stifling to the Commission's work, had now evaporated. It stands today as an insight into how the Commission saw its work, and how its British and American members interacted on a daily basis. The fact that the poem was passed to a member (or members) of the American delegation arguably demonstrates that Northcote felt a sense of collegiality—or at the very least common cause—with those opposite, a feeling further reaffirmed in his description of the Commission's work overall: 'If we have not built a castle, we have laid the foundations of a very nice cottage, which may be turned into a castle at some future day.'⁴³

Northcote's *Ode* is accordingly presented without further ado, together with some explanatory notes for the reader.

5 Ode to the Fourth Article

1

Oh where and oh where is my little Fourth Article?
Where is it gone?
It is not in the Protocol, not in the Treaty;
Vainly each stone I turn, vainly each bush beat I;
Vainly, despairing, in every party I call;
Making my moan;
Nobody shows me my little Fourth Article;
It is gone.

2

Oh who shall paint that vanished beauty;
What still born rule of Britain's duty,
What flower which blushed unseen,
What Ocean gem serene,
That snow-flake on the river
So bright, so lost for ever,
Vanished, like Belinda's hairs
When they felt the Baron's shears?⁴⁴
'Tis with awe
I endeavour to render in language that's rational
That would-have-been pillar of International Law!⁴⁵

⁴³ *ibid* 185–86.

⁴⁴ See Alexander Pope's *The Rape of the Lock* (1712), a mock-epic satirising the upper middle class in London. The story focuses on the central character, Belinda, whose lock of hair is cut off at a social gathering. Although trivial to most, Belinda is outraged that her lock of hair has been cut by the Baron.

⁴⁵ At this stage, Northcote could not have known that Fish's long time *bête noir*, Senator Charles Sumner of Massachusetts, planned to amend the rules when ratification of the Treaty was sought in the Senate. Fish,

3

See what a commotion!
 All over the Ocean
 The British fleet must be set in motion.
 Open the port-holes, and close the posts;
 Fire on the rascal from all the forts;
 That saucy cruiser,
 The pest Arethusa,⁴⁶
 As she passed the Isles of Scilly,
 (Home of the great Augustus Smith),⁴⁷
 Took on board Tom, Dick, and Willy,
 Cornishmen of mighty pith.⁴⁸
 Up, up, and pursue,
 Capture vessel and crew,
 That's what the Fourth Article says we must do.

4

In caucus on K Street,⁴⁹ the High Joints are closeted;
 With straws to their two lips
 They sip their Mint Juleps,
 They shake their heads, and they close their eyes,
 And they try to look exceedingly wise,
 While Professor Bernard

recognising that any attempt to amend the Treaty would cause its collapse, ensured that his proposals were never subject to a vote. The Treaty eventually passed the Senate by a vote of 50 to 12: Cook (n 2) 197–98.

⁴⁶ Arethusa in Greek mythology was a nymph who gave her name to a spring in Elis and to another on the island of Ortygia near Syracuse. She is depicted occasionally on coins as a girl with a net in her hair and dolphins around her head. In one of London's humorous illustrated weeklies, the *Comic News*, lyrics celebrating the victories of the *Alabama* were set to the tune of a popular air, *The Saucy Arethusa*: Gary L. Bunker, 'The Comic News, Lincoln and the Civil War' (1996) 17 J Abraham Lincoln Association 53.

⁴⁷ Augustus Smith (1804–1872) was Governor of the Scilly Isles for over 30 years, and largely responsible for the economy of the islands as it is today.

⁴⁸ This may have been an invention by Northcote, or a mistake as to the course taken by 'hull 290' after its escape. As Semmes notes, after escaping Birkenhead 'hull 290' proceeded west to Moelfre in Wales before turning to starboard and entering the Atlantic via the northern end of the Irish channel. There is no indication that the vessel ever visited Cornwall or the Scilly Isles: Semmes (n 3) 100–01.

⁴⁹ The US Department of State at that time was housed in the Washington City Orphan Asylum, on the southeast corner of Fourteenth and S Streets Northwest. This was a temporary arrangement between 1866 and 1875. It proved singularly unsuitable in terms of both size and layout and was furthermore a considerable fire hazard—an unwelcome attribute in an orphanage. It was traded in for the State, War and Navy Building in 1875, which housed the Department until 1947: See US Department of State Office of the Historian, 'Buildings of the Department of State: Washington City Orphan Asylum, November 1866–July 1875' <<https://history.state.gov/departmentshistory/buildings/section26>> accessed 22 September 2014. Early meetings of the Commission were held there (Cook (n 2) 169) and there is no reason to believe that the location changed midway through the proceedings. It therefore seems likely that this passage refers to the British Commissioners alone, who would have conducted their deliberations at the British Embassy, then located on K Street.

In his language hard
Says 'Suppose the offence be deposited?'

5

Then they gazed at one another,
'Let us take' they said, 'this creature,
Let us alter every feature,
So that e'en its tender mother
Would not know her child.'
And they laid their heads together
In intense deliberation;
Changing what was white to black;
Changing what was stern to mild;
Each proposed his alteration,
Trembling lest it prove the feather
Which should break the camel's back.
And they turned it inside out,
And they turned it outside in,
And they turned it round about,
And their brains began to spin.

6

But conceive the consternation
In the sacred street of Downing,⁵⁰
Where the Cabinet sat frowning,
Glowing hot with indignation
Pishing, pshawing, wond'ring, guessing,
Doing everything but blessing,
That unlucky High Commission
For this awkward proposition.
Vainly they try its defects to amend,
Vainly they tinker beginning to end,
Vainly they wonder,—
May I dare to add?—blunder.
The poor Fourth Article,
Innocent particle,
Finds in that stately assembly no friend.

⁵⁰ Clearly a reference to the Cabinet Room at 10 Downing Street.

7

At length a noble Viscount⁵¹ rising
Puts a period to the quarrel,
'Quit', he says 'this weak revising,
List my tale and draw the moral

'There was once upon a time a physician,
(The story perhaps you may know,)
There came a dyspeptic Apician,⁵²
His embarrassed position to show.

"Dear doctor, I want a suggestion;
How may I avoid the distress,
Which a cucumber gives my digestion?
Oh teach me the viand to dress".

'Says the doctor, "I have a prescription,
Which your case I feel certain will suit;
With pleasure I'll give a description
Of the way you should handle the fruit.

"Be careful to cut it up thin;
Do not fail to add oil that is sweet;
Then some pepper, then open the window,
And throw the thing into the Street".

8

O! My Fourth Article,
Innocent particle,
Wanting a friend,
Projected, suspected,
Convicted, rejected,
This was thine end!

SHN
May 1871

⁵¹ The only person bearing this title in the First Gladstone Cabinet was Charles Wood, 1st Viscount Halifax (1800–1885), who sat as Lord Privy Seal. The intervention was presumably his.

⁵² An Apician is one belonging to Apicius, a notorious Roman epicure. The term is thus applied to whatever is peculiarly refined or dainty or expensive in cookery.