

THE EXPANSION OF INTERNATIONAL FRANCHISE IN THE LATE NINETEENTH CENTURY

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Having never been codified, English law contains many anomalies. Prior to, and to some degree even after, the Matrimonial Causes Act of 1857, one of the strangest of those anomalies was that marriage law and law of nations were unified in the practice of the civil lawyers who resided in the Doctors Commons. Historians of international law in England have largely ignored the fact that the lawyers who form the subject of their study were mainly employed, prior to the twentieth century, in the pursuit of ecclesiastical law, and particularly marriage law, while international law was a second string to their bows. As a young man, Charles Dickens worked in the Doctors' Commons as a journalist, and he was accordingly alert to this odd combination. In *David Copperfield*, Steerforth explained the nature of the Doctors' Commons when advising David to get a job there: Nonsense, Steerforth!' I exclaimed. 'You don't mean to say that there is any affinity between nautical matters and ecclesiastical matters?' 'I don't, indeed, my dear boy,' he returned; 'but I mean to say that they are managed and decided by the same set of people, down in that same Doctors' Commons.'¹

Admiralty law was, of course, the focus of international law in this period. The reason marriage law and the law of nations were combined in legal practices in this way was because both, in contrast to most law in England, had a common basis in Roman and civil law. When the Church of England broke from Rome in the sixteenth century, it retained Roman law as the basis of ecclesiastical law, while civil law provided a common language for legal relations between all European nations.²

This paper concerns one of these lawyers in the Doctors' Commons, Sir Travers Twiss – whose daily practice concerned both ecclesiastical and

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1. See CHARLES DICKENS, *DAVID COPPERFIELD* 390–91 (1850).

2. G.D. SQUIBB, *DOCTORS' COMMONS: A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW* (1977).

marriage law, on the one hand, and international law, on the other. It examines one of the affinities between practicing in both those fields of law (contrary to Dickens' observation, there were affinities): namely, in the creation of new legal persons. Moreover, I examine how this lawyer's own life, and that of his wife, became entangled in this matter of creating new persons. The period I am discussing is the second half of the nineteenth century, a period in which the possibilities for creating new legal persons was expanding as a result of the liberal reforms for expansion of the franchise. On the one hand, for example, the Married Women's Property Acts of 1870 and 1882 significantly extended the legal personality of women while, on the other, international lawyers debated admitting non-European nations to legal personality in the society of nations.³ Sir Travers Twiss in particular, the lawyer with whom I am concerned in this paper, also proposed a further expansion of the international franchise, one that would allow non-state organisations to possess international legal personality. This was a radical proposal at the time and it was tied, I will argue, to the broader practice of creating new legal persons, including the practice of marriage law and even this lawyer's own marriage.

Sir Travers Twiss was one of the most eminent English ecclesiastical lawyers in the nineteenth century. In 1852, he was appointed Commissary of the Archdeaconry of Suffolk.⁴ In 1856, he was made Chancellor of the Consistory Court of the Diocese of Hereford and Chancellor of the Diocese of Lincoln.⁵ In 1858, he became Chancellor of the Diocese of London.⁶ His most elevated position in the church was as Vicar General to the Archbishop of Canterbury.⁷ At the same time, Twiss was also one of the most eminent international lawyers in England. He held the first Professorship of International Law at King's College London from 1849 to 1855, and he was subsequently appointed Regius Professor of Civil Law at Oxford from 1856.⁸ He had a flourishing practice in the Admiralty Courts, where everyday problems of the law of nations were determined, and from 1867, he was

3. See MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND* 49-78, 103-30 (1989); see also LEE HOLCOMBE, *WIVES AND PROPERTY: REFORM OF THE MARRIED WOMEN'S PROPERTY LAW IN NINETEENTH-CENTURY ENGLAND* 166-205 (1983).

4. THE IPSWICH JOURNAL, March 6, 1852, at 2.

5. EVENING MAIL, Feb. 6, 1856, at 3; LONDON EVENING STANDARD, Nov. 20, 1856, at 2.

6. HERTFORD MERCURY AND REFORMER, July 31, 1858, at 3.

7. THE TIMES, Mar. 5, 1852, at 4.

8. College Minutes from King's College, London, 46-47 (Jan. 19, 1849) (archived at King's College, London, MS KA/IC/M5); THE CALENDAR OF KING'S COLLEGE LONDON FOR 1849-50 (John W. Parker ed., 1849); Minutes of Hebdomadal Council, 1854-66, 81, 117 (archived at Bodleian Library, Oxford University, HC 1/2/2).

appointed as Queen's Advocate: that is, as an advisor to the government on matters of international law.⁹

Amongst other responsibilities, as Vicar-General Twiss was responsible for issuing marriage licenses for two thirds of England. He also presided in the ceremonies swearing in new bishops. Bishops in the Church of England, as in the Catholic Church, were corporations.¹⁰ As Vicar-General, it was Twiss's job to perform the ceremony which created this legal person. Corporations were created through the issuing of letters patent and it was Twiss who issued the letters in the case of bishops.¹¹ He was, therefore, an expert in the matter of making persons, performing the ceremonies, and issuing the letters patent, through which, for example, Archibald Tait was confirmed as Bishop of London in 1856, and whereby Charles Longley was enthroned as the new Archbishop of Canterbury in 1862, just days after Twiss's own marriage.¹²

Twiss met his wife, Pharaïlde van Lynseele, in 1859. She was born in 1834, in Kortrijk, in the Flemish northwest of Belgium. Her parents were Pierre Denis van Lynseele, a carpenter, aged 28, and Barbe Therese Vanderschoore, a farmer's daughter. By the late 1850s Pharaïlde van Lynseele was working as a prostitute in London, using the name Marie Gelas. London attracted large numbers of French and Belgian prostitutes, many of whom were drawn into rapidly growing urban areas from rural poverty. Lynseele worked in Regent Street, where, in its lower half, according to William Acton's contemporary account, the Belgian prostitutes congregated.¹³ In an 1855 case before the Marlborough Street magistrate, residents of lower Regent Street complained of the "thongs" of French and Belgian prostitutes "infesting" lower Regent Street who, as Acton said, "proclaimed" their "craft" 'à haute voix', such that the street was full of 'noisy, soliciting, gesticulating prostitutes'.¹⁴ This was not the purpose for which Regent Street had been intended. It was designed and constructed by John Nash earlier in the century for the purpose of demarcating the upper

9. Travers Twiss, *Law Officer's Opinions, 1862-1886*, vol. 8, Harvard Law Library, MS 1110; WESTERN DAILY PRESS, Aug. 20, 1867, at 2.

10. F.W. Maitland, STATE, TRUST AND CORPORATION 9-31 (David Runciman & Magnus Ryan eds., 2003).

11. For Twiss's confirmation of a new Bishop of Norwich, see MORNING POST, May 19, 1857, at 5. For Twiss's consecration of colonial bishops in St Mary's Church, Lambeth, see THE IPSWICH JOURNAL, Dec. 3, 1853, at 3. For giving letters patent for bishops in St Mary Church, see KENTISH GAZETTE, Dec. 5, 1854, at 2.

12. EVENING MAIL, Nov. 21, 1856, at 7.

13. WILLIAM ACTON, PROSTITUTION, CONSIDERED IN ITS MORAL, SOCIAL AND SANITARY ASPECTS IN LONDON AND OTHER LARGE CITIES 112-13 (London, J. Churchill 1857).

14. *Marlborough-Street*, THE GLOBE, Dec. 28, 1855, at 4; ACTON, *supra* note 13, at 109, 113.

classes of Mayfair from the working classes of Soho and it was intended that the street should be a space for fashionable and tasteful commerce.¹⁵ The classes, however, could not be kept apart. Lower Regent Street was precisely where Twiss's club, the Athenaeum, was located (and still is). He was elected to the club in 1845 and it appears very likely that he met his future wife outside the doorstep of the club when leaving after his evening meal (it is apparent from the club's dinner bills that he regularly ate there during this period).¹⁶

Twiss initially paid Lynseele at £20 a month. There was nothing at all unusual in such an arrangement. It was not a coincidence that Victorian entertainment venues, such as Cremorne Gardens and the theatres in the Haymarket, were attended at nights by throngs of gentlemen and prostitutes. According to contemporary accounts, such as Henry Mayhew's *London Labour and the London Poor* (1868) and William Acton's *Prostitution, Considered in its Moral, Social and Sanitary Aspects in London* (1857), it was also common for prostitutes and gentlemen to marry. In order to do so, the woman's past had to be concealed while, at the same time, a new person had to be invented. Such artifice created anxiety in the minds of Victorians about contagion between classes as well as the possibility that their own mothers or wives may have hidden pasts.¹⁷ While these anxieties were common, how frequently such marriages occurred is harder to determine. One case, which became the subject of a trial, and about which we therefore have some information, involved the marriage of a notorious prostitute known as Agnes Willoughby (born Rogers), to a Norfolk aristocrat, William Windham. In that case, Willoughby made no effort to disguise her background and Windham was, in consequence, subjected to a lunacy trial in 1862. According to the briefing notes of one solicitor who was involved in the trial, prior to Willoughby meeting Windham "probably her best friend was Dr. Travers Twiss D.C.L. who took a house for her in St. John's Wood and kept up an establishment for her there".¹⁸ Twiss subsequently moved from Willoughby to Lynseele, but in the same year he and Lynseele decided to marry it cannot have escaped his attention that his colleagues in Chancery

15. CHRISTOPHER HIBBERT ET AL., *THE LONDON ENCYCLOPAEDIA 685–87* (3d ed. 2010).

16. For Twiss's membership, see Athenaeum Club, Candidates' Book, MEM 1/15; for his dining, see, e.g., Athenaeum Marked Dinner Bills 1846–1850, CAT 1/5, June 17, 1847, when he ate veal and bacon with new potatoes and a brandy and soda and complained about the members having been put on 'rations of stale bread'; March 6, 1848; December 15, 1849.

17. MARY POOVEY, *MAKING A SOCIAL BODY: BRITISH CULTURAL FORMATION, 1830–1864* 90 (1995); DEBORAH EPSTEIN NORD, *WALKING THE VICTORIAN STREETS: WOMEN, REPRESENTATION AND THE CITY* 10–11 (1995).

18. Brief of Petitioner at 7–8, In the matter of William Frederick Windham a supposed lunatic (1862).

were engaged in trying the husband of his former mistress for lunacy. Lynseele and Twiss, by contrast, carefully chose to reinvent her social and legal personality in order to avoid social destruction.

Despite such care, it is difficult to explain why they would pursue a course that was so dangerous not only for Twiss himself but also for Lynseele. It was not uncommon for men to have affective relationships with their mistresses, so emotion does not seem alone to explain the need for the change in status. One explanation for the metamorphosis of Lynseele is that the 1850s and 60s was a moment of high-liberalism, of great social emancipation, and expansion of the franchise – a movement in which all political interests shared, Liberals, Conservatives, Whigs, and Radicals, while disagreeing on the particular forms of emancipation.¹⁹ It was a time of increasing social mobility, not only for men but also for women. William Gladstone described the moment as “the age of extended franchises”.²⁰ At the same time, it should be said, measures such as the Contagious Diseases Acts, introduced shortly after Lynseele and Twiss’s marriage, could make life for prostitutes and the poor extremely difficult.²¹ The Acts sought to control venereal disease and, as such, sought to control prostitutes who were identified as the cause of the problem. Feminists and reformers such as Harriet Martineau and Florence Nightingale condemned the laws, although as Mary Lyndon Shanley has observed, nineteenth century women’s emancipation movements largely followed liberal principles and therefore sought the legal emancipation of women but did little to address the poverty of many women and class subordination.²² For Lynseele, marriage would lead to her legal obliteration, under the law of coverture, but to economic and social emancipation and she was clearly prepared to trade her autonomous legal personality as a *feme sole* for material comfort and social elevation.

In order to evade prosecution and incarceration, prostitutes were adept at creating multiple identities, including multiple names and multiple addresses – both strategies that Lynseele had employed. Lynseele and Twiss

19. Robert Saunders, *The Politics of the Reform and the Making of the Second Reform Act, 1848–1867*, 50 *HIST. J.* 571, 571 (2007); Boyd Hilton, *Moral Disciplines*, in *LIBERTY AND AUTHORITY IN VICTORIAN BRITAIN* 224–46 (Peter Mandler ed., 2006); see generally WILLIAM LAURENCE BURN, *THE AGE OF EQUIPOISE: A STUDY OF THE MID-VICTORIAN GENERATION* (1964).

20. Saunders, *supra* note 19, at 582 (quoting an 1862 speech by William Gladstone).

21. See JUDITH R. WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE* 201–02 (1980); JUDITH R. WALKOWITZ, *CITY OF DREADFUL DELIGHT: NARRATIVES OF SEXUAL DANGER IN LATE-VICTORIAN LONDON* 22–23 (1992).

22. See WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY*, *supra* note 21, at 75–77; Helen Rogers, *Women and Liberty*, in *LIBERTY AND AUTHORITY IN VICTORIAN BRITAIN* 127, 137–38 (Peter Mandler, ed., 2006); SHANLEY, *supra* note 3, at 12.

seized upon the potential for her metamorphosis from a street-walker into a member of Victorian Society, a “woman of blood” as Twiss would later describe her. The liberal spirit of the time did not extend to welcoming prostitutes into Society – even if it might inspire such an idea – and so Lynseele and Twiss understood that artifice was necessary to help the process of transformation.

Victorians were extremely fond of stories of transformation, such as the well-known myth from Ovid’s *Metamorphoses* of the sculptor, Pygmalion, who fell in love with his statue, Galatea, and, such was the force of his love, the statue came to life. They were fascinated with the Pygmalion myth to such a degree that they pathologized “statue-love” as a medical disorder.²³ One version of the story ran as a play in the Haymarket Theatre during 1871 and 1872, around the corner from the Athenaeum, while the trial of the man who accused Lady Twiss of prostitution was being held. The play was *Pygmalion and Galatea*, written by William S. Gilbert, later one half of Gilbert and Sullivan, the composers of the comic operas. Gilbert’s Galatea discovered that the mortal world was corrupt and vulgar and decided to return to stone. Later versions of the story, such as George Bernard Shaw’s *Pygmalion*, developed this tension between the liberating potential and the pitfalls of individual reinvention.

Pharailde van Lynseele’s transformation into Mrs. Twiss was accomplished by the couple inventing a story that she was the orphaned daughter of a Polish noble family. Lynseele and Twiss travelled separately to Dresden in 1862 where they married in the chapel of the British Legation, away from the public gaze.²⁴ Twiss knew that marriages in legations were not subject to the same proofs of identity that were required in consulates by the Consular Marriage Act of 1849. In legations it was possible to marry without a prior period of residence in the parish and without a public declaration of the marriage. He knew this because he was Chancellor, the most senior legal officer, of the Consistory Court of the Diocese of London, the Diocese that was responsible for chaplaincies on the continent, but he also knew it because he subsequently sat on the 1868 Royal Commission on the Law of Marriage which recommended closing the loophole.²⁵ Having thus married, Lynseele was transformed into a new legal person, whereby,

23. Alastair J. L. Blanchard, *Queer Desires and Classicizing Strategies of Resistance*, in *SEX, KNOWLEDGE, AND RECEPTIONS OF THE PAST* 25, 31 (Kate Fisher & Rebecca Langlands eds., 2015).

24. Certificate of Marriage, Travers Twiss to Pharailde Rosalinde van Linseele (August 29, 1862), located at the National Archives; Kew, England; *General Register Office: Miscellaneous Foreign Marriage Returns*; Class: RG 34; Piece: 1.

25. Report of the Royal Commission on the Laws of Marriage, presented to both houses of Parliament by command of Her Majesty, at 88 (London, 1868).

under the law of coverture, her legal personality was “incorporated”, as William Blackstone put it, with that of her husband.²⁶

When Mrs. Twiss returned to London she successfully joined Society. She was introduced to the Court of St. James on May 16, 1863, and was presented by Lady Lucy Alcock to the Princess of Wales, who was standing in for the Queen still in mourning for the death of Albert.²⁷ Lucy Alcock was the wife of Sir Rutherford Alcock, one of the first British diplomats to reside in Japan. He and Lucy Alcock had lived in Japan and China for several years and knew little about the current state of London Society, so they were well suited to the presentation of Mrs. Twiss to Court. Alcock was also a member of the Athenaeum, which is probably where he met Twiss. Two months prior to Lady Alcock presenting Pharailde Twiss at Court, Rutherford Alcock had been awarded an honorary Doctorate of Civil Law (DCL) in the Convocation ceremony in the Sheldonian Theatre at the University of Oxford on Saturday March 28, 1863. Although DCLs were supposed to be awarded by the University Orator, the person who awarded the degree to Alcock and gave the Latin oration praising his eminence and achievements was the Regius Professor of Civil Law, Travers Twiss.²⁸ Lucy Alcock presented Pharailde Twiss, Travers Twiss presented Rutherford Alcock. In 1867, on accepting the position of Queen’s Advocate, Twiss was knighted.²⁹ Lady Twiss, as she was now, was again presented at court completing her admission to social personality. Lynseele and Twiss had brilliantly and almost flawlessly orchestrated her transformation into a member of Society.

Metamorphoses usually contain flaws and this was the case in the creation of Lady Twiss. An unemployed solicitor, Alexander Chaffers, who was a former client of Pharailde van Lynseele had begun blackmailing the Twisses a couple of years after their marriage, threatening, of course, to reveal her real identity.³⁰ They paid him several times, usually sums of around £50 to £100. By the late 60s, they refused to pay more. On April 4, 1871, Chaffers, true to his word, made a statutory declaration in Bow Street Police Court stating that the wife of Sir Travers Twiss had, prior to her

26. See 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

27. THE TIMES, May 18, 1863, at 5; MORNING POST, May 18, 1863, at 2.

28. MINUTES OF HEBDOMADAL COUNCIL, 1854-66 HC 1/2/1, at 396-8 (available at Oxford University Archives, Bodleian Library); REGISTER OF CONVOCATION, NEP/subtus/Reg Bu, 1854-1871, at 305 (available at Oxford University Archives, Bodleian Library).

29. WESTERN DAILY PRESS, Aug. 20, 1867, at 2; YORKSHIRE POST AND LEEDS INTELLIGENCER, Nov. 6, 1867 at 3; *London Gazette of Tuesday*, ALNWICK MERCURY, Nov. 16, 1867, at 6.

30. See generally Michael Taggart, *Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896*, 63(3) CAMBRIDGE L. J. 656, 656-84 (2004) (for more on Chaffers).

marriage, been one of the most notorious prostitutes in London.³¹ Her behaviour was so bad that she was even ejected from Holborn Casino. Chaffers sent this statutory declaration to Viscount Castlerosse, the Vice Chamberlain of Her Majesty's Household, to Lord Granville, the Foreign Secretary (and so Twiss's employer as Queen's Advocate, as well as an old friend), to Rutherford Alcock, to Thomas Tristram (a colleague in the Doctors' Commons), and to the Archbishop of Canterbury, Archibald Tait (again Twiss's employer but also an old and close friend). Tait told Twiss that he must sue for libel – a criminal prosecution that could lead to a prison sentence for Chaffers.³² Twiss hesitated for months because he knew that in a court case it would be difficult to prove his wife was who she claimed to be. Tait insisted and a trial began in Southwark Police Court on Thursday, February 29, 1872. Importantly, while the Married Women's Property Act of August 1870 had established limited property rights for married women, it had not created married women as legal personalities capable of suing and being sued. That right was finally established in the 1882 Married Women's Property Act, ten years after the trial of Alexander Chaffers for criminal libel.³³ In that trial, therefore, it was both Pharailde and Travers Twiss, as an incorporated legal person, who sued Chaffers.

Chaffers represented himself and cross-examined Lady Twiss for two days. He forensically recalled every minute detail he knew about her former life and, having no regard for his own reputation, he gave details of his full sexual history with her. As *The Daily News* reported, he asked her about her time working in a notorious brothel at 46 Half-Moon Street, about their visits to the Argyll Rooms, the Burlington Arcade, Cremorne Gardens, the Crystal Palace, and the Turkish Divan, as well as numerous other nights they spent together. On the night of May 6, 1859, he asked: "did not another woman come and sleep in the same bed with us? Had she had not 'spent the evening' with Twiss on September 3, 1859, before Chaffers himself arrived at midnight to spend the rest of the night with her?"³⁴ Under the pressure of

31. Detailed accounts of the blackmail and the trial were published in newspapers at the time. *Extraordinary Charges of Libel*, THE STANDARD, Mar. 1, 1872, at 6; *Extraordinary Charges of Libel*, MORNING POST, Mar. 1, 1876, at 3; *The Charge of Libel Upon Sir Travers and Lady Twiss*, DAILY NEWS, Mar. 6, 1872, at 5; *The Charge of Libel Upon Sir Travers and Lady Twiss*, DAILY NEWS, Mar. 13, 1872, at 2. See also ALEXANDER CHAFFERS, THE TWISS LIBEL CASE: AUDI ALTERAM PARTEM (London, 1873).

32. "I think under the circumstances you have no course open to you, but to prosecute the man for libel". Letter from Archibald Tait, Archbishop of Canterbury, to Sir Travers Twiss, Knight Ecclesiastical Lawyer Historian (Nov. 10, 1981) (on file with Lambeth Palace Library, London, UK, Tait 176ff).

33. See Married Women's Property Act, 1882, 45 & 46 Vict., c. 75, § 1(2) (Eng.), reprinted in LEE HOLCOMBE, WIVES AND PROPERTY: REFORM OF THE MARRIED WOMEN'S PROPERTY LAW IN NINETEENTH CENTURY ENGLAND 247 (1983) (on the right of women to "suing and being sued").

34. *Extraordinary Charge of Libel*, THE TIMES, Mar. 6, 1872, at 11; *The Charge of Libel upon Sir Travers and Lady Twiss*, THE DAILY NEWS (London), March 6, 1872, at 5.

such cross-examination, Lady Twiss fled to Switzerland, failing to appear in court on the fourth day, and the case collapsed. Buckingham Palace immediately annulled her presentation at court, the letters patent of her admission to Society—an almost unprecedented humiliation publicly announced in the *London Gazette*—and Twiss was left with no choice but to resign all his offices.³⁵ Letters in Lambeth Palace reveal that he wrote to Tait from Switzerland begging for some means of income and declaring: “I felt myself compelled to leave London by the consciousness that my mind would have given way under the weight of the calamities, which have so suddenly overtaken me if I had remained there. In fact I was hardly responsible for my actions when I left, so completely were the nerves of my brain disordered”.³⁶ Tait informed him, however, that any return to public life was impossible.

From these ashes, it may not be thought that Twiss who, in 1872, was 63 years old, could revive his career or his fortunes. But he did so through two measures: firstly, by pursuing a life in international law which, at this moment, was undergoing a process of professionalization and institutionalization; and, secondly, and against what we might expect, by pursuing the insight he had gained into the creation of new persons, in both his professional and personal life, and bringing it to his understanding of the state. In 1849, Twiss had written to his friend Prince Metternich: “I have always considered the life of the individual man to represent the life of nations”.³⁷ He now set about exploring the possibilities of that Hobbesian analogy. Now he was expanding the insights he had gained from the Victorian fascination with the metamorphoses of persons from one status, and one form, to another, to the question of international law and the person of the state. The eminent jurist Hersch Lauterpacht observed in 1927 that international law developed largely through analogies taken from private law, but we can take that insight further.³⁸ International law also developed through analogies based upon the understanding that states are persons. The expanded Victorian understanding of the possibilities for personal

35. On the cancellation of Lady Twiss’s presentation, see Letter from John Robert Townshend, Lord Chamberlain to Archibald Tait, Archbishop of Canterbury (Apr. 15, 1872) (on file with Lambeth Palace Library, Tait 184ff. 94–95); *Published by Authority*, THE LONDON GAZETTE, Apr. 19, 1872, at 1933.

36. Letter from Sir Travers Twiss, to Archibald Tait, Archbishop of Canterbury (undated, sent Apr., 1872) (on file with Lambeth Palace Library, Tait 184ff., 92–93).

37. Letter from Travers Twiss to Prince Metternich (Feb. 6, 1849) (on file with National Archives of the Czech Republic, Prague, NAD0611_4-AC10_AC775_str.103).

38. See generally HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (1927).

transformation were an inspiration to international lawyers in their understanding of the person of the state.

Twiss had seen the potential for the transformation and creation of persons in his daily legal practice. He had been responsible for the creation of the new person, or corporation, of bishops and archbishops. He had, as an ecclesiastical judge, ruled on the correct interpretation of the creation of the body of Christ from the host. These were all conventional processes of metamorphoses, condoned and institutionalised by law. He would now, however, be called upon to make a case for the metamorphoses of a person, a private corporation, into another kind of person, a state, that was not in any way condoned by law and was, in fact, seen to be a kind of legal heresy in international law. This was the transformation of Leopold II's International Association of the Congo into the Congo Free State. While there were no obvious precedents in the law of nations for making the kind of metamorphoses Leopold required, the salient experience in Twiss's life of working outside recognised conventions and laws in creating a new kind of person was that which he had performed with his wife in her own transformation.

There was also a direct, rather than analogical way, in which Twiss's marriage drove him to Leopold. Having lost all his offices due to his marriage scandal in 1872, Twiss sought new opportunities and, by the late 1870s, turned his attention to the rapidly growing interest in the colonisation of Africa and the supposedly humanitarian missions being led there by Leopold in the wake of Henry Stanley's expeditions. He accordingly wrote to Leopold, sending him one of his pamphlets arguing for the equality of 'Oriental' nations in international law.³⁹ The significance of this argument was that if the African peoples with whom Stanley was making treaties could be recognised as possessing sovereignty then the treaties of cession they made to Leopold's International Association of the Congo meant that his "humanitarian" company was acquiring sovereignty over the vast Congo Basin of Central Africa. There was, however, a very serious legal obstacle to this possibility: namely, as the law of nations developed over the course of the eighteenth century, it did so in such a way that excluded all agents who were not sovereign states from participation in international society. States, in short, sought a monopoly over international life. Individuals and private associations, such as commercial companies, were excluded from having any

39. Letter from Travers Twiss, to Baron Paul de Borchgrave d'Altena (Aug. 21, 1879) (on file with Archives du Palais Royal, Brussels, A96 – CDG XI/ 22). The article was: TRAVERS TWISS, ON INTERNATIONAL CONVENTIONS FOR THE MAINTENANCE OF SEA-LIGHTS (London: printed by William Clowes and Sons, Stamford Street and Charing Cross, 1879). See also Travers Twiss, *Applicability of the European Law of Nations to African Slave States*, CCXX L. MAG. & REV. (1876).

standing in that society. Chartered companies, such as the East India Company, had, of course, in reality exercised enormous power in international affairs from the seventeenth century, but it was precisely in part to curtail that influence that international lawyers in the nineteenth century declared, following the great Swiss jurist Emer de Vattel, that all pretensions by private associations to have international standing were “rash and ridiculous”. This was a position that Twiss himself had stated vigorously early in his career when he had written on the Oregon Boundary dispute in the 1840s.⁴⁰ In his treatise on that dispute he implacably opposed the right of the private individuals crossing the Rocky Mountains to establish new societies of their own.

Leopold, therefore, faced a seemingly insurmountable legal obstacle in his hidden desire to carve out an empire in Africa. The Belgian government steadfastly refused to endanger its neutrality by becoming engaged in colonial enterprises, so that Leopold was left to pursue his ambitions as a private individual using the instrument of his company. It would be extremely unlikely that the European Powers, as they turned their attention to the Scramble for Africa, would take seriously the claims of an individual or even concede a place at the table to him. Leopold saw the potential in Twiss’s arguments and he employed him in making a case that Twiss had himself opposed until this point in his career. Twiss seized the opportunity – an opportunity to return to public life, albeit in the service of another sovereign – and published a series of articles in 1883 and 1884 making the argument as well as rewriting his own textbooks of international law to bring them into line with the case.⁴¹ When Twiss wrote in 1849 “I have always considered the life of the individual man to represent the life of nations”, he added the caveat “although nations do not grow like men equally fast in point of time”. By the 1880s, he began to argue that a state could, in fact, grow faster than a natural person and could do so by virtue of the metamorphoses of the person of a private corporation into the person of the state. He faced fierce resistance and caused an outcry across Europe, in France and Portugal – both of which were interested in the Congo – but even in Belgium.⁴² His

40. TRAVERS TWISS, *THE OREGON TERRITORY, ITS HISTORY AND DISCOVERY* 111–13 (1846).

41. Travers Twiss, *La Libre Navigation du Congo*, in *REVUE DE DROIT INTERNATIONAL* vol.15, 437–42 (1883); Travers Twiss, *La Libre Navigation du Congo. Deuxième Article*, in *REVUE DE DROIT INTERNATIONAL* vol.15, 547–63 (1883); Travers Twiss, *La Libre Navigation du Congo. Troisième Article*, *REVUE DE DROIT INTERNATIONAL* vol.16, 237–46 (1884); Travers Twiss, *An International Protectorate of the Congo River*, *LAW MAGAZINE AND REVIEW*, 250, 1–20 (1883); TRAVERS TWISS, *LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE* (2d ed. 1884).

42. Louis Delavaud, *La France et le Portugal au Congo*, *REVUE DE GEOGRAPHIE*, March 1883; Anon., *Sir Travers Twiss et le Congo. Réponse à la Revue de Droit International et de Législation*

arguments appealed to medieval precedents for “private associations”, as he described them, possessing sovereignty, such as the Knights of Jerusalem, and contemporary examples such as the North Borneo Company (chaired by his friend Rutherford Alcock) and the American Colonisation Society which had established Liberia.⁴³ Despite the outcry, his arguments that “private associations” can have a standing in international law began to gain traction. His case had three steps: firstly, that non-European peoples, even sub-Saharan African peoples, could possess sovereignty and so they could cede that sovereignty. The logic of this argument was that in international society emancipation, understood as the acquisition of legal personality, could lead to dependence.⁴⁴ The second step in Twiss’s case was that private associations could possess a status with international society and therefore accept cessions of sovereignty; and thirdly, he argued that such associations could be transformed into states. In 1884, the United States government was the first to accept the claims of the International Association of the Congo to be a sovereign power after Leopold’s American agents brought Twiss’s treatises on the subject to the Senate Committee on Foreign Relations.⁴⁵

Recognition by one power, however, did not make a state. In 1884, Prince Bismarck of Germany, in cooperation with the French, issued invitations to all the Powers to come to Berlin for a conference that would determine rules for the carve-up of Africa that might help avoid deepening conflicts that were already festering.⁴⁶ Britain reluctantly agreed to attend. In common with all the Powers, it assembled a delegation of experts on the questions to be discussed. Twiss, by this time, had earned himself recognition as an expert on questions of law regarding Africa, and he had never lost his status as one of the most eminent international lawyers of his generation. Foreign Office files also reveal that in Britain it was not clear the degree to which he was in Leopold’s pocket. Over the previous several years, his publications on the status of “Oriental” nations and private associations in international law had been presented as contributions to theoretical debates, not as a lawyer’s brief, and they were all the more

comparée et au Law Magazine and Review, par un membre de la Société Royale de Géographie d'Anvers (Bruxelles, Office de Publicité, 1884); *Politischer Tagesbericht*, NORDDEUTSCHE ALLGEMEINE ZEITUNG, May 6, 1884; ‘*O Congo e a Revista de Direito Internacional*’, LA CORRESPONDENCIA DE PORTUGAL January 7, 1884; EDWARD HERTSLET, PRIVATE TREATIES WITH AFRICAN CHIEFS 238–43 (1884).

43. On Alcock and the North Borneo Company, see STEPHEN PRESS, ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE’S SCRAMBLE FOR AFRICA (2017).

44. For emancipation as a condition of dependence, see Andrew Fitzmaurice, *The Equality of Non-European States in International Law*, in INTERNATIONAL LAW IN THE LONG NINETEENTH CENTURY (Inge Van Hulle & Randall Lesaffer eds., 2018).

45. STAFF OF S. COMM. ON FOREIGN RELATIONS, 48TH CONG., REP. ON OCCUPATION OF THE CONGO COUNTRY IN AFRICA, 15 CONG. REC. 2274, 2275 (1884).

46. S.E. CROWE, THE BERLIN WEST AFRICA CONFERENCE, 1884–85 (1942).

influential for their seemingly impartial status. It was, therefore, quite astonishing that Twiss's old colleague and friend, Lord Granville, who was once more Foreign Secretary, put Twiss forward as the legal adviser to the British delegation to the 1884/85 Berlin Conference, although he was not given an official status, possibly because the air of scandal still stuck to him.⁴⁷ Twiss gratefully accepted the invitation and the return to the performance of public duties for Britain. What the Foreign Office did not know, although later came to suspect, was that Twiss would be working for them *and* Leopold while in Berlin, although the interests of the two parties were far from the same. Leopold, and his International Association, were not invited to the conference because, despite the fact that Twiss had succeeded in starting a debate on the membership of international society, the convention remained that only sovereign states could talk to each other about matters of international life. Twiss's presence at the conference was therefore crucial to Leopold.

At Berlin, Twiss played a central role, chairing the committee on the occupation of territory while being in constant contact with the Foreign Office.⁴⁸ It quickly became apparent that none of the major powers wanted any of their rivals to gain control over the Congo – a territory the size of Western Europe itself. Bismarck accordingly realised that the best way to block the ambitions of all, while at the same time creating an entity that was a threat to nobody, was to grant sovereignty to Leopold's company. This meant that the Powers had to revise their understanding of who could participate in international society and, almost overnight, they embraced Twiss's proposals. The Congo Free State was born. It was not a colony, because it had not been colonised by another state, and it was not quite like any other state either. When the question of its constitution arose, Twiss produced one, already drafted, that he had written at Leopold's request the year before.⁴⁹ By this time, the Foreign Office realised his double-role but they accepted it phlegmatically.⁵⁰ They were not unhappy with the outcome of the conference and Twiss had served them well in other important respects. At the same time, he had helped establish a very important

47. Telegram from Malet to Lord Granville (Nov. 12, 1884), National Archives, London, FO 84/1814/310; Telegram from Lord Granville to Malet (Nov. 14, 1884), National Archives, London, FO 84/1814/ 348.

48. On Twiss as chair of the sub-committee on occupation, *See* Telegram from Malet to Lord Granville (Jan. 19, 1885), National Archives, London, FO 84/ 1820/ 58.

49. *Projet. La constitution de l'Etat – L'Afrique Equatoriale*, National Archives, FO 84/ 1814/ 220-221.

50. 'The constitution is I believe the work of Sir T. Twiss', T.V. Lister, memo, Nov 23, 1884, National Archives, London, FO 84/ 1815/214; Julian Pauncefote, Memo, 6/11/84, National Archives, London, FO 84/ 1814/ 222.

precedent in international law. From the late nineteenth century, and throughout the twentieth, private associations, such as the Red Cross, companies, and even individuals, in human rights discourse and in the prosecution of war crimes, progressively came to be accepted as potential subjects of international law. The franchise of international society was greatly expanded.

Despite Twiss's success in transforming it into a state, the International Association of the Congo had neither possessed the qualities nor performed any of the duties of a state. It was a brutal organisation bent upon extracting resources from the Congo territory; initially ivory, and then rubber, and it was responsible for the death and mutilation of millions of Congolese people. Even Twiss, prior to his death in 1897, must have been aware of the rumours that had begun to circulate about the consequences of the metamorphoses of the International Association into a state. These two stories, that of Lady Twiss and Leopold's Congo, came together again when, in 1889, Twiss wrote to Leopold, from an address in Brussels, as follows: Sire, I beg your majesty to forgive my indiscretion in recommending to His Majesty's gracious kindness my wife Lady Twiss and in pleading with His Majesty to accord her his kindly protection. I have suffered so much misfortune, that I cannot come to her aid to meet certain very grave commitments that could compromise my honour. I beg your Majesty to believe that my heart is indeed broken to dare to hope for help in your kindness.⁵¹

Apparently, Lady Twiss was once more entangled in scandal and probably blackmail, and, at the age of 80, Twiss abandoned her to Leopold. Three years later, in 1892, the new Vicar General to the Archbishop of Canterbury, John Hassard, wrote to Archbishop Benson touching a matter that concerned Twiss's own tenure of the office many years earlier. Having settled the matter, Hassard added a postscript to his letter advising on Twiss's address and the fate of his wife: "ps. Riverside is at Ashford in Middlesex but Sir Travers Twiss does not care for the address to be known. His unfortunate wife (Lady Twiss) is, I hear, now, in a Lunatic Asylum in Belgium".⁵² Clearly, Leopold wasted no time in determining the fate of Lady Twiss. She would die in that asylum at some point in the next several years. In the metamorphoses of Pharaïlde van Lynseele into Lady Twiss and of the International Association of the Congo into the Congo Free State, she and Twiss had discovered the limits, as well as the possibilities, of the liberal world of personal transformation.

51. Letter from Twiss to Leopold (Apr. 18, 1889) (on file with Archives du Palais Royal, Brussels, A 168, 16, 3).

52. Letter from John Hassard, Vicar General, to Archbishop Benson E.W. Benson Papers (Oct. 31, 1992) (on file with Lambeth Palace Library, Benson 123 ff. 291-292).