Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hart v. Von Gumpach, from the Supreme Court for China and Japan; delivered 28th January, 1873.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THIS is an Appeal from judgments of Her Majesty's Supreme Court for China and Japan at Shanghai, established in the dominions of the Emperor of China by virtue of the Treaty of Tientsin.

The Appellant and Respondent are English subjects in the service of the Chinese Government. The former holds the office of Inspector-General of Customs, one of his duties being to treat with foreigners on matters in which the Imperial Government is concerned, under the general direction of the Tsung-li Yamên, a Board of Ministers for Foreign Affairs.

The Chinese Government having determined to establish a College at Peking for the purpose of teaching "Western languages and sciences," the Appellant was authorized by the Yamên to engage Professors, and was invested with the general superintendence of the College. Acting on this authority he came to England, and the Respondent on his appointment accepted the office of Professor of Mathematics and Astronomy in the College at a salary of 600*l.* a year.

The action which gives occasion to this Appeal

was brought by the Respondent for alleged false representations made by the Appellant to the Yamên respecting his conduct as Professor which led to his dismissal by that Board.

The Petition included a charge of alleged misrepresentation made to induce the Respondent to accept the professorship, which the jury disposed of in favour of the Appellant. It also contained a money claim which will be separately considered hereafter.

In the answer of the Appellant to the charge of false representation, he denied that he had wilfully and falsely made the alleged representations, and he asserted that the representations respecting the Respondent were contained in a report made by him to the Yamên in the course of his duty as a servant to the Imperial Chinese Government.

The Respondent demurred to the paragraphs of the answer which raised the defence of official privilege, and the Court ordered the paragraphs to be struck out. This is one of the orders appealed from.

The other issues were tried before the Assistant Judge and a jury, and a verdict found for the Plaintiff (the Respondent) with large damages.

A rule nisi was afterwards obtained for a nonsuit or a new trial on the ground of misdirection, and that the verdict was against the evidence.

The misdirections complained of were: 1st, the judge not having directed the jury that the representations were privileged; 2nd, not having left to the jury whether the representations were wilfully false; 3rd, that there was no evidence to go to the jury that the representations were wilfully false. The last point appears in the rule as a ground of nonsuit; but it may be taken as an objection to the direction of the Judge, because, if there was no evidence that the statements were wilfully false, the Judge ought to have directed a verdict for the Defendant.

After argument the Court discharged the rule, which is the second order appealed from.

It will be convenient first to advert to the facts, and the trial and the rule for a new trial, before considering the judgment on the demurrer.

The Respondent, and the Appellant, and Mr. Campbell, his secretary, were examined, and

a long correspondence read, upon the trial. It appeared that, on the 15th August, 1866, the Respondent, who was then in England, received an official letter from the Appellant to say he had been selected for appointment "to the Chair of Mathematics and Astronomy at the Tung-wen-Kwan (College) at Peking." After his arrival at Peking, obstacles arose to the establishment of a class in astronomy, and to the erection of an observatory. The Respondent was disappointed, and complained of the delay, and especially of the loss of the opportunities he expected for scientific observations. He evinced at the same time great disinclination to become the teacher of a class in mathematics. He continued to receive his salary, but no classes in mathematics or astronomy were formed. Various suggestions were made to expedite the formation of these classes and to employ the time of the Respondent meanwhile, but they led to no result. In 1868 he went to the Hills, and was absent from Peking for some time. About June in that year he had interviews with the Appellant and Mr. Campbell, in which he expressed his determination to return to England. This fact is beyond dispute, for it is admitted in the Respondent's own evidence.

The Appellant and Mr. Campbell state that at these interviews the Respondent also declared that he would not teach mathematics. The Appellant says:—"He protested against being called on to teach mathemathics—it was an indignity to a man in his position to teach mathematics. He positively refused to do so." Mr. Campbell says:—"In June, 1868, he was constantly complaining. He told me he was required to teach mathematics, and he could not, and would not." The Respondent was not recalled to contradict these explicit statements. He no doubt said in his evidence in chief, "During the whole of the time I was not called upon to perform any duties nor did I refuse to do any." This may be literally true, as classes were not actually formed. He adds:—"Mr. Hart came to me and asked me whether I would take again the Chair of Mathematics. I expressed my astonishment, as I understood Mr. Jamieson was appointed. I said I preferred to keep to our agreement. Hart appeared

satisfied." This evidence cannot be regarded as a satisfactary denial of the explicit statements that he had declared that he would not teach mathematics. It is to be observed that there is no proof of the appointment of Mr. Jamieson.

At one of these interviews discussions took place with reference to putting an end to the Respondent's engagement, and the terms on which it should be done. According to the Appellant's evidence it was arranged that the Respondent should give up his appointment at the end of the coming September quarter on receiving his salary for that quarter, and in addition an allowance of one year's salary and a free passage home. The Respondent denies that such an arrangement was made, but the fact is beyond dispute that, early in the following month of October, the quarter's salary and a year's additional salary were received by him. Soon after this payment, he wrote to inquire whether the year's pay was "an annual addition" to his salary. Now, whatever misunderstanding may have existed upon the question of a final agreement to terminate his engagement having been come to, there could be none as to the grounds upon which the allowance of a year's pay had been made by the Appellant, who at once replied to this inquiry by a letter of the 15th October, 1868:—"You now inquire if the year's pay is 'an annual addition' to your salary—it is not; it is simply the allowance I promised should be issued to you at the end of the September quarter, on the termination of your connection with the College." In the same letter he was told that the Commissioner of Customs had instructions to provide for him a free passage home. The Respondent, in reply to this letter, protested against the propositions, and the truth of the statements contained in it; but he kept the money.

The Respondent remained in China, but for a year there seems to have been no communication between the parties. On the 11th October, 1869, however, he wrote to the Appellant asking for 1,200 or 1,500 taels on account of his salary, and suggesting whether it would not be expedient "in the common interest, and more especially in that of the Imperial Government," to settle all differences by arbitration or otherwise. He was asked

to state what the differences were, and he answered by giving a series of questions, so framed as to open his original engagement and all subsequent agreements, and to leave generally to an arbitrator what he was in justice and equity entitled to receive as compensation from the Chinese Government. The Appellant in a long letter in reply, recapitulated the history of the Respondent's relations with the Imperial Government, and in the end stated that the questions were not of a nature which, as the Agent of the Government, he would be justified in submitting to arbitration.

In the course of this renewed correspondence, the Respondent expressed a strong desire to stay in China, and urged his claim "in the common interest of science at large, and of Chinese science in particular," and expressed a desire "to write the history of Chinese astronomy and mathematics." It appears also that about this time Mr. Martin, the Head of the Professors, made a communication to the Appellant in his favour, which induced the Appellant to recall the despatch he had sent to the Yamên reporting the Respondent's resignation; and on the 22nd November, 1869, he thus writes to Mr. Martin:—

"*Inspectorate-General of Customs,*

"Sir, "*Peking, 22nd November*, 1869.

"Having reference to Mr. Von Gumpach, who claims to still hold an appointment in the Tung-wên-Kwan, I beg to inform you that I never had any desire to displace him, and as he himself does not desire to be regarded as having resigned, I have written officially to the Yamên to withdraw my former despatch, and to state that Mr. Von Gumpach, with your approbation, continues to retain his position.

"I am,

"Sir,

"Your obedient Servant,

"ROBERT HART,

"*Inspector-General.*

"Revd. W. A. P. Martin, D.D.,

"President of the Tung-wên-Kwan, Peking."

On the same day the Appellant sent the following despatch to the Yamên:—

"*Peking, 22nd November*, 1869.

"It will be remembered that I addressed the Yamên in my despatch of 22nd September, 1869, with reference to Fang-Ken-pa (Von Gumpach) who was long since engaged by me in behalf of the Yamên as a Professor in the Tung-wên-Kwan (*lit.*, Government School of Languages) explaining that, in consequence

of my having refused his request to raise a raised terrace (observatory?) and to purchase books, Fang-Ken-pa had afterwards steadily declined to do any of the work that was allotted to him. And I (therein) reported that he had said to me in, June 1868, that 'as there had been words to the effect that he might return to his country, why perhaps he had better resign and do so.' I now have to state that I am told by Ting-wei-liang (Mr. W. Martin), the Head of the Professors, that Fang-Ken-pa *has not yet* returned home, and further that he holds that my action above, in requesting of the Yamên that his functions might cease (*i.e.*, to accept his resignation), was without any agreement or consent on his part.

"Since, therefore, the Professor in question declares that he has not resigned, I have to request the Yamên will lay aside my despatch about his functions ceasing.

"I must consult with the newly-made Head of the College as to the way in which this matter is to be settled.

"As in duty bound, I write this for the information of the Yamên.

"A necessary despatch, &c."

This attempt to reinstate the Respondent was frustrated by his own hostile proceedings. On the 27th November, the Respondent wrote to the Appellant a letter, in which he says:—

"Your refusal to settle the differences pending between us, either by fair arbitration or amicable arrangement, imposes on me the necessity of submitting them to a legal decision. With this view I intend proceeding to Shanghai to-morrow, and I therefore request that you will be pleased to inform the Imperial Government with both the occasion for, and the object of, my temporary absence from the capital."

He added that there could be no objection, as he was told in 1867 that students would not be ready to join the astronomical class for seven or eight years.

This letter was reported, as the Respondent desired, to the Yamên, and the action taken by them upon it appears in the following despatch from that Board to the Appellant:—

"*The Yamên to Mr. Hart, Inspector-General of Customs.*

"(No. 375.) "*November* 29, 1869.

"On the 23rd of November, the Yamên received a despatch from the Inspector-General, reporting that, having reference to Professor von Gumpach, who, according to an intention formed in June, 1868, having resigned his appointment, was to have gone home. President Martyn had stated that Mr. von Gumpach, still in Peking, disputes the Inspector-General's report concerning his resignation. The Inspector-General thereon proceeds to say, 'As Mr. von Gumpach now maintained that he has never

resigned, the Yamên is requested to consider the despatch reporting him to have resigned as not written.

"Just as the Yamên was drafting its reply, another despatch was received from the Inspector-General, dated 28th November, and which states :—

"The Inspector-General's last despatch, requesting the Yamên to cancel a former despatch reporting Mr. Von Gumpach's resignation, was duly communicated to Mr. Von Gumpach by President Martyn. Professor Von Gumpach has now written to say that it is his intention to leave Peking on the 28th November to go to Shanghai to procure a legal decision in those matters wherein he considers the Inspector-General's action wrong, and he requests that the same may be reported to the Yamên.

"On the 28th, Professor Von Gumpach left Peking.

"In acting thus, and in leaving without permission, Professor Von Gumpach appears to the Inspector-General to be doing what, if allowed to pass unnoticed, may be harmful to the interests of the Tung-wên-Kwan. The Yamên is therefore requested to consider the matter, and issue instructions for the Inspector-General's guidance."

"Having received the foregoing report, the Yamên, in reply, has now to state that, in view of the action thus taken by Professor Von Gumpach, it is not fitting that he should be any longer retained as a Professor in the said College.

"The Inspector-General is accordingly hereby instructed to acquaint the President with the Yamên's decision, and to intimate the same to Mr. Von Gumpach.

"The Yamên, in conclusion, leaves it to the Inspector-General to be guided by circumstances in deciding whether or not to issue a year's pay and allowance for passage home to Mr. Von Gumpach."

The decision of the Yamên was notified to the Respondent on the 30th November, and the correspondence appears to be closed by the two following letters from the Appellant's Secretary, Mr. Campbell, to the Respondent :—

"*Shanghae, December* 15, 1869.

"Dear Mr. Von Gumpach,

"Mr. Hart requests me to intimate to you that the President of the Tung-wên-Kwan has sanctioned the payment to you of salary for the period from the 1st Ooctober, 1869, to the 30th November, 1869, minus a sum of 158 taels, authorized to be paid on your account to Mr. Edkins.

"Believe me,

"Yours truly,

"J. D. CAMPBELL,

"*Chief Secretary.*

"Johs. Von Gumpach, Esq.

"&c. &c. &c."

"*Inspectorate-General of Customs,*

"Sir, "*Shanghae, December* 18, 1869.

"I am directed by the Inspector General of Customs to acknowledge your letter of the 17th instant.

"I am to hand you the inclosed cheque for 176 t. 2 m. balance of pay due to you at the end of November last.

"And, with reference to the concluding paragraph of your letter, I am to inform you that the Tsung-li Yamên has authorized the Inspector-General to decide whether or not a passage home and a money allowance of one year's pay shall be given.

"I am,
"Sir,
"Your obedient Servant,
"J. D. CAMPBELL.
"*Chief Secretary.*

"Johs. Von Gumpach, Esq.,
"Astor House, Shanghae."

The misrepresentations alleged in the Petition to have been made by the Appellant to the Yamên are, "that the Plaintiff had asked to be relieved from his duties, and declined to perform them; and that he had absented himself from Peking at a time when his active services might be required at the College."

The proof that representations were made to the Yamên in the terms alleged is not at all clear, particularly as to the part relating to the active services of the Respondent. But it is not necessary to examine minutely this proof in considering the grounds of objection to the direction of the Judge, which are stated in the Rule for a new trial.

The direction, so far as it relates to the misrepresentations, was as follows:—

"The second issue was, whether Mr. Hart, by misrepresenting that the Baron was absent from Peking when he was wanted, made a false statement, and did the Chinese Government dismiss him in consequence. It was a thing specially for the jury to consider, whether the representations were warranted by facts."

This is the whole of the summing up on this issue (except as to damages), and their Lordships are of opinion that it is clearly defective and erroneous. They think, in the lowest view that can be taken of the relations of these gentlemen to the Imperial Government, and to each other, that the representations made by the Inspector-General were privileged communications in the ordinary sense in which those words are understood; that is to say, communications so far justified by the occasion on which they are made, that the inference of malice, which, *primâ facie*, arises from defamatory statements is rebutted, and the burden of proving express malice thrown on the Plaintiff.

The Appellant was entrusted by the Government with the general superintendence of the College and its Professors, and it was his duty to make reports to the Yamên upon matters relating to its management and welfare. The resignation of a Professor, his absence from Peking, and any avowed disinclination or refusal to perform the duties for which he was engaged, were matters which it would be within his province to report. Reports so made, although defamatory, are *primâ facie* justifiable, and the duty of making them rebuts the malice which the law implies, and renders proof of actual malice, that is, of some wrong and improper motive, necessary to the maintenance of an action.

It was not denied on the part of the Respondent that this qualified privilege attached to the communications made by the Appellant to the Yamên, but it was contended that the question was not properly raised by the form of the issues; and, further, that actual malice must be taken to have been found by the jury. The Supreme Court appear to have adopted this contention in discharging the rule for a new trial.

But, in the view taken by their Lordships, the question of privilege was substantially involved in the issues to be tried. In technical strictness, perhaps, the Plaintiff ought to have alleged that the representations were malicious, but it may be taken in substance to be so alleged in the averment that the representations were wilfully false. If, however, this be assumed in the Plaintiff's favour, it follows that the proof must be the same on a traverse of that allegation as if malice had been expressly averred.

The Judge ought therefore to have explained to the jury the relation and position of the parties, and (assuming for the present the existence of a limited privilege only) he should have told them that the action would not lie if the statements were made honestly, and in a belief of their truth, and that the burden was on the Plaintiff to prove they were not so made.

No such explanation, however, was given. The Judge only asked the jury whether the Appellant had made false statements, and whether the representations were warranted by facts. The last ques-

tion is clearly misleading. In cases of this kind, the question is not as upon a plea of the truth of the libel, whether the representations are true, or warranted by facts; but whether, although they may not be true, the Defendant might have honestly believed them to be so, and made them, without malice, in the discharge of his duty.

The material word "wilfully," which might have opened the minds of the jury, although, without explanation, imperfectly, to the real issue, was omitted altogether from the question. The Supreme Court, in supporting the direction, say it was not necessary to ask the jury whether the representations were "wilfully" false, because they had the paragraphs before them which distinctly charged the Defendant with making wilfully false statements. Their Lordships cannot concur in this opinion and relieve the summing up from the objection made to it on this ground.

The consideration of the Judge's direction by their Lordships has hitherto proceeded on the assumption that there was evidence proper to be left to the jury, and on that assumption it appears to them to be wrong; but, on reviewing the proof offered at the trial, they have come to the conclusion that there was no evidence of malice to sustain the action.

Their Lordships have carefully gone through the evidence and correspondence, and have not found any acts or expressions of the Inspector-General which indicate bad, or even unfriendly feeling towards the Respondent; on the contrary, he appears to have given consideration to his complaints and remonstrances, explained to him from time to time the difficulties attending the formation of the School of Astronomy, and shown a desire to mitigate the disappointment occasioned by the delay. When the Respondent expressed a wish to return to Europe, the Appellant did not press him to do so, but appears to have been willing either to retain him as a Professor, and provide some employment for him in the College, or to accept his resignation and facilitate his return to England, offering, in the latter case, allowances which show that he was not dealing with him in a harsh or unfriendly manner. It is to be observed that the Respondent himself in his

evidence at the trial does not suggest that any unfriendly feeling existed or was shown to him. On the contrary, he says: "I believe Mr. Hart had the best intention to carry out the schemes proposed."

It was contended that the representations themselves supply evidence of malice. It is no doubt true that malice may in some cases be inferred from the defamatory statements themselves; but where representations, if *bonâ fide*, are privileged by the occasion on which they are made, the mere circumstance that they are defamatory does not furnish that proof:—it must be shown, either from the nature of the language employed, or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice, they must be inconsistent with *bona fides* and honesty of purpose. (The cases on this point were cited and their authority recognized by this Board in Laughton *v.* the Bishop of Sodor and Man.)

The representations in this case afford no intrinsic evidence of malice. They relate only to the conduct of the Respondent as a Professor of the College, and it would be the duty of the Appellant to make them to the Yamên, if they were true, or he believed them to be so. But it is said the evidence proves they were untrue in fact. Their Lordships are by no means satisfied that it does, on the contrary there is much which leaves the impression, if that had been the question, that the Respondent had really resigned his appointment.

With regard to the statement respecting the Respondent's absence from Peking, their Lordships have been unable to find the evidence of what the exact representation was. If it related to his going to Shanghai, there was foundation for it.

Undoubtedly, however, if the truth of the statements had been the issue to be tried, it would have been proper to leave the evidence to the jury; but that, as already observed, is not the issue. The question is whether the statements are so groundless that they afford evidence that the Appellant knew and believed they were untrue, and acted from malicious motives in making them. Their

Lordships think that the Appellant might have honestly believed he was reporting what was substantially true, and that there is no evidence from which it can be reasonably inferred that he was acting otherwise than in the *bonâ fide* discharge of what he conceived to be his duty. But it is *enough to* say that it is consistent with the evidence that such were his belief and motives, in the absence of any proof that he really entertained hostile or unfriendly feeling towards the Respondent. The Respondent therefore failed to sustain the burden, thrown upon him by the law, of proving actual malice.

Having come to the above conclusions, it is almost unnecessary for their Lordships to say that, if the only question on the rule had been whether the verdict was against the evidence, they must on that ground have directed a new trial. They now advert to this part of the rule, chiefly because the Court in their judgment seem disposed to renounce the exercise of the power to grant new trials in cases of verdicts against evidence, except where they are "evidently perverse." The Judges refer to the possible inconvenience of a single judge having to exercise it. Their Lordships think the Court ought not thus to limit their discretion. Undoubtedly, whether the Court is composed of a single judge, or many, the verdicts of juries should not be disturbed, unless the Court can come to a clear conclusion, on definite grounds, that they are wrong. But when this conclusion is arrived at, it would be the duty of the Court, in many cases, to act upon its own opinion. The Judges below may, perhaps, have intended to allow a wider meaning to the terms "perverse verdicts" than is commonly given to them, but if the rule apparently laid down by their judgment should be really acted on, verdicts founded on mistake or prejudice would be, in effect, irreversible.

Their Lordships now come to the consideration of the 22nd and 24th paragraphs of the Answer, which were ordered to be struck out on demurrer.

The 22nd paragraph alleges, in substance, that the Appellant and Respondent were in the employment of the Chinese Government, and that it was the duty of the Appellant to report to the Yamên upon the conduct of the Professors of the College,

and that, in the exercise of such duty, and as an act of duty, and not otherwise, he made the representation complained of.

The 24th paragraph is to the effect that it was the Respondent's duty, by virtue of his employment by the Chinese Government, to superintend the affairs of the College, and the foreigners connected therewith, and to make such representations and reports as to him in his discretion should seem fit in the premises (not alleging to whom), and that the representations complained of were made in the exercise of his lawful authority, and of his duty as a servant of the Chinese Government, and in pursuance of no other object.

These paragraphs, in their Lordships' opinion, state relevant facts to raise the issue that the reports were, from the relation of the parties to the Chinese Government, privileged in the limited sense before explained. The Court below struck them out, on the ground that they must be taken to admit that the reports were wilfully false and, by implication, malicious. This is not clear upon the construction of the paragraphs themselves; but, looking at them with reference to the Rules which regulate the nature and form of pleading in the Court below, their Lordships think that the order to strike them out ought not to have been made. According to these Rules, pleadings are to be in the form of Petitions and Answers. The Petition is to contain a narrative of the facts relied on, divided into paragraphs. The Answer is to show the nature of the defence; it must deny the material allegations intended to be questioned, and allege "any matter of fact not stated in the Petition on which the Defendant relies." This is not analogous to the English system of pleading in the Courts of Common Law, where, in general, each plea is separately regarded, and must furnish a complete answer independently of all other pleas on the Record. The paragraphs of an Answer are not in the nature of such separate pleas, and, unless where clearly so intended, should not be so treated. Cases may obviously occur where justice would not be done unless the paragraphs of an Answer were read together. In this case the Appellant, in one part of his Answer, denies that the representations were wilful and false, and in the paragraphs in question

alleges facts, showing under what circumstances they were made. Their Lordships consider that both parts of the Answer should have been allowed to remain on the Record; and that, if necessary to do so, in order to ascertain the questions to be tried, the Court should have settled the issues under Rule 58. If this course had been followed, the miscarriage which occurred at the trial would probably have been avoided. On the ground, therefore, that these paragraphs of the Answer allege matters relevant to the defence, their Lordships think that the order for striking them out ought to be set aside, and the paragraphs restored to the Record.

The opinion expressed by their Lordships upon the points hitherto discussed is sufficient to dispose of both the Rule and the Demurrer, in favour of the Appellant. But it was contended on his behalf that he was entitled to judgment on the Demurrer, not merely on the ground of the limited privilege above explained, but on the higher ground that the facts alleged in the answer were sufficient to establish an absolute privilege, precluding an inquiry by an English Court of Law, or at least by the Queen's Court established in China, into any report, however wilfully false, and malicious, made under colour of his office by the Appellant to the Yamên, concerning the Respondent as a Professor of the College.

Their Lordships however think that the answer does not contain sufficient facts to enable them to give judgment for the Appellant on this ground.

It was argued that what had been done was an act of State, and therefore beyond the cognizance of a Municipal Court. But the wrong complained of is not an executive act of the Chinese Government, nor of the Appellant as its Agent. The action is founded not on the dismissal of the Respondent from his post, but on alleged false and wrongful representations which are said to have led to it. If the power to dismiss had been delegated by the Chinese Government to the Appellant, and he had, from whatever motives, discharged the Respondent by virtue of that authority, it may be that his act should be regarded as an act of the Government. But it is not necessary to consider the supposed case, or the principles which determine the effect of the acts of sovereign

powers, and their Agents, since the wrong complained of does not in their Lordships' view fall within that category. The dismissal in this case was the act of the Yamên, and the legality of their act is not in any way impugned.

A further contention on this part of the case was, that questions of this kind arising between officers in the service of a foreign Government ought not to be entertained by an English Court, although the litigants might be English subjects. It was urged that it would be against public policy and the comity of nations to allow of such inquiries.

This contention opens a question of great importance; but their Lordships think that, in the present case, the facts stated in the answer are insufficient to raise it.

By the law of England, actions for libel, and other personal wrongs arising in foreign countries, may be brought in an English Court; and any special circumstances which preclude the Court from entertaining them should be shown (see Mostyn *v.* Fabrigas, and the Notes 1 Smith's Leading Cases, 6th edition, 623, and Scott *v.* Lord Seymour, 1 H. & C. 219).

Now the answer does not state what are the laws and customs of China with reference to reports of this kind, nor whether any protection is allowed to the officers making them, nor what specific privileges were accorded to the Appellant as a servant of the Chinese Government. It does not allege that he was a Minister, with the duty of advising on affairs of State, or even that his reports were confidential, or that it is contrary to the law or policy of China, or the usages of the service, to allow a subordinate officer, if maliciously defamed, to seek redress in the Courts.

It was admitted that the present case was one of the first impression, and no decision could be found which governs it. The immunity accorded to Judges, Counsel, and others engaged in the administration of justice, against actions for statements made in the course of duty, and the recent case of Dawkins *v.* Lord Paulet (L.R. 5 Q.B. 94), in which the same protection was extended to reports made by a military officer for the information of the Commander-in-Chief, were referred to. The

immunity in these cases rests upon grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and the safety of the State depend.

The principle of this rule may be capable of application to cases other than those already brought within it, but it does not seem apposite to the circumstances of the present.

Considerations of public policy arise, if at all, in this case upon the suggestion that it is contrary to the comity of nations, and therefore against the public interests of this country to entertain a suit involving an inquiry into Reports made by an officer in the service of a foreign State to the Government of that State.

Their Lordships are not prepared to say that cases may not occur in which effect should be given to these considerations. If it were shown that by the law and customs of China, officers in the service of the Government were absolutely protected in making Reports concerning their subordinates, and that it was against the policy of the Empire to allow them to be questioned by any Court, it might be proper to hold that it would be contrary to the comity of nations, and therefore against our own public policy, having regard to this comity, to allow a subject of the Queen, who had voluntarily entered into that service, to maintain such an action as the present. But this is not shown, and if the law and customs of China should be otherwise, and it is not the policy of that Empire to prevent redress for a wrong inflicted under the colour of official reports, in the case of such a servant as the Appellant appears to be, then it may well be that nothing would be found in English public policy to preclude the Queen's Courts from entertaining the action between her own subjects.

It was then insisted that, if the Queen's Courts in England might entertain the action, it would still be contrary to the spirit of the Treaty of Tientsin, which authorized the Queen to establish Courts of Justice in China, that Her Court so established should take cognizance of it. Their

Lordships are unable to find in the Treaty sufficient grounds for this contention.

By Article XV, "All questions in regard to rights, whether of property or persons, arising between British subjects, shall be subject to the jurisdiction of the British authorities;" and the effect of the Order of the Queen in Council establishing the Supreme Court, and declaring its powers and jurisdiction is, that the law of England, as between British subjects, shall be administered in it. Their Lordships therefore are unable to declare that the same principles of law shall not be applied to the decision of the action in the Court below, which would have governed it, if brought in the Queen's Courts in England; especially when no act of the Chinese Government is impugned, and no law or custom of China is, for anything which appears, violated.

In case the action should again be taken to trial (which their Lordships cannot anticipate will happen) it will be the duty of the judge to rule that the Reports were privileged in the limited sense above explained, and that the action cannot be maintained without proof of express malice; and, if the same evidence only is given, to direct a verdict for the Defendant, on the ground that it does not afford such proof.

Their Lordships desire also to point out that, in their view, the evidence fails to connect the dismissal with the alleged false representations. The first of them, relating to the Respondent's wish to be relieved from his duties, and declining to perform them, was made long before, and there is really no proof that it led to the dismissal, which proceeded on the fact that the Respondent had gone to Shanghai without permission for the purpose of taking legal proceedings. It was "in view of the action thus taken by the Professor," to use the words of their despatch, that the Yamên decided, "it is not fitting that he should be any longer retained as a Professor of the College." It is to be observed that it was not at all likely he would be retained, after he had taken this hostile step.

It only remains to consider the money-demand. It appears that the Chinese Government were willing to pay 176 taels to the Respondent, as the

balance of his salary to November 1869, and a cheque was sent to him by Mr. Campbell for that amount in the letter of the 18th December, 1869. It does not clearly appear on whom it was drawn. It was suggested that the fund out of which it was payable was in the hands of the bankers of the Government, and that the cheque was not paid owing to the refusal of the Respondent to give the receipt required of him; but, however this may be, there is no evidence that the Appellant had received the money, and held it, as the agent of the Respondent.

This point was not raised by the rule for a new trial; but that is not, now, material, for, the rule being made absolute, the entire verdict will be set aside. Their Lordships think it right to state that, in their opinion, no evidence whatever appears to support this claim. They think also the 23rd paragraph of the Answer, which alleges that the money was entrusted to the Appellant as the servant of the Government to be disposod of at his discretion, is a clear answer to the demand, as it negatives that the Appellant held the money as the Respondent's agent or to his use. The paragraph, therefore, ought not to have been struck out on demurrer.

In the result, their Lordships will humbly advise Her Majesty to direct that the Order made upon the demurrer ought to be reversed, and that the demurrer ought to be disallowed with costs; and also that the order discharging the rule nisi to set aside the verdict should be reversed, and that in lieu thereof it should be ordered that the verdict be set aside, and, if the parties so desire, that there be a new trial of the cause.

The Respondent must pay the costs of this Appeal.

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