ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

1902. Dec. 8 and 9.

JEHANGIR M. CURSETJI, PLAINTIFF, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.*

Jurisdiction—Defamation in Government Resolution—Secretary of State, liability of, to be sued—Governor and Members of Council, liability of—Act of State—Government servants, powers of Government over—Liability to be dismissed or censured—Discovery—Privilege—Privileged document—Official communication absolutely privileged—Notice of suit, what is sufficient—Civil Procedure Code (Act XIV of 1882), sections 416 and 424.

The plaintiff, who was Huzur Deputy Collector of Poona and as such exercised magisterial and revenue functions, sued the Secretary of State for India in Council for defamation. The alleged defamation was contained in a Resolution of the Bombay Government dated the 6th November, 1899, which, after reciting the substance of certain papers which had been laid before Government, stated that, after careful consideration of the facts disclosed in those papers and of the explanation tendered by the plaintiff, the *Governor in* Council had "come to the conclusion that the plaintiff had been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness." The Resolution then set forth the penalties inflicted in respect of the said misconduct. The defendant (*inter alia*) contended that the suit was not maintainable.

Held, that the Court had no jurisdiction and that the suit was not maintainable on the following grounds:

(1) The Governor of Bombay and Members of Council are by statute exempt from the jurisdiction of the High Court so far as acts done in their public capacity are concerned. That being so, no action lies against the Secretary of State for India in Council in respect of such acts of the Governor and Members of Council.

(2) The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, viz., matters for which private individuals or trading corporations could have been sued or in regard to those matters for which there is express statutory provision. No suit would lie against the East India Company in respect of acts of state or acts of sovereignty, and therefore no suit in respect of such acts lies against the Secretary of State in Council.

(3) The plaintiff was a public officer, whose employment was one which could only be given to him by the Sovereign or the agents of the Sovereign. Such public servants hold their offices at the pleasure of the Sovereign and are liable

* Suit No. 775A of 1900.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision. The power of dismissal includes all other powers (*e.g.* of reduction or censure). It is open to Government by Resolution or otherwise to censure or reprimand an officer.

(4) The Resolution complained of by the plaintiff being an official communication was absolutely privileged. It could not be put in evidence or produced in Court and no secondary evidence of it could be given. In respect of such official communications no allegation of malice is allowed and no proof of malice takes away the privilege. No action, therefore, could be based on any libel, however malicious, contained in the Resolution.

It was contended for the defendant that the notice of action given by the plaintiff under section 424 of the Civil Procedure Code (Act XIV of 1882) was insufficient, inasmuch as it did not allege malice, while in his plaint the plaintiff charged malice against the officers of Government who were parties to the issue of the Resolution.

Held, that the notice was sufficient. Such a notice is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed.

SUIT for damages for defamation.

The plaintiff was a member of the Provincial Civil Service of the Bombay Presidency, and in 1899 occupied the position of fourth grade Deputy Collector of Poona in charge of the treasury.

The defamation he complained of was contained in a Government Resolution (No. 7846) dated the 6th November, 1899, which, after reciting the substance of certain papers which had been laid before Government, stated that, after careful consideration of the facts disclosed in these papers and of the explanation tendered by Mr. Cursetji (the plaintiff), the Governor in Council had come to the conclusion that that officer had been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness. The Resolution then set forth the penalties inflicted in respect of the said misconduct of the plaintiff.

The Resolution as set forth in the plaint was as follows:

Official conduct—
Mr. J. M. Cursetji, Huzur Deputy
Collector, Poona.

No. 7846.

REVENUE DEPARTMENT.

Bombay Castle, 6th November, 1899.

Memorandum from the Commissioner, C. D., Confidential, No. 100, dated 16th August, 1899—Submitting a letter, No. 108, dated 1st idem, from the District

Magistrate, Poona, who brings to notice the conduct of Khán Bahádur J. M. Cursetji, Huzur Deputy Collector, Poona, in connection with the trial of a case arising in the Ambegaon *Petha of that district, which, though referred to the* Police for inquiry and reported by them as false, was nevertheless heard by Mr. Cursetji; states that the hearing was prolonged for over 3½ months and that the result was merely a confirmation of the original report received from the Police; observes that after the case was heard on various days the Magistrate was invited by the parties to proceed to the scene of the alleged offence, and that Mr. Cursetji arranged to do so on condition that the cost of his conveyance was paid by the accused and that of his clerk by the complainant's pleader; and adds that the impropriety of Mr. Cursetji's conduct is most seriously aggravated by the fact that shortly afterwards he preferred a bill claiming travelling allowance for the very same journey and also allowed his clerk to do the same.

Letter from the Commissioner, C. D., No. Confidential—120, dated 30th August, 1899.

Memorandum from the Commissioner, C. D., No. *Confidential*—124, dated 7th September, 1899.

RESOLUTION.—After careful consideration of the painful facts disclosed in these papers and of the explanations tendered by Mr. Cursetji, the Governor in Council has come to the conclusion that that officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness in the following respects:

(1) Improperly requiring the accused person in a criminal case conducted by him (Mr. Cursetji) in his Magisterial capacity to pay for the conveyance of himself and the complainant in the same case to pay for the conveyance of his clerk Bhange to the scene of the offence alleged to have been committed by the said accused, namely, to the village of Wachpe, distant some 59 miles from Poona, and back, and in receiving himself from the defendant the sum of Rs. 25 and in permitting his clerk Bhange to receive from the complainant the sum of Rs. 16-12-0 in respect of the said expenses of conveyance.

(2) In having after receipt of the said expenses improperly drawn bills upon Government and obtained from the treasury the sum of Rs. 29-8-0 for himself and permitted his clerk to obtain Rs. 14-12-0 in respect of the same journey.

(3) Entering incorrect dates in his own travelling allowance bill in order to prevent objection being raised in audit to the drawing by him of mileage allowance on at least one of the days on which he travelled.

(4) In connection with the travelling allowance bill of the clerk Bhange deliberately signing certificates which he knew to be false.

2. As regards the first and second charges, Mr. Cursetji's defence is simply a denial of the impropriety alleged. Such a defence will not bear even the most slender examination. The impropriety of taking money on any pretext whatever from parties to a Magisterial case under inquiry before him must be patent to any officer called upon to discharge Magisterial duties. As an experienced Account Officer, Mr. Cursetji must be intimately conversant with Articles 1086

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

and 1087 of the Civil Service Regulations and fully aware therefore that he was not entitled himself to make or to allow his clerk to make travelling allowance a source of profit.

3. As regards the third charge, Mr. Cursetji asserts that the erroneous dates were signed to by him through inadvertence. The fact that the errors resulted to his advantage, conjoined with the other discreditable circumstances of the case, throws grave doubts on the credibility of this defence. It was also Mr. Cursetji's clear duty, as he must have been fully conscious, to be scrupulously careful that the entries of dates on which he travelled were absolutely accurate.

4. As regards the fourth charge, it is shown that Mr. Cursetji certified (1) that the amount entered in the clerk's travelling allowance bill (Rs. 14-12-0) did not exceed his actual travelling expenses and (2) that these expenses were Rs. 16-12-0, whereas Mr. Cursetji knew as a matter of fact that the clerk's expenses were nil, that he paid nothing for the *tonga* mentioned in the bill, and that he was conveyed free of cost to Wachpe and back by the complainant in the case. Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false. His defence to these charges, that he signed the certificates by inadvertence and believed on the assurance of his clerk and office that the charges were justifiable, can only be characterised as puerile and incredible.

5. The above four charges having been found proved against Mr. Cursetji, it has to be decided what notice should be taken of his misconduct. The Governor in Council has most seriously considered whether the case would be met by any punishment short of dismissal and has been mainly induced by consideration of Mr. Cursetji's length of service (22½ years) and by compassion for those who are dependent on him to limit his award to the following penalties :

(1) The reduction of Mr. Cursetji to the sixth grade of Deputy Collectors.

(2) The stoppage of all further promotion for him.

(3) His compulsory retirement at the age of 55.

(4) The refund of the amount of travelling allowance fraudulently drawn by him.

6. The question whether Mr. Cursetji should be permitted to retain Magisterial powers should be referred to the Judicial Department, with the intimation that having regard to the facts proved under the first charge and the allegations, if they be considered proved, of his general conduct of the case dealt with in these papers, and also bearing in mind previous occasions on which his conduct and competency as Magistrate have been called in question, Government in the Revenue Department entertain grave doubts whether he should be any longer entrusted with the exercise of Magisterial powers.

7. The Collector of Poona should deal with the case of the clerk Bhange, requiring him to refund the sum of Rs. 14-12-0 wrongfully drawn by him on account of travelling allowance and passing such other orders as he may deem fit.

(Signed) J. W. P. MUIR-MACKENZIE,
Secretary to Government.

The plaint stated that the plaintiff had received the above Resolution through the Collector of Poona, his then immediate superior, on the 15th November, and that he (the plaintiff) at once requested Government to supply him with copies of "all reports, petitions and other documents on which Government had passed the said Resolution," but that Government by a subsequent Resolution (No. 9032) dated the 16th December, 1899, declared this request to be inadmissible.

The plaint further stated that the plaintiff had applied to the Government of Bombay for a reconsideration of his case, but that the Government had refused his application.

The plaint then charged as follows:

7. The plaintiff says that the Government of Bombay by their said Resolution, No. 7846 of 6th November, 1899, falsely and maliciously published of and concerning the plaintiff a false and defamatory libel, in that the said Resolution imputes dishonesty and fraud to the plaintiff, who is a public officer, and is made the means of promulgating defamatory and malicious allegations not warranted by the occasion or the circumstances of the case, and exceeds the limit of just comment and, besides, contains misstatements showing a reckless indifference as to whether the facts published were true or false.

8. In conformity with the provisions of section 424 of the Civil Procedure Code, the plaintiff on the 4th day of September, 1900, caused a notice in the terms required by such section to be delivered to the Chief Secretary to the Government of Bombay.

The prayer of the plaint was for—

(*a*) judgment for the sum of Rs. 1,50,000 as damages sustained by the said wrongful act of the Government of Bombay;

(*b*) that the said Government Resolution No. 7846 of 6th November, 1899, may be ordered to be set aside.

The notice of action given to Government by the plaintiff under section 424 of the Civil Procedure Code (XIV of 1882), after stating the various steps taken by the plaintiff to obtain redress, stated as follows:

5. I have, therefore, in order to avoid the bar of limitation under section 424 of Act XIV of 1882 (the Civil Procedure Code), to give you notice that in the event of my being so unfortunate as to fail to secure justice at the hands of the Government of Bombay and of India, I shall file an action against the Secretary of State for India in Council for (*a*) cancellation of Government Resolution No. 7846 of 6th November last, and (*b*) for loss of character, as I am advised that the following words in the said Resolution are libellous:

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

(1) 'That officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness' in respect of my official conduct, the subject-matter of the said Resolution.

(2) 'Conjoined with the other discreditable circumstances of the case, throws grave doubt on the credibility of the defence.'

(3) 'Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false.'

(4) 'The refund of the amount of travelling allowance fraudulently drawn by him.'

The written statement of the defendant was as follows:

1. The defendant says that the Resolution No. 7846 of the 6th November, 1899, set out in the plaint was an act and order of the Governor of Bombay and Council, counselled, ordered and done by the said Governor and Council in their public capacity only and acting as Governor and Council, and that by virtue of the provisions of the Statute 4 Geo. IV, c. 71, the said Governor and Council are not subject to the jurisdiction of this Honourable Court by reason of such act and order.

2. The defendant also says that apart from the provisions of the said statute no suit is maintainable against him in respect of the said Resolution, inasmuch as the same was issued and published by the Governor of Bombay and Council acting in their public capacity as the Executive Government on behalf of Her late Majesty the Queen-Empress.

3. The defendant submits that the allegations in the plaint contained, and particularly those in the seventh paragraph thereof, disclose no cause of action against him or the Government of Bombay.

4. The defendant further says that the statements contained in the said Resolution are privileged.

5. The defendant says that the notice of action referred to in the eighth paragraph of the plaint is confined to a charge of alleged libel contained in four sentences from the said Resolution and contains no intimation of the plaintiff's intention to claim Rs. 1,50,000 or any other sum as damages. The defendant says that having regard to the terms of the said notice the plaintiff is not entitled to make any charge in this suit in respect of any alleged malice or in respect of any allegations exceeding the limit of just comment or in respect of any reckless indifference to the truth or falsity of the facts published on the part of the Government of Bombay, and is not entitled to claim in this suit any sum of money by way of damages.

6. The defendant says that there was in fact no malice or excess of just comment or reckless indifference to the truth or falsity of the facts published on the part of the Government of Bombay.

7. The defendant says that the statements in the said Resolution are true in substance and in fact and were justified by the conduct of the plaintiff and the reports and papers connected with his case.

8. The defendant says that this Honourable Court has no jurisdiction to order that the said Resolution be set aside.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

The issues raised by the Counsel for defendant at the hearing were as follows:

(1) Whether the Court has jurisdiction to entertain this suit.

(2) Whether this suit is maintainable against the defendant.

(3) Whether the plaint discloses any cause of action against the defendant.

(4) Whether, having regard to the notice of action given by plaintiff, he is entitled to maintain this suit in respect of any false or malicious libel published by the Government of Bombay.

(5) Whether the statements in the said Resolution are not absolutely privileged.

(6) Whether there was any malice on the part of the Government of Bombay in issuing the said Resolution as alleged in paragraph 7 of the plaint.

(7) Whether the statements in the Resolution were not true in substance or in fact and justified by conduct of plaintiff and reports and papers connected with the case.

(8) Whether having regard to plaintiff's notice of action he is entitled to claim any sum by way of damages.

(9) Whether this Court has jurisdiction to set aside the Resolution of the Government of Bombay.

(10) Whether plaintiff is entitled to the relief prayed for or any and what part thereof.

Counsel for the defendant applied under section 146 of the Civil Procedure Code (Act XIV of 1882) that the first five issues should be tried as preliminary issues, contending that if decided for the defendant the suit would go no further.

The plaintiff objected and contended that, in order to decide the questions raised in the case, it would be necessary that evidence should be taken. He raised the following additional issues:

11. Having regard to the Resolution being an act counselled, ordered and done by the Governor $\frac{\text{and}}{\text{or}}$ Council and having regard to the provision of Statute 4 Geo. IV, c. 71, is the Governor in Council subject to the jurisdiction of this Court?

12. Apart from the provision of the said statute, is the suit maintainable against the Secretary of State for the Resolution issued and published by the Governor in Council in their public capacity on behalf of Her Majesty the Queen-Empress?

13. Do the allegations in the plaint contained, and particularly paragraph 7 thereof, disclose a cause of action against defendant and the Government of Bombay?

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

14. Is the Resolution malicious or in excess of just comment or reckless indifference to truth or falsity of the facts published in the Government Resolution?

15. Are the statements in the Resolution true and justifiable? If not, which of them?

16. Was the said Resolution counselled, ordered and done according to the rules and orders and pursuant to the provisions of section 28 of the Indian Councils Act, 1861?

The plaintiff contended that his issues raised the real questions in the case and that they could not be decided as preliminary issues.

TYABJI, J.:—The question is whether the first five issues raise questions of law the decision of which may dispose of the suit, assuming the facts to be as the plaintiff alleges them in the plaint. These facts for the purpose of the argument on these issues are admitted on behalf of the defendant, but it is contended that even admitting them the plaintiff's suit is not maintainable. These being the questions raised on the issues, I think they should be tried as preliminary issues.

Scott (Advocate General) and *Kirkpatrick* for the defendant:— We submit that this suit is not maintainable. The plaintiff sues the Secretary of State for a libel published of him by the Government of Bombay. That is the allegation in paragraph 7 of the plaint. The first point then is whether, assuming that the Government of Bombay have committed this wrong, the Secretary of State is liable for it. Section 416 of the Civil Procedure Code (Act XIV of 1882) provides that suits against the Government may be brought against the Secretary of State. We submit that the Government mentioned in the section means, not a local Government, but the Supreme Government, the Government of the King, *i. e.*, the Government of India. Under that section suits against the Government of the King in India may be instituted against the Secretary of State. In what class of suits may he be sued? In England there is no remedy against the Crown for a tort. In such a case the maxim that the king can do no wrong applies. Where the tort is committed by a Government official, the remedy (if any) is against the individual and not against the head of the department: *Raleigh* v. *Goschen*.[1] In the case of

[1] (1898) 1 Ch. 73.

contracts the remedy in England is by Petition of Right. That is the law in England.

In India, until 1858, the Government was vested in the East India Company. That Company exercised different functions. It was partly a trading Company with the rights and liabilities of an ordinary commercial body. It also exercised sovereign power delegated to it by the Crown. In respect of its acts in the former capacity it could be sued. For its acts in the latter capacity it could not.

In 1858 the East India Company came to an end and since then India has been governed directly by the Crown. By Statute 21 and 22 Vict., c. 106, sections 1 and 2, the territories and revenues of India were transferred to the Crown. In order, however, that no one should be deprived of any right or claim which he might have had against the East India Company, section 65 of that statute provided that the Secretary of State in Council as a body corporate (not personally, see section 68) might be sued in all cases in which the Company might have been sued. Thus the Secretary of State in Council now stands in the position of the Company and can be sued in cases in which the Company would formerly have been sued. But it could not have been sued in respect of acts done by it as a sovereign power, but only in respect of acts which did not fall within that category. The liability of the Company is now the liability of the Secretary of State and the suits referred to in section 416 of the Civil Procedure Code are suits in respect of acts of Government which are not acts of State, *i.e.*, which have no relation to the Government of the country, and the section clearly refers to the Government of India and not to local Governments: compare section 419 of the Civil Procedure Code. The *P. & O. Steam Navigation Co.* v. *Secretary of State*[1] is an illustration of the cases in which the Secretary of State is liable. The act for which the Government was there held liable was not an act of Government as the ruling power. The distinction is clearly taken by Peacock, C.J., who says (see page 14): "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully

(1) (1861) 5 Bom. H. C. R. Appx. i.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie." See also *Gould* v. *Stuart*[1]; *Vijaya Ragava* v. *Secretary of State for India*[2]. Ilbert on the Government of India, page 161.

We submit that as the East India Company could not have been sued in respect of any act done by it as a sovereign power, so the Secretary of State, who now so far as acts of sovereignty are concerned stands in the place of the Company, is similarly exempt in respect of such acts: Statute 24 and 25 Vict., c. 11, section 4; *In re Wallace*.[3] The position of the Secretary of State in Council is discussed in *Kinlock* v. *Secretary of State*[4] and *Nobin Chunder* v. *Secretary of State*,[5] which last case was dissented from in *Secretary of State* v. *Hari Bhanji*.[6] The most important cases on the point are *Grant* v. *Secretary of State*[7] and *Chatterton* v. *Secretary of State*.[8]

Then comes the question whether the publication of the Resolution in question censuring and punishing the plaintiff was an act of state or sovereignty for which no suit lies. The plaintiff here was an officer employed by Government in the administration of the country. We submit that an act of Government dealing with one of its own officers is an act of state for which no action could have been brought against the East India Company, and for which no action therefore now lies against the Secretary of State. The East India Company had ample power over its officers: see 33 Geo. III, c. 52, sections 55 and 56; Stat. 3 and 4 Will. IV, c. 85, sections 74, 75. That power has now been transferred to the Government of the Crown. As to the power of Government over its servants, see *Mitchell* v. *The Queen*[9]; *Dunn* v. *The Queen*.[10] Civil and military servants stand in the same position: *Shenton* v. *Smith*.[11] See also Ilbert's Government of India, pages 159, 160, and 33 Geo. III, c. 52, sections 35 and 36.

(1) (1896) Ap. Ca. 575.
(2) (1884) 7 Mad. 466.
(3) (1884) 8 Mad. 24.
(4) (1880) 15 Ch. D. 1; Sub. Nom. *Kinlock* v. *Secretary of State* (1882) 7 Ap. Ca. 619.
(5) (1875) 1 Cal. 11.
(6) (1882) 5 Mad. 273.
(7) (1877) 2 C. P. D. 445.
(8) (1895) 2 Q. B. 189.
(9) (1896) 1 Q. B. 121 *f. n.* (decided 1890).
(10) (1896) 1 Q. B. 126.
(11) (1895) Ap. Ca. 229.

The Government may also state its reasons for censuring its officers: see *per* Mansfield, C.J., in *Oliver* v. *Lord William Bentinck* (1); *Chatterton* v. *Secretary of State for India* (2); and no suit lies for publishing the reasons. See also *Grant* v. *Secretary of State* (3) and *Gould* v. *Stuart*.(4)

The plaintiff, however, here complains not of the act of the Government of India, but of the act of the local Government of Bombay. What is the position of the local Government? It is merely an executive department composed of certain individuals entrusted with certain powers: see Stat. 3 and 4 Will. IV, c. 85, sections 56 and 57; see also the definition in the General Clauses Acts (I of 1868), section 2, clause 10, and Act X of 1897, section 3, clause 29. The local Government is not a corporation and cannot be sued as such. The plaintiff makes no charge against the individuals comprising the local Government. If he did, he should have given the notice required by section 424 of the Civil Procedure Code (Act XIV of 1882), but no such notice was given. But it is clear that no suit is maintainable against the individual members of Government for their official acts, and if so, of course no suit can lie against the Secretary of State for such acts. It has always been the policy of the Legislature to exempt the members of the local Government from the jurisdiction of the Courts in India for acts done in their official capacity. See Stat. 37 Geo. III, c. 142, section 11; 4 Geo. IV, c. 71, section 7, and 21 Geo. III, c. 70, section 1; Stat. 24 and 25 Vict., c. 104, section 9; Ilbert's Government of India, page 251, paragraph 105. See also *per* Kernan, J., in *Collector of Sea Customs* v. *P. Chithambaram*.(5) We therefore submit that the members of the Government have an absolute privilege in respect of their official acts: *Grant* v. *Secretary of State* (3); *Chatterton* v. *Secretary of State* (2); and *Oliver* v. *Bentinck*.(1) The publication of the Resolution in question was an official act and was therefore privileged, and even if it were proved that in publishing it the members of Government were actuated by malice they would be protected. The document is an official communication and is

(1) (1811) 3 Taunt. 456 at p. 459.
(2) (1895) 2 Q. B. 189.
(3) (1877) 2 C. P. D. 445.
(4) (1896) A. C. 575.
(5) (1876) 1 Mad. 89 at p. 121.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

absolutely privileged and cannot even be produced or proved in Court. See *Dawkins* v. *Paulet* (1); *Dawkins* v. *Rokeby*(2); *Hennessy* v. *Wright*.(3)

Lastly, we say the notice given by plaintiff was insufficient. By section 424 of the Civil Procedure Code (Act XIV of 1882) a plaintiff is to give notice of his cause of action. The notice states the cause of action to be the publication of statements which the plaintiff alleges to be libellous *per se*; he does not there allege malice. But in his plaint (paragraph 7) he alleges express malice. That is not covered by the notice given.

As to express malice see *Nevill* v. *Fine Arts Company* cited in Odgers on Libel; *Abrath* v. *North Eastern Railway Company*.(4)

Plaintiff in person:—I contend (1) that the charges made against me in the Resolution of which I complain are untrue; (2) the Government have given undue publication to the Resolution; (3) the Resolution was passed irregularly and not according to the ordinary procedure; (4) the Government did not give me a full hearing in answer to the charges made against me; (5) it was unnecessary to state the charges against me in the Resolution.

These are the allegations I make. It is contended that the Government is protected and that I have no remedy. I submit that no Government has a right to libel its servants, and that its power over them of dismissal or punishment must be exercised in a proper manner: *Hughes* v. *Secretary of State*(5); *East Freemantle Corporation* v. *Annois*(6); *Canadian Pacific Railway* v. *Parke*(7); *Pudan* v. *The Secretary of State*.(8) The Resolution was not passed in the course of official duty: Folkard on Libel, page 359. It ought to have been sent by letter and marked confidential: *Williamson* v. *Freer*.(9) The Government exceeded its duty: *Vallabha* v. *Madusudanan*.(10)

As to the jurisdiction of the Court, plaintiff cited *Narayan* v. *Norman*(11); *P. & O. Steam Navigation Company* v. *Secretary of*

(1) (1869) L. R. 5 Q. B. 94.
(2) (1873) L. R. 7 H. L. 744.
(3) (1888) 21 Q. B. D. 509 at p. 512.
(4) (1886) 11 Ap. Ca. 247 at p. 253.
(5) (1871) 7 Beng. L. R. 688.
(6) (1902) Ap. Ca. 213 (decided 1901).
(7) (1899) Ap. Ca. 535.
(8) (1899) 3 Cal. W. Notes (P. C.) cxli.
(9) (1874) L. R. 9 C. P. 393.
(10) (1889) 12 Mad. 495.
(11) (1868) 5 Bom. H. C. Rep. 1 (O. C.)

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

State.[1]; *Vijaya Ragava* v. *Secretary of State for India*[2]; *Rex* v. *Stepney Corporation*.[3]

As to sufficiency of notice of suit he cited *Sabin* v. *De Burgh*[4]; *Secretary of State for India* v. *Perumal*[5]; *Stokes* v. *Hill*[6]; *Kharshedji N. Cama* v. *Secretary of State*.[7]

He also referred to *Walker* v. *Baird*[8]; *Dulieu* v. *White & Sons*[9]; *Quinn* v. *Leatham*[10]; Maxwell on Statutes, pages 320, 333, 356, 361-368; Ilbert's Government of India, pages 62 and 174; and *Shepherd* v. *Trustees of the Port of Bombay*.[11]

Plaintiff also cited the following cases:—As to the maintainability of suit, he cited *Cornford* v. *Carlton Bank*[12]; *Stockdale* v. *Hansard*[13]; *Graham* v. *Public Works Commissioners*[14]; *Secretary of State* v. *Jagat Mohini*[15]; *Reg.* v. *Janardhan*.[16] As to jurisdiction, *Bell* v. *Municipal Corporation of Madras*.[17] As to notice and construction of statutes, *Smith* v. *West Derby Local Board*[18]; *Parbutti* v. *Nobin*[19]; *Jones* v. *Bird*[20]; *Higgins* v. *Dawson*.[21] As to cause of action, *Chinnappa* v. *Sikka Naikan*[22]; *Reed* v. *Friendly Society of Stonemasons, &c.*[23] As to libel and privileged communication, *Stevens* v. *Sampson*.[24]

TYABJI, J.:—This suit was filed by Mr. Jehangir Manekji Cursetji against the Secretary of State for India in Council on the 6th November, 1900, complaining of a Resolution of the Government of Bombay, set forth in the plaint, and praying that the plaintiff may be awarded a sum of Rs. 1,50,000 as damages sustained by the wrongful acts of Government, and that the said Resolution dated the 6th November, 1899, may be ordered to be set aside, and for costs of the suit.

(1) (1861) 5 B. H. C. R. 1 appx.
(2) (1884) 7 Mad. 466.
(3) (1902) 1 K. B. 322 (decided 1901).
(4) (1809) 2 Campb. 196.
(5) (1900) 24 Mad. 279.
(6) (1901) 1 K. B. 493 at page 496.
(7) (1868) 5 Bom. H. C. Rep. 97 (O. C.).
(8) (1892) Ap. Ca. 491.
(9) (1901) 2 Q. B. 669.
(10) (1901) Ap. Ca. 495.
(11) (1876) 1 Bom. 477.
(12) (1899) 16 Times Law Rep. 12.
(13) Broom's Constitutional Law, p 25.
(14) (1901) 2 K. B. 781 at pp. 790-1.
(15) (1901) 28 Cal. 540.
(16) (1894) 19 Bom. 703.
(17) (1902) 25 Mad. 457.
(18) (1878) 3 C. P. D. 427.
(19) (1883) 13 Cal. L. R. 195.
(20) (1822) 5 B. and Ald. 837.
(21) (1902) Ap. Ca. 1.
(22) (1900) 24 Mad. 36.
(23) (1902) 2 Q. B. 91.
(24) (1879) 5 Ex. D. 53.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

The plaintiff, at the time of the Resolution complained of, was a Government servant in the Provincial Civil Service of the Bombay Presidency, and, according to the plaint, had served Government for twenty-five years. Prior to this Resolution he was serving as a fourth grade Deputy Collector, and was in charge of the treasury. The Resolution, which is dated the 6th November, 1899, is based upon a memorandum from the Commissioner, C. D., commenting on the conduct of the plaintiff in respect of certain of the plaintiff's acts in the course of the trial of a case by him as Magistrate. The Resolution says:

After a careful consideration of the painful facts disclosed in these papers and of the explanations tendered by Mr. Cursetji, the Governor in Council has come to the conclusion that that officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness in the following respects:

(1) Improperly requiring the accused person in a criminal case, conducted by him (Mr. Cursetji) in his Magisterial capacity, to pay for the conveyance of himself and the complainant in the same case to pay for the conveyance of his clerk Bhange to the scene of the offence alleged to have been committed by the accused, namely, to the village of Wachpe, distant some 59 miles from Poona, and back, and in receiving himself from the defendant the sum of Rs. 25 and in permitting his clerk Bhange to receive from the complainant the sum of Rs. 16-12-0 in respect of the said expenses of conveyance.

(2) In having after the receipt of the said expenses improperly drawn bills upon Government and obtained from the treasury the sum of Rs. 29-8-0 for himself and permitted his clerk to obtain Rs. 14-12-0 in respect of the same journey.

(3) Entering incorrect dates in his own travelling allowance bill in order to prevent objection being raised in audit to the drawing by him of mileage allowances on at least one of the days on which he travelled.

(4) In connection with the travelling allowance bill of the clerk Bhange deliberately signing certificates which he knew to be false.

The Resolution then goes on commenting on the above charges in the following terms:

As regards the first and second charges Mr. Cursetji's defence is simply a denial of the impropriety alleged. Such a defence will not bear even the most slender examination. The impropriety of taking money on any pretext whatever from parties to a Magisterial case under inquiry before him must be patent to any officer called upon to discharge Magisterial duties. As an experienced Account Officer Mr. Cursetji must be intimately conversant with Articles 1086 and 1087 of the Civil Service Regulations, and fully aware, therefore, that he was not entitled himself to make or to allow his clerk to make travelling allowance a source of profit.

3. As regards the third charge, Mr. Cursetji asserts that the erroneous dates were signed to by him through inadvertence. The fact that the errors resulted to his advantage, conjoined with the other discreditable circumstances of the case, throw grave doubts on the credibility of the defence. It was also Mr. Cursetji's clear duty, as he must have been fully conscious, to be scrupulously careful that the entries of dates on which he travelled were absolutely accurate.

4. As regards the fourth charge, it is shown that Mr. Cursetji certified (1) that the amount entered in the clerk's travelling allowance bill (Rs. 14-12-0) did not exceed his actual travelling expenses, and (2) that these expenses were Rs. 16-12-0, whereas Mr. Cursetji knew as a matter of fact that his clerk's expenses were nil, that he paid nothing for the *tonga* mentioned in the bill, and that he was conveyed free of cost to Wachpe and back by the complainant in the case. Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false. His defence to these charges that he signed the certificates by inadvertence and believed on the assurance of his clerk and office that the charges were justifiable can only be characterised as puerile and incredible.

The Resolution then proceeds as follows:

5. The above four charges having been found proved against Mr. Cursetji, it has to be decided what notice should be taken of his misconduct. The Governor in Council has most seriously considered whether the case would be met by any punishment short of dismissal, and has been mainly induced by consideration of Mr. Cursetji's length of service (twenty-two and a half years) and by compassion for those who are dependent on him to limit his award to the following penalties:

(1) The reduction of Mr. Cursetji to the sixth grade of Deputy Collectors.

(2) The stoppage of all further promotion for him.

(3) His compulsory retirement at the age of 55.

(4) The refund of the amount of travelling allowance fraudulently drawn by him.

It is in respect of the charges of misconduct and dishonesty that the plaintiff mainly complains. He says in the plaint that he tried to obtain redress from Government, and obtaining none, he gave notice to Government of his intention to file this suit. That notice is Exhibit B, attached to the plaint, and is dated the 4th September, 1900. After reciting certain previous facts, the notice in paragraph 5 proceeds as follows:

I have, therefore, in order to avoid the bar of limitation, under section 424 of the Civil Procedure Code, to give you notice that in the event of my being so unfortunate as to fail to secure justice at the hands of the Government of Bombay and India, I shall file an action against the Secretary of State in

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

Council for (*a*) cancellation of Government Resolution No. 7846 of 6th November last, (*b*) for loss of character, as I am advised that the following words in the said Resolution are libellous :

(1) 'That officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness,' in respect of my official conduct, the subject-matter of the said Resolution.

(2) 'Conjoined with other discreditable circumstances of the case, throws grave doubt on the credibility of the defence.'

(3) 'Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false.'

(4) 'The refund of the amount of travelling allowance fraudulently drawn by him.'

At the first hearing before me the following issues were raised on the pleadings of the learned Advocate General, and afterwards by the plaintiff:

(1) Whether this Court had jurisdiction to entertain this suit.

(2) Whether this suit is maintainable against the defendant.

(3) Whether the plaint discloses any cause of action against defendant.

(4) Whether having regard to the notice of action given by the plaintiff he is entitled to maintain this suit in respect of false or malicious libel published by the Government of Bombay.

(5) If the first four issues are found against the defendant, whether the statements in the Resolution are absolutely privileged.

Issues 11 to 17, raised by the plaintiff, are substantially the same as the above issues, but perhaps in greater detail.

The learned Advocate General applied to me that the first four issues being questions of law should be determined first, as, if these issues were found against the plaintiff, it would be unnecessary to proceed any further with the case or record any evidence. The plaintiff objected to the course, apparently because he thought that the evidence he might be able to produce might remove some of the objections the Court might possibly feel in deciding these issues. After some discussion I was of opinion that it would be best to decide these issues in the first instance, and at the request of the plaintiff the fifth issue was also to be decided in the first instance, along with the first four, as desired by the learned Advocate General. It seemed to me, however, fair to the plaintiff that in considering these issues the Court should have before it not merely the allegations in the

notice, nor merely the statement and allegations in the plaint, but that he should also be permitted to explain more fully and more in detail, what he meant by his allegations in the plaint as regards the action of Government. Accordingly at the suggestion of the Court, the learned Advocate General acquiesced in the Court taking into consideration all the explanations and details of the case, and all the allegations which the plaintiff thought he would be able to place before the Court, if allowed to do so. The allegations, explanations and details are all set forth fully in the affidavit of the 8th September, 1901, which the plaintiff made in answer to the interrogatories administered to him on behalf of the defendant. It seems to me, therefore, that having regard to what has actually taken place between the Court, the learned Advocate General and the plaintiff, that the Court could not possibly be in a better position for the determination of these issues than it is at this moment. For the purposes of the issues I have to determine I am now going to assume that the plaintiff's explanations, allegations and statements are true, and that if the plaintiff is allowed to go into evidence he will be able to establish those allegations.

Now the first question, which I think it necessary to refer to, is the question of notice. The learned Advocate General argued that that notice was confined merely to a suit based upon the document which was libellous and defamatory in itself, and that not having made any allegations in that notice of any actual or expressed malice on the part of the defendant, the suit as now framed cannot be allowed to proceed on the basis of express malice, and must be confined simply to the various issues on the document itself as if no malice had been alleged. Now it is perfectly true that the notice does not allege any "express malice." That is probably, as the plaintiff explains, from motives of delicacy, and not liking to offend the feelings of Government officials he abstained from charging them with malice, but that at the same time the notice is one which is consistent with a case based on actual malice. At all events I see nothing in it which is inconsistent with actual malice. The authorities on these points show very clearly that the object of such notices as that required by section 424 of the Civil Procedure Code is to

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

inform Government, or the public officers concerned, generally of the nature of the suit which is intended to be filed against them. It has been decided that these notices must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings and that they need not set out all the details and facts of the case which the plaintiff intends to prove, and that the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. This proposition of law is borne out by the following cases: *Secretary of State* v. *Perumal Pillai*[1]; *Stokes* v. *Hill*[2]; *Smith & Co.* v. *West Derby Local Board*[3]; *Parbutti* v. *Nobin Chunder*[4]; *Sabin* v. *DeBurgh*[5]; *Jones* v. *Bird*.[6] On the whole, therefore, I am of opinion that the notice is sufficient to cover the case as now made by the plaintiff, viz., that including the allegations of malice against officers of Government who were parties to the issue of the Resolution.

The next question is whether this Court has jurisdiction to try this suit. Shortly the argument of the learned Advocate General was that the Resolution in question was issued or purported to be issued by the Government of Bombay; that the Government of Bombay itself, that is to say, His Excellency the Governor and the two Members of his Council, are exempt from the jurisdiction of this Court, because they must be taken to have acted in a public capacity; and that if the Members of the Bombay Government are exempt, the Secretary of State in Council must also be exempt, because, if he is liable at all, he is only liable through the Bombay Government by reason of the public acts of the Government of Bombay. It was also argued that the suit against the defendant must be taken substantially to be a suit against the Government of the King-Emperor, and that as a broad constitutional principle of law no suit will lie against Government in matters of tort, including libel, on the principle that the King can do no wrong. It was also argued that apart from this general and universal principle, suits against

(1) (1900) 24 Mad. 279.
(2) (1901) 1 K. B. 493.
(3) (1878) 3 C. P. D. 423 at pp. 427, 428.
(4) (1883) 13 Cal. L. R. 195.
(5) (1809) 2 Camp. 196.
(6) (1822) 5 B. & Ald. 837-844.

the Secretary of State in Council are only permitted and can lie only in respect of matters for which the East India Company could have been sued, and it was argued that the East India Company, although it could have been sued as a trading corporation and in regard to those matters and things as to which private merchants or individuals might have been sued, yet that it could not have been sued in respect of those acts of sovereignty which were delegated to it, and which it performed as a governing body in this country. It was further argued that the employment of public servants, Naval, Military, Civil, Magisterial, Judicial, or Revenue, and their dismissal or compulsory retirement was a matter which partook of the character of sovereign acts, which could not be brought within the cognizance of the municipal Courts of the country, and that therefore no suit would lie against Government for the dismissal of any servants of the Crown or Government.

It was further argued, on the principle that the greater includes the less, that if the Government had power to dismiss or compulsorily retire its servants, it necessarily must have power to reduce its servants or stop their promotion or to censure or reprimand them, and that all the acts of Government in relation to this matter were "acts of state and sovereignty" and could not be impugned in a Court of Justice. It was further argued that all such acts and documents or communications between Members of Government or Ministers in any way concerned with the employment and dismissal of public servants and officers were in their nature confidential and privileged, and that no action or suit could be based upon any such actions or Resolutions. Lastly, it was argued that the mere allegation that any of these acts of these public functionaries were actuated from feelings of malice will not make any difference, because the Courts will not and ought not to permit proof of any such malice being given: so it was argued by the learned Advocate General that the plaintiff's case must fail.

The case for the plaintiff shortly is the negation of these various propositions or the contention that they are too broadly stated, and that they do not apply to his case, and that if actual malice is proved there must be a decree in his favour.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

I propose to examine these various contentions at some length, not only because the matters involved in them are extremely important in themselves to the parties to this suit, but also because they are of grave importance to the public at large, and because I do not find that the particular question has ever risen before in a Court of Justice in India.

I may at once say that although the plaintiff had not had the advantage of being represented by Counsel during the arguments before me, and although he was confronted with the best legal talent, still I have no doubt he was assisted by kind legal friends outside this Court. The plaintiff has placed before me all the authorities which have or can have any bearing on the question I have to decide. I should have been extremely pained if for want of legal assistance the plaintiff could not have placed his case before me as it ought to be placed. I feel confident that the plaintiff will not suffer by reason of his not having the assistance of Counsel, as that fact has imposed on me the grave duty of inquiring into the law and authorities for myself, so that the question may be decided properly to the best of my ability and without prejudice to the plaintiff.

Now as to the first question, viz., whether this Court has jurisdiction to entertain this suit, I find that Statute 21 Geo. III, c. 70, provides, in its preamble and section 1, as follows:

* * * * * *

And whereas many doubts and difficulties have risen concerning the true intent and meaning of certain clauses and provisions in the said Act and Letters Patent, and by reason thereof dissension hath arisen between the Judges of the Supreme Court and the Governor General and Council of Bengal, and the minds of many inhabitants subject to the said Government have been disquieted with fears and apprehensions, and further mischiefs may possibly ensue from the said misunderstandings and discontents if a reasonable and suitable remedy be not provided:

* * * * * *

May it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the Governor General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or

order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor General and Council.

It will be observed that this exempts the Governor General and Council from the jurisdiction of the Supreme Court of Fort William, Calcutta, in respect of any matters done by them in their public capacity.

Statute 37 Geo. III, c. 142, section 11, extends these provisions to the Government of Bombay in the following terms:

Nor shall it be competent for the said Courts within their respective jurisdictions to hear or determine or to entertain and exercise jurisdiction in any suit or action against the Governor or any of the Council at the said Settlements of Madras and Bombay respectively, for or on account of any act or order, or any other act, matter or thing whatsoever, counselled, ordered or done by them in their public capacity or acting as Governor and Council.

This, it will be observed, exempts the Governor or any of his Council from the jurisdiction of the Recorder's Court which was in existence at that time.

Statute 4 Geo. IV, c. 71, section 7, provides as follows:

Provided always, that the Governor and Council...shall enjoy the same exemption and no other from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor General and Council at Fort William aforesaid for the time being from the jurisdiction of the Supreme Court of Judicature there already by law established.

Then Statute 21 and 22 Vic., c. 106 [Government of India Act of 1858] in section 67 has the following provision:

All treaties made by the said Company shall be binding on Her Majesty; and all contracts, covenants, liabilities, and engagements of the said Company made, incurred, or entered into before the commencement of this Act may be enforced by and against the Secretary of State in Council in like manner and in the same Courts as they might have been by and against the said Company if this Act had not been passed.

And, lastly, Statute 24 and 25 Vic., c. 104, section 9, provides as follows:

Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

And section 11 runs as follows:

Upon the establishment of the High Courts in the Presidencies respectively all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or Charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and to the Judges thereof respectively so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council.

So that section 9 invests the High Court with general powers in respect of all classes of jurisdiction, and by section 11 all acts, &c., which applied to the Supreme Court are to be taken to apply equally to the High Court so far as they are consistent with the provisions of the Act itself. The question, therefore, is whether the exemption from the jurisdiction of the Court enjoyed by the Governor and the Members of his Council in their public capacity is a provision which is inconsistent with the general provisions of this Act.

The matter has come before the Courts in other Presidencies and I need only refer to the case of the *Collector of Sea Customs* v. *Chithambaram*,(1) where after an exhaustive consideration of the question (the question was as to the exemption from the jurisdiction of the Court in revenue matters, but the Court considered generally the powers of the High Court in relation to public officers and public policy) in a most elaborate judgment Mr. Justice Kernan says as follows:

I do not lay any great stress on the fact that there is only one exception to

(1) (1876) 1 Mad. 89 at p. 121.

the wide jurisdiction given by the Act, though it is certainly significant. No doubt particular exceptions may exist in respect of part of a general subject legislated for, though such exception is not expressly given or referred to by the statute.

Such exception may arise when several statutes in *pari materia* are to be construed together, and all may stand together by treating the one statute referring to part as an exception. There is then no inconsistency. An instance of such an exception occurs in relation to the High Court jurisdiction, though not provided for in express terms, viz., the Governor and Members of Council, &c., are exempt from the jurisdiction (in respect of their official acts). This is the result of construing the Statute 24 & 25 Vic., c. 104, and the Charter, with the statutable provisions relating to the Governor and Council. But there is no inconsistency between the statutes: they may both stand together. One is an exception from the other. On principles of public policy the official acts of the Governor and Council could not be the subject of inquiry in any municipal Court.

It is, therefore, quite clear that the Governor in Council is exempt from the jurisdiction of the High Court in the same manner as he was exempt from the jurisdiction of the Supreme Court, and earlier still from the jurisdiction of the Court of the Recorder. Sir Courtney Ilbert, in his valuable book "The Government of India," page 251, section 105, treats the statute quoted by me as being still in force and applicable to the High Courts to the same extent as they applied to the Supreme Courts.

If, then, it were absolutely necessary for me to decide this question, I should be prepared to hold the same view as Mr. Justice Kernan. So far as it is necessary I hold that the Governor and the Members of the Council are exempt from the jurisdiction of this Court, so far as their acts in their public capacity are concerned. I am not dealing with malice. I hold no suit will lie in this Court in respect of public acts of the Governor and his Members.

Then comes the question whether this suit will lie against the Secretary of State. As no action will lie against the Governor and the Members of his Council, none will lie against the Secretary of State. This argument seems to me a sound one. Again, apart from the question of malice, supposing it was simply a public act, then if the Governor and the Members of his Council are exempt, the Secretary of State, whose liability can only be

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

traced through the Governor and Members of Council, would be equally exempt.

I now come to the question of liability of the Secretary of State independently of these statutes referred to above. Can the Secretary of State be sued, or in other words, could the East India Company be sued, if it was still in existence? I have already referred to the Government of India Act of 1858 (21 & 22 Vic., c. 106, section 67) as laying down that the Secretary of State for India in Council can be sued in respect of those matters for which the East India Company could have been sued. This question has been discussed in the following cases: *P. & O. Company* v. *Secretary of State*(1); *Nobin Chunder Dey* v. *Secretary of State*(2); *Secretary of State* v. *Hari Bhanji*(3); *Grant* v. *Secretary of State*(4); *Chatterton* v. *Secretary of State*.(5)

Now without going through these authorities in detail, I may say at once that they have established very clearly that the East India Company could only have been sued in regard to those matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there was express statutory provision, and, conversely, they establish that no suit would lie against the East India Company in respect of acts of state or acts of sovereignty.

The next question is, was the treatment of the plaintiff under the Resolution of the 6th November, 1899, which is complained of, an act of sovereignty? This involves the question whether public servants hold their office at the pleasure of the Sovereign or how? Whether they are liable to be dismissed at the will and pleasure of the Sovereign and those who represent the Sovereign? Now I think that Stat. 33 Geo. III, c. 52, sections 35 and 36, and Stat. 3 and 4 Will. IV, c. 85, sections 74, 76, very clearly lay down the right of the Sovereign to dismiss a public servant at pleasure. They at the same time provide that that right of the Sovereign is without prejudice to the right of the East India Company also to dismiss public servants at pleasure. Indeed, this appears

(1) (1861) 5 Bom. H. C. appx. at p. 14.
(2) (1875) 1 Cal. 11.
(3) (1882) 5 Mad. 273.
(4) (1877) 2 C. P. D. 445.
(5) (1895) 2 Q. B. 189.

to be the general, almost universal, principle of public law, quite apart from any statutory provision. I find this principle very clearly laid down in the following cases: *Chatterton* v. *Secretary of State*(1); *Grant* v. *Secretary of State* (2); *Mitchell* v. *The Queen* (3); *Dunn* v. *The Queen* (4); *Shenton* v. *Smith* (5); *Gould* v. *Stuart* (6); Ilbert's Government of India, page 161. They clearly establish the right of the Sovereign and of his Ministers, and those who represent him, to employ and dismiss public servants at pleasure on public grounds. Indeed, so strongly is this principle laid down, that in some of the cases to which I have referred, it is even stated that it is not in the power of any of the agents of Government to contract that public servants shall hold their appointments for any fixed period and that they shall not be liable to be discharged within that period. No doubt, the majority of these cases refer to the dismissal of military officers, but there are some which expressly refer to civil officers also. The case of *Dunn* v. *The Queen* (4) was the case of a Consular agent, who is a civil officer. *Shenton* v. *Smith*(5) was the case of a medical officer who was dismissed. In all these cases it was broadly laid down that you cannot limit the power of the Crown to dismiss its officers at pleasure. I must qualify this proposition to this extent, that the power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants, and it may not have application to such of the servants of Government as are not charged with functions which are in themselves the acts or the attributes of sovereignty. As the Secretary of State for India in Council is now liable to the same extent as the East India Company was, it seems to me to be extremely probable that the Secretary of State would be bound by his contracts with private individuals, where those individuals are not employed in carrying on those departments, which are essentially sovereign in their character. Sir Courtney Ilbert, in referring to the cases I have already referred to, says as follows at the bottom of page 161:

(1) (1895) 2 Q. B. 189, 194.
(2) (1877) 2 C. P. D. 445, 460, 463.
(3) (1896) 1 Q. B. 121 *f. n.*
(4) (1896) 1 Q. B. 116.
(5) (1895) A. C. 229.
(6) (1896) A. C. 575.

1902.

JEHANGIR M. CURSETJI *v.* SECRETARY OF STATE.

It is the practice for the Secretary of State in Council to make and formulate contracts with persons appointed in England to various branches of the Government service in India, *e.g.*, Educational officers, Forest officers, men in the Geological Survey, and mechanics and artificers in Railway and other works, and many of these contracts contain an agreement to keep the men in the service for a term certain subject to a right of dismissal for particular causes. Whether and how far the principles laid down in *Shenton* v. *Smith* (1) and *Dunn* v. *The Queen* (2) apply to these contracts is a question which in the present state of authorities cannot be considered free from doubt. A member of the Civil Service of India is expressly declared by his covenant to continue during the pleasure of Her Majesty. Tenure during good behaviour is subject to a few exceptions (*e.g.*, the Auditor of Indian Accounts) confined to persons holding Judicial offices. But the Judges of the Indian High Courts are expressly declared by statute to hold during pleasure. The difference between the two forms of tenure is that a person holding during good behaviour cannot be removed from his office except for such misconduct as would in the opinion of a Court of Justice justify his removal; whilst a person holding during pleasure can be removed without any reason for his removal being assigned.

Now this makes it necessary for me to consider a little more minutely what the position of the plaintiff was. He was Huzur Deputy Collector of Poona, and as such, I presume, he exercised magisterial, revenue and executive functions. As regards magisterial functions, there can certainly be no doubt, that would be functions that could be given to him only as an act of state or sovereignty. No private individual could employ a Magistrate; that is clearly an act of state. The same thing may be said with regard to revenue functions. Revenue is a matter (in its imperial sense) which relates to Government and the Crown: no private individual has a right to collect revenue. That again, therefore, is an employment which, essentially in its nature, partakes of the acts of the Sovereign. As regards the other executive functions, the same may be said, though they may not quite partake of the same character. But what I have said is quite enough to show that the plaintiff's employment must be taken, on the whole, to partake more of that character of employment which can only be given to him by the Sovereign or the agents of the Sovereign, and which could not be given to him by any private individuals. That being so, it is quite clear that the plaintiff was liable to be dismissed at the pleasure

(1) (1895) A. C. 229. (2) (1896) 1 Q. B. 116.

of the Crown or agents of the Crown, that is, the Government of Bombay. There is no allegation of the plaintiff that he was employed for any specified period, or that there were any regulations or conditions which limited the pleasure of Government. He held his appointment at the will and pleasure of Government.

Then comes the question whether the plaintiff, apart from his reduction and stoppage of promotion, has any cause of action for anything contained in the Resolution of the 6th November, 1899. I have already said that the power of dismissal must necessarily include all other powers, on the principle that the greater includes the less. The power to dismiss necessarily gives the power to reduce. He can have no cause of action in a municipal Court of Justice for his reduction. Then as to censure and reprimand, it follows from the power of dismissal that the Crown has also the power of censuring its officers. It is singular that I can find no authority, nor have I been referred to any, by either side, in which the principle underlying this question has been clearly established by authority. It seems to me that the power of censuring must be included in the power of dismissal. It may be at times unnecessary to dismiss an officer; a censure or reprimand may be a sufficient penalty. Therefore, though there is no express authority, I must hold it is open to Government by Resolution or otherwise to censure or reprimand an officer.

The plaintiff's case goes further. He says that it may be that Government have power to dismiss, to degrade, or to stop his promotion, but, he says, Government have no power to libel him, or slander him, and therefore, in this case, Government having been guilty of libel must be liable to the jurisdiction of this Court. Now let me first consider where this libel lies. It is contained in the Resolution, which in the plaint is described as the Resolution of the Government of Bombay, and it is so described in the notice. Taking it to be a Resolution of the Government of Bombay (apart from any question of malice for the present) as a document which is *per se* defamatory and which would be a libel in an ordinary case, the question is whether the plaintiff can maintain a suit against the Secretary of State and the Governor in Council. The cases of *Dawkins* v.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

Paulet,[1] *Dawkins* v. *Rokeby*,[2] *Henessey* v. *Wright*,[3] *Grant* v. *The Secretary of State*,[4] *Chatterton* v. *The Secretary of State*,[5] *Oliver* v. *Bentinck*,[6] lay down very broadly that all communications between Ministers of State with regard to public matters or public functions, and all expressions of opinion on the conduct of public duties by the officers of State, and all records and documents in which the opinions or orders of public officers relating to other public officers are contained, are absolutely privileged, and that they are privileged to such an extent that they cannot be compelled to be produced, and that even if the defendant or any party in whose possession that document may be is willing to produce it, the Court ought not to notice it, and ought not to allow that document to be put in or produced. They further lay down that if *primâ facie* the document is privileged, if *primâ facie* it purports to be an official communication which would be privileged, then no allegation of malice would be allowed, and no proof of malice will take away the privilege. It then comes to this, that any charge of libel against a public officer must fail if it is contained in a document which is privileged, because that document cannot be produced and so is incapable of being proved in Court. Therefore you have a public officer *primâ facie* acting in his public capacity, and once you have the document *primâ facie* a privileged one, no action can be based upon any libel, however malicious that may be, contained in that document. This view is supported by the decision in *Dawkins* v. *Paulet*,[1] in which case Mellor and Lush, JJ., delivered a judgment, in which Mr. Justice Hayes agreed, but from which Chief Justice Cockburn differed. Mr. Justice Mellor, at page **113**, says:

To this plea the plaintiff replied that the words in the declaration mentioned were written and published of actual malice on the defendant's part and without any reasonable, probable or justifiable cause and not *bonâ fide* or in the *bonâ fide* discharge of theldefendant's duty as such superior officer as aforesaid. To this *replication* the defendant demurred, and as one ground of demurrer alleged that no action is maintainable in respect of words written and published under the

(1) (1869) L. R. 5 Q. B. 94.
(2) (1873) 7 E. & Ir. Ap. 744.
(3) (1888) 21 Q. B. D. 509.
(4) (1877) C. P. D. 445.
(5) (1895) 2 Q. B. 189.
(6) (1811) 3 Taunt. 456.

1902.

JEHANGIR M CURSETJI v. SECRETARY OF STATE.

circumstances stated in the plea, even if written and published maliciously and without reasonable or justifiable cause.

Then he goes on:

I am of opinion that such replication is bad and is no answer to the matters alleged in the plea. If it was the defendant's duty to write such letters and to make such reports touching the plaintiff's conduct, qualifications and fitness as an officer, which is admitted by the replication, I do not see how it makes the defendant's conduct actionable because he did what it was his duty to do, maliciously and not *boná fide* in the discharge of his duty.

Dawkins v. *Rokeby* (1) is to the same effect and *Hennessey* v. *Wright* (2) lays down the same doctrine.

Then we come to the case of *Grant* v. *Secretary of State*,(3) which is a decision of Mr. Justice Grove, who goes very elaborately into all the previous authorities on the point. He cites (page 461) a passage from the judgment of Dallas, C.J., in *Gidley* v. *Lord Palmerston*,(4) which contains the following quotation from a judgment of Ashurst, J.:

In great questions of policy we cannot argue from the nature of private agreements......... Great inconveniences would result from considering a Governor or Commander as personally responsible .... No man would accept of any appointment of trust under Government under such conditions.

And also one from the judgment of Mr. Justice Buller:

Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.

Dallas, C.J., for himself said:

I am aware that these cases are not in their circumstances precisely similar to the present, and, perhaps in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done; but in their doctrine they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which from the very nature would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and, though it is to be presumed that action improperly brought will fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.

(1) (1873) 7 E. & Ir. Ap. 744.
(2) (1888) 21 Q. B. D. 509.
(3) (1877) 2 C. P. D. 455 at pp. 461, 462.
(4) (1822) 3 B. & B. at p. 286.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

Grove, J., adds:

It is true this was an action of contract; but the reasons given in the judgment apply generally to 'an action against a public agent for anything done by him in his public character or employment,' and, as it appears to me, apply *à fortiori* to an action of tort where there is no charge of personal action and personal malice.

It is further important to observe that at page 463 Grove, J., says:

I might decide this point upon the narrower ground that there is no averment that the defendant personally ordered, sanctioned, or knew of the publication in the Gazette, and that the statement in the order itself, that it is under the authority of Government, it being signed "Commander-in-Chief," is no sufficient allegation that the publication was the act of the defendant; but I prefer deciding it upon the broader ground, as, if I am right as to that, great expense may be saved to the plaintiff. I will add that, if I am right as to the first point, viz., that the act of removal is not within the cognizance of this Court, it seems to me that the publication in the official Government record of that act, being obviously necessary for the information of those whom it may concern, is in my judgment also not within the competence of this Court.

Lastly, *Chatterton* v. *The Secretary of State*(1) seems to me to go much further than is necessary for me to go in this case. It lays down generally that "a communication relating to State matters made by one officer of State to another officer in the course of his official duty is absolutely privileged and cannot be made the subject of an action for libel." This decision is the decision of three eminent Judges; and Lord Esher, Master of the Rolls, at page 190 of the report says:

The plaintiff in this case has brought an action of libel against the Secretary of State for India in Council. It would seem from the form of the action that it is meant to be brought against him in his official capacity, treating him as a corporation, not against him personally. But it would have made no difference if it had been brought against him as an individual. The substance of the case is that it is an action brought against him in respect of a communication in writing made by him as a Secretary of State, and, therefore, a high official of the State, to an Under Secretary of State in the course of the performance of his official duty. The Master, the Judge at Chambers, and the Divisional Court have all come to the conclusion that the action is one which cannot by any

(1) (1895) 2 Q. B. 189.

possibility be maintained; that it is not competent to a Civil Court to entertain a suit in respect of the action of an official of State in making such a communication to another official in the course of his official duty, or to enquire whether or not he acted maliciously in making it. I think that conclusion was correct. The authorities which have been cited to us appear to show that, as a matter of clear law, a Judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not. It follows that such an action as this cannot possibly in point of law be maintained; and, that being so, to allow it to proceed would be merely vexatious and a waste of time and money. The reason for the law on this subject plainly appears from what Lord Ellenborough and many other Judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of State his freedom of action in a matter concerning the public weal. If an officer of State were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be questioned before a jury, would clearly be against the public interest and prejudicial to the independence necessary for the performance of his functions as an official of State. Therefore the law confers upon him an absolute privilege in such a case.

Further on at page 192 Kay, L.J., says:

I am of the same opinion. I will assume that the statement of claim sufficiently alleges that the statement made by the defendant, of which the plaintiff complains, was untrue, and that it was made with malicious intent. But assuming that to be so, the question arises whether under the circumstances that statement is not absolutely privileged, and therefore *one* upon which no action can be founded.

Then he goes into the question and holds that no action can be founded, and that it is absolutely privileged.

Now, applying the principles laid down in these authorities, it seems to be clear that if the Resolution complained of be brought into Court, it must be held to be absolutely privileged; that the plaintiff would not be able to have it produced in Court; even if it was produced in Court, it would be my duty to refuse it to be put in evidence, and that no secondary evidence could be led. The result must necessarily be that plaintiff must fail because the charge of malice cannot be allowed to be proved against a public functionary.

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

On these authorities and on the grounds I have stated, I must find on the first issue for the defendant, that this Court has no jurisdiction over the defendant. On the second issue, viz., whether this suit is maintainable against the defendant, that also I must hold against the plaintiff, and in favour of the defendant. The third issue, viz., whether the plaint discloses any cause of action, I hold in favour of the defendant and against the plaintiff. On the fourth issue, viz., whether having regard to the notice of action given by the plaintiff he is entitled to maintain this suit in respect of false and malicious libel, I hold in favour of the plaintiff and against the defendant, in that I hold the notice given to be sufficient. The fifth issue, viz., whether if the first four are found in favour of the defendant the statements in the Resolution are not absolutely privileged, I find in favour of the defendant and against the plaintiff. The result is that the plaintiff must be non-suited and his suit dismissed.

The plaintiff appeals to me and says that all that he wants is a public inquiry into his conduct. I have already stated that I am debarred from entering into that question on the ground of express statutory law and also on the ground of public policy. I cannot in this Court give him any redress. But it does not follow that because the plaintiff has mistaken his remedy and come to me, therefore there is no remedy for him at all. The maxim on which he relied, that there can be no wrong without remedy, is a maxim of universal acceptance, and the fallacy of the plaintiff's reasoning lies in this, that he assumes justice only lies within the four walls of this Court; he thinks that there is no justice in the Secretariat, or in the Council of His Excellency the Governor, and also that he cannot obtain it from the Government of India, or the Secretary of State, or even, as a last resort, from Parliament.

I feel perfectly certain that if it be a fact—as to which I give no opinion—that the plaintiff's conduct has really been misunderstood or misconstrued by Government, and if it be a fact—as to which also I give no opinion—that he is able to give proper explanation of what he did, and if it further be a fact that the manner in which he acted was consistent with the

1902.

JEHANGIR M. CURSETJI v. SECRETARY OF STATE.

practice of other people, all I can say is that he should go to proper authorities, and I have not the smallest doubt that if he makes a proper representation in the proper quarter his representation will be considered by the proper authorities. The mere fact that I do not entertain his suit does not debar the Government from taking such action as in the interests of public service, and having regard to the circumstances of this case, it may think it right and expedient to adopt. I can give no opinion on that point. All I say is that the plaintiff is mistaken in coming before me. He must address the proper authorities for redress, and redress will be given to him if he deserves it.

This suit is dismissed with costs. I leave it to Government whether they will enforce the costs or not.

Suit dismissed.

Plaintiff in person.

Attorney for defendant—*Mr. E. F. Nicholson,* Solicitor to Government.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston; and, on reference, before Mr. Justice Chandavarkar.

TRIBHOVAN CHUNILAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

1902. *December 9.*

Municipality—Bombay District Municipal Act (Bombay Act VI of 1873), sections 33, 42—Private street—Balcony projecting over private street—Notice to Municipality—Disobedience of the permission granted by Municipality.

Held, by *Chandavarkar* and *Aston,* JJ. (Batty, J., dissenting), that under the District Municipal Act (Bombay Act VI of 1873) a Municipality has power to regulate or control the construction of balconies projecting over private streets.

* Second Appeal No. 258 of 1902.