

1. Prozessuale Fragen

Alexander Chaffers before the courts of Berlin

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I. Introduction

“τὸν δὴ τοσούτοις ἀθρόοις τῶν πολιτῶν ἔχθραν ἐπ’ οὐδενὶ τηλικαύτην ἀράμενον πόσῃ πονηρίᾳ καὶ θρασύτητι ταῦτα χρὴ νομίζειν πράττειν;”¹ – such might be our reaction upon learning of Alexander Chaffers’ involvement in legal proceedings not merely in England, but in Germany as well. For Alexander Chaffers (1821 – 1899)² is an infamous figure in English legal history. It is to his excessive use of the legal system that we owe the creation of an entirely new legal institution, that of the vexatious litigant – a person who is banned from commencing further legal proceedings without the prior approval of the Courts as a result of his past abuses of every citizen’s unrestricted right to commence litigation.³ As Professor Michael Taggart

1 *Demosthenes* (ed. M.R. Dilts), *Orationes*, Oxford : O.U.P. 2005, p. 208 (*Against Midias*, section 132) – “Now if he provoked such serious but groundless quarrels with so many citizens at once, what degree of wickedness and recklessness may we expect from him now?” (translation from the Perseus website. I note, however, a point of disagreement with it in *Demosthenes* (ed. Douglas MacDowell), *Against Meidias*, Oxford : Clarendon 1990, p. 330.)

2 The dates are taken from the general biographical note in *Frederic Boase*, *Modern English Biography* Vol. IV, London : Frank Cass 1965, coll. 627f.

3 For more details and a longer history, see, e.g., *Jordan Tutton*, *Vexatious Litigant Orders in South Australia : Time for a New Look?*, (2021) 42 *Adelaide Law Review* 551; *Simon Smith*, *Maverick Litigants : A History of Vexatious Litigants in Australia 1930 – 2008*, Elwood : Maverick 2009.

As I know from experience as well as book learning, the declaration of a person as a vexatious litigant generally does not spare the Courts : they are simply inundated with the vexatious litigant’s applications for leave to commence proceedings. Such a declaration does however spare the vexatious litigant’s would-be opponents from the trouble and stress of litigation, as the Courts almost always deny leave for very good reasons.

Further information on this topic may be found in *Grant Lester/Beth Wilson/Lynn Griffin/Paul Mullen*, *Unusually Persistent Complainants*, (2004) 184 *British Journal of Psychiatry* 352 (with follow-up correspondence at (2004) 185 *British Journal of Psychiatry* 175f); *Morissette J.A.*, *Querulous and Vexatious Litigants as a Disorder of a Modern Legal System*, (2019) 24 *Canadian Criminal Law Review* 265, 283; *Paul*

has demonstrated, Chaffers started his notorious career as a litigant in England as a result of his confrontation with Professor Sir Travis Twiss Q.C. in the early 1870s.⁴ Chaffers, by the end of his career of vexatiousness, had sued the entire cast of a Gilbert and Sullivan operetta and more – not on the stage, but in real life : his defendants included the Prince of Wales (later King Edward VII), the Archbishop of Canterbury, Lord Chancellors, the Master of the Rolls, assorted Judges, the Speaker of the House of Commons and several other dignitaries.⁵

But the Twiſſ matter, to adopt for a moment the spelling of “Twiss” used in some German newspaper reports of the day, was not quite the beginning of Chaffers’ career as a litigant : as Professor Taggart discovered from a brief report in the Times in August 1867,⁶ Chaffers was prosecuted in the City Court of Berlin in that year on a charge of insulting a Prussian civil servant in the execution of his duty under laws originally designed for newspapers. Professor Taggart, I assume, lacked the linguistic skills necessary to pursue this discovery.⁷ Possessing them and standing on the shoulders of his (or his research assistants’) discovery, I have analysed

Mullen/Grant Lester, *Vexatious Litigants and Unusually Persistent Complainants and Petitioners : from Querulous Paranoia to Querulous Behaviour*, (2006) 24 *Behavioural Sciences & the Law* 333.

4 *Michael Taggart*, *Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896*, (2004) 63 *Cambridge Law Journal* 656.

5 *Taggart*, (2004) 63 *Cambridge Law Journal* 656, 677.

6 “Foreign Intelligence”, 20 August 1867, p. 8; *Taggart*, (2004) 63 *Cambridge Law Journal* 656, 658.

7 In addition to a command of German, one also needs to be able to read the old German *Kurrentschrift*, afterwards called *Sütterlin* after the name of the developer of a later version; it was removed from school curricula on Hitler’s personal order in 1941 as being antiquated and a barrier to the conquest of the world by the German language and because of alleged Jewish influence in its history. There is an interesting note on this in *Friedrich Beck*, „Schwabacher Judenlettern“ : Schriftverruſſ im Dritten Reich, in : *Botho Brachmann/Helmut Knüppel/Joachim-Felix Leonhard/Julius Schoeps*, *Die Kunst des Vernetzens : Festschrift für Wolfgang Hempel*, Berlin 2006, pp. 251ff.

Fortunately I taught myself this obsolete and difficult script many years ago, and in the Prussian file on the litigation most of the materials are written very clearly. The exception is the writing of the Prussian Minister of Trade, Commerce and Public Works, Graf von Itzenplitz (an amusing name, all the more so for today’s German speakers given its similarity to that of the children’s book character Robber Hotzenplotz). Herr Minister Graf von Itzenplitz wrote in the illegible scrawl that is the prerogative of the busy and important man. The story told here has therefore had to be constructed largely without his direct input, but fortunately his subordinates and others writing to him sometimes began their memoranda to him by summarizing what he had just written.

the surviving file, which is not from the records of the Courts themselves but from the Prussia's Ministry of Trade, Commerce and Public Works⁸ (hereinafter "the Prussian file"), on the case against Chaffers – his first-ever run-in with the law – and found an interesting supplement to the story of the common-law world's first officially declared vexatious litigant.

II. The facts

The charge of insulting a Prussian civil servant in the exercise of his duty related to August Ludwig Freiherr von der Recke (1809 – 1869).⁹ As the director of the Second Division (Railway Matters) of the Prussian Ministry of Trade, Commerce and Public Works¹⁰ the Freiherr was, as the history of his aristocratic house puts it,

an important pioneer of the rising railway system, and especially of the extension of the network. In the Trade Ministry in Berlin he was chief of the Railway Division and responsible for a whole series of treaties with other German and European states which regulated the railway connexions between Prussia and neighbouring countries. On this basis he received numerous decorations, including Russian, Dutch, Luxembourgian, Hanoverian, Saxon and of course also Prussian ones. For his summer residence he acquired a villa in Schmiedeberg in the Giant Mountains. He was a man who did very well for himself.¹¹

8 GStA (Secret State Archives, Prussian Cultural Heritage Foundation), I. HA Rep. 120, Anhang Nr 18. It is also apparent from the Prussian file that other files on the matter existed, most obviously the City Court's own file. As the State Archives of Berlin's website indicates, the Court's files perished in the Second World War. Finally, there are also three files in the Secret State Archives, Prussian Cultural Heritage Foundation on the building of the Tilsit-Insterburg railway specifically (the principal file is I. HA Rep. 89, Nr 29666 – Eisenbahn von Memel über Tilsit nach Insterburg). I read all of them but nothing of present relevance appears from them.

9 Sometimes "von der Reck" in the sources; in this essay, I have silently corrected any source that omits the final "e" in the interests of simplicity and consistency.

10 *Königlich Preußischer Staats-Kalender für 1865*, Berlin s.d., p. 210.

11 *Wilhelm Freiherr von der Recke, Vom Burgherrn zum Bürger : 750 Jahre Freiherrn und Barone von der Recke sowie der Grafen von der Recke von Volmerstein – eine Familiengeschichte 1265 – 2015*, Heidelberg 2015, p. 401.

On 18 June 1866,¹² Chaffers wrote a letter to this gentleman which contained the following passage : ‘How Herr Eduard vom Hof expended the principal part of the first-mentioned sum of £4000 I know very well, as I learnt the details from his own lips, and you also know very well what use has been made of a great part of such sum’.¹³ Freiherr von der Recke read this as an accusation that he had received a bribe in the matter in question, the building of a railway between Tilsit and Insterburg in East Prussia, on which he had indeed been in contact with Eduard vom Hof.

Chaffers directed a further letter to the Prussian consul in London on 8 August 1866, which ran in part, ‘vom Hof has according to his own explanations not merely bribed an official in the Prussian Ministry of Trade but must also have paid Freiherr von der Recke £5000 sterling before the concession could be obtained’.¹⁴ This was a very clear accusation, and the sum of the alleged bribe has also increased since the earlier letter. Making such a claim against a man as influential and well-connected as Freiherr von der Recke was clearly a dangerous game – receiving bribes would grossly contradict the Prussian ethos of duty, abstemiousness and selfless devotion to the public good – and the Freiherr must have passed these accusations on to the public prosecutor at the Berlin City Court¹⁵ (which has long since been replaced by other institutions). And it was huge amount of money : by way of comparison, £5000 was also the annual salary of a superior Judge in England around this time.¹⁶ Charges were laid against Chaffers under para. 102 of the Prussian Criminal Code of 1851, which did indeed prohibit, among other things, offering insults to civil servants in

12 The report in the „Kölnische Zeitung“ about to be mentioned states consistently that the date was 8 June 1866. As the Prussian file states 18 June 1866 with equal consistency, I have preferred that date.

13 Prussian file, application for Chaffers’ pardoning, 20 March 1868. The application states that Chaffers wrote in English and that what is quoted in the application is a translation into German. I have had to translate what is written back into English for present purposes. It is most unlikely that my re-translation is exactly what Chaffers wrote, but it should capture the sense. I have also decided to refer to vom Hof uniformly by that name throughout this essay and silently to correct any source that spells his name in a variant way such as “vom Hoff”.

14 See above, fn 13, including the note on re-translation.

15 It is true that, under § 103 of the Prussian Criminal Code, the Freiherr did not need to make a formal application for charges to be brought – but he or someone must have informed the prosecutor of the contents of the letters.

16 *Supreme Court of Judicature Act 1873* (U.K.) s 13.

the execution of their duty.¹⁷ The paragraph had originally appeared in the Prussian Press Act of 30 June 1849,¹⁸ but the Criminal Code of 1851 made it generally applicable.

For his part, Eduard Franz Bernhard vom Hof is a more mysterious figure. The Prussian file¹⁹ does contain some information about him from a police report. He was born on 2 October 1807 and had lived for about twenty years in England, which, it will be recalled, shared the same sovereign as vom Hof's native Hanover until 1837; by the time of the events involving Chaffers he had, however, returned to the area around Hanover; he owed his wealth to speculation involving English and German capital and German railways. Gottfried Semper, the famous architect, met vom Hof on his arrival in London in 1850 and referred to him as 'a kind of *homme d'affaires*'.²⁰ Semper himself had a more immediate reason for visiting England : he, like Richard Wagner, was on the run from the authorities after

17 Preußische Gesetzsammlung 1851, p. 122. The full text of the first paragraph was : § 102 [Beleidigung von Staatsorganen]

Wer durch Wort, Schrift, Druck, Zeichen, bildliche oder andere Darstellung eine der beiden Kammern, ein Mitglied der beiden Kammern, eine andere politische Körperschaft, eine öffentliche Behörde, einen öffentlichen Beamten, einen Religionsdiener, ein Mitglied der bewaffneten Macht, einen Geschworenen, einen Zeugen oder Sachverständigen, während sie in der Ausübung ihres Berufes begriffen sind, oder in Beziehung auf ihren Beruf beleidigt, wird mit Gefängniß von einer Woche bis zu einem Jahre bestraft.

The remaining two paragraphs concerned aggravating and mitigating factors in sentencing.

By the time in question here, this description of crime had only a little longer to last : in the Criminal Codes of 1870 for the North German Confederation and 1871 for the *Deutsches Reich*, there was no separate provision dealing with insults offered to official personages. The substantive law applicable was the same for all citizens, leaving aside the *lèse-majesté* laws and a minor procedural provision of which the present-day successor is para. 194 (3) of the German Criminal Code.

18 Para. 23 of that Act, Preußische Gesetzsammlung 1849, pp. 230f; Georg Beseler, Kommentar über das Strafgesetzbuch für die preussischen Staaten und das Einführungsgesetz vom 14. April 1851, Leipzig 1851, p. 270. However, the French Penal Code of 1810 included (para. 222) a comparable and generally applicable provision, which was known in Prussia from the law of some of its westernmost dominions. Para. 102 was enacted without parliamentary consent by the government alone owing to the lack of action by the legislature : Kurt Koszyk, Deutsche Presse im 19. Jahrhundert Teil II, Berlin 1966, pp. 121f.

19 Police presidium to Graf von Itzenplitz, 29 February 1868.

20 Dieter Weidmann, Through the Stable Door to Prince Albert? On Gottfried Semper's London Connexions, (2014) II Journal of Art Historiography 1, 18; see also Michael Gnehm/Sonja Hildebrand/Dieter Weidmann (eds.), Gottfried Semper : London Writings 1850 – 1855, Zürich 2021, p. xvi.

participating in the failed uprising of 1849 in Saxony's capital, Dresden. He is, of course, the eponym of the famous opera house in Dresden.

The roughly fifty-kilometre-long railway line between what are now, since the Russian takeover of northern East Prussia in 1945, Sovetsk (Tilsit) and Chernyakhovsk (Insterburg) was opened in 1865, but the final Royal grant of the concession to build it had occurred in December 1862²¹ according to a new method of financing and construction based somewhat on the English model and using English capital, which is no doubt where vom Hof came into the picture and which also made this railway line something of a milestone in Prussian railway history.²² As Professor Taggart records Chaffers' slide towards bankruptcy from 1866 to 1868,²³ his decision to bring these accusations in 1866 relating to an alleged bribe four or more years in the past may have been a part of some sort of attempt to salvage his finances – by fair means or foul.

What happened in the trial of the charges before the City Court of Berlin on 6 November 1867 is fortunately recorded in the "Kölnische Zeitung",²⁴ a prominent newspaper of Cologne with a national readership – Cologne, despite its distance from Berlin, was part of Prussia. (References in this

21 Preußische Gesetzsammlung 1863, pp. 5ff.

22 Ralf Roth, *Das Jahrhundert der Eisenbahn : die Herrschaft über Raum und Zeit 1800 – 1914*, Ostfildern 2005, pp. 115-117 (the latter page contains a photograph of the inaugural committee of the railway company, without names); Dieter Ziegler, *Eisenbahnen und Staat im Zeitalter der Industrialisierung*, Stuttgart 1996, pp. 74, 158-160. The photograph also appears in Wolfgang Klee, *Preußische Eisenbahngeschichte*, Stuttgart 1982, pp. 150, 218, and is stated to come from the author's personal collection.

There is still further background to all of this in the Prussian constitutional conflict of 1862 – 1866 and the career of the railway baron Bethel Henry Strousberg. This is too remote from the present topic to be considered in the space available here.

23 Taggart, (2004) 63 *Cambridge Law Journal* 656, 657, 663.

24 9 November 1867, p. [7]. I also searched prominent Berlin newspapers without success. As newspaper digitisation has not advanced as quickly in Germany as it has in some other countries, the search method was usually the old-fashioned one of trying to locate reports in microfilms by looking at every single news item on likely dates. It may well be that smaller or more distant newspapers also contained reports, but I cannot search everything.

I have translated the newspaper's '*in contumaciam*' as "*in absentia*" given the connotations of "contumacious" in English. The insertions in square brackets are not mine, but appear as editorial insertions in the newspaper report itself. In the original report also, what is stated to have been the contents of the letter of 8 August is not enclosed in quotation marks.

report to a letter written on 8 June are clearly an error for 18 June – the first letter from the Prussian file quoted above.)²⁵

The accused neither appeared personally nor had employed counsel. Thus the proceedings took place *in absentia*. Several years ago a Hanoverian, Eduard vom Hof, was resident in London. Seeking from there to obtain the concession for the construction of a railway from Tilsit to Insterburg, he sought to begin negotiations with Ministerial Director Freiherr von der Recke. At the same time he made contact with the accused, advocate Chaffers, to whom he later owed £1500. On 8 June 1866 Chaffers wrote to Freiherr von der Recke in approximately these terms :

In relation to the Tilsit-Insterburg railway I take the liberty of stating as follows. Mr vom Hof owes me £1500; I advise you [Freiherr von der Recke], before you become involved with him, to check his antecedents; in London he lived as a knight of industry; he [Chaffers] had repeatedly given him a few shillings to save him from famine. Vom Hof did not hesitate to state, loudly and openly, that he would receive the concession thanks to the influence of Freiherr von der Recke; vom Hof had received £6000 for obtaining the concession.

At the end it was then stated, 'How vom Hof expended £6000 sterling I know very well, and how a greater part of it has been expended, you also know very well. As a suit against vom Hof would be fruitless, I ask for your assistance.' On 14 July and on 8 August Chaffers then wrote to the Prussian Consul-General in London; in the second letter he said, among other things : Herr vom Hof had said to a person resident in London that he had had to pay £5000 to Freiherr von der Recke before he could receive the concession and that various other officials of the Trade Ministry had also been bribed. — As all these claims were invented and sworn by vom Hof himself to be untrue, the accused was convicted and sentenced to six weeks' imprisonment. Concerning the criminal liability of the accused as a foreigner the Court explained : the insult was already committed in effect in the letter dated 8 June sent to the person insulted, and that occurred in Prussia as the letter was delivered here.

By the sounds of it, Chaffers expected the Freiherr to pay off vom Hof's debt of £1500 to Chaffers with money from the alleged bribe. If vom Hof

25 See above, fn 12.

disputed the debt, the report did not mention it, so he might well have conceded it, and indeed the reported evidence of its existence may have come from him. If the debt really existed and vom Hof was not worth suing for it, here is one reason for Chaffers' lack of funds in the late 1860s; but neither Chaffers nor anyone else gives any other reason for his poking his nose into this particular affair : it is not alleged, for example, that he represented a rival consortium seeking the same concession.

Although there are evidently some differences, beyond the error in the date, between this newspaper report and the Prussian file in the archives – at least this suggests that the reporter was actually present in Court and writing down the proceedings as best he could as they happened – the Prussian file does confirm that the sentence was indeed six weeks' imprisonment. The final sentence of the report is also confirmed by a passing reference in the Prussian file²⁶ to para. 3 of the Prussian Criminal Code of 1851, which expressly permitted the punishment of foreigners for crimes committed in Prussia. It still seems a bit of a stretch to convict Chaffers solely by reason of what he wrote in June, which was hardly a clear accusation, while the letters to the consul in London in July and August were not delivered in Prussia. It should however be mentioned that, although the identities of the Judge(s) involved in the conviction on 6 November 1867 can no longer be determined, Prussia, like all the German states, had by this time developed strong principles protecting the independence of the Judiciary which were zealously defended,²⁷ even if many other general democratic principles remained for future adoption; so we should not conclude, in the absence of any good reason to do so, that the Judge(s) concerned had been merely doing the bidding of the executive government.

III. Amnesty and further proceedings

It may be assumed that Chaffers was not merely absent from the courtroom, but safely back in England while all this was going on so that the chances of his serving the six weeks' imprisonment were low. If nothing else, Chaffers' impecuniosity might have precluded his attendance.²⁸ Pre-

26 Prussian file, application for Chaffers' pardoning, 20 March 1868.

27 *Michael Stolleis*, *Geschichte des öffentlichen Rechts in Deutschland* 2. Band : Staatslehre und Verwaltungswissenschaft 1800 – 1914, Munich 1992, pp. 116f.

28 See above, fn 23.

sumably the Prussian authorities properly notified Chaffers of the pending proceedings, although it is conceivable that notifications went astray or that he did not understand their significance, particularly if his German was wobbly or non-existent (he wrote to Freiherr von der Recke in English).²⁹ At any rate, it is also safe to assume that Chaffers obtained news of his conviction. If this did not occur in any other way, someone would surely have brought to his attention the report in the Times³⁰ and that would have put him on notice.

After the conviction, somebody recalled the amnesty declared on 20 September 1866³¹ to celebrate the Prussian defeat of Austria on the battlefield a few weeks beforehand. On that day “We William, King of Prussia etc.” had declared an amnesty for those convicted under various paragraphs of the Criminal Code, including para. 102 under which Chaffers had been charged. The amnesty decree left open the possibility of its application to those who were convicted after its publication of crimes committed beforehand, subject to a report by the Minister of Justice. This was the category into which Chaffers fell, as his last letter had been written about six weeks before the amnesty, on 8 August 1866, while he was convicted in November of the following year.

The long interval suggests a reason why the amnesty might have been forgotten in Court; the delay may well be due to attempts to contact Chaffers in London and secure his attendance; if Chaffers had been represented by counsel at the hearing in November 1867, perhaps the amnesty would have precluded his conviction in the first place. The amnesty decree also suggested that in such cases as Chaffers’ the Justice Ministry might initiate proceedings for a pardon of its own motion. The City Court of Berlin appears to have set the wheels in motion for a pardon itself, and it obtained the agreement of the *Kammergericht*, the appellate Court above itself.³² There was little discussion, at least as far as the Prussian file reveals, although (it will be recalled) that file is not that of the Courts themselves : Chaffers was duly pardoned by the King of Prussia on 8 May 1868.³³ It is possible that the Courts realised, or were made to realise by a representative of Chaffers, that an appeal to the *Kammergericht* would inevitably succeed

29 See above, fn 13.

30 See above, fn 6.

31 *Königlich Preussischer Staatsanzeiger*, 21 September 1866, p. 3267.

32 Prussian file, memoranda of 20 March 1868; 3 April 1868.

33 There is a copy of the King’s pardon of that date in the Prussian file. The previous day had coincidentally been that of Lord Brougham’s death.

because the only clear accusation of corruption had been made outside the Court's jurisdiction to the Prussian consul in London, while the accusation that was made in the letter delivered in Prussia, that of 18 June 1866, was insufficiently clear.

It is also worth noting that Prussia annexed the Kingdom of Hanover on the very same day as the amnesty, 20 September 1866,³⁴ deposing the blind King George V (Ernest Augustus, Duke of Cumberland) – for Hanover had chosen the wrong side in the war and backed Austria. The Prussian annexations of 1866 are now seen as a prelude to the full unification of Germany in January 1871. I do not know whether the Hanoverian vom Hof was personally dismayed by the disappearance of his country in 1866, as many in the former Kingdom were, but it is worth bearing in mind the possibility of some reciprocal bad feeling between him and Prussian officials in what follows.

For there is a curious reference in a report on vom Hof by the police commissioner's office on 29 February 1868 to the Minister of Trade, Commerce and Public Works.³⁵ The report states that 'as far as the character of vom Hof is concerned, the police commissioner would not think it right to omit to mention that vom Hof, in the investigation against the advocate A. Chaffers in London for insulting a public official, played a very peculiar role as a witness'. This statement (the original German is : *eine sehr eigenthümliche Rolle als Zeuge gespielt hat*) is unfortunately not elaborated upon. As we saw in the report of the "Kölnische Zeitung", vom Hof had sworn in Court that Chaffers' claims of bribery were untrue and Chaffers was convicted.

The Prussian file now indicates that proceedings were considered against vom Hof himself, and in one place it is stated that he was now also accused of insulting a public official.³⁶ There may have been some political pressure on the public prosecutor's office here, for the Prussian Minister of Trade,

34 *Gesetz betreffend die Vereinigung des Königreichs Hannover, des Kurfürstentums Hessen, des Herzogtums Nassau und der Freien Stadt Frankfurt mit der preußischen Monarchie*, Preußische Gesetzsammlung 1866, p. 555.

35 This too is in the Prussian file. An ellipsis could be inserted into the quotation that follows to indicate some omissions, but I have not done this in my translation owing to the necessarily different word order in the two languages concerned.

36 Prussian file, public prosecutor to von Itzenplitz, 16 February 1869.

Commerce and Public Works, Graf von Itzenplitz,³⁷ was a strong backer of the new system of railway construction and financing pioneered by the Tilsit-Insterburg railway. Perhaps, also, vom Hof had been shown by the Court proceedings in November 1867 to have spread the rumours about bribery himself. The investigations did not get very far, however. Chaffers and an engineer named James Hendry refused to give evidence – at this point if not long beforehand, Chaffers must have been informed of the previous proceedings against himself – and neither could be compelled to do so as long as they remained in England. On the other hand, one Davis, whose role in this drama does not appear from the Prussian file, demanded for the trouble of giving evidence the sum of twenty-five guineas (£26/5/-) – no very small amount of money, as unskilled workers managed to support a family for a whole year for around this sum; the Prussian Minister of Justice refused this offer as payment might obviously reflect upon the veracity of the statement.³⁸

At another point the public prosecutor reported to the Minister of Trade, Commerce and Public Works³⁹ that without Chaffers' evidence a prosecution of vom Hof could not succeed as the evidence would be insufficient, and Chaffers himself was an incompetent witness under para. 356 (8) of the Prussian *Criminal-Ordnung* (in modern terms, the code of criminal procedure); and there was of course also the amnesty which might make the prosecution of vom Hof merely a waste of public funds. Para. 356 (8) declared incompetent as witnesses 'all those who participated either in the crime about which their evidence is required, or to their knowledge, whether directly or indirectly, in the fruits of the crime',⁴⁰ although a proviso permitted evidence from such persons if it were not sworn. The reference to this paragraph is also consistent with the idea that vom Hof was to be charged as one who also spread the rumours of bribery, as indeed Chaffers' letters had suggested.

37 See above, fn 7. In the Prussian file, it is noticeable that he sent quite a few minutes to his officials apparently asking for updates on this matter, but they are unfortunately illegible.

38 Prussian file, memoranda of 17 August 1868 (public prosecutor to von Itzenplitz); 8 February 1869 (Minister of Justice to public prosecutor); 16 February 1869 (public prosecutor to von Itzenplitz).

39 Prussian file, 19 March 1868.

40 *Allgemeines Criminalrecht für die preußischen Staaten*, Erster Theil : Criminal-Ordnung, Berlin 1806, pp. 131-133.

On the other hand, there is no evidence that Freiherr von der Recke, who retired aged fifty-nine in the first half of 1869 and died at the end of that year, was ever personally investigated, let alone dismissed in disgrace⁴¹ – so the rumours were probably false, whoever spread them. One could of course postulate a massive cover-up by such a well-connected person, but there is no evidence for any such thing and the Prussian file gives the sensible, workaday reasons just summarised for not pursuing the matter any further. Piling speculation upon speculation, could we wonder whether the Freiherr's death at the end of 1869, just after his sixtieth birthday, was a means of escaping justice and avoiding shame? At least according to the death notice placed by his wife two days after he died, however, the death occurred naturally after an illness of several weeks' duration,⁴² and there is no other sign of anything untoward about it anywhere else either.⁴³ And when in 1873 the bubble burst, both politically and financially, on the railway companies set up on the English model since the early 1860s, a huge public scandal erupted and claimed the careers of both Graf von Itzenplitz and Hermann Wagener, a close confidant of Prince von Bismarck's who was even found to be personally corrupt⁴⁴ – but there is no sign in all

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- 41 There is a brief reference in the Cabinet minutes (GStA, *Protokolle des preussischen Staatsministeriums*, Vol. 81 (microfiche no. 469)) of 9 May 1869, p. 124, to the retirement of Freiherr von der Recke as a precedent in another case in which a civil servant sought continuation of a quasi-judicial appointment after retirement; there is no suggestion that the usefulness of the Freiherr's case as a precedent was affected by anything untoward; nor is there any other reason to suspect a forced retirement in, for example, the *Acta Borussica* index to the proceedings of the highest organs of the Prussian government. The Freiherr was noted in the official gazette as being at work in late February 1869: *Königlich Preussischer Staatsanzeiger*, 26 February 1869, p. 845.
- 42 „Vossische Zeitung“, 28 December 1869, 5. Beilage, p. 4. His wife would naturally have been aware of the principle behind, if not the exact words of Dr Johnson's saying that 'in lapidary inscriptions a man is not upon oath' – but everything about the announcement of the death, such as its contents and rapidity, contraindicates suicide.
- 43 There is thus also a brief and unremarkable notice of the death on the front page of the next day's edition of the „Vossische Zeitung“: 29 December 1869, p. 1, and in one or two other newspapers such as the „Berliner Börsen-Zeitung“, 30 December 1869, p. 2. The death of this important civil servant was also noticed in the official gazette: *Königlich Preussischer Staatsanzeiger*, 28 December 1869, p. 5006.
- 44 *Christoph Peter, Hermann Wagener (1815 – 1889) : eine politische Biographie*, Düsseldorf 2020, pp. 488–502; *Roth, Jahrhundert der Eisenbahn* (fn 22), p. 125; *Ziegler, Eisenbahnen und Staat* (fn 22), pp. 162–171.

the parliamentary investigations of the discovery of any wrongdoing on the part of Freiherr von der Recke.⁴⁵

IV. Concluding comments

During this Prussian drama, Chaffers' notorious career as a vexatious litigant in England was still in the future. When it did come, it was conducted on his part more often offensively than defensively, unlike in the Berlin case. Indeed, we have seen that Chaffers even refused to give evidence against vom Hof, which is a remarkable degree of restraint against a person who, he claimed, had wronged him so severely. In the Twiss matter he aggressively cross-examined his opponents⁴⁶ – not here.

There are certain aspects of this episode which do presage Chaffers' later offensive career as a plaintiff, however. He was certainly the aggressor in the broader sense, even though he was the defendant both in Berlin and in the Twiss case. In both cases, he had made very serious allegations against a well-connected person without possessing all the necessary evidence to back them up. Certainly, if Chaffers had any serious evidence of bribery in the Berlin case neither the surviving records nor the subsequent investigation of the railway financing reveal it. As far as we know, all he had was something that vom Hof had allegedly told him. A lack of circumspection and a dogmatic conviction of one's own correctness despite the lack of sufficient evidence for one's standpoint are characteristics of many vexatious litigants and of Chaffers personally: '[i]t was he who was right, and the rest of the world wrong', as Professor Taggart put it.⁴⁷

The discovery of the amnesty may also have convinced Chaffers that there is always a loophole to be found if one looks hard enough. Persistence is a hallmark of the vexatious litigant. It may be that the initial success stemming from the discovery of a loophole taught Chaffers that persistence would always win the day – when, in fact, it does not.

Indeed, another infamous figure in nineteenth-century legal history who started off with a win before running completely off the rails and becoming a hindrance to justice by reason of vexatiousness is Mr Justice Benjamin

45 As well as searching for the name electronically myself, I have confirmed this with colleagues who have researched this field of history extensively.

46 Taggart, (2004) 63 Cambridge Law Journal 656, 659.

47 (2004) 63 Cambridge Law Journal 656, 683.

Boothby. Boothby J. distinguished himself in mid-nineteenth-century Australia by finding all manner of parliamentary enactments invalid, even when there was barely the slightest reason to do so, and for his trouble was eventually dismissed as a Judge and had his views officially repudiated by no lesser authority than the Imperial Parliament at Westminster *via* the *Colonial Laws Validity Act* 1865 (Imp.). It is a story that has been well told elsewhere.⁴⁸ Boothby J.'s initial discovery of a technical legal defect in the enactment of the electoral laws, which resulted in their invalidity, seems to have convinced him that he was always able to discover such; his initial success in finding invalidity despite much opposition seems to have convinced him that persistence coupled with intelligence would always eventually bring success – and perhaps even of his own infallibility.

Chaffers seems to have followed approximately the same path. His success in having his Prussian conviction set aside may have convinced him that “where there’s a will, there’s a way”. As he was to discover over many years and at great expense to himself and others after his Berlin adventure, the saying is false and, under our legal system, the existence of a will is quite consistent with the non-existence of a way – even for the most determined, persistent and intelligent people.

48 For example, by *John Williams*, [Mr] Justice Boothby : a Disaster that Happened, in : *George Winterton* (ed.), *State Constitutional Landmarks*, Leichhardt : Federation 2006, ch. 1.