English Contract Law Moves East: Legal Transplants and the Doctrine of Misrepresentation in British Consular Courts

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Abstract

This article analyses the legal conception of misrepresentation in the well-noted case of Von Gumpach v Hart (1870). It investigates to what extent the English doctrine of misrepresentation was adapted for the local context when the case was heard by the British Supreme Court for China and Japan in Shanghai. The article adds to our understanding of the historical evolution of the doctrine of misrepresentation in the common law world. We find that legal ideas concerning misrepresentation did not change significantly when they crossed borders. Lawyers in the British consular courts in China borrowed their legal understandings and knowledge from English contract law. It points to the context, the origins, and the socialization of the legal community as one way of understanding transfers between spatially separated groups. It also draws attention to other aspects of this phenomenon, which influence the ways in which legal ideas were received, such as information asymmetries between those at the centre and the periphery, the speed in the circulation of legal texts, and the movement of those in the legal profession.

Introduction

According to most strands of modern legal theory, legal rules sprout from cultural values. It might be assumed that law emerges from each society as a distinctive or unique body of law.¹ In practice, however, empirical research

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¹ This is the view according to both Marxist and post-modernist legal theorists (these two being the largest schools of thought in modern legal theory). In Marxist legal theory, it is through the State that individuals of a ruling class assert their common aims. In other words, the law that they make in the form of the State is believed to reflect the opinions or ideology of this dominant class or group. It legitimizes their power and furthers this class’s interests. “For each new [ruling] class...is compelled...to present its interest as the common interest of all the members of
shows that this did not always seem to be the case. In many examples of legal comparison, the letter of the law was the same; there was cross-fertilization and the law was copied and did not change or adapt to suit different groups and cultures. This is argued by some to be a result of the law’s intellectual superiority and its relentless internal dynamic. Others argue that legal terms can move, but their meaning is culturally specific and cannot move to a new social group. A key question in legal scholarship, therefore, is about the relationship between law and society. Did inspiration come from internal or external sources? To what extent does law move to new geographies and cross borders? To what extent do lawyers adapt law and legal rules for the local context, culture, and climates? Are legal rules transplanted and, therefore, the same around the globe? Why do legal rules change or stay the same when they are applied in new territories? There is a considerable amount of literature written that responds to these questions. This article follows such an approach. It adds to this ongoing debate about the ways in which law, legal principles, and doctrines moved geographically from one jurisdiction to another and how legal ideas were received from abroad, if at all.

society...and present them as the only rational and universally valid ones.’ Karl Marx and Friedrich Engels, *The German Ideology* (Prometheus Books 1998) 68; Maureen Cain and Alan Hunt, *Marx and Engels on Law* (Academic Press 1979) ch 4. Post-modernist legal theory differs here, and those who subscribe to this viewpoint depart most clearly from Marxists when it comes to the question of how the law is constructed. This strand of thought is influenced by the work of Foucault, who saw law as a product of discourses between individuals, groups and institutions. He did not see law as important in shaping ideas, economic conditions, or class struggles. See Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press 1994) 53. Those writing prior to these two groups in the 20th century did not readily consider society. Due to its inability to distinguish between law and social values or custom, it was assumed that the values represented by legal rules were also cultural values. Montesquieu, writing in the 18th century, argued that legal systems reflect not values but, rather, climates. Montesquieu was neither a Marxist nor a post-modernist by any standard. See Baron de Montesquieu, *The Spirit of Laws*, vols 1 and 2, translated anonymously (A Donaldson 1793).

2 Alan Watson was a key proponent in this debate. He thought that legal rules were purely technical and existed apart from society, culture, and economics and can therefore be planted without alteration. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974); see also the work of Twining, who argued that if the idea is spread by an intellectual legal leader, it will have a greater and quicker diffusion. William Twining, ‘Social Science and Diffusion of Law’ (2005) 32 JIL & Society 203.

3 A strong advocate of this alternate view is Pierre Legrand, *The Impossibility of “Legal Transplants”* (1997) 4 Maastricht J Eur & Comparative L 111.

4 See eg Gianmaria Ajani, ‘By Chance and Prestige: Legal Transplants in Russia and Eastern Europe’ (1995) 43 Am J Comp L 93; Maximo Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’ (2004) 45 Harv Int’l L J 1; John W Cairns, ‘Watson, Walton, and the History of Legal Transplants’ (2012) 41 Georgia J Int’l Comp L 637; Jaakko Husa, ‘Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law’ (2018) 6 Chinese J Comp L 129; Michele Graziadei, ‘Comparative Law, Legal Transplants, and Receptions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 442.
This article examines a well-known case, which was heard in the British Supreme Court for China and Japan in Shanghai, called Von Gumpach v Hart (1870). It focuses on the law that was used in what was then a new British consular court in China. China made and enforced its own laws for its subjects. However, China conceded extraterritorial rights to other nations, such as Great Britain, the USA, and France, among others. It followed that agents empowered by the British government had the authority to hear legal complaints and determine the outcome of litigation, which involved British defendants.\(^5\) The case of Von Gumpach v Hart was one such instance. It turned on a question of misrepresentation in contract law. This article examines how closely the judges and legal counsel in China borrowed from the law of England and to what extent they adapted the law to apply it in China.\(^6\) Given the theoretical premises about the relationship between law and society, one might expect that as the court was based in China, the laws applied in China should differ greatly from whatever their functional or doctrinal counterparts were in England.\(^7\)

The article’s merit and its value are in its ability to examine vast quantities of primary source material generated by this piece of litigation, to synthesize this body of material, and to weave it into a cogent and coherent account of the case. In doing so, we place the case in its original historical context. One challenge that faces comparative lawyers as much as legal historians is the changing meaning of legal terminology. Legal terms can change through space as well as across time. Its core contribution to the literature is found in its capacity to discuss, analyse, and interpret legal principles, as they would have been at the time. These ideas are often forgotten as law changes over time and, thus, is neglected in contemporary legal scholarship. The article, therefore, considers the context of the litigation as an important factor that shaped the outcome of the case as well as the legal terminology used. It analyses the body of substantive law that was used as well as the method, style, and form of legal reasoning.

In Von Gumpach v Hart, the substantive law applied in China cannot be distinguished from the law in England. Indeed, those in the courtroom followed the same doctrine and doctrinal thinking that they believed was occurring in England. The article argues that the mirroring of English law was both a deliberate and conscious decision. It notes two pre-conditions for a strong or complete transfer of law from one jurisdiction to another. First is the background

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5 This ended in 1943. See T Kayaoglu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (CUP 2010); W Fishel, The End of Extraterritoriality in China (Octagon 1974).

6 For a discussion of the way American law was applied in China, see Tahirih V Lee, ‘The United States Court for China: A Triumph of Local Law’ (2004) 52 Buffalo L Rev 923; Teemu Ruskola, ‘Colonialism without Colonies: On the Extra Territorial Jurisprudence of the U.S. Court for China Transdisciplinary Conflict of Laws’ (2008) 71 L & Contemporary Problems 217; Anna MacCormack, ‘United States, China, and Extradition: Ready for the Next Step Note’ (2008) 12 NYU J Leg & Pub Poly 445; Jedidiah Kroncke, ‘Law and Development as Anti-Comparative Law’ (2012) 45 Vanderbilt J Transntl L 477.

7 Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (OUP 2006) 339.
and identity of the society that surrounded the court. While in a different geographical location, both parties to the litigation were British nationals and so were more familiar with the society of this jurisdiction than the land in which they now resided. They were part of a population of British merchants and traders who moved to exploit new opportunities. Second is the background, identity, and training of the legal profession. To help this community of British migrants resolve its disputes, a set of legal actors who were born in Britain and trained in England soon followed. The arguments of this group of lawyers drew naturally from the letter of the law as they understood it to be conceived in their former home of England. Overall, although the court was located in China, the society that it serviced was British.

This shows that people, society, and culture did matter in the construction of legal doctrines. The exercise of law across the British Empire depended on the people in the courtroom, including those litigating and raising issues as well as those interpreting and applying the law. The article further shows that lawyers based in China and outside of England were on the outskirts of the legal community. Due to poor levels of communication and lags in the transfer of legal information, they struggled to keep pace with law as it evolved in England. This naturally left them practising old law until more efficient forms of communication could be found. It is probable that not only were they unaware of these progressive debates and gradual nuances in judicial thinking but they were also more comfortable using settled principles of English law. While they failed to receive new legal ideas in a timely manner, it is equally likely that they believed that applying an undisputed, but older, notion of English law was a safer option.

We begin this article by examining the historical context and the actors in the case. It shines a light on the wider circumstances in which the disagreement between Von Gumpach and Hart occurred. It describes the background of the actors in the case, the nature of British trade in China, and the settlement of the British people there. This part is crucial in understanding the body of law that was used to decide the lawsuit. The next section consists of a discussion of the legal issues in the case. It contrasts between those issues that were identified by the legal counsel and pursued by judges in the court and those that were not. It proffers some explanation for why some issues were more important than others, and why some fell by the wayside. It shows that the lawyers and judges identified misrepresentation as the main legal question. This is followed by the fourth section, which explores the doctrine of misrepresentation as it was recognized by English law. It demonstrates that the treatise literature explained and dissected the state of case law and opened up new discussions about the direction of doctrinal thinking. The fifth section compares the principles in English law to the ones that were applied in the case. It shows that the two were linked. Lawyers in China practised the doctrine of misrepresentation as they thought it would have been in England. They did not engage in, or have knowledge of, the somewhat radical discussions that were occurring simultaneously in England in English contract law.
Context

After the opening of the first five treaty ports in 1842 and the burgeoning international trade of Shanghai, foreign nationals came in greater numbers to the Chinese coast. In 1847, for example, there were just 108 foreign residents in Shanghai, with 87 ‘English’ subjects. However, while the total foreign resident population remained a small percentage compared to Chinese inhabitants throughout the lifetime of the foreign settlements in Shanghai, census records often excluded foreigners of the non-resident population: notably, naval and merchant shipping crews. As a rapidly commercializing port, Shanghai attracted increasing numbers of transient individuals. In 1848, foreign residents numbered approximately 200, but there were 2,000 sailors manning the merchant ships that year in the harbour. Whereas the resident community grew slowly, the number of sailors rapidly increased over the next few years; in 1849 there were 133 ships entering the port of Shanghai, 94 of which were British. By 1852, foreign ships numbered 182, with 103 being British, and, by 1855, there were 437 ships, with 249 British ships. In six years, therefore, the number of British ships had more than doubled.

The shipping trade was the dominant industry in Shanghai, with foreign merchant vessels regularly coming into the port with various goods. Individuals unconnected with maritime trade and the lawyering profession also came to Shanghai for economic opportunity. One such individual was a German-born naturalized British national—Johannes von Gumpach. Von Gumpach had an unusual background. With the digitization of records of birth, deaths, and marriages, von Gumpach’s history can be mapped out fully using these documents and his family tree. Von Gumpach was born in 1814 as Johann Diedrich Grumbrecht. He moved to England at some point in his early adult life. Under the name of Theodor Diedrich Grumbrecht, he married Jane Edwards in Cheltenham, England, in 1842. In 1843, Theodor Grumbrecht, as he was then known, was found guilty of embezzling extensively from his employer, Huth & Company, a merchant bank founded by a German based in London. He was arrested on board a ship bound for New Zealand and, at the trial, was sentenced to seven years of exile. Grumbrecht then arrived in Munich with his wife. Here, he used the name of Baron Johannes von Gumpach and assumed the profession of an academic. Von Gumpach now looked to use his scientific expertise to teach mathematics and astronomy in a

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8 HB Morse, The International Relations of the Chinese Empire, vol 1 (Longmans, Green and Company 1910) 355.
9 G Lanning and S Couling, A History of Shanghai (Kelly & Walsh 1921) 364.
10 Morse (n 8) 357.
11 Ibid.
12 The Gentleman’s Magazine (1842) 421.
13 The Economist, vol 4 (1) (1843) 43.
14 John King Fairbank, Katherine Frost Bruner and Elizabeth MacLeod Matheson (eds), The I.G. in Peking: Letters of Robert Hart, Chinese Maritime Customs, 1868–1907 (Harvard University Press 1975) 63.
location that was beyond the British Isles. Robert Hart, on the other hand, conducted a search for mathematicians and scientists who were willing to teach and work in China on behalf of the Chinese authorities.

Hart’s background was, by comparison, less intriguing and varied than von Gumpach’s. Hart was born in Ireland in 1835 and attended Queen’s University at the tender age of 15. Shortly after graduating, he entered the China Service in 1854. He had various posts as an interpreter and assistant for the Superintendency of Trade at Hong Kong and as an assistant at the consulates in Ningbo and Canton. He then held positions in the service of the Chinese government, working for the Chinese Imperial Maritime Customs from 1859 and became inspector-general in 1863. His role included managing their affairs and institutions of learning, such as the Tongwen Guan (School of Combined Learning) established by the newly founded Zongli Yamen (Board of Foreign Affairs). Hart aimed to recruit Westerners, in particular, to build up the educational system and educate Chinese students so that they would go on to be competent personnel in China’s diplomatic service.15 Hart looked to hire von Gumpach to teach at a Chinese university, and the two entered into contractual negotiations before eventually agreeing on terms. Von Gumpach worked in this capacity before his relationship with his employer, and Hart eventually broke down.

With an increasing number of British subjects in China and economic transactions, there were more disputes over payment, conduct, and business behaviour. The relationship between von Gumpach and Hart was no different in this sense. Von Gumpach and Hart needed a third party to resolve a disagreement. They turned to British authorities in China. This followed treaty provisions and metropolitan legislation. After the First Opium War (1839–42), bilateral treaties guaranteed British representatives the right to hear cases and suits of British defendants in China. Various Western commentators had argued for British subjects to be exempt from Chinese law formally. They pointed to incompatibility of Chinese law with English law and customs. Chinese methods of adjudication, procedure, standards of evidence, and jurisprudence, they argued, were wholly different to English law. British commentators saw Chinese law as arbitrary, cruel, and largely penal.16 A common perception was that there was little, if any, civil law or civil adjudication compared to Western legal systems. It was believed that an alternative system of law needed to be available for British subjects.17 This was of particular importance in the treaty ports opened for foreign residence and commerce in China. These were places where Britain hoped to develop commercial interests and hosted a growing merchant community. One aspect that might encourage trade and commerce was the ability to use a body of law that was familiar

15 See William J Haas, China Voyager: Gist Gee’s Life in Science (Routledge 2016).
16 See T Brook, J Bourgon and G Blue, Death by a Thousand Cuts (Harvard University Press 2008).
17 See L Chen, Chinese Law in Imperial Eyes: Sovereignty, Justice and Transnational Politics (Columbia University Press 2016).
and thought to be fair and ‘rational’ for the British subjects in comparison to the system of Chinese law.\textsuperscript{18}

The legal rights that were given to British subjects in China were referred to as extraterritoriality or consular jurisdiction. At the same time, other Western powers also received extraterritorial rights alongside Britain in separate Sino-foreign treaties, making Britain just one nation.\textsuperscript{19} The Orders in Council provided the scope of English law to be applied to such subjects, with the Foreign Jurisdiction Act (1843) legitimizing the extension of English law outside of Britain. Following the signing of the treaties, British consuls stationed in opened treaty ports on the east coast of China could exercise extraterritorial law in their localities. Initially, the Supreme Court of Hong Kong in the Crown colony acted as a higher and appellate court and the judge provided judicial oversight for consular courts.\textsuperscript{20} Unlike colonial legal systems, the Foreign Office, rather than the Colonial Office, oversaw various aspects of consular governance and policy in China. The Foreign Office and Treasury staffed and financed the consular system. As consuls exercised English law extraterritorially, the legal arrangement was semi-colonial, but the consular system’s institutional connection to Hong Kong gave it elements of colonial influence and governance.

Although the substance of law and the court structure was intended to resemble those of the metropole, the application of law and justice did not necessarily maintain English legal thought. There were inefficiencies, miscommunications, and problems, largely due to the vast distances between London, Hong Kong, and some of the consular courts. It made the process costly, and it was impractical to send witnesses from various ports to the Crown colony. Prior to 1869, clippers were the primary means of speedy maritime transport. The Great Tea Race of 1866 saw a record time of 99 days to travel from Fuzhou on the south coast of China to London.\textsuperscript{21} The opening of the Suez Canal in 1869 allowed steamers to transport people and goods to China, but it was not until 1871 that communication between London and China took weeks rather than months. With the establishment of the international telegraph system, correspondence passing from the metropole to Shanghai took approximately nine days.\textsuperscript{22} Lay consuls and reports of the

\textsuperscript{18} Ibid.
\textsuperscript{19} For more on Western imperial interests, notably those of the USA in Asia, and the Middle East, see the works of E Scully, Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844–1942 (Columbia University Press 2001); P Cassel, Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan (OUP 2012); Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law (Harvard University Press 2013).
\textsuperscript{20} See, more generally, G Keeton, The Development of Extraterritoriality in China (Longmans 1928).
\textsuperscript{21} S Jefferson, Clipper Ships and the Golden Age of Sail: Races and Rivalries on the Nineteenth Century High Seas (Bloomsbury 2014) 127–50.
\textsuperscript{22} PD Coates, The China Consuls: British Consular Officers, 1843–1943 (OUP 1988) 157. A local post office in Shanghai also opened in 1863, and soon became one of the most important institutions for imperial communications on the China coast. L Harris, ‘Stumbling towards
corrupt practices of Hong Kong judges also damaged the reputation of consular jurisdiction. Metropolitan newspapers reported various scandals and a number of cases where suspects had been acquitted on technicalities because of the legal incompetence of consuls.

Maladministration was exacerbated by scale. The legal system imported from England into China had to contend with increasing numbers of ports and numbers of sojourning and resident British subjects. During 1858–60, more ports opened not only in China but also in Japan and Taiwan. The distance between some of these ports and Hong Kong made communication slow. With heavier caseloads in the more populated ports, untrained consuls struggled. As Edmund Hornby, the first chief judge of Her Majesty’s Supreme Court for China and Japan noted in his autobiography, the work of administering law by consuls in the largest treaty port of Shanghai had ‘outgrown the resources of non-professional men’. An efficient, interlinked, and professionalized court system was necessary to provide for the increasingly interconnected flows of people, goods, and trade.

Finally, it was during the 1860s that metropolitan authorities started to consider, and later implement, reforms for the standardization of British jurisdictional practices across the British Empire. It became more apparent to the Foreign Office that the consular system needed to be less rough and ready and more professional. It required changes to the ad hoc method of producing, recording, and storing legal case records. The Foreign Office also decided to establish a new supreme court to replace the Hong Kong Supreme Court. Hornby explained that this was ‘for the due administration of justice with a jurisdiction over British subjects in China and Japan co-extensive with that exercised by the Supreme Courts at home.’

The Order in Council for the Exercise of Jurisdiction in China and Japan (1865) created a court known as Her Britannic Majesty’s Supreme Court for China and Japan in Shanghai. It replaced the Hong Kong Supreme Court as the higher and appellate court of the consular courts. The Order stated that the new court and regulations were necessary ‘particularly for the more regular and efficient administration of justice among Her Majesty’s subjects’ in China and Japan. These new regulations were designed to provide for a streamlined mechanism for legal reporting and recording of case law. This decision was not motivated by the local problems alone—it occurred in tandem with other reforms across the British Empire.
with changes that were made in the method of law reporting in England.\textsuperscript{29} The Order framed the administration of the court, giving the Foreign Office powers to appoint a judge to preside over the court. He was styled the ‘Chief Judge’ or ‘Chief Justice’, as his English counterpart would be.\textsuperscript{30} To ensure that this judge had the requisite skill and expertise, he was to be a barrister with at least seven years of legal experience.\textsuperscript{31}

When Edmund Hornby was appointed the chief justice, he appeared to be a good candidate. Hornby had formerly spent time in the dominions of the Ottoman Empire overseeing the British consular system. In his capacity as chief judge in China, he could delegate judicial responsibilities and had the power to appoint legal personnel to work alongside him. These personnel included an assistant judge, to which he nominated Charles Goodwin. Goodwin had been called to the Bar at Lincoln’s Inn in 1843 and had a passion for Egyptology. Goodwin returned to the profession in 1847 to practise as a barrister. Among his publications were those on probate and succession duty.\textsuperscript{32} Hornby also appointed a law secretary, junior officers, and clerks to help run his court, as provided by the Order in Council.\textsuperscript{33} In practice, Hornby and later chief judges were often overburdened with appeals, high court cases, and administrative duties, rendering the assistant judge and law secretary essential. Hornby decided to divide the burden by assigning Goodwin civil cases, leaving ‘heavy and appeal cases - civil and criminal’ for himself.\textsuperscript{34} Goodwin and the law secretaries also often stood in for Hornby when he was busy or on leave. Like colonial domains, appellants or the chief judge could send civil cases to the Judicial Committee of the Privy Council in London.

A jury, as well as the judge, would decide both civil and criminal cases. The Order in Council, section 5, number 62 stated that ‘[w]here a suit originally inspected in the Supreme Court relates to money or goods other than property or any matter at issue of the amount or value of 1,500 dollars or upwards—the suit shall, on the demand of either party, be under order of the Court, tried with a jury’. A jury trial was a feature of civil and criminal cases in China, as it was in England. The Order mirrored that of English law and the metropole, but with the acknowledgement that the setting of China, or practicality, or other reason may alter certain aspects of procedure, adjudication, and punishment. It stated that ‘civil and criminal jurisdiction...shall, as far as circumstances admit be exercised upon the principles of and in conformity

\textsuperscript{29} See WTS Daniel, \textit{The History and Origin of the Law Reports} (Wildy 1969); Nathaniel Lindley, ‘History of the Law Reports’ (1885) 1 LQR 137.

\textsuperscript{30} All were male at this point in legal history.

\textsuperscript{31} Order in Council (n 28) section III, subsection I, no 9.

\textsuperscript{32} Charles Wycliffe Goodwin, \textit{The Succession Duty Act: (16 & 17 Vict. C. 51): with Introduction, Notes, and Index, and an Appendix Containing the Legacy Duty Acts} (J Crockford 1853); Charles Wycliffe Goodwin, \textit{The Practice of Probate and Administration, under 20 & 21 cap. 77: together with the Statute and an Appendix containing the Rules and Orders issued by the Court of Probate and the Table of Fees} (Law Times Office 1858).

\textsuperscript{33} Order in Council (n 28) section III, subsection I, nos 7–24.

\textsuperscript{34} \textit{Sir Edmund Hornby} (n 25) 214.
with the Common Law, the Rules of Equity, the Statute Law, and other law for the time being in force in and for England. Further, it should operate ‘with the powers vested in and according to the course of procedure and practice observed by and before the Courts of Justice and Justices of the Peace in England’.

Yet it was not simply the case that courts followed the Orders in Council literally and discounted different systems of law. Judges had relatively wide powers of discretion and more so in cases where statutes required interpretation. If the case involved property or encroached on religious or mercantile custom, account could be made of the subtle differences that were outside of the remit of traditional black letter law. Judges could pay lip service to these rules or import these foreign ideas wholesale into their legal reasoning. There are plenty of examples where adaptation or alteration has taken place. One such example comes from Her Majesty’s Supreme Court of Kenya at Nairobi in 1928. When pressed with what would have been an unfamiliar complaint, Stephens, one of the judges, adapted his legal view to fit those of the community he serviced. As Elisabeth McMahon notes, Stephens adjudicated on a case where a brother claimed that his sister was using witchcraft to transfigure into a bush baby so that she could eat his bananas. English law at the time did not recognize witchcraft, superstition, or belief as anything other than criminally insane. Stephens ordered that members of the family take an Islamic oath, which would prevent them from practising witchcraft in future. Stephens, therefore, was able to consider law as a matter of abstract legal principles as well as a question of local customs and sensibilities. He was prepared to deviate from English legal procedure to find a solution that suited those in the courtroom well. This choice to apply the exact letter of the law or adapt it depended on the perspectives and openness of lawyers in question.

Those in the new Supreme Court practised in the city of Shanghai. Aside from this setting being a more practical location than Hong Kong for the chief judge to communicate with various consulates, it was also quickly becoming an important trading hub with a growing community of merchants and lawyers. Lawyers came to Shanghai to practise, including Richard Rennie and

35 Order in Council (n 28) section II, no 5.
36 Order in Council (n 28) section II, no 5.
37 Indeed, this did happen in various different contexts. Scholars have explored this using the lens of legal pluralism and multinormativity. See eg the retention of corporal punishment in Hong Kong. Munn (n 24); William Twining, ‘Normative and Legal Pluralism: A Global Perspective Annual Herbert L. Bernstein Lecture in International and Comparative Law’ (2009) 20 Duke J Comp & Intl L 473; Lauren Benton and Lisa Ford, *Rage for Order* (Harvard University Press 2016); Alyssia Maria Di Stefano, ‘Italian Judges and Judicial Practice in Libya: A Legal Experiment in Multinormativity’ (2018) 58 American J Legal History 425; Thomas Duve, ‘Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History’ (2018) 6 Comp Legal History 15.
38 The legal issue was not clear.
39 Elisabeth McMahon, *Slavery and Emancipation in Islamic East Africa: From Honor to Respectability* (CUP 2013) 71–2. McMahon notes some officials recommended this method.
40 Ibid.
Nicholas Hannen. Richard Rennie represented von Gumpach. Rennie was called to bar of the Inner Temple in 1860 and went to Hong Kong for two months before arriving in Shanghai 1866 at the age of 27. Nicholas Hannen defended Robert Hart and was also called to the Bar at the Inner Temple in 1866. Two years later, Hannen moved Shanghai. These two framed the legal issues. We now turn to discuss their work in more detail.

Legal issues
The relevant facts were as follows. Johannes von Gumpach encountered Robert Hart in 1866 in the city of London. Hart said that he was acting as an agent for the English and Chinese government, which had founded a college and observatory in Peking. This fact was undisputed, but the interpretation of this remark was called into question. Von Gumpach understood this point to mean that the college and observatory were built, functional, and in operation. Hart sought a professor of mathematics and astronomy, and, after his meeting with von Gumpach, Hart appointed von Gumpach to the post. Von Gumpach, on arrival, found that the college and observatory did not yet exist. This did not, it seems, become an issue for von Gumpach until von Gumpach’s contract with the Chinese imperial government was terminated. Hart alleged to representatives of the Chinese imperial government that von Gumpach refused to carry out his duties, while von Gumpach advanced the argument that, without a college or observatory, he had not been called upon to perform any duties. Von Gumpach sued Hart for breach of contract and non-payment of debt.

The first set of details in this fact pattern is important for the purposes of this article. Was Hart’s statement about the physical character of the college and observatory a misrepresentation? If so, what kind, and what was the outcome for the contract? Had this statement induced von Gumpach to enter into the contract? The legal issues expanded as the case was appealed from Her Britannic Majesty’s Supreme Court for China and Japan in Shanghai to the Judicial Committee of the Privy Council in London.41 The judge’s direction to the jury about misrepresentation was called into question on appeal, and the latter part of the facts as described in the paragraph above became relevant. It was questioned at this point whether Hart’s statement that von Gumpach had refused to work was untrue. And, if so, was it libellous?

Some other issues were at the background of this case and not at the forefront. They were linked to the questions of whether English or Chinese law should operate. In other words, what were the limits of British jurisdiction? There were also issues of conflicts of law. Should the case be heard in England as the contract was made in England? Hornby, the chief justice, was clear on these questions; this was a case that should—and would—be decided in the British Supreme Court for China and Japan in Shanghai. Hornby stated

41 Hart v Von Gumpach (1872) 9 Moore NS 241, 17 ER 505.
that ‘[t]he Order in Council expressly gives jurisdiction to this Court in all cases between British subjects (and these parties are British subjects)’. It was, of course, true that both von Gumpach and Hart were British subjects. The Chinese government, von Gumpach’s employer, on the other hand, was not. This explains one point but raises another set of questions about the legal issues identified and the matters that Hornby considered most pertinent. It clarifies, for instance, why von Gumpach did not sue for what would be understood in today’s legal language as wrongful dismissal. To sue the Chinese government and his former employer, von Gumpach would have to have started proceedings in a Chinese court. Indeed, Hornby made it clear that his court would not entertain such a discussion. He said that ‘[t]he defendant and he were both servants of the Chinese Government...the Court will not enquire into anything which took place after that relation was established’. He reiterated that the key legal issue was about misrepresentation by stating that ‘[a]ll it will do at the most will be to enquire whether the plaintiff was induced by false representations to put himself in that position, and if any what the damage to him has been’.

The second and more problematic issue, which follows, is linked to the identity of von Gumpach’s employer. It was the agency question. Who was liable in a disclosed and undisclosed agency relationship? Von Gumpach knew that he had entered into a contract with the Chinese government—not Hart. Hart, thus, held what we would understand as a disclosed agency relationship: he negotiated with von Gumpach, the third party, on behalf of the principal, the Chinese government. In a disclosed agency relationship, the agent was not generally liable because the contract was made plainly between the principal and third party. William Paley, in the first treatise on the Law of Principal and Agent, written in 1812, noted that ‘[i]n general, where a man is known to act merely as an agent, where the principal is known...the rule is, that the agent making the contract, is not subject to personal responsibility’. This rule had a strong foundation. Its application would mean that Hart could not be held liable. Hart’s counsel made use of this argument and made it clear in the written petition that the Chinese government was responsible, but it did not progress much further than this in Shanghai. Hornby dismissed this point of law.

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42 North-China Herald, Law Reports, 22 March 1870. See judgment of 29 March 1870.
43 North-China Herald, Law Reports, 22 March 1870.
44 William Paley, A Treatise on the Law of Principal and Agent: Chiefly with Reference to Mercantile Transactions (J Butterworth & J Cooke 1812) 246. Paley’s text was an influential treatise. See Victoria Barnes and James Oldham, ‘The Legal Foundations of Apparent Authority’ J Corp L (forthcoming).
45 Goodhaylie’s Case Dy 230 a, ex parte Hartop (1806) 12 Ves 352, 33 ER 132.
46 North-China Herald, Law Reports, 22 March 1870. Mr Hannen made this argument at several points. He said that ‘[i]t is simply an action for breach of warranty, and all the declarations in such actions allege that the principal has been applied to, and has repudiated the acts of his supposed agent’. He argued that Hart acted ‘in the exercise of his lawful authority in pursuance of such employment and in the exercise of his said duty as a servant of the said Imp. China Government’.
in his judgment. He did so in the belief that ‘that no action lies against a man, so long as he does his duty, but a false representation is no act of duty, and therefore is not protected’. There were exceptions to the general rule that agents could not be liable when the principal was known—but this entailed that the principal, the Chinese government, sue the agent, Hart. The third party, von Gumpach, still needed to sue the principal, the Chinese government, rather than the agent, Hart. Hornby pressed forward with the other legal issues in the belief that deciding this case was within his legal powers and that it should be heard in his court rather than a Chinese one. When this case was appealed to the Judicial Committee of the Privy Council, the privy councilors had the other opinion. They believed that Hart could not be held liable as an agent of von Gumpach, who still needed to sue the principal, the Chinese government. The following section explores the principles in the English law that Hornby did consider relevant—namely, that of misrepresentation.

**Principles of English law**

Reading texts, such as treaties, digests, and encyclopaedias, helped lawyers to conceptualize legal doctrines. For those lacking a full series of case reports or access to the London-based network of lawyers, legal literature was a crucial way of learning about the current state of the law and any new developments in it. Law books were especially helpful to those working outside of England. It was a principal source of legal knowledge. Through the reading of law books and legal writing, the problem of distance and disconnect with the legal centre of the common law world could be overcome.

In 1870, misrepresentation was an unsettled legal topic. Law books on English contract law described it in a lacklustre manner. It was not understood at this stage to be a subject or doctrine in its own right. Most legal writers in England, such as Joseph Chitty, John William Smith, or William Anson, did not think misrepresentation important enough to include as a term in their context pages or to devote an entire section to its study. In this scholarship, this subject was discussed sporadically. The few dedicated paragraphs or pages were locatable only via the index. Despite little attention being given to the doctrine, there were propositions in which all experts on English contract law were in general agreement. All concurred that, for the misrepresentation to be actionable, it must induce the contract. The types and definitions of misrepresentation were, by contrast, highly contested issues.

47 North-China Herald, Law Reports, 22 March 1870.
48 Hart v Von Gumpach (n 41).
49 See the essays in Angela Fernandez and Markus D Dubber (eds), Law Books in Action: Essays on the Anglo-American Legal Treatise (Hart Publishing 2012).
50 Smith articulated this notion clearly with the statement that the ‘deceit, moreover, must also actually induce the contracting party to enter into the contract’. John William Smith, The Law of Contracts, edited by John George Malcolm (5th edn, Stevens & Sons 1868) 226.
For this group of lawyers, who were writing around the middle of the 19th century, misrepresentation related strongly to an act of fraud. Its conception was tied closely to the tort of deceit, and negligence, less so. In 1857, Shaw, when writing about Scottish and English contract law, explained that misrepresentation in fact came from the legal definition of fraud. He believed that:

[f]raud, by misrepresentation, is the more distinct and definite species, and generally the more capable of proof; whether it consists in express misstatement, or in that silent kind of misrepresentation, which is accomplished by means of certain arrangements, calculated to deceive.\(^{51}\)

Misrepresentation, therefore, was considered to be made either by a misstatement or the concealment of a fact.\(^{52}\) It was, as Shaw noted, mainly considered to be an act of fraud, which meant that deception—and the intent to deceive—was important in establishing whether the act constituted misrepresentation. This definition came from Polhill v Walter (1832). Chief Justice Lord Tenterden, in this case, considered that ‘[a] wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud’.\(^{53}\) For misrepresentation to be found, the statement must have been wilfully or intentionally false. Smith, in his leading text on contract law, gave a similar definition as he said that ‘[a]s to the deceit, it may be of an active kind, as falsehood and misrepresentation actually used by one party for the purpose of deceiving the other’.\(^{54}\) He clarified that the statement must be ‘known to be false by the utterer of it’. Smith advised his readers that if it was not the case, the representation ‘will not amount to fraud, although really false’.\(^{55}\)

What were these other kinds of misrepresentations then? What were those representations, which were false but not made in an attempt to deceive, called? How did they operate? In the early 19th century, only fraudulent misrepresentation was actionable. In Flinn v Tobin (1829), Lord Tenterden CJ said that ‘the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff’s recovering. ...The question therefore is, whether you [the jury] think there was any wilful and fraudulent misrepresentation made’.\(^{56}\) Anson was alone in devoting academic attention to reporting changes in this rule when it had been relaxed. Anson considered that:

[i]f then neither the intent to defraud nor the deliberate assertion of untruth are necessary elements in fraud, the nearest approach which we can make to a distinction between misrepresentation and fraud is that the former is an innocent misrepresentation of facts, while

\(^{51}\) Patrick Shaw, A Treatise on the Law of Obligations and Contracts (T & T Clark 1857) 51.
\(^{52}\) The two were the same. See Walker v Young (1695) 4 Brown’s Sup. 290; see also Charles G Addison, A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu: In Two Volumes, vol 1 (2nd edn, Benning 1849) 132.
\(^{53}\) Polhill v Walter (1832) 3 B & Ad 114, 123 ER 43, 46
\(^{54}\) Smith (n 50) 224.
\(^{55}\) Ibid 225.
\(^{56}\) Flinn, Assignee of Krum, an Insolvent Debtor v Tobin Assizes (1829) Mood & M 36970, 173 ER 1192. For the former rule, see also Evans v Collins 5 QB 804; Ormrod v Huth 14 M & W 651; Rawlings v Bell 1 CB 951.
the latter consists in representations known to be false, or made in such reckless ignorance of their truth or falsehood as to entitle the injured party to the action of deceit.57

It was here that we can see the first use of the terms ‘innocent’ and ‘reckless’ misrepresentation in this body of academic literature. It is important to note that Anson wrote in 1879, after Von Gumpach v Hart, but that the terms ‘innocent’ and ‘reckless’ misrepresentation could be seen within the English case law well before this particular case was heard.58

The significant change in the legal framework was not in the development of new concepts and terminology. Rather, it was the widening of circumstances in which the court was willing to find misrepresentation and, thus, to award remedies. What remedies were available to the party injured by a misrepresentation? The answer depended on the type of misrepresentation. Misrepresentation by fraud was a discussion that, as we have noted, was most developed. It was clear that if a fraudulent misrepresentation was made, the party could rescind the contract.59 Restitution was also possible but if the misrepresentation did not affect the value or enjoyment of the property it did not invalidate the contract.60 For the other types of misrepresentation, the remedies were not as clear. Anson, in 1879, explained that ‘[t]he subject of misrepresentation is beset with various difficulties. One difficulty arises from the wide use of the term Fraud to cover misrepresentations of fact which vary widely in their nature and consequences’.61 Fraud was, in Anson’s view, a catch-all term used too readily and that reflected the facts in each case rather poorly.

Anson advised that reckless misrepresentation had the same remedies as fraudulent misrepresentation. He opined that ‘[s]tatesments which are intended to be acted upon, if made recklessly and with no reasonable ground of belief, bring their maker within the remedies appropriate to fraud’.62 This reasoning also appeared in Behn v Burness in 1864. Williams L said: ‘Where, indeed, the misrepresentation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable.63 Indeed, what was in question here was not the fraudulent nature of the statement. The intention or presence of deception no longer mattered. It was the extent of the falsehood—the ‘grossness’ of it, as Williams put it—that made the difference.

Anson clarified William’s comment and expanded on its reasoning by saying that ‘[w]e have therefore to distinguish the representation, whether innocent or fraudulent, which affects the validity of a contract, from representation

57 William R Anson, Principles of the English Law of Contract (Clarendon Press 1879) 151–2.
58 Jenkins v Hiles (1809) 1 Ves Jr 636, 34 ER 956; Nash v Palmer (1816) 5 M & S 374, 105 E.R. 1088; Glasspoole v Young (1829) 9 B & C 696, 109 ER 259; Ex parte William Bird, the Official Assignee, and Samuel Smith, the Creditor’s Assignee (1851) 4 De G & Sm 273, 64 ER 829
59 Anson (n 57) 129.
60 Addison (n 52) 150, 202.
61 Anson (n 57) 128.
62 Anson (n 57) 131.
63 Behn v Burness (1864) 3 B & S 753, 122 ER 281.
which affects the performance of a contract. And the terminology of this part of the subject is extraordinary confused.\(^6^4\)

The confusion that Anson alluded to here was a result of the opaqueness of the contemporary discussion of conditions and warranties. To put it simply, it was not clear what kinds of false statements or misrepresentations went to the root of the contract. The case law on misrepresentation interacted with the case law on charter parties. A false statement that a vessel was ready to sail—or shipbuilding would be completed and ready to sail on a specified date—could be a misrepresentation.\(^6^5\) Yet the case law did not adequately summarize which false statements and misrepresentations would be breaches of condition, which entitled a party to rescind the contract or breaches of warranty, or which entitled the injured party to damages.\(^6^6\) The case law was also influenced by the influx of corporations and misstatements in prospectuses. This line of reasoning was equally problematic. A shareholder who invested in a company as a result of a misrepresentation could not, for example, rescind the contract or gain damages if the company was profitable.\(^6^7\) It followed that misrepresentation—whether fraudulent, reckless, or innocent—could, if the misstatement was ‘gross’ enough, result in rescission. If it was not, on the other hand, ‘gross’ enough, damages would be awarded.

How might a misrepresentation be made? The legal community gave contradictory information in reply. Smith considered that it must be made in writing.\(^6^8\) While he noted that section 4 of the Statute of Frauds had been put to an end with Lord Tenterden’s Act,\(^6^9\) he considered that Haslock v Fergusson (1837) was a binding authority.\(^7^0\) Chitty, on the other hand, offered the exact opposite advice to his fellow lawyers. In 1863, Chitty’s treatise stated that ‘[a]ccordingly, an action is maintainable for fraudulent misrepresentation as to the value of a business, although such representations were not embodied in the contract of sale, and could only be shown by parol evidence’.\(^7^1\) This principle came from a different set of cases.\(^7^2\) Chitty’s treatise was in its seventh edition at this stage, and it was the premier treatise of its day. It was unmoving on the permissibility of parol evidence. ‘So it is clear’, Chitty explained, ‘parol evidence is always admissible, to defeat a deed or written contract on the

\(^{64}\) Anson (n 57) 128.

\(^{65}\) Glaholm v Hays, Irving, and Anderson (1841) 2 Man & G 257, 133 ER 743; Tarrabochia v Hickie (1856) 1 Hurl & N 183, 156 ER 1168.

\(^{66}\) See the confusion in Behn v Burness (1862) 1 B & S 877, 121 ER 939 over the treatment of misrepresentations in Ollive v Booker 1 Exch 416. In Dimech v Corlett 12 Moo PC C 199; Boone v Eyre 1 HBl 273; Barker v Windle 6 E & B 675 more generally.

\(^{67}\) Kennedy v Panama New Zealand & Australian Royal Mail Co (1866–7) LR 2 QB 580.

\(^{68}\) Smith (n 50) 105.

\(^{69}\) 9 Geo IV, c 14, s 6

\(^{70}\) Haslock v Fergusson (1837) 7 Ad & El 86, 112 ER 403.

\(^{71}\) Joseph Chitty and John Archibald Russell, A Practical Treatise on the Law of Contracts (7th edn, H Sweet 1863) 107.

\(^{72}\) Dobell v Stevens (1825) 3 B & C 623, 107 ER 864; Lysney v Selby (1704) 2 Ld Raym 1118, 92 ER 240.
ground of *illegality, duress* or *fraud* (emphasis in original). Could parol evidence be used in cases of reckless or innocent misrepresentation? Given that Chitty did not acknowledge that these types of misrepresentation existed, he did not delve further or provide valuable insights at this point in time.

Overall, the term ‘misrepresentation’ was not universally understood in English contract law during this period. The doctrinal understanding of the term was evolving, with the definition of fraudulent misrepresentation being the most common and well developed. Reckless and innocent misrepresentations, while present and exposed in Anson’s work, were seldom discussed elsewhere. It was even less clear what the legal effect of an act of reckless and innocent misrepresentation had upon the contract in question. More research—and litigation—was needed to settle these points. For the most part, lawyers knew that if misrepresentation could be found, the injured party could ask to either rescind the contract or ask for damages.

The British Supreme Court for China and Japan

At Her Britannic Majesty’s Supreme Court for China and Japan in Shanghai, the court’s decision was made over the course of 1870. There were several hearings. A key complaint in von Gumpach’s petition was that Hart’s representation that the college and observatory was built, functional, and in operation was false. This point resembled some of the issues in the case law on charter parties, where misrepresentations had been made about the construction of the vessel and the time it would be ready to sail. These links were not made explicit in the report of the trial, which was reported by a newspaper called the *North-China Herald*. The paper was also the gazette for the Supreme Court for China and Japan and was the most influential English language newspaper in China from 1863. The facts, therefore, were presented at the trial in a way that allowed the judge and jury to find evidence of misrepresentation in the broadest sense of the legal term.

The written complaint gave more detail on the legal conception of misrepresentation and provided links to other case law. It was replicated in great detail in the newspaper. The oral proceedings, which were reported extensively in the local press, responded to the documents that initiated the lawsuit and give some indication of the legal arguments. In response to von Gumpach’s written complaint to the court, Hannen, defending Hart, said ‘[t]he nature of the Plaintiff’s claim cannot be changed by a profuse sprinkling of the words “malice”, “fraud”, “false”.’ In the written complaint at least, it was alleged that the representation was of a fraudulent nature. But, as the case was argued in the court, the claim seemed to change. Rennie, the counsel for von Gumpach,

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73 Chitty and Russell (n 71) 107.
74 The newspaper reports have now been digitalized as part of Macquarie Law School’s Colonial Case Law project; the newspaper reports for this case consisted of over 20,000 words.
75 *North-China Herald*, Law Reports, 21 April 1870. See proceedings of 22 March 1870.
said ‘[i]f it were proved that the misrepresentations had been made and dam-
ages sustained, English law provided that the party making them must com-
pensate the party damaged.’\textsuperscript{76} If damages were the remedy sought, the
misrepresentation could not have been considered to have been of a sufficiently
significant nature. It helped that in this set of circumstances the contract had
already ended. Von Gumpach did not need to be relieved of his obligations.

The language used here was unclear. Conditions, warranties, innocence, recklessness—they were all terms that were absent. Both the legal counsels
and the judges appeared to refuse to enter this legal quagmire and avoided
this style of argumentation. The conception of innocent misrepresentation
was alluded to but not articulated expressly. This point is, of course, assuming
that those in the room knew that this type of misrepresentation existed or
had read \textit{Behn v Burness} (1864). There was, by this point now, a wide range of
remedies that were available to the injured party if different types of misrepre-
sentations—fraudulent, reckless, innocent—could be shown. Yet this typology
was novel. It was presented only in Anson’s treatise in the legal literature of
the period. It is perhaps unreasonable to expect our actors to be on top of emer-
ging trends, to be discussing recent case in this manner, and to be using
those terms in this case. If the counsel relied upon older legal literature and
Chitty’s text rather than law reports as their guide to English contract law,
then the legal question hung naturally upon the identification of fraud and de-
ception in the misstatement.

The theory and conceptualization of other kinds of false statements were de-
veloped here just as they were in English law 20 or 30 years previously.
Moreover, there was further evidence that the counsel were using Chitty’s trea-
tise heavily. For their arguments in contract law, they cited the eighth edition
of Chitty’s treatise and no other cases. As we have noted above, Chitty argued
in contrast to some other lawyers that a misrepresentation did not have to be
made in writing. Hart’s representations were oral and the meaning of those
representations took the form of inferences.\textsuperscript{77} While the inferences and impli-
cations of those statements were arguable and, indeed, contested by either
legal team,\textsuperscript{78} the fact that they were made orally was not. This suggested that
Chitty was the principal source for understanding contract law in the British
courts in China, but it was too general to help decide the finer points of this
case.

Whatever the state of English law as described by Chitty and the legal coun-
sel’s interpretation of this treatise, it is clear that Chief Justice Hornby and
Assistant Judge Goodwin held similar misgivings about the types of

\textsuperscript{76} Ibid. See proceedings of 13 April 1870.

\textsuperscript{77} \textit{North-China Herald}, Law Reports, 21 April 1870. See proceedings of 13 April 1870. Von Gumpach
tested that ‘Mr. Hart did not say that any observatory would be erected directly. ...I should
not have understood what Mr. Hart meant by Tung-wen-kwan. I should perhaps have asked
for an explanation, if he had used the word; and I presume he would have told me it was the
College for Western Science’.

\textsuperscript{78} This is discussed in detail below.
misrepresentation and remedies available. Hornby permitted the jury to rule on the question of misrepresentation and award damages. To dress this in language that those in the court either did not have or were unwilling to use, Goodwin believed this statement—if made—resulted in breach of a warranty.79 Goodwin said:

[I]n reference to certain misrepresentations alleged to have been made to Baron von Gumpach in London, and by which he is said to have suffered damage. ...It was for the Jury to say whether mis-representations were made in regard to the nature of the college, and whether they were made by Mr. Hart or authorized by him. If the Jury thought such were made, and that M. von Gumpach had suffered in consequence, it would be their duty to return a verdict in his favour. If they were of opinion that there had been no misrepresentation, they would return a verdict for Mr. Hart.80

The judge’s lack of reference to ‘wilfulness’ prompted a complaint from Hannen, Hart’s lawyer.81 Hannen was using the language of Lord Tenterden CJ in Flinn v Tobin (1829) and Polhill v Walter (1832).82 Wilfulness tied directly to the notion of fraud and the intention to deceive and harm. This was the manner in which most lawyers who followed the main texts in English contract understood the doctrine of misrepresentation to operate. The jury was called to determine a question of fact, with the judge advising them on questions of law. The jury had heard von Gumpach’s testimony on the matter and had to determine its accuracy. Hornby did not say that it was for the jury to decide whether Hart’s representations were deliberately false. This was, perhaps, an oversight in his summing up, but these questions were raised throughout the trial by von Gumpach in his testimony and the counsel’s interjections. English law left factual questions about fraudulent behaviour as a matter for the jury to decide.83

Von Gumpach recalled that in London, when discussing the opportunities available in China, ‘Mr. Hart mentioned the intention to erect an observatory. I also looked for the foundation of a library as a necessary means to the facilities which I stipulated, for pursuing my studies’. Von Gumpach made it clear that he would not have entered into this contract and become an academic in China without this infrastructure for he believed that ‘[s]tudy is impossible without a library’.84 The statements made by Hart, von Gumpach argued, induced him into the contract. Where was the misrepresentation then? What was the exact false statement? This point was convoluted and for it to be believed, it required some faith in von Gumpach’s character.

Von Gumpach explained that ‘[t]he college was not spoken of by name—only as a college for Western Sciences and learning’. It was his ‘impression

79 On the date of 14 April, it is unclear who sat in the courtroom
80 North-China Herald, Law Reports, 21 April 1870. See proceedings of 14 April 1870.
81 Ibid.
82 Flinn, Assignee of Krum, an Insolvent Debtor v Tobin Assizes (1829) Mood & M 369–70, 173 ER 1192; Polhill v Walter (1832) 3 B & Ad 114, 110 ER 43.
83 North-China Herald, Law Reports, 21 April 1870. See proceedings of 14 April 1870.
84 Ibid. See proceedings of 13 April 1870.
was that the word Tung-wen-kwan [Tongwen Guan] meant college’. Hannen, acting for Hart, objected to this argument. ‘Impressions’, he said, ‘were not evidence’. Goodwin responded to say this was not a question of law but of fact and this was a matter for the jury to decide.\(^{85}\) Von Gumpach explained that he relied heavily on Hart and his assistant’s words and made his decisions based upon his interpretation of them. He explained that this was because ‘I found it very difficult to get information regarding the college, because I did not understand Chinese. I now understand that the Tung-wen-kwan is a school for teaching the English, French, and Russian languages, founded in 1862’.\(^{86}\) This miscommunication—caused by von Gumpach’s inability to understand the local language—was sure to evoke feelings of empathy to the Englishmen on the jury, many of whom were not likely to be fully proficient in the Chinese language.

Even with a jury of English-speaking Englishmen, its members still had to decide whether von Gumpach was telling the truth when he said Hart’s words had induced him to leave England and enter into the contract. The amount of damages that could be awarded in such circumstances was another problem. This was a matter of law. So Hornby advised the jury that if they found that:

> [s]omething [said] to induce Plaintiff to leave England unjustly, the question arose what were the damages he had sustained. He appeared to have received his salary of £600 a year, so that there was no pecuniary damage in this respect. But he tells you that he has been long engaged in important studies which may result in benefit to the human race, and that it was a great object to him to be able to pursue these studies. If therefore he had been really seduced by misrepresentation to quit these studies, he might be entitled to damages. But it was also his (the Judge’s) duty to tell them that the amount of such damage was almost inappreciable.\(^{87}\)

This case did not seem to be difficult for the jury to decide upon its outcome. They returned a verdict after only an hour. In respect to this particular claim of misrepresentation, the jury did not find in von Gumpach’s favour. But they did in respect of the claims regarding the termination of von Gumpach’s contract.

In Hart’s application for an appeal against this verdict, there was considerable discussion about whether judge’s direction to the jury constituted misdirection. Hart’s counsel did not make this argument.\(^{88}\) Hart’s counsel pointed to the obvious: ‘[I]t is immaterial whether it is false or not, for no damage

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\(^{85}\) Ibid. The judge, Goodwin, ‘thought it was fail he should speak to establish the point of misrepresentations. It was for the Jury to attach what weight they thought right to his statements’.

\(^{86}\) Ibid.

\(^{87}\) North-China Herald, Law Reports, 21 April 1870. See proceedings of 14 April 1870.

\(^{88}\) North-China Herald, Law Reports, 5 May 1870. See proceedings of 3 May 1870. Hannen, defending Hart, commented that ‘[a]part, therefore, from the question whether it would have been necessary for the false representations to have been wilfully made, we are of opinion that there is no ground for disturbing the verdict for the reason that the learned Judge omitted to make actual mention of the word “wilfully”’. 
There was an obvious reason that Hart’s call for an appeal did not focus on the misrepresentation or statements that induced von Gumpach’s contract. It focused instead on the statements that resulted in the termination of his contract. This split was because of the lower court’s decision. The jury had ruled in von Gumpach’s favour only on the second legal question: the statement that resulted in the termination of the contract. The court awarded von Gumpach an unusually large sum of money in damages in respect of this issue, and Hart appealed against their decision. Hart and his counsel did not appeal or question the issues where the jury ruled in his favour. Hart did not appeal the decision about the allegations of misrepresentation about the physical character of the college and observatory, probably, principally, because he won on this issue.

As part of this discussion about granting an appeal—the misdirection over the construction of misrepresentation—the lawyers contemplated the roles of judge and jury in the courtroom. This went to the heart of the complaint about the judge’s direction. What should the judge decide? What should be left to the jury? Hornby considered this and gave the matter some thought before announcing that: ‘[w]e think that it is most important, especially out here, for Judges not to interfere with the province of a Jury, except a verdict is evidently perverse. It may be that a Jury, in cases of this kind, often jump at a conclusion, at which lawyers and trained professional men would not arrive [emphasis in original].’ He believed that the jury held an important role in the legal system but was well aware of its flaws. In one case, Hornby, in his summing up to the jury, instructed them to give a verdict of manslaughter as it fell below the legal standard needed for murder. Contrary to Hornby’s direction, the jury returned a verdict of ‘Wilful Murder’. Hornby had felt that the jury ‘did’ him and took him as a fool.

At the same time in England, juries were seldom used to decide civil disputes, but remained a feature of the criminal trial. Even with Hornby’s apprehension about the jury, he was a strong believer in its merit and in upholding the right to request a jury trial. He commented:

> In all probability there will in the future be only one Judge at Shanghai, and we think we should be introducing a most inconvenient precedent, and one fatal to the legitimate functions of a Jury, were we to decide that the Judge who tried a case might, as it were, sit in appeal on the verdict of a Jury. ...If the parties are willing, they can leave the case to the Judge on questions of fact as well as of law; but when they are unwilling so to leave it, no practice ought, in our opinion, to sanction the taking of the opinion of a Jury which would open the door to a revision of such an opinion by a single Judge.

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89 North-China Herald, Law Reports, 30 April 1870. See proceedings of 26 April 1870.

90 Von Gumpach sued for £3,000 pounds but was awarded £1,800.

91 North-China Herald, Law Reports, 5 May 1870. See proceedings of 3 May 1870.

92 Sir Edmund Hornby (n 25) 256.

93 James Oldham, ‘Special Juries in England: Nineteenth Century Usage and Reform’ (1987) 8 J Legal History 148; Conor Hanly, ‘The Decline of Civil Jury Trial in Nineteenth-Century England’ (2005) 26 J Legal History 253.

94 North-China Herald, Law Reports, 5 May 1870.
With this remark, he stood by his decision to direct the jury in the way he did and leave the jury to decide the facts of the case. While they may not have decided the case or awarded the damages as a trained lawyer might have done, it was a principle of law that justice was delivered by one's peers. Having the support of the community was of considerable importance to lawyers in places that were far afield. These jurisdictions lacked the infrastructure or machinery that meant that rules could be imposed on a society from above. While juries were an important way to ensure that the community felt involved and the decisions themselves were left to juries to decide (if requested), the law itself was not local. It was based upon concepts, ideas, and cases that were made in England. The presence of local men in the jury box may have legitimated the court’s decision but the legal questions turned on unadulterated interpretations of English law.

Conclusion

This analysis provides important new insights to show the ways in which law moved across borders and to what extent it was adapted for local circumstances. In the case of *Von Gumpach v Hart*, principles of English law were not adapted to fit local customs or society that would be found in China. The doctrine of misrepresentation was understood in China in the way it would have been recognized by most lawyers in England years earlier. The lawyers acting in this case borrowed the legal rules that they thought were present and up to date and did not alter them substantively. They used the same body of English case law as described by legal treatises to construct their understanding of the doctrine of misrepresentation. One point that is clear is that the court in Shanghai was on the outskirts of the legal community; the doctrine was conceived as it traditionally would have been in 19th-century contract law. The lawyers in China did not engage with the radical or new ideas contained in the most recent law books about the doctrine. These notions were emerging and beginning to be accepted in English legal thought. These doctrinal developments took place first in England and the jurisdictions on the periphery were slow to follow. This group of British lawyers based in China adopted innovative ideas when they received news of them, but only when they were readily and fully accepted in England.

Why did the judges in Her Majesty’s Supreme Court for China and Japan not alter the substance of English law as they saw it? The transfer we observe here is the result of the lawyer’s aim to conduct a complete and wholesale transplant of English rules. Of course, the lawyers in China were instructed and mandated to use English law. Two legal authorities determined the body of law that was used and influenced the way the law was understood and practiced. The first was the bilateral treaties, starting with Treaty of Nanjing in 1842 and the Treaty of the Bogue of 1843. They established the general principle of British extraterritoriality. The second legal authority was the Orders
in Council. This was passed by the Privy Council and established an English court system in China. It gave Her Majesty’s Supreme Court for China and Japan the power to act in cases with British defendants. It stipulated that the substance of the law should be English.

However, this did not preclude innovations or prevent the legal community in China from building their own idea of local and imperial law. As misrepresentation was, at this stage, a judge-made rule, judicial discretion was paramount. Those in the court could well have established their own internal dialogue that would have resulted in a different or unique understanding of the doctrine, but they did not. They looked outwards to external sources. The analysis in this article has not shown that the court in China reached the same decision that a court in England would have. Rather, it has been concerned with the body of substantive law that was used as well as the method, style, and form of legal reasoning. The lawyers in this case used English legal authorities and English law books. These were the sources that they used to derive their understanding of the legal principles.

Unadulterated principles of English law were applied without consideration for geography or climate, because of practical reasons as well as legal reasons. Discourses of ‘otherness’ abounded in legitimizing of extraterritorial jurisdiction in China (that is, that China was an ‘uncivilised’ place where British subjects deserved to be immune from its laws). We argue that when lawyers and judges came to interpret English substantive law in court cases between British subjects, they did not take into consideration the foreignness of their location, or the wider Chinese population. The personnel involved were British lawyers who were first trained in England and moved to Shanghai later in their legal career. By 1870, the court had been in operation for five years. The lawyers were still steeped in the law of England and did not yet have time to develop their own identity or separatist legal thought. None were homegrown Chinese lawyers; none were well versed in Chinese legal customs. This explains why the foundations for their doctrinal thinking can be found in English law and the terms had the same cultural meaning. By its very nature, this court dealt solely with cases that involved British lawyers, British defendants, and, in other words, British society. If the defendant was Chinese or another national of a treaty power, Chinese law or the law of another legal system would apply. It, therefore, made sense that the law, which was taken and then used in this court, was English. Their decisions needed to be understood by the commercial community that surrounded the court. Even though this lawsuit took place in a separate geographical location, with British judges, British lawyers, and British litigants, it is perhaps not surprising that this society used English law to resolve its disputes; they applied the principles of English law and derived their understanding of legal rules from English law books.

More to the point, when this case came to the Judicial Committee of the Privy Council, the outcome was reversed partially.