the settled rule that publication is sufficient for the main purpose of the decree, I rather give a reason for sustaining the decisions, in that respect, than controvert them. It is true that I have dissented from a few decisions as to the effect of divorce on the absent defendant, but, in doing so, I find myself in company with the great majority of those who have rendered divorce decisions, and who sustain the doctrine that the divorce of one of a married couple is the virtual divorce of both.

So far from this paper being a mere theory, it is a diffident attempt to reconcile differences, and to show that the current of decisions, notwithstanding untenable *obiter dicta* and the misuse of terms and the fallacies in reasoning often found, is, in the main, consonant with the symmetry of legal science. Manifestly, it was impossible, in a brief essay, to discuss or even cite the many decisions sustaining the prevalent doctrine in opposition to the controverted ones of New York.

RUFUS WAPLES.

Ann Arbor, Mich.

## RECENT ENGLISH CASE.

*High Court of Appeals.*

LIVERPOOL HOUSEHOLD STORES ASSOCIATION *v.* SMITH.

Since the passing of the Judicature Acts, the Court has jurisdiction to restrain by interlocutory injunction the publication of a trade libel, but as, if it grants such an injunction, it must pronounce the publication to be libellous before it has been found so by a jury, the jurisdiction is to be exercised only in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if they found otherwise, their verdict would be set aside as unreasonable.

The question as to granting injunctions to restrain publication in a newspaper, of reports and correspondence containing unfavorable statements as to the position and solvency of a joint stock company, considered.

Injunction to restrain the publication of future articles reflecting unfavorably on a company refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libellous, and, because if the injunction were granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way, on a motion to commit.

APPEAL from the Chancery Division.

COTTON, L. J.—This is an appeal from a decision of Mr. Justice KEKEWICH, who declined to grant an interlocutory injunction in an action brought against the proprietors of a newspaper, in respect of three alleged libels, the first being a report of a meeting of the shareholders of the plaintiff company, published in the newspaper of the defendants, and the others being two letters published in the same newspaper. The injunction sought for, is not to restrain the future publication of these alleged libels, and for this reason, that there is no probability of any republication in that paper, of the report of the meeting, and no probability that those letters will be again sent to the paper. It is not necessary to decide the question, how far, if those who regulate the affairs of a company invite the reporters of a newspaper to come to a private meeting, the company can afterwards sue the newspaper for publishing a full report of that meeting, because statements made at the meeting were libellous. I think that would require some consideration. Nor is it necessary for us to consider how far the proprietors of the newspaper would be liable for inserting letters commenting on what was said at the meeting of which they have published a report. We have not to decide these questions because there is no probability that the report of the meeting or these letters will be repeated, and whether damages can be recovered for them is a question to be decided only at the trial of the action. There is also another question to be considered at the trial, whether a company issuing a prospectus asking shareholders to join it, does not to a certain extent invite public comment on its constitution, its capital, and its prospects. The injunction now asked for is not an injunction to restrain the republication of the report or of the letters, but it is to restrain the defendants from publishing "any articles, letters from correspondents, or any other matter containing assertions, imputations, or suggestions that the plaintiff company is insolvent or incapable of carrying on its business with success, or that the shareholders did at the general meeting unanimously sign or propose a resolution to the effect that another general meeting of the company should be convened for the purpose of taking into consideration whether the company should be wound up." Now there

is really no suggestion that the defendants threaten or intend to republish the statement as to the unanimous resolution. Ought we then to grant an injunction with reference to the future publication in this paper of things of the nature here complained of? No doubt it may be very truly said, "I am not bound by the notice of motion; I am entitled to go for any injunction with regard to future publication that the Court may grant me." But I agree with Mr. Justice KEKEWICH, that there would be the very greatest difficulty in laying down the terms in which we, in the present case, could grant an injunction. In *Coulson* v. *Coulson*, 3 Times, L. R. 846, the Master of the Rolls said that to justify the Court in granting an interim injunction, it must come to a decision on the question of libel or no libel, before the jury decided whether it was a libel or not, that the jurisdiction therefore was of a delicate nature and ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable. That is what the Master of the Rolls said with reference to an existing document, brought before the Court, and Lords Justices LINDLEY and LOPES concurred in that ruling. Now in the case of an existing document brought before the Court, the Court can judge of its character, but how can the Court judge whether documents, which are not yet in existence, will be libellous? In my opinion, it would be very dangerous to grant an interlocutory injunction with reference to future publication, unless we could lay down definitely some line which would include only the publication of what would necessarily be libellous. In my opinion, it would be very unadvisable to grant any injunction, which would restrain fair discussion in the newspapers, of matters of importance like that of the probable success or failure of a public company. Of course, if anything libellous is published in the newspaper, there will be a right of action against the proprietors, and they will be answerable; but I feel that there would be the greatest danger in granting an interlocutory injunction such as is now asked for. Several cases were cited in support of the case of the appellants. That of

*Hill* v. *Hart Davies*, 21 Ch. D., 798, 802, before KAY, J., is the strongest. The defendant there was the parson of a parish, and published a circular containing statements with reference to a friendly society to the effect that it was insolvent, and that it would be dangerous to invest money in it. These statements were proved to be incorrect; and then, with the document before the Court proved to be incorrect, and defamatory and injurious to the plaintiff society, an interlocutory injunction was granted in reference to the document, Mr. Justice KAY adding, "or any other circular or letter containing false or inaccurate representations as to the credit or financial condition of the said society." Whether he was right or wrong in adding those words, I give no opinion; but there was before the Court a document showing the nature of the statements likely to be published by the defendant. The defendant, moreover, was not in the position of a newspaper. I think that a newspaper occupies a peculiar position, especially with regard to matters concerning the interest of those amongst whom the newspaper circulates, such as the discussion of the condition of a company like this. I do not say that any statements or letters printed in the defendants' newspaper, making reflections of the character indicated in the notice of motion, will not be libellous; but I cannot say that the jury would necessarily find them to be libellous. As regards *Herman Loog* v. *Bean*, 26 Ch. D. 306, the main ground for granting the injunction was one that does not exist in the present case. There, the defendant had been in the employment of the plaintiff's firm, and was restrained from making to their customers slanderous statements as to the plaintiff's business, in making which he was guilty of a breach of duty to his former employers. The Court abstained from giving any opinion whether the defendant could be restrained from making the statement to any persons other than the plaintiff's customers. In no case do I find an injunction granted such as is asked for here, an injunction as regards future publication of statements coming under such an indefinite description. Supposing we were to grant the injunction against "libellous" letters, then it would have to be decided on motion to commit, whether what was published was libellous or not;

and that would be a most inconvenient course to be adopted. In my opinion, therefore, the appeal must fail.

LOPES, L. J.:—This is an application for an interlocutory injunction to restrain libellous publications. It is clear that, since the Judicature Act, the Court has power to restrain the publication of libellous or slanderous matter, if it is immediately calculated to injure the person or trade of any one against whom it is directed, but whether the jurisdiction should be exercised or not, is a matter for the discretion of the Court. We have to deal in the present case with the report and two letters, one published on the 21st, and the other on the 24th of October. With regard to the report, it is clear that the question whether it is privileged, must be left to be decided at the trial, and if the publication should be held to be privileged, it will be necessary for the plaintiffs to establish that there has been actual malice, which is not suggested to exist in this case. The reporters, at the meeting in question, were present with the knowledge of the plaintiffs, if not with their sanction. Are the reporters in such cases to give an imperfect report, omitting all that is detrimental to the company, and stating only what is in its favor? I do not hesitate to say that any thing more undesirable or more calculated to mislead and bring about disastrous results can scarcely be imagined. Passing from the report, I come to the letters, and after what has been said by Lord Justice COTTON, with which I agree, I have little to add. Speaking for myself, it does not appear to me to be so perfectly clear, taking all the circumstances into consideration, that the jury will come to the conclusion that the letters which have been published, were libels, as to justify the Court in granting an interlocutory injunction against republishing them; and as regards future letters of the description mentioned in the notice of motion, it clearly is not so apparent that a jury will find them libels, as to justify the Court in interfering in the way asked. It would be most inconvenient to have the question of libel or no libel tried by the judge on motion to commit instead of being tried by a jury. I agree with all that was said by the Master of the Rolls in *Coulson* v. *Coulson*, 3 Times L. R. 846, and in the present case my opinion is that

the judge below was right, and that the appeal must be dismissed.

Before the Judicature Act of 1873, the Court of Chancery claimed but a limited jurisdiction to grant injunctions. Originally, indeed, as was admitted by Sir GEORGE JESSELL, in *Beddow* v. *Beddow*, L. R. 9 Ch. Div. 89, it was subject to no other restriction in this respect than that the exercise of the jurisdiction should be reasonable and just, but its power had, as he says, become "limited by the practice of different chancellors. The jurisdiction was never extended in modern times beyond what was warranted by the authorities; and in course of time various vexatious and inconvenient restrictions were adopted. The granting of an injunction was always looked upon as an extraordinary exercise of jurisdiction. * * * * The instances in which an injunction might be granted were decided by the court, and there were certain well-known cases in which it was settled that the court ought not to grant an injunction." Among these cases was that of libel, whether private or public, unless, indeed, the libel were also a contempt of the court: *Roach* v. *Garvan*, 2 Dick. 794; s. c. 2 Atk. 469. See, on the latter point, *Brook* v. *Evans*, 8 Weekly R. 688. The Star Chamber had, indeed, restrained the publication of seditious works, but Scroggs was impeached for attempting to introduce the practice into the King's Bench. The Common Law Procedure Act of 1854 (17 & 18 Vic. c. 125, s. 79) gave the courts of law extensive powers of injunction, but only to prevent the repetition or continuance of an injury for which an action for damages had already been brought.

It is true, that in *Du Bost* v. *Beresford*, 2 Camp. 511, Lord ELLENBOROUGH said of a libellous picture, "Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition," but this *dictum* was never recognized as of any authority, and in *Gee* v. *Pritchard*, 2 Swanst. 402, 413, Lord ELDON said, expressly, "The publication of the libel is a crime; and I have no jurisdiction to prevent the commission of crimes, excepting, of course, such cases as belong to the protection of infants." For many years, all attempts to change the rule were uniformly unsuccessful. In *Martin* v. *Wright*, 6 Sim. 297 (1833), an enlarged copy of a picture by the plaintiff had been made as a diorama and advertised as "Mr. Martin's grand picture of Belshazzar's Feast, painted with dioramic effect." An injunction was refused, SHADWELL, V. C., saying, "Then with respect to the defendant representing his copy as Martin's picture. It must either be better or worse; if it is better, Martin had the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this court will not prevent the publication of a libel." *Seeley* v. *Fisher*, 11 Sim. 581, is to the same effect as to this latter point.

*Routh* v. *Webster*, 10 Beav. 561 (1847), was no real exception to the rule. The provisional directors of a company were enjoined from publishing a prospectus in which the plaintiff was stated to be a trustee, but the decision rested wholly on the unauthorized use of the plaintiff's name, involving him in possible liabilities, and no question of libel was raised. In *Clark* v. *Freeman*, 11 Beav. 112 (1848), the eminent physician, Sir

James Clark, sought to enjoin a chemist from advertising and selling a quack medicine called "Sir James Clarke's Consumption Pills," it being a highly injurious compound, if indiscriminately used, and, from the clearly intentional similarity of names, calculated to injure his reputation. The court admitted that the plaintiff might be very seriously injured, but maintained that the fact must first be established at law, before the continuance of the injury could be enjoined. "I think," said Lord LANGDALE, M. R., "that granting the injunction in this case would imply that the court has jurisdiction to stay the publication of a libel, and I cannot think it has." As his lordship had decided *Routh* v. *Webster*, this makes it perfectly clear that he did not hold that case to be one of libel.

*Fleming* v. *Newton*, 1 H. L. C. 363 (1848), was an appeal from a decree of the Court of Sessions, interdicting, so far as concerned the plaintiff's name, the publication of the register of protests of bills and notes. The case did not call for a decision on the jurisdiction of the Court of Sessions to interdict the publication of libels, but Lord COTTENHAM expressed "an earnest hope that, if this question should arise and require a decision in the Court of Sessions, and no distinct rule should be found already to exist upon the subject, the consequences of any rule to be established for the first time will be most carefully considered before such a rule is laid down; and particularly that it may be considered how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries, or, indeed, with the liberty of the press."

The doctrine that a libellous publication could not be enjoined, was reasserted, *obiter*, in 1861, in *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217.

The well-known rule that a criminal act which affects the enjoyment of property, or works an injury thereto, may be enjoined on that ground only (*Macaulay* v. *Shackell*, 1 Bligh N. S. 96,127; *Att.-Gen.* v. *Shef. Gas Con. Co.*, 3 De G. M. & G. 304,320; *Emp. of Austria* v. *Day*, 3 De G. F. & J. 217, 253) worked one partial exception to the doctrine, viz: that if the fact of libel had been found by a jury, its further publication might be enjoined as an injury to the plaintiff's property, or his means of gaining a livelihood: *Clark* v. *Freeman*, *supra*; *Cox* v. *Cox*, 11 Hare, 118, 124.

The continuity of this course of decision was at length broken by Vice-Chancellor MALINS, who was strongly convinced that the powers of the court were in reality amply sufficient to grant this form of relief, and had been too long suffered to remain in abeyance. In *Springhead Spin. Co.* v. *Riley*, L. R. 6 Eq. 551 (1868), he granted an injunction to restrain the issuing of placards and advertisements, intimidating workmen and preventing them from hiring themselves to the plaintiffs. As the value of the plaintiffs' property was seriously affected by this course of boycotting, as it would now be called, there was certainly ample cause for the action of the court, provided it had jurisdiction in the matter. The next year he went a step further and in *Dixon* v. *Holden*, L. R. 7. Eq. 488, granted a preliminary injunction against the publication of a notice, stating that the plaintiff was a member of a certain firm which had been adjudicated bankrupt, but that he had defrauded the creditors by concealing the fact of his membership. Upon the hearing, the injunction was made perpetual, the Vice-Chancellor saying, "I am

told that a court of equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to and cannot be denied, that the effect of this will be seriously damaging to the plaintiff's business of a merchant * * * about the most valuable kind of property that he can well have. * * * But I go further, and say, if it had only injured his reputation, it is within the jurisdiction of this court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and if possible, more valuable than other property. * * * I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself."

In reaching this conclusion, the Vice-Chancellor conceived himself to be "fortified by authority." Without denying the abstract reasonableness of his views of the powers of the court, he seems to have been mistaken about the authority. The doctrine that equity will prevent even a criminal injury to property had never been carried so far. He held *Routh* v. *Webster*, *supra*, as "going the whole length of what is asked here," but while this is in one sense true, both cases involving statements that the plaintiff belonged to a business concern, they were decided on such wholly different grounds that the one cannot be regarded as any authority for the other. The Vice-Chancellor went on to say that Lord LANGDALE refused the injunction in *Clark* v. *Freeman* "only because he did not think it likely that such a thing could possibly prove an injury to the reputation of a man in the position of Sir James Clark." In view of Lord LANGDALE'S unqualified statement of the real ground of his decision, one is led to believe that the Vice-Chancellor quoted from memory.

In *Mulkern* v. *Ward*, L. R. 13 Eq. 619 (1872), the rule attempted to be established in *Dixon* v. *Holden*, is referred to as "wholly new," but its correctness is neither affirmed nor denied, the case before the court being held distinguishable.

*Dixon* v. *Holden* did not long pass unchallenged. It was not followed in *Brown* v. *Freeman*, Weekly Notes, 1873, 178, and was expressly overruled in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. App. 142 (1875). An injunction was prayed for against the continued publication of a pamphlet containing statistics as to insurance companies, with comments on their condition, but Lord CAIRNS held that while the court could restrain certain publications, it could not do so merely because they were libellous, and as no other reason for its interference was alleged, he refused the appeal, saying, "not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction." He referred to *Springhead Spin. Co.* v. *Riley* and

*Dixon* v. *Holden*, but thought them unwarranted by the decisions on which they relied, and said "I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this court, and I cannot accept them as an authority, for the present application." The other Lord Justices concurred in this view, JAMES, L. J., saying, "I think that the Vice-Chancellor, in that case of *Dixon* v. *Holden*, was, by his desire to do what was right, led to exaggerate the jurisdiction of this court in a manner for which there was no authority in any reported case, and no foundation in principle. I think it right to say that I hold without doubt that the statement of the law in that case is not correct." To the same effect, *Fisher* v. *Apollinaris Co.*, Id. 297, 302.

The Judicature Act of 1873 (36 & 37 Vict. c. 66) took effect Nov. 2, 1874, a few months before these last decisions, and in fact the decision appealed from in *Prud. Ass. Co.* v. *Knott* was probably made before that date. It seems, however, that in neither case was that act claimed to affect the matter. It provided (§ 25, sub. § 8), that "an injunction may be granted * * * by an interlocutory order of the court in all cases in which it shall appear to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just."

It was apparently not until 1877 that this act was claimed to have altered the law as to libel, and, by a rather curious coincidence, the first case came before Vice-Chancellor MALINS—*Thorley's Cattle Food Co.* v. *Massam*, L. R. 6 Ch. D. 582 (1877); on appeal 14 Id. 763, 782 (1880). The defendants had published in various newspapers an advertisement stating that they "are alone possessed of the secret for compounding" the cattle food, and warning the public "against the course pursued by a company which has lately been registered with a nominal capital of only £200, and a paid-up capital of a few shillings, in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley." Finding the advertisement to be untrue and misleading, and calculated to injure the plaintiffs in their business, the Vice-Chancellor held that the thing ought to be stopped, and that if he were not fettered by authority he "should, without the slightest hesitation, have granted an injunction to prevent the continuance of such a practice as this. * * * In my own individual opinion, I have not the slightest doubt whatever that it is, and it ought to be, as much the principle of this court to stop publications which go to destroy property as to prevent the darkening of ancient lights, or the trespassing upon property, or anything else which goes to the destruction of property." He admitted, however, that the opinion expressed in *Prudential Ass. Co.* v. *Knott* stood in the way, though he thought that case rightly decided on the facts, and clearly distinguishable from *Springhead Spin. Co.* v. *Riley* and *Dixon* v. *Holden*. His own opinion was in favor of the plaintiffs' contention, that the force of *Prudential Ass. Co.* v. *Knott* was nullified by the act, but as the point was a new one, involving considerations of the highest possible importance, he would not decide it on an interlocutory application, and refused the motion, thereby reserving the question for decision on the hearing of the cause.

The courts were at first slow to adopt the Vice-Chancellor's view of the act. In *Hinrichs* v. *Berndes*, Weekly Notes, 1878, page 11, the Master of the Rolls admitted himself unprepared to answer the question, and in *Saxby* v. *Easterbrook*, L. R. 3 C. P. D. 339, in the same year, Lord COLERIDGE referred to the act and said, "I confess I do not appreciate its application to the matter." In that case an injunction was granted *after verdict*, LINDLEY, J., saying, "The principle upon which the courts of equity have acted in declining to restrain the publication of matter alleged to be libellous, is, that the question of libel or no libel is pre-eminently for a jury. But when the jury have found the matter complained of to be libellous, and that it affects property, I see no principle by which the court ought to be precluded from saying that the repetition of the libel shall be restrained."

A month later, the effect of the Judicature Act was explained by Sir GEORGE JESSEL in *Beddow* v. *Beddow*, L. R. 9 Ch. D. 89, already cited. The case was not one of libel, but he made no distinction as to the object sought by the injunction. After referring to the former limited jurisdiction of the Court of Chancery in this respect, see *supra*, and to the fact that the new act extended to all the courts the power of injunction given to common law courts by the Common Law Procedure Act of 1854, and also to the wide terms used in the Judicature Act, he proceeded, "It appears to me that the only limit to my power of granting an injunction is whether I can properly do so. In my opinion, having regard to these two acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles."

This case was considered reasonably enough, by MALINS, V. C., as settling the question in favor of the view he had maintained through evil report and good report, for this is clearly the case to which he meant to refer in *Day* v. *Brownrigg*, L. R. 10 Ch. D. 294, 300, though the report makes him rely on *Byron* v. *Johnston*, 2 Mer. 29, obviously a misprint. Accordingly, the second stage of *Thorley's Cattle Food Co.* v. *Massam* (L. R. 14 Ch. D. 763) found his opinion unaltered as to the law, "that, where one man publishes that which is injurious to another in his trade and business, that publication is actionable, and, being actionable, will be stayed by injunction, because it is a wrong which ought not to be repeated." In view of the facts proved in the case, he granted a perpetual injunction, and his decision was affirmed on appeal. Neither in his reported opinion nor in those of the Court of Appeals is there any reference to *Prudential Ass. Co.* v. *Knott*, or the effect of the act upon it. That the act did control it, seems to be tacitly admitted. *Thorley's Cattle Food Co.* v. *Massam* was followed in the same year in *Thomas* v. *Williams*, L. R. 14 Ch. D. 864, where FRY, J., after reviewing the facts, said, "In the next place, it is said that, this being a libel, no injunction ought to be granted in respect of it. I am at a loss to see why a libel affecting property or trade may not be the subject of an injunction. It is not necessary for me to point out the evident intention of the Legislature, as indicated by the 25th section of the Judicature Act of 1873, to enlarge rather than diminish the power of the court in respect of injunctions," and on adverting to the authorities,

he pointed out that JAMES, L. J., one of the judges in *Thorley's Cattle Food Co.* v. *Massam*, had been a party to the decision in *Prudential Ass. Co.* v. *Knott*.

The rule once admitted, there was a general "falling into line." In *Quartz Hill Cons. G. M. Co.* v. *Beall*, L. R. 20 Ch. D. 501 (1882), BACON, V. C., granted an interlocutory injunction restraining the defendant from publishing a circular or advertisement, containing certain statements, "or otherwise libellous or defamatory to the company or the property, title to property, value of assets, or financial position of the company." This was dissolved on appeal, on the ground that the circular was a privileged communication, but the jurisdiction since the Judicature Act was admitted. This jurisdiction, it was however agreed, must be exercised with the utmost possible caution.

In *Hill* v. *Davies*, L. R. 21 Ch. D. 798 (1882), a circular calculated to injure the credit or financial standing of a friendly society was enjoined.

The same general principle was followed in *Briton Life Assn.* v. *Roberts*, 2 Times L. R. 319, and *Coulson* v. *Coulson*, 3 Id. 846, but in the latter case Lord ESHER, M.R., observed that "it was a most delicate jurisdiction to exercise. * * * To justify the court in granting an interim injunction it must come to a decision on the question of libel or no libel, before the jury decided whether it was a libel or not. * * * It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." *Armstrong* v. *Armit*, 2 Id. 887, in the Queen's Bench Division, is to the same effect.

In *Herrmann Loog* v. *Bean*, L. R. 26 Ch. D. 306 (1884); s. c. 23 Am. Law Reg. 701 (with note), the rule was held to cover cases of slander also. The defendant had been dismissed from the plaintiffs' service, and the injunction sought was to restrain him, *inter alia*, "from stating to the plaintiffs' customers, or any other person, or persons, that the plaintiffs were about to stop payment, or were in difficulties, or insolvent, or making any statements to the above or like effect, and from in any manner slandering the plaintiffs or injuring their reputation or business." In the Chancery Division, PEARSON, J., said, "On that part of the case, independently of any other question, there must be an injunction to restrain the defendant from continuing such proceedings." This was affirmed in the Court of Appeal, COTTON, L. J., saying, "Here is a man who had been in the employ of the plaintiffs, making to their customers slanderous statements with regard to the business of the company * * * The Court has of late granted injunctions in cases of libel, and why should it not also do so in cases of slander? It is clear that slanderous statements such as were made to old customers in this case, must have a tendency materially to injure the plaintiffs' business; they are slanders, therefore, spoken against their trade. It is not necessary therefore in my opinion to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade, the plaintiffs may clearly come to the court. There is, no doubt more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the defendant is proved to have made certain definite state-

ments, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The defendant, though no doubt the tongue is an unruly member to govern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is, by the injunction, restricted from uttering." BOWEN, L. J., also said, "There is a wrong done which is actionable if it has been committed, and which naturally would, if repeated or persisted in, affect injuriously the property or trade of the plaintiff company. It has been held since the Judicature Act that a plaintiff is entitled to the protection of the court against a wrong of that sort which is contained in a written document. * * * Can there be any distinction in principle between a slander which is contained in a written document and a slander which is not?" And he held that the same rule must govern both.

It was on the authority of these latter cases that Lord Justice LOPES was able to say, in the principal case, "It is clear that since the Judicature Act, the court has power to restrain the publication of libellous or slanderous matter, if it is immediately calculated to injure the person or trade of any one against whom it is directed." Such is now the law in England, and it is a noteworthy extension of the powers of a court of equity beyond these recognized in Lord ELDON'S time, when in *Gee* v. *Pritchard*, *supra*, he cut short the counsel, who was adverting to the contention that the letters under consideration were libellous, with the observations, "It will not be necessary to trouble you with that view of the case. The publication of the libel is a crime; and I have no jurisdiction to prevent the commission of crimes. * * * The question will be, whether the bill has stated facts of which the court will take notice." What was then held to be wholly outside the consideration of the court is now a substantial feature of its jurisdiction.

The American cases are few, and are practically unanimous in upholding the former English rule.

*In Singer Mfg. Co.* v. *Domestic S. M. Co.*, 49 Ga. 70 (1872), the plaintiff had published a report of a committee of the State Agricultural Society, declaring the plaintiff's machine the best that they had inspected in the competition, and the defendant had published a statement that the report as set forth by the plaintiff was untrue, and that the decision had been in favor of the defendant's machine. The court refused the injunction, on the authority of the earlier English cases, saying, "If a wrong capable of redress before the courts at all, it comes more nearly within the definition of a libel, or of slander concerning one's trade and business, than anything else. Equity, it must be remembered, will not enjoin every wrong. * * * Libel and slander, however outrageous, will not be enjoined * * * The principle is, that, to authorize the writ, there must be an irreparable expected injury to a property right. It is a perversion of language to say that the complainant has a property right in *the truth* of the report. He has, perhaps, a right to the report, but a perversion of the truth, a claim that it is different from what it in fact is, can in no fair sense be called an infringement of his right of property in the report." To this latter statement it might be answered that as the report could only be of value if it were believed to be true, anything calculated to impair that belief would necessarily impair the value of the

report, and of whatever property-right there might be in it.

In 1880, the Supreme Court of the same State expressed an opinion in direct conflict with the above. In *Bell* v. *Singer Mfg. Co.*, 65 Ga. 452, the defendant had issued a circular, charging the plaintiffs with violation of the defendant's patent. The injunction was refused on the facts as presented, but the court said, "We recognize the rule that a court of equity upon a proper case has the power to enjoin the publication and circulation of a libel, and that the principle is applicable to equitable rights arising under the patent laws of the United States, where the legality of the patent is not the subject of inquiry, but the patent right is only collateral to the relief sought." No authorities are cited, nor are any reasons given, but it is a significant fact that the court was composed of judges, all of whom had come to the bench since the decision made eight years before. Whether the change of doctrine is due to anything more fundamental than rotation in judicial office, we are left to conjecture.

In Massachusetts, the former English rule has been consistently followed: *Boston Diatite Co.* v. *Florence Mfg. Co.*, 114 Mass. 69 (1873), where *Dixon* v. *Holden*, *supra*, is disapproved; *Whitehead* v. *Kitson*, 119 Id. 484 (1876); and *Raymond* v. *Russell*, 143 Id. 295 (1887), apparently the most recent American case on the point, and where *Prud. Ass. Co.* v. *Knott*, *supra*, is relied on as law.

In *Life Ass'n of America* v. *Boogher*, 3 Mo. App. 173 (1876), the petition for the injunction set forth the fact of the libel, and also alleged that the defendants "were wholly insolvent and irresponsible, and that the plaintiff had, therefore, no available recourse to an action for damages." A preliminary injunction was granted, but dissolved on demurrer, and this judgment was affirmed in the Court of Appeals, on the authority of *Brandreth* v. *Lance*, 8 Paige, 24, and the earlier English cases. To the argument that the defendants were insolvent, the court said, "It is obvious that if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured by the Constitution of Missouri to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. We are of opinion that this discrimination was not intended by the framers of the organic law." The court went on to admit, that, irrespective of such insolvency, "there is much room for saying that the legal remedy falls short of making full compensation for injury done or of giving full protection against injury threatened;" but added, "To infer from this that recourse may be had to the preventive jurisdiction of a court of equity is clearly not allowable. No human institutions are perfect." The bill of rights was referred to, and it was observed that "If it be said that the right to speak, write, or print, thus secured to every one, cannot be construed to mean a license to wantonly injure another, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is that we have no power to suspend that right for a moment, or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted, to limit or restrain this right, except by the fear of the penalty, civil or criminal, which may wait on abuse."

In *Brandreth* v. *Lance*, 8 Paige, 24 (1839), the old New York Court of Chancery held to the English rule then in force, on the authority of *Gee* v. *Pritchard*, *supra*, and this precedent has been held to bind the courts of to-day in the exercise of their equity powers: *N. Y. Juv. Guard. Soc.* v. *Roosevelt*, 7 Daly, 188 (1877); *Mauger* v. *Dick*, 55 How. Pr. 132 (1878); *Wolfe* v. *Burke*, 56 N. Y. 115 (1874), was a somewhat analogous case, an injunction to restrain the defendants from interfering with the plaintiffs' business by threats, circulars, *suits, or injunctions*, being refused, but there were so many grounds for the decision that it does not constitute an authority on the point under consideration. In *Croft* v. *Richardson*, 59 How. Pr. 356 (1880), however, the New York Supreme Court, finding that the defendants were "publishing false and malicious libels concerning the plaintiffs' business, and their business character and transactions," granted an injunction on the authority of the second decision in *Thorley's Cattle Food Co.* v. *Massam*, *supra*.

In the recent case of *Kidd* v. *Horry*, 28 Fed. R. 773; s. c. *sub nom. Kidd* v. *Smith*, 25 Am. Law Reg. N. S. 730, BRADLEY, J., reviews the English and American authorities, points to the powers granted by the Judicature Act as the sole foundation of the present English doctrine, and says, "Neither the statute law of this country, nor any well-considered judgment of the courts, has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. * * We do not regard the contrary decision in *Croft* v. *Richardson* [*supra*] sufficient authority to counteract these cases, or to disturb what we consider to be the well-established law on the subject. That law clearly is that the Court of Chancery will not interfere by injunction to restrain the publication of a libel [citing *Prud. Ass. Co.* v. *Knott*]. * * * If this decision has since been overruled, it is only because of the enlarged jurisdiction conferred upon the English courts by the statutes referred to. It is a standard authority on the general law, independent of legislation. * * * Charges of libel and slander are peculiarly adapted to and require trial by jury, and exercising, as we do, authority under a system of government and law which, by a fundamental article, secures the right of trial by jury in all cases at common law, and which, by express statute, declares that suits in equity shall not be sustained in any case where a plain, adequate, and complete remedy may be had at law, as has always heretofore been considered the case in cases of libel and slander, we do not think that we would be justified in extending the remedy of injunction to such cases."

This decision is undoubtedly a correct statement of the law as it has hitherto been almost invariably held in the United States. The isolated cases in Georgia and New York, cited above, show, indeed, that it is possible for some of our courts to abandon the old rule, but as neither case contains any argument in support of the conclusion reached, they can hardly be regarded as authority. At most they may be straws showing how the judicial wind is beginning to blow.

In view of the direct opposition, at present existing between the English and American rules, a few observations may not be inappropriate. The usual argument against attempting to enjoin the publication of a libel or the repetition of a slander is that such

action on the part of the court would be an interference with trial by jury, and freedom of speech and of the press. The danger of such interference certainly calls for great caution in allowing such injunctions, as was recognized in the principal case, and in some of the others cited above, but as long as this caution is exercised, the interference is more apparent than real. If a judge, sitting in equity, only diminishes the evil result of what a jury would unquestionably condemn; if he checks the evil more speedily than a jury could do, there is certainly no interference with justice. Besides, the plaintiff has rights as well as the defendant. Freedom of speech and freedom from unmerited attacks on character and credit must stand on equally high ground as natural rights, while, among those rights which take their rise in legal institutions, the aid of a court of equity to prevent irreparable wrong is often not less valuable than trial by jury itself; and irreparable wrong (the prospect of which must exist to warrant any injunction) may be caused by an abuse of the right of free speech as easily as by anything else. The objection that trial by jury is interfered with, can, from one point of view, be made to every injunction that is not granted after a trial has been had at law. The proper test for the granting of an injunction must be the irreparable character of the injury, not the particular manner in which it was inflicted.

The fact that the highest English courts see fit to exercise their new power, and believe that they further the interests of justice thereby, is in itself an argument, and one still stronger is found in the fact that they did not shrink from claiming the power, though it came to them concealed, as it were, in the general terms of the act.

The rise of the former English practice, and its subsequent abandonment, are not far to seek. When the recognition of the right to trial by jury had to be wrested from an unwilling monarch, when freedom of speech was restricted, and the voice of the press yet unheard, it was expedient that the Court of Chancery should avoid even the appearance of interfering with popular rights, but when they became firmly established, the rule ceased to be much more than a technicality. The court could not enjoin a libel because it never had done so. Sir RICHARD MALINS tried to break down the rule, and his judgments were overruled, not because they were inequitable, but because they were unprecedented. When the statutory grant of general powers of injunction overcame this objection, the judges did not long hesitate to exercise those powers in this new way.

Now the American rule is unquestionably founded on that of the former English Courts of Chancery. If the rule be only technical, then it cannot bind American courts unless they are constituted with the same limited powers of injunction that that court was considered to possess. If they are so limited, of course the recent English cases are no precedent for them, and legislation alone can change their practice; but any court with power to grant an injunction whenever such action appears "on settled legal principles" to be "right or just" (see *Beddow* v. *Beddow*, *supra*), would seem to be justified in following the present English practice.

Apart from English precedents, however, BRADLEY, J., *Kidd* v. *Horry*, *supra*, declares the right to equitable

relief in the Federal courts to depend on the absence of a plain, adequate, and complete remedy at law, and that this remedy exists in cases of libel and slander. As is admitted in *Life Assn.* v. *Boogher*, *supra*, this latter assertion may be open to doubt. Should it ever cease to command judicial acquiescence, a strong argument in favor of the old rule would be removed.

It is to be observed that all the English cases recognizing the power to grant injunctions involve "trade libels" only, calculated to injure the plaintiff's credit or business reputation. The principal case is no exception to the rule, but Lord Justice LOPES did not confine the doctrine to such cases. He said, "The court has power to restrain the publication of libellous or slanderous matter, if it is immediately calculated to injure the *person or trade* of any one against whom it is directed." While there seems to be no reported case of an injunction against a personal libel, unconnected with the business of a company or individual, there is no reason why all kinds of libel should not be subject to the same rule in this respect. *Clark* v. *Freeman*, *supra*, involving as it did the professional reputation of a physician of eminence, comes perhaps nearer a strictly personal libel than any of the other cases, especially as at that time the social distinction between a profession and a trade was much more marked than at present. At all events, it serves to show how closely personal and trade libels are connected. It was not without reason that Vice-Chancellor MALINS said, in *Dixon* v. *Holden*, *supra*, that a man's reputation is his property, and this must be irrespective of whether he be engaged in business or not. Of course the injury inflicted by libels upon the character or credit of persons engaged in business is much more likely to be of that irreparable character which calls for the intervention of a court of equity than is to be expected in cases of purely personal libel, but it can hardly be asserted that these cases can never come properly before such a court.

Extensive as is the jurisdiction of the English courts with regard to injunctions in general, the principal case clearly shows that the exercise of this jurisdiction is limited, in cases of libel, by certain well-recognized restrictions. *First.* Whether the injunction be interlocutory or final, there must be such proof of the fact of libel or slander as would satisfy a jury. *Second.* The language or character of the publications or verbal statements forbidden must be definitely described. If the caution displayed by the court in the principal case be always observed, there will be little chance of complaint of interference with popular rights.

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