named" had been left out, the question would not have arisen. The addition of these words "herein named," especially having regard to the similar power which is given to the executors in the earlier part of his will, seems to me really not to make any serious difficulty in the matter; "herein named" means no more than "hereby appointed," and I come to the conclusion that on the construction of this particular will a power is granted which is attached to the office of executors, and, that being the case, of course the power can be exercised by the executors for the time being.

Solicitors: *Miller & Williamson, Liverpool; Solicitor to the Treasury.*

H. C. J.

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[1891 B. 735.]

Libel—Injunction—Jurisdiction—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 78].

The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable.

An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so.

Decision of *North*, J., granting an interlocutory injunction to restrain the publication of an alleged libel, reversed, *Kay*, L.J., dissenting.

THIS was an action for libel. The Plaintiffs were *Gustave Richard Bonnard* and *Arthur Henry Deakin*, trading as the *Mercantile and General Trust* at *Broad Street Avenue*. The Defendants were, *Charles W. Perryman*, the publisher, proprietor, and editor of a weekly newspaper called the *Financial Observer and Mining Herald*; and *Clement Allen*, sued as the printer of that newspaper. Both Defendants swore that the Defendant *Allen* was not the printer, and that the Defendant *Perryman* was; but there was

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evidence which satisfied the Court that the Defendant *Allen* had, in fact, printed the numbers of the paper referred to below.

The writ was indorsed with a claim for an injunction to restrain the Defendants "from selling, circulating, or delivering, or communicating to any person or persons, any copy of the *Financial Observer and Mining Herald* of the 7th of February, 1891, containing an article headed 'The *Fletcher Mills* of *Providence, Rhode Island,*' or of the said article, and from printing or publishing in the said newspaper, or otherwise, any statement imputing to the Plaintiffs, or either of them, fraudulent or dishonest conduct in connection with the promotion or floating of *Sykes Brewery* or the *City of Baltimore United Breweries*, or the promotion of the proposed *Providence and National Worsted Mills, Limited*, or imputing or suggesting that the Plaintiffs, or either of them, have or has bribed, suborned, or conspired with the proprietors or editors of the *Financial News*, or any other newspaper proprietor or other person, or that they or either of them have or has been guilty of stealing or other dishonest conduct.

"£5000 damages for libel."

A motion was now made on behalf of the Plaintiffs for an *interim* injunction, till trial, substantially in the terms of the claim for an injunction indorsed on the writ.

In the number of the *Financial Observer* of the 10th of January, 1891, there appeared the following remarks:—

"By the way, there appears a very peculiar connection between *Marks, Campbell,* and the gorgeous *Mercantile and General Trust and Finance Company, Unlimited*, located in the sumptuous offices in *Broad Street Avenue*, where the lovely *Engel* is on guard. We shall have a rare budget to say about this curious concern and those working the oracle."

The article in the number of the 7th of February, which was complained of, was headed—

"The *Fletcher Mills* of *Providence, Rhode Island.*
"The *Providence and National Worsted Mills, Limited.*
"A Jews' Den.
"Marks' Promoting Vehicle."

It proceeded:—

"In 1889 offices were taken at 143, *Cannon Street*, by a couple

of Jews, named *Gustave Richard Bonnard* and *Arthur H. Deakin*, who styled themselves the *Mercantile and General Trust.* How they got into the offices we cannot understand, for they had not a sixpence in the world; the furniture was obtained on the hire system, and they often had to beg a lunch. They were, however, of a very enterprising nature, although young, and they were lucky enough to ingratiate themselves with the great *Harry Hananel Marks* by offering him inducements to puff the *Sykes Brewery*, which had by some means come into their hands. We are not yet concerned with the circumstances connected with the floating of this brewery, but we shall have more to say soon. Having made a fair start, and been enabled to open a banking account, they are next found dealing with some American breweries, called the *City of Baltimore United Breweries*, which were floated in due course, and now have their habitation in *Broad Street Avenue.* There was some very shady work in this business. The plunder amounted to no less than £58,000, and an action is now pending over a commission note for £3000 given by *Arthur H. Deakin*, which he is endeavouring to repudiate.

"In both these concerns they were greatly assisted by a *Bernard Engel*, a brother of a money-lender in *Great Marlborough Street*, who knew the corners in which shares could be pushed, and who also had a large Jewish connection. This *Bernard Engel* figures in *Broad Street Avenue* as *D. Engel*, and at times he has varied his name into *Engle*, *Angle*, and *Eagle*, to meet different phases of promoting and dodging.

"Success has so far crowned their shady deeds, and having such a wonderful engine as the *Financial News* at their disposal, on terms, we next find them at work, altogether, at the *Broad Street Avenue*, where they flourish as the *Mercantile and General Trust Finance Company.* This concern is composed of the following Jews:—*Bernard Engel*, *Gustave Richard Bonnard*, *Arthur H. Deakin*, *Edmund Campbell, alias Callisher*, a member of the *Stock Exchange*, *Harry Hananel Marks.* The next bit of company promoting to come before the public is the *Providence and National Worsted Mills, Limited.*"

After some remarks as to the promotion of that company and

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extracts from the *New York Herald*, in one of which "An English syndicate, represented by *G. R. Bonnard* and *D. Eagle*, who are said to be connected with the *Bank of England*," was stated to have bought the *Fletcher Mills* and another mill in *Rhode Island*, the article proceeded:—

"If these gentlemen 'connected with the *Bank of England*' only made £58,000 over the *Baltimore* breweries, they appear to have a chance now of making far more over this deal. But when our readers have carefully considered what a wretched halo of picking and stealing surrounds the den in *Broad Street Avenue*, they will think twice before putting their hard-earned savings into the pockets of these gentry. The board of directors headed by Lord *Suffield* is a group of guinea pigs; but how such names as *Bircham & Co.* for solicitors, and *Sheppard, Pelly, Scott, & Co.* for brokers, have been obtained it is not for us to mention now. Suffice it to say they surely could not have known for whom they have consented to work, and we look to a withdrawal of their names before the prospectus is issued."

The Plaintiffs made affidavits to shew that the statements in the article of which they complained were untrue. They denied specifically that they had any Jewish blood in them; that they had purchased their furniture on the hire system; and that they had any connection with *Harry Hananel Marks*.

The Defendant *Perryman* made an affidavit in which he swore, "The whole of the allegations in the article entitled 'the *Fletcher Mills* of *Providence, Rhode Island*,' complained of by the Plaintiffs, are true in substance and in fact, and I shall be able to prove the same at the trial of this action by subpœnaing witnesses and by cross-examination of the Plaintiffs, and by other evidence which I cannot, and which I submit I ought not to have to, produce on an interlocutory application." "All the copies of the issue of my paper of the 7th of February have been printed and (with the exception of a few copies which I always retain of each issue) have been circulated and sold, and it is not my intention to print, circulate, or sell any more copies."

It was stated by the counsel for the Defendant *Perryman* in reply to the Judge that he was instructed that that Defendant had in stock some forty copies of the *Financial Observer* for the

7th of February, 1891, and that he sold them over the counter when asked for; he admitted that one copy had been sold since his affidavits had been made; he desired to continue the sale, and he refused to give any undertaking either not to sell other copies or not to reprint the article.

It was the practice of the Defendant *Perryman* occasionally to reprint in his paper articles which had appeared in former issues; in each of the issues for the 10th of January and the 7th of February there appeared the reprint of an article headed "Two City Thieves," containing strong expressions against *H. H. Marks* and another person.

The motion was heard before Mr. Justice *North* on the 27th of February, 1891.

Napier Higgins, Q.C., and *Dunham*, for the Plaintiffs:—

It is now settled law that since the *Judicature Acts* the Court has jurisdiction to restrain the further publication of a trade libel, a jurisdiction which it will exercise in a proper case even by way of interlocutory injunction: *Liverpool Household Stores Association* v. *Smith* (1). This libel satisfies all the conditions required by the Court before it takes the strong measure of granting an interlocutory injunction; (1.) on the evidence the libel is false in at least three material particulars; (2.) it is shewn to be calculated to injure the Plaintiffs in their business; (3.) and it is apparent that in all probability the mischief will continue unless an injunction is granted; (4.) no case of privilege can be set up. The article is not like a report of public proceedings. The notice of motion goes further than the relief we are warranted in asking for; we quite admit that there would be great difficulty in restraining more than the particular libel.

[NORTH, J.:—As far as the printer is concerned, assuming against him that he has printed a libel which ought to be restrained till trial, all the purpose will be gained if an injunction is granted against the other Defendant, and the motion as against the printer stands over till trial. On the other hand, if I do not grant an injunction against the publisher, there can be no case against the printer.]

(1) 37 Ch. D. 170.

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The Plaintiffs will not press for an injunction against the printer at this stage.

Cozens-Hardy, Q.C., and *W. E. Vernon*, for the Defendant *Perryman* :—

The jurisdiction to grant an injunction to restrain a libel is one that will be exercised with extreme caution. It will not be exercised where the libel is true, and the Court will not in the present state of the evidence decide the question whether the libel is true or not; and will not grant an injunction till that question has been decided by a jury: *Liverpool Household Stores Association* v. *Smith* (1). The Court will take into consideration the fact that the article complained of is not one written for a particular private end, but is published in a newspaper for a general, and to some extent public, purpose.

Eve, for the Defendant *Allen*.

Napier Higgins, in reply.

1891. Mar. 3. NORTH, J. (after stating the nature of the present application, reading the paragraph above set out from the *Financial Observer* of the 10th of January, 1891, and stating the substance of the article the subject of the action, continued):—

No one can read that article without seeing that it is one of a very serious character, that it directly affects and probably will affect the business of the Plaintiffs, and that it is an allegation which, unless it can be justified at the trial of the action, is one in which a jury would give the Plaintiffs very serious damages.

The Defendant says nothing ought to be done now: that the question is one that ought to be tried by a jury, and that he has a right to have it tried by a jury, which is a far better tribunal than any Judge can be. And so far as that goes I quite agree that a jury is the proper tribunal to decide whether this is or is not the libel it is alleged to be. But the difficulty is this, that I have to consider now whether the publication of this article should or

(1) 37 Ch. D. 170.

should not be continued in the meantime, and that, inasmuch as I have come to the conclusion that, unless I restrain it, it will be continued, I have no course but to consider for myself as well as I can whether it is a case in which an interlocutory injunction should be granted.

The principles of the Court are expressed in several cases, but I think it sufficient to refer to one of them. That is the case of the *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1) before the Court of Appeal. In that case there had been a circular distributed amongst the shareholders in a company reflecting on the conduct of persons interested in it, and Sir *George Jessel* in giving judgment says this (2): "The result, therefore, is that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel. What I have said is confirmed by *Beddow* v. *Beddow* (3), *Shaw* v. *Earl of Jersey* (4), and *Day* v. *Brownrigg* (5). But the question as to whether the jurisdiction though existing has been properly exercised is quite different. It is a jurisdiction which must be very carefully exercised. No doubt there are cases in which it would be quite proper to exercise it, as, for instance, the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the Plaintiff. But, on the other hand, where there is a case to try, and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory injunction." I entirely accept that as binding upon me, and intend to be governed by it.

Now, in the first place, as he points out, it is necessary to consider whether an interlocutory injunction is required, and a little further on, dealing with that part of the case, he says: "The injunction is to restrain future publication. Now the circular in question has been issued to all the shareholders; there is no allegation either on the writ or the statement of claim, or the affidavit of any intention on the part of the defendant to issue any more circulars, nor can I infer such intention, because it is alleged that he has issued the circular to all the shareholders.

(1) 20 Ch. D. 501.
(2) Ibid. 507.
(3) 9 Ch. D. 89.
(4) 4 C. P. D. 120, 359.
(5) 10 Ch. D. 294.

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There is no ground, therefore, for interference. The act is passed, the mischief has been done, if mischief there is, and there is no ground for the intervention of the Court before the trial." If I found that to be the case here I should act on that view and refuse the injunction.

[His Lordship considered the evidence as to the Defendant's intention to continue the sale of the number of his newspaper containing the article complained of and his refusal to give an undertaking, and said :—] It appears to me a case in which there is reason for supposing that the sale will be continued, as I know it has been as matter of fact in one case since action brought. Therefore as far as that goes the inducement held out to the Court to abstain from granting an injunction because there will be no further sales is untrue and misleading.

[After referring to passages in the issues of the Defendant's paper before the Court, his Lordship continued :—] Therefore it is evident what is his course of conduct: that he does when he thinks it right republish over again articles addressed against particular persons or firms whom it is considered desirable by him to attack. That being so and bearing in mind that he declined to give any undertaking as to a repetition of the article, I feel bound to say that I must deal with the case now upon its merits.

Referring again to the case of *Quartz Hill Consolidated Gold Mining Company* v. *Beall* the Master of the Rolls says (1): "In the present case I think the objections to the exercise of the jurisdiction are, at least three." One I have dealt with, that was the question of intention to continue the publication. "In the first place the alleged libel is not proved to be untrue." Then he says this: "As a general rule the plaintiff who applies for an interlocutory injunction must shew the statement to be untrue." Then he goes on to point out that in that case there was no evidence that it was untrue except the evidence of a person on behalf of the plaintiffs, the secretary of the plaintiff company, who said that he believed it to be untrue, and on the other hand the defendant had pledged his oath that he verily believed it was true. In that state of things the Court refused to interfere.

(1) 20 Ch. D. 508.

Now how does the matter stand here? In the present case I have come to the conclusion that, on certain material points the article is shewn to be untrue. I will give my reasons for my conclusion. [His Lordship examined the evidence as to the truth of allegations in the article, and continued:—]

The result is this, that on these three points, first, as to the religion of the Plaintiffs, and the Jews' den; secondly, with respect to the acquisition of the furniture; and thirdly, with respect to *Marks*, I am satisfied on the evidence before me that the article is untrue, in those material respects; and as regards two points—namely, that with regard to the purchase of the furniture, and also upon the point in connection with the Defendant's intention not to sell his paper, I am satisfied that the Defendant is misleading me, and that I cannot attach any weight to what he says in his affidavit as to his belief of what he can do at the trial.

Then in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1), to which I have referred, and which I take as a guide to follow, there was a third point involved—namely, the difficulty of granting an interlocutory injunction where the alleged libel was apparently on its face a privileged communication, and the difficulty there was of going into any question of express malice on an interlocutory application. That point does not arise here, because I do not find it set up that this article in the newspaper is in any sense a privileged communication, and it is unnecessary for the present purpose to inquire whether there is on the face of the article any evidence of express malice.

Then it is said that if I grant an injunction here, I shall simply be doing what will fill the Courts with applications for interlocutory injunctions to restrain libels. I am not alarmed at that prospect, because I do not think my granting an injunction in this case will lead to that result; and, on the other hand, I have this to bear in mind, that, if in such a case as this an interlocutory injunction is not granted, I cannot imagine any case in which an interlocutory injunction to restrain a libel could be granted, whereas it is clear on the authorities that there are cases in which it would be proper to grant it.

(1) 20 Ch. D. 501.

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Then there is this further matter to be considered with reference to the point made, that the matter ought to be tried before a jury. I am satisfied of this, that if the matter was before a jury now, upon the evidence which is before me—that is to say, the evidence of the Plaintiffs uncontradicted, not cross-examined to, and merely resting on the Defendant's evidence in answer to it—I am perfectly satisfied there is not any jury in *England* who would say there should be a verdict for the Defendant in such a case, and, what is more, if they did, I am quite satisfied it is a case in which a new trial would be directed. This, of course, does not touch what may be the case when the action comes to be tried. There may be evidence before the Court then which would satisfy a jury who tries it that the Defendant has made out a justification. I am merely referring to the materials before me, which are all I can look to now in considering what I am to do in the matter. In these circumstances I have come to the conclusion that an injunction must be granted in the terms which I have mentioned.

What I have said applies to *Perryman* only. There remains the case against *Allen*, the printer. At an early period of the case I pointed out to Mr. *Higgins* that, if I did not grant an injunction against *Perryman*, I could not possibly do so against *Allen*, to which he assented. On the other hand, I pointed this out, that if I did grant an injunction against *Perryman*, all that was required really would be accomplished, to stay the further publication until the trial, and that it was waste of time going into the question whether *Allen* ought or ought not to be restrained by an interlocutory injunction. To that also, I think, after a little protest, Mr. *Higgins* acceded. The result is that it has been unnecessary to consider the case against *Allen*, and I do not grant any injunction against him. As regards him, I shall make his costs costs in the action. I shall make the Plaintiffs' costs costs in the action also, not only as against *Perryman*, which would follow without my mentioning it, but also as against *Allen*, but as to *Perryman* there will be no costs.

I should add this before settling the terms of the order. I was asked to go on by the notice of motion, and in very general terms to restrain all future libels. That is going further than I

think necessary or proper. In point of fact I could not do it, because I should not know how to frame an order in such a way that it would prevent any other improper libels, and at the same time not prevent something that would be legitimate and proper. I therefore decline to interfere as to that second part of the notice of motion.

The form of the order, therefore, that I shall make is this, to restrain, not the Defendants and each of them, but the Defendant *Perryman*, his servants and agents, until trial or further order, from selling, circulating, or delivering or communicating to any person or persons, or permitting to be sold or circulated, or delivered or communicated, to any person or persons, any copy of the *Financial Observer and Mining Herald* of the 7th of February, 1891, containing an article headed "*Fletcher Mills, Providence, Rhode Island,*" and from—here I depart rather from the terms of the notice of motion—printing or publishing or selling—repeating the previous words I have used—any copy of the said article, or any extract thereof, or material portion thereof, so far as such extract or portion affects the Plaintiffs, or either of them.

D. P.

The Defendant *Perryman* appealed.

The appeal was heard by the full Court of Appeal on the 9th and 10th of April, 1891. C. A.

Cozens-Hardy, Q.C., and *W. E. Vernon*, for the Appellant:—

There is no jurisdiction to grant an interlocutory injunction in a libel action when the Defendant deposes that he will be able at the trial to justify the libel. Admitting that there are decisions of the Court of Appeal against this view, the Court as now constituted can overrule them: *Kelly & Co.* v. *Kellond* (1).

The Defendant says that he will be able to prove truth of his statements, and he claims the right to have the question of justification tried before a jury.

[LORD ESHER, M.R., referred to *Hadfield's Case* (2).]

Before the *Judicature Act*, the Court of Chancery had no

(1) 20 Q. B. D. 569, 572, 574, 575. (2) Law Rep. 8 C. P. 306.

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jurisdiction to restrain the publication of a libel: *Prudential Assurance Company* v. *Knott* (1).

[LINDLEY, L.J., referred to *Mulkern* v. *Ward* (2).]

Fleming v. *Newton* (3).

Before the *Common Law Procedure Act*, 1874 (17 & 18 Vict. c. 125), the Courts of Common Law had no jurisdiction to grant injunctions. That jurisdiction was conferred by sects. 79–82, but, though the words are very general, it ought not to be held that jurisdiction was thereby conferred to grant an interlocutory injunction in a libel action. The effect would be to withdraw from the jury the decision of the question "libel or no libel."

Since the *Judicature Act* it has, no doubt, been held that either division of the High Court has jurisdiction to restrain by injunction the publication of a libel, but it has always been said that an interlocutory injunction will not be granted except under very special circumstances, and that the jurisdiction must be exercised with great caution: *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (4); *Saxby* v. *Easterbrook* (5); *Thomas* v. *Williams* (6); *Hermann Loog* v. *Bean* (7); *Liverpool Household Stores Association* v. *Smith* (8).

In *Saxby* v. *Easterbrook*, the injunction was granted after the libel had been found to be such by a jury.

The principles on which the Court acts as to granting injunctions have not been altered by sect. 25, sub-sect. 8, of the *Judicature Act*, 1873: *Day* v. *Brownrigg* (9); *Gaskin* v. *Balls* (10); *Beddow* v. *Beddow* (11).

The circumstances of the present case are not such as to justify the granting of an interlocutory injunction.

THE COURT said that they were satisfied that there was jurisdiction to grant the injunction, and it therefore became

(1) Law Rep. 10 Ch. 142.
(2) Ibid. 13 Eq. 619.
(3) 1 H. L. C. 363, 376.
(4) 20 Ch. D. 501.
(5) 3 C. P. D. 339.
(6) 14 Ch. D. 864.
(7) 26 Ch. D. 306.
(8) 37 Ch. D. 170.
(9) 10 Ch. D. 294.
(10) 13 Ch. D. 324.
(11) 9 Ch. D. 89.

unnecessary to consider whether the full Court had power to review the decision of a Court of Appeal, consisting of a smaller number of judges.

Napier Higgins, Q.C., and *Dunham*, for the Plaintiffs :—

The circumstances are such as to justify, and indeed to require, the granting of an interlocutory injunction. No real injury will be done to the Defendant if the injunction is granted, and great injury will be done to the Plaintiffs if it is refused. The balance of convenience and inconvenience is in favour of granting the injunction; it would be "just and convenient" to do so. There is really no question to be tried.

Under the present practice a libel action can be tried without a jury.

It is no doubt very important that the liberty of the press should not be interfered with, but that liberty may be abused. The libel of which the Plaintiffs complain is an atrocious one, and it is obviously untrue. It is clearly published for the purpose of blackmailing the Plaintiffs. The argument for the Defendant comes to this, that, however atrocious and untrue the statement may be, the Court is powerless, if the Defendant chooses to swear that he will justify the libel at the trial.

One of the Defendant's affidavits is inadmissible, because it does not shew the grounds of the deponent's belief: Order XXXVIII., rule 3: *Bidder* v. *Bridges* (1).

The Court should be governed in a libel action by the same principles as in other cases in which it is asked to grant an interlocutory injunction; that is, it should take into consideration the balance of convenience and inconvenience.

[LINDLEY, L.J. :—Libel is a new subject-matter.

FRY, L.J. :—May not, therefore, new considerations arise?]

If the Plaintiffs have shewn that *primâ facie* the libel is untrue, they have shewn a *primâ facie* case for an injunction. In every case in which an interlocutory injunction is asked for there must be a *primâ facie* trial and a final trial. In *Coulson* v. *Coulson* (2) the Court considered the evidence.

(1) 26 Ch. D. 1.
(2) 3 Times L. R. 846.

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Cozens-Hardy, in reply :—

In ordinary cases an interlocutory injunction will be granted when there is a case to be tried; in actions for libel an interlocutory injunction will be granted only where there is clearly no case to be tried.

1891. April 21. LORD COLERIDGE, C.J., read the following judgment, in which Lord *Esher*, M.R., and *Lindley*, *Bowen*, and *Lopes*, L.JJ., concurred :—

The Plaintiffs in this case are two gentlemen carrying on business as financial agents under the title of the *Mercantile and General Trust*. The Defendant *Perryman* is the printer and publisher of a paper called the *Financial Observer and Mining Herald*. The Defendant *Allen* is in some way (not material to ascertain) connected with the paper, and he appears to have printed the particular number which contains the matter of which the Plaintiffs complain. In the number of the 7th of February, 1891, appeared the article which the Plaintiffs assert to be a libel upon them, and in respect of which, having issued a writ in the Chancery Division, they applied for and have obtained from Mr. Justice *North* the injunction which we are asked upon appeal to dissolve. [His Lordship read the order appealed from, and continued :—] One point raised in the course of the argument has become immaterial to decide—namely, whether the Court of Appeal, sitting with its full number, can, according to the course and practice of the Court, overrule a Court consisting of three or any other number of members, if the decision which they are asked to review appears to be clearly wrong. It is unnecessary to discuss or to decide this question, because the previous decisions of this Court on the main question before us appear to us to be perfectly correct, and we found our own decision upon them. Two questions only is it really necessary to decide—(1) is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel, either at all, or before the libel has been adjudged to be such? And (2) is this a case in which, as matter of discretion, the jurisdiction should be exercised, if it exists? The decision

of the first question is, it is manifest, independent of the circumstances of any particular case; the decision of the second entirely depends upon them. As to the first, we are unable to entertain any doubt; the point is clear, and is settled by authority. The authorities, indeed, are few and recent, for very obvious reasons; but they are uniform, and they are clear. Prior to the *Common Law Procedure Act*, 1854, neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this: not Courts of Equity, because cases of libel could not come before them; not Courts of Law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82nd sections of the *Common Law Procedure Act*, 1854, undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was, by the *Judicature Act*, 1873, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a Court of Common Law till *Saxby* v. *Easterbrook* (1), which was decided in 1878. In that case the injunction was not applied for, nor, of course, granted, till after a verdict and judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action for libel. Sir *George Jessel* in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (2) distinctly asserted the jurisdiction; and it was considered and established in an elaborate judgment of this Court in *Liverpool Household Stores Association* v. *Smith* (3), in which Lord Justice *Cotton*, affirming indeed the refusal of Mr. Justice *Kekewich* to issue the injunction prayed for in that case, asserted the jurisdiction in plain language, and went on to explain the principles on which, in his opinion, the jurisdiction should be exercised. There have been other examples, but these are sufficient; and we do not

(1) 3 C. P. D. 339. (2) 20 Ch. D. 501.
(3) 37 Ch. D. 170.

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doubt, upon the true construction of the statutes and upon authority, that as matter of jurisdiction Mr. Justice *North's* order might lawfully be made. But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord *Esher*, M.R., in *Coulson* v. *Coulson* (1)—"To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. 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." In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the Plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial,—on which further it is not desirable that the Court should express an opinion before the trial. Otherwise, an injunction might be granted before the

(1) 3 Times L. R. 846.

trial in a case in which at the trial nothing but nominal damages, if so much, could be obtained. Upon the whole we think, with great deference to Mr. Justice *North*, that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification. The appeal, therefore, must be allowed, and the order discharged; the costs in this Court and in the Court below to be costs in the cause.

KAY, L.J.:—

I agree with all the members of the Court that, since the passing of the *Common Law Procedure Act*, 1854, by sects. 79, 81, and 82 of that Act, the Courts of Common Law had, and by sects. 16 and 25, sub-sect. 8, of the *Judicature Act*, 1873, the High Court of Justice now has, undoubted jurisdiction to grant injunctions at or before the trial in actions of libel. I also agree that in such actions this jurisdiction should before trial be very cautiously exercised, especially because the questions of libel or no libel, and of the validity of a justification, if pleaded, are eminently matters to be determined by the verdict of a jury. The only point on which I have felt any difficulty is, whether it is expedient or right altogether to discharge the interlocutory injunction which has been granted. The alleged libel is expressed in coarse and abusive language, which would incline any one reading it to the belief that some personal feeling of spite or malignity against the Plaintiffs, and not merely a desire to protect the interests of the public, was among the actuating motives of the Defendant. Some of the most serious allegations in the article are those by which the Defendant associates the Plaintiffs with a person whom he represents to be of infamous character. I know nothing whatever of that individual, except what appears in the evidence before us, and I have no means of judging whether the allegations made against him are true or false. It appears from another page in the same paper that since the 18th of February, 1890, the Defendant has been in the habit of publishing concerning this person accusations expressed in some of the strongest language of his well-furnished vocabulary. The individual so traduced is, it seems, the editor or owner of another

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financial paper published in *London*, called the *Financial News*, and the Defendant's paper states that the Defendant intends to repeat the article against him until some notice is taken of it by the *London* County Council, of which we are told this person is a member, the Incorporated Law Society, the Houses of Parliament, or the police. The article so published, and which the Defendant intends to repeat, calls the person denounced a city thief, a vulture, speaks of his swindles and his nefarious practices, and says, amongst other choice phrases, that there is no phase of the criminal law that has not been scoffed at by him, and that fraud, conspiracy, burglary, and felony have been used to aid his schemes to despoil and hoodwink the public. Now, in the article complained of in this action, it is stated that the Plaintiffs have been lucky enough to ingratiate themselves with this person by offering him inducements to puff one of the companies which they promoted, and that the *Mercantile and General Trust*, which is the style under which the Plaintiffs are carrying on business, is composed of themselves, this man so vilified, and two other persons named *Deakin* and *Campbell*. These statements that the Plaintiffs are carrying on business in partnership or in close association with a man who is described in this way as a swindler and a thief are undoubtedly calculated to damage the Plaintiffs extremely, if not to ruin them. We are relieved from one of the difficulties which occur in most cases of this kind, because counsel have admitted in the argument before us that, if the statements in this article are untrue, it is unquestionably a libel. They say, however, that they intend to plead that the statements are true, and the truth or falsehood of them must undoubtedly be determined at the trial by a jury. They decline to give any undertaking not to repeat these statements before the trial, but they insist that the Defendant has a right to do so. My doubt arises upon the affidavit evidence which is now before the Court. What may be the case at the trial I can only judge at present from that evidence, and I do not wish to say anything which can influence the trial in any way.

In the Plaintiffs' first affidavit, paragraph 4, they deny that they have ever spoken to or communicated with, or had any communication from, the person in question, either directly or

indirectly in any manner at all, or that they have ever had, or have now, any connection, business or private, with him; in paragraph 8 they say that it is not true that they ever had any connection or understanding, upon terms or otherwise, with the *Financial News*, which is his paper, or any representative thereof or person in connection therewith; and in paragraph 9 they say that it is not true that either he or *Campbell* is a member of, or connected with, the *Mercantile and General Trust*, or that *Engel* is a member of the said trust; and in another affidavit filed the same day, the Plaintiffs say that they are the only members of that firm.

Now what impresses me strongly is the mode in which the Defendant *Perryman* answers those affidavits. In paragraph 2 of his affidavit he says he has read copies of them, and in paragraph 4 he states this: The whole of the allegations in the article complained of "are true in substance and in fact, and I shall be able to prove the same at the trial of this action by subpœnaing witnesses, and by cross-examination of the Plaintiffs, and by other evidence, which I cannot, and which I submit I ought not to have to, produce on an interlocutory application"; in paragraph 6 he states that he is not acquainted with the Plaintiffs; in paragraph 8 he repeats that the Plaintiffs have had business connection with the man he vilifies, either personally or through *Engel*, who occupies the same offices as the Plaintiffs in respect of two companies which he names, and which were promoted by the Plaintiffs; and in paragraph 12 he says, in answer to paragraphs 8 and 9 of the Plaintiffs' first affidavit: "I have been informed and verily believe that this person" (naming him) "is personally, or by his agent and stockbroker, *Campbell*, connected with the *Mercantile and General Trust*."

By Order XXXVIII., rule 3, of the Rules of the Supreme Court, 1883, it is provided that "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." Lord *Selborne*, L.C., in *Bidder* v. *Bridges* (1), said: "I do not think this

(1) 26 Ch. D. 8.

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Court can for a single moment give countenance to the notion that any common neglect, if there be such common neglect, of the provisions of that Order can absolve persons from the consequences of disregarding them when the question is raised, as it is here raised, by a person having a right to raise it. That Order requires, in effect, that affidavit evidence as to matters of fact by a person who is not able strictly to prove them, must shew, not only the fact but also the grounds of his belief." To the same effect is the judgment of Sir *G. Jessel*, M.R., in the Court of Appeal, in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1), where the injunction in a libel case was dissolved partly on the ground that the Plaintiffs' affidavit did not comply with this order. Speaking for myself, I entirely agree with this view of the meaning and effect of the order, and think it essential to the ends of justice that it should be strictly observed. In the case now before us the Defendant's answer to the express and categorical denial by the Plaintiffs of any kind of association with the person in question is only met by these statements as to the Defendant's belief, which do not attempt to shew the grounds of his belief, otherwise than by stating that the association is through *Engel* or *Campbell*, and there is no other evidence in support of the Defendant's case on this point. Now, I agree that, in order to justify the Court in granting an interlocutory injunction in such a case, there must be strong *primâ facie* evidence that the statement is untrue. In my opinion, in this state of the affidavits, there is that strong *primâ facie* evidence. If that is so, according to the ordinary practice, the Court should be actuated in granting or refusing the injunction by the consideration of what is commonly termed the balance of convenience and inconvenience. To which side in this case does that balance incline? If this injunction be continued in the whole or in part, it will not prevent the Defendant from protecting the public by any other statements he can legitimately make against the Plaintiffs; it will only prevent him from repeating this particular allegation. Even if at the trial the Defendant should be able to adduce evidence shewing that the Plaintiffs' denial of their association with the person described as

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a swindler is untrue, it is impossible to conceive that the Defendant can be damnified by being restrained meanwhile from repeating it. On the other hand, I can easily believe that this statement, if repeated, as the Defendant admits he intends to do in the interval before the trial, may occasion very great injury, if not ruin, to the Plaintiffs. If it should turn out at the trial of the action that the Plaintiffs' denial on this point is true, and that the Defendant's allegation is false, an irreparable injury may have been done to the Plaintiffs by denying them this relief by interim injunction. I think the true result of the affidavit evidence is, that the Defendant has a suspicion of the Plaintiffs' connection with the person whom he so defames, for which he is not able to allege any substantial foundation. For these reasons I should have granted the injunction, at least as to this part of the libel, and I should have been glad if the Court of Appeal had been prepared to sustain it.

Solicitors for Plaintiffs: *Watson & Watson.*
Solicitors for Defendant: *John Vernon, Son & Co.*

W. L. C.

In re CHEESMAN.

C. A. 1891 *April* 22.

[1891 C. 143.]

Solicitor—Taxation of Bill of Costs—Taxation after payment—Special circumstances—6 *&* 7 *Vict. c.* 73, *ss.* 38, 41 [*Revised Ed. Statutes, vol. ix., pp.* 130, 132].

There is no rigid rule as to what kind of circumstances will justify the taxation of a solicitor's bill after payment, but the judge has in each case to determine whether there are special circumstances which make it right to refer the bill for taxation, and if there are special circumstances in the case, the Court of Appeal will not readily interfere with the decision of the Court below that they are sufficient to justify taxation.

THIS was an appeal from an order of Mr. Justice *Kekewich,* in Chambers, directing taxation of the costs of a mortgagee's solicitor on the application of the mortgagor.

Vernon was the owner of property which he had mortgaged to *Kenwood,* who employed *Cheesman* as his solicitor. In September,