COMMENT.

INJUNCTION AS A REMEDY FOR LIBEL.

During recent years there has been a tendency, in England especially, to seek injunction as a remedy for libel, and particularly libel of property and business. That the province of the High Court of Chancery included the protection of personal reputation, few have contended (Vice-Chancellor Malius in *Dixon v. Holden,* L. R. 7 Eq. 488, being the great exception); but it has been often urged that where a libel worked an injury to property rights, equity should restrain.

The early position of the English courts is best expressed in the leading case of *Prudential Ins. Co. v. Knott,* L. R. 10 Ch. 142 (1874) where the Court of Appeal refused to enjoin the continued publication of a pamphlet containing false and erroneous statistics and statements of the complainant's business. The opinion reads: "It is attempted to give color to the application by saying that these are libelous publications which will injure property. Not merely is there no authority for this application but the books afford repeated instances of the refusal to exercise jurisdiction." However, the revolution worked in the English judicial system by the Judicature Act of 1873 left the equity courts with what have been assumed to be greater powers in this regard, and the remedy of injunction as now administered by them is practically co-extensive with the right to bring an action. Vice-Chancellor Melins' position, *Quartz Hill Mining Co. v. Beall,* 20 Ch. D. 501 (1882); *22 Law Mag. & Rev.* 63. In *Bownard v. Perryman* (1891), 2 Ch. D. 269, the Court of Appeal asserts its power to restrain even the publication of a purely personal libel.

The American courts have from the first with great unanimity refused to restrain the publication of libels either of person or business, and have left the complainant to his remedy at law. *Kidd v. Horry,* 28 Fed. 774; *Diatite Co. v. Florence,* 114 Mass. 69; *Allegretti Co. v. Rubel,* 83 Ill. App. 558. There is, however, a class of cases arising chiefly out of labor troubles, in which libelous publications have been restrained. But these cases are to be distinguished, for the libelous character of the publication is merely an in-

cident. Boycotting circulars, etc., where the words are intimidatory and calculated forcibly to interfere with business, are enjoined by the courts as a "nuisance," whether libelous or not. *Sherry v. Perkins,* 147 Mass. 212; *Emack v. Kane,* 34 Fed. 46; *Beck v. Teamsters' Union,* 118 Mich. 497. The distinction is well brought out in *Beck v. Teamsters' Union, supra* (1898), where the court, referring to the argument of counsel that the boycotting circular was a libel and thus within the rule that courts of equity will not enjoin a libel, remarks: "If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainant's business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants."

A recent case in New York is of interest at this point. The publisher of a magazine, to compel a former advertiser to continue at an advanced rate, published "fake" letters which falsely attacked the usefulness and value of the advertiser's article. To an action to enjoin continued publication, defendant demurred. The Supreme Court holds that a sufficient cause of action is stated and that the publisher may be enjoined. McLaughlin, J., dissenting. *Marlin Firearms Co. v. Shields,* (N. Y. Sup. Ct.), 34 Chic. Legal News 194.

The argument of the court in brief is that libel of property is to be distinguished from libel of person, and if the libelous publication will work a destruction of or irreparable injury to property it may be enjoined. This conclusion, in accord as it may be with modern English opinion, is a departure from the uniform attitude of our courts. As we have pointed out, the distinction has not been between libel of person and of property but between simple libel where injunction has been denied and libel constituting or aiding intimidation and forcible interference with business where injunction has been granted. The Court relies upon *Vegelohn v. Guntner,* 167 Mass. 92 (1896)—where no publication was involved—and other recent labor cases as cited above. Manifestly the situation is quite different, as we have tried to show. In *2 Story's Equity Jurisprudence, sec. 948,* also relied upon, the distinguished author is clearly alluding to the right of property remaining in the writer of letters and not to such property rights as are here the subject of discussion. Nor is it easy to reconcile this decision with our fundamental ideas of liberty of speech and of the press, subject only to an action of damages, for an abuse of that liberty. However apparent the abuse,

yet power to enjoin a libel has been, inferentially at least, denied the courts by our constitutions and it is doubtful whether even the presence of irreparable injury to property, constitutes such an exception as will permit their exercise of this prerogative.

GOVERNMENTAL REGULATION OF CHARGES.

No question causes more diversity of opinion among the justices of the Supreme Court of the United States than that which involves the limitation of governmental power over individuals and corporations engaged in occupations of a public nature.

That the state has power to regulate such occupations has been settled by a long line of decisions beginning with *Munn v. Illinois,* 94 U. S. 113, though not without a constant dissent. But to what extent this power may be exercised has never been definitely decided.

In the recent case of *Cotting v. Godard,* 22 Sup. Ct. Rep. 30, Justice Brewer, in an able opinion, has reviewed the cases on this subject and attempted to deduce therefrom rules by the application of which the limitations upon this governmental power may be more clearly ascertained.

It must first be observed that a distinction is made between those who are engaged in performing a strictly public service and those who have devoted their property to a use in which the public have an interest, although not engaged in a work of a confessedly public character.

In the former class of cases, Justice Brewer states that "while the power to regulate has been sustained, negatively, the court has held that the legislature may not prescribe rates, which if enforced would amount to a confiscation of property. But, it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owners without any remuneration for its use." Nevertheless, it is a fair inference from the remarks of the Justice, that he considers the States might well go to this extent in the exercise of their power, without violating the 14th Amendment to the Constitution of the United States.

In justification of this seemingly severe doctrine, it is pointed out that one thus engaging in a public service undertakes to perform a function of the state and therefore voluntarily accepts all the conditions of public service which attach to like service performed by the

State itself. He is aware that the State in the performance of its work is not actuated by motives of private gain, but may, on the other hand, if the greater public good demands it, render the services at a loss or at any rate without pecuniary profit.

It is therefore argued that he who voluntarily undertakes to act for the State must submit to a like determination as to the paramount interests of the public. Then, again, one so engaged is granted certain governmental powers, such as the power of eminent domain, by which he is enabled to acquire property at its real market value. All these circumstances tend to lessen the severity of this doctrine.

But, however much these reasons might justify the application of this doctrine to the former class of cases, the Justice maintains that a different rule must be applied in the latter class, of which the case at bar is an example.

This case was brought to test the constitutionality of a statute passed by the Kansas legislature, regulating the price per head to be charged by stock yard companies. It is to be distinguished from the class of cases just discussed in that the stock yard company had not undertaken to do the work of the State, nor to use its property in the discharge of a purely public service, nor had it acquired any of the governmental powers of the State. It was engaged in an occupation for merely private gain and had placed its property, willingly or unwillingly, in such a position that the public had become interested in its use.

The case is therefore analogous to *Munn v. Illinois,* and tested by the rule there laid down it was conceded that the State has the power to make *reasonable* regulation of the charges for services rendered by the stock yards company.

What shall be the test of reasonableness in those charges is absolutely undisclosed by decisions prior to the case at bar. The Circuit Court held that the chief inquiry should be, "What is the aggregate profits of the stock-yards?" supplemented by the further inquiry as to whether the company could make a reasonable profit by charging the statutory rates.

Justice Brewer considers that the inquiry of the lower court proceeded on too narrow limits, and lays down the rule that the State's regulation of charges is not to be measured by the volume of business but by the question whether any particular charge to an individual dealing with the corporation is, considering the service rendered, an unreasonable exaction. "The question is not how

much he makes out of his business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered."

In this conclusion he is supported by the decisions of the English courts. *Canada Southern R. Co. v. International Bridge Co.*, L. R. 8 App. Cas. 723.

But in using this case of *Cotting v. Godard* as an authority, the fact must not be overlooked that, while Justice Brewer devoted the greater part of his opinion to the consideration of the questions above mentioned and deemed them of great importance, his associates declined to express their opinion upon these points but based their concurrence upon the ground that the statute applied to one company and not to other companies engaged in like business and was therefore unconstitutional.

What the decision would have been had the question of the limitation of governmental power been squarely presented to the court is open to speculation.