THE CANADIAN BAR REVIEW

VOL. XI. TORONTO, FEBRUARY, 1933. No. 2

EQUITY AND PUBLIC WRONGS.*

INTRODUCTION.

The concern of these lectures is to discover the principles and dogma of equity which, with a reasonable measure of probability, may be predicted as the basis for judgment when the courts are faced with the problem of redressing public wrongs.[1] We shall examine the question of how far the courts may be influenced by considerations of the welfare of society, or the community as such, when applying the doctrines which originated in the Chancery Courts, and we shall attempt to ascertain whether this area of the law is a "tortuous and ungodly jumble," or whether it is governed by a consistent underlying principle.

In attempting at least partially to answer these questions, the point of view that will be adopted is that the problems of law are social, because the legal order is a social institution, a highly specialized form of social control.[2] Further, for the most part, a purely pragmatic method will be applied. The aim will be to seek the content, causes and results of the various doctrines encountered in searching the relevant legal materials. In adopting this point of view it is fully realized that the truth was spoken by Von Jhering when he remarked that:

> Any point of view is of scientific value only when it proves to be productive, that is, when it advances knowledge of the object (which is being scrutinized), when it discloses sides of it which were formerly overlooked.[3]

As a person who is not immersed in the practice of the law must gather his material from the law reports, and as the reports do not

*The first of a series of three lectures delivered under this title before the Faculty and students of Osgoode Hall Law School.

[1] See Cardozo, The Growth of the Law, at p. 44.

[2] See Pound, Social and Economic Problems of the Law, The Annals, Am. Acad. of Pol. and Social Science, 1928.

[3] Von Jhering, Law as a Means to an End, at p. 332.

give us the silent traditions which influence the judges in administering the law,[4] care has been taken in the following discussion to attribute no mental attitude to any member of the judiciary which he has not expressly set out in his reported judgments.

Before going farther, it is necessary to refer to the meaning with which the term "public wrongs" is used in the title to these lectures. It is intended to be used with its widest meaning; that is, as any offence against the community, irrespective of whether it is legally wrongful or not; in other words, as meaning the violation of a so-called social interest.

There can be no well founded timidity about speaking in terms of interests, because, whatever you may consider the end or purpose of law to be, there is no doubt, as Dr. C. A. Wright has recently demonstrated,[5] that an analysis of the contemporary legal system reveals that it operates to attain its purpose through a process involving three steps: first, by recognizing certain human interests; second, by defining the limits within which those interests shall be recognized legally and given effect through legal rules, principles and standards; and third, by endeavouring to secure the interests so recognized within the defined limits by means of a system of remedies enforced through legal institutions.

The term "interest" is used here with its Latin meaning as being something of concern or "advantage" to a human being or group of human beings, a meaning made plain by Dr. Wright in the article to which I have just referred. As he points out, these concerns or advantages of human beings take the form of claims or demands which they individually, or in groups, continually seek to satisfy in the face of the conflicting claims and demands of other individuals or groups. These conflicting claims and demands cannot all be satisfied; they must be reconciled in some orderly fashion if civilized society is to exist. The pressure of these human interests for recognition actually is brought to bear upon the courts in the form of definite claims, which persons make for protection and redress against other persons. Thus do human interests become the subject-matter of the law. As a modern European jurist has said: "To settle the principles of the reciprocal delimitation of one's own and other people's interests is the function of law."[6]

In juristic science, as in the cultural arts, we observe striking illustrations of the change of emphasis that each century brings along, and no analyst of existing contemporary legal systems can

[4] See Winfield, Public Policy in the English Common Law, (1928), 43 Harv. L. Rev. at p. 91.
[5] (1932), 10 Can. B. Rev. at pp. 4-5.
[6] Korkunov, General Theory of Law, at p. 52.

be more modern than the age in which he lives. For example, in the year 1629 Bacon stated that "The use of the law consisteth principally in these three things: 1. To secure men's persons from death and violence; 2. To dispose of the property of their goods and lands; 3. For preservation of their good names from shame and infamy."[7] In comparison, now consider Dean Roscoe Pound's classification of the interests that are recognized and protected by the law to-day. This is the classification that I have adopted for the purposes of these lectures. Dean Pound defines three classes of interests: (a) The claims or demands of individual human beings immediately as such, which he calls *individual* interests. (b) The claims or demands of the political or corporate organization of society as such, concerning politically organized society as a juristic person, such as a state or incorporated town. These he calls *public* interests. (c) The claims or demands of the members of the social group in the aggregate, which he classifies as *social* interests.[8] "Humanity forms an aggregated whole, a solidarity is established among its members independently of their will. It results that many interests by their content have a character not individual but social."[9] It will be obvious that the distinction between the last two types of interests, between public and social, is inherent in the antithesis between the state and society.

As already indicated, the scope of these lectures is limited to an examination of the use of the peculiar equitable remedies for the protection of social and public interests as distinct from individual interests. At this point it is, therefore, perhaps advisable to take time to fix firmly in mind the essential distinction between the two classes of interests with which we shall be most concerned. With this object let us look at the familiar case of *Wolverhampton* v. *Emmons* decided in 1901.[10] In this case the Court of Appeal set out the requirements that must be satisfied in order that a plaintiff may bring himself within the exception to the general rule that the Court will not enforce specific performance of a building contract. In this case there is recognition and equitable protection of *two public interests*. It will be remembered that the second of the three requirements laid down was that the plaintiff must have "a substantial interest in having the contract performed, one which is of such a nature that he cannot adequately be compensated for breach of the contract by damages." The plaintiffs were the sanitary author-

[7] Bacon, Use of the Law, p. 1.
[8] See An Introduction to American Law, Dunster House Papers No. 3, Cambridge, 1920, at p. 4.
[9] Korkunov, *opus cit.*, at p. 59.
[10] [1901] 1 Q.B. 515.

ities of the municipal corporation of Wolverhampton and, in order to carry out a street improvement scheme in an unsanitary district, had contracted with the defendant for the removal by the defendant of the old buildings and erection of new. In decreeing specific performance, Lord Justice Romer said:

> The . . . question is whether in this case the plaintiffs were interested in the performance of the contract in such a manner that damages would be no adequate compensation to them for the breach of it. To my mind, they clearly were so interested. I do not see how it is possible adequately to estimate in money the loss which would be suffered by the plaintiffs, if the defendant's agreement to build these houses were not performed. The object of the plaintiffs, in requiring the defendant to enter into the contract to build on the land, obviously was *to benefit the town,* and *to increase the rateable value of the property therein.*

Here the litigation concerned *not merely* the public interest of the municipal corporation of Wolverhampton in the performance of the contract as such, that is, in the *chose in action.* Interests of incalculable value and of concern to a large and uncertain number of the citizens of Wolverhampton were also involved. These latter were interests of the community or society, rather than of the government, what Dean Pound calls *social* interests, in the health and economic progress of members of the public at large. Further, the court held that the municipal corporation, as a juristic person, had a substantial interest in these two *social* interests. In other words, the court recognized the public interest of the state, the corporation, as the constituted guardian of social interests. Two other things should be noticed concerning this case: (a) the primary common law right directly protected arose out of a contract between two persons, but the interests actually protected, the existence of which induced the granting of the equitable remedy, were both public and social; (b) the necessity for specific remedies to protect interests of a public or social nature adequately. The difficulties involved in evaluating those interests for the purpose of estimating damages would be insuperable. Effective specific remedies have, as you know, been provided only by equity, although, as Pollock and Maitland tell us, they were known to the common law in the 13th century, and suffered an arrested development due to "an old-fashioned dislike (of the common law) for extreme measures."[11]

In approaching a study of the use of equitable remedies to protect public and social interests, it is necessary to keep in mind, *first,* that the courts now, just as did the old Chancery Courts, exercise their jurisdiction to grant those remedies only in cases where the common law has failed to provide an adequate remedy. *Also,* it

[11] History of English Law (2nd ed.), Vol. II, pp. 522-5.

should be remembered that the available equitable remedies, and the principles and rules pertinent to them, differ accordingly as the court exercises so-called "exclusive" equitable jurisdiction, on the one hand, or so-called "concurrent" jurisdiction on the other. You will recall that, according to Story's classification, a court exercises *exclusive* equity jurisdiction when recognizing and protecting interests for violation of which the common law provides no remedy at all. Equity creates both the primary and the remedial rights, as in trusts, equitable waste, and the mortgagor's equity of redemption.

Concurrent equitable jurisdiction is exercised in cases where the common law has already recognized and protected an interest by means of its remedies. A primary common law right exists, but the remedy provided by the common law is for some reason inadequate to protect the interest, and to overcome this defect equity supplies a remedy; for example, specific performance or an injunction.

It is of course true that, as the late Professor Maitland has pointed out, Story's generally accepted classification of equity jurisdiction "presupposes that there is one set of courts administering law, another set administering equity,"[12] and since the enactment of the Judicature Acts, that is no longer the case in England and the provinces of Canada.[13] But it was laid down by the Court of Appeal in *Britain* v. *Rossiter*[14] in 1879, just four years after the original Judicature Act became effective, that, although the Act's "provisions enable the Courts of Common Law to deal with equitable rights and to give relief upon equitable grounds; . . . they do not confer new rights: the different divisions of the High Court may dispose of matters (formerly) within the jurisdiction of the Chancery and the Common Law Courts; but they cannot proceed upon novel principles,"[15] and "ought not to go further than the decisions of (the former) Courts of Equity as to the principles of relief" . . . [16] when applying doctrines that were developed in and were peculiar to those courts. That is to say, the so-called "fusion" of law and equity effected by the Judicature Acts was principally one of courts rather than one of doctrines. Consequently, the system of principles and rules which, prior to the Judicature Acts, governed the Chancery Courts in granting and withholding the remedies peculiar to those courts, control the courts to-day with slight modification and extension. What I have just said is also well illustrated by the case

[12] Maitland, Equity and the Forms of Action, at p. 21; Story, Equity.
[13] The last Canadian Province to enact a Judicature Act was Prince Edward Island, in 1929.
[14] 11 Q.B.D. 123.
[15] 11 Q.B.D. at p. 125.
[16] *Ibid.*, at p. 126.

of *Lavery* v. *Purcell*,[17] and the various cases on the effect of the Judicature Acts on jurisdiction to grant injunctions.[18] To quote from the judgment in *The Hudson Bay Co.* v. *Green*, "The principles on which the court acts within the modern wider limits since the Judicature Acts are the same as those on which the former Court of Chancery acted within its narrowest limits."[19] For this reason, Lord Shaw, as recently as the year 1926, in delivering the opinion of the Judicial Committee of the Privy Council in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*,[20] has recognized the persisting utility of Story's classification and adopted it.

It must not be forgotten that a primary right must exist, that is, the interest in question must have been recognized and protected with a remedy at common law, and that remedy must be inadequate, before a concurrent equitable remedy is available. As Lord Watson said in *White* v. *Mellin*,[21] "Damages and injunctions are merely two different forms of remedy against the same wrong." Let us keep this in mind during these lectures, as we shall be concerned almost entirely with some aspects of the doctrines peculiar to the judicial application of concurrent remedies, in so far as they relate to public and social interests.

I. The Doctrine of Comparative Injuries.

If it is true that the law acts to recognize and protect conflicting interests, it would seem to be plain that the judicial process necessarily involves evaluating or weighing those interests relatively to each other. In practice, however, it must be recognized that the result of adjudication is not often in fact determined by a conscious and precise weighing of interests. "In practice the pressure of wants, demands, desires will warp the actual compromises made by the legal system this way or that."[22] *In the long run this evaluating or weighing of interests is, however, actually done by the Courts.*

What then is the result when social or public interests, on the one hand come into conflict with individual interests on the other, in equity? Which, if either, do the courts value more highly when equitable remedies are sought? This question may arise in two ways: when social or public interests are either (a) immediately or (b) mediately in conflict with individual interests. They are in immediate conflict when, as in the *Wolverhampton* case, one of the

[17] (1888), 39 Ch. D. 508.
[18] See Maitland, *opus cit.*, at pp. 16-17.
[19] (1881), 1 B.C.R., Pt. I, 247.
[20] [1926] A.C. 108.
[21] [1895] A.C. 154, at p. 167.
[22] Pound, "An Introd. to Philosophy of Law," at p. 94.

parties to litigation is claiming protection for an individual interest, and the opposite party is a public body having a direct responsibility for, and hence interest in, public or social welfare. They are mediately in conflict when the claims immediately at issue are for the protection of conflicting individual interests, and public or social interests are incidentally but not remotely involved.[23]

Nowhere are the courts more consciously and avowedly weighing the relative values of competing interests than when applying the doctrine of comparative injuries in injunction suits. A balance of convenience will be struck to a nicety between conflicting individual interests, particularly, as you know, on applications for interlocutory orders, if the plaintiff's claim to have his interest protected at law is not clearly established. Mr. Justice Moss said, in *Dwyer* v. *Ottawa*:

> Where the legal right is not sufficiently clear to enable the court to form an opinion it will generally be governed in deciding an application for an interim injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the order.[24]

Here we see the judicial process of weighing or valuing conflicting interests masquerading under the phrase "balancing of convenience."[25]

Let us see the result on the balance of convenience when *individual* interests are in *immediate* conflict and, in addition, the transaction in issue brings a social interest *mediately* into conflict with one of them. An Ontario case, *Haggerty* v. *Latreille*,[26] decided in 1913, was of this type. The defendant had filled in the river along the shore in front of the plaintiff's land, and had thus clearly violated the plaintiff's right to the protection at common law of his interest in free access to the river. The members of the public, especially the inhabitants of the adjacent community, had, in common with the defendant, used the filled-in land freely as a wharf as a means of access to the river for a number of years prior to the action being brought. The trial judge, in refusing a mandatory injunction on the ground of a negative balance of convenience, took the social interest into account.[27] But Chief Justice Meredith, who delivered

[23] See for example of a social interest too remotely involved: *Atty.-Gen.* v. *Terry* (1874), L.R. 9 Ch. App. 423, at p. 428 (n).

[24] (1898), 25 O.A.R. 121. at p. 130.

[25] The granting of an injunction is always a matter of discretion to some degree, although even where the immediately conflicting claims are for protection of respective *individual* interests of the parties, if it is clear that the defendant has violated the plaintiff's common law right, the courts lean against applying the so-called "doctrine of comparative injuries." See *Wells* v. *Central Ry. Co.* (1914), 19 D.L.R. 174, at p. 181.

[26] 29 O.L.R. 300.

[27] (1913), 29 O.L.R. at pp. 305 and 309.

the judgment of the Appellate Division, affirming the judgment at the trial, does not mention the social interest even as a makeweight.[28]

A case which cannot be distinguished from *Haggerty* v. *Latreille* as to the way in which social interests were affected was decided by the House of Lords in 1859. In that case, *Broadbent* v. *Imperial Gas Co.*,[29] the complaint was that vegetables growing in the market-garden of the plaintiff were injured by the escaping gas of the defendant company. There was an appeal from Vice-Chancellor Wood's injunction order, to the Lord Chancellor, and when the argument was pressed upon the Lord Chancellor, Lord Cranworth, by the defendant that the injury to the plaintiff was slight in comparison with the benefits conferred by the company on the public by the manufacture of gas, and that, on this account, the court should not exericse its power to restrain such manufacture, he replied:

> If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on.[30]

In dismissing the appeal to the House of Lords from Lord Cranworth's decision, Lord Kingsdown used this language:

> It is said that the balance of inconvenience is so great against granting an injunction that it ought not to be done; that in one view of it, it may stop these large and expensive works to the great injury of the public, while, on the other hand, the only inconvenience to which the plaintiff in the suit will be subjected is the inconvenience of the trifling damage, it is said (but be it trifling or large, makes no difference in principle) that he may sustain from time to time, for which he may recover compensation by action.

In a similar case decided by Mr. Justice North in the English Chancery Division in 1898, the case of *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company*,[31] his Lordship said:

> . . . . to refer to (the) argument strongly pressed by Mr. Haldane (for the defence), that the defendant company owed some duty to the public, and the preambles of their Acts showed that the powers conferred upon them were given for the public benefit, and therefore as against them all private and individual interests should give way. A complete and sufficient answer to this will be found in the observations . . . of Lord Cranworth . . . in *Broadbent* v. *Imperial Gas Co.*

On analysis, it is seen that in both *Haggerty* v. *Latreille* and the *Broadbent* case the interests immediately in conflict were individual, and that in both cases social interests were mediately in conflict with

[28] *Ibid.*
[29] (1859), 7 H.L.C. 601.
[30] (1857) 7 DeG.M. & G. 436, at p. 462. See *Hennessy* v. *Carmony* (1892), 50 N.J. Eq. 616.
[31] [1898] 2 Ch. D. 614, at p. 622.

the plaintiff's legally protected individual interest. In the *Broadbent* case, both the Lord Chancellor and the House of Lords expressly refused to weigh the social interest mediately against the conflicting individual interest. And, as the defendant company could, at no great cost, prevent the injury to the plaintiff, the injunction order was affirmed, the injury to the plaintiff's primary legal right being clear, even though the damage he suffered from the injury was trifling. The only distinction between the *Broadbent* case and *Haggerty* v. *Latreille* lies in the relative values of the conflicting *individual* interests, the balance being heavily in favour of the defendant in the Ontario case. Thus Chief Justice Meredith was bound by no less authority than the House of Lords to ignore a social interest when it was only mediately in conflict with that of an individual when applying the doctrine of comparative injuries. In the language of a similar Manitoba case,[32] "Inconvenience to the public cannot be set up as against private rights." Also, in the *Shelfer* case,[33] an essentially similar case in which the Court of Appeal refused to award damages in lieu of an injunction, Lord Justice Lindley declared that

> . . . the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) (has never) been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation.[34]

Another English judgment that must not be overlooked is that of Mr. Justice Buckley (as he then was), in *Behrens* v. *Richards*,[35] where, as in the cases just discussed, the interests of a wide section of the community came mediately into conflict with the plaintiff's individual property rights. The court in this case, in refusing an injunction, undoubtedly gave weight to the social interest, but the *Broadbent* case can be distinguished on the ground that, while each item of damage there was trifling, repeated injuries would accumulate the damage; whereas, in *Behrens* v. *Richards*, the continuous series of trespasses complained of would never result in other than trivial damage to the plaintiff. And, also, Mr. Justice Buckley did actually rest his judgment mainly on the doctrine enunciated by Chancellor Boyd in *Rowe* v. *Hewitt*, that: "an injunction . . . is

[32] *Patton* v. *The Pioneer Navigation and Sand Co.* (1906), 16 Man. R. 435.

[33] *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

[34] At p. 316.

[35] [1905] 2 Ch. 614. See also *Lelandudno Urban District Council* v. *Woods*, [1899] 2 Ch. 705; *Fielden* v. *Cox* (1906), 22 T.L.R. 411.

a formidable legal weapon which ought to be reserved for less trivial occasions."[36]

That the principle of the *Broadbent* case is not confined in equity to injunctions against torts is shown by the case of *Lloyd* v. *The London, Chatham and Dover Railway Company*,[37] where, in an action to restrain the defendant company from breaking a negative covenant, Lord Justice Turner held that the circumstance that a work undertaken in breach of a valid covenant is one of great public importance, is not sufficient to induce a Court of Equity to refuse to restrain the breach of covenant.

Before passing to a different aspect of the problem, the language of Professor Bohlen, of the Law School of the University of Pennsylvania, should not be disregarded. While discussing the desirability of allowing public and social interests mediately to outweigh individual interests when determining whether there is an actionable nuisance at common law, Professor Bohlen remarked that so

> To throw the risk of a business essential to public interests upon a particular individual who derives no special benefit therefrom, simply because the exercise of his rights brings him within reach of its injurious effects, is not substantially different from the conduct of the Sultan of Morocco, who, in order to raise funds for the carrying on of a war, confiscates the property of the nearest rich man.[38]

A writer in the *Harvard Law Review* contends that these words are applicable to the present problem,[39] and they might have been before Lord Cairns' Act was passed, when the courts had no power to award damages in lieu of an injunction. But that Act, with all due deference to the *Shelfer* case, virtually empowers the court, in the exercise of its judicial discretion, to expropriate private property for money. That this is true is borne out by the case of *Black* v. *Canadian Copper Co.*,[40] decided in the Supreme Court of Ontario in 1917. The action was founded on private nuisance caused by vapours issuing from the roastbeds and smelter stacks of the defendant's mines. This resulted in claims for protection of individual property interests of the plaintiffs' coming into mediate conflict with social interests of a like nature, in the manner indicated in the following extract from Mr. Justice Middleton's elaborate written judgment. He granted damages, and set out his attitude in socially enlightened language, as follows:

[36] (1906), 12 O.L.R. 13.
[37] (1864), 34 L.J. Ch. 401.
[38] (1911), 59 U. Pa. L. Rev., at p. 445(n); (1926), Bohlen, Studies in the Law of Torts, at p. 430 (n). See Lord Cairns in *Hammersmith & City Ry. Co.* v. *Brand*, L.R. 4 H.L.C. 215; Bowen, L.J., in *London & Northwestern Ry. Co.* v. *Evans*, [1893] 1 Ch. 28.
[39] (1922), 36 Harv. L. Rev., at p. 214 (n).
[40] 12 O.W.N. 243, at p. 244.

There are circumstances in which it is impossible for the individual so to assert his individual rights as to inflict a substantial injury upon the whole community. If the mines should be prevented from operating, the community could not exist at all. Once close the mines, and the mining community would be at an end, and farming would not long continue. (The consideration of this situation induced the plaintiffs' counsel to abandon the claims for injunctions.) The court ought not to destroy the mining industry —nickel is of great value to the world—even if a few farms are damaged or destroyed; but in all such cases compensation, liberally estimated, ought to be awarded. The court has now by statute discretion to refuse an injunction and award damages in lieu thereof.

Let us now consider another type of comparative injury case, where individual interests have come into immediate instead of merely mediate conflict with public and social interests. Here we find that the leading case is *The Attorney-General* v. *The Council of the Borough of Birmingham,*[41] decided by Vice-Chancellor, Sir W. Page Wood, in 1858. In that case, although the action was brought in the name of the Attorney-General, the real plaintiff was a Mr. Adderley, at whose relation the Attorney-General sued, and who could probably have sued privately on his own behalf as he had suffered special damage.[42] As a lower riparian owner he, Adderley, sought an *interim* injunction to prevent continuation of the pollution of the water of a river by the sewage from the sewer system of the defendant corporation, which constituted a real menace to his health. Thus the plaintiff's individual interest in his health came into *immediate* conflict with the defendant's public and social interest in the maintenance of the general health and in the economic progress of the people of Birmingham. The defendants had been empowered by statute to construct and maintain a sewage system within the municipal boundaries of Birmingham. The plaintiff's premises were situated outside of those boundaries.

In argument, the defendant's counsel contended that "private interests must bend to those of the country at large. The safety of the public is the highest law."

In his judgment granting the injunction, the Vice-Chancellor said that the defendant's contention was "one of remarkable novelty." The judge is worth quoting at some length. Sir W. Page Wood said:

There are cases at common law in which it has been held, that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, the question is simply whether he has those rights, and

[41] 4 K. and J. 528.

[42] See Special Damage, When Recoverable in Case of a Public Nuisance, (1912), 32 Can. L.T. 1.

if so, whether the court, *looking to the precedents by which it must be governed in the exercise of its judicial discretion,* can interfere to protect them.

Now, with regard to the question of the plaintiff's right to an injunction, it appears to me that, so far as this court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. . . . I am not sitting here as a committee for public safety, armed with power to prevent what, it is said, will be a great injury not to Birmingham only, but to the whole of England; that is not my function. My function is only to interpret what the Legislature (the proper body to which all such arguments should be addressed) has considered necessary for the town of Birmingham. . . . The plaintiff's rights are neither more nor less than the Legislature has thought it proper to leave him. And the question, whether the town of Birmingham is concerned, or whether . . . the defendants are carrying on these operations for their own profit, is one which is entirely beside the purpose to argue in this court.[43]

Although the English courts have refused to balance social interests against individual interests at all in applying the comparative injuries doctrine, it should not be overlooked that there is at least one Canadian case, *Dwyre* v. *Ottawa,* decided in 1898, where the Court of Appeal of Ontario gave some weight to community safety and convenience in refusing an application for an interlocutory injunction.[44] This case appears to be *sui generis.*

The *Birmingham* case was decided in the year 1858. Quite different was the attitude of an Ontario judge in 1914, when called upon to weigh public and social interests against individual interests when they came into immediate conflict in an analogous, if not similar, way. In *Chadwick* v. *City of Toronto,*[45] the plaintiffs, a man and his wife, claimed an injunction to restrain the operation of certain electric pumps of the defendant corporation's water works at the high level pumping station on Poplar Plains Road. The noise and vibration occasioned by the operation of these pumps definitely constituted a nuisance, and seriously interfered with the comfort of the plaintiffs and their family in the enjoyment of their house. As in the *Birmingham* case, the defendant corporation was authorized by statute to construct and maintain the works in question, but not so as to commit a nuisance. Under the doctrine enunciated in the *Birmingham* case, it is submitted that this was the very case for an injunction.

However, Mr. Justice Middleton, quite correctly, may I respectfully suggest, held in effect that the public and social interests of the City of Toronto so far outweighed the individual interests of the

[43] 4 K. and J., at pp. 538-9.
[44] *Supra cit.*
[45] (1914), 32 O.L.R. 111.

plaintiffs; that he should withhold an injunction. He said: "Inasmuch as the pumping of this water is necessary for municipal purposes, the case, I think, falls under the provision of the Judicature Act empowering me to refrain from granting an injunction and to substitute damages."[46] The Appellate Division affirmed his decision, without question as to this point.

While *Chadwick* v. *City of Toronto* was not technically a "comparative injury" case, the underlying principle, as enunciated by Lord Justice A. L. Smith in the *Shelfer* case,[47] on which the court substitutes damages for an injunction under Lord Cairns' Act,[48] is fundamentally the same. In order to appreciate fully the effect of the *Toronto* case, three things should be brought to mind. Recall *first*: that Mr. Justice Middleton expressly found that the injury and damage caused to the Chadwicks by the noise and vibration was serious; *second*: recall that Mr. Justice Masten has declared that:

> In the case of a continuing nuisance by way of noise such as materially to interfere with the ordinary comfort of living, there is difficulty in estimating in money the damage which the plaintiff suffers, nor can it be said that a small money payment affords adequate compensation in such a case. Hence arises the general rule stated by Lord Justice Lindley in *Shelfer* v. *London Electric Lighting Co.*, that, in cases of continuing actionable nuisances, the jurisdiction conferred by Lord Cairns' Act, ought only to be exercised under very exceptional circumstances.[49]

And recall, *third*, that Mr. Justice Middleton has said that he does not agree with a recent suggestion by Mr. Justice Riddell that Ontario Courts are more free than the English Courts in substituting damages for an injunction.[50] With these three things in mind, we cannot fail to appreciate the relatively high value which Mr. Justice Middleton placed upon the public and social interests involved in *Chadwick* v. *City of Toronto*. Surely there can be no doubt that his judgment in this case is more in accord with the social realities of the present day than is the extremely individualistic doctrine of *Attorney-General* v. *The Borough of Birmingham*.

You will have observed Vice-Chancellor Wood's remark in the *Birmingham* case to the effect that, although public or social interests could not be weighed against private rights, there are cases at law which hold that conflicting social interests of two portions of the community may be balanced the one against the other. Those cases were discussed by Sir George Jessel, Master of the Rolls, in

[46] 32 O.L.R., at p. 113.
[47] [1895] 1 Ch. 287, at pp. 322-3.
[48] The Judicature Act, R.S.O., 1927, ch. 88, sec. 17; 1919 N.S., ch. 32, sec. 18 (5).
[49] *Duchman* v. *Oakland Dairy Co. Ltd.* (1928), 63 O.L.R. 111, at p. 118.
[50] *Ibid.*, at p. 134.

1874, in the case of *Attorney-General* v. *Terry*.[51] They were cases in which the problem was whether or not a public nuisance existed at common law, a problem which necessarily usually involves a valuing of competing interests.[52] Sir George Jessel expressed his opinion in a considered *dictum* that the public or social interests in conflict must be those of the same portion of the community, in order that they may be weighed against one another. Of the two cases that he takes from the books to illustrate his meaning, one must suffice:

> Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river, and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the waterway, and to some extent . . . obstruct the navigation. But it is for the public benefit *at that spot* that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation (at that spot), that on the whole, a court of justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case, it would be a public benefit that would counterbalance the public injury.[53]

That public and social interests may, in some cases, be balanced in like manner when a court is exercising judicial discretion as to whether or not to grant an injunction might well be inferred from a suggestion by Mr. Justice Chitty in the case of *Attorney-General* v. *Corporation of Manchester*,[54] but this does not seem to have been the *ratio decidendi* in any reported case so far. The possibility still exists, however.

But from the cases that we have considered, we have seen that, in applying the doctrine of comparative injuries, the English precedents expressly disregard public and social interests entirely when they are in conflict with private rights, whether on an application for an interlocutory or a perpetual injunction. And *stare decisis* now plays almost an equally important place when the courts are applying equitable rules and principles as when they are applying those derived from the other side of Westminster Hall.[55]

There must be an explanation for this failure of equity to maintain sufficient flexibility in applying this doctrine to adapt itself effectively for the protection of public and social interests upon which the changing social structure of the twentieth century has laid

[51] (1874), L.R. 9 Ch. App. 425 (n), at pp. 426-7 (n).
[52] *Rex* v. *Russell* (1827), 6 B. & C. 566; *Rex* v. *Ward* (1836), 4 Ad. & E. 384.
[53] L.R. 9 Ch. App., at p. 428 (n).
[54] [1893] 2 Ch. 87, at pp. 93-4.
[55] See Lord Eldon in *Gee* v. *Pritchard* (1818), 2 Swanst. 402.

a new emphasis. Why did equity in the nineteenth century bind itself so thoroughly to a purely individualistic doctrine with links of its own forging? The answer seems to lie in the ever-increasing tendency, after the advent of the law-bred chancellors in the sixteenth century, to find the analogies for equity in the common law, and the spirit of the common law has in general always been one of extreme individualism. Indeed, Blackstone declared that: "The public good is in nothing more essentially interested than in the protection of every individual's private rights."[56] "Ministers of kings and of the people," said Jeremy Bentham, "it is not by the wretchedness of individuals that you will produce the happiness of nations. The altar of the public good demands barbarous sacrifices as little as the altar of the Divinity."[57] And a foreign commentator asserts that the one distinguishing mark of common law juristic thought is its "unlimited valuation of individual liberty and respect for individual property."[58]

This emphasis of the law upon individual interests, as exemplified in the *Broadbent* and *Birmingham* cases, was undoubtedly well founded in the life and organization of society as it had existed for five hundred years. But within the last hundred years, and particularly within the last five decades, man has almost completely changed the world in which he lives. Within this period the great strides of science and invention have not only revolutionized the physical and economic aspects of life; they have induced a surging and upheaval in thought concerning social and spiritual values. Our conception of the bases and rights of private ownership has already undergone a fundamental change, as has our conception of the relationship of the individual to society. Indeed, our present-day industrialized and urban environment has placed such a relatively higher valuation upon public and social interests that it is safe to describe the non-social application of the comparative injuries doctrine as an outworn anachronism. That this is true is well illustrated by the weight given to public and social interests by Mr. Justice Middleton in his judgments in *Black* v. *Canadian Copper Co.* and *Chadwick* v. *City of Toronto*, when exercising a discretion which involved performing essentially the same evaluating process.

(To be Continued.)

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[56] 1 Blackstone Commentaries, p. 139.
[57] Bentham: Principles of Legislation, p. 144.
[58] Berolzheimer, System des Rechtsund Wirthschaftsphilssophie, II. p. 160 (The World's Legal Philosophies, p. 137).