EQUITY AND PUBLIC WRONGS.*

PART II.

INJUNCTIONS AGAINST PUBLIC NUISANCE.

(a) *Some Influential Ideas.*

In any consideration of the use of the equitable remedies for the protection of public and social interests we must not fail to take into account the leading principle of individualism exemplified in the *Broadbent* and *Birmingham* cases which we discussed in the first lecture. We must also give due consideration to the present tendency, seen in *Black* v. *Canadian Copper Co.* and *Chadwick* v. *City of Toronto,* toward judicial legislation in favour of social welfare when the courts are not strictly restrained by principles and rules that have become petrified by the accumulated weight of precedent.

May I also recall to your attention another characteristic of judicial law making, the importance of which is sometimes overlooked, but which is patent in the *Birmingham* and *Shelfer* cases. There is naturally a tendency for the juristic notions current at the time a leading case is decided to be treated henceforth as axiomatic. I refer in this instance to the idea expressed in the quotations in our first lecture from the judgments in the *Birmingham* and *Shelfer* cases, and put into words by Lord Selborne in the latter case in the following language: "Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than (the) court can take."[1] In the year 1832 John Austin, the founder of the English analytical school of jurisprudence, had published his momentous work in which he had demonstrated what was then a new fundamental conception: "that the Law of a State or other organized body is not an ideal, but (is) something which actually exists. (Law) is not (necessarily) that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which *is*."[2]

Influenced by the dogma of separation of the judicial and legislative powers of government, Austin, although he insisted rightly that much law is made by judicial decision, also contended that, insofar as the separation of judicial and legislative powers was com-

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

[1] *Shelfer et al.* v. *London Elec. Lighting Co.,* [1895] 1 Ch. 287.

[2] Gray, Nature and Sources of the Law, 2nd ed. at p. 94.

plete, the courts were concerned only with the actually existing law; what the law ought to be came within the exclusive purview of the legislature.[3] Thus, declaimed the judges in the latter half of the nineteenth century: "Courts of justice are not like parliament, which considers whether proposed works will be . . . beneficial to the public . . . " and, "my function is only to interpret what the Legislature . . . has considered necessary for the town of Birmingham." Whether or not we concur in the validity of these functional restrictions; that is, that the proper function of the courts is to be merely animated phonographs, we must not disregard the effect upon the attitude of the Courts when they are dealing with claims for the equitable protection of new types of public and social interests.

We have also seen the so-called doctrine of *stare decisis* operating in the comparative injury cases. You will recall, for example, that Vice-Chancellor Wood in the *Birmingham* case held that the Chancery Court must look to "the precedents by which it must be governed in the exercise of its judicial discretion." Just how far the principles governing the *direct* use of equitable remedies have been stereotyped by early precedents would thus seem to become a constituent and pertinent question in our discussion of injunctions against public nuisance. Sometimes a page of history of the law is worth a volume of logic, and, indeed, to understand the extent to which equitable remedies may be used to protect public and social rights to-day, we must make two brief historical sketches our starting points.

(b) *Use and Effect of Precedents.*

Equity may still in large measure have varied with the length of the Chancellor's foot before the conflict between the Court of Chancery and the courts of common law came to a head with the celebrated dispute between Lord Coke and Lord Chancellor Ellesmere at the beginning of the 17th century. But after James I took the advice of Bacon, then Attorney-General, and other counsel, and issued an order in favour of the jurisdiction claimed by Lord Ellesmere for the Chancery, it was not long before the Chancellor's decisions were reported, even though inadequately at first.[4] After this, as Sir Frederick Pollock says: "it was only a matter of time for Bacon's successors to put the house of Equity in order,"[5] and by the year 1670, in *Fry* v. *Porter,* we find Lord Keeper Bridgman, speak-

[3] Cf. Pound, Law and Morals, pp. 46-7 and pp. 46 (n. 8), 47 (n. 9).

[4] See Veeder, The English Reports, Select Essays in Anglo-American Legal History, ii, p. 148, *et seq.*; Holdsworth, History of English Law, pp. 459-69.

[5] Pollock, Expansion of the Common Law, at p. 72.

ing for the Chancery, saying: "Certainly precedents are very necessary and useful to us, for in them we find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded."[6] The development of a system of precedents in equity had passed the embryonic stage. This hardening process gradually developed with successive Chancellors through the 18th century until the great, though in some ways reactionary, Lord Eldon accelerated it by his famous pronouncement in *Gee* v. *Pritchard* in 1818, when he declared that:

> The doctrines of this Court ought to be as well settled, and made as uniform *almost* as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge.[7]

In the words of Lord Macaulay: "Equity had been gradually shaping itself into a refined science, which no human faculties could master without long and intense application."[8] The extent to which the lawyer editors of the chancery reports may have had a hand in shaping equity into a refined science is hinted at by Lord Campbell in his autobiography where he remarks:

> Lord Ellenborough ought to have been particularly grateful to me for suppressing his bad decisions . . . Before each number was sent to the press, I carefully revised all the cases I had collected for it and rejected such as were inconsistent with former decisions or recognized principles. When I arrived at the end of my fourth and last volume, I had a whole drawer full of "bad Ellenborough law."[9]

As late as the year 1841, we find Lord Chancellor Cottenham observing that he still thought it was the duty of the Court "to adapt its practice and course of proceeding to the existing state of society, and by not too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there was no other remedy."[10] But with the stimulus afforded by the great authority of Lord Eldon, what Carleton Kemp Allen calls *"rigor aequitatis"*[11] developed so rapidly that, as Sir George Jessel has remarked: "In the year 1866 Equity Judges did not profess to make new law, and when they state what the law is, they do not mean, as might have been said two or three centuries

[6] 1 Mod. 300 at p. 307.
[7] 2 Swanst. 428 at p. 441. (Italics by the lecturer.)
[8] Macaulay, England, Vol. III, p. 17.
[9] Autobiography of Lord Campbell, Hardcastle, Life of Lord Campbell, I, at p. 215.
[10] In *Wallworth* v. *Holt*, 4 My. & Cr. 619 at p. 635.
[11] See Law in the Making (1927), at pp. 228-31.

before, that that was law which they thought ought to be law."[12] Nowhere is the sterility that was the almost inevitable result of the completion of this process toward rigidity more apparent than in Lord Justice Brett's judgment in *Haywood* v. *The Brunswick Permanent Benefit Building Society,* decided by the Court of Appeal in 1881.[13] In answer to the argument that the Court should specifically enforce a covenant to repair against an assignee of the covenantor by analogy to the doctrine of *Tulk* v. *Moxhay,* Lord Justice Brett replied that there was no precedent for enforcing other than a restrictive covenant, and a covenant to repair is not restrictive, but affirmative. Then, after admitting that the probable reason for affirmative covenants not having been enforced hitherto was that "a mandatory injunction was not in former times grantable, whereas it is now," he concluded, "but I cannot help thinking, in spite of this, that if we enlarged the rule, *we should be making a new equity, which we cannot do.*"

Thus a modern chancery judge spoke the exact truth when, at the beginning of the present century, he declared that "This Court is not a Court of Conscience."[14]

The result of this avowed adherence to precedent and process of systematization is that many of the principles and rules of equity are now less flexible than several of those that originated in the common law side of the Court. As Sir Frederick Pollock approvingly pronounces: "The genius of our law deliberately prefers the risk of some hardship in particular cases to the unlimited dangers of arbitrary discretion; and in this general principle, as well as in various and more specific matters, equity follows the law."[15] Who can doubt that one of the fundamental social interests is that equity as well as the rest of the law shall be uniform, and systematically developed, and that there should therefore in the main be adherence to precedent? "No one can gainsay the wisdom of the saying that the uncertainty of the law is (sometimes) a public danger."[16] But strict adherence to precedent always tends toward the development and mechanical application of a rigid system of categories. Thus, when, as the result of cultural and economic changes, new types of social interests develop, which do not fall within those categories,

[12] See *Johnson* v. *Crook* (1879), 12 Ch. D. 639 at p. 649.
[13] 8 Q.B.D. 403.
[14] Buckley, J. *In re Telescription Syndicate,* [1903] 2 Ch. 174 at p. 195. Cf. E. C. Clark, Practical Jurisprudence (1883), at pp. 376-7.
[15] *Opus cit.* at p. 73.
[16] See Atkin, L.J. in *Ware & C.* v. *Motor Trade Assoc.,* [1921] 3 K.B. 40. "Sometimes" inserted by the lecturer to indicate lecturer's opinion.

claims for their protection are certain to bring the new interests into conflict with the social interest in the certainty and symmetry of law.[17]

(c) *History of Injunction as Remedy for Public Nuisance.*

As reference to any standard digest will show, the equitable remedy most often used to protect public and social interests *directly* has been the concurrent remedy of injunction, granted at the suit of the Attorney-General to restrain the defendant from committing what amounts to a public nuisance. Now, as you know, a public nuisance has long been classed as a crime at common law, and we find that Mr. Justice Irving of British Columbia affirms in the twentieth century, as did Lord Eldon almost a hundred years before, a general rule that the Courts do not grant injunctions for the purpose of "keeping people without the range of the criminal law."[18] Conversely, it is laid down that the foundation of equity is the civil law of property.

We turn now to develop our second necessary fragment of history. When Lord Eldon, in 1818, in *Gee* v. *Pritchard*[19] stated categorically that he had no jurisdiction to prevent the commission of crimes, he recognized a limitation upon the function of equitable remedies which would not have occurred to the early Chancellors, and which had never been imposed by legislative enactment. Closely allied to the jurisdiction to deal with cases for which no adequate remedy was available owing to some defect in the law itself, the early Chancery exercised a protective jurisdiction[20] in cases where the criminal common law provided a remedy, but in which, owing to the turbulent state of the country, the ordinary courts were powerless to afford protection.[21] All through the Middle Ages, until the establishment of strong government by the Tudors, "Highwaymen and rioters made trade and travel hazardous; powerful barons overawed the local courts,"[22] abuse of office by sheriffs, and others in authority was common, and on the slightest provocation resort was had to force of arms in private affairs, in defiance of the laws of the realm. The result was a complete breakdown of the ordinary system of criminal

[17] See Cardozo. Nature of the Judicial Process, at pp. 112-3.
[18] See *Atty.-Gen.* v. *Wellington Colliery Co.* (1903), 10 B.C.R. 397 at p. 398.
[19] 2 Swans. 403 at p. 413.
[20] See 22 Edw. III.
[21] See Holdsworth, History of English Law, Vol. I, p. 405-6 (3rd edition); Mack, the Revival of Criminal Equity (1903), 16 Harv. L. Rev. 389; MacRae, Readings in History of English Law, p. 150.
[22] 16 Harv. L. Rev. at p. 390.

justice in the 13th and 14th centuries and the resort by the victims of oppression to the Chancery for protection. Numerous petitions collected in volume X of the Selden Society publications illustrate the scope of the criminal jurisdiction which came in this way to be exercised by the Chancery. For example we find the following bill, dated 1397, in the last days of the reign of Richard II:

> To the most reverend Lord, the Chancellor of England, Showeth one John de Rouseby of Bardney, that one John Skipwith on the Monday after the feast of S. John the Baptist in the 19th year of the reign of our Lord the King who now is, being then Sheriff of Lincoln, by colour of his office arrested the said John Rouseby and imprisoned him horribly in his house at Lincoln, and put him in stocks and fastened his hands behind his back, and put a pair of handcuffs on his hands, and threatened him that he should not be delivered from prison unless he would give him his land or 10 marks; and so he kept him in prison until he was delivered for a fine of 40s.; to the great damage of the said suppliant, and against right and reason; Of which he prayeth a remedy from your highness, for God and in way of charity: considering that the due effect of the common law is so overborne by the said John Skipwith and his supporters in the county of Lincoln and elsewhere, that sufficient execution of common right is therefore not likely to avail the said suppliant, nor many others greater than he, if he be not aided by special remedy in his need.[23]

From the latter years of Edward IV's reign in the second half of the 15th century, this criminal function of the Chancellor was gradually taken over by the branch of the King's Council which later developed into that "twin sister"[24] of Chancery, the Court of Star Chamber, and little by little the Chancellor's criminal jurisdiction lapsed into disuse, until, by the reign of Elizabeth it had practically ceased altogether. During her reign we see the tendency to rely upon the procedure of the ordinary tribunals, rather than on the extraordinary justice of the King's Council, in cases of violence and outrage exemplified in the resort to a "petition for sureties of the peace" against William Shakespeare, the bard of Stratford-on-Avon, and others. That petition, dated Michaelmas Term, 1596, which was discovered last year in the Controlment Rolls of the Queen's Bench is worth quoting for its literary associations. It reads in substance as follows: "Be it known that William Wayte craves sureties of the peace against William Shakespere (and others), for fear of death and mutilation of his limbs." It is perhaps also of interest that the petitioner, William Wayte, was a notorious Justice of the Peace who is believed to have been the prototype for Justice Shallow in Shake-

[23] The Publications of the Selden Society (1896), Vol. X, at p. 30.
[24] Maitland, *opus cit.* at p. 10.

speare's "The Merry Wives of Windsor.[25] And by the time the Court of Star Chamber was abolished by statute in 1645,[26] government had become so stable and the courts of law so efficient in criminal matters that the need for the extraordinary remedies of a criminal equity had disappeared. There was thus no precedent in Chancery reports which that great lover of authority, Lord Eldon, could find in 1811, when the case of *Attorney-General* v. *Cleaver* came before him, to justify using the injunction to prevent a public nuisance.[27] Owing to the accidents of history Chancery had become a purely civil court. Indeed, although the Chancery Court never ceased to assert its function to protect property from injury, in so far as reported cases go, there is little on the subject of suits by the Attorney-General to enjoin public nuisances before Lord Eldon became Chancellor. And, for a different reason, there is little more in the reports during that time on the subject of private actions for injunctions against the purely civil wrong of private nuisance. The whole subject of equity jurisdiction over torts was backward because the Chancery Court was reluctant to try questions which were adapted peculiarly to trial by jury, in view of the dissatisfaction which arose from the evidence being taken by deposition instead of *viva voce*,[28] a method of procedure that persisted in England until 1873. In fact, before Lord Eldon mounted the Woolsack, the only near approach by the Chancery Court to exercising jurisdiction to enjoin a public nuisance seems to have occurred in 1799, on a petition by the Mayor of London to prevent putting any more sugar in some old houses which had been turned into warehouses and were about to fall from the weight. Lord Chancellor Loughborough, with considerable hesitation, made the prohibitory order, but said that the Mayor could apply a much more effective remedy by himself ordering the houses to be shored up and the weight removed, which the Chancellor could not order. Adverting to the staple analogy of the common law, his lordship said: "I can only interfere as between landlord and tenant."[29]

The Court of Exchequer, however, as a court of revenue,[30] possessed certain equitable powers in matters between the Crown and

[25] See, Leslie Hotson, A Great Shakespeare Discovery (1931), Atlantic Monthly, Vol. 148, p. 419 *et seq.*

[26] 16 Car. I, Ch. 10.

[27] In *Attorney-General* v. *Cleaver*, 18 Ves. 211.

[28] See Pound, Equitable Relief Against Defamation (1916), 29 Harv. L. Rev. 640 at pp. 643-4.

[29] *Mayor of London* v. *Bolt* (1799), 5 Ves. 129. See Chaffee, Cases on Equitable Relief against Torts, at p. 439.

[30] Holdsworth, *opus cit.*, Vol. I, at p. 241. See Pound, Readings on the History and System of the Common Law, p. 62 *et seq.*

the subject.[31] And the first injunction against a public nuisance seems to have been granted by the Court of Exchequer in *Bonds Case,* on an information by the Queen in 1587.[32] But this jurisdiction apparently lapsed after the reign of Charles I not to be revived until 1795. In 1795 Chief Baron MacDonald delivered the judgment in *Attorney-General* v. *Richards*[33] which involved questions both of purpresture and nuisance, and is the first reported case of an injunction against a nuisance to the public right of navigation.[34]

The suit was by information of the Attorney-General in the Court of Exchequer to restrain the defendants from erecting some wharves which the defendants had built between high and low water mark, and for the abatement of those already erected. It was alleged and argued that the erections were both a purpresture and a nuisance, the former as an encroachment upon the king's *jus privatum* to the soil between high and low water mark, and the latter as an interference with the *jus publicum* of free navigation. It was conceded that, regarding the wharves as purprestures, the defendants could justify under a royal grant of the soil, but not if they were a nuisance. The *jus publicum,* though vested in the Crown, is not alienable, and is held solely for the benefit of the public, for whom the King is bound to preserve it unimpaired. But the jurisdiction of the court to issue an injunction to restrain or abate the structure as a nuisance was vigorously disputed. The counsel for the defence argued:

> As to the question of nuisance, that is a matter completely foreign to the jurisdiction of a court of equity. It is a breach of the general police of the kingdom, and as such is considered as a crime, and to be prosecuted in the criminal courts. But a court of equity cannot hold cognizance of any criminal matter. It never was attempted to prosecute a suit in equity to remedy any other public mischiefs, as to prohibit rope-dancing, plays, etc., or to abate a nuisance or purpresture on the highway. That is exactly like the present case, and is every day prosecuted in the ordinary criminal courts. Questions of nuisance are particularly improper to be discussed in equity, because the remedy at law is complete.

Despite that argument, the court granted an injunction decree abating the wrongful structures, ostensibly as a purpresture.[35] But no inquiry was had to determine whether it were more profitable for the King to abate these wharves or to have them remain subject to a rent, an enquiry that could, and would have been made if the erec-

[31] See 5 Vic., Ch. 5.
[32] Moore 238, No. 372.
[33] 2 Anstruther 603.
[34] See 9 Harv. L. Rev. at pp. 523-4.
[35] A mere purpresture does not necessarily amount to a public nuisance: See *Atty.-Gen.* v. *U.K. Elec. Tel.* (1861), 30 Beav. 287. See Story, Equity Jurisprudence, Sec. 922.

tions were mere purprestures. Therefore subsequent cases have held that the decision can be better supported upon the ground of public nuisance.

Again, in 1811, the Court of Exchequer gave the Court of Chancery a lead by granting two injunctions against wrongful obstructions in Portsmouth Harbour.[36] Eight years later, in 1819, Lord Eldon, in *Attorney-General* v. *Johnson,* his doubts having been dispelled by the precedents which had been provided by the Exchequer judges, granted a temporary injunction against the erection of an embankment as a nuisance to the public rights in the river Thames.[37] He ingeniously distinguished the *Cleaver* case in which he had held, in 1811, that he had no such jurisdiction, as having been barred by laches.

During Lord Eldon's regime the jurisdiction of equity to issue injunctions at the suit of the Attorney-General to abate or restrain certain public nuisances became definitely settled. Since then the task of the Courts has been to define the subject-matter and limitations for the exercise of that jurisdiction, a task that has been much influenced by the historically grounded conception that property rights compose the *sine qua non* of equity. Thus, in a *dictum* uttered in 1853, in *Attorney-General* v. *The Sheffield Gas Consumers' Company,*[38] Lord Justice Turner stated what he conceived to be the principle underlying that jurisdiction as follows:

> I confess . . . that, looking at the principles on which as I apprehend this court interferes, it does not appear to me that there can be any sound distinction between cases of private and public nuisance. It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. *It is on the ground of injury to property that the jurisdiction of this court must rest; and taking it to rest upon that ground, the only distinction which seems to me to exist between the cases of public and private nuisance is this, that in case of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind.*

This *stare dictis* has been clung to by text writers and judges ever since, with varying degrees of tenacity.

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Just here I desire to emphasize the following points which are evident from our discussion thus far: *First,* that the development of the law concerning the use of the injunction to restrain or abate

[36] *Atty.-Gen.* v. *Burridge* (1822), 10 Pri. 350; *Atty.-Gen.* v. *Parmeter* (1811), *ibid.* p. 378, affirmed by the House of Lords, *ibid.*, p. 412.
[37] (1819), 2 Wils. Ch. 87.
[38] 3 De G. M. & G. 304 at p. 320.

public nuisances was historically coterminous with the period during which equity was becoming rapidly hardened into a system of binding precedents. *Second,* that the use of the equitable remedy to restrain the commission of a criminal offence involved at least an extension of, if not strictly an exception to, what had hitherto become a basic doctrine; the doctrine that equity is concerned solely with remedying the inadequacies of the civil side as distinguished from the criminal side of the common law.

In view of these two facts it was to be expected that equity would require a public nuisance to involve an injury to a property interest, either actual or fictional, in order to be remedied by injunction, in other words, that the nuisance should fall within a category labelled "property." It was also almost inevitable that the requirement that a public nuisance fall within that category should become fixed in equity during the 19th century and be perpetuated by the binding force of precedents to the present day.

(d) *The So-called "Property Requirement."*

Students of equity are, of course, familiar with the apparent anomaly that equity generally values individual property rights more highly than either rights or interests of personality. Equity does anything but look upon a man's purse as trash. As it was put in an English case, "the Court does not grant an injunction to restrain the (unauthorized) use of a man's name simply because it is a libel or calculated to do *him* injury; but if what is being done is calculated to injure his *property,* and the probable effect of it will be to expose him to (property) risk or liability, then . . . an injunction is the proper remedy."[39] In this, of course, equity merely follows the civil side of the common law, as distinguished from the criminal law.

A plaintiff is not entitled to an injunction for a matter solely affecting his person. *Rights in property are what equity interferes to protect,* and although the courts have considered this distinction as going to their jurisdiction rather than to their discretion it has been little affected by the "just and convenient" clause of the Judicature Acts.[40]

As to the *enabling* effect of this so-called "property" doctrine in equity, you should not overlook the peculiar sanctity of private property which enabled an injunction to be granted in the Quebec case of

[39] *Walter* v. *Ashton,* [1902] 2 Ch. 282 at p. 293.

[40] 1919, N.S. Ch. 32, s. 19(a); R.S.O. 1927, c. 88, s. 16. See the *Hudson Bay Co.* v. *Green* (1881), 1 B.C.R., Part I, 247; Cases in Smith & Read, Cases on Equity, Part IV, Ch. II.

International Ladies' Garment Workers Union v. *Rother*[41] where the plaintiff was a private person, to prevent acts amounting to crime when they did not stop at being criminal but also tended to cause the irreparable destruction of the plaintiff's property. In that case jurisdiction to grant the equitable remedy was exercised not because of, but in spite of the criminality of the acts.

You have seen the *disabling* effect of this doctrine applied in Ontario in *Rowe* v. *Hewitt* and in that most unmoral case, *Warren* v. *D. W. Karn Co.*[42] where Chancellor Boyd felt himself bound to hold that: "It is not every breach or violation of good faith or departure from honourable dealing which can call forth the powers of equity to make redress; there must be disclosed some case of civil property which the Court is bound to protect."

In the words of Dean Sidney Smith, at page 383 in Volume 8 of the Canadian Bar Review, "The effect of the publication upon a man's estimation of himself and upon his own feelings does not constitute an essential element in a cause of action for defamation. In granting an injunction or awarding damages in a action for libel or slander the courts are extending the protection which is given to physical property to certain of the conditions necessary or helpful to material prosperity."

In *Attorney-General for Ontario* v. *Canadian Wholesale Grocers' Association,*[43] Chief Justice Meredith held that it is only an injury to his property in the ordinary sense of the word that entitles a private individual to an injunction to restrain an act which is a tort as well as a crime, and that is probably the law to-day. On the other hand, whatever may be the state of the law concerning private rights, Mr. Justice Hodgins came to a reasoned conclusion in the same case that the "cases indicate that where a *public* right is concerned the remedy by injunction is not strictly limited to cases where property, in the usual sense of the term is injured."[44] *It is submitted that in no case of public nuisance where the court grants an injunction does the exercise of that jurisdiction operate to protect directly the sort of interests ordinarily connoted by the term "property."* Just what constitutes a nuisance in general is perhaps incapable of exact definition, and in Hawkins' *Pleas of the Crown* a public or common nuisance is merely described as "an offence against the public, either by doing a thing which tends to the annoyance of the King's subjects,

[41] [1923] 3 D.L.R. 768.
[42] (1907), 15 O.L.R. 115.
[43] (1923), 53 O.L.R. 627.
[44] 53 O.L.R. at p. 656.

or by neglecting to do a thing which the common good requires."[45] Blackstone sets forth a somewhat picturesque eightfold enumeration of public nuisances.[46] But a public or common nuisance is defined to-day *for Canada* by Sec. 221 of the Criminal Code to be, "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects." It is to be observed that the word "public" is used in this definition in two different senses. As first used it means nothing more than a large number of private individuals; thus the "property of the public" there referred to does not mean property owned by the state but the property of a large number of private persons. As used in the latter part of the definition the word "public" is used in its ordinary acceptation. In the case of the nuisances there dealt with the public aspect is conferred not by the number of persons affected, but it is conferred by the character in which they are affected, that is, as members of the public having, for example, a right to free passage along a highway, whether by land or water.[47]

In neither of these senses does the word "public" imply that the nuisance is to property owned by the state as a juristic person. We have seen that in the case of tideflowed lands, as the Crown has a *jus privatum* in the bed of the stream, an unauthorized obstruction gives rise to both an actionable interference with property owned by the state and a public nuisance. But they are two distinct causes of action. When, for example, the Attorney-General for Ontario sues for an injunction to restrain a public nuisance, the foundation of his action bears no resemblance to that of the action he would bring on behalf of the Crown *as landowner* to obtain an injunction against a trespass or a nuisance causing damage to the legislative buildings or grounds. In other words, when the Attorney-General obtains an injunction against public nuisance as such, the Court is not protecting what Dean Pound classifies as public interests. Public nuisances are injuries to what are essentially social interests, those of the community, rather than of the Crown, and the latter has affected merely its interest as *parens patriae*, or protector of the people's welfare.[48] It is thus plain, as Professor Chaffee of Harvard Law School has commented, that when granting the injunction as a

[45] 8 ed., vol. 1, p. 692, s. 1.
[46] Commentaries, book IV, pp. 167-8.
[47] See Clerk and Lindsell, The Law of Torts, eighth edition, at pp. 369-70.
[48] See *Atty.-Gen.* v. *Cambridge Consumers' Gas Co.* (1868), L.R. 4 Ch. App. 71 at p. 86.

protection against public nuisance a court goes beyond securing *property* rights of the plaintiff in any ordinary sense of the term.

It seems, then, to be sufficiently evident that in cases of so-called public nuisance to property it is erroneous to use the term "property" in its strict sense as meaning a legally protected proprietary interest. The primary right is a social one. If, therefore, the foundation of the jurisdiction to protect that right by means of the concurrent equitable remedy is said to be injury to property, the logical inference is that it may rest on a relatively much wider foundation than that comprised by the incidental rights that flow from private ownership of land or chattels. When Lord Justice Turner said that "in cases of private nuisance the injury is to individual property, whereas in cases of public nuisance the injury is to the property of mankind," the term "property" was necessarily used by him in the second collocation with a fuller and wider content than in the first. His comparison of private and public nuisances was inept as far as the use of the word "property" was concerned.

(e) *Effect of Canadian Criminal Code, and a 19th Century Corollary.*

In suits brought by the Attorney-General for injunctions to restrain wrongful acts that fell within the category of public nuisance at common law, the nineteenth century equity precedents are consistent in demanding that the primary legal right be at least colourably of a property nature. Every public nuisance was a crime at common law and as such was indictable as a misdemeanour, and, as we have seen, equity required this property element in order to maintain the fiction that it was not extending its jurisdiction into the field of the criminal law. But in Canada, since the year 1892, what were public or common nuisances at common law before that time have been statutory offences under the Criminal Code. Let us now investigate the consequences of that change.

In the first place we find that public nuisances are defined as in the definition which I read to you a few minutes ago, and are then divided into two classes, namely, *first,* those which are dangerous to the lives, safety or health of the members of the public; or which occasion physical injury to the persons of members of the community; and, *second,* those which are not dangerous to the lives, safety, or health of the general public,—although they interfere with or endanger the comfort or property of the members of the community generally, or obstruct them in the exercise or enjoyment of any com-

mon right.[49] In the second place, although all of these public nuisances as defined by Sec. 221 of the Code, are indictable offences, the effect of the Code is that those which fall within the second category are not criminal offences in Canada. Section 223 of the Code enacts that if a person commits an unlawful act or omits to discharge a legal duty, and such act or omission endangers the property or comfort only of the members of the community, or such act or omission merely obstructs the public in the exercise or enjoyment of a right common to all his Majesty's subjects, that person shall not be deemed to have committed a criminal offence. In the language of Viscount Haldane speaking for the Privy Council in *Toronto Railway Co.* v. *The King*:[50]

> The effect of (section 223 of the Criminal Code) is . . . to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public; or by obstruction of any right, other than one affecting life, safety, or health, which is common to all His Majesty's subjects, has been committed. But it does deprive a conviction on indictment, in these cases, of its criminal character . . . The wrong done is therefore . . . only a civil wrong.

It will have been observed from what I have said that the Code classifies common nuisances that endanger interests of personality as criminal, while those that endanger or violate interests solely of a property nature are transformed by the Code into civil wrongs.

Now, as to the effect of the Code on available remedies, it is further provided by section 223 of the Code that in the case of the non-criminal common nuisances "all such proceedings or judgments may be taken and had *as heretofore* to abate *or remedy* the mischief done by such nuisance to the public right." *The effect of this part of section 233* is to preserve for the Attorney-General as the representative of the community, all of his remedies, common law or equitable, that he had before the Code was enacted, with which to protect the social interests which fall within the categories which are embraced by the terms of that section. As we have seen, prior to the year 1892 public nuisances which resulted in injury to social rights of a property character could be restrained by injunction at the suit of the Attorney-General. Also, jurisdiction had been exercised in a number of cases to restrain as public nuisances the erection of obstructions in public highways and navigable streams.[51] The Code

[49] Crankshaw, Criminal Code of Canada, at p. 232.

[50] (1917), 29 Can. C.C. 29, at pp. 31 and 34. As to whether indictment is a proper procedure in a civil action in Canada, you should see *Rex* v. *City of Victoria* (1920), 33 Can. C.C. 108.

[51] See *Atty.-Gen.* v. *Forbes* (1836), 2 Mg. & C. 123; *Atty.-Gen.* v. *Johnson* (1819), 2 Wils. Ch. 87.

makes no change. It seems, however, that there is no English precedent for granting an injunction at the suit of the Attorney-General against a public nuisance involving merely deprivation of comfort.[52]

It is submitted, however, that it is not now necessary to find a precedent specifically of that sort to enable the Attorney-General of a Canadian province to be granted an injunction to restrain a common nuisance which tends solely to depreciate the comfort of the community. I base this contention upon a line of cases that originated in an observation made by Lord Romilly, then Master of the Rolls, in the course of his judgment in *Attorney-General* v. *Oxford Worcester and Wolverhampton Railway*, decided in 1853.[53] He said that the Attorney-General, representing the Crown, as *parens patriae*, "might apply to the Court to restrain the execution of an illegal act of a public nature, provided that it was established that the act was an illegal act, and it affected the public generally."

This observation of Lord Romilly's was the starting point for two related but divergent lines of cases, one of which lines is discussed by Chief Justice Meredith in *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* where he points out that the act complained of was an act of a public nature in the *Oxford Worcester and Wolverhampton Railway* case and in the other cases he discusses, and that the defendants therein were public bodies doing acts of a public nature. He thus concludes that the right of the Attorney-General as enunciated by Lord Romilly to sue for an injunction is confined to cases of that type, and does not include a case in which the defendant is a private person.[54]

However, as I have remarked, another and distinct line of precedents has evolved as a consequence of Lord Romilly's language. They have culminated in the English case of *Attorney-General* v. *Sharp* decided in 1930.[55] This was a decision of the Court of Appeal.[56]

May I digress just here to indicate the course of development of the idea expressed by Lord Romilly which resulted in the doctrine in the case of *Attorney-General* v. *Sharp*. In the judgment delivered by Sir George Jessel in 1874, in *Attorney-General* v. *Cockermouth Local Board*[57] he held that because the defendants had infringed a

[52] There are some decrees at the suit of private individuals who had suffered special damages of that kind beyond that which they had suffered in conjunction with other members of the public. See *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H.L.C. 642; *Walter* v. *Selfe* (1851), 4 DeG. & Sm. 315; *Crump* v. *Lambert* (1867), L.R. 3 Eq. 409.

[53] 2 W.R. 330; 99 R.R. 875.

[54] See also Orde, J., in 52 O.L.R. at pp. 546-7, 53 O.L.R. at pp. 637-8.

[55] 99 L.J. Ch. 441.

[56] See (1931), 4 Austr. L.J. at pp. 330-1.

[57] L.R. 18 Eq. 172.

public statute which prohibited them from polluting a stream at all, they could be restrained by injunction in an action by the Attorney-General even though the pollution caused no damage and was therefore neither a private nor a public nuisance. It is, of course, elementary, that there must be damage before an action for nuisance will lie at common law. The act complained of must have been both "tortious and hurtful."[58] The Master of the Rolls stated his *ratio decidendi* as follows:

> The Legislature is of opinion that it is desirable to preserve our natural streams in at least their present state of purity; it therefore has said that you shall not affect or deteriorate the water at all; *and the Court must assume that the deterioration of the water is an injury which is prohibited by the Legislature for good and sufficient cause.*[59]

Now it is clear that this is nothing more than a corollary from the doctrine discussed at the beginning of this lecture that it is the exclusive function of the legislature to decide what the law ought to be. Once the legislature creates a public primary right of a property nature, says Sir George Jessel, it becomes the duty of the Chancery Court to provide an adequate remedy for its protection.

Let us now consider the effect of *Attorney-General* v. *Sharp*. The defendant in the *Sharp* case was a private person, not a public body, and the Attorney-General sued for an injunction to restrain him from plying his motor buses for hire without a license contrary to the provisions of the English Police Regulation Act. That statute imposed a fine for breach, and the defendant and his servants had been convicted and fined no fewer than sixty times. The present Master of the Rolls, Lord Hanworth, agreed with the argument of the Attorney-General that the sanction provided by the statute had proved ineffective, that there was therefore need for a remedy by injunction, and that the mere fact that the imposition of a fine was available under the statute did not exclude the concurrent equitable remedy which was sought by the Attorney-General. In his judgment in the same case Lord Justice Lawrence came to the same conclusion and stated that:

> it is firmly established that the Court has jurisdiction to restrain an illegal act of a public nature at the instance of the Attorney-General, suing on behalf of the public, although the illegal act does not constitute an invasion of any right of property, and although the (statute) imposes a new liability and prescribes the remedy for its breach.[60]

[58] See Pearce and Meston, Law of Nuisances, at p. 13.
[59] L.R. 18 Eq. at p. 178. See also *Attorney-Gen.* v. *Shrewsbury (Kingsland) Bridge Company* (1882), 21 Ch. D. 752 at p. 755; and *Governor* v. *Meredith* (1792), 4 T.R. 794, Kenyon, C.J. at p. 796, and Buller, J. at p. 797.
[60] 99 L.J. Ch. at p. 446.

Lord Justice Romer concurred. I would draw your attention particularly to five features of this case: *first,* the defendant was a private individual carrying on a private business, *not* a public body performing a public function; *second,* the injury was to public and social interests; *third,* there was not a property interest in any ordinary or strict sense involved, but the community had an actual pecuniary interest in payment of the license fees, which, together with the social interest in ensuring public safety, was affected detrimentally by the defendant's illegal acts; *fourth,* remedies other than the concurrent remedy by injunction were inadequate; and *fifth,* the primary public and social right was not a creature of the common law, but was created by a public act of parliament.

It is therefore now authoritatively established insofar as the English Court of Appeal is authoritative, that, in an action by the Attorney-General, a Court has jurisdiction to grant an injunction to restrain anyone from committing a breach of a public statute which creates a primary public and social right of pecuniary value. This is true although the statute provides a different remedy, and although the illegal act does not constitute an invasion of a property right in the ordinary sense of the term. The grant of an injunction is an additional or alternate remedy. As a result of the *Sharp* case, and wholly apart from any question of public nuisance, I suggest that it becomes obvious that because it has been made a statutory offence in Canada by the Criminal Code, a civil *common* nuisance which endangers the comfort of the community may be prohibited by injunction at the suit of the Attorney-General whenever the common law remedy available to him is, in the opinion of the Court, inadequate.

Whether or not the case of *Attorney-General* v. *Sharp* is also authority for extending the jurisdiction of the Canadian Courts so as to enable them, in an action by the Attorney-General of a province, to grant injunctions against committing the criminal as well as the civil public nuisances as defined by the Criminal Code, involves further considerations which will be briefly discussed in the next lecture.

Conclusion.

To state the conclusion which may be founded upon the authorities analyzed in this lecture in propositional form: The Canadian courts which under the provincial Judicature Acts have jurisdiction to administer equity have power to grant injunctions, at the suit of the Attorney-General of the province where the court is located, as a concurrent remedy against those categories of common nuisance

which tend (a) to the detriment of the property, in the widest sense of the term including comfort, of the members of the community generally, or (b) which obstruct freedom of transit over public roads or navigable waters.

Within the field thus delimited the equitable remedy may be used by the courts to afford adequate protection for: *first,* the social interest in the security of the individual property of the members of the community generally; *second,* to some extent the social interest in the conservation of social resources, "the claim or want of civilized society that the natural media of satisfying human wants in such society shall not be wasted (for example, by wrongful pollution of streams); *third,* to protect as to comfort, one aspect of the social interest in each member of society being able to live his life according to the ordinary standards of that society; and *fourth,* the social interest in economic progress through maintenance of uninterrupted means of communication and transportation.

In this way, when injunctions are granted against public nuisances, equity follows the law, as far as the obstacles and barriers of 19th century precedents will allow, into an area in which the governing principle is not the leading principle of individualism, but where the maxim *salus populi est suprema lex* (the welfare of the people is the paramount law) applies, and where private interests must therefore be made subservient to the general interests of the community.

(To be continued.)

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