EQUITY AND PUBLIC WRONGS.*

(*Continued*).

III. Criminal Equity in Canada.

Another question relevant to our general topic in these lectures is raised by the judgments in the cases of *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* and *Attorney-General* v. *Sharp*: To what extent may the injunction be used as a concurrent remedy at the suit of the Attorney-General to restrain offences under the Criminal Code other than the non-criminal public nuisances There is as yet no judicial answer to this question, but the probable answer is, I think, suggested by a consideration of three factors, first, the effect of the judgments themselves in the *Wholesale Grocers* case and the *Sharp* case; second, the principles which govern the courts in granting the remedy of injunction generally; and third, considerations of public policy, a conscious weighing of social interests.

In the Ontario case Chief Justice Meredith and Mr. Justice Hodgins were in disagreement on the question whether the Court had jurisdiction to restrain the defendants from violating sec. 498 of the Criminal Code, that is, from committing the statutory criminal offence of combination in restraint of trade. But the conclusion of the latter judge that he had such power, because the offence caused injury to an interest of a property nature vital to the community, is supported by the more recent decision of the English Court of Appeal in the *Sharp* case, which we discussed in our second lecture. The tentative proposition may thus be advanced with some assurance that a Canadian court has jurisdiction to issue an injunction against a person who commits an offence under the Criminal Code, if the wrongful act tends to injure property interests of the community seriously, using the term "property" in its widest sense as meaning an interest of substance. But many offences under the Criminal Code do not affect property in any sense. Has the court jurisdiction to restrain these personal offences? Let us take, for instance, the criminal public nuisances as distinguished from the non-criminal common nuisances.

The types of nuisance that are criminal offences under the Code, those which endanger the lives, safety, or health or cause injury

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to the physical persons of members of the community, may constitute violations of interests of personality purely. In essence there is not necessarily the remotest aspect of a property interest affected by them as such. Lord Justice Lawrence, however, said in the *Sharp* case, in words which I quoted in the last lecture that the court has jurisdiction to restrain an illegal act of a public nature at the suit of the Attorney-General, although the illegal act does not constitute an invasion of any right of property. But I suggest that when a similar case arises in the future the court may hold that as the public and social interest in the economic progress of the community was prejudiced by Sharp's failure to pay his license fees, there was a property interest in the wider sense of the term involved in that case. If that is so Lord Justice Lawrence's statement, insofar as it purports to dispense with the need for anything whatever in the nature of a property right, is a *dictum* merely. Further, it is a *dictum* unsupported by discoverable previous authority, and certainly the decisions cited in his judgment do not support it. Moreover, when Mr. Justice Hodgins gave his opinion in the *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* that the Attorney-General could enforce by injunction the provision of the Criminal Code prohibiting criminal conspiracy in restraint of trade, he was careful to establish that, although no injury to property rights in the narrow sense was involved, there was a social interest infringed which savoured of property, something of a pecuniary value. When we keep also in view the settled general principle that equity requires a formal property right at least, as a peg on which to hang its remedies, it is probably sound to conclude that the injunction is not available at the suit of the Attorney-General as a concurrent remedy to prevent the commission of any common nuisance which endangers *only* the lives, safety or health of the members of the public at large or any common nuisance of those types which occasions injury *only* to the person of an individual. *A fortiori*, the injunction cannot be used as a concurrent remedy for other crimes which are solely offences against the person or against public order and involve no injury to public and social rights of a property nature.

Assuming it to be established that a court has jurisdiction in actions by the Attorney-General of a province to grant an injunction to restrain the commission of certain offences under the Criminal Code, there is yet another aspect of the problem that must be considered. As Chief Justice Meredith has clearly shown in the *Wholesale Grocers* case, in actions brought by the Attorney-General to protect public and social rights there is no exception to the general

rule that granting an injunction is a matter for the exercise of judicial discretion.[1] "The principle upon which the Court interferes in cases of injury to the public or to private individuals by an unlawful act is the inadequacy of the remedy which the law gives in such cases."[2] The court must find the remedy provided by the Criminal Code to be inadequate before it may exercise any equitable jurisdiction that it may have. As we saw in our second lecture, the use of the injunction as a remedy for criminal offences involves extending the remedy beyond its historic limitations. Therefore, if for no other reason, it is to be expected that the courts may be reluctant to find that the remedy provided by the Criminal Code is insufficient. In the *Wholesale Grocers* case, Chief Justice Meredith, with whom Mr. Justice Ferguson seems to have agreed, held that even if he were of opinion that the Attorney-General might maintain the action in that case, he (the Chief Justice) would have decided, in the exercise of his discretion, that the case was not one for granting an injunction because the public could be protected by proceeding against the defendants by indictment.[3] With this, Mr. Justice Hodgins disagreed, and his illuminating counter-argument should be quoted, as it brings out one of the grounds on which criminal remedies are most apt to be held to be inadequate. He said that "It would be a singular thing if, an offence against a statute having been committed, the offenders might, with impunity, proceed to put into operation the consequences intended by them when so breaking the law. If, under sec. 498, a fine had been imposed following a conviction upon an indictment charging the defendants with conspiracy to restrain trade, and the defendants, having paid the fine, contemplated continuing their practices, it ought to be within the power of the Court to interpose by injunction as the suit of the Attorney-General. The argument that an adequate remedy is provided by sec. 498, that is, by the imposition of a fine or imprisonment, is not tenable, because that only goes to the offence of conspiracy, and has no reference to its consequences."[4]

You will recall too, that the factor in the case of *Attorney-General* v. *Sharp* which moved the Court of Appeal to exercise the jurisdiction to grant an injunction was the inadequacy of the penal statutory remedy in that case to prevent repeated violations of the public right, with consequent multiplicity of actions, and resultant continuous

[1] Concerning the apparent exception in express negative contracts, see *Doherty* v. *Allman* (1878), 3 App. Cas. 709, at p. 720.
[2] Meredith, C.J.O., in 53 O.L.R. at p. 639, citing *Atty.-Gen.* v. *Sheffield Gas Consumer's Co.* (1853), 3 D.M. & G. 304 at p. 319.
[3] 53 O.L.R. at p. 641.
[4] 53 O.L.R. at p. 652, citing *Soull* v. *Browne* (1874), L.R. 10 Ch. 64.

injury to the community. May I suggest that it is probably only on the basis of similar circumstances that a court will hold the remedies provided by the Criminal Code to be inadequate. In such circumstances only, that is, first, where repetition of unlawful acts is threatened or they are actually being repeated, and second, where the unlawful acts are also immediately detrimental to a large portion of the community, an injunction is a proper remedy and has real advantages over a mere prosecution. It protects the community interests without punitive consequences to the defendant and operates relatively very rapidly.[5] On the other hand, apart from these circumstances it is difficult to imagine a court holding that the remedy provided by the Code is inadequate or that as a matter of policy the injunction should further invade the field of the criminal law. Indeed, a consideration that may well induce a restrictive policy is the experience of the United States which has shown that "the distortion of the injunction into a general weapon of the criminal law can be of no ultimate salutary effect."[6] In that country, owing to the widespread failure to administer criminal justice effectively, and for other reasons, there has been what has been called a "Revival of Criminal Equity"[7] with attendant abuses almost reminiscent of the days of the Star Chamber. The report of the Attorney-General of the United States shows that in the last four years and a half the United States has obtained over twenty thousand injunctions to aid it in the enforcement of criminal statutes, in many cases thus preventing the defendant from having a trial by jury. At the present time, as the result of alleged misuse of the injunction in labour disputes, an anti-injunction bill is pending before the United States Congress, and in 1930 the state legislature of New York passed an act sponsored by organized labour, abolishing *ex parte* injunctions altogether.[8]

I suggest that the use of the injunction in the criminal law will be confined by our courts within narrow limits, and not allowed to upset well-established principles of equity.

IV. Equity and Political Institutions.

Appurtenant to an inquiry into the use of the injunction as a concurrent remedy in the criminal law, the question naturally arises as to how far equity protects the social interest in the security of political institutions. Concerning this it is enough to notice that during the rule of the Stuart dynasty in the 17th century there

[5] Cf. 34 Harv. L. Rev. at p. 398.
[6] See Chaffee, The Inquiring Mind (1928), p. 74, *et seq.*
[7] Mack, The Revival of Criminal Equity (1903), 16 Harv. L. Rev. 389.
[8] See (1930), 30 Colum. L. Rev. 1184.

were a number of cases in which Chancery took jurisdiction on the ground that "matters of state" were involved. You will find those cases discussed in W. Harrison Moore's book, *Act of State in English Law,* at pages 24 and 85. In the words of Professor Winfield of Cambridge University, "the Court of Chancery at one time looked as though it was becoming the *ame damnée* of the executive in what were called 'cases of state.'"[9] But Lord Keeper Guildford in 1682 bluntly checked that tendency when in an anonymous case there was an application for an injunction to prevent the sale of English bibles printed beyond the seas. In reply to argument that Chancery was a court of state, and that relief should be given on the "public account," he replied, "I do not apprehend the Chancery to be in the least a court of state," and he directed a trial in the law courts.[10] "An echo of the idea of case of state was heard in 1861 when an English court had to make up its mind, (in that extraordinary case, *Emperor of Austria* v. *Day and Kossuth,*[11]) whether it should stop the Hungarian patriot, Louis Kossuth, from printing bank notes in usurpation of the Emperor of Austria's prerogative; but it was no more than an echo."[12] To-day there can be no suggestion of using the injunction for the purpose of *directly* protecting the social interest in the security of our political institutions. Direct protection of that interest is an exclusive function of the remedies peculiar to the criminal law.

The outstanding and, I think, the only modern instance of the social interest in the security of political institutions being *indirectly* protected by a refusal to grant an injunction was in the English case of *Litvinoff* v. *Kent*[13] decided in 1918, when the atmosphere engendered by the great war affected the mental attitude of even the courts. In that case Mr. Justice Neville stretched the defence of lack of clean hands to the breaking point and beyond, when he took, as one ground for dismissing the action, the fact that the plaintiff had issued a circular to the British trade unions which, in the opinion of the Court, contained language which clearly incited the workmen to political revolution.

V. Equity and the General Morals.

Professor Chaffee[14] has remarked that insofar as the United States authorities are concerned a New Jersey Court recently went

[9] 43 Harv. L. Rev. at pp. 84-5.
[10] See Chaffee, Cases on Equitable Relief Against Torts, at pp. 438-9.
[11] 3 De G.F. & J. 217.
[12] Prof. Winfield, 43 Harv. L. Rev. at p. 85.
[13] (1918), 34 T.L.R. 298.
[14] (1921), 34 Harv. L. Rev. at p. 399.

too far in saying that, "No instance can be found in the English reports, nor in the reports of (the United States), in states where the (English) law prevailed and still prevails, where a court of equity has ever taken cognizance of a case of a public nuisance founded purely on moral turpitude."[15] Professor Chaffee probably had in mind, for instance, that an injunction has been granted in Kentucky at the suit of the Attorney-General to prevent the use of real property for the holding of a prize fight on the ground that "the morals of the public" were involved, and that "the public good is the first consideration."[16] But as far as England and Canada are concerned the statement of the New Jersey court appears to be correct. The term "moral" seems to be narrowed down to a sexual connotation in the law of contract and the law of trusts, but in various other specific branches of the law it is broader in meaning.[17]

In England and Canada *direct* protection of the social interest in public morality has been provided by the criminal law, both at common law and by statute, concerning such offences as keeping bawdy-houses, gaming houses, prostitution, various sexual offences, and so on. A striking statutory example is section 207(a) of the Canadian Criminal Code, under which the tendency to corrupt the general morals by inflaming the passions and inciting to immoral conduct is held to be the *gravàmen* of the offence.[18]

A few cases are to be found where equity has recognized this interest and protected it by granting a remedy by way of rescission. Thus in 1860, in *Evans* v. *Carrington*[19] where the court came to the conclusion that the purpose of a wife in inducing her husband to execute a deed of separation was to enable her to renew illicit intercourse with her lover, the Lord Chancellor, Lord Campbell, rescinded the deed on "principles of morality, justice and expediency." Again, in an unique Ontario case, *Owen* v. *Mercier*,[20] where the vendor discovered after conveyance that the object of the purchaser in acquiring the land in question was to secure it for the purposes of a woman who was a prostitute, Chancellor Boyd cancelled the deed and rescinded the sale.

Equity has also followed the law in relieving parties from the obligations of contracts made in consideration of sexually immoral acts, this being, as I have already mentioned, the only aspect of

[15] *Hedden* v. *Hand* (1919), 90 N.J. Eq. 583.
[16] *Commonwealth* v. *McGovern* (1903), 116 Ky. 212.
[17] See Winfield, Ethics in English Case Law, (1931), 44 Harv. L. Rev. 112 at p. 131.
[18] See *Rex* v. *St. Clair* (1913), 28 O.L.R. 271.
[19] (1860), 30 L.J. Ch. 364.
[20] (1906), 12 O.L.R. 529.

immorality with which the common law of contracts has been concerned.

An injunction will be withheld in order *indirectly* to protect the morals of the community. In *Glyn* v. *Weston Feature Film Co.*,[21] Eleanor Glyn, the authoress, claimed an injunction to restrain the alleged infringement of her copyright on her novel "Three Weeks" by the sale and exhibition by the defendants of a burlesque motion picture of it. It was held that as her book was of a highly immoral tendency, she must be denied the protection of a restrictive injunction. It had already been held, ninety years previously, by the common law side of Westminster Hall that the publisher of an immoral book cannot maintain an action at common law against any person who may publish a pirated edition. The language of Chief Justice Abbott in that case, *Stockdale* v. *Omwhyn*,[22] is worth quoting. He said: "Upon the plainest principles of the common law, founded as it is, *where there are no authorities*, upon common sense and justice, this action cannot be maintained.". Notice that the common law court here does not *expressly* recognize the particular interest which it was in fact indirectly protecting.

Now compare the following extract from the interesting judgment of Mr. Justice Younger in the *Glyn* case: "The episode described in the plaintiff's novel, and which she alleges has been pirated by the defendant, is in my opinion grossly immoral in its essence, in its treatment, and in its tendency . . . Now it is clear law that copyright cannot exist in a work of a tendency so grossly immoral as this, a work which, apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome. It may well be that the Court in this matter is now less strict than it was in the days of Lord Eldon, but the present is not a case in which in the public interest it might, as it seems to me to be at all anxious to relax its principles." (The reference to Lord Eldon is to the case of *Southey* v. *Sherwood*, decided in 1817,[23] where Lord Eldon refused to restrain a pirated edition of Southey's poem, "Wat Tyler" on the ground that it was immoral). Mr. Justice Younger continues, "A glittering record of adulterous sensuality masquerading as superior virtue, as it does in this book, is calculated, with consequences as inevitable as they are sure to be disastrous, to mislead into the belief that she may without danger choose the easy life of sin many a poor romantic girl striving amidst manifold hardships and discouragements to keep her honour

[21] [1916] 1 Ch. 261.
[22] (1826), 5 B. & C. 174. Italics are by the lecturer.
[23] 2 Mer. 435.

untarnished. It is enough for me to say that to a book of such a cruelly destructive tendency no protection will be extended by a Court of Equity. It rests with others to determine whether such a work ought not to be altogether suppressed."

It seems strange indeed that in order to prevent the pollution of the public morals the law should allow pollution to be circulated, yet that is the effect of the *Glyn* case and is the state of the law as far as both common law and equitable remedies are concerned.[24] Even if Mr. Justice Younger had been asked to enjoin the further publication of "Three Weeks" he would, it is submitted, have been forced to reply that "It rests with others to determine whether such a work ought not to be altogether suppressed," because the courts are, without legislative intervention, powerless to use the injunction directly to protect the social interest in maintaining the morals of the community as such. The only direct protection that it receives is through the remedies of the criminal law. It has heretofore been shown that due to accidents of history there is now a rule that the injunction cannot be used to prevent the commission of an act if that act is a violation of the criminal law only. If the criminal act is also either a public nuisance at common law, or prohibited by statute, as all criminally punishable violations of the social interest in maintenance of public morals now are, it must be recalled that in order to constitute an exception to the general rule that a crime cannot be remedied by injunction, the wrongful act must injure or tend to injure a community interest of a property nature. There is no clean-cut precedent otherwise. *Rigor aequitatis* thus forces the conclusion that the courts have no jurisdiction *directly* to protect the social interest in maintaining public morals, *per se*, by means of equitable remedies, with the possible exception of the remedy of rescission.

VI. Equity and Religious Institutions.

Nowhere are some of the peculiar features of equity and its relation to the common law thrown into bolder relief, and nowhere do we see forces which shape the progress of the law more vividly portrayed, than in a study of the course of the law concerning the equitable protection of the social interest in the security of religious institutions.

The social interest in the security of Christianity as the established religion of England was recognized and protected both by statute and in common law for three centuries and more.[25] This

[24] Cf. Keating, J., in *Steele* v. *Brannan* (1872), L.R. 7 C.P. 261.
[25] See Holdsworth, History of English Law, vol. VIII, pp. 402-21.

interest was afforded *direct* protection by criminal prosecutions for blasphemous libel as late as the year 1841,[26] and it was *indirectly* protected by the civil common law as well. Thus in 1867, in the case of *Cowan* v. *Milbourn,*[27] it was held that a contract to let a lecture room for an anti-Christian lecture was void for illegality. In Ontario, even though no established church existed, this social interest was recognized and protected in similar fashion in 1878 in the case of *Pringle* v. *Napanee,*[28] in which the judge said that he founded his decision on the proposition that, as the old cases say: "Offences against religion strike at the root of moral obligations and weaken the securities of the social ties."

Equity, being an incomplete gloss on the common law, particularly, as we have seen, in the application of its concurrent remedies, and being confined by precedent to the protection of interests of a property nature, there is no case in our law where the social interest in the security of religious institutions has been protected *directly* by injunction. It was *indirectly* protected in equity, however, in 1822 in the famous case of *Murray* v. *Benbow,*[29] when Lord Eldon refused an injunction to restrain the sale of a pirated edition of Lord Byron's *Cain,* on the ground that it was a profane libel. (Lord Eldon's judgment is given in the prefatory notes to *Cain* in the collected editions of Lord Byron's works by Moore.) The great Chancellor makes an interesting allusion, by way of contrast, to Milton's *Paradise Lost and Regained,* saying: "It appears to me that the great object of (Milton) was to promote the cause of Christianity. There are undoubtedly a great many passages in (*Paradise Lost*), of which, if that were not the object, it would be very improper by law to vindicate the publication; but, taking it altogether, it is clear that the object and effect was not to bring disrepute, but to promote the reverence of our religion."[30]

Also in 1822, Lord Eldon refused to enjoin a pirated edition of a medical book because it seemed to throw some doubt on the doctrine of the immortality of the soul.

Turning to the realm in which equity exercises exclusive jurisdiction, we find that in 1850, in the case of *Briggs* v. *Hartley,*[31] it was held that a trust which contemplated an object inconsistent with Christianity must fail. Meanwhile, however, with the progress of time, a public opinion in favour of a more universal religious toler-

[26] See *R.* v. *Hetherington,* 5 Jurist, 529.
[27] L.R. 2 Ex. 230.
[28] 43 U.C.Q.B. 285.
[29] 4 L.T.N.S. 1409.
[30] See (1868), L.R. 3 Q.B. at p. 366.
[31] 19 L.J. Ch. 416.

ance had developed in England,[32] which was partly the cause and partly the effect of the series of statutory emancipations of the Roman Catholics that commenced with the Toleration Act of 1689.[33] As a result a complete transformation of belief concerning the proper relation of the state and the law to religion had been consummated by the dawn of the twentieth century, which resulted in lessening the social value placed upon the maintenance of any particular form of religion. In fact, it has been said that in England heresy had come to be generally considered as less dangerous than radical views on economics or politics. Judges, being human beings, could not escape being profoundly influenced by such a revolutionary change in the *mores* of the community, and in 1917 the House of Lords, in *Bowman* v. *Secular Society, Limited*,[34] overruled previous authority and held that a bequest to an anti-Christian company, assuming that the object of the company was the denial of Christianity, was not on that account invalid. Denial of Christianity "was not illegal in the sense of rendering the company incapable in law of acquiring property by gift, and (that) therefore a bequest upon trust for the Secular Society was valid."

And again, in 1919, in the House of Lords, by its decision in *Bourne* v. *Keane*,[35] took the greatest liberty it has ever taken with established legal principles,[36] and swept away practically the whole of the pre-existing English law about the invalidity of so-called superstitious uses. In this the Law Lords had been correctly anticipated by Vice-Chancellor Strong in Ontario, forty-eight years previously, in *Elmsley* v. *Madden*,[37] when he held that a bequest by a member of the Roman Catholic church of a sum of money for the purpose of paying for masses for his soul was valid, and said, in part: "The definition of a gift to superstitious uses is . . . as follows: 'One which has for its object the propagation of a religion not tolerated by the law.' But by (Ontario statute) law all bodies of Christians enjoy equal toleration."

The *Bowman* case has been applied by the Court of Appeal of British Columbia in the case of *Yew* v. *Attorney-General for British Columbia*,[38] a not strictly cognate case, in a way that brings out clearly, if indirectly, that the courts generally share the opinion that

[32] See Holdsworth, *opus cit.* at pp. 410-14.
[33] William & Mary, ch. 18.
[34] [1917] A.C. 406. See Pollock, Contracts, 9th ed., p. 378, note (o).
[35] [1919] A.C. 815.
[36] Holdsworth, *opus cit.* at p. 418.
[37] (1871), 18 Gr. 386. See also *Re Zeagman* (1916), 37 O.L.R. 536; *Re Hallisey*, [1932] 4 D.L.R. 516.
[38] *(1923), 33* B.C.R. *109; [1924] 1* D.L.R. *1166.*

there is now no legally recognized social interest at common law in the security of religious institutions as such.

Although so-called blasphemous libel is still an offence under the Criminal Code, even the fundamentals of religion may be attacked with impunity as long as the attacker observes the decencies of controversy. The essence of the criminal offence is the use of language calculated and intended to shock the feelings and outrage the belief of mankind. As Lord Parker of Waddington said in the *Bowman* case, "to constitute blasphemy . . . there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace."[39] It thus becomes plain that the Criminal Code is here designed to protect the social interest in the preservation of peace and order primarily, and that any protection thereby afforded to religion is merely incidental.[40]

As from our investigation we must conclude that no primary social right to protection exists either at law or equity, there can now be no possibility of protecting religious institutions from criticism by means of the concurrent equitable remedy of injunction.

VII. The Maintenance of an "Aesthetic" Environment.

A social interest in an "æsthetic" environment has been pressing increasingly for legal recognition as a result of the marked advances that have occurred in the cultural development of our civilization during the quarter century just passed. The reality of that social interest was recognized three years ago by Honourable Frank Oliver in his dissenting opinion in an Ottawa case, *Gatineau Transmission Company* v. *Hendricks and Others*,[41] when it was before the Board of Railway Commissioners. Commissioner Oliver said:

> Hendricks, an owner of property affected by the route of line applied for by the Gatineau Transmission Company, opposed the application. Hendricks is the owner of a farm of approximately 400 acres fronting towards the Gatineau river but separated from the river by a 300-foot strip, the property of the Transmission Company. The Gatineau highway passes through the farm on a route parallel to the river. The farm dwelling house is on the high plateau between the highway and the brow of the valley. It overlooks the country beyond the Gatineau to the eastward. To the southward the highway comes up to the plateau on which the house is situated by a fairly steep grade from a lower level. The view from the highway as the plateau is reached is very attractive. This view is enhanced by the fringe of pine and other trees which line the brow and extend down the

[39] [1917] A.C. at p. 446.
[40] Criminal Code, sec. 198. See cases cited in (1929) Tremeear's Annotated Criminal Code, 4th ed. at p. 222.
[41] (1929), 35 Can. Ry. Cas. 392, at pp. 389-9.

broken front of the valley bank to the river. Just where the road rises to the plateau a point of pines extends close to the highway. The power line route, as applied for by the company, coming from the opposite bank of the river, will cut a one hundred foot swath diagonally through the pine tree fringe along the brow of the valley and completely destroy the point of pines that is close to the highway. In place of the pine trees there will be two steel towers between the highway and the east boundary of Mr. Hendricks' property. I am of the opinion that the cutting down of the trees and the erection of the towers will seriously depreciate one of the most beautiful views within a six mile radius of Ottawa, and, to that extent, constitute a trespass upon the public right. While the cultivable value of the greater part of Mr. Hendricks' farm is very considerable, its scenic value having regard to its situation is much greater. In my opinion, while Mr. Hendricks is in fact the sole owner of the land as to its cultivable value, he is trustee for the public rather than sole owner of its scenic value; for the public who use the highway have a measure of benefit from the existence of the scenery as well as himself, and therefore have an interest with him in its preservation. As the case stands, the value to the public of the scenic interest in the property is, of necessity, included in the value to Mr. Hendricks, and adds corresponding weight, to his objections to the proposed injury to its scenic value.

"The damage to be suffered by Mr. Hendricks," said Commissioner Oliver, "from the granting of the application is not, in my opinion, as serious in the obviously material losses directly imposed, as in its depreciation of scenic values."

The growth of a civic and municipal appreciation of æsthetic and scenic values has resulted in increasing statutory recognition, advancement and protection of this social interest, both in England and in this country.[42] To take some examples at random, there is the English Advertisements Regulation Act of 1907.[43] That statute is a legislative recognition and securing of the social interest in æsthetic surroundings in that it empowers any local municipal authority to make by-laws "for regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape," and provides a remedy for their breach by way of monetary penalty.

Coming nearer home, there is the Ontario Local Improvements Act,[44] which authorizes the raising and expenditure of public funds for constructing and maintaining boulevards, sodding and planting and caring for trees, shrubs and plants upon or in a street, and for acquiring, laying out and improving parks and squares.

[42] Cf. (1906), 21 Harv. L. Rev. at p. 35.
[43] 7 Edw. VII. ch. 27.
[44] R.S.O. 1927, ch. 235, sec. 2(1) h, i, and l.

Again, under section 17 of the Ontario Provincial Parks Act,[45] for the purpose of beautification of a park, the Minister of Lands and Forests is authorized to withdraw timber land out of any areas of a provincial park that may have been granted under a timber-cutting license to any person. The Minister may withdraw this timber whenever he thinks fit and without compensation to the licensee.

A similar legislative movement has occurred in the United States, although its effectiveness has, to no small extent, been negatived by the restraints of a written constitution.[46]

It is obvious that the effective method of protecting the social interest in æsthetic surroundings by judicial means would be the use of the injunction; but when we search our reports for some trace of the use of the equitable remedy for that purpose we can find none, for the sufficiently simple reason that the common law has created no such species of primary right. As a writer in a recent number of the University of Pennsylvania Law Review has well said:[47] "The common law has always shown a hesitancy, amounting almost to an aversion, towards granting legal protection to æsthetic interests. Whether this be due to a policy of expediency, or to the rugged social conditions existing when this portion of the law was becoming crystallized, or whether, as (two writers)[48] have suggested, there is a racial and climatic basis for the aversion, it is at least evident that there is a marked difference between the common law and the continental systems in this respect." As far back as 1587, Chief Justice Wray, in the case of *Bland* v. *Moseley*,[49] held, "that for stopping as well of the wholesome air, as of light, an action lies, and damages shall be recovered for them, for both are necessary. . . . But he said that for prospect, which is a matter only of delight and not of necessity, no action lies, . . . and yet it is a great commendation of a house if it has a long and large prospect. But the law does not give an action for things of delight." That this principle met with judicial approval is indicated by the large number of cases subsequently reaching a similar result, either on the authority of *Bland* v. *Moseley*, or as a result of a similar line of reasoning. Nor is this attitude of mind merely a relic of antiquity. Three hundred and eighteen years after *Bland* v. *Moseley*, a New Jersey court made the

[45] R.S.O. 1927, ch. 82.

[46] The 14th Amendment.

[47] (1932), 80 U. Pa. L. Rev. at pp. 428-9.

[48] Hamilton, The Civil Law and the Common Law (1922), 36 Harv. L. Rev. 180 at pp. 191-2; Allen, (1924) Legal Duties, at pp. 92-3.

[49] 9 Co. 576.

same dichotomy. "Aesthetic considerations are a matter of luxury and indulgence, rather than necessity."[50]

That the general attitude of disregard for æsthetic values has maintained its potency in Canada is evidenced by Mr. Justice Stuart's assertion in an Alberta case where he said: "I do not think that there is such a thing known to the English law . . . as an easement to maintain appearances in the way of architectural designs."[51]

The Chancery Courts, when restraining particular tenants from committing equitable waste by cutting ornamental trees have recognized an individual æsthetic interest to a very limited extent. To quote Lord Eldon:[52] "The principle upon which the Court has gone seems to be, that if the testator or the author of the interest by deed had gratified his own taste by planting trees for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question which is the most fit method of clothing an estate with timber for the purpose of ornament cannot be safely trusted to the Court." At common law, there seems to be only one instance where an open attempt has been made by a court to combine law and æsthetics. In *D'Eyncourt* v. *Gregory*, a fixture case,[53] decided in 1866, Lord Romilly committed himself to the view that whether or not statuary, stone lions and garden seats in and around a mansion were fixtures depended on whether they were strictly and properly part of the architectural design. In 1897, when the trial Judge and the Court of Appeal failed to take the opportunity to apply the same criterion in a similar case,[54] Sir Frederick Pollock remarked that "A judge of first instance may shrink from so bold a departure, but the House of Lords has its opportunity."[55] However, the Law Lords have never taken any opportunity of that kind.

It is probably still true that, except to a minority of the members of many communities, an unsightly view is but a slight irritation,

[50] *Passaic* v. *Paterson Bill Posting Co.* (1905), 62 Atl. 267, at p. 268.
[51] *The Alberta Loan and Investment Co. Ltd.* v. *Beveridge & Johnson* (1913), 6 Alta. L.R. 212 at p. 214.
[52] In *Downshire* v. *Sandys* (1801), 6 Ves. 107 at p. 110.
[53] L.R. 3 Eq. 382. See *Bulkeley* v. *Lyne Stephens* (1895), 11 T.L.R. 564.
[54] *Viscount Hill* v. *Bullock*, [1897] 2 Ch. 55.
[55] 13 L.Q. Rev. at p. 338.

as compared with discomfort caused by evil smells or nerve-wracking noises. It is submitted, however, that it does not require an excess of temerity or even originality to argue that in certain localities violations of æsthetic and scenic values may sometimes involve sufficient injury to the economic interests of the community, enough injury to the "property" of the members of the community, to amount to public nuisances. This would not be generally true. But, as Mr. Justice Middleton has stated, concerning the question as to what degree of discomfort amounts to a nuisance: "It is to be borne in mind that an arbitrary standard cannot be set up, which is applicable to all localities. There is a local standard applicable in each particular district. . . . "[56] The editor of a newspaper[57] in a province where the tourist trade has recently become of great economic value, and a real social interest exists in maintaining it, has said recently: "Our highways are more and more coming to be cluttered up with all sorts of billboard advertising, which is a blot upon the countryside and rapidly drifting to the place where it is becoming a public nuisance. The tourist coming in from another land and hoping to see the sweep of hillside and valley, is anything but appreciative when he is compelled to rest his eye on the same old billboards, advertising pills and paint and powder and toothpaste and what-not, that he hoped to leave behind him when he sped off for his summer holiday. The public surely has a right to the preservation of the beauties with which Nature has endowed the land." Lord Justice James has beautifully said: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town which would drive the Dryads and their masters from their ancient solitudes."[58] Surely when the converse of the factual situation portrayed by Lord Justice James exists, the courts should be able to supply a remedy. Before they can do so, however, it is probable that they must have legislative assistance, as it would require avowed judicial legislation as rare and catastrophic as in the *Bowman* and *Bourne* v. *Kean* cases to free them from the shackles of ancient authority. Some legislative assistance of this type has already been provided by provincial statutes, and their remedies can probably, in many cases, be supplemented by the injunction under the doctrine in the *Sharp* case. I would suggest, however, that statutes designed to prevent the desecration of the landscape should, in

[56] In *Appleby* v. *Erie Tobacco Co.* (1910), 22 O.L.R. 533, at p. 536.
[57] Halifax Chronicle, Oct. 14, 1930.
[58] In *Salvin* v. *North Brancepeth Coal Co.* (1874), L.R. 9 Ch. App. 705 at pp. 709-10.

order to be completely effective, expressly empower the courts to enforce their provisions by granting injunctions at the suit of the Attorney-General. I also submit that there is no great practical difficulty involved in establishing an objective standard of beauty. The standard should be left to the courts to fix and apply by the method familiar to the law of nuisance, "not by an abstract consideration of the thing considered apart, but by considering it in connection with the circumstances of the locality. A nuisance may be merely a right thing in a wrong place—like a pig in the parlour instead of the barnyard."[59] The use of the term "æsthetic" by jurists to designate the social interest I have just been discussing has been perhaps unfortunate, as technically æsthetics is the philosophy of the beautiful. However, it is not necessary for the hard-headed lawyers even to wet their toes in the ocean of metaphysics to provide adequate protection for the increasing and constantly more impelling social interest in an attractive and well ordered community.

Conclusion.

From our discussion of equity and public wrongs which, although it has been necessarily non-exhaustive, has treated the essential and indicative material, the haphazard development of this area of the law is apparent. Like Topsy, in *Uncle Tom's Cabin,* it has "just growed." Not only have we seen the lack of interrelation among the various fields of equitable jurisdiction, *per se,* that we might naturally expect to find in an incomplete gloss; but we have noted that there are wide variations in their degrees of responsiveness to new situations in a changing society. Indeed, to adopt a figure of speech, being merely engirdled by a procedural bond, equity has not enveloping robes of its own derivation in the nature of general juristic principles. Chancery judges have fashioned flexible nether garments in their efforts to remedy *in personam* the inadequacies of the common law. But during the time when its several parts were assuming form, equity borrowed a mantle of individualism and a top hat of "property" from the common law; old style garments to-day which, in general, restrict the growth and movement necessary to fit social trends.

We have seen the recent tendency of the more socially enlightened judges, when not strictly restrained by precedent from lawmaking, to seek criteria for their decisions not only from within the materials of the legal system but also from relevant economic and social data. Too much, however, cannot be expected of the judiciary in this direction. As Mr. Justice Holmes so well said at the dawn

[59] Sutherland, J., in *Euclid* v. *Ambler Co.* (1926), 272 U.S. 365 at p. 390.

of the present century: "The improvements made by the courts are made, almost invariably, by very slow degrees and very slow steps. Their general duty is not to change but to work the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain."[60]

The courts must be aided by statute. Only the legislatures have the power to free them from outworn restrictions, both to frame and to vitalize a fully rounded and socially far-seeing adaptation of law and equity to modern civilization. As future members of the courts and legislatures of this country, you students have the opportunity and the responsibility to examine the legal order in the light of whatever social change may come—"and then re-mould it nearer to the Heart's Desire."

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[60] In *Stack* v. *New York, N.H. & H.R. Co.* (1900), 77 Mass. 155 at p. 158; 58 N.E. 686 at p. 687. See also Holland, Jurisprudence, 10th ed. p. 73. Cf. Atkin, L.J. in in *M'Alister* v. *Stevenson* (1932), 48 T.L.R. 494 at p. 500.