[HIGH COURT OF AUSTRALIA.]

RAMSAY AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

ABERFOYLE MANUFACTURING COMPANY (AUSTRALIA) PROPRIETARY LIMITED AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Nov.* 22, 25, 26; *Dec.* 12.

Latham C.J., Rich, Starke and McTiernan JJ.

Injunction—Suit by Attorney-General—Infringement of municipal by-law—Local Government Act 1928 (*Vict.*) (*No.* 3720), *sec.* 197 (5), (6).

The defendants were proceeding to erect a factory within an area in which the erection of a factory was prohibited by a municipal by-law. The by-law imposed penalties for its infringement and also provided that, where a building was erected contrary to the by-law, the council of the municipality might have the building pulled down. R. owned land adjacent to the factory site. In an action in the Supreme Court of Victoria by R., and by the Attorney-General of Victoria at the relation of R., the plaintiffs applied for an interlocutory injunction restraining the defendants from proceeding with the erection of the factory. The application was refused.

Held, by *Latham* C.J., *Rich* and *McTiernan* JJ. (*Starke* J. dissenting), that the injunction was rightly refused.

Per Latham C.J.: The legislation authorizing the by-law and the by-law comprised a code of remedies for the enforcement of the by-law which Parliament intended to be exhaustive, and the general interest of the public in the observance of the law was not alone sufficient to justify the Court in granting an injunction at the suit of the Attorney-General.

Per Rich J.: The Supreme Court properly exercised its discretion in refusing the special remedy of interlocutory injunction notwithstanding the Attorney-General's fiat.

Per McTiernan J.: Although the by-law affected the interests of the public, the Attorney-General was not entitled to enforce it by the equitable remedy of injunction, as the by-law did not create any right for which this was an appropriate remedy; for, while the breach of the by-law, as in the case of any other law, might impair the general welfare, it did not interfere with the right of the public to the enjoyment of any positive interest or advantage.

Attorney-General and Lumley v. *T. S. Gill & Son Pty. Ltd.*, (1927) V.L.R. 22; 48 A.L.T. 112, discussed.

Decision of the Supreme Court of Victoria (*Martin* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Ellen Donaldson Ramsay brought an action in the Supreme Court of Victoria against the Aberfoyle Manufacturing Co. (Australia) Pty. Ltd. and John R. & E. Seccull Pty. Ltd. claiming an injunction to restrain the defendants, their servants and agents, from erecting or continuing to erect the factory in course of erection by the defendants on a piece of land in the City of Essendon adjoining on the north the plaintiff's premises, and an order that the defendants do forthwith pull down and remove so much of the factory as had been erected on the land in question. This land was within an area within which a by-law of the City of Essendon prohibited the erection of such a factory. The council made a new by-law altering the boundaries of the residential area established by the by-law and, if that by-law had been valid, the action of the defendants would have been lawful. The new by-law was, however, quashed by the Supreme Court by reason of a defect in the procedure of making the by-law. The council proposed to make a by-law identical in terms as soon as possible, but no such by-law had as yet been made. The plaintiff was the owner and occupier of land which adjoined the land upon which the factory was being built by the Aberfoyle Manufacturing Co. (Australia) Pty. Ltd., John R. & E. Seccull Pty. Ltd. being the contractor for the erection of the building. The plaintiff applied for an interlocutory injunction. The application was heard by *Martin* J., who applied the decision of the Full Court of Victoria in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1) and refused the application. Subsequently, the Attorney-General was added as a plaintiff. The application was renewed on behalf of the Attorney-General and was refused.

(1) (1927) V.L.R. 22; 48 A.L.T. 112.

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From that decision the plaintiff now, by leave, appealed to the High Court.

Herring and *T. W. Smith*, for the appellants. Ratepayers can inform for breach of a by-law (*Gill* v. *City of Prahran* (1)). Even though the statute prescribes a penalty, unless it takes away the Court's power to grant an injunction, that power still remains. As soon as it is determined that the by-law creates public rights, the Attorney-General can take action independently of any private rights. The Attorney-General can come to Court to assert any public right which he believes to have been infringed. This is so, provided that the laws confer the benefits on the members of the public. The rights conferred by the building by-law are conferred generally on citizens of Victoria and not only on citizens of Essendon (*Attorney-General* v. *Ashborne Recreation Ground Co.* (2)). The Court should not have attempted to limit the classes of cases which it could protect by injunction, as it did in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (3). The analogy to restrictive covenants which was there used was unsound. The law was correctly laid down in *Attorney-General* v. *Sharp* (4). A by-law as to highways imposes an obligation and, consequently, a correlative right on the public, which could be enforced by injunction. The Court has the widest jurisdiction in granting an injunction to restrain an infringement of a public right (*Attorney-General* v. *Premier Line Ltd.* (5) ; *Halsbury, Laws of England*, 2nd ed., vol. 18, p. 51). The interest created by the by-law in this case possesses characteristics of a nature recognized in equity and capable of enforcement by injunction. The principle in *Gill's Case* (6) is too narrow, as a public right for the invasion of which the Court will grant an injunction at the suit of the Attorney-General need not possess the same characteristics as those possessed by individuals and enforced by them. *Attorney-General* v. *Sharp* (4) shows that the jurisdiction of the Court reaches even further than it is necessary for the appellant to go here, and establishes a wider jurisdiction on a different basis. *Gill's Case* (6) rightly states the law but wrongly

(1) (1926) V.L.R. 410 ; 48 A.L.T. 36.
(2) (1903) 1 Ch. 101.
(3) (1927) V.L.R. 22 ; 48 A.L.T. 112.
(4) (1931) 1 Ch. 121.
(5) (1932) 1 Ch. 303, at p. 313.
(6) (1927) V.L.R. 22 ; 48 A.L.T. 112.

applies it to the facts of that case. The residential by-law such as this is a development of the equitable rights incorporated in a building scheme (*Council of the Shire of Hornsby* v. *Danglade* (1); *Hanbury's Essays on Equity* (1934), pp. 80, 107, 112). [Counsel also referred to *Shelfer* v. *City of London Electric Lighting Co.* (2), *Attorney-General* v. *Wimbledon House Estate Co.* (3), *Attorney-General* v. *Ashborne Recreation Ground Co. Ltd.* (4) and *Public Health Act* 1875 (38 & 39 Vict. c. 55), sec. 157). The plaintiff has a right to an injunction apart from the Attorney-General (*Boyce* v. *Paddington Borough Council* (5); *Mayner* v. *Payne* (6); *Winterbottom* v. *Lord Derby* (7)). This Court should not consider the possibility or probability of a new by-law being passed sanctioning the erection of the factory on the present site (*Attorney-General* v. *Westminster City Council* (8)). The Court should not suspend an injunction which refers solely to the future (*Attorney-General* v. *Acton Local Board* (9)).

Wilbur Ham K.C. (with him *Dean*), for Aberfoyle Manufacturing Co. *Gill's Case* (10) was correctly decided. *Attorney-General* v. *Sharp* (11) was based upon nuisance. The ordinary law is laid down in *Institute of Patent Agents* v. *Lockwood* (12). An injunction will not issue to restrain *anything* which is illegal. The council can at any time vary the limits of the residential area, and, consequently nothing in the nature of a proprietary right can attach to the property in consequence of the by-law. The by-law makes the bulk of the municipality a residential area, leaving only a fraction available for a shopping area. This must contemplate enlargement of the latter area from time to time as the exigencies of the time requires. This is a very different right from that acquired under a restrictive covenant or under a building scheme (*Attorney-General* v. *Sheffield Gas Consumers Co.* (13); *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (14)). The only person

(1) (1929) 29 S.R. (N.S.W.) 118.
(2) (1895) 1 Ch. 287.
(3) (1904) 2 Ch. 34.
(4) (1903) 1 Ch., at p. 103.
(5) (1903) 1 Ch. 109, at p. 113.
(6) (1914) 2 Ch. 555.
(7) (1867) L.R. 2 Ex. 316, at p. 320.
(8) (1924) 2 Ch. 416, at pp. 419, 422.
(9) (1882) 22 Ch. D. 221.
(10) (1927) V.L.R. 22; 48 A.L.T. 112.
(11) (1931) 1 Ch. 121.
(12) (1894) A.C. 347.
(13) (1853) 3 DeG. M. & G. 304, at pp. 319, 320; 43 E.R. 119, at p. 125.
(14) (1910) 1 Ch. 48, at pp. 59-61.

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who can bring such a matter before the Court is the Attorney-General acting on behalf of all the people and not on behalf of part (*Attorney-General* v. *Churchill's Veterinary Sanatorium Ltd.* (1); *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (2)). Here there is another remedy given in that the local council can require the building to be pulled down. This case does not come within the class of case in which there is no other legal remedy available (*Hanbury's Essays* on *Equity* (1934), p. 112; *Hanbury* on *Modern Equity* (1935), pp. 571, 572). Under the *Local Government Act* and the by-law the remedy given by the Act and by-law is intended to be the only remedy. The council is not to have its authority taken away from it and to have the discretion of the Attorney-General substituted for that of the council unless there is some breach of duty on the part of the council. The Legislature has left it in the discretion of the council to determine whether the building is to be pulled down or not. The by-law was passed under sec. 197 (5) (*b*) of the *Local Government Act*, and sec. 197 (6) (*b*) provides for the inclusion of provisions for pulling down. Penalties for breach of the by-law go into the municipal fund. The council has sufficient power to prevent the factory operating, and, therefore, the Attorney-General should not intervene. There is sufficient cause for the Court to refuse an injunction because of the action of the council in altering the by-law. The matter should be left in abeyance until the position with regard to the by-law is cleared up (*Dunstan* v. *Neems* (3)). The cases as to what persons can sue are collected in *Collins and Meaden* on *Local Government*, 2nd ed. (1933), at pp. 815-817. In any case, having regard to the fact that this is an interlocutory application, even if the Court has jurisdiction, it should refuse to exercise it in favour of the applicant (*Attorney-General* v. *Sheffield Gas Consumers Co.* (4)). Before an interlocutory injunction should be granted there should be a very strong probability of success at the trial (*Challender* v. *Royle* (5); *Halsbury, Laws of England*, 2nd ed., vol. 18, p. 29; *Hanbury, Modern Equity* (1935), p. 570). The balance of convenience is the very question that is

(1) (1910) 2 Ch. 401, at pp. 406, 407.
(2) (1904) 2 Ch., at pp. 41, 44.
(3) (1914) V.L.R. 364, at pp. 367, 368; 36 A.L.T. 10, at p. 12.
(4) (1853) 3 DeG. M. & G., at p. 311; 43 E.R., at p. 122.
(5) (1887) 36 Ch. D. 425, at pp. 436, 443.

committed to the council (*Halsbury, Laws of England*, 2nd ed., vol. 18, p. 33). This is not a case in which the Court ought to exercise the exceptional remedy of injunction.

Walker, for John R. & E. Seccull Pty. Ltd. By far the most important question is how far will the Court go in issuing an injunction. To say that the Court will grant an injunction to restrain a breach of any statute is going much too far (*Attorney-General* v. *Sheffield Gas Consumers Co.* (1)). An injunction will go only in the case of a breach of a proprietary right, that is, a right which the public enjoys in respect of property, a breach of which will constitute a public nuisance (*Attorney-General* v. *Mercantile Investments Ltd.* (2)). The law with regard to the issuing of injunctions should be static. The only laws that have ever been regarded as creating proprietary rights of this nature in the public are those creating a public nuisance. There must be some special right infringed in order to give rise to the remedy of injunction. The Attorney-General could not sue to restrain the breach of a building scheme. Where a specific remedy is contained in a statute, that is the only remedy available (*Pasmore* v. *Oswaldtwistle Urban Council* (3); *Country Roads Board* v. *Neale Ads Pty. Ltd.* (4)).

[STARKE J. referred to *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (5).]

If there is not here an exclusive remedy, there is at least an adequate remedy (*Attorney-General* v. *Merthyr Tydfil Union* (6)). An injunction should be refused because the plaintiff will be in no worse position if it is refused than if it is granted, and the defendants will be in a very much worse position.

T. W. Smith, in reply. The right here is similar to that conferred by a private building scheme. It is a legislative restriction of the use of land for the use of the public at large. No permit to build should have been given by the building surveyor. A permit to build in a residential area is not valid and is not a permit at all. *Attorney-General* v. *Sharp* (7) lays down a general rule which

(1) (1853) 3 DeG. M. & G., at p. 320; 43 E.R., at p. 125.
(2) (1920) 21 S.R. (N.S.W.) 183; 38 W.N. (N.S.W.) 31.
(3) (1898) A.C. 387, at pp. 394, 397.
(4) (1930) 43 C.L.R. 126, at p. 134.
(5) (1898) 2 Ch. 331, at p. 345.
(6) (1900) 1 Ch. 516, at p. 550.
(7) (1931) 1 Ch. 121.

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would cover any case of statutory prohibition. *Attorney-General* v. *Churchill's Veterinary Sanatorium Ltd.* (1), so far as the individual was concerned, was on the same footing as *Sharp's Case* (2). As to the exercise of the Court's discretion: Once the Court finds that there is a right in the Attorney-General to complain of breaches of the by-law, then, though an injunction does not follow as of right, it follows as of course (*Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (3)). If the right and the violation thereof are found the question of the balance of convenience does not arise (*Halsbury, Laws of England*, 2nd ed., vol. 18. p. 33; *Attorney-General and Lumley* v. *T. S .Gill & Sons Pty. Ltd.* (4)). An adequate remedy means one adequate in fact, and the remedy by pulling down does not exist in this case. There is here special damage caused to the individual plaintiff and she is entitled to an injunction in her own right (*Blundy, Clark & Co.* v. *London and North Eastern Railway Co.* (5)). There is evidence that the plaintiff's property will be damaged, and the plaintiff thus shows special damage to enable her to sue for this public wrong.

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered :—

LATHAM C.J. The important question which is raised by this appeal is whether the Supreme Court of Victoria may properly grant an injunction to restrain the breach of a certain by-law of the City of Essendon. If this question be answered in the affirmative it will become necessary to consider whether the Court should in this case exercise its discretion by granting an interlocutory injunction upon the application of the plaintiff.

The defendant the Aberfoyle Manufacturing Co. (Australia) Pty. Ltd. is engaged in erecting a factory within an area within which an existing by-law of the city prohibits the erection of such a factory. The second-named defendant is the contractor for the erection of the factory and is doing the actual work of building. The council made a new by-law altering the boundaries of the residential area

(1) (1910) 2 Ch. 410.
(2) (1931) 1 Ch. 121.
(3) (1910) 1 Ch., at p. 60.
(4) (1926) V.L.R. 414, at p. 418; 48 A.L.T. 46. at p. 48.
(5) (1931) 2 K.B. 334, at p. 352.

established by the by-law, and, if that by-law had been valid, the action of the defendants would have been lawful. The new by-law, however, was quashed by the Supreme Court by reason, we are told, of a defect in the procedure of making the by-law, so that it became unnecessary to consider other objections raised to its validity. The council proposes to make a by-law in identical terms as soon as possible, but no such by-law had been made at the time when the plaintiff applied for an interlocutory injunction restraining the defendant from proceeding with the building of the factory. The proposed new by-law has not yet been made and it can only be a matter of more or less certain speculation as to whether it will ultimately be made and come into effective operation. *Martin* J. refused the application for an interlocutory injunction, applying the decision of the Full Court of Victoria in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1). Subsequently the Attorney-General was added as a plaintiff. The application was renewed on behalf of the Attorney-General and was refused.

The plaintiff is the owner and occupier of land which adjoins the land upon which the factory is being built. The by-law which is now in operation was made under the powers contained in the *Local Government Act* 1928, sec. 197 (5) and (6). It prohibits the erection within a specified area of any building for the purposes of any trade, industry, manufacture, business or public amusement, with certain exceptions which are not material. The defendant's factory is being erected within the area specified and it is being erected for the purpose of conducting trading, industrial and manufacturing operations. The by-law contains provisions for enforcement which are authorized by the statute under which it was made. If a building is erected contrary to the by-law the council may give to the owner or builder a notice in writing requiring him to deliver a statement in writing or to attend personally or by agent before the council and show sufficient cause why such building should not be brought into conformity with the provisions of the by-law or why it should not be pulled down or removed. In the event of failure to show such cause the council may, through its surveyor with workmen, demolish and pull down the building, or

(1) (1927) V.L.R. 22; 48 A.L.T. 112.

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any part or parts thereof, and may do any other act that may be necessary for the purposes mentioned and may remove the materials and sell them. Provision is made for deduction from the proceeds of sale and the retention by the council of expenses, fees and penalties. Any surplus is payable to the person entitled. The by-law also provides that any person who is guilty of any wilful act or default contrary to the provisions of the by-law shall be liable to a penalty of not less than one pound and not exceeding twenty pounds for each offence, and in the case of a continuing offence to a further penalty not exceeding two pounds for each day such offence is continued after written notice of the offence from the council.

Thus legislative provision has been made for the by-law to be enforced, not only by penalties recoverable before magistrates, but also by proceedings which the council is left to initiate and in the course of which it exercises its discretion in each particular case. By the utilization of this provision the council can accomplish the same result as would be reached if a mandatory injunction were granted by a Court of equity.

The argument upon the hearing of the appeal was largely devoted to an analysis of the principles stated by the Full Court of Victoria in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1). The judgment in that case contains a valuable examination of the principles upon which a Court of equity may properly grant a remedy by way of injunction, particularly in cases when it is sought to found that jurisdiction upon the breach of a statutory duty. The Attorney-General is, in a general sense, the guardian of public rights. As such he not only represents the King in the enforcement of the criminal law, but he may also represent the community in certain cases in civil proceedings in order to protect public rights. It was held that, in order to entitle the Attorney-General, as representing the public, to an injunction as a remedy for the breach of a statutory duty, there must exist something more than some benefit or advantage to the public arising from the enforcement of the law; that there must be a positive interest, susceptible of enjoyment by the public as of common right—something analogous to a proprietary right. In my opinion, however,

(1) (1927) V.L.R. 22; 48 A.L.T. 112.

it is unnecessary to re-examine these difficult questions, the decisions upon which cannot readily be reconciled.

A Court of equity has no general duty to " enforce the law," either at the suit of the Attorney-General or of private persons. Criminal Courts exist for the purpose of enforcing the criminal law and magistrates' Courts have the function of enforcing many laws which create offences. In the case of *Institute of Patent Agents* v. *Lockwood* (1) the House of Lords had to consider an attempt to enforce by interdict rules made under the *Patents, Designs, and Trade Marks Act* 1883 which prohibited any person describing himself as a patent agent unless he was duly registered in accordance with the rules. The defendant described himself as a patent agent and was not registered. Lord *Herschell* L.C. expressed what he described as his strong opinion in the following words :—" You have here, for the first time, a new offence created—the offence of practising as a patent agent without being on the register. But for the enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £20. Can it possibly under these circumstances be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a £20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict ? My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from

(1) (1894) A.C. 347.

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sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison. For these reasons, I think that this action was not competent" (1). Lord *Watson* expressed an equally definite opinion when he said that, contrary to the contention of the plaintiff, "I think it was the plain meaning of the Legislature that when a man whose name was not on the register chose to hold himself forth as a patent agent, the full measure of punishment to be inflicted upon him should be a fine within the sum limited, viz., twenty pounds, to be fixed by a summary Court of criminal jurisdiction. There is a mass of statutes regulating sanitary and other improvements for the benefit of the general public, which every neighbouring member of the public has a certain interest in seeing enforced, as to which it would never do to permit the civil Courts to adjudicate. It is clear, upon the face of such legislation, that breaches of those laws were intended to be dealt with simply as a matter of police regulation, to be punished by a fine" (2).

This case has often been followed and applied and I am aware of no subsequent decision which in any degree diminishes the authority and weight of these important general principles. In my opinion, they are particularly relevant in such a case as the present. The by-law in question, made in precise and detailed conformity with the statute, provides for three kinds of penalties in order to secure its enforcement. There is, first, a penalty of not less than one pound and not exceeding twenty pounds. Then, secondly, if the council thinks it proper to give a written notice of the offence, there is a penalty not exceeding two pounds a day for a continuing offence. Thirdly, if the council, after hearing the owner or builder, is of opinion that the building should be pulled down or removed, the council may, by its officers and workmen, pull it down or remove

(1) (1894) A.C., at pp. 361, 362. (2) (1894) A.C., at p. 363.

it. It would be difficult for a Legislature more clearly to show its intention to provide a complete code of remedies. Everything that a Court of equity can achieve can in substance be attained by the application of the by-law. The Legislature, in explicitly authorizing such a by-law, has indicated in the clearest manner that it is for the council in its discretion to decide, by a simple and inexpensive procedure, whether a building which (*ex hypothesi*) is being erected in contravention of the by-law, should be pulled down or removed. In my opinion, apart from other considerations, the application of the remedy by way of injunction is in this case definitely excluded by the statute which expresses so clear an intention as to the means whereby this particular by-law shall be enforced. The relevant discretion is expressly committed to the council. The council is a representative body, responsible to the ratepayers, who can express their approval or disapproval of the manner in which it exercises its powers and discharges its duties.

It may be observed that this by-law does not present a case of the statutory "re-enactment" of a previously existing common law liability as in *Stevens* v. *Chown* (1), and that in cases like *Attorney-General* v. *Ashborne Recreation Ground Co.* (2) and *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (3) there was no actually available provision in the law under which the local authority (which actually sought the aid of the Court) could itself so act as to secure observance of the law by pulling down the unlawful structure.

In my opinion these specific provisions for enforcement of this by-law are sufficient to distinguish this case also from *Attorney-General* v. *Sharp* (4), where the Court held that an injunction should be granted to restrain a person from plying for hire with motor omnibuses in breach of a statute. The defendant had been fined for this offence sixty times. It was held that this fact showed that the remedies provided by the act were ineffective and that the Court had jurisdiction to grant an injunction restraining the defendant from causing or permitting any of his motor omnibuses to ply for hire in breach of the statute. Lawyers are familiar with the principles relating to the inadequacy of a common law remedy in damages

(1) (1901) 1 Ch. 894, at p. 903.
(2) (1903) 1 Ch. 101.
(3) (1904) 2 Ch. 34.
(4) (1931) 1 Ch. 121.

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which in particular cases provide a foundation for the application of the equitable remedy by way of injunction. It appears to me that those principles are given a new application when a Court decides that a penalty imposed by a statute is inadequate because it has not proved to be a deterrent in a particular case, with the result that an injunction is granted so that a further breach of the law will involve a contempt of Court with consequent imprisonment. However, as I have said, the specific provisions for enforcement of this particular by-law distinguish it from such a provision as that which was under consideration in *Sharp's Case* (1).

In *Sharp's Case* (1) it was also decided that, where the Attorney-General was a party, the fact that the Act imposing a new liability prescribes a remedy for its breach does not exclude the jurisdiction of the Court to grant an injunction. To this extent the Court of Appeal held that the principle laid down by the House of Lords in *Institute of Patent Agents* v. *Lockwood* (2) was not applicable when the Attorney-General was a party. I cannot think that the Court meant to decide that the presence of the Attorney-General in litigation may affect the construction of a statute in ascertaining the intention of the legislation as to the exclusive character of the remedies provided, but it is not necessary to consider this question. There is nothing in the decision in *Sharp's Case* (1) to affect the proposition that, if the statute clearly shows that a particular remedy was to be applied at the discretion of a municipal council, a Court of equity has no authority to substitute its judgment for that of the council. The later case of *Attorney-General* v. *Premier Line Ltd.* (3) went further than *Sharp's Case* (1). In that case the learned Judge said :—"The Attorney-General has been invoked, and he has intervened in order to assert, not only the rights of the three relators joined with him as co-plaintiffs, but of the public at large. The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting

(1) (1931) 1 Ch. 121. (2) (1894) A.C. 347.
(3) (1932) 1 Ch. 303.

public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land" (1).

Upon this principle a Court of equity would, in cases where the Attorney-General is a party, have a most extensive and hitherto unprecedented field of authority in securing observance of the law. Obedience to any ordinary public statute is a matter of concern to the public, but in my opinion the general interest of the public in the observance of the law is not in itself sufficient to justify the Court in granting an injunction at the suit of the Attorney-General. I am not aware of any other authority which supports such a proposition stated in the general terms which have been quoted. Prima facie it is for Parliament to see that the remedies for breach of a statute are adequate to secure observance of the law, and it is not for any Court of law or of equity to assume a general supervision, even at the suit of the Attorney-General, for the purpose of remedying what it regards as the defective machinery of a statute. In *Sharp's Case* (2) and the *Premier Line Case* (3) the Courts were dealing with statutes which prescribed only a pecuniary penalty. This case is very different, and, whatever may be the power of a Court of equity in such cases as those mentioned, there is, in my opinion, no doubt that it would not be a proper exercise of the power of such a Court to administer a remedy which is substantially identical with a remedy the application of which is definitely entrusted by Parliament to another Court or to a public body acting as a tribunal for this specific purpose.

Thus I find it unnecessary to consider the second question as to the exercise of the discretion of the Court in this particular case.

For the reasons stated I am of opinion that the appeal should be dismissed with costs.

RICH J. After having had the advantage on the hearing of the appeal of a full examination of the facts of this case and the considerations which arise out of them I regret to say that we were

(1) (1932) 1 Ch., at p. 313. (2) (1931) 1 Ch. 121.
(3) (1932) 1 Ch. 303.

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mistaken in granting special leave. For I think that the learned Judge whose order is appealed from exercised a very sound discretion in refusing the special remedy of interlocutory injunction, notwithstanding the Attorney-General's fiat. As a plaintiff Miss Ramsay has no cause of action : as a relator she has no better right than the public at large whom the Attorney-General represents. What that right amounts to has been the subject of much discussion before us and is the subject of an elaborate judgment in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1), but, whatever else is said about it, it cannot be regarded as fundamental in the public welfare. The *Local Government Act* authorizes the council to take power to enforce the by-law to the full extent a mandatory injunction could go. Under the by-law the council has taken those powers. Whether or not this excludes the jurisdiction to grant an injunction, it affords a powerful consideration in relation to its exercise. We find that in fact the council intended to repeal the by-law and that but for a slip it would have succeeded in doing so : that it has set about doing so again, and that, believing that the by-law was repealed, it encouraged the defendants to begin building. There is every reason for the council at the moment to refrain from requiring the pulling down of the work that has been done. By recourse to the Attorney-General's fiat the relator seeks to overcome what is decided on in the way of local government by the intervention of the central Government. Further it appears that if the by-law is repealed a great deal of unnecessary inconvenience and loss will be inflicted. The peculiar remedy of a Court of equity in these circumstances is sought for a purpose which may prove transient in the protection of an interest not very tangible. In my opinion every reason is against interfering *brevi manu*. It is not as if the defendants had not committed themselves to building and nothing had been done. If in the end the local law remains that the building ought not to remain, so much the worse for them. The building cannot be used. If there is jurisdiction to grant an interlocutory injunction there is jurisdiction to grant a final injunction. If the by-law is not repealed the area will remain residential and no doubt the council which has resolved not to repeal it will see that it is obeyed and, if necessary,

(1) (1927) V.L.R. 22 ; 48 A.L.T. 112.

have the building pulled down or altered. I do not feel that we are called upon to say whether the remedies provided by the *Local Government Act* are exclusive or whether the decision of the Full Court in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1) is right in all respects. We are called upon to give a prompt decision, and for that reason and for that reason alone I refrain from giving an opinion on those difficult questions. But I certainly entertain no present opinion adverse to the respondents upon them. Old-fashioned views upon the jurisdiction of Courts of equity find the growth of the use of injunction more repugnant than satisfying. An Attorney-General's fiat does not entitle a relator to succeed on a somehow equity or on no equity at all. I am afraid I speak as one not indoctrinated with the *Judicature Act*. However, in the present case I am not called upon either to advance or restrict the jurisdiction.

The appeal should be dismissed with costs.

STARKE J. The City of Essendon made a by-law (No. 71) under various powers conferred upon it by the *Local Government Act* 1928, secs. 197, 198. By this by-law (Part XV.) certain areas within the municipal district were prescribed as residential areas. It also provided that "the erection (including adaptation for use) or the use of any building or any land for the purpose of any trade, industry, manufacture, business, or public amusement within the whole of the said residential areas shall be and is hereby prohibited." By a contract in writing dated 22nd October 1935 between the Aberfoyle Manufacturing Co. (Australia) Pty. Ltd. (called the proprietor) and John R. & E. Seccull Pty. Ltd. (called the contractor), the contractor agreed to erect and complete a one-story brick factory for the proprietor, on the land of the proprietor in Vida Street, within the municipal district of Essendon. It is intended that the factory, when completed, shall be used for the conversion of grey cotton yarns into mercerized cotton yarns. The site of the factory is within a residential area prescribed by the by-law No. 71. On 23rd October 1935 the City of Essendon purported to amend the by-law No. 71 by excepting certain areas from the residential areas thereby prescribed,

(1) (1927) V.L.R. 22; 48 A.L.T. 112.

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the effect of which would have been to exclude the site of the factory from any residential area; but this amending by-law was quashed by the Supreme Court of Victoria, on the last day of October 1935, for illegality. Towards the end of October 1935 building operations were commenced on the factory site already mentioned, and have gone on continuously ever since that date. The building surveyor of the city granted a building permit on the day before the amending by-law was passed, and the buildings were commenced pursuant to it and in anticipation of the passing of the amended by-law. The land on the south side of the factory site is owned by Ellen Donaldson Ramsay, and she has erected thereon a substantial dwelling house, in which she lives. On 30th October 1935 she commenced an action in the Supreme Court against the Aberfoyle Co. and Seccull Pty. Ltd. claiming an injunction restraining them from erecting or continuing to erect the factory already referred to and an order that they do pull down so much of the factory as has been erected. She moved for an interim injunction, which was refused. The Attorney-General for the State of Victoria then joined, on the relation of Ramsay, as a plaintiff in the action. The motion for an interim injunction was renewed, and again refused. An appeal from these decisions has been brought by special leave to this Court.

It cannot be denied that the defendants, the Aberfoyle and the Seccull companies, are engaged in an illegal act in proceeding with the erection of the factory in contravention of the by-law No. 71. The amending by-law which was quashed for illegality, and the building permit given by the building surveyor, do not authorize or in any way excuse the violation of the by-law. The City of Essendon "cannot any more than a private person dispense with laws that have to be administered" (*Yabbicom* v. *King* (1)).

But it is contended that there is no jurisdiction to restrain by way of injunction the illegal acts of the defendants, and reliance is placed upon the decision of the Supreme Court of Victoria in the case of *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (2). In that case a by-law of a municipality prescribed a residential area, and provided that no person in such area should use any land or erect or adapt for use any building for the purpose

(1) (1899) 1 Q.B. 444, at p. 448. (2) (1927) V.L.R. 22; 48 A.L.T. 112.

of any trade, industry, manufacture, business or public amusement. It was held that the Attorney-General could only maintain a suit for injunction for the enforcement of a public right or interest if the right or interest presented " those features which belong to the wide category of rights recognized in equity as proprietary "; they must " take the form of " some " positive interest susceptible of enjoyment by his Majesty's subjects as of common right." The conclusion was then reached that the by-law in question there, prescribing residential areas within the municipality of the City of Prahran, did not possess the features or characteristics necessary to sustain the suit of the Attorney-General.

The principle upon which the equitable jurisdiction of English Courts is exerted by way of injunction in the field of public law is ill-defined and difficult of statement. But the principle asserted in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1) confines the jurisdiction within too narrow limits and runs counter to a body of authority that ought not to be disregarded. It has been said that " the Court of Chancery kept very clear of the province of crime, and since the province of crime and the province of tort overlap, it kept very clear of large portions of the province of tort " (*Maitland* on *Equity*, (1920), p. 19). Thus it was once thought that the publication of a libel could not be restrained by injunction because libel was a criminal offence as well as a civil wrong (*Gee* v. *Pritchard* (2); *Prudential Assurance Co.* v. *Knott* (3)). The jurisdiction was gradually asserted, however, over this class of wrong, and is now exercised, though with caution (*Thomas* v. *Williams* (4); *Bonnard* v. *Perryman* (5)). But it has been authoritatively stated that, where an illegal act is being committed which in its nature tends to the injury of the public, the Attorney-General can maintain an action on behalf of the public to restrain the commission of the act without adducing any evidence of actual injury to the public (*Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (6)). A later statement to the same effect may be found in *Attorney-General* v. *Sharp* (7): " It is firmly established that the Court has jurisdiction

(1) (1927) V.L.R. 22; 48 A.L.T. 112.
(2) (1818) 2 Swans. 402, at p. 414; 36 E.R. 670, at p. 674.
(3) (1875) L.R. 10 Ch. 142.
(4) (1880) 14 Ch. D. 864, at p. 873.
(5) (1891) 2 Ch. 269.
(6) (1882) 21 Ch. D. 752.
(7) (1931) 1 Ch., at p. 134.

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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 Act imposing the new liability prescribes the remedy for its breach." Such a jurisdiction amounts, it is objected, to a general jurisdiction to enforce the law; no definition is given of an act which tends in its nature to injure the public, or of an illegal act of a public nature. But similar obscurity exists in other branches of the law, and still its administration has not been insuperable. Acts tending to cause public mischief constitute, it is said, a misdemeanour at common law (see *Stephen, General View of the Criminal Law*, 2nd ed. (1890), pp. 99-107; *R.* v. *Porter* (1); *R.* v. *Manley* (2)). No definition is given of acts tending to cause public mischief; the question whether any particular act tends to the public mischief is for the Court (*R.* v. *Brailsford* (3); *R.* v. *Porter* (1)). The Courts will not define such acts, for it is impossible to foresee all the exigencies of society which may require protection. So, too, in the case of injunctions, the Courts of equity decline to define too precisely the limit of their jurisdiction and authority. "The intrusions of equity into the sphere of public law have been sporadic and unsystematic, but we are awakening to the immense possibilities of equity in this field, and we may be on the threshold of many new developments" (*Hanbury, Modern Equity* (1935), p. 577). The Courts, however, have held that certain acts are illegal and tend to the injury of the public, and thus as to acts of that character the law becomes fixed and settled. It is unnecessary to make a detailed examination of all the authorities in which injunctions have been granted in the field of public law, but instances in which jurisdiction has been asserted to restrain, by injunction at the suit of the Attorney-General, the contravention of various enactments, include: (1) the contravention of statutes or by-laws regulating the width of streets, public or private, or the alignment of buildings upon street frontages, or the erection of buildings (*Attorney-General* v. *Ashborne Recreation Ground Co.* (4); *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (5); *Attorney-General* v. *Gibb* (6); *Council of the Shire of Hornsby*

(1) (1910) 1 K.B. 369.
(2) (1933) 1 K.B. 529.
(3) (1905) 2 K.B. 730.
(4) (1903) 1 Ch. 101.
(5) (1904) 2 Ch. 34.
(6) (1909) 2 Ch. 265.

v. *Danglade* (1)); (2) the contravention of a statute providing for the licensing of vehicles (*Attorney-General* v. *Sharp* (2); *Attorney-General* v. *Premier Line Ltd.* (3)); (3) the contravention or the fraudulent evasion of statutes prohibiting the use of professional titles by unqualified persons or bodies (*Attorney-General* v. *George C. Smith Ltd.* (4); *Attorney-General* v. *Churchill's Veterinary Sanatorium Ltd.* (5); *Attorney-General* v. *Appleton* (6); *Attorney-General* v. *Myddletons Ltd.* (7): these cases may seem anomalous, as may also the case of *Trethowan* v. *Peden* (8)). Then there is a long line of cases in which the Courts have at the suit of the Attorney-General restrained statutory corporations, created for particular purposes, from going beyond or exceeding the scope of such purposes. (See *Kerr* on *Injunctions*, 6th ed. (1927), p. 548.) None of these cases "take the form of any positive interest susceptible of enjoyment by his Majesty's subjects as of common right," and they possess no features or characteristics which are ordinarily described as proprietary, or are even analogous to features or characteristics so described. Yet the Courts act by injunction. They discern in the Act some provision enacted for the benefit of, or in the interest of, the public generally. Such are provisions for the public health or comfort or safety, or for the orderly arrangement of cities or towns, or for keeping public corporations, created for particular purposes, within the ambit of their powers, and so forth. But the categories of cases in which the Courts will act are never closed, owing to the exigencies of society and the great variety of cases that arise. It does not follow that the Courts will enforce by injunction every statutory duty or obligation (*Attorney-General* v. *Mercantile Investments Ltd.* (9)). The nature and purpose of the duty or obligation must be considered and also the effect of its contravention upon the public generally. The Courts have not defined the limit of their jurisdiction, and no one has yet been able to expound a simple and consistent system. The

(1) (1929) 29 S.R. (N.S.W.) 118.
(2) (1931) 1 Ch. 121.
(3) (1932) 1 Ch. 303.
(4) (1909) 2 Ch. 524.
(5) (1910) 2 Ch. 401.
(6) (1907) 1 I.R. 252.
(7) (1907) 1 I.R. 471.
(8) (1931) 31 S.R. (N.S.W.) 183; 48 W.N. (N.S.W.) 36; (1931) 44 C.L.R. 394; (1932) A.C. 526; 47 C.L.R. 97.
(9) (1920) 21 S.R. (N.S.W.) 183; 38 W.N. (N.S.W.) 31.

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criminal code is not enforced by injunction, for constitutional and practical reasons. Otherwise the overruling consideration upon the topic has always been the critical question whether an illegal act is being committed that tends in its nature to injure the public.

The ground upon which *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (1) was decided is thus too narrow, and consequently affords no answer to the Attorney-General's claim in the present case.

The defendant, however, contends that by-law No. 71 of the City of Essendon provides the only and exclusive remedy in case of its contravention. An Act may provide expressly or impliedly that the remedy it prescribes is the sole remedy for its contravention, and then neither the Attorney-General nor a private individual can seek any other remedy or sue for an injunction. But it must be remembered in the present case, if I am right, that the by-law creates a public right or interest and that an invasion of that right has taken place. "The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the Court as a private owner suing in respect of his rights" (*Attorney-General* v. *Ashborne Recreation Ground Co.* (2)). The public right does not spring from the remedy, but from the prohibition contained in the by-law. The statute in question in *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (3) prohibited the erection of buildings beyond the building line, under penalty of forty shillings for every day during which the offence was continued after written notice had been given by the urban authority. *Farwell* J. said:—"I am clear that there is not one remedy only, namely, the statutory remedy. There is, first of all, the statutory obligation not to build without the written consent, and if that is disobeyed —apart from any question of penalty—there is a remedy by injunction, because it is a public general Act prohibiting certain matters in the interests of public health and in order to preserve uniformity in the width of the public streets, and that is a matter for which the Attorney-General can sue . . . I see no reason why the Attorney-General should not be heard to say in this Court, 'The

(1) (1927) V.L.R. 22; 48 A.L.T. 112.
(2) (1903) 1 Ch., at p. 107.
(3) (1904) 2 Ch. 34.

defendants have done that which the Act of Parliament has forbidden them to do, and I appeal to the Court to make them take it down again' " (1). The question depends upon the construction of the particular statute or by-law under consideration, but the general rule of construction, in the absence of clear words or necessary intendment to the contrary, is that when a by-law creating public rights is contravened the remedy contained in it is not the only remedy available, and the Court can enforce compliance with the by-law by injunction at the suit of the Attorney-General (*Attorney-General* v. *Ashborne Recreation Ground Co.* (2); *Devonport Corporation* v. *Tozer* (3); *Attorney-General* v. *Sharp* (4); *Attorney-General* v. *Premier Line Ltd.* (5)). *Institute of Patent Agents* v. *Lockwood* (6) was much relied upon, but it does not touch the point under discussion; it is based upon the view that the penalty imposed by the Act there in question created no private right in any person or body. It was pointed out during the argument in *Attorney-General* v. *Sharp* (7) that the proceeding in *Lockwood's Case* (6) was not by the Attorney-General to enforce a public right.

The by-law in the case now before us contains, in Part XVI., provisions for its enforcement, and for penalties. These provisions are not limited to the clause which prohibits the erection of buildings for the purposes of trade, &c., within residential areas, but include a multitude of clauses in the by-law relating to the erection of buildings and other constructions. The first provision is that the council may give to an owner or builder a notice in writing requiring the owner or builder to show sufficient cause why any such building or construction should not be brought into conformity with the provisions of the by-law or why such building or construction should not be pulled down. If the owner or builder fails to show sufficient cause, the council may demolish and pull down the building or construction, sell the same, and deduct the expenses of so doing out of the proceeds. This is a discretionary power, which the council may or may not think fit to exercise. It gives no remedy to the Attorney-General in respect of the invasion of any public right. It

(1) (1904) 2 Ch., at pp. 41, 42.
(2) (1903) 1 Ch. 101.
(3) (1903) 1 Ch. 759.
(4) (1931) 1 Ch. 121.
(5) (1932) 1 Ch. 303.
(6) (1894) A.C. 347.
(7) (1931) 1 Ch., at pp. 126-128.

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does not explicitly, nor, I think, by any necessary intendment, limit or take away any public right, or prevent the Attorney-General from suing in respect of the invasion of any such right. It confers no dispensing power upon the council, nor does it enable the council to override the rights of the public. (Cf. *Lumley's Public Health*, 10th ed. (1930), vol. 1, pp. 368, 369). Another provision of the by-law prescribes that any person who is guilty of any wilful act or default contrary to the by-law shall be liable to a penalty of not less than one pound and not exceeding twenty pounds for each offence, and in the case of a continuing offence to a further penalty not exceeding two pounds for each day such offence is continued after written notice of the offence. (See also *Local Government Act* 1928, sec. 222.) I assume that anybody might take proceedings to recover the penalty (*Sargood* v. *Veale* (1); *Dunstan* v. *Neems* (2)); with which, however, must be compared *R.* v. *Panton*; *Ex parte Schuh* (3)). The authorities already cited make it clear that such a provision is not the only remedy available, and that the Court can enforce compliance with the by-law in an action by the Attorney-General. But the Attorney-General is not entitled to an injunction as a matter of right in every case in which public rights are invaded, for the Court has a discretion—a judicial discretion—in the case of actions by the Attorney-General as well as in other actions (*Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (4); *Attorney-General* v. *Grand Junction Canal Co.* (5); *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (6)). "The Court no doubt has a discretion in the case of Attorney-General actions as well as other actions. It is not sufficient for the Attorney-General simply to come to the Court and say, 'I call attention to the fact that there has been a breach of this statute, and it follows as a matter of course that the . . . injunction which I ask for must be granted'" (*Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (7), per *Farwell* J.). Again, in *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (8), the same learned Judge, then a Lord Justice of Appeal,

(1) (1891) 17 V.L.R. 660; 13 A.L.T. 121.
(2) (1914) V.L.R. 364; 36 A.L.T. 10.
(3) (1888) 14 V.L.R. 529; 10 A.L.T. 115.
(4) (1904) 2 Ch. 34.
(5) (1909) 2 Ch. 505, at p. 517.
(6) (1910) 1 Ch. 48; (1912) A.C. 788.
(7) (1904) 2 Ch., at p. 42.
(8) (1910) 1 Ch., at p. 61.

observed that it is for the Attorney-General to determine whether he should commence litigation, but for the Court to determine what the result of that litigation shall be. The adequacy and convenience of other remedies must be considered, such, for instance, in the present case, as the provision for enforcement contained in the by-law itself. The ineffective nature of the remedy may be established by evidence that it has been resorted to and proved futile (*Attorney-General* v. *Sharp* (1)). But in the present case the provisions of the by-law appear to me wholly inadequate to redress the wrong of which the Attorney-General complains, and that by reason of the action of the council and the defendants. The council endeavoured to amend the by-law, as already stated, but the amending by-law was quashed for illegality. It proposes to make another attempt to amend the by-law, which will exclude the site of the defendants' factory from any residential area under the by-law, and is in the course, we are informed, of making such an amendment. In these circumstances, the council refuses to enforce the present by-law—the existing law—and the defendants proceed with the erection of their factory despite its provisions. It was conceded that the approval of the Governor in Council must be obtained before any such amendment can take place (see *Local Government Act* 1928, secs. 197, 198). Courts of law, however, can only act upon the law as it is, and have no right to, and cannot, speculate upon alterations in the law that may be made in the future.

In my opinion, the Attorney-General has established a clear invasion of public right in the contravention of the by-law, and, indeed, the defendants do not dispute their contravention of its provisions. The defendants are doing illegal acts which tend in their nature, if I am right, to the injury of the public. Adapting the words of *Farwell* J. in *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (2), the Attorney-General has brought to the attention of the Court the fact that there has been a clear and deliberate breach of the duty imposed by law. In such circumstances, an injunction, whether perpetual or interim, should go, if not of right, still almost as a matter of course. It may be discharged if the by-law is amended so that the erection of the factory becomes no longer a breach of

(1) (1931) 1 Ch. 121. (2) (1904) 2 Ch. 34.

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the law, but until that time arrives it is the duty of the Courts of law to enforce, and of the defendants to obey, the law as it exists (*Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (1)).

It was also contended that Ellen Donaldson Ramsay, who as well as the Attorney-General is a party plaintiff in this action, is entitled to an injunction restraining the defendants from proceeding with the erection of the factory already mentioned. The argument was founded upon the propositions contained in the judgment of *Buckley* J. in *Boyce* v. *Paddington Borough Council* (2). But the plaintiff Ramsay has not, I think, established that any private right of hers has been interfered with, and the evidence before the Court does not sufficiently establish that she has sustained or is likely to sustain any special damage peculiar to herself by reason of the invasion by the defendants of the public right created by virtue of the by-law. It may be that she will be able to establish such special damage at the trial of the action, but the probability of success does not yet sufficiently appear.

The result is that the appeal of the Attorney-General should succeed, and that an interim injunction should be granted at his suit in the terms of the first claim in the writ of summons.

McTIERNAN J. The question arising in this appeal, whether the Attorney-General of Victoria can maintain a suit for an injunction restraining the respondents from erecting a factory in an area prescribed by a by-law of the City of Essendon made pursuant to the provisions of the *Local Government Act* 1928 of Victoria as a residential area and within which the erection of a building for the purpose of manufacture is prohibited, was decided adversely to the contention of the appellants by the Full Court of Victoria in *Attorney-General and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (3). There the Attorney-General sought to make the breach of a by-law of similar import the foundation of a claim for an injunction. The by-law of the City of Essendon, now in question, provides that any person who is guilty of any wilful act or default contrary

(1) (1910) 1 Ch. 48; (1912) A.C. 788. (2) (1903) 1 Ch. 109.
(3) (1927) V.L.R. 22; 48 A.L.T. 112.

to any of its provisions shall be liable to a penalty for each offence and to further penalties for each day such offence is continued after written notice of the offence from the council of the municipality. An offence against the by-law is deemed an offence against the *Local Government Act* 1928, and the penalties imposed by the by-law are recoverable before a Court of Petty Sessions and are to be paid into the funds of the municipality. Besides these penalties the by-law contains provisions enabling the council to require the owner or builder of any structure erected in contravention of it to show cause why the structure should not be brought into conformity with the provisions of the by-law or pulled down or removed, and, failing sufficient cause being shown, enabling the council to have it demolished and the materials removed.

The Supreme Court of Victoria (*Martin* J.), following the decision of the Full Court of Victoria in *Attorney-General and Lumley* v. *T. S. Gill and Son Pty. Ltd.* (1), held that the Attorney-General was not entitled to maintain a suit for an injunction to restrain the respondents from proceeding with the erection of the factory in contravention of the by-law. Counsel for the appellant submit that *Gill's Case* (1) was wrongly decided and that the Attorney-General is entitled to ask for the relief which is now claimed.

The criticism of the judgment in the above-mentioned case is founded on the wide ground that the Attorney-General is entitled to ask for an injunction to restrain a breach of any statute or by-law having statutory force; but that criticism is not justified by the settled principles on which equity administers this remedy. The breach of a by-law which renders the offender liable to a penalty may be a criminal act (see *Mellor* v. *Denham* (2); *R.* v. *Whitchurch* (3)); and the breach of a statute may be a criminal matter irrespective of whether it prohibits "a matter of public grievance to the liberties and securities of a subject" or "commands a matter of public convenience" (see *Hawkins' Pleas of the Crown*, 8th ed. (1824), Book 2, c. 25, sec. 4). The equitable jurisdiction to grant an injunction cannot be invoked for the sole purpose of preventing the commission of an offence. The provisions

(1) (1927) V.L.R. 22; 48 A.L.T. 112. (2) (1880) 5 Q.B.D. 467, at p. 469.
(3) (1881) 7 Q.B.D. 534.

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of the law for the trial and punishment of offenders are not to be supplanted or supplemented by this remedy. But the Court in its equitable jurisdiction will not refrain from granting an injunction against a breach of a statute for which the offender is liable to a penalty, merely because the injunction will result in the statute being enforced. In *Cooper* v. *Whittingham* (1) *Jessel* M.R. said that it is true as a general rule " that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for." But the Master of the Rolls said that an exception to this rule is the " ancillary remedy in equity to protect a right." Where a statute grants a right of a kind which is protected by the equitable remedy of injunction, the Court interferes to preserve and secure enjoyment of the right and not to punish the offender ; and the grant of an injunction is not to be regarded as a remedy which is merely alternative or even additional, to the exaction of the penalty provided by the statute. But the statute may exclude the remedy of injunction, and in that case, of course, it cannot be granted by the Court (*Stevens* v. *Chown* (2)). This remedy may be excluded expressly or by necessary intendment.

The question therefore arises whether the by-law creates any right of a nature which Courts of equity regard as needing the protection of the equitable remedy of injunction. The judgment of the Supreme Court in *Gill's Case* (3) decided that a right of this nature was not created by a similar by-law. In impugning this conclusion the appellants not only took the ground that the equitable remedy of injunction is available to the Attorney-General as an instrument for enforcing the law, but also, as an alternative, a more plausible ground, namely, that the by-law creates a right to which the equitable remedy of injunction extends.

To quote the words of *Channell* J. in *Attorney-General and Spalding Rural Council* v. *Garner* (4), " the rights, which the Attorney-General intervenes in order to protect, as representing the Crown, in the capacity, as it is stated in some of the cases, of *parens patriæ*, must be rights of the community in general, and not rights

(1) (1880) 15 Ch. D., 501, at p. 506.
(2) (1901) 1 Ch. at pp. 904, 905.
(3) (1927) V.L.R. 22 ; 48 A.L.T. 112.
(4) (1907) 2 K.B. 480, at p. 487.

of a limited portion of His Majesty's subjects, especially when the limited portion in question, the inhabitants of a parish, have representatives who can bring the action."

The two views which may be advanced with respect to the by-law now in question are (1) that it does no more than fulfil the function of numerous restrictive covenants which might have been exacted from purchasers if the whole residential area had been sold by a common vendor, and (2) that it is a statutory rule made in the interests of the community in general.

If the former view were correct the Attorney-General would not be a competent plaintiff and the action would fail. In *Gill's Case* (1) the Full Court of Victoria did not adopt that view of the by-law then in question. It preferred the latter view, which, in my opinion, is correct. Although the Court preferred the view that the by-law affects the public and not a limited class, it said :—" But whilst this conclusion shows that none but the Attorney-General may sue, it is founded upon considerations which go some distance to determine whether there arises from the restrictions imposed by the by-law anything which is appropriate for the protection of an injunction. It does not prescribe the condition or character of any definite thing which is provided for the use or service of members of the public, nor does it operate to prevent any actual interference with the general health or comfort, or the enjoyment at large of lawful rights. The consequences to the public at large which flow from the restriction imposed by the by-law upon the rights of user ordinarily incident to property in land may be described as benefits or advantages. But this is so because they tend to promote the general welfare by the orderly discrimination of localities for business and residence. They do not take the form of any positive interest susceptible of enjoyment by His Majesty's subjects as of common right" (2). In my opinion that is a correct description of the nature of the by-law which is now in question. It is clear that the rights which it confers on the public are not enjoyed by them as owners of land or residents in the residential area where the respondents are building the factory. It is true that the

(1) (1927) V.L.R. 22 ; 48 A.L.T. 112.
(2) (1927) V.L.R., at p. 33 ; 48 A.L.T., at p. 117.

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by-law forbids the erection of any building or the use of any building or land for the purpose of manufacture, trade or public amusement, but it does not select as the objects of its prohibition activities which result in a public nuisance. When its prohibitions are disregarded the public does not cease to enjoy any definite benefit or advantage except that which flows from the observance of a law which it may regard as salutary. Whatever the tendency of the by-law, whether artistic or useful, it creates no rights in the members of the public to the enjoyment of any identifiable or definable thing. It results in benefits and advantages it is true, but they do not take the form of any positive interest susceptible of enjoyment by his Majesty's subjects as of common right. The Court, in my opinion, correctly decided that "there is nothing brought into existence by the by-law which upon any reasonable application of principle can require or receive equitable recognition or protection," and this decision is applicable to the present case and expresses the conclusion which should be reached on the Attorney-General's application as the representative of the public. No English case was cited in which an offender was restrained by an injunction at the suit of the Attorney-General from infringing a by-law similar to that in the present case. The appellants strongly relied on *Attorney-General* v. *Ashborne Recreation Ground Co.* (1). But in that case the statute required that the new street which the defendants were laying out should be of a certain width and the defendants were depriving the public of their right to the use of a street of this width by laying down a street of less width. *Buckley* J. (as he then was) decided that although the statute provided remedies for the breach of these provisions the Attorney-General was entitled to apply for an injunction to protect this public right.

In *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (2) an injunction was granted to restrain the breach of sec. 3 of the *Public Health* (*Buildings in Streets*) *Act* 1888. The section was in these terms: "It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the

(1) (1903) 1 Ch. 101. (2) (1904) 2 Ch. 34.

same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same." The breach of this section did not impair a public right similar to that in the case which has just been cited. But it was contended on behalf of the Attorney-General that one of the objects of the Act was to secure the uninterrupted access of light and air to the houses on either side. This provision more closely resembles the present by-law than the by-law in *Attorney-General* v. *Ashborne Recreation Ground Co.* (1). But the benefits or advantages to the public which it is alleged that the present respondents are infringing lack the positive characteristics of rights exercisable in relation to definite things, light and air, the enjoyment of which was secured by sec. 3 of the *Public Health* (*Buildings in Streets*) *Act* 1888 (51 & 52 Vict. c. 52). It is a mistake to look only for a proprietary interest as the foundation of the equitable jurisdiction, but that public right is not appropriate subject matter for protection by injunction which may be infringed without the loss to members of the public of some specific benefits as distinct from the impairment of the general welfare. There are difficulties in reconciling *Attorney-General* v. *Sharp* (2) and *Attorney-General* v. *Premier Line Ltd.* (3) with this view, if those cases decide that there is enough to found the Attorney-General's claim for an injunction if the defendant has violated a public duty, using that term in its general sense, and the remedies given by the statute creating the duty are inadequate, provided that the statute does not disallow this equitable remedy. But it is sufficiently clear from the facts in these two cases that the illegal conduct of the defendants respectively tended to the injury of the positive right of the public to orderly and regulated transport; what was protected by injunction was a public right of the same general nature as that in the *Ashborne Case* (1) and in the *Wimbledon Case* (4). But the public right created by the by-law in the present case is not of this nature. Viewing the right which was protected by injunction in each of these cases, they are all in line with the principle enunciated by *Turner* L.J. in *Attorney-General* v. *Sheffield Gas Consumers Co.* (5) :—" It is not on the ground of any

(1) (1903) 1 Ch. 101.
(2) (1931) 1 Ch. 121.
(3) (1932) 1 Ch. 303.
(4) (1904) 2 Ch. 34.
(5) (1853) 3 DeG. M. & G., at p. 320; 43 E.R., at p. 125.

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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 cases of public nuisance and private nuisance is this—that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind." According to my understanding of the nature of the public rights which equity has intervened to protect, the decided cases which have been cited have not departed from this principle and exhibit no tendency to make equity the handmaid of the criminal law.

In *Council of the Shire of Hornsby* v. *Danglade* (1) *Harvey* C.J. in Eq. disagreed with the view taken in *Gill's Case* (2) as to the nature of the rights created by the by-law and said that they were within the protection of an injunction. That learned Judge in deciding that case gave a description of the interest of the public which the Court did intervene to protect, but the definition was given primarily with reference to the interests of the residents of a proclaimed district, in a statutory building scheme in the district. It appears that agreement was expressed with the principles enunciated in *Gill's Case* (2), but disagreement only with their application. Viewing the present by-law as one affecting the public at large, it is clear that its benefits lack the positive character of those which a building scheme confers on the residents of the particular district where the scheme is introduced. That mere considerations of public welfare are not sufficient to enable the Attorney-General to sue to restrain breaches of a statute is fully recognized in the following passage from the judgment of the same learned Judge (*Harvey* C.J. in Eq.) in *Attorney-General* v. *Mercantile Investments Ltd.* (3):—"I think it may be stated generally that the Court of equity has power to intervene at the suit of the Attorney-General, and to grant an injunction against the commission of any threatened wrongful act which is a menace to the general

(1) (1929) 29 S.R. (N.S.W.) 118.
(2) (1927) V.L.R. 22; 48 A.L.T. 112.
(3) (1920) 21 S.R. (N.S.W.), at p. 187; 38 W.N. (N.S.W.), at p. 33.

rights of the public which are of a proprietary nature, such as the user of a highway, or which is likely to cause injury to the members of the public in general capable of being assessed in individual cases in terms of money, such as nuisances from noise, smell, or filth, i.e., injuries to the health or comfort of the general public." Upon the assumption that it is a matter of public rather than private right which is affected by the operations of the present respondents, the injury to members of the public is in my opinion wholly incalculable, as their so-called interest in the observance of the by-law is not related to any specific matter.

In my opinion the principles stated and their application by the Supreme Court of Victoria in *Gill's Case* (1) are unexceptionable. Assuming the Attorney-General had a right to sue, in my opinion *Martin* J. did not err in the exercise of his discretion by declining to grant an interlocutory injunction.

The appeal against the learned Judge's refusal to grant Miss Ramsay's application for an interlocutory injunction was also right because the case does not show that the acts of the respondent are in breach of any private right as distinct from her rights as a member of the public (*Devonport Corporation* v. *Tozer* (2)).

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *John P. Rhoden.*

Solicitors for the respondent, Aberfoyle Manufacturing Co. (Australia) Pty. Ltd., *Arthur Robinson & Co.*

Solicitors for the respondent John R. & E. Seccull Pty. Ltd., *Doyle & Kerr.*

H. D. W.

(1) (1927) V.L.R. 22 ; 48 A.L.T. 112.

(2) (1902) 2 Ch. 182.