Worthing v. Rowell that s.52(1) only concerned laws for a Commonwealth place "as a place". That argument was necessarily rejected in *Phillips. Windeyer* J. deliberately confined himself to the narrow point raisd for decision, "whether or not a particular state law, the ordinance, which had previously no force with respect to the subject land . . . somehow came into force there when the Commonwealth relinquished its ownership"[23], rather than the broad point, hitherto left open, "of the application of general laws of a State in places that have ceased to be Commonwealth places"[24]. However, this is open to the same criticism as *Walsh* J's reservation.

Although such a proposed limitation seems to be untenable, the High Court may find it necessary to seize upon it in order to overcome what seems likely to be an impossibly inconvenient situation for both the Commonwealth and the States. Or it wil lhave to take the drastic step of overruling *Worthing* v. *Rowell* where the whole trouble started.

*Kathleen McEvoy**

ATTORNEY-GENERAL (S.A.) EX. REL. DANIELS, STEWARD & WELLS V. HUBER, SANDY & WICHMAN INVESTMENTS PTY. LTD.

EQUITY — INJUNCTION — APPREHENDED COMMISSION OF ILLEGAL ACT.

The action in this the "Oh, Calcutta" case[1] created widespread public controversy and the case itself posed difficult questions of law.

The case came before the Full Court (Bray C.J., Walters and Wells JJ.) on appeal from interlocutory orders made by Hogarth J. The action was brought by the respondent, the Attorney-General, on the relation of several private citizens, seeking an injunction to restrain the appellants Huber and Sandy, as the intended producers of the review at premises called Chequers Place, and the appellant Wichmann Investments Pty. Ltd., as the owner of the premises, from staging the whole or any part of the production at Chequer's Place or elsewhere in South Australia, and a declaration that its production staging and presentation would involve the appellants in the commission of breaches of the law and in particular of the provisions of secs. 7(1) and 23 of the Police Offences Act 1953-1967[2].

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23. *Id.*, 16.
24. *Ibid.*

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1. [1971] S.A.S.R. 142.
2. Bray C.J. noted that if the actors would have been guilty of the offences against the act then the appellants would have been liable under the provisions of s.53 of the Justices Act 1921-1969 to be dealt with as principal offenders ([1971] S.A.S.R. at 154). The case was argued, however, on the basis that the only relevant offences were those against the Police Offices Act.

The appellants took out an interlocutory summons asking that the writ be set aside on the ground that the Supreme Court had no jurisdiction to grant the relief claimed, or alternatively, that the writ disclosed no cause of action.

Hogarth J. had dismissed the appellants' summons and granted the interlocutory injunction sought by the respondent.

S.23(1) of the Police Offences Act states:

> "Any person who behaves in an indecent manner—
>
> (a) in a public place, or while visible from a public place, or in a police station, or
>
> (b) in any place other than a public place or police station, so as to offend or insult any person,
> shall be guilty of an offence.
>
> Penalty: Fifty pounds or imprisonment for three months."

It was not contended that the staging of the play would necessarily involve a breach of s.23(1) (b): the argument was that it would involve indecent behaviour in a public place.

The Full Court held it unnecessary to consider the offence of offensive behaviour contained in s.7(1). Any offensive element in the performance was to be found in its indecent nature, and if it was not indecent—cadit quaestio.

The appellants could most effectively deny the jurisdiction of the court by showing either (a) that Chequer's Place would not be a public place within the meaning of those words in the Act, or (b) that the performance of the play would not involve acts of indecent behaviour. Success on either issue necessarily meant that the staging of the play would not involve the appellants in the commission of breaches of the provisions of the Police Offences Act, and hence the foundation of the Court's jurisdiction would be destroyed.

The "public place" question centred on the interpretation of s.4(1) of the Police Offences Act which provides, inter alia, that:

> "In this Act, unless the context otherwise requires or some other meaning is clearly intended . . .
>
> 'public place' includes—
>
> (b) every place to which the public are admitted on the payment of money, the test of admittance being the payment of money only; . . . "[3]

Wells J. held that the imposition of a test of admittance other than the payment of money only meant simply that the issue was left to depend on the ordinary and natural meaning of the phrase "public place" and Walters J. agreed with him that the conditions upon which tickets were intended to be sold would not have precluded Chequer's Place from being a public place,

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3. So far as Bray C.J. could ascertain, "legislation in this form providing that, in order for a place to which the public are admitted on payment of money to be a public place, the test of admittance must be the payment of money only, is unique to South Australia and to this Act in South Australia". [1971] S.A.S.R. at 155.

which, in its ordinary and natural meaning is a place where the public *qua* public go, regardless of how the right to go there arises and even though the test of admittance might be the payment of money or the fulfillment of any other condition. Bray C.J., in dissent, did not think such reasoning met what he regarded as the "imperative obligation of subsection (b)", the obligation to declare that a place to which the test of admittance was something in addition to the payment of money, was not a public place.

On the questions of indecent behaviour Walters and Wells J.J. had no hesitation in holding that the performance of the play would involve acts of such a nature, whereas Bray C.J. thought this "likely" or even "extremely likely"[5], but not necessarily so, and accordingly would have allowed the appellants to stand on their claim that the play was innocent and their acceptance of the consequences if it was not.

These two questions having been decided against the appellants, it became necessary to consider their remaining argument which was of a more fundamental nature; they disputed the very existence of the Court's jurisdiction in the case and whether the Attorney-General's application could even be entertained, and they contended that even if jurisdiction was established, it should not, in the circumstances of the case, be exercised and the relief claimed should not be granted.

Under s.29 of the Supreme Court Act (S.A.) 1935-70, the Supreme Court may grant an injunction by interlocutory order "in all cases in which it appears to the Court to be just or convenient so to do"; but deriving support from dicta of Lord Eldon L.C.[6], the appellants asserted the broad principle that a Court of Equity has no jurisdiction to prevent the commission of crimes and submitted that it was beyond the jurisdiction of Hogarth J. to entertain the application for an interlocutory injunction merely on the ground that the intended performance of "Oh, Calcutta" would involve breaches of the Police Offences Act. Two qualifications to the principle were conceded, the first being where the offence alleged or apprehendd involved some interference with a private or public property right and the second where there is a public interest in securing the observance of the law in the face of repeated violations of its criminal sanctions.

Whilst this reasoning may have been sound in its conception, the authorities revealed to Walters and Wells J.J. an extension, in the last 50 years, of the principles by which Equitty had held itself able to interfere in the realm of public law. This extension had been recognised by the High Court in *Cooney's* case[7], in which Menzies J. (with whom Kitto, Taylor and Windeyer JJ. agreed) observed that the jurisdiction of Equity had been enlarged to confer "benefits or advantages that could not be regarded as having any resemblance

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4. *Id.*, 172.
5. *Id.*, 167.
6. Viz.: "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes." *Gee* v. *Pritchard* (1818) 2 Swan 402, 413: 36 E.R. 670, 674, and similarly in *Macauley* v. *Shackels* (1827) 1 Bligh (NS) 96, 127: 4 E.R. 809, 820.
7. *Cooney* v. *Ku-ring-gai Municipal Council* (1963) 114 C.L.R. 582.

at all to proprietary rights"[8]. But although that much may have been clear, its applicability to and effect on the instant case were not free from doubt, as Bray C.J. pointed out. The High Court in *Cooney's case* was primarily concerned with breaches of laws that have a limited operation within the community generally. The offences, the commission of which had been restrained, were breaches of administrative regulations or by-laws, whereas the Police Offences Act is a public general Act. Wells J. however, inferred from the generality of the judgment of Menzies J., support for the wider application of the principle expressed therein, and Walters J., by necessary implication of his final decision, did not regard this distinction as material.

A further distinction drawn by Bray C.J. between the authorities and the instant case was likewise rejected. In the decided cases some sort of material interest in health, comfort, convenience or pocket was protected, whereas the instant case involved only the apprehended commission of offences against public morality or decency and no civil right or material interest of any particular individual, and indeed no material interest of the public itself, was alleged to be affected. Harvey J. (as he then was) in *Attorney General (N.S.W.)* v. *Mercantile Investment Ltd.*[9] had doubted "whether the court would ever interfere where the only injury alleged is to the moral well-being of the public, even though that injury is prohibited by Act of Parliament under penalty." The Court, he said, "should be very slow to interfere on behalf of the public injury in any case except where the members of the public require protection from some wrongful act from which they cannot protect themselves"[10]. The case before the court was not, in the opinion of Bray C.J., such a case, for the members of the public could protect themselves simply by staying away from the theatre.

The majority view expressed by Wells J. was that since the time of *Attorney-General* v. *Mercantile Investments Ltd.* there had been "almost dramatic" changes in this branch of the law and there was no longer any fundamental distinction to be drawn between laws based on supposed moral standards and other kinds of laws; and further, Harvey J. did not actually exclude the possibility of equity's intervention in areas of law concerned with moral standards, but rather, he was expressing a considered opinion that in those areas a strong case would have to be made out before Equity would be justified in using its reserve power to enjoin.

At this point it can be said that pursuant to the view of the authorities held by Walters and Wells J.J. it would be within the jurisdiction of a Court of Equity to enjoin the infringement of a law of general or limited operation, be it based on moral standards or otherwise, which protects no civil right or material interest in the health, comfort, convenience or pocket of any individual or member of the public, in order to confer a benefit or advantage which need not necessarily bear any resemblance to a proprietary right. What then was the benefit, advantage, right or interest which in this case, although it bore no resemblance to a proprietary right, could nevertheless justify the interven-

8. *Id.* 603.
9. 21 S.R. (N.S.W.) 183.
10. *Id.* 187.

tion of Equity? It was the public interest. To Walters and Wells J.J., the essence of the case was an action brought by the Attorney-General to assert a public right or interest in the enforcement of the law. It was the obligation imposed on the Attorney-General to promote the interests of all sections of the community and to prevent the wrong-doing of one resulting in injury to the general welfare which gave him standing in the Court, and by his intervention the dispute was no longer between individuals but between the law breaker and the public.

The concept of the public interest which lies at the core of the judgments of Walters and Wells J.J. and upon which their decisions were ultimately based, merits close analysis. It was not clarified however, other than by statements to the effect that if the law is flouted or brought into contempt a detriment to the public will result. Arguably, the public interest is something intangible and any detriment caused to it by the breach of a law is of a purely formal nature and cannot be quantitatively assessed, or at least not precisely. This would seem to be the rationalé of the view expressed by Wells J. that "if the apprehended offences in the opinion of the court *tend* to the detriment of the public . . . it is not necessary in order to establish the existence of the jurisdiction to prove that any detriment *will*, in the particular circumstances, *in fact be caused*"[11]. Walters J. made an interesting reference (p.186) to the prospect of "substantial injury to the public interest". The word "substantial" in particular suggests that some sort of quantitative assessment of the injury might, in fact, be possible. The next question of course relates to the factors of criteria upon which the court will rely in making such an assessment. The answer would seem to lie in the fact of His Honour's several references to open, repeated, continuous, persistent and intentional violations of a statute.

If it is a correct assumption that the detriment is purely formal, i.e., it is constituted by the breach of the law, it is difficult to see how distinctions can be made between offences. Wells J. spoke against the enjoining of felonies and misdemeanours[12], and Walters J. drew a distinction between the enjoining of crimes which are "definitely criminal and mala in se", which His Honour said would be inappropriate, and cases such as the instant case, which concerned "anti-social acts made quasi-criminal by statute", in which a completely different situation obtained[13]. Thus, it seems that some sort of qualitative assessment can be made of the detriment caused to the public interest by breach of different laws. Now while this proposition may be easily maintained if extreme examples are taken, no clear indication was given as to the basis on which distinctions between offences were to be drawn, nor as to the means by which the difficult cases, such as the instant case, were to be resolved. The Court thereby runs the risk of being accused of making a decision to enjoin on the basis of some unexpressed prejudgment or value judgment, and such accusations, it may be added, be they conceived in ignorance or nay, tend to bring the law and its institutions into disrespect. Similarly it may be asked why was the offence involved, quasi-criminal rather than mala in se. When all is said and done the public interest emerges as an unfortunately nebulous concept.

11. *Supra* n.1 at 199.
12. *Id.*, 210.
13. *Id.*, 181.

The statement of Walters J. that "where there is evidence that a statute will in future be openly, repeatedly, continuously, persistently and intentionally, violated a detriment to the public will result"[14], apart from its relevance to the analysis of the public interest above, also prompts an examination of the evidence before the Court in the instant case. The appellants had neither violated, let alone persistently flouted, any law, nor had they been prosecuted. Accordingly it was argued that it had not been proved that prosecution and the imposition of the penalty imposed by the Statute had and would be an ineffective means of enforcing the law. These facts were a distinguishing feature of the decided cases, and the appellants further claimed that what they proposed to do did not constitute any offence at all and they should be allowed to stand on this claim and bear the consequences if it was proved wrong. This argument was accepted only by Bray C.J. who refused to deny the appellants the right to a trial by jury, or in a court of summary jurisdiction, and thereby provide a means of short circuiting the processes of a criminal trial, with its safeguards for the rights of accused persons such as the burden on the prosecution of proving their case beyond reasonable doubt. "The dominant tradition of the English Law", observed the Chief Justice, "has always been to deal with offenders or potential offenders retrospectively for what they have done, not prospectively for what they might be going to do"[15].

The force of these considerations was recognised by Walters and Wells J.J. and both made it clear that they would not deny the right to trial by jury[16]. It was concluded that while proof of past breaches might be of great weight in determining whether future breaches are imminent, it was not essential to the existence of the jurisdiction. But in the words of Wells J., it was "largely the certainty of the primary facts that (took) this case out of the ordinary run"[17], and it is to be assumed that their Honours felt that the facts were certain beyond a reasonable doubt. Yet it must be asked that even though a trial in a court of summary jurisdiction would merely have vindicated this view (albeit with extra expense and delay) is this sufficient reason to preclude the operation of a process which is a corner-stone of the British system of justice? Walters and Wells J.J. thought that this argument did not outweigh the regard and effect which must be given to the public interest, which it would no doubt be added is what the law is ultimately designed to serve, but again what is the public interest but the sum of individual interests?—and so the debate continues.

The requirement of the condition precedent, as it were, of the certainty of the essential primary facts which Wells J. thought would effectively fetter persons who sought to invoke the principles of Equity in order to build and establish a modern regimen morum, makes it tempting to conclude that the particular case was unique and entirely sui generis, yet the fear expressed by Bray C.J. nevertheless remains, that if the injunction stood, the civil courts would be invaded by "bands of self-appointed moral vigilantes using the name of the Attorney-General, as by constitutional practice they would be able to

14. *Id.*, 186.
15. *Id.*, 166.
16. *Id.*, 181 and 210.
17. *Id.*, 210.

do if they showed him a prima facie case, seeking to restrain the publication of books and periodicals, the showing of films, the opening of art exhibitions, the performance of plays and, for all I know, the holding of public meetings and the delivery of speeches". His Honour added that it would be "a cause of some surprise that the authorities had not previously hit on this easy way of closing down brothels, sly grog shops and gambling dens"[18].

It is submitted that there may now be a right of action for conservationers and persons concerned with the protection of the environment.

A further limiting characteristic in what, at first glance, appears to be a decision of far-ranging implications is the requirement expressed by Wells J. that the apprehended offence must be seriously intended. This requirement as to intention should not be confused (as it has a tendency to be) with the requirement as to the certainty of essential primary facts in issue. It is one thing to say that a person seriously intends to do or perform something and another to say that that act or performance would undoubtedly involve the commission of a breach of the law.

As to the argument that it is the general rule that where an Act creates an offence and provides a remedy, then the only remedy is that provided by the statute, Wells J. was of the opinion that this general rule was displaced by the intervention of the Attorney-General, subject to the qualification which was not applicable in the instant case, that a set of laws, Parliamentary or subordinate, may be so comprehensive as to demand reading as an exhaustive code, and accordingly exclude the Attorney-General's remedy altogether[19]. In the instant case the intervention of the Attorney-General meant that dispute had become one "between the public at large and a small section of the public who are refusing to obey the law of the land"[20]. Walters J. had rejected a total acceptance of the general rule, at least impliedly, when he said:

> "the foundation of equitable jurisdiction lies in the inadequacy of the relief as it is administered through ordinary legal procedures; the acts which occasion the right to a remedy may be brought within the cognizance of common law or statutory law, yet the remedies provided are so insufficient that complete justice can only be done by means of the equity jurisdiction . . . In a case where the ordinary remedy to be obtained is not as efficient as the relief which equity will confer in the same circumstances, something in the nature of a concurrent equity jurisdiction subsists in order to redress the alleged illegal act"[21].

Now while prima facie, it seems implicit in such statements that there be a person who has already broken the law, or that there be an act which is alleged to be illegal and which must be redressed by (the most effective) retrospective action, their Honours, as has been seen, did not regard proof of prior breaches of the law as essential.

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18. *Id.*, 165.
19. Note the explicit wording of the provisions of the Places of Public Entertainment Act Amendment Act 1971-1972 which are set out in the addendum. The Act was passed after judgment was given in the case.
20. *Supra* n.1 at 198.
21. *Id.*, 176.

On what basis then did Walters J. when considering the exercise of the jurisdiction decide that the remedy provided by the legislature was inadequate? The only guide given is in the statement: "if what is in prospect is likely to occasion substantial injury to the public interest which cannot be repaired—if the proceedings are allowed to run their normal course—then, as it seems to me, the party who has established his jurisdictional right is entitled virtually to go to complete relief, and the interlocutory injunction should go"[22]. But if it is correct to assume that the injury to the public interest lies in the fact that a breach of the law has been committed it will never be able to be repaired, for what is done cannot be undone: To construe the sentence as placing the emphasis on the requirement of "substantial injury" to the public interest ultimately leads us back to the question of how can their injury be quantitavely assessed and accordingly makes the answer to their question doubly important. It may well be that the size of the maximum penalty provided by the Act is a relevant factor (in the instant case in which the injunction went the maximum penalty under s.23(1) was comparatively small in the context of the case, viz. $100 or imprisonment for three months); but this was not expressly stated. Would the relevance be that the smaller a penalty, the less seriously parliament regards an offence and accordingly that the less is the need in the eyes of the lawmakers to restrain, in advance, the apprehended commission of the offence; or would it be that, as seems more consistent with the judgment, the smaller the penalty the more the apprehended breach of a law (or more consistently, any law which makes anti-social acts quasi-criminal) should be prevented in advance in order to protect the public interest?

Walters and Wells J.J. in contrast to Bray C.J. rejected the appellants argument against the exercise of the jurisdiction based on the relative damage, harm and inconvenience likely to be suffered by the appellants and the members of the public, because of the overiding consideration of the protection of the public interest. A matter upon which Bray C.J. concentrated however, was the effect of certain correspondence between the Attorney-General and the appellants, and the fact that the Attorney-General had not exercised the powers he possessed under s.25 of the Places of Public Entertainment Act (S.A.) 1913-67. It was the view of Bray C.J. that the relators were using the name of the Attorney-General to ask the Court to do something which he had power to do himself in his official capacity without reference to the Court and which he had disclaimed his intention of doing unless and until a performance demonstrated that he ought to do it. Wells J. on the other hand felt that the producers, in proceeding with their plans. had accepted "the very real risk that they would be frustrated by some process of law, be it administrative or in the courts . . . They had shown themselves unmindful of warnings" and were "apparently determined to put on the show unless enjoined"[23]. It was His Honour's view that "the Attorney-General had not seen fit to use his power under the Places of Public Entertainment Act and had suffered the relator action to proceed according to law[24]. His Honour was supported by Walters J. in his view that the jurisdiction which they had held to exist should be exercised and accordingly the appeal was dismissed.

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22. *Id.*, 186.

"The play's the thing wherein I'll
catch the conscience of the king." Hamlet II, ii.

Addendum

On 23rd March, 1972, the Places of Public Entertainment Act Amendment Act 1971-72 was assented to, and the following was inserted:

> "(1) Where a Minister is of the opinion that a public entertainment has been, or is about to be conducted in a place of public entertainment in contravention of the provisions of this Act, or any other Act or law, he may apply to a local court of full jurisdiction for an order under this section.
>
> (2) The Minister, the proprietor of the place of public entertainment and any person by whom the public entertainment was, or is to be conducted may appear personally or by counsel upon the hearing of an application under this section.
>
> (3) Where the court is satisfied upon the hearing of an application under this section that a public entertainment has been, or is about to be concluded in a place of public entertainment in contravention of the provisions of this Act or any other Act or law, and that an order should in the interests of the public be made under this section, it may order:
>
> (a) that the place of public entertainment be closed and kept closed, for a period specified in the order, or until further order of the Court.
>
> (b) that the place of public entertainment be not used for the conduct of the entertainment, or an entertainment of the kind specified in the order.
>
> (4) Where an order has been made under this section, the Commissioner of Police shall ensure that the order is complied with and any members of the Police Force acting under his authority may enter any place or premises, and exercise such force as may be reasonably necessary to give effect to the order."

Now while the Act seems clearly, in both intent and effect, to remove the equitable jurisdiction of the Court in relation to public entertainment which has been, or is about to be, conducted in breach of the law, it should be noted that the equitable principles upon which the majority relied were not expressly limited, or necessarily related to public entertainment.

M. W. Mills*

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23. *Id.*, 214.
24. *Id.*, 215.

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ATHENS - McDONALD v. KAZIS

CONTRACT — DAMAGES — MENTAL INJURY

The recent case of *Athens-Macdonald* v. *Kazis*[1] decided by Zelling J. in the South Australian Supreme Court may be a significant development in the law relating to the award of damages for mental injury, such as anxiety, suffering and torment caused by a breach of contract. Before examining this case, the existing law will be briefly reviewed.

In *Robinson* v. *Harman*[2] Baron Parke said:

> "The rule of the Common Law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Unfortunately such a statement is deceptively broad. Although apparently governing every situation, on examination of the cases it is found that such a "principle" can only be applied after other conditions required by precedent, have been satisfied. So it is that the damage sustained is usually required to be of a pecuniary nature. Thus in *Hamlin* v. *Great Northern Railway Company*[3] Pollock C.B. said:

> "In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated . . . The plaintiff is entitled to nominal damages, at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract . . . it may be laid down as a rule that generally in actions upon contracts no damages can be given which can not be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract."

Ease of assessment of damages, uniformity in the law, and certainty in commercial affairs are sometimes advanced as reasons for such a rule. For example in *Addis* v. *Gramophone Company*[4] Lord Atkinson took the view that exceptions should be "checked rather than stimulated; inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more 'lawless science' than it is said to be".

Thus in *Foaminol Ltd.* v. *British Plastics*[5] although pecuniary loss had undoubtedly been suffered, through a loss of good will, Hallet J. refused to estimate the amount involved:

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1. [1970] S.A.S.R. 264.
2. [1848] 1 Ex. 850, at 855. For a similar general statement, see *Hadley* v. *Baxendale* [1854] 9 Ex. 341 at p.354 per Baron Alderson.
3. 156 E.R. 1261 at 1262.
4. [1909] A.C. 488.
5. [1941] 2 All E.R. 393, at 401.