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Injunction Versus Indictment

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from any right therein might lead to his unwillingness to disclose his discovery. To avoid this, the owner of the *locus in quo* should be given the custody of the goods for a period determined by statute, after which he and the finder should share in the goods equitably.

Whether the distinction between lost and mislaid goods should be maintained is a serious question. From the practical difficulties arising in determining, in a specific case, into which of these categories a particular object falls, a negative answer is supportable. Then too, the possibility of a mislaid article slipping to the floor and becoming lost also argues against this distinction. But if the itinerant finder of goods, mislaid in a quasi-public place, is to be given the right to possession, rather than the owner of the *locus in quo*, the distinction should be maintained. For then the owner of the *locus in quo*, who is more likely to protect the interests of the owner, would retain possession under the established rules of mislaid property. It is submitted that, unless the receptacle theory is followed, the distinction between lost and mislaid property should be maintained but modified to give both the finder and the owner of the *locus in quo* equitable protection where the owner of the chattel does not ultimately claim the property.

INJUNCTION VERSUS INDICTMENT

I. INTRODUCTION

In the formative years of the English common law,¹ there were many gaps in the remedies necessary for a complete code of justice. These gaps were caused by the rigid adherence of the common law judges to precedents to the extent that in many instances even if the precedent were clearly wrong, it was followed.² Such an inflexible conservatism perpetuated error and unjust law. Litigants were forced to appeal to the king who in turn referred them to his chancellor,³ the "keeper of his conscience." The chancellor was invariably a clergyman, and a student of Roman and Canon law.⁴ When he

1. To properly evaluate the nature of the problem involved, the history of equity in general is a necessary adjunct. Cf. 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (13th ed. 1886) 51.

2. 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 16. This rigidity prevented the English common law from developing along the line of natural justice as did the law in ancient Rome. The Roman law was aided in its development toward natural justice because of the willingness of the praetors to administer both law and equity. In England, however, the common law judges were not disposed to so adapt themselves. This situation necessitated the establishment of the two rival systems of common law and equity. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 449. When Lord Mansfield attempted to emulate the Roman praetors, he was accused of being ignorant of the English law. 1 POMEROY, *op. cit. supra* § 18; cf. 1 HOLDSWORTH, *op. cit. supra* at 77, 78.

3. 1 HOLDSWORTH, *op. cit. supra* note 2, at 449.

4. 5 HOLDSWORTH, *op. cit. supra* note 2, at 218.

decided the cases it was in accordance with the doctrines of *aequitas* prevalent in those systems of jurisprudence.⁵ In this manner, a code of justice was formed to complement the law.⁶ The theory was that wherever the remedy at law was inadequate, recourse was had to equity for relief.⁷

At first, this jurisdiction of equity was ill-defined and the common law was not considered to be a separate and distinct system of law.⁸ And so, it happened that the chancellor did not confine his jurisdiction to the civil law. Jurisdiction was assumed over cases of criminal nature. There were two reasons for this extension of equity to the penal branch of the law. The first was that the local magistrates at the time of Richard II were easily impressed by wealthy landowners.⁹ A penurious plaintiff did not receive justice against an affluent defendant. The second cause of the extension of equity into criminal matters was the widespread lawlessness and the rampant violence prevalent throughout the country.¹⁰ But it must be noted that this juris-

5. 5 HOLDSWORTH, *op. cit. supra* note 2, at 216; *cf.* POLLOCK, *ESSAYS IN THE LAW* (1922) 40. The law of nature as declared by the Romans is similar to the law of God as declared by the clergy in the Canon law.

There were several factors operating to prevent the development of the English common law into a system of jurisprudence similar to the concepts of right, duty, and morality as they existed in the Roman code. The inflexibility of the common law was one. See note 2, *supra*. Secondly the feudal laws of property found no counterpart in the law of Rome. 1 POMEROY, *op. cit. supra* note 2, § 18. Thirdly, after the Reformation, the animosity of the Crown for the Church of Rome was wreaked upon everything Roman. The law of Rome, too, became obnoxious because of its name and its support by the Pope. It fell into disfavor and was rarely cited in the common law courts. *Id.* § 12; *cf.* *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Reprints 107 (1704) (common law judge basing the entire doctrine of bailments on the Roman concept); 2 HOLDSWORTH, *op. cit. supra* note 2, at 289.

6. There were many reasons besides the failure of attainment of justice in the common law courts for the trend of litigants to equity. A major shortcoming of the common law was the fixed number of the forms of action. If a cause of action didn't fit the limited number of writs, there was no remedy at law and relief was had in equity. 1 POMEROY, *op. cit. supra* note 2, § 21. Another reason was the inability of the law courts to command an act to be done by the parties. MAITLAND, *EQUITY* (2d ed. rev. 1936) 5. An advantage of a trial in equity was that its flexibility enabled it to deal with more than a two-sided case. EATON, *EQUITY* (2d ed. 1923) 14. Another advantage of equity procedure was that the future commission of harm could be enjoined. CLARK, *EQUITY* (1937) § 5.

7. 1 POMEROY, *op. cit. supra* note 2, § 217; EATON, *op. cit. supra* note 6, § 8.

8. MAITLAND, *op. cit. supra* note 6, at 5; EATON, *op. cit. supra* note 6, at 5. It was not until the fourteenth century that a clear distinction was made between equity and common law. Adams, *The Origin of English Equity* (1916) 16 COL. L. REV. 87. As an example of the lack of any definite boundary, the kings justices for a time believed that they could do whatever equity could do. 1 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1923) 197.

9. EATON, *op. cit. supra* note 6, at 15.

10. Mack, *Revival of Criminal Equity* (1903) 16 HARV. L. REV. 389, 390, 391; Comment (1930) 28 MICH. L. REV. 440.

diction was considered as temporary.¹¹ The chancellors were merely aiding the courts of law until such time as the common law judges were able to judiciously handle the cases. After the Tudor period, the condition of the country was altered. Equity became clearly defined as a court of civil remedies complementary to the common law, and the chancellors completely receded from their interference with the criminal law.¹²

The maxim finally developed that equity will not enforce the criminal law.¹³ Equity will not enjoin the commission of crimes.¹⁴ However, in the past few years, the accusation has been made that courts of equity have unwisely extended their jurisdiction once more so as to include the administration of the criminal law.¹⁵ This can be clearly seen when the *Debs*¹⁶ case is used

11. See *Stuart v. La Salle County*, 83 Ill. 341, 345, 25 Am. Rep. 397, 400 (1876). Since the abolition of the Court of Star Chamber there has been no criminal jurisdiction of equity. Mack, *supra* note 10, at 391; Maitland, *op. cit. supra* note 6, at 19.

12. 1 HOLDSWORTH, *op. cit. supra* note 2, at 405. However, because of the many disadvantages of the common law procedure and the advantages of the equity procedure, the court of chancery retained its civil jurisdiction. See note 6, *supra*.

13. This maxim is attributed to Lord Eldon. It is interesting to note that it was merely *dictum*. See *Gee v. Pritchard*, 2 Swans. 402, 413, 36 Eng. Reprints 670, 674 (Ch. 1818).

14. *Cope v. District Fair Ass'n*, 99 Ill. 489 (1881). The strict rule is that equity will only protect property rights. There is no basis in principle for equity to confine its protection to property rights although as a practical matter it is better so restricted. Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 222. Although it has been stated that equity will not enforce personal rights, there have been many exceptions to the rule. EATON, *op. cit. supra* note 6, § 6. This rule that equity restricts itself to protection of proprietary rights only has evolved so that equity will not protect political rights. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683 (1894) (to prevent giving of election notices); *United States Voting Machine Co. v. Hobson*, 132 Iowa 38, 169 N. W. 458 (1906) (use of voting machines); *Winnett v. Adams*, 71 Neb. 317, 99 N. W. 681 (1904) (to supervise the management of a political party); *State ex rel. Crawford v. Dunbar*, 48 Ore. 109, 85 Pac. 337 (1906) (to strike words from a ballot); *Fuller v. McHaney*, 192 S. W. 1159 (Tex. 1917) (count ballots and declare result of election); nor will equity enforce religion or morality. *Snedaker v. King*, 111 Ohio St. 225, 145 N. E. 15 (1924); see *Cope v. District Fair*, 99 Ill. 489 (1881); Cohen, *Positivism and the Limits of Idealism in the Law* (1927) 27 COL. L. REV. 237, 246; but see (1932) 23 J. CRIM. L. 659.

15. That there have been extensions is clear. *In re Debs*, 158 U. S. 564 (1894); *Ex parte Wood*, 194 Cal. 49, 227 Pac. 908 (1924); *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 14 N. E. (2d) 439 (1938); CLARK, EQUITY (1937) § 244. That it has been unwise, many writers have alleged. Comment (1924) 73 U. PA. L. REV. 185; Simpson, *supra* note 14, at 247.

16. *In re Debs*, 158 U. S. 564 (1894). A labor dispute arose between the Pullman Company and its employees. To adjust the dispute, four officers of the union combined to boycott the cars of the company by preventing the trains from leaving Chicago. An injunction was issued commanding them and all others combining with them to desist from their tactics. The injunction was disobeyed and the officers were found in contempt and sentenced to imprisonment. This case originated on a petition for a writ of *habeas corpus* on the ground that the actions of the petitioners in obstructing the

as a turning point. Prior to that time, American courts of equity sparingly used the injunction to prevent a crime. Since that case, however, it has been eagerly seized upon as a precedent,¹⁷ and no more phenomenal growth has been witnessed than that of the injunction. Today it is a common method of law enforcement,¹⁸ having been nurtured both by judicial and legislative sanction.

Perhaps the theory that doctrines of equity have become rigid, inflexible, and crystalized¹⁹ must now be qualified in the area of criminal law. Here, at least, the equitable jurisdiction is not stagnant. It may well be that just as equity originally arose as an aid to the common law, it is now reawakening as an aid to the criminal law.²⁰ To what extent will the criminal jurisdiction of equity develop? At this early stage of its evolution, the limits of its possible exercise are unknown.

II. THE BENEFITS AND DISADVANTAGES OF A CRIMINAL EQUITY

Assuming for the moment, that the venerable doctrine that equity will not take cognizance of violation of the penal law is being effaced, what harm is there in such an elimination? When Pomeroy²¹ conservatively advocates extending the use of the injunction in criminal matters which are "closely analogous," he does so cautiously. Indeed, he contends that if this authority were generally expanded, it would be a clear denial of the right to a trial by jury. This temperate stand is in striking contrast to the suggestions of other writers who see naught but benefits in the effectiveness of the injunction.²² Of course, no one can deny that the injunctive process is a speedy²³ and

United States' mails was a crime and that no injunction could issue to prevent a crime. The writ of *habeas corpus* was denied and the court stated that even if a crime were involved, there was also a public nuisance in the obstruction of a public highway of commerce. It was declared that restraining nuisances was always in the province of equity.

17. Simpson, *supra* note 14, at 228.

18. *Id.* at 225; (1923) 8 CORN. L. Q. 371.

19. Simpson, *supra* note 14, 172.

20. *Cf.* Mack, *supra* note 10, 389. That the enforcement of the law is lax and that public officials are corrupt is not enough to move equity to exercise its sweeping powers. *Powers v. Flansburg*, 90 Neb. 467, 133 N. W. 844 (1911). *Contra*: *Mayor of Columbus v. Jacques*, 30 Ga. 506 (1860) (influence of defendants would sway jury); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912). These two cases are against the weight of authority. Caldwell, *Injunctions Against Crime* (1931) 26 ILL. L. REV. 259, 273. See *State v. Crawford*, 28 Kan. 726, 733, 42 Am. Rep. 182, 185 (1882) (failure of jury to convict not ground for equity to interfere).

21. 5 POMEROY, *op. cit.* *supra* note 2, § 1894.

22. HUSTON, *THE ENFORCEMENT OF DECREES IN EQUITY* (1915) vii; *McMurdy, Use of the Injunction to Destroy Commercialized Prostitution* (1929) 19 J. CRIM. LAW 513. It cannot be denied that the injunction is effective when officers of the law neglect to perform their sworn duty, but that has always been insufficient grounds for equity's interposition. *Heber v. Portland Gold Mining Co.*, 64 Colo. 352, 172 Pac. 12 (1918). The remedy in such a case is the ballot box.

23. Chafee, *The Progress of the Law* (1921) 34 HARV. L. REV. 388, 398.

efficient deterrent.²⁴ But speed and efficiency are not synonymous with justice. No defendant charged with a crime desires to go to prison in a hurry if there is a possibility that a slower trial before a jury of his peers will acquit him. Deprivation of this jury trial is a deviation from the normal course of criminal enforcement. Injury to the interests of the general public will be done unless the procedure of the criminal trial be preserved. By means of this artful destruction of constitutional guarantees, a definite destruction of respect for the courts will be experienced.²⁵ The public will not analyze their opposition²⁶ because of their ignorance of the refinements of jurisprudence. But although they do not distinguish between courts of law with juries and courts of equity without juries, they vaguely experience a feeling that a procedure contrary to tradition is taking place. The explanation that the injunction is merely preventive and not punitive²⁷ will be inadequate. They know that it is penal in result, if not in character, because a violation of the injunction means summary punishment for contempt.²⁸

There is still another surprise in store for a hapless defendant. Having been punished for violating the injunction, the possibility of a conviction for violation of the penal law remains. The plea of double jeopardy is no defense to either action because one is criminal and the other is civil.²⁹ In California, there is even a possibility of a third punishment. In that state, the wilful disobedience of an order of a court is a crime all its own.³⁰ Nor is it *res*

24. Mack, *supra* note 10, at 400. The efficiency of the injunction lies in the fact that it is a more personal order than the penal law which is the standing injunction against crime. Caldwell, *supra* note 20, at 274. See Legis. (1932) 45 HARV. L. REV. 1096, 1101.

25. See Caldwell, *supra* note 20, at 280.

26. Mack, *supra* note 10, at 402; Legis. (1932) 45 HARV. L. REV. 1096, 1101, 1102. Note, however, that these writers indicate that the opposition to the injunction arose because of labor's dislike of the labor injunction. They further contended that the average American is in favor of the extended use of the injunction in the criminal area. This writer disagrees, and feels that when the average American is the defendant in equity on a matter of criminal nature he, too, will find disfavor with the speedy and efficient injunction.

Mack at 403 indicates that the public welcomes the extended use of the injunction especially in cases of violations of the antitrust law because the offenders were too influential for the criminal courts. But he cautions with some degree of foresight that this jurisdiction may lead to abuse. This misuse of power is somewhat evident today in the present policy of the U. S. Department of Justice. The threat of the remedy of injunction plus an added amount of publicity adverse to the defendant finally is expected to result in a consent decree. It is possible for this decree to contain provisions beyond those obtainable in the ordinary suit in equity. See Arnold, *Use of Present Antitrust Procedure* (1938) 47 YALE L. J. 1294, 1300 where he admits the policy of the Department is the use of the injunction, publicity, and consent decrees.

27. See *Littleton v. Fritz*, 65 Iowa 488, 452, 22 N. W. 641, 644 (1885).

28. Comment (1930) 28 MICH. L. REV. 440, 442.

29. *People ex rel. Lemon v. Elmore*, 225 App. Div. 869, 233 N. Y. Supp. 40 (2d Dep't 1929); *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870 (1906); see *In re Debs*, 153 U. S. 564, 599 (1894). *Contra: Ex parte Morris*, 194 Cal. 63, 227 Pac. 914 (1924).

30. See (1924) 13 CALIF. L. REV. 63, 67.

adjudicata that the defendant has already been *acquitted* on a criminal charge of maintaining a nuisance.³¹ The theory of these holdings is that the purpose of the equity trial is prevention and not punishment. However, many of the statutes upheld are in obvious contradiction of this explanation. They provide that if the existence of a nuisance has been proved, equity has no alternative but to grant the injunction even though the nuisance no longer exists. There is no obligation to prove that the nuisance is likely to recur.³² It is obvious that the abatement of an already abated nuisance is merely a thinly disguised delegation of criminal jurisdiction to equity. The impression of having been tricked will be justifiable. It is then but a short step to the shattering of complete faith in the expected true administration of justice.

The breakdown of this requirement for a jury trial in criminal matters³³ is being accomplished in two ways: (1) by legislation which widens the area of equitable jurisdiction and transfers the control of criminal matters to the equity courts; and (2) by the generous extension of the equitable principle that a court of equity will act where the remedies at law are inadequate.³⁴ The enlargement by legislation will be later considered.³⁵ Distortion of the equity requirement of an inadequate remedy at law has been urged by district attorneys. The theory developed in cases where defendants were acquitted every time they were indicted.³⁶ This difficulty to convict is well illustrated in the unsuccessful prosecutions of persons practising a profession without a license; following each acquittal the defendant at once commits the alleged crime again and again. But it is submitted that it is fallacious to argue that the *legal* remedy is inadequate because *juries* refuse to convict. The jury was purposely created so that the law would be tempered with the human element.³⁷ This was evident during the prohibition era. Juries were loathe to convict because of lack of sympathy for the statute creating the crime.³⁸

31. *Murphy v. United States*, 272 U. S. 630 (1926).

32. See Comment (1930) 15 CORN. L. Q. 269, 271.

33. Jury trials are guaranteed in criminal cases. U. S. CONSR. Amendment VI (1791); N. Y. CONST. Art. I, § 2 (1938); *United States v. Cunningham*, 37 F. (2d) 349 (D. Neb. 1929).

34. See note 7, *supra*.

35. See p. 247, *infra*.

36. *State ex rel. La Prade v. Smith*, 43 Ariz. 131, 29 P. (2d) 718 (1934); *State v. Chicago B. & Q. R.R.*, 88 Neb. 669, 130 N. W. 295 (1911). *Contra: People ex rel. Bennett v. Laman*, 277 N. Y. 368, 382, 14 N. E. 439, 445 (1938).

37. See Howe, *Juries as Judges of Criminal Law* (1939) 52 HARV. L. REV. 582-584. The refusal of juries to convict today is not the counterpart of the refusal of judges to convict during the reign of Richard II. See p. 238, *supra*. The juries are performing their duty honestly whereas the judges were shirking their duty corruptly. *Cf. CLARK, op. cit. supra* note 6, § 244 where he says history is repeating itself. But see note 20, *supra*. Law enforcement will not move equity to grant relief.

38. (1931) *The World Almanac*, p. 37. Report by the Assistant Attorney General on liquor enforcement. Trials by jury resulted in 61% acquittals in the Eastern District of New York, and in the Southern District of New York the acquittals were 53%. This report covered the year ending June 1930 and it is stated that this ratio remained constant. However, note that only about 10% of all the cases were even submitted to juries. *Cf.*

Besides any number of other factors may contribute to an acquittal. The jurors may not be convinced beyond a reasonable doubt, or the district attorney may not have properly prepared his case.

Once adopt a liberal policy of granting injunctions in aid of the criminal law and the safeguards of the ordinary rules of criminal procedure are evaded by merely changing the tribunal for determining guilt.³⁹ In any criminal prosecution, following the indictment, there is a jury trial; guilt must be shown beyond a reasonable doubt; and there is a presumption that the defendant is innocent until proven guilty.⁴⁰ Not so under the equity procedure. No longer is it necessary to establish the guilt of the defendant beyond a reasonable doubt, but only by a preponderance of the evidence.⁴¹ This is graphically illustrated by considering the simple crime of lending money at usurious rates of interest.⁴² If this crime is made the basis of injunctive proceedings the picture is materially altered. There is no jury;⁴³ no longer is there a presumption of innocence; no longer need the evidence be so overwhelming as to destroy all reasonable doubt. Mere preponderance suffices. A still further development of the extension into criminal matters occurs after the injunction has been disobeyed. The defendant is now charged with contempt. A one-man court sits in judgment. There is no jury here and all the other safeguards of the criminal trial heretofore mentioned are missing.⁴⁴

State v. Jones, 114 Wash. 144, 194 Pac. 585 (1921) where the court held that although the defendant had a glass of liquor in his hand, he did not have it in his possession. This is an indication that the attitude of judges towards the enforcement of the liquor laws was similar to the antipathy of jurors prevalent at the time.

39. FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 107.

40. People v. Sutherland, 252 N. Y. 86, 168 N. E. 838 (1929); *Royals v. Commonwealth*, 144 Va. 630, 131 S. E. 204 (1926).

41. Courts of equity are courts of civil law and the rules of evidence of these civil courts is observed. 2 STORY, *op. cit. supra* note 1, 854; 5 WIGMORE, *EVIDENCE* (2d ed. 1923) § 2498; *cf.* Comment (1924) 72 U. PA. L. REV. 283, 286 where he suggests that in spite of the fact that a preponderance of evidence suffices, no judge who is human would be satisfied until all reasonable doubt is dispelled.

42. N. Y. PENAL LAW (1938) § 2400; State *ex rel.* Smith v. McMahon, 128 Kan. 772, 280 Pac. 906 (1929). This is the first case to attempt enforcement of the usury law by an injunction. Comment (1930) 39 YALE L. J. 590.

43. Note that in the granting of the labor injunction a jury trial is now provided for. (1938) 8 BKLYN. L. REV. 100, 106.

44. See Comment (1930) 28 MICH. L. REV. 440, 442. It has been suggested that the defect of a jury trial be corrected at this point by requiring juries in cases of contempt. This suggestion is not practicable. To permit the uncertainties of a jury trial to prevail where formerly punishment for contempt was summary would undermine the entire strength of the equity court. The remedy lies not in the enforcement of the injunction but in the jurisdiction to issue them. Mack, *supra* note 10, at 402. Unless checked, the momentum of this expansion may carry it along to unbelievable lengths. In California it seems the limit has been reached. Comment (1925) 73 U. PA. L. REV. 185. This result was obtained by the use of an "omnibus" injunction. The injunction merely recited the penal statute in the form of a restraining order and it was directed to unnamed defendants. *Ex parte* Wood, 194 Cal. 49, 227 Pac. 908, 911 (1924). A similar device

III. NUISANCES

Although many dangers have been indicated in the use of the equitable process, there are instances of the use of the powers of equity which are approved by tradition and practicability. That equity will act to restrain nuisances is well known.⁴⁵ This is true even though the injunction will incidentally restrain the commission of a crime.⁴⁶ The rule has evolved that it is no defense to a bill to enjoin a nuisance whether public or private⁴⁷ to show that it is also a crime and that the criminality of the deed will not *per se* oust equity of jurisdiction.⁴⁸

A public nuisance has been defined as any place where a public statute is "openly, publicly, repeatedly, continuously, persistently," and intentionally violated.⁴⁹ This definition is indicative of the general looseness of language associated with this term.⁵⁰ However, such a result is almost inevitable because the term is so comprehensive and its content so heterogeneous. A more exact definition and one limited to cases in which it is proper for equity to act is anything causing material inconvenience or serious annoyance to the public as a whole.⁵¹ The best example of the classical public nuisance is the maintenance of saloons and gambling-houses.

The right of action to restrain the commission of a public nuisance⁵² belongs to the government. There is only one distinction between this cause of action and one to restrain a private nuisance. No property right in the government need be shown.⁵³ It is sufficient that there is the duty to protect the property rights of all its citizens.

New York, however, insisted for a long time that there be a property right even when the suit was instituted by the state. In *Attorney-General v. Ulica*

was used in Michigan. There "John Doe" and "Richard Roe" were enjoined from violating the laws of the state of Michigan. Comment (1930) 28 MICH. L. REV. 440, 443 (unreported case).

45. 1 POMEROY, *op. cit. supra* note 2, § 24.

46. 5 POMEROY, *op. cit. supra* note 2, § 1941.

47. Private nuisance: *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59 (1892); *Hamilton v. Whitridge*, 11 Md. 128 (1857). Public nuisance: *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374 (1897); *State v. Crawford*, 28 Kan. 726, 42 Am. Dec. 182 (1882).

48. See *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 14 N. E. (2d) 439, 444 (1938).

49. *State v. Crawford*, 28 Kan. 726, 733, 42 Am. Rep. 182, 189 (1882); *cf.* the definition in N. Y. PENAL LAW (1909) § 1530.

50. Caldwell, *supra* note 20, at 267. "The category of public nuisance includes such an infinite variety of seemingly unrelated situations that it is impossible to frame any definition which would be of material assistance in determining what is and what is not a public nuisance in particular cases." RESTATEMENT, TORTS (Tent. Draft No. 16, 1938) 55.

51. *State v. Columbia Water Power Co.*, 82 S. C. 181, 63 S. E. 884, 889 (1909); see 4 BL. COMM. 167.

52. Chafee finds the power of the chancellor to restrain public nuisances in the fact that he is the representative of the sovereign who is the guardian of the public welfare. Chafee, *supra* note 23, at 395.

53. *State v. Lindsay*, 85 Kan. 79, 116 Pac. 207 (1911).

*Insurance Co.*⁵⁴ the court refused to enjoin unauthorized banking operations. The court stated by way of *dictum* that assuming that this was a public nuisance, no injunction would issue because there was no interference with any property rights of the state or the public. Relying on this *dictum*⁵⁵ relief was denied unless a property right could be found needing protection.⁵⁶ But there was not universal acceptance of the New York opinion,⁵⁷ and even those states which adopted the New York viewpoint later abandoned it.⁵⁸ The courts began to recognize that health and morals were just as important as property rights. But it was not until 1938 that New York judicially recognized this truism. In the case of *People ex rel. Bennett, Att'y-Gen. v. Laman*⁵⁹ the court restrained a chiropractor from the unlicensed practise of medicine. It was clearly stated that the basis of the decision was the power of courts of equity to restrain acts which are detrimental to the public health. Thus the annoying and illogical requirement⁶⁰ that a property right must be involved was deleted from the public nuisance class of cases. It must be observed, however, that neither the mere unlicensed practise of medicine,⁶¹ nor the

54. 2 Johns. 371 (N. Y. 1817).

55. It is interesting to note that the subject of criminal jurisdiction of equity is easily influenced by *dicta*. It is the dictum of Lord Eldon in *Gee v. Pritchard*, 2 Swans. 402, 413, 36 Eng. Reprints 670, 674 (Ch. 1818) which is the keystone of this subject, generally.

56. See Caldwell, *supra* note 20, at 264; (1938) 8 *BELTON. L. REV.* 100, 101. Compare *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809 (1898) with *State v. Schweickardt*, 109 Mo. 496, 19 S. W. 47 (1892).

There is an early English case in which an injunction was granted on unusual facts. The plaintiff was the Emperor of Austria. He successfully enjoined the defendants in the English Court of Chancery from bringing spurious paper money from England into Austria. The court side-stepped the criminal aspect of the case by declaring it was preventing injury to property. *Emperor of Austria v. Day*, 3 De G., F. & J. 217, 45 Eng. Reprints 861 (1861).

57. *State v. Mobile*, 5 Porter 279, 30 Am. Dec. 564 (Ala. 1837); *Attorney-General v. R. R.*, 35 Wis. 425, 537 (1874).

58. Compare *State v. Schweickardt*, 109 Mo. 496, 19 S. W. 47 (1892) with *State v. Canty*, 207 Mo. 439, 105 S. W. 1078 (1907).

59. 277 N. Y. 368, 14 N. E. (2d) 439 (1938).

60. Simpson, *supra* note 14, at 222. Whether this need for a property right as stated in the *Utica Ins. Co.* case had to be satisfied in New York was in doubt until the *Laman* case finally erased it. It will be recalled that in the *Utica Ins. Co.* case it was merely *dictum*. Then *Health Dep't v. Purdon*, 99 N. Y. 237, 2 N. E. 687 (1885) stated in a dictum that an injunction would issue to protect the health of the community even though there were no property rights involved. However, the court cited the *Utica Ins. Co.* case favorably. These developments can well be called erratic. Cf. *Att'y-Gen'l v. R. R.*, 35 Wis. 425, 549 (1874). A true indication of this unsettled state of the law is evident from the report of the Appellate Division in the *Laman* case. The injunction was denied on the authority of the *Utica Ins. Co.* case which it declared had never been questioned. 250 App. Div. 660, 295 N. Y. Supp. 223 (2d Dep't 1937). See (1938) 24 *CORN. L. Q.* 118.

61. *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 371, 14 N. E. (2d) 439, 442 (1938). *Contra: Kentucky State Bd. v. Payne*, 213 Ky. 382, 281 S. W. 188 (1926).

mere violation of any other penal statute,⁶² spells out a nuisance *per se*. The fact of the public nuisance must be proved.⁶³

Kansas has gone further and has even abolished the necessity of proving the fact of a public nuisance. This is evidenced by the case of *State ex rel. Smith v. McMahan*⁶⁴ where the lending of money at usurious rates of interest was restrained.⁶⁵ When an injunction issues in a case such as this, it seems that a cause of action is made out by merely alleging the successive violations of the criminal law. The weight of authority has always been against this proposition.⁶⁶ It is submitted that this case is an unwarranted extension of the proposition of the *Debs*⁶⁷ case that equity has jurisdiction to protect the "public welfare."

*City of New Orleans v. Liberty Shop*⁶⁸ is another example of the extension of equity jurisdiction by way of extending the scope of public nuisances. In that case, an injunction was granted to prevent the operation of a retail business in a residential district in violation of a municipal zoning ordinance. The court found that this amounted to a nuisance⁶⁹ to a sufficiently large number of the public and therefore restrained it.

Equity will also grant an injunction to restrain the commission of a private nuisance. A private nuisance is spelled out whenever a person's occupation and enjoyment of his property are rendered injurious to his health whether because of odors, noises, or because of other injurious or seriously disturbing features.⁷⁰ It is most essential for the plaintiff in order to come within the confines of this definition, to show a substantial interference with the enjoyment of his property.⁷¹ This requirement is particularly important and must

62. Caldwell, *supra* note 20, at 270.

63. Strangely and erroneously it seems that where a person practices law without a license, there is no *public* nuisance. There is, however, a right of action in the members of the bar to abate a *private* nuisance. *Dworken v. Apartment House Owners Ass'n*, 38 Ohio 265, 176 N. E. 577 (1931). However, N. Y. CIV. PRAC. ACT (1935) § 1221b authorizes a suit by the attorney-general to restrain the illegal practise of law. This section has not been construed.

64. 128 Kan. 772, 280 Pac. 906 (1929). *Contra*: *People ex rel. Stephens v. Seccombe*, 103 Cal. App. 306, 284 Pac. 725 (1930).

65. Extending the injunction to usury cases has been described as "a spurious expansion of the public nuisance concept." Simpson, *supra* note 14, at 228. See note 42, *supra*.

66. *People v. Vandewater*, 250 N. Y. 83, 164 N. E. 864 (1928).

67. *In re Debs*, 158 U. S. 564, 584, 586 (1895).

68. 157 La. 26, 101 So. 798 (1924).

69. It has also been held to be a private nuisance. *Holzbauer v. Ritter*, 184 Wis. 35, 198 N. W. 852 (1924). *Contra*: *Whiteridge v. Calestock*, 100 Misc. 367, 165 N. Y. Supp. 640 (Sup. Ct. 1917).

70. *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514 (1891).

71. Property right involved; injunction granted: *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375 (1900) (criminal trespass on oyster beds); *Barrett v. Mt. Greenwood Ass'n*, 159 Ill. 385, 42 N. E. 891 (1896) (criminal pollution of stream). No property right; injunction denied: *Cope v. District Fair*, 99 Ill. 489, 39 Am. Rep. 30 (1881) (gambling); *Ocean City Ass'n v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914 (1898) (Sunday bathing)

be observed where the same act constitutes both a private and a public nuisance such as the operation of a bawdy-house in close proximity with the plaintiff's property. He must show that he suffers damage different from the rest of the public.⁷² It has been clearly decided that the mere fact that a statute has been violated does not spell out a nuisance *per se*.⁷³ The act complained of must be an actual nuisance apart from the fact that it is a violation of the penal law. Thus a licensed bus driver may not enjoin his competitor from operating a bus without a license and in violation of a municipal ordinance.⁷⁴ However, the courts of equity have not been so strict in cases involving unlicensed professional men. They argue that the individual's right to practice a profession is either a property right⁷⁵ or a franchise⁷⁶ which is being violated by unlicensed practitioners.⁷⁷

IV. STATUTORY ENLARGEMENTS

There have been numerous enlargements of the powers of equity by statute in the federal field. Many injunctions have been granted under the Sherman Antitrust Act.⁷⁸ These cases involved the prevention of concerted action to injure property of members of the public so as to amount to a public nuisance.⁷⁹ It was after the passage of this Act that the famous *Debs*⁸⁰ case was decided. There the officials of a union, in enforcing a boycott of the Pullman Car Company conspired to interfere with trains carrying mail and interstate freight. The court granted the injunction and found there was a technical property

Cf. Mack, *supra* note 10, at 397 where he describes the case of *Jones v. Oemler*, *supra* as a careless disregard of the traditional limits of equity jurisdiction. But see 5 POMEROY, *op. cit. supra* note 2, at § 1891 where he cites the case as the usual instance of the application of the principle.

72. *O'Brien v. Harris*, 105 Ga. 732, 31 S. E. 745 (1898); *Cranford v. Tyrrell*, 128 N. Y. 341 (1891). 5 POMEROY, *op. cit. supra* note 2, § 1956 exhausts the possible types of cases.

73. *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446 (1874).

74. *Healy v. Sidone*, 127 Atl. 520 (N. J. Ch. 1923); *San Antonio v. Schutte*, 246 S. W. 413 (Tex. 1922). *Contra*: *New York, N. H., & H. R.R. v. Deister*, 253 Mass. 178, 148 N. E. 590 (1925) (it was held to be a nuisance).

75. It is difficult to distinguish this property right from that of operating a bus.

76. *Matter of Co-Operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910). Where the plaintiff has been given an exclusive franchise, he may enjoin others from competing. *California State Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398 (1863); *Rar. & Del. Bay R.R. v. Del. & Rar. Canal*, 18 N. J. Eq. 546 (1867).

77. *Ezell v. Ritholz*, 188 S. C. 39, 198 S. E. 419 (1938). Suits of this nature are representative actions. If they were not, it is difficult to see how one member of a profession could claim his property is substantially damaged. It is, however, possible for that class of professional men to show that their franchise is violated. Comment (1937) 35 MICH. L. REV. 497. Prior to 1931 attorneys didn't avail themselves of this remedy. See Comment (1938) 11 So. CALIF. L. REV. 476 covering the various classes of professional men.

78. 26 STAT. 209 (1890), 15 U. S. C. §§ 1-7 (1926).

79. *United States v. Elliot*, 62 Fed. 801 (E. D. Mo. 1894); *United States v. Agler*, 62 Fed. 824 (D. Ind. 1894).

80. *In re Debs*, 158 U. S. 564 (1895).

right of the federal government in the mails which was being molested. Besides finding a property right, the court held that the obstruction of a national way of commerce was a public nuisance.⁸¹

One of the most well known of federal statutory extensions of equity into the criminal zone is the late unlamented Prohibition Act.⁸² There were two injunctions possible. The padlock injunction was one. It provided that if a tenant trafficks in liquor, the landlord would lose the right to use those premises for one year because it was a nuisance.⁸³ This procedure had been held constitutional ever since the case of *Mugler v. Kansas*.⁸⁴ The other injunction authorized was directed against a person engaged in bootlegging activities. The constitutionality of this section is in dispute even at this late date.⁸⁵

There have been statutory extensions by the state legislatures⁸⁶ too. An unsuccessful and most unusual attempt to enjoin a crime was exposed in the case of *State ex rel. Stewart v. District Court*.⁸⁷ Instead of enlarging the power of the court of equity, the legislature granted to a criminal court the authority to enjoin violations of the state liquor law. This was declared unconstitutional because injunctions are the weapons peculiar to courts of equity and may not be assigned to criminal tribunals. No other legislature has ever attempted this before or since.

It has been stated that the policy in New York is to extend the remedy of injunction and not to restrict it.⁸⁸ Today injunctions may be had in this state to restrain violations of the rules regulating milk control,⁸⁹ and public markets,⁹⁰ zoning laws,⁹¹ and certain nuisances.⁹²

81. Note, however, that generally strikes, boycotts, and other interferences with lawful business would be *private* nuisances. *Gompers v. Buck Stove Co.*, 221 U. S. 418 (1911); *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928 (1908).

82. 41 STAT. 314 (1919), 23 U. S. C. §§ 34, 35 (1926).

83. *Grosfield v. United States*, 276 U. S. 494 (1928); *United States v. Reisenweber*, 288 Fed. 520 (C. C. A. 2d, 1923); *United States v. Boynton*, 297 Fed. 261 (E. D. Mich. 1924).

84. 123 U. S. 623 (1887).

85. *Simpson*, *supra* note 14, at 227. Compare *United States v. Lockhardt*, 33 F. (2d) 597 (D. Neb. 1929) with *United States v. Cunningham*, 37 F. (2d) 349 (D. Neb. 1929); (1930) 43 HARV. L. REV. 1159. See (1930) 28 MICH. L. REV. 440, 442 where the writer indicates that the Supreme Court of the United States never passed on the validity of the injunction against the person. The case of *Mugler v. Kansas*, 123 U. S. 623 (1887) which is cited as authority on the constitutionality of this injunction is not in point. That injunction was not directed against a person but against specific property.

86. The first of these was in Iowa in 1884. Comment (1930) 28 MICH. L. REV. 440, 441. The fact that the concept of public nuisance is so vague and indefinite is an aid to statutory enlargement.

87. 77 Mont. 361, 251 Pac. 137 (1926).

88. See *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 382, 14 N. E. (2d) 439, 445 (1938).

89. N. Y. AGRICULTURE AND MARKETS LAW (1938) § 258-c.

90. *Id.* § 270-c.

91. N. Y. VILLAGE LAW (1934) § 179-c.

92. N. Y. PUBLIC HEALTH LAW (1927) §§ 343a-e.

This liberal attitude of legislatures to enlarge the remedy of injunction to the field of criminal law is clearly traceable back to the case of *Littleton v. Fritz*,⁹³ and others similar to it at that time.⁹⁴ Under the statutes involved, the right of action to restrain the public nuisance of criminally selling liquor was granted to any individual member of the public. There was no need for him to allege that he suffered damages different from the rest of the public.⁹⁵ The court points out that there was no deprivation of the right to a trial by jury because in the field of nuisances there never was that right.⁹⁶ Equity always had the power to restrain this act because it constituted a public nuisance. The statute merely designates the person who may bring the action. It must, however, be observed that the legislature cannot declare every act a nuisance.⁹⁷ It is obvious that if the legislature is not limited to acts which in fact are nuisances, it could transfer jurisdiction over all crimes to the courts of equity by the simple expedient of labelling them nuisances. On the other hand the legislature may validly extend the common boundaries to situations resembling the classical common law nuisances by balancing interests to determine whether a nuisance exists.⁹⁸ Although the legislature may differ with the courts on whether a nuisance exists in the border line cases, yet it is not unusual for the courts to differ among themselves. These statutes usually apply to such borderline cases and have been upheld as a valid extension of equity's jurisdiction.⁹⁹

V. LIBEL

There is one crime worthy of particular note, libel.¹⁰⁰ It is neither a public nor a private nuisance, but in certain instances an injunction will issue to restrain future publication. The evolution of the use of this injunction dates back to 1875. Before that date no court of equity would grant an injunction to restrain a threatened libel.¹⁰¹ Although the power had been conferred upon the chancery courts by statute passed in 1854, it was not until 1875 that the power was exercised.¹⁰² In order for this extraordinary remedy to be

93. 65 Iowa 488, 22 N. W. 641 (1885).

94. *Kansas v. Ziebold*, 123 U. S. 623, 671 (1887); *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55 (1889); *Ex parte Allison*, 90 S. W. 492 (Tex. 1905).

95. It will be recalled that a private citizen had only the right to restrain a public nuisance when it also was a private nuisance as to him. See p. 247, *supra*.

96. Equity had jurisdiction over nuisances before the bill of rights was adopted. That jurisdiction was not meant to be denied equity by the constitutions. (1923) 8 *Conn. L. Q.* 371, 372.

97. *State v. Saunders*, 66 N. H. 39, 25 Atl. 588 (1889); *Richmond v. Caruthers*, 103 Va. 774, 50 S. E. 265 (1905).

98. Chafee, *supra* note 23, at 399.

99. See note 94, *supra*. *Contra*: *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 235 (1919). Chafee criticizes this court as having too narrow a viewpoint. Chafee, *supra* note 23, at 399.

100. N. Y. PENAL LAW (1938) § 1340.

101. MATTLAND, *op. cit. supra* note 6, at 19.

102. *Ibid.*

granted a property right had to be shown. This requirement was satisfied when the plaintiff alleged his business was being defamed.¹⁰³ The American courts of equity have refused to be so liberal with the injunction. It is generally settled that even where a property right is involved, the sacredness of the theory of free speech rears itself up to prevent equity from acting in advance of publication.¹⁰⁴ The New York Court of Appeals is in accord with this rule.¹⁰⁵ However, the lower courts in New York have not followed this authority.¹⁰⁶ They relaxed the rule so that a competitor would be restrained from defaming another's product.¹⁰⁷ But recently an Appellate Division case¹⁰⁸ refused to grant an injunction restraining a future libel and relied on the authority as stated in the highest court in New York. It is submitted that the strict rule of no injunction for libel is still the New York law, at least until the Court of Appeals definitely declares otherwise.

VI. CONCLUSION

Looking back over the years since *In re Debs*, the dominant note to be observed is the expansion of the field of equity jurisdiction over criminal matters. This expansion is accounted for by the enlarged concept of the nebulous category called nuisance principally by means of statutory changes. Such enlargement was, however, to be expected. Our rapidly changing world encountering multitudes of new problems could not be restricted to its original limits. Nor is it logical to expect that the category of nuisances should be limited to the concept of earlier times.¹⁰⁹

No violence has been done to the old principles. It is still the general rule that equity will not enforce the criminal law; and it is still the exception that if equity can assume jurisdiction on other grounds, the criminality of

103. 5. POMEROY, *op. cit. supra* note 2, § 1895. *Thorley's Cattle-Food Co. v. Massain*, 14 Ch. D. 763 (1880).

104. 5 POMEROY, *op. cit. supra* note 2, § 1895. It seems that a further ground would be an adequate remedy at law. Accord: *Finnish Temperance Soc. v. Raivaaja Pub. Co.*, 219 Mass. 28, 106 N. E. 561 (1914); *De Wick v. Dobson*, 18 App. Div. 399, 46 N. Y. Supp. 390 (2d Dep't 1897). *Contra*: *Beck v. Ry. Teamsters' Union*, 118 Mich. 497, 77 N. W. 13 (1898).

105. *Brandreth v. Lance*, 8 Paige 24 (N. Y. 1839); *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902); *cf. Lawrence Trust Co. v. Sun-American Pub. Co.*, 245 Mass. 262, 139 N. E. 655 (1923). In that case the Massachusetts court circumvented the hard and fast rule by a change in the manner of pleading. The plaintiff merely alleges there is continuing injury to property without mentioning the defamation.

106. *Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N. Y. Supp. 692 (4th Dep't 1928); *Old Investors' Corp. v. Jenkins*, 133 Misc. 213, 232 N. Y. Supp. 245 (Sup. Ct. 1928); *Samson United Corp. v. Dover Mfg. Co.*, 139 Misc. 312, 248 N. Y. Supp. 325 (Sup. Ct. 1931); *Downes v. Culbertson*, 153 Misc. 14, 275 N. Y. Supp. 233 (Sup. Ct. 1934).

107. See (1938) 38 Col. L. Rev. 1291.

108. *Singer v. Romerrick*, 255 App. Div. 715, 5 N. Y. S. (2d) 607 (2d Dep't 1938). Note that this case is partially distinguishable from the liberal cases in note 106, *supra*. Those suits were between competitors. In this case, the defamation was uttered by a dissatisfied vendee.

109. *Simpson*, *supra* note 14, at 226.

the act will not oust it. The two main divisions under which equity assumes jurisdiction are public and private nuisances. To enjoin a private nuisance, the individual plaintiff must show some property right of his which is endangered. The extension of this point of view was created by statutes which gave the individuals a right of action, without showing any property right as long as the act was in fact a public nuisance. In all cases of public nuisance, the state has a right of action by showing that a property right of a great many individuals is involved. This was extended so that detriments to public health will be protected, without the need of proving a property right. Recent statutory extensions are found, *inter alia*, in the Sherman Antitrust Act, the late Volstead Act, the defunct National Recovery Act,¹¹⁰ the Securities and Exchange Act,¹¹¹ and the National Labor Relations Act.¹¹² In the state field there are many extensions. A New York case¹¹³ enumerates more than a dozen new injunctions authorized, and concludes that the policy is to extend the injunctive remedy.¹¹⁴ Finally, in cases of libel, it seems as though the injunction will be withheld and the plaintiff will be relegated to his action for damages.

It is obvious that wherever a traditional crime is proved, such as robbery, no injunction will issue. On the other hand, equity ought to act where the crime is too complicated for a jury, e.g., antitrust violations.¹¹⁵ There the request for a jury to determine facts that are too complicated for them to understand is an inconsistency. And wherever there is no likelihood that the evidence is disputed, no jury can be said to be necessary.¹¹⁶ Such a case is the violation of building and zoning laws.

Because of the growing complexity of our government, extensions further than these can be expected.¹¹⁷ But they are unwise if they go too far beyond reasonable limits. Too often, the extension occurs when the chancellor neglects to remember that the penal law is an efficient standing injunction against crime.¹¹⁸ When the prosecutors wield it properly, there is no need for recourse to equity.

110. 48 STAT. 195, 15 U. S. C. § 701 *et seq.* (1934).

111. 48 STAT. 881, 15 U. S. C. § 78a *et seq.* (1934) amended 49 STAT. 1921; 15 U. S. C. A. § 78u(e) (Supp. 1936).

112. 49 STAT. 449, 29 U. S. C. A. § 151 *et seq.* (Supp. 1935).

113. See *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 382, 14 N. E. (2d) 439, 445 (1938).

114. For statutes generally in the United States see Legis. (1932) 45 HARV. L. REV. 1036.

115. Perhaps the line of demarcation is that crimes of a continuing nature, such as antitrust violations, more nearly resemble the common law nuisances and so ought to be enjoined. But an isolated robbery or a scheme of robberies are so unlike the accepted notions of nuisances that no injunction will issue.

116. Simpson, *supra* note 14, at 227.

117. *Id.* at 224.

118. *Wood Mowing & Reaping Co. v. Toohey*, 114 Misc. 185, 196, 186 N. Y. Supp. 95, 102 (Sup. Ct. 1921). But see Caldwell, *supra* note 20, at 274. He points out, not without merit, that a command of a court addressed to a particular defendant is more effective than a statute addressed to all the residents of a state.

Unless tests are set up to prevent a gradual elimination of the right to a jury in criminal cases, other civil liberties will be destroyed in its wake. To sacrifice juries for the sake of speed and efficiency sayors of the ideology of totalitarianism. Fortunately the American system of jurisprudence tends to the opposite course.

Two tests can be set up. First, courts of equity should not grant injunctions to restrain acts that are wrongful only in that they are forbidden by the penal law. Second, the courts of equity should refuse every attempt by the legislature to grant such power to it unless, after all the interests involved have been balanced, it can reasonably be said that a nuisance does exist.¹¹⁹

It is submitted that any hiatus in the penal law ought to be corrected by the legislature in the procedure of the criminal courts and not by grants of power to courts of equity. The legislature is to be reminded that courts cannot violate the law in order to prevent the violation of the law.

119. The theory of the court would be that the grant is unconstitutional. There would be a denial of the right to a trial by jury in criminal cases. 5 ПОМЕРОВ, *op. cit.* *supra* note 2, § 1894.