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the right or the constitutional issues in the case.[8] In other words, it must be decided whether or not Greene has a right to sue or whether his case presents a justiciable controversy before the other issues can be considered. Moreover, because of the type of relief which Greene sought—in effect, a mandatory injunction—the case really does present a problem of the right of access to secret information.[9]

Despite the apparent crucial nature of this issue, the Government concede it in oral argument before the Court, and, therefore, the opinion correctly speaks only in terms of dicta. Nevertheless, the language of the dicta is strong and unequivocal. But it is submitted that the Court erred in its statements and overlooked fundamental constitutional law on this issue as pointed out in the above comment. The facts of the *Greene* case were particularly difficult, and it is oftentimes the situation that hard cases make bad law. In its zealous efforts to protect a person of Greene's high caliber from discrimination through somewhat doubtful procedures, the Court simply overreached itself to discuss issues upon which it declined to decide under the circumstances.

"Let us hope," as Justice Clark put it so aptly in his dissent, "that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security."[10]

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EQUITY'S POWER TO ENJOIN CRIMINAL ACTS

A matter of importance is the expansion of chancery jurisdiction to include the enjoining of acts, such as the unlicensed practice of dentistry, once considered punishable only at criminal law.[1] By assuming this power, equity courts deny the defendant his constitutional

[8]Id. at 512. (dissenting opinion).

[9]Id. at 512, n.3. See also the strong language of Justice Clark: "In holding that the Fifth Amendment protects Greene the Court ignores the basic consideration in the case, namely, that no person, save the President, has a constitutional right to access to government secrets. Even though such access is necessary for one to keep a job in private industry, he is still not entitiled to the secrets. It matters not if as a consequence he is unable to secure a specific job or loses one he presently enjoys. The simple reason for this conclusion is that he has no constitutional right to the secrets. If access to its secrets is granted by the Government it is entirely permissive and may be revoked at any time.... The Court seems to hold that the access granted Greene was for his benefit. It was not. Access was granted to secure for the Government the supplies or services it needed." Id. at 513-14 (dissenting opinion).

[10]Id. at 524 (dissenting opinion).

[1]Nugent v. Stokes, 313 Ky. 131, 230 S.W.2d 609 (1950).

right to trial by jury. This denial has raised no storm of protest,[2] and the courts have proceeded to extend the use of injunctions in this field with the result that some courts have enjoined an act merely because it is a crime.[3] Essentially the same result is reached in other jurisdictions by giving the public nuisance concept a wide application, thereby classifying the criminal act as a public nuisnace.[4]

The Minnesota Supreme Court, in *State v. Red Owl Stores, Inc.*,[5] was confronted with the problem of whether to enjoin a crime, there being no statutory authority to do so. The defendant corporation was a wholesale grocer and supplied retail stores with such drugs and medicines as Anacin, Bufferin, Pepto-Bismol and Murine. A Minnesota Statute[6] prohibits the sale of drugs and medicines[7] in establishments which do not employ a registered pharmacist and provides a penalty for its violation.[8] Notwithstanding the fact that the statute fails to provide injunctive relief for its violation, the State of Minnesota as plaintiff contended that because the defendant employed no pharmacist, the sale of the above-mentioned items was dangerous to the public health and should be enjoined. The trial court denied the injunction with findings of fact that the items complained of were drugs and medicines within the meaning of the statute, but that there was no evidence from which the court could

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[2]Maloney, Injunctive Law Enforcement: Leaven or Secret Weapon, 1 Mercer L. Rev. 1, 10 (1949).

[3]Ex parte Wood, 194 Cal. 49, 227 Pac. 908 (1923); State ex rel. Hopkins v. Industrial Workers of the World, 113 Kan. 347, 214 Pac. 617 (1923); State ex rel. Hopkins v. Howat, 109 Kan. 376, 198 Pac. 686 (1921). The court in each case cited justified its holding by stating that harm was threatened to the public, but it is evident that there existed no traditional ground for equity's jurisdiction. The annotation in 25 A.L.R. 1245 (1923) describes the holding of the Howat case as novel.

[4]Corte v. State, 259 Ala. 536, 67 So. 2d 782 (1953); State ex rel. Attorney Gen. v. Canty, 207 Mo. 439, 105 S.W. 1078 (1907).

[5]253 Minn. 236, 92 N.W.2d 103 (1958).

[6]Minn. Stat. Ann. §§ 151.15, 151.25 (1946).

[7]Section 151.25 of the Minnesota Statutes Annotated excludes those persons handling harmless proprietary medicines from the provisions of chapter 151. Prior to the instant case, no Minnesota court had determined whether or not the drugs and medicines complained of were within that exception. It had been determined by the Minnesota Supreme Court that the exception did not apply to sale of aspirin and vitamins. Culver v. Nelson, 237 Minn. 65, 54 N.W.2d 7 (1952); State v. F. W. Woolworth Co., 184 Minn. 51, 237 N.W. 817 (1931). The trial court found in accordance with the general rule that the items complained of were not excepted from the provisions of the statute. There is some authority contra in at least one jurisdiction. King v. Board of Medical Examiners, 65 Cal. App. 2d 644, 151 P.2d 282 (1944).

[8]"Any person violating any of the provisions of this chapter... shall be guilty of a misdemeanor...." Minn. Stat. Ann. § 151.29 (1946).

find that sales of the drugs had resulted in harm to the public health.[9] The court further found there was no evidence that a multiplicity of suits to enforce the statute could be prevented only by an equity court, for a criminal prosecution would reach exactly the same number of persons and stores as might be reached in an equity proceeding.[10] The state appealed and the Supreme Court reversed for a new trial, reasoning as follows: any act which is inimical to the public health is a public nuisance and should be enjoined; the legislature by enacting the Pharmacy Act[11] adopted the position that the uncontrolled and unsupervised sale of drugs is inimical to the public health; therefore a showing that the defendant violated this statute makes a prima facie case that he has created a public nuisance and should be enjoined.[12] It is submitted that this reasoning begs the question, in that practically all statutes are enacted for the protection of the public health, welfare, or property, and under the reasoning of the Minnesota Supreme Court the violation of any such statute would establish a prima facie case entitling the state to injunctive relief. Thus the defendant, having violated a criminal statute, would find himself with the burden of proving that he was entitled to a trial by jury.[13]

In remanding the case, the Supreme Court reversed the findings of fact by the trial court that a criminal prosecution would not result in a multiplicity of suits and that sale of the drugs had caused no harm to the public. In so doing, the Supreme Court ignored the rule that the appellate court will not interfere if the trial court's finding of fact is supported by the evidence.[14] On this ground, Chief Judge Dell dissented.[15]

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[9]92 N.W.2d at 108.

[10]Ibid.

[11]Minn. Stat. Ann. ch. 151 (1946).

[12]92 N.W.2d at 105. While this is not an exact quote, the substance of the reasoning is identical to that used by the court in paragraph six of its syllabus.

[13]The Minn. State Const. art I, § 6 guarantees the defendant the right to trial by jury in criminal prosecutions. In addition to the loss of trial by jury, the accused may suffer another disadvantage by trial in equity. It has been held that a contempt proceeding against one who has violated a public nuisance injunction is a civil rather than a criminal action. State v. Froelich, 316 Ill. 77, 146 N.E. 733 (1925). Thus the state only has to prove the defendant's guilt by a preponderance of the evidence rather than beyond a reasonable doubt. Annot., 49 A.L.R. 620, 624 (1927).

[14]Standard Oil Co. v. Bertelsen, 186 Minn. 483, 243 N.W. 701 (1932).

[15]92 N.W.2d at 114. Chief Judge Dell also differed from the majority on the grounds that there was no showing of harm, either past, present or future; that there had never been a criminal prosecution of the defendant; and that any assertion that the violation would continue after one prosecution was mere speculation. He also brought out the important point that the injunction would serve

In order to understand the position of the Minnesota Supreme Court, it is necessary to examine the situations in which equity courts have enjoined criminal acts. First, when the legislature has authorized injunctive enforcement of a criminal statute,[16] equity's jurisdiction cannot be disputed.[17]

Secondly, equity is said to have jurisdiction when a statute declares an act or practice illegal but provides no punishment.[18] Equity takes jurisdiction on the ground that the act is illegal, but the remedy at criminal law is inadequate. This assumption of jurisdiction by equity courts seems a bit presumptuous, but a finding that the criminal law remedy is inadequate is clearly more sound in these cases than in a case such as *Red Owl,* where the statute provides a penalty for its violation.

A third situation admitting of equity's jurisdiction is one in which the act or practice complained of is by statute made a public nuisance,[19] or in which the court finds the act or practice a nuisance per se.[20] Such a holding may be criticized only if, in the latter case, no nuisance exists, but the court finds a nuisance as a matter of expediency.

Finally, courts will enjoin an act as a nuisance when it is also a crime for which a penalty is provided, for the fact that the nuisance is also a crime does not bar equity jurisdiction which would otherwise exist.[21] The Supreme Court in the instant case necessarily attempted to bring itself within this line of reasoning, because the Minnesota statute provides for punishment and does not authorize injunctive

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no practical purpose because the drugs and medicines could still be procured in large quantities at any drug store. Id. at 114-16.

[16]These statutes have been frequently attacked on constitutional grounds, and, except in New Jersey, have been upheld despite the argument that the defendant is denied his right to trial by jury. McClintock, Equity § 164 at 445 (2d ed. 1948). Actually the defendant is not denied his right to trial by jury when, as in Oklahoma, the state constitution guarantees the right of trial by jury to defendants in all indirect contempt cases. Okla. Const. art. II § 25.

[17]Hudkins v. Arkansas State Bd. of Optometry, 208 Ark. 577, 187 S.W.2d 538 (1945); State ex rel. Wolfley v. Oster, 75 Idaho 472, 274 P.2d 829 (1954) (unlicensed practice of dentistry); State v. Howard, 214 Iowa 60, 241 N.W. 682 (1932) (unlicensed practice of medicine).

[18]State ex rel. Missildine v. Jewett Market Co., 209 Iowa 567, 228 N.W. 288 (1929) (sale of aspirin by one not a registered pharmacist); State ex rel. Smith v. McMahon, 128 Kan. 772, 280 Pac. 906 (1929) (usury, civil remedy of forfeiture provided, but no criminal penalty); Town of Linden v. Fisher, 154 Minn. 354, 191 N.W. 901 (1923) (dance hall prohibited by city ordinance).

[19]State v. Robertson, 63 N.M. 74, 313 P.2d 342 (1957).

[20]City of New Orleans v. Lafon, 61 So. 2d 270 (La. 1952).

[21]McClintock, Equity § 164 at 443 (2d ed. 1948).

relief. But most courts issuing an injunction in such a case realize that the legislature has defined a crime and its punishment, and unless some traditional ground for equity jurisdiction exists, the only effect of the injunction is to threaten the defendant with (or subject him to) contempt proceedings rather than trial by jury. These courts are adamant in their requirement that the existence of a public nuisance be conclusively proven. In a leading case on point,[22] the defendant was enjoined from practicing medicine without a license, the court stating in its opinion: "In the case at bar, the People would not be entitled to an injunction upon a mere showing that the statute had been violated.... However, they go much further than that. They allege facts showing that the acts of defendant imperil the health of the people of the community, and will continue to cause irreparable injury...."[23] Similar reasoning is employed when the plaintiff alleges that the defendant's acts are harmful to the public, but pleads no facts from which specific harm may be found. In these cases, a demurrer has been sustained on the ground that the plaintiff has only pleaded conclusions of law and has not shown the existence of a public nuisance.[24] The court in the instant case not only overlooked the requirement that such facts be alleged and proved, but specifically stated that even without a showing that the health of the community had been imperiled, the state had established a prima facie case for injunctive relief.[25] This resort to expediency seems a weak premise upon which to deny the defendant his right to trial by jury. The court attempted to justify its action by stating that *if* the statute had provided for enforcement by injunction or had provided no penalty for its violation, then injunctive relief would be proper and the defendant could not complain of the loss of trial by jury.[26] But if these contingencies had been met, the case would have been decided on different principles as previously discussed. It is submitted that this additional statement by the court only emphasizes the weakness of the reasoning employed.

The instant case establishes an unfortunate precedent for the arbitrary denial of trial by jury to one charged with a criminal offense. "It may be doubted whether such courage of equity [is]... the better

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[22]People ex rel. Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938).

[23]Id. at 445-46.

[24]People ex rel. Stephens v. Seccombe, 103 Cal. App. 306, 284 Pac. 725 (1930); State v. Johnson, 26 N.M. 20, 188 Pac. 1109 (1920).

[25]See note 12 supra and accompanying text.

[26]92 N.W.2d at 111 n.10.