1897

Constitutionality of Section 29 of the New York Liquor Tax Law of 1896

Thomas Francis Fennell
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Part of the Constitutional Law Commons

Recommended Citation
CONSTITUTIONALITY OF SECTION 29
OF
THE NEW YORK LIQUOR TAX LAW OF 1896.

THESIS PRESENTED FOR THE DEGREE OF MASTER OF LAWS
BY
THOMAS FRANCIS FENNELL LL.B

CORNELL UNIVERSITY
JUNE 1897
INTRODUCTION.

The following article is a discussion of the constitutionality of Section 29 of the NEW YORK LIQUOR TAX LAW; commonly known as the "RAINES" law, named after the father of the bill. The section in question declares substantially, that when one is known to be selling liquor without a license, that the District Attorney, or County Treasurer shall make a motion before an Equity court, for an order to have the one so selling appear and show cause why he should not be enjoined. On his failure to show cause (which is a foregone conclusion), he is enjoined personally from selling liquor until he pays the tax. If he then sells without paying the tax, he is to be brought before the Court and sentenced for contempt.

It is claimed that this mode of procedure contravenes Article I Section 2 of the New York State Constitution: "In all cases where the jury trial was had heretofore it shall remain inviolate forever!"

The question thus arises, whether the legislature, in declaring that an offence, formerly criminal, shall be tried in an Equity court, has overstepped the bounds set by the Constitution.
INTRODUCTION

CHAPTER I

RIGHT OF JURY TRIAL UNDER THE CLAUSE "AS HERETOFORE EXISTING"....1

Discussion of the authorities in different states having the same clause in their constitution

CHAPTER II

JURY TRIAL IN CRIMINAL CASES UNDER THE LIQUOR LAWS .... 6

Jurisdiction of Courts of Special Sessions
(a) before amendment of 1870
(b) after " 1870, and the right of jury trial thereunder.

Jurisdiction of Equity in such cases.

CHAPTER III

INJUNCTION REMEDY IN NUISANCE CASES .......15

Usual remedy is by
(a) Abatement
(b) Indictment.

Ground for Equity jurisdiction and injunction
1. Inadequacy of legal remedies
2. Irreparable Injury
   (a) to individuals
   (b) to the public.
3. Danger to public health.
4. Great public danger
   (on authority of the Debs' case)

CHAPTER IV.

LEGISLATIVE ENCROACHMENTS ON THE RIGHT OF TRIAL BY JURY ....29

The people alone have authority to restrict this fundamental right.

Legislative circumlocution

CONCLUSION
CHAPTER I

RIGHT OF JURY TRIAL UNDER THE CLAUSE
"AS HERETOFORE EXISTING"

The right of trial by jury is secured to the people in the United States Courts by the Federal Constitution, and all the State Constitutions have provisions relating thereto. Although the phraseology varies in the different states, still the vital part of each is practically the same; that the jury trial, in all its substantial qualities, is, and remains, secured inviolately forever.

The New York Constitution (Art. Sec. 2) secures the right in the following terms: "The trial by jury, in all cases where it has been heretofore used, shall remain inviolate forever." This wording is similar to that in most of the other states, and identical with quite a number. Twenty-one state constitutions declare that the right shall remain inviolate, though not stating that it shall be "used as heretofore!"

The following is a collection of decisions in states having provision practically identical with New York.

New Hampshire. The case of Copp v Henniker (a) held the phrase, "As heretofore used", to refer to the provincial law as modified by the statutes passed between 1776 and 1792. But the leading case of (b) King v Hopkins, held that the construction of the phrase should be that given by Judge Parker in Pierce v State (c), that, "The jury trial intended by the Constitution was the pure and genuine jury.

(a) 55 N.H.179 at p. 192
(b) 57 N.H.334
(c) 13 N.H.557.
trial of English and American Common Law. Though the early American judges sometimes made singular work of it, it is to be inferred, that they meant to give the parties their full Common law rights. Such an understanding and intention are of vastly more weight, than the fact that they failed to give such rights, because of their unfamiliarity with the law. And as for the judges whom had no such intention, their rulings and decisions should have no weight at all. They tried to decide cases not by any scientific application of legal rules, but upon principles of "common sense and justice." Though such a system of coming to a decision may be satisfactory in a given case, its universal adoption would be fatal to scientific jurisprudence. Decisions of such a nature should be absolutely discarded. One example will show the fallacy of construing the clause in the Constitution, to refer to the law and procedure in the Colonies, immediately preceding the Revolution. Judge Dudley was regarded, by the leading men of his time, as "The best judge in New Hampshire!"

The following is one of his charges to a jury (a), "You have heard, gentlemen of the jury, what has been said in this case by the lawyers - the rascals! But no, I will not abuse them, it is their business to make a good case for their clients ....... But you and I, gentlemen, have something else to consider. They talk of law. Why, gentlemen, it is not law we want, but justice.......... A clear head and an honest heart are worth more than all the law of the lawyers. ....... It is our business to do justice between the parties. Not by any quirk of the

(a) Life of Wm Plummer.
law out of Coke or Blackstone, books that I never read and never will, but by common sense and common honesty, as between man and man. . . . And now Mr Sheriff, take out the jury; and you, Mr Foreman, do not keep us waiting with idle talk, of which there has been too much already, about matters which have nothing to do with the case.

The phrase, "as heretofore existing," means the common law of England modified by American conditions, that is, the Common Law of England, such parts only being excepted, as are inconsistent with the Constitution, or not applicable to the institutions or circumstances of this Country (a). This is the general rule (b).

In Massachusetts, "as heretofore used," is construed to mean, as at Common Law (c).

In Maine it is held that a Court Martial trial does not necessarily include a hearing before a jury, as such Courts did not have juries at common law. (d). In Coffin v Coffin (e) the Court stated that, "The case does not come within the clause of the Constitution, as the practice has been otherwise at Common Law!"

In Pennsylvania it was stated, in Emeric v Harris (f), that the legislature cannot impose any provisions substantially restrictive of the right of trial by jury. So, although a law has been passed, giving power to a justice to hold trial in certain cases without a jury, still such law was constitutional, as it covered only cases

which had been so tried at common law (a).

In Illinois, the constitution of 1870 (b) declares, "The right of trial by jury as heretofore enjoyed shall remain inviolate." But in the two preceding Constitutions the section reads simply, "Shall remain inviolate (c)." Thus the Constitution of 1870 refers to the right as existing under the preceding Constitutions, which did not contain "as heretofore," so that Illinois cannot be brought into the group of states having the clause "as heretofore used!"

Maryland. State v Buchanan (d) declares, "Our ancestors brought with them the Common Law of England, and to their judicial decisions we are to look for the evidences of that law! "'As heretofore used," refers to the common law of England before the Revolution (e).

In Delaware, State v Williams (f) holds that, "the common law obtains in America, where it suits our condition, and nothing in the Constitution prohibits it!"

Missouri. "The general rule of construction, in reference to this provision of the constitution, is that any act, which destroys or materially impairs the right of trial by jury, according the course of the common law, in cases proper for cognizance by a jury, is unconstitutional." (g)

(a) In Matter of Pennsylvanian Hall, 5 Pa St. 204. p. 208 Trimbles Appeal, 6 Watts 133. (b) Const. Art 2 Sec. 5. (c) Const. of 1818, Art 13 Sec 6; Const. of 1818 Art 8 Sec 6. (d) 5 H. & J. 317. p. 356 (e) Dashiel v Atty Gen. 5 H. & J. 392. p. 401; 2 Md. 429 p. 452; 16 Md. 549 p. 555 (f) 9 Houst. 508 at p. 525 (g) State v Vail 53 Mo. 97 p. 107. See also Smith's Adams' v Smith 1 How (Miss) 102 p. 105. Lewis v Garret's Adams 5 How (Miss) 453. Littleton v Fritz 65 Ia 488 p. 491.
In New York State the decisions hold practically the same way as in the other states. The cases under this clause in New York, will be treated of in the next chapter in connection with those discussing the right of jury trial in criminal cases arising under the liquor laws.
Numerous cases can be found covering the point at issue, namely: that a jury trial was a matter of right, under the Constitution, in all cases of misdemeanor, especially for the illegal sale of intoxicating liquor.

In People v Kennedy (a) we find the following, "It is declared by the Constitution of this State (Art. 1 Sec. 2) 'the trial by jury, in all cases where it has been heretofore used, shall remain inviolate forever! The obvious meaning of the expression 'heretofore used', is, in use at the time of the adoption of the Constitution. What is meant by this expression, 'trial by jury'? Does it mean a common law jury of twelve men, or a jury of six men, as provided in the trial at Special Sessions? I think there can be no doubt on this point. If the legislature may reduce a jury in number to six, they have the same right to reduce it in number to one, and thus make a jury of one a compliance with the requirements of the Constitution. The Constitution secures a jury of twelve men, whose verdict is to be unanimous (See Hudson v River Ry Co v Cruger, 2 Kernan 198; State v Cox 5 Sm. & Mar. 664; 3 Peters 446-7; 4 Wheat. 242-3-4.) If, therefore, the accused, in an offence of this grade, had a

(a) 2 Park 312 p.137
right to a trial by jury, when the Constitution took effect, his right cannot be taken away by subsequent act of the legislature. It is no answer to say that his offence did not exist at the time the Constitution took effect, but has since been created by statute. If the offence be such that it would have been entitled to a trial by jury, if created before the Constitution was adopted, it cannot be deprived of the same right when created afterwards. Any other view would enable the legislature to create a new offence and call it a felony, make it triable in a court of Special Sessions, and punishable by death. If you deny the constitutional control over new as well as old offences, you make the power of the legislature omnipotent, and have no protection against its despotism. The true rule undoubtedly is, that when the legislature creates a new offence it is placed on the same footing with other previous offences of the same grade, and is equally governed by the provisions of the Constitution. Selling liquor without a licence was then (1 R.S. 628 Sec. 25), as now, declared a misdemeanor, but it could only be tried on indictment and by a full jury.

Under the "Raines" law (Sec. 34), any one who shall neglect or refuse to make application for certificate, or give the bond, or pay the tax imposed, as required by this act, is guilty of a misdemeanor. By another section all misdemeanors, under the Act, are to be tried in a Court of Record having jurisdiction over crimes of the grade of felonies. Selling liquor without a license has always been a misdemeanor and triable only after indictment. The present law expressly declares it to be a misdemeanor, and that all misdemeanors
shall be tried in a Court having jurisdiction over felonies. But Sec."29" provides a method whereby equity takes cognizance of an act criminal in its nature and after having enjoined the person, not the act, on a further breach of the law, proceeds to punish summarily an act of a purely criminal character.

People v Johnson.(a) was a case of petition for a writ of habeas corpus to enquire into the cause of his detention. The petitioner had been arrested for violation of the liquor law, taken before a magistrate, where he was refused a jury trial. It was held: "The right of trial by jury is what the prisoner claims. .... There has been no one subject which has been so jealously guarded, and so uniformly lauded since the date of the celebrated Magna Charta, as the common law right to a trial by jury. .... As the Constitution, which is the fundamental law - the permanent will of the majority - declares that 'the trial by jury in all cases, where it has been heretofore used shall remain inviolate forever', the legislature is prohibited from depriving a person accused of a criminal offence, of the right of a trial by such jury. The law in reference to an examination applicable to other cases of misdemeanor, is alike applicable to offences for selling liquor without a license.

With regard to legislative attempts to create new offences, and put them in a special class, the case of Wood v City of Brooklyn(b) is very pertinent. "Section 2 of Article I of the Constitution relates to classes, and, of course, includes the individual cases which

---

(a) 2 Park. 322. p. 323.
(b) 14 Barb. 425, p. 432.
they comprise. In no other way can constitutional enactments preserve that continued efficacy, which is so essential for the public good. Whenever, therefore, a new case is added to a class, it becomes subject to its rules. To allow the legislature to except from the operation of a constitutional provision, by direct enactment, a matter clearly falling within its meaning, would sanction a fraud upon its organic law, and might, in the end, destroy its obligation!

If the offence of selling liquor without a licence is identical with the offence at common law, then it is triable by jury, and the person charged is entitled to a jury trial. (a)

Nor can an Equity Court assume jurisdiction to try cases of a criminal nature (b). In the case of Kramer v The Board of Police of New York (b), Kramer sought to restrain the Board of Police by an injunction in Equity from arresting him for selling wines etc., in the lobbies of places of amusement. Such sales of liquors were made misdemeanors by statute. Kramer had requested the Court below to grant the injunction, on the ground that his act was not in violation of the statute. "The Court below held the plaintiff not guilty of a crime, thus trying in a Court of Equity the guilt or innocence of a person accused of a crime on affidavit. The tendency has been to greatly extend the remedy of injunction in civil cases, but certainly such remedy should be limited to civil cases, and criminal cases left to the disposition of the criminal courts!"


(b) 4 N.Y.Crim R 551
In Davis v American Society &c (a), the Court declares very clearly and concisely, that equity must keep its hands off criminal matters. The Court holds as follows: "Hence it cannot be disputed that Bergli was acting under a valid law, and regular authority and he had the right to make the threatened arrests, if the plaintiffs were actually engaged in violating the law to prevent cruelty to animals. The only question for contestation was whether, as a matter of fact, they were guilty or innocent of such violation; and the determination of the question could not, by such an action as this, be drawn into a court of equity. Whether a person accused of a crime, be guilty or innocent, is to be determined in a common law court by a jury; and the people, as well as the accused, have the right to have it thus determined. If this action in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited."

In Hill v People (b) we find the following: "But our laws (organic as well as statute) exempt persons, charged with criminal offences, from coercive summary trials without a jury. Our State constitution provides that the jury trial shall remain inviolate in all cases where it has been heretofore used. Under the laws existing at the adoption of the constitution, a justice could hold a court

(a) 75 N.Y.362
(b) 20 N.Y.366, p 368.
of Special Sessions, and could try certain cases, but if proper security was given, the culprit must be tried at a court of Oyer and Terminer or General Sessions, where they could not be tried without indictment, not by any except a common law jury of twelve men."

Such must be the rule and such must be the rights of persons charged with misdemeanors now. They have the right to have the complaint exhibited before them, for any crime or misdemeanor, examined and passed upon by a grand jury, before they can be coerced into a trial, and if indicted to be tried by a jury of twelve men.

In People v Killeen, the charter of the city of Yonkers gave the city judge power to try excise cases. The relator was arrested for a violation of the excise law. He pleaded "Not Guilty", and demanded a jury trial, but the court refused it. It was held that selling intoxicating liquors in violation of law, was an offence triable by jury when the constitution was adopted. "The term 'cases' in Art I, sec. 2, is used in a generic sense; it embraces grades or classes, not individual or particular cases, except as they make up a class. The intent of the constitution was to preserve the right as amply as it was enjoyed at the time of its adoption."

It has been uniformly held that the sale of intoxicating liquor without a license is a criminal offence, and punishable as such. In the case of People v Charbineau, the Court so held in the following language: "The learned counsel for the defendant contends that

(a) 11 Hun. 289 p 290
(b) 115 N.Y. 433 p. 436.
a sale without a license is not a criminal offence. But for more than thirty years (17 N.Y.516), the courts, construing the Act, have held such sales to be crimes; and that construction which is in harmony with the previous laws on the same subject, which is in accordance with the common understanding, and which has been acquiesced in by the legislature, should prevail. It has been held ever since that such an indictment charges a crime.

In this connection it may be well to take a glance into the construction of the Court of Special Sessions, and the right of trial by jury therein.

By the present constitution, offences of the grade of misdemeanors may be tried by a Court of Special Sessions, in any case where the legislature so directs (Const.1896, Art 6 Sec.23). This section is the same as sec.26 of Art. 6 of Constitution of 1870, which was the first amendment to give a court of Special Sessions that power. At first glance it would look as though these sections abrogated the right of trial by jury, in all cases where the legislature saw fit so to do.

The first Act, authorizing the trial of petty offences by a Court of Special Sessions, composed of three justices, was passed by the New York Colonial Legislature, September 1, 1744. Jurisdiction was there given over "misdemeanors, breaches of the peace, and other criminal offences, under the degree of grand larceny." The same

(a) 1 Smith & Livingston 339
Van Shaick, 240
power was continued after the Revolution, by the Act of March 24th, 1787 (a) Various modifications and amendments were adopted at different times until 1824, when a jury was authorized to be summoned on application of the accused (b). The constitutional amendment, empowering the legislature to grant courts of special sessions jurisdiction over all offences of the grade of misdemeanors was enacted in 1870. For the forty-six years immediately preceding the amendment, juries of six men had been allowed in Courts of Special Sessions, so that when the people gave the legislature power to increase the jurisdiction of such courts, they did it with the understanding that the court should remain practically of the same nature. Certainly it cannot be presumed that the people have given up their right of trial by jury in all cases of misdemeanor, in the discretion of the legislature. However, the people by giving a Court of Special Sessions with a jury of six men, the authority to try misdemeanors, did not "ipso facto," give the legislature the power to declare that misdemeanors shall be tried in an Equity Court. The Court of Special sessions is a criminal court, and can take cognizance of all misdemeanors falling within its jurisdiction; but an Equity court has authority only over civil matters and cannot try the criminality of an offence. Selling liquor without a license is, and always has been, a misdemeanor, a criminal offence; and demanding as such, a criminal trial.

The question to be decided by the Equity court, under sec. "29"

(a) 1 Greenleaf, 424.
(b) Session Laws of 1824, 297 #47.
of the present law, is one merely of the guilt or innocence of the defendant. The court is asked, first, to decide whether or not the defendant is selling liquor without a license. As such a sale is declared, by Section 34, to be a misdemeanor, the determination of this question involves merely the guilt or innocence of the defendant. He is then enjoined from further commission of the said crime. It is not the place of business, but the person, who is enjoined. Thus it is restraining the commission of a crime, pure and simple. Who is enjoined? The person. The nuisance is not the person, but the place. But the injunction runs against the person generally and is binding on him in all places and at all times. It would appear, therefore, that the legislature not only grants the Equity courts jurisdiction in criminal cases, but also compels the Court to use its extraordinary remedies and powers in a given case. It has always been the general understanding that Equity would use its extraordinary power only in cases where the law was powerless or insufficient to grant full relief. The Equity judge always used his discretion in the matter; first, as to whether the legal remedy really was inadequate, and, second, as to whether the case was one deserving equitable relief. The present law overthrows this theory entirely, leaves no discretion in the Court, and compels it to act where there is no excuse for equitable interference, and even goes so far as to direct the court to take cognizance of a purely criminal offence.
INJUNCTION REMEDY IN NUISANCE CASES.

It is set up in defence of the section under discussion, that the act enjoined is a nuisance, and therefore cognizable in an Equity court.

A common nuisance is an offence against the public, by doing injuries to all the people generally; or by omitting to do that which the common good requires.

The remedies for nuisance are twofold

I. Preventative
   (a) Abate
   (b) Indict
   (c) Enjoin.

II. Compensatory
    Action for damages.

Public (or common) nuisances, with all their constituent facts are public offences, and Equity may, in some cases, take jurisdiction to suppress them; but only when no adequate remedy at law exists. The legal remedy of indictment is always adequate, in a case of the illegal sale of liquor, except where irreparable injury is threatened. The mere sale never causes irreparable injury to the public at large, and indictment should therefore be sufficient. In cases of nuisance, only such remedy will be granted as is necessary to eliminate
the nuisance and nothing further, as the court interferes only to stop the nuisance and not to punish the offender.

The ordinary remedy, and the one which is usually deemed sufficient, is **Abatement**; in respect to which numerous cases are to be found. Brown v Perkins declares that "Spirituous liquors are not of themselves a common nuisance, but the act of keeping them for sale, may be made such by statute. The only legal method to stop it, is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. As it is the use of the building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use." (a)

A statute declaring places, in which intoxicating liquor is illegally sold or kept for sale, to be common nuisances, does not authorize the destruction of such buildings by private individuals or by the public authorities. The abatement of a nuisance, caused by the illegal use of a building, consists in the prevention of the future illegal use, and not in the destruction of the building(b).

Under the guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or quasi criminal law(c).

In Fisher v McGirr (d) Chief Justice Shaw makes use of the

(a) 15 Gray, 89  (b) State v Paine, 5 R.I. 185, Ames, C.J. Taunton v Steele, 119 Mass 237, and cases there cited.  (c) Taunton v Steel.  
(d) 1 Gray 1 p. 26.
following language: "Suppose the object to be, to prevent and punish possession of intoxicating liquor . . . . There seems to be two distinct modes or courses of proceeding, both well known to the law, but of considerable difference in their modes of operation; they are, a proceeding **in rem**, by the sequestration of the property or thing, which is noxious in itself, or made the instrument or subject of a noxious and injurious use; The other, a proceeding **in personam**, for the **punishment** of the person of the offender, as an example to deter others from the commission of a like offence. Both are proceedings designated for the enforcement of the **criminal law**, and must be governed by the rules applicable to its administration."

These few cases will show the theory on which the courts proceed in dealing with cases of nuisance; namely, to abate only the use which constitutes the nuisance, and thus eliminate the nuisance entirely. The maintaining of certain nuisances is criminal, and subjects the one maintaining them, to indictment. It might be well to mention a few cases under this head.

"The remedy for abating a public nuisance is by **indictment**, and not by removing it by force, without legal proceedings finding it to be a nuisance of that character" (a) Upon conviction of a nuisance, the court may punish by fine only, or they may also cause the nuisance to be abated (b) The order of abatement is no part of the punishment, and issues, not as a matter of course, after indictment, but such indictment forms the basis of the order of abatement (c)

---

(a) Earp v Lee, 71 Ill 193.  (b) Waring v Mayer, 24 Ala 701.  
(Droneberber v State, 112 Ind. 105.  State v Dudley 30 Me 65.  
(c) Buzzard v State 25 Oh.St. 536  Shepard v People, 40 Mich 167.
An individual cannot abate a common nuisance; the remedy being by indictment (a). Relief by abatement or indictment being present, the court will not grant an injunction (b). If neither abatement or indictment are found to be sufficient, the remedy of injunction may be used.

The earliest cases of injunction to restrain a common nuisance were those relating to purprestures, namely, the enclosing of that which should be left open as belonging to the public. In the early case of Attorney General v Richards (c), the court enjoined any further erection of structures between high and low water marks in ports, mouths of harbors etc, and decreed that those already erected should be abated.

The earliest case was in the reign of Elizabeth. An information was filed by the Attorney-General to restrain the erection of a pigeon house, by a tenant for years, of a parcel of a manor, the reversion of which was in the Queen. The court being of opinion that a pigeon house was a common nuisance, an injunction was granted (d). There was of course no valid ground for granting this injunction, but it shows very clearly the antiquity of the jurisdiction in such matters. In 1752, in the case of Baines v Baker (e), a motion for an injunction to stay the building of a house to inoculate for small-pox, was denied, the Chancellor saying: "Bills to restrain nuisances must be extended to such only as are nuisances at law,...".

(a) State v Pane, 5 R.I.185  State v Kernan 5 R.I.497. (b) Powell v Foster, 59 Ga 790. (2 Aust.603, So also Bristol Harbor Case, 18 Ves.214. (d) Eliz. Bond's Case, Mo.238. (e) 3 Atk.750.
The proper method would be by information through the Attorney-General." In Attorney Gen. v Cleaver (a), Lord Eldon stated that "Instances of the interposition of this court upon the subject of nuisances have been confined and rare". Nor will Equity interfere to stay proceedings in any criminal matter or case not strictly of a civil nature.

"Equity will grant an injunction to restrain a nuisance only where it is a public one and is asked for by the Attorney General; and then only after it has been tried at law; or extreme probability of irreparable injury to the property of the plaintiff or his person" (b)

Injunction will not be granted except where irreparable injury or danger to health would follow (c).

In our own state the leading case on this matter is Atty Gen. v Utica Ins Co (d). Here an information was filed by the Attorney General to obtain an injunction restraining defendant from acting as a bank. The company was established to conduct an insurance business, but was assuming the powers and functions of a bank, both of issue and discount. An act of the legislature declared anyone subject to a fine who should become a member of any banking association, not authorized by law. Thus, in this case, we have a defendant sought to be enjoined from pursuing a business which was illegal, as to him, until he complied with the statutory regulations relating thereto. The opinion, in the case, by the great Chancellor

(a) 18 Ves.211 p.217. (b) Crandler v Tinkler, 19 Ves.622 (Eldon) (c) Wynstanley v Lee, 3 Swanst.355. (d) 2 Johns. Ch.371.
Kent, is very applicable to the present case. The weight of his name, added to the justice of the principles therein contained, should make the opinion the best possible authority. "Whether the defendants have banking powers given them, by the act by which they are incorporated, is, strictly, a legal question. It is equally a question of law whether they were within the purview of the restraining act. I have always understood it to be a general principle, in respect to the powers of this court, that when a cause depends, simply and entirely, on the solution of a dry legal question, the proper forum for the determination of that question is a court of law. It appears not to admit of doubt, nor do I understand it to be disputed, that if the defendants, as a corporation, have assumed powers not within their charter, the people of this state, by their Attorney General, have a complete and adequate remedy at law, either by the common law, writ of 'quo warranto', or by an information in the nature of such writ ....... If found guilty of usurpation, or unlawfully holding and executing any such office or franchise, the Supreme Court may give judgment of ouster, and fine the defendant for his unlawful usurpation and etc. Prosecutions in the King's Bench appear to have been the established course. Banking was formerly a common law right, but the legislature having declared it to require a franchise; any usurpation of this privilege has its adequate remedy by the public prosecutor in the Supreme Court. I cannot find that this Court has any concurrent jurisdiction .... The restraining act itself considers the act
of banking without legislative authority, as an offence, for which
the party offending is subject to a penalty .... The charge
contained in the information savors, then, so much of a criminal
offence, that it would require a clear and settled practice to jus-
tify the interference of this court, when that interference is not
called for in aid of a prosecution at law. The charge of a usur-
pation of a franchise has, so frequently, occurred, and the remedy,
by injunction, so convenient and summary, that the jurisdiction of
this court would have been placed beyond all possibility of a
doubt, and have been distinctly announced, by a series of precedents,
if any such general jurisdiction existed. But I have searched,
in vain, for this authentic evidence of such power. The precedents
are all in the writ of King's Bench, and 'Kyd' cites nearly a hun-
dred instances, within the last century, of informations filed in
the King's Bench to call in question the exercise of a franchise.
(So also with the present "Raines" law. Injunction to enforce
payment of license would have been an easy method, but we find no
such exercise of the equity power. On the other hand, we see, in-
deed, hundreds of cases where failure to pay such tax has been the
foundation of suits in the law courts, and usually, if not always, in
criminal actions.) If the charge be of a criminal nature, or an ofen-
ce against the public, and does not touch the enjoyment of property,
it ought not to be brought within the direct jurisdiction of this
court, which was intended to deal only in matters of civil right,
resting in Equity, or where the remedy at law was not sufficiently
adequate. Nor ought the process of injunction be applied but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful, it must be exercised with great discretion, and only when necessity requires it. Assuming the charges in the information to be true, it does not appear to me that the banking power, in this case, produces such imminent and great mischief to the community, as to call for this summary remedy.

The English Court of Chancery rarely uses this process, except where the right is first established at law, or the exigency of the case renders it indispensable. I know that the Court is in the habit of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a Court of equity to interfere at all, and much less preliminarily, by injunction, to put down a public nuisance which did not violate the right of property, but only contravened the general policy. This information proceeds against the defendant for a mere usurpation of power belonging to the government alone, or to its special grantees. The plain state of the case then is, that information is here filed by the Attorney General to redress and restrain by injunction, the usurpation of a franchise which, if true, amounts to a breach of law, and of public policy. I may venture to say that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in a court of law. The whole question, upon the merits, is one of law, and
not of equity. The charge is too much of the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall best consult the utility and stability of the powers of this court, by not stretching them beyond the limits prescribed by the precedents.

It seems that the above case is analogous to the one under discussion, both in points of resemblance and in similarity of reasoning. Both are statutory wrongs; but neither is declared a nuisance. Both are offences against the people as a whole, and are prosecuted in the name of the people, but neither does any great damage to the public at large, as both may be lawful by a precedent compliance with certain formal rules, or payment of a money consideration. Nor is either inherently dangerous, as it is not the act itself which constitutes the offence, but merely the lack of a nominal sanction, granted on the payment of money or compliance with formal rules.

Village of Brockport v Johnston (a) was an action by the Village of Brockport to restrain defendant, Johnston, from erecting wooden structures within limits forbidden by the by-laws of the village. The village was authorized to make such laws, under an Act of the Legislature. It was held that "equity will not interfere by injunction to enforce a penal ordinance, unless the act sought to be restrained is, in itself, a nuisance!"

(a) 13 Abb. N. C. 468.
Round Lake Association v Kellog (a). In this case the defendant asked relief from an order of injunction, restraining him in certain uses of premises leased by him for ninety-nine years. Plaintiff claims right to fix a license fee for defendant, and obtained this injunction pending the action. It was held that as the business is not claimed to be a nuisance, and plaintiff has shown no great or irreparable injury to follow on continuance of the sale, that an injunction would not lie.

Attorney General v New Jersey Railway (b) An information was laid to prevent an alleged public nuisance. "It would seem, at first, incongruous and improper, for this court to interfere in cases of public nuisance. The very fact that nuisances of that character are offences against the community, and necessarily savor of criminality in a greater or less degree, would seem to distinguish them as matters not proper to be dealt with by this court. . . . . In cases of public nuisance there is an undisputed jurisdiction in the common law courts by indictment; and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals.

Thus we see in all the cases, equity refuses to enjoin unless plaintiff shows some ground for equitable interference. In the case of a license or privilege, between private individuals, equity refuses to interfere unless the plaintiff shows some valid ground for equitable jurisdiction; he is left to his remedy at law. Where

(a) 34 N.Y.S.R. 291.
(b) 2 Green Ch. 136, p. 139.
the question comes up between the state or municipality and an individual, even in a clearly civil case, still Equity refuses to enjoin unless an injurious nuisance be shown. And in all cases of a criminal nature, equity refuses to enjoin unless the crime be a nuisance also, and affecting some individual in such a manner, as to allow him an action. But no cases can be found where offences declared by statute to be a crime, and expressly declared to be punishable in a court of record, having jurisdiction to punish as for a felony, which hold that the defendant can be brought before an Equity court, and after being proven a criminal therein, can then be enjoined from further acts of a criminal nature.

In Mayor of Hudson v Thorne (a), Chancellor Walworth declared, that it was no part of the business of a court of Equity, to enforce the penal laws of the state by injunction, unless the act sought to be restrained was a nuisance. A case bearing directly on the point at issue is Waupun v Moore (b). It is there stated, that a court of Equity will not enforce by injunction, a village ordinance, forbidding an act which is not a nuisance per se. And this is so, although the very terms of the ordinance, declares such to be the proper remedy. Nor is the remedy at law inadequate, merely because not stringent enough (c).

Judge Story in Parsons v Bedford (d), lays it down that the trial by jury is not dependent on the form of the action, but on the real substance as at common law. "The trial by jury is justly dear

(a) 7 Paige 261, p. 264.  (b) 34 Wis. 450.  (c) 33 Mich. 72.  
(d) 3 Pet. 433, p. 445.
to the American people. It has always been an object of deep interest and solicitude, and every encroachment on it has been watched with great jealousy. One of the strongest objections, originally taken, against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. 'No fact once tried by a jury, shall be otherwise reexaminable in any court of the United States, than according to the rules of the common law'. By the common law, they meant, what the constitution denominated in the Third Article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined.

Irwin v Dixon (a), was a request for an injunction. "This form of remedy was one much questioned, as permissible to the public or individual in case of a public right of this kind invaded. And when at last deemed allowable, it was only where the community at large, or some individual, felt interested in having the supposed nuisance immediately prostrated, on account of its great, continued, and irreparable injury."

The leading case, setting forth the rule regarding the restraining of public nuisances by equity, is City of Georgetown v Alexandria Canal Co. (b) A bill was filed by plaintiff to restrain the construction of an aqueduct. "Besides the remedy at law, it is now

(a) 9 How. p.27. See also, Osborne v U.S. Bank, 9 Wheat. 840. Eden on Inj. Ch.XI; 1 Story Eq.Jur.25. (b) 12 Pet. 91 p.93
settled, that a court of Equity may take jurisdiction in cases of public nuisance, by an information filed with the Attorney General. This jurisdiction seems to have been acted on with great caution and hesitancy . . . . . Yet the jurisdiction has been finally sustained, upon the principle that Equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore it is admitted by all that it is confessedly one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of mischief before the tardiness of the law could reach it. The other case, where the Attorney General can get an injunction, is where the public health is threatened by a nuisance (a).

The case of In re Debs, Petitioner (b), will be treated more fully in the next chapter, but it may be cited here as additional proof of the rule that, "The jurisdiction of Chancery with regard to public nuisances is founded on the irreparable damage to individuals or the great public injury likely to ensue" (p. 592)

Where a delay can safely be tolerated, the usual remedy in such cases, by or on behalf of the public, is by indictment, rather than injunction (c).

Under the "Raines" law (Sec. "29") not only can delay be tolerated, but the case is actually delayed by going into Equity. An injunction is obtained, but only after a trial, in which the defendant is heard. This takes almost as much time as a trial at law would.

(a) Attorney Gen. v Jamaica Pond Aqueduct Corp. 133 Mass. 361.
(b) 158 U.S. 564. (c) 12 Pet. 98; 19 Pick. 154; 2 Story's Eq. Jur. 923
It seems, therefore, that nuisances may be abated, but only after a proper action, or in extreme cases summarily, where a statute, based on the police power, so declares. But even them only in a valid exercise the Police power. An indictment may also be had in a case of nuisance. This action is brought by the public prosecutor in a case where the criminal law covers the facts. The remedy of injunction may be had by a private individual where the nuisance causes him special damage, and both the other remedies are inadequate, as where he fears irreparable injury. Or the public prosecutor may get an injunction to restrain a public nuisance, but only where there is danger of irreparable damage to the public, or injury to their health.

The mere sale of liquor without a license, causes no more damage to an individual or to the public than a sale under a license. (The only damage to the public, in such a case, is the loss of the license fee. This cannot be called irreparable damage) Such being the case, (Sec."29") of the New York Liquor Tax law, is unconstitutional, as extending the jurisdiction of Equity, without a jury, to cases wherein a jury trial has always been had as of right heretofore.
CHAPTER IV

LEGISLATIVE ENCROACHMENTS ON THE RIGHT OF

TRIAL BY JURY.

"To err is human". Every man makes a mistake or commits a wrong sometime in his life; but the welfare and safety of society demands he be punished when such wrongs assume proportions dangerous to the rights of others. No excuses are accepted. Every man must be supposed to know the law. The penalties for violation are plainly set forth. To break a law entails punishment. A method has been adopted by the people, by means of which, the question of the breach is decided. This is a vital question to the one charged with the offence. It is a question of fact, and needs no legal learning to decide it. The decision of the people based on centuries of trial and usage, is, that twelve men, the peers of the accused, are the fittest to determine the question. The people having thus decided, have placed a provision in their constitution, declaring that, "In all cases where the jury trial was had heretofore, it shall remain inviolate forever". There can be no theoretical discussions of this clause. It is an absolute rule founded on the experience of centuries, and upheld by the master minds of the race, as a safeguard against tyranny. The tyrants of the present day are not Kings, Emperors, or Oligarchs, but
"legislative majorities" And in the present condition of political combination and strife, such majorities would be dangerous indeed, were it not for the restrictions of the Constitution. These restrictions are the rules which govern in that border region, where the power of the government, and individual liberty conflict. Where they apply, they are supreme and cannot be contravened. Criminal acts, as existing heretofore, pure and simple, demand a jury trial. This cannot be contested. But can a legislature declare an act, which heretofore was merely a crime, to be also a nuisance, and as such cognizable in a court of Equity? Equity can only take cognizance of a supposed nuisance, where it is such in fact, or has been declared so by statute. The legislature cannot declare a thing to be a nuisance, which, in its very nature and in fact, has none of the elements of a nuisance.

Let it be granted that the legislature can prohibit a certain traffic. Can it regulate it? Certainly, because it may prohibit it. But could the legislature prohibit it arbitrarily, by the use of some cruel or unusual method? If not, then, can the traffic be regulated, so that a breach of a rule entails some cruel or unusual punishment? No, the procedure in such cases must be by due process of law. The legislature may declare that the sale of liquor without a license to be a misdemeanor, as it has always been; but it is unconstitutional to decree that such misdemeanor shall be punished by contempt proceedings in an Equity court. The act of selling liquor without a license, is either a criminal or a civil wrong. If it be criminal then Equity has no jurisdiction,
in the absence of danger of irreparable damage. If it be a civil wrong, it is against the people only, and is the amount of the tax. But absolutely no authority can be found, allowing Equity to enforce a tax levy by personal injunction on pain of punishment by contempt proceedings. If such were the case, any class of persons could be put in jail at the wish of the legislature, by levying a heavy tax on them, and on their refusal commanding an Equity Court to put them in jail by contempt proceedings.

The question, whether the legislature can declare a thing to be a nuisance, whether in fact it is or is not such, is not up for discussion in the present case, as the New York Liquor Tax law does not, in any of its provisions, declare sales without a license to be a nuisance. But if anyone who pays the fee may sell, then the mere failure to pay such fee is not of itself a nuisance. The sale of liquor without paying a license fee is not different in fact from the sale after paying it. The fact may be, that the manner of the sale of liquor by the one who has paid the tax may be more of a nuisance than the mere sale without such payment.

The facts in both cases are absolutely identical, with the exception of the payment of the fee. And how the mere failure to pay the stipulated sum of money can be a nuisance is beyond ordinary comprehension.

If such sale is not a nuisance; and we fail to see how it can be, when it is not so in fact, and the legislature has not declared it so (even if it has such power, which is doubtful) then the legislature has not the authority to direct an issue to be tried in an
equity court.
The act is one which is, and always has been, regarded as criminal in its nature, and therefore equity has not jurisdiction to enjoin, unless there be great or irreparable harm threatening, which cannot be compensated by damages. The remedy by injunction derives its salutary effects from the power of prohibiting future acts. But if an injunction would prohibit future sales, by fear of punishment; an indictment would prohibit them far more fully, by putting it beyond the power of the defendant to sell at all. The legal action is far speedier and more nearly final in its results than an application for injunction. In fact we find there is absolutely no ground for equitable jurisdiction, but the arbitrary will of the legislature. If the full rights of the defendant, as secured in the Constitution, could be had in an equity court, then it could take cognizance, in the discretion of the legislature. But the legislature has not the power, to indirectly cut off a constitutional guaranty by directly transferring a legal action into an equity court, and thus cutting off the right of trial by jury.
"The proposition that remedies may be altered by the legislature, is subject to the supreme qualification that no constitutional right can be infringed by any alteration of remedies" (a)

The great rise and expansion of late of such legislation as section "29" of the "Raines" law, is due in no slight degree to the decision of the United States in the case of In re Debs (b). As the outcome of the doctrine there laid down may be far reaching in

(a) King v Hopkins, 57 N.H. 334 p.353.
(b) 158 U.S. 564.
its effects, it may be well to discuss some of the principles and reasoning therein set forth.

A man may lawfully quit work whenever he pleases, and the reason or object for which he quits is a purely private matter.

All the men in a certain employment may simultaneously quit work, and remain away until their demands are satisfied.

If there be no combination among them, but they merely stop work, then their act is lawful. If, however, they form a combination, and by their united force conspire to compel acquiescence in their wishes, then their act is unlawful. Not the act of quitting work, but the act of combining and conspiring.

Men may endeavor to influence others to quit work by argument, or other means, but cannot go so far as to use force, fraud, intimidation, or threats.

In the "Debs" case, the United States Court took jurisdiction because the acts complained of were interfering with interstate commerce and obstructing the mails. But the remedy sought was by injunction. The ground shown for equitable jurisdiction was that the acts of the defendant constituted a public nuisance. To grant an injunction in such a case it must be shown that some irreparable injury was threatened, or the public health imperilled.

The facts, on which the order of injunction was based, were stated as follows: "The vast interests involved, not merely of the city of Chicago and the State of Illinois, but of all the states, and the general confusion into which interstate commerce was thrown; the forcible interference with that commerce; the attempted exercise
by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs, which called for the fullest exercise of all the powers of the courts.

It requires some little stretch of imagination to perceive in the foregoing facts, any results differing from those which usually follow the commission of crimes against the public. The act of a train robber in stopping a train, produces the same results; the difference in damage being of degree merely. But it would hardly be contested that he could be enjoined in equity. The act which caused the damage was the combination, not Debs. It was the men's united action which caused the "tie up" of the railroads, not the mere order of Debs. If there was any public nuisance, the combination and conspiracy alone was the nuisance, and the act of Debs was the purely criminal one of instigating a nuisance. The punishment of such an act had always been an indictment, and it should have been so in this case.

In his opinion (p. 581) Judge Brewer quotes the Federal guaranty of "jury trial in all criminal cases, except impeachment, in the state where the crime was committed." He then goes on to say: If all the inhabitants of the state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences, had in such a community, would be doomed in advance to failure.

This is declaring, that as juries might be swayed by popular feeling, in certain cases, therefore they should not be allowed to hear such cases. Thus a single judge deprives a person of a
constitutional right, because he fears the enforcing power will not do its duty. The jury has heretofore been found the bulwark against the arbitrary power of the government. The people have declared that it shall continue so to be. Whenever the time comes that the jury is found incapable of performing its functions, the people will make such changes as they see fit. Until that time comes the jury remains supreme in its own sphere, and it lies not with any judge, however eminent, to take a proper case from them, on the ground that they might, being swayed by popular feeling, discharge the prisoner. The people in securing the trial by jury, adopted it faults as well as benefits, and no judge has the right to speculate whether, in a given case, the faults outweigh the benefits, and on the outcome of his speculations, to arbitrarily deprive the culprit of the right of a jury trial.

The vital point of the whole case, and the reason why equity assumed jurisdiction, was because it was feared the jurors would not do their duty, being swayed by popular feeling. But this was the very argument advanced against the right of free verdict in the early English cases.

In the case of Sir Nicholas Thockmorton, tried in 1554(a), the judge sentenced the jury to jail for acquitting the prisoner. But putting a jury in jail after doing what they thought their duty, is not as bad as depriving them entirely of the chance to do their duty.

(a) 1st of Mary.
The old case of William Penn has a strange analogy to the "Debs" case. Penn was indicted in 1670 (22 Chas.II) for having with divers other persons, unlawfully and tumultuously, congregated themselves in Gracechurch Street, London. The indictment also set forth that Penn, in the open street, "did preach and speak to persons in the street assembled, by reason whereof a great concourse and tumult of people, a long time did remain and continue in contempt of the king and his law, and to the great terror and disturbance of many of his liege people and subjects." Penn was a Quaker, and his speech to the people was distasteful to the government, as that class were not in favor at the time. He was tried, and the jury brought in a verdict of "not guilty", against the direction of the judge. They were each fined and sent to "Newgate" for non-payment. They were subsequently released on a writ of habeas corpus returnable in the Court of Common Pleas.

The defendant in the case shortly afterwards left England, and founded the second largest state, and the third largest city, in our land. The city in which the "liberty bell" first tolled the birth of the Union. But were Penn now in Chicago and caused "a great concourse and tumult of people to assemble and remain, in contempt of the law" he would be enjoined by our courts, and then being guilty of contempt thereof, would be summarily put in jail. He would not be allowed a trial by jury, as such a prosecution would on account of public opinion, "be doomed in advance to failure. It seems highly impertinent to criticise the reasoning of a judge.
of our highest tribunal, but it has never before been asserted as a reason for taking a case into equity, that the legal remedy was inadequate, because of an inherent defect in the jury system. The decision in this case caused a widespread feeling of dissatisfaction among the laboring classes. It seems to them, the Court held that a combination of workingmen, to cause an increase of wages (a benefit to the many, and detriment to by few), or to protect the rights of their weaker brethren, is a conspiracy, a crime, a tort; a nuisance; in fact, everything wrong, so that it could be attacked from all sides;—while combinations of "Coal Barons", to raise the price of coal to the many to benefit themselves; "Pools" of railway "Magnates" to increase rates to the travelling public; combinations of oil "Kings", to tax an increase of the poor man's day; in truth, all combinations of capital increase and grow stronger with never a hindrance from the courts. It seems strange to them that such things should be so; it may be remarked, incidentally, that their bewilderment is said to be shared by many who claim some insight into the "eternal fitness of things".

It was laid down Denio, C.J., (a) that offences under the liquor laws, were punishable only after a jury trial, at the time of the adoption of the constitution, and a law directing them to be tried before a Court of Special Sessions, does away with that right and is void.

Although the constitution of 1870 grants Courts of Special Sessions jurisdiction in cases of misdemeanor, in the discretion of the legislature, it does not, ipso facto, allow an Equity court to take
cognizance of such misdemeanors.

The opinion by Judge Field in Carleton v Rugg(a), is very pertinent to the matter in hand, and applies directly to a state of affairs arising under section "29" of the "Raines" law. The Massachusetts statute was not passed for the abatement of a nuisance, by destroying or changing the character of tangible property, or by removing obstructions to the exercise of a public right. Its purpose was, I think, to prevent the illegal sale of intoxicating liquor, by punishing by fine or imprisonment, or both, without limit, in the discretion of the court, any person who sells, or keeps such liquors for sale, after he has been enjoined by the court. The prevention of crime, by the punishment of persons found guilty of an offence against a general law, is aimed at. The legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things, by affixing to them new names. If the legislature, by statute, can authorize a court, in a public prosecution, to enjoin any person from illegally keeping or selling intoxicating liquors, in any specified place within the Commonwealth, why can it not authorize a court to enjoin any person from illegally keeping or selling intoxicating liquors anywhere within the Commonwealth? (This is precisely what is done under section "29" of the New York Liquor Tax Law.) And if this can be done, why can it not authorize a court at the suit of the Commonwealth, to enjoin any person, from doing any illegal or criminal act, anywhere within the Commonwealth, and so try without a jury, any person so enjoined on a charge of having violated the injunction, and to

(a) 149 Mass. 550.
punish him by fine and imprisonment, without limit, if the court find him guilty? . . . . If this jurisdiction were confined to crimes having some direct relation to a particular building, place, or tenement, the number of such crimes is large, and all crimes have some relation to place, as they must be committed somewhere. . . .

It was not the intention of the constitution that persons should be punished for violating general laws by proceedings in Equity, or by a court acting without a jury, and subject to no limitation on its power to fine and imprison, except its own discretion. The safeguards of the common law were carefully secured by the Declaration of Rights, both in public prosecutions, and in private suits, 'except in cases where it has heretofore been otherwise used and practiced! This is not such a case, and the only thing novel about it is the procedure. Statutes against illegally selling, or keeping for sale intoxicating liquors, from earliest times, have been enforced by criminal complaints or indictments, or by penal actions. Such statutes were never enforced in Equity anywhere when the Constitution was adopted. I think the statute under which the present proceedings were brought, is inconsistent with Article XII of the Declaration of Rights"

In the same case Knowlton J., states that there is a difference between restraining the place of sale and the act of selling. The former being a nuisance, and the latter a criminal act pure and simple, and not subject to equitable cognizance. "It would be an anomalous proceeding, for a court to enjoin a defendant from committing the crime of larceny, or of selling liquor, with a view to
punish as disobedience of the injunction, and contempt of court, the same act which was before punishable as a crime. If that could be done, an accused person through a mere change of form in the proceedings, might be punished for a crime without a trial by jury, and in violation of both the Federal and State Constitutions.

CONCLUSION. It seems, therefore, that section "29" of the New York Liquor Tax Law is merely a piece of legislative circumlocution, adopted by the legislature to expedite conviction under the Liquor Tax Law. Undoubtedly, a speedy trial is a much desired object, and the efforts of the legislature to aid this end are appreciated; but the provisions of the Constitution are superior to all theories or designs of the legislature, and must not be contravened.

For the reasons hereinbefore set forth, we think section "29" of the New York Liquor Tax Law is in conflict with Article I Section 2 of the New York Constitution.