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EQUITY JURISDICTION APPLIED TO CRIMES
AND MISDEMEANORS.

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“ For an evil which is not felt, and which is, therefore, considered a trifle and little thought of, draws after it consequences only so much the more disastrous ” (Wickliff, as quoted by Neander).

Some time since a distinguished judge, now dead, went out of his way to commend, in the name of the Supreme Court of the United States, the new departure in criminal legislation and the administration of criminal justice in extending the jurisdiction and forms of procedure of courts of equity to the statutory misdemeanor of selling intoxicants. At that time an article was inserted in the *Evening Post*, of New York, deprecating the legislation and the commendatory expressions of the Supreme Court. A learned judge requested that the objections should be pointed out. Not that he doubted as to the impropriety of the legislation, but as it is evident that when such a court as the Supreme Court of the United States allowed a commendation by one of its number, while speaking for the whole bench, to pass unchallenged, it is impossible to rely on the mere legal instinct as sufficient to condemn it.

The commendatory expressions referred to are found in the case of *Eilenbecken v. Plymouth County*.¹

Before speaking of this case, it may be said that it is quite evident, from reports of judgments in the daily press, that many judges are assuming to use the forms of equity jurisdiction over crimes—not, of course, of crimes generally, this would be an absurdity too great—and also in matters to which the same objections exist, as in the particular instance to which I refer—political elections, strikes of workmen, etc. Believing this subject belongs to political jurisprudence, and that its importance is measured only by the value of the rule that removes criminal jurisprudence from even the apparent caprice of the judiciary and compels the intervention of a public trial with the witnesses and the accused brought face to face, a jury to determine the facts, the public discussion of the admissibility and effect of evidence, and a fixed standard of punishment, with a right to a review and to an appeal to the pardoning power, I now propose to point out the one sufficient objection to the new system.

It may be well to state the particulars of the case of *Eilenbecken v. Plymouth County*.

Iowa, by a statute, prohibited the selling or other distribution of intoxicants. It then conferred on the courts the power of a Court of Chancery to deal with the violation of the statute. For this purpose it declared the act of selling to be a nuisance, as also the place where it was done, and, while limiting the penalty, it gave the court the power to restrain the sale by an injunction and to punish the breach of the mandate like a court of equity. There are absurdities and iniquities in the statute that seem incredible. The provisions that have had the approval of the Supreme Court, however, have alone been stated. The suppressed provisions might well be referred to as illustrating the disastrous consequences that may follow from a disregard of the rule on which, more than

¹134 U. S., 31. An abstract of this case and the commendatory expressions of the Court referred to will be found in note at the end of this article.

on anything else, all civil and political liberty depends,—the reputation for purity of the judiciary itself; and also the consequences of committing legislation to persons who apparently are ignorant of the foundations of that liberty.

To enable one not a lawyer to comprehend the question it is necessary to say this much as to what is called chancery or equity jurisdiction. It is an exceptional jurisdiction. It was designed to furnish a kind of redress that the law did not and could not give; to deal with rights of property not recognized by the law, but established by courts of equity. It has always, and by every author or court been recognized as confined to matters of property; and to cases where the law failed to furnish an adequate remedy, and never to have any right to interfere in respect to the rights of persons as distinguished from property, much less with crimes or anything involving persons or personal liberty. Its mode of procedure differs from that of the law. Its remedies are as wholly different as the compelling of the doing of an act differs from merely exacting compensation as estimated by a jury for not doing it. And out of this, and as a part of this very exceptional and peculiar power of compelling the delivery of a specific thing under penalty of imprisonment until it is delivered, or restraining or compelling the performance of an act under the same penalty, there was invented a writ or form of procedure called injunction, which is simply a writ commanding the doing or prohibiting the doing of some defined act which is enforced by imprisonment at the discretion of the judge. The disobedience is called *contempt*, that is disregard of the command of the judge.¹

The capacity to determine whether there is a violation of this order depends upon the discretion of the judge. It is not *necessary* that there shall be a trace left of the proof or evidence, for it may all be by unwritten testimony, and it may all be *ex parte* without the accused seeing the witnesses or having an opportunity to ask them a single question.

Now this system, confined as it has been to mere mat-

¹ See 35 Ch. Div., 455.

ters of property—to commands not to do some particular act relative to property, such as not to negotiate a bill, or not to build or not to pull down until a final hearing—has never been complained of. On the contrary, it is one of the most useful of all the forms given us for administering justice, and this arises from the fact that passions are excluded when the rights of property alone are under consideration, and the remedy is a provisional, temporary and protective remedy only. Is it wise or prudent, is it consistent with the great fundamental laws that protect civil liberty, to extend this sort of remedy to crimes and misdemeanors? And if it is inconsistent with these, is that not a sufficient objection?

It may be that the uniform voice of the equity lawyers of England, where the system originated, and by whom alone it has been formed, will, with some people, be sufficient to condemn this extension of equity jurisdiction. Not one solitary feature in the system arises through legislation. It is all judge-made law, and it is submitted that the recognition by the equity judges of England of the limitation on equity jurisdiction clearly implies their belief that it ought to be so limited, seeing that they alone have ever attempted to set the limits to their own jurisdiction.

That there is no jurisdiction in a court of equity to prevent crime or any act *because it is criminal* was distinctly decided by Lord ELDON, in *Lee v. Pritchard*.¹ It was also there decided that the publication of a libel could not be prevented by a court of equity. It is important for our present purposes to observe that at the same time it was decided that there was nothing in the way of the Court preventing the publication or the doing of the act because it is a crime, if these prohibitions are necessary for *the protection of property*. This principle was recognized by Chancellor KENT, and, in fact, made the basis of a great judgment.² It was also recognized and applied in *Springhead v. Riley*,³ in 1866, showing that under the reformed

¹ 2 Swanston, 440 (1818).

² Attn.-Gen. v. Utica Ins. Co., 2 Johnson's Rep., 271.

³ L. R. 6 Eq., 558.

law no change had taken place in this fundamental rule, nor had the supposed fusion of law and equity produced such a revolution as to permit the application of equity forms and processes to matters involving personal liberty or merely to illegal and injurious acts not affecting property. The authority is not a very high one ; but the precise point was clearly stated and abundantly fortified by authorities there cited to maintain the proposition, that *the jurisdiction of this Court is to protect property*. The distinction as to when a trespass can and cannot be prevented,¹ the trespass must amount to waste, that is, an injury for which damages are not a compensation.² When forged notes may or may not be restrained, citing *Austria v. Day*.³ In this case the eminent patriot Kossuth was preparing to wage war by flooding his enemies' country with forged currency. The jurisdiction to restrain this as an invasion of the prerogative was disclaimed, as was any jurisdiction in political cases, or because a revolution would result. A quotation is given from this judgment containing the reason upon which the judgment was rested : "I agree" (it is here Lord CAMPBELL who speaks) "that the jurisdiction of this Court in a case of this nature rests on injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property." Then there is a citation from Lord ELDON'S judgment in *Macauley v. Shackell*. "*This Court has no criminal jurisdiction, but it lends its assistance to a man who has in view of the law a right of property, and who makes out that an action at law will not be sufficient remedy and protection*"

There is no more perfect illustration that property, and that alone, is the subject of equity jurisdiction than the judgment of Lord LANGDALE, in *Clark v. Freeman*,⁴ coupled with the comment of that great lawyer, Lord CAIRNS, in

¹ *Lewdes v. Bette*, L. J., Ch. 451, by Kindersley, V.C.; *Turner v. the Highway Board*, 18 U. R., 424.

² 3 D. F. & I., 217.

³ 1 Bl. N. S., 76, 127.

⁴ 11 Beavan, 113.

Maxwell *v.* Hogg.¹ The decision was that the manufacture and sale of spurious pills under a false representation that they were made under a prescription of Sir James Clark could not be enjoined. Lord CAIRNS' comment was that Sir James might be said to have a property in his own name to warrant the interference. Certainly the pills ought to bear the palm as against the whiskey if the sale of either could constitute a nuisance. The judgment reviewed in this case was a very singular one, and savored altogether of the line of reasoning that, with regret, we are very familiar with in this country leading to this proposition, that boycotting and its tribe of crimes could be enjoined because they are injurious to property. In *Prudential v. Knott* these cases will be found to be thus characterized: "The Vice-Chancellor, in his desire to do what was right, was led to exaggerate the jurisdiction of this Court in a manner for which there is no authority in any reported case, *and no foundation in principle.*"² The decision cited deserves notice, it being that of Lord Cairns, Sir W. M. JAMES and Sir G. MELLISH: *There is no jurisdiction to restrain the publication of a libel, even though it affects rights of property.*

There is a passage in the judgment of KNIGHT-BRUCE, V.C., in *Soltau v. Deheld*,³ which perfectly illustrates the exceptional character of the jurisdiction. An injunction was asked to restrain a nuisance by the ringing of bells; one of the reasons urged was that the ringing of the bells of Roman Catholic churches was illegal. He said: "That is perfectly immaterial . . . because if it be illegal I am not to grant an injunction to restrain an illegal act merely *because it is illegal.* I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering." Suppose we extend the jurisdiction to theft or even to gambling. Is it nothing to have a public order made on a particular person commanding him to abstain

¹ L. R. 2 Ch., 310.

² 10 Chanc., 142.

³ 2 Sim. N. S., 153-4.

from stealing or gambling? The utmost limit of punishment for the most malicious suit of this kind is the payment of costs; and if we yet introduce the securities given by the common law against similar accusations, which the courts cannot, we may ask, why make the change in the forms of criminal procedure, except to conceal the real purpose?

There is a striking passage or sentence of Lord LANGDALE, in *Ryves v. the Duke of Wellington*,¹ that may be of service to gentlemen who conceive that whenever the law fails to produce the result they desire the remedy may be had in equity. In that case the Probate Judge had refused to make an order on George IV to produce and prove the will of George III, because there was no precedent to compel the wearer of the crown to produce and prove the will of his predecessor. The Duke of Wellington was the executor of George IV. This was the equity of the bill, to compel payment by the executor of the person who had suppressed the will of his father. Lord LANGDALE said: "It was argued that if no remedy can be obtained here, the law of England does not afford any remedy for an alleged wrong, such as is stated on this record. I may observe that the absence of a remedy for a supposed wrong in another place is not, of itself, any reason for this Court assuming a jurisdiction on the subject; the case must be such as to bring it properly within the jurisdiction of this Court on other grounds."

There is a passage in a judgment of a man who stands second to none in the estimation of the Bar and Bench of the United States that may possibly be deemed of weight on this point. It is not a *dictum*, it is a *ratio decidendi* of a very important case. It is the decision of Chancellor KENT, of New York, in *Atty.-Genl. v. the Utica Ins. Co.*,² that a court of equity has no jurisdiction over offences against a public statute, and could not restrain the violation of an act prohibiting unincorporated banking associations from issuing bills to be used as currency. The real

¹ 9 Beav., 600.

² 2 Johnson's Ch. R., 361.

point of the judgment, apart from precedents, and the replies to the sophistical use of the elementary rules defining the jurisdiction by misapplying them and perverting the meaning of words, lies in this sentence: "If a charge be of a criminal nature or of an offence 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 rights* resting on equity, or where the remedy at law is not sufficiently adequate."¹ The legitimate subject-matter of equity lies in the two words that have been italicised. And when the origin of the jurisdiction is considered—that it is exceptional and of grace, not of right—and also when we consider the forms or mode of administration and the remedies, no one will question that there is ample reason for confining such a jurisdiction to mere matters of property. At the close of the judgment, which well deserves reading by those who are willing to believe that a thorough study of the subject and long experience in the administration of justice, both as a common-law and equity judge, entitle a man to have an opinion, and that opinion to carry weight, there is this sentence: "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." This is as pregnant with the negative principle of equity jurisdiction as were the two words that have been italicised with the affirmative.

It may be permitted here to add, if one were to desire to exhibit this emanation of American politics in all its grotesqueness, a case reported in 4th Wallace, *State of Mississippi v. Johnson*.² The scheme was of the same stamp as the legislation of Iowa, and also the judicial comments on that piece of statesmanship.

It was an attempt to obtain an injunction from the Supreme Court of the United States restraining the President from enforcing certain acts of Congress on the ground of their unconstitutionality. The Chief Justice (CHASE)

¹ 2 Johnson's Ch. Rep., 378.

² Page 476.

was probably quite competent to point out the absurdity of employing equity jurisdiction for such purposes. And it was most unfortunate that he did not condescend to use the instrument that such folly and ignorance deserved. He, however, did not attempt to ridicule the peculiar absurdity of calling in aid the jurisdiction of equity to determine (1) a pure legal question, (2) a political question, (3) a question of criminal law determinable by another department of the government. He preferred taking the higher ground and, no doubt, the wiser one. He rested the case upon the total want of power in the judicial department to undertake to control the Executive in anything that involved discretion. Impliedly, he said, or rather the Court decided, that the question of the legality of an act of Congress in reference to matters of government could not be discussed by the judicial department of the government before some overt act, and then only by action, indictment or impeachment. He pointed out that there was another tribunal appointed for this purpose by the law, if the criminal held official position, viz. : the Senate, on an impeachment, and they might impeach for not obeying while this Court was prohibiting obedience. And he contented himself by simply denying the power to enjoin the President in the performance of his official duties, and with one touch of ridicule by quoting the words of his great predecessor, MARSHALL, "an absurd and excessive extravagance," as justly characterizing an attempt by the judicial tribunal to enforce executive and political duties.

There was thus, however, lost an opportunity for speaking out by one that could not but be listened to even if not comprehended, and of giving to the people of the United States some little conception of the inherent and essential features of the subjects proper to be committed to a court of equity. Had he but said, "Where is the equity of this bill, and what do you understand by that word you are always repeating, and do you have any real conception of its meaning?—certainly the draughtsmen of this bill had not—did any one before ever conceive that illegality creates an equity?—it may be an essential element in the

equity, but if illegality constitutes or creates the equity there can be no wrong or crime that is not within the jurisdiction, yet it is only when the law cannot give the proper redress that such a jurisdiction exists," he would have rendered essential benefit to American jurisprudence. Possibly he may have apprehended that he would be giving support to the notion that the form of the remedy only was mistaken; and if he was dealing with a bar whose brains were sufficiently addled to try the experiment of a *mandamus*, he was very wise to extinguish all hope of involving the judiciary in the absurd attempt to administer the government as if it were an insolvent corporation.

If any should say the English judges gave no reason for these limitations to equity jurisdiction, it is sufficient to reply that they were speaking to an educated class to whom the reasons were self-evident. When we find Lord ELDON taking infinite pains to explain when and where and under what circumstances and for what reason he is justified in interfering to prevent the destruction of property, and not to put the man to an action for damages, we may be quite sure that he saw a reason and a serious one for the rule. If the jurisdiction is improper in the case of a most vexatious trespass, such as entering into private grounds or going over enclosures, must not the same objections exist to similar acts when rising to the dignity of a violation of the statute law? Those who commend the practice of extending the forms of equity procedure, and those who seek for the means for curtailing extension equally overlook these practical reasons.

But to comply with the request that has led to this paper, it is necessary to call attention to the subject in detail. It is not a sufficient reason against the new system, looking at the question as one of policy, or from the standpoint of politics, that such a jurisdiction has never before been exercised. That may be sufficient in a court—it may be none against the grant of the jurisdiction by a legislature. What has been said in reference to English jurists, including some of the most illustrious of our own, is to make it clear that they declined the jurisdiction and denied

its existence. But the purpose of this paper is not to defend the courts for declining the jurisdiction, but to state the reasons against its creation. The courts will readily acquiesce in a denial of a jurisdiction that has never been exercised, if it is seen to be of such a character that it is a violation of the fundamental principles of free government to confer it.

Equity jurisprudence as applied to crime and as distinguished from that of law is preventive only. Let us now look at what the jurisdiction would be were it not preventive. Injunctions would then be impossible, for, while there are such things as injunctions after the wrong done, they are confined, of course, only to the case where the wrong may be righted, and things replaced as they were; as, for instance, a building may be erected contrary to a covenant, and the builder may be compelled to restore the land to its former condition.

And here it may be observed there is no pretence of a jurisdiction conferred to try or punish the offence created by the statute. It is because it is a preventive that it is commended in the opinion of the Supreme Court, and it is the preventive jurisdiction only that is supposed to be conferred. And yet I am aware of no crime or misdemeanor in which this preventive remedy by injunction is possible. Certainly it cannot be applied to an unlicensed sale of a dram. It is too absurd even for a joke. What, then, is the practical, what is the inevitable and necessary result of applying the preventive remedy? Look at it as it must occur. A person is suspected of an intention to do the forbidden thing. He is enjoined not to do it by a judge. If he does it he has committed two wrongs,—one is the violation of the prohibition in the statute; the other is the violation of the command of the Judge not to violate the statute. It is the one single act that constitutes the disobedience. What is the immediate consequence? The command of the statute is overlooked and its violation is disregarded; or if that is punished, and also the disobedience to the judge's order, the man is punished twice for the same offence. There is, of course, nothing of prevention here.

If, however, punishment is dealt with as a preventive, then the disobedience, which consisted in doing what is prohibited by the statute, is punished after that kind of trial that does apply to the breach of an injunction. And what is that? A trial by affidavits—that is, by evidence given by witnesses—given in the form they see fit, without the form of conducting what is called a cross-examination—that is, by asking questions explanatory of the statement. And in what respect is this preventive; except as the fear of punishment is preventive, and how does this differ from the fear of the sentence of a court of law, saving that one has and the other has not a right to a trial by due course of law? It is difficult to make any one not accustomed to the administration of justice comprehend the importance of this, and how utterly absurd and iniquitous it would be to apply this system to what is really a violation of the criminal law. Apply it honorably—that is, as the courts of equity do apply it—and the whole thing would be a laughing-stock. The accused has but to deny the fact on affidavit. When has it been found that a defendant was committed for contempt after his denial of such a fact as this must be? And is it desirable to compel the accused to choose between perjury or committing himself?

The whole scheme is a most unworthy perversion of the forms of justice. It is a mere evasion of the principles of law, and these principles are those on which, with the writ of *habeas corpus*, the whole system of criminal jurisprudence as a matter of politics rests.

To make this plain, the following observations are sufficient: If the jurisdiction, to punish for a violation of the license law, when there is a violation, or for a violation of the prohibitions of all use of intoxicants, whether by sale or gift, is intended to be given to the Courts of Chancery, nothing whatever is done but to change the form of procedure by indictment to injunction. In imagining the jurisdiction is preventive the legislature is deceiving itself and the community. In place of an indictment and a public prosecution, a grand jury, a court using common law forms, which require a jury to determine the

fact, and a judge to determine all matters of law, including the sufficiency of the evidence and the nature of the proof, there are substituted a bill, answer, proofs in writing, and a hearing before a judge without the right of appeal.

If there is no constitutional guarantee of the right to the trial by jury, then there is nothing to prevent the legislature doing this as a matter of *power*. The only remark to be made is that it would be far better to give the same power to punish to the ordinary courts and by common law forms. No possible benefit will result from the novelty. The offence will be much more speedily and certainly punished by the common law courts. All that is effected by the change is to confuse men's notions, and impose an expensive and dilatory system in place of a speedy and cheap one. No one who has the slightest knowledge of equity can fail to see that what the Legislature of Iowa has done is simply absurd, except to evade a trial by jury. Was anything but this the real intention? It is the extraordinary powers of the Court of Chancery that the framers of these laws designed to apply to assist in suppressing the evil of dram-drinking, and to the enforcing the prohibitory laws of the State, concealing the fact that they had removed the right of trial by jury. So far as the punishment is concerned, that cannot differ because of the court which is to enforce it. It would be something worse than absurd to provide that a court of equity may impose a heavier penalty for a violation of a statute than a court of law is permitted to do.

There is another form of relief which the forms of equity furnish, that is one compelling some act to be done. It is, however, obvious that in reference to the violation of the law there can be nothing done after the violation but punish. To confer this jurisdiction on courts of equity, therefore, has no possible meaning or object but to sanction and punish a misdemeanor without the intervention of a jury. The objections, therefore, to this novelty begin and end with this change. If it is proposed and is deemed wise and proper to make this change in the forms of law, and to substitute a judge for the jury to try facts constituting

crimes or misdemeanors, it is idle to waste time declaiming on the mere nonsense of doing it in this round-about way. But no one can read the act and suppose that this was the real intention. It is the preventive remedy of Chancery Courts that was intended to be conferred, and which alone is in question.

It is immaterial as a question of power that no such thing has ever been done, or that such things are not within the jurisdiction of courts of equity. Legislatures may, if not restrained by a constitution, confer jurisdiction in this case on the courts of equity, as it may as to another crime. It may make all crimes punishable only by an action for damages, and it may enforce contracts by hanging for failure to perform.

Granting, therefore, the power, what are the objections? Precisely and solely these. The whole system of administering the criminal laws is changed in the one particular that we and our ancestors have thought essential to political freedom, and which the experience of the world proves there is no other sure support for that which is beyond all price—that is, assuring to the accused of any crime for which there can be fine and imprisonment imposed, a trial by jury, according to the course of the common law—that is, with the witnesses produced and examined in the presence of the accused and before the world.

If these things are not deemed important, there is nothing more to be said.

If the fact of a violation of the order of the judge not to sell is tried as a misdemeanor, nothing is gained by the grant of the jurisdiction. But it cannot be tried in that way. No court has jurisdiction to try for contempt but the one whose order is disobeyed. That court and judge must decide the facts as the forms of the jurisdiction conferred require. If this fact of the contempt is to be tried by a jury indirectly, the whole thing becomes so absurd as to be incapable of discussion. If it is not to be so tried, the real purpose of this legislation is to confer a jurisdiction over one class of misdemeanors on a judge who may try it on *ex-parte* evidence without opportunity for cross-examine.

Where will this stop? Will any one deny that the only justification pretended is that the tribunal appointed for such purpose declines convicting? Thus it comes to this. We are to introduce a system denounced as outrageous when applied, under the name of coercion, to a people avowing a determination not to enforce the law, merely to carry out one newly-conceived scheme of moral reform, because the community will not submit to such dictation. Is not this a prodigious political blunder? And what will become of the judiciary compelled to exercise what the people will believe to be merely a capricious power?

NOTE.

The case of *Eilenbecken v. District Court of Plymouth County*, reported in 139 U. S., 31, arose, like so many other cases which have been taken to the Supreme Court of the United States, out of the policy of that State in attempting to suppress the traffic in intoxicating liquors.

Section 1534 of the Code of Iowa, as amended by C. 143 of the Acts of the Twentieth General Assembly, is as follows:

Sec. 1534: "In case of violation of the provisions of either of the three preceding sections or of Section 1525 of this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping, with intent to sell, use or give away, of any intoxicating liquors, is carried on, or continued, or exists, and the furniture, fixtures, vessels and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided; and whoever shall erect, or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and, upon conviction, shall pay a fine not exceeding \$1,000 and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of Chap. 47, Title 25, of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same; and any person violating the terms of any injunction granted in such proceeding shall be punished, as for contempt, by fine of not less than \$500 nor more than \$1,000, or by imprisonment in the county jail not more than six months, or by both, such fine and imprisonment in the discretion of the Court."

This statute thus declares it is a crime to sell liquor or to keep liquor for sale, and provides for prosecution according to common law forms. It provides that any citizen may further maintain an action in equity against any person who, he alleges, keeps liquor for sale, to abate or perpetually enjoin said person from a further violation of the law. The Court, whether convinced or not of the truth of the allegation, may grant an injunction restraining the person against whom the bill is filed from selling

liquor. For violating the terms of this injunction—in other words, for selling liquor or keeping the same for sale—the Court, on proof by affidavit of the fact of the violation, *having no personal knowledge of the facts*, shall adjudge him in contempt of court.

Unlike all other punishments for contempt, the maximum and minimum punishment is fixed by the statute.

With this law in force, on the eleventh day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of the plaintiffs in error, praying that they should be enjoined from selling or keeping for sale intoxicating liquors, including ale, wine and beer. On the 6th of July, the Court ordered the issue of preliminary injunctions as prayed. On the 7th of July, the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that the plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the Court ordered that a hearing be had at the next term of the Court upon affidavits; and on the eighth day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the Court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of the injunction issued in said cause, and the sentence of fine and imprisonment entered against them.

The Supreme Court of the State on a writ of *certiorari* affirmed this judgment. The third assignment of error, which was the only one of any importance, was, that the statute in question was void because in effect it deprived the plaintiffs, who are charged with selling intoxicating liquors, “of the equal protection of the laws, and it prejudices the rights and privileges of that particular class of persons, and denies to them the right of trial by jury, while in all other prosecutions the accused must first be presented by indictment, and then have the benefit of trial by jury of his peers.”

The Court, per Mr. Justice MILLER, held, first, that the record did not show whether the plaintiffs would have been denied a trial by jury had they demanded it; and, second, that it was within the power of the Court to issue the injunction. The opinion of the late Mr. Justice Miller, however, goes far beyond this. He considers, in the first place, that the offence is one against the Court, and not against the statute. After deciding that a court has power to punish for contempt without intervention of a jury, the learned jurist continues:

“The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have right to trial by jury.

“We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the Court punishing