UNCONSTITUTIONAL.

The Dispensary Law So Construed by the Supreme Court.

On last Thursday, the long looked-for decision of the State Supreme Court in the Dispensary case, was filed. The opinion, delivered by Chief Justice Mclver, and concurred in by Justice McGowan, completely upsets the whole Dispensary business, and as a result all the dispensaries have been closed and the employees in Columbia discharged. Justice Pope filed a dissenting opinion. Space prevents the publication of both, but we give the decision of the Court:

THE DECISION.

The State of South Carolina—In the Supreme Court, November, term, 1893—Charles S. McCullough and others, plaintiffs, respondents, vs. George Just Brown and others, defendants, appellants; the State, appellant, vs. Hentz Jacobs, defendant, respondent; the State, appellant, vs. J. C. H. Troeger, defendant, respondent; the State appellant, vs. Thomas Fagan and others, defendants, respondents; the State, appellant, vs. Benjamin David, defendant, respondent.

OPINION—M'IVER, C. J.

These cases all arise under an Act entitled "An Act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State, except as herein provided," approved 24th of December, 1892, 21 Statutes, 62, and were, therefore, heard and will be considered together, for, while there are certain subordinate questions presented in some of the cases which do not arise in others, yet they all present the question of the constitutionality of the Act. To that question as one of over-shadowing importance, we propose first to direct our attention. Before doing so, however, it may be proper to state that just before the commencement of the argument the Attorney General, deeming it due to the Court so to do, presented a suggestion in writing calling the attention of the Court to the fact that at the recent session of the General Assembly (1893) another Act on the same substance had been passed which might possibly be regarded as repealing or superseding the Act of 1892, under which these cases arise, and if so might deprive the questions presented in these cases of any practical character, leaving them only as speculative questions which the Court might be willing to hear. But as no motion to dismiss the appeals was made and no application on the part of the counsel for the State to abandon the appeals upon any such grounds was presented, this Court will not, of its own motion, decline to hear the cases, but on the contrary will assume, for the purpose of this discussion, that these cases are not in any way affected by the passage of the Act of 1893, but do present practical questions, which this Court is bound to decide.

Recurring, then, to the question of the constitutionality of the Act, it may be as well to say in the outset that we freely concede that the presumption is always in favor of the constitutionality of an Act of the Legislature; and hence, as is said by Shaw, Chief Justice, in Willington, petitioner, 16 Pick, 95, referred to with approval by Judge Cooley in his great work on Constitutional Limitations at page 182 of the second edition (which it may be well to say here is the edition referred to throughout this opinion:) "When Courts are called upon to pronounce the invalidity of an Act of Legislature, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt." A reasonable doubt must be solved in favor of the Legislative action and the Act be sustained. Or as was said by Marshall, C. J., in Fletcher vs. Pack, 6 Cranch, 128, likewise quoted with approval by Judge Cooley in the same connection: "The question whether a law be void for its repugnacy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes, but it is not on slight implications and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its Acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." These views have been fully recognized in this State, as is most fully, clearly and forcibly set forth by Mr. Justice McGowan in ex parte Lynch 16 S. C., 52, and have been approved in many other cases.

We also freely concede that in considering the question whether an Act of the General Assembly of this State is in conflict with the Constitution, either State or Federal, the inquiry is whether there is anything in either of those instruments forbidding the passage of such an Act, either in express terms or by necessary implications, whereas in considering the question of constitutionality of an Act of Congress the inquiry is whether there is anything in the Federal Constitution which, either in express terms or by necessary implication, confers upon Congress the power to pass the Act in question.

Fully impressed with these conceded principles we approach the consideration of the question whether the Act of the 24th of December, 1892, which for convenience will be designated throughout this discussion as the Dispensary Act, is in conflict with any constitutional provision either State or Federal.

In considering this question the first inquiry which naturally presents itself is, what is the general nature, scope and objects of the Act as disclosed by its terms. Without going into a detailed consideration of the numerous sections of the Act, we think it is safe to say that it is an Act forbidding the manufacture or sale of intoxicating liquors as a beverage within the limits of this State by any private individual and vesting the right to manufacture and sell such liquors in the State exclusively, through certain designated officers and agents. (We may say here that in the further discussion of this subject we will drop the word "manufacture" and speak only of the sale or keeping for sale of intoxicating liquor as a beverage, not only for convenience of phraseology, but for the better reason that in none of these cases which we are called upon to decide does the question of the manufacture of intoxicating liquors arise, but they all relate to the sale or keeping for sale of such liquors.) It seems to us that the view which we have presented as to the nature, scope and object of the Act is manifest not only from the title of the Act, but also from the provisions found in almost every section. The title declares it to be an Act to prohibit the sale of intoxicating liquors "except as herein provided," and the various sections show beyond dispute that the only exception made is the State, which is expressly authorized to engage in the sale of intoxicating liquors for any purpose whatsoever, either as a beverage or otherwise. Indeed the body of the Act goes further than the title; for while the language used in the title seems to indicate that the purpose of the Act was only to forbid the sale of intoxicating liquors "as a beverage," yet in the body of the Act it is very manifest that a sale of such liquors for any purpose, and not simply "as a beverage," is forbidden except when made by the State through certain designated officers and agents. Licensed druggists must buy such intoxicating liquors as may be necessary in compounding their medicines and tinctures only from the designated agents of the State. Even wine for sacramental purposes can only be bought from such agents. In other words, the manifest object of the Act is that the State shall monopolize the entire traffic in intoxicating liquors to the entire exclusion of all persons whomsoever, and this too for the purpose of profit to the State and its governmental agencies, counties and municipal corporations; for the Act, after appropriating the sum of $50,000 from the State treasury for the purpose of purchasing a supply of liquors with which to begin the business, provides that the liquors so purchased by the State commissioner shall shall sold by him to the various county dispensers at a profit not exceeding 50 per centum of the net cost thereof, and that the proceeds of such sales shall be paid into the State treasury, upon which the commissioner may draw from time to time to amounts necessary to meet the expenses incurred in conducting the business, and also provides that the county dispensers may sell such liquors to consumers at a profit not exceeding 50 per centum above the cost thereof, except in sales to licensed druggists, where the profit is limited to 10 per centum, and that all profits, after paying the expenses of such dispensary, shall be divided equally between the county and the municipal corporation within which such dispensary is located. It is also provided that the State commissioner may sell intoxicating liquors so purchased by him to persons outside of the State.

This being the nature, scope and object of the Dispensary Act, our next inquiry is whether it conflicts with any provision of our State Constitution. There are at least two of the provisions of that instrument with which the Dispensary Act conflicts. The 1st section of the 1st article of the Constitution reads as follows: "All men are born free and equal, endowed by their Creator with certain inalienable rights among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing protecting property, and of seeking and obtaining their safety and happiness." And in Section 1 of the same article it is explicitly declared that 'no person shall be despoiled or dispossessed of his property, immunities or privileges or deprived of his life, liberty or estate but by the judgment of his peers or the law of the land."

Here, then we have not only an explicit declaration that every person in this Commonwealth has certain rights derived, not from the Government, but from the Creator, which are declared to be inalienable, but also an expressed declaration that he shall not be deprived of them except in one of two ways—first, by the judgment of his peers, or second, by the law of the land. So sacred was this right of property regarded that the framers of the Constitution, not content with the general provisions above referred to, declaring the right and forbidding an interference with such rights, proceeded in the 12th section of the 1st article to declare explicitly that "no person shall be prevented from acquiring, holding and transmitting property."

Now, then, what are these inalienable rights of personal liberty and private property thus emphatically asserted and carefully guarded, and what do they necessarily involve? As is said by Earl, J. in re Jacobs, 98 N. Y., 98, reported also in 50 Am Rep, 636: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purposes and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth if the Legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein."

Blackstone in 1 Comm., 138, says; "The third absolute right inherent in every Englishman is that of property; which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the laws of the land." To same effect see what is said by Miller, J., in Pumpelly vs Green Bay Company, 13 Wall, at pages 177-78, also what is said by Comstock, J., in Wynchamber vs People, 13 N. Y., 398, and by Andrews, J., in People vs Otis, 90 N. Y., 48, See also what is said by the same Judge in Bertholf vs O'Reilly, 30 Am Rep, at page 328, 74 N. Y., 509.

Again it is said in the case in re Jacobs Supra: "So too one may be deprived of his liberty, and constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, dishonor, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade as an avocation." See also, to the same effect, what is said by Mr. Justice Field in his concurring opinion of Butchers' Union Co vs Crescent City Co, 111 U. S. Rep. at pages 756-7, and what is said by Mr. Justice Bradley in his concurring opinion in the same case, in which he was joined by Mr. Justice Harland and Mr. Justice Woods, page 764, and as was said in Live Stock, etc. Association, vs Crescent City, etc. 1 Abb U. S., 388-398: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

If, then, it can be shown that the traffic in intoxicating liquors is not in itself unlawful, but on the contrary that intoxicating liquor is a lawful subject of commerce, then it follows from what has been said that the Dispensary Act, in so far as it undertakes to forbid every person in this State from engaging in such traffic conflicts with the above mentioned constitutional provisions, and is therefor null and void, unless such legislation can be defended as an exercise of what is known as the police power, a question which will be hereafter considered. We do not see how it can be denied that such a traffic is lawful. Judge Cooley in his work on Constitutional Limitations, at pages 583-4, says in express terms that it is lawful, and every one of the numerous cases decided by the Supreme Court of the United States, involving questions where State legislation designed to prohibit the sale of intoxicating liquors, are effected by the Inter-State commerce clause of the Constitution of the United States, necessarily imply that intoxicating liquor is a subject of lawful commerce, for, otherwise such questions could not arise.

It was only upon this ground that the decision in the case of Leisy vs Hardin, 135 U. S Rep, 100, was or could be defended. There the question was whether such liquor imported into the State of Iowa from the State of Illinois could be lawfully sold in the unbroken packages in which they were imported within the limits of the State of Iowa, and the Court held that, notwithstanding the stringent provisions of the Iowa prohibitory law, such liquors could be sold by the importer as long as the original package remained in his hands unbroken, and that the Iowa statutes, in so far as they purported to forbid such a sale, was in conflict with that clause of the United States Constitution conferring upon Congress the power to regulate commerce with foreign States and between the several States. In that case Fuller, C. J., in delivering the opinion of the Court, cites with approval certain language used by Mr. Justice Matthews, in delivering the opinion of the Court in the case of Bowman against Chicago, etc, Railway Company 125 U. S. Rep, 465, involving the same principle, where he draws a distinction between articles not in a merchantable condition, and therefore not legitimate subjects of commerce, for example, rags likely to spread infectious diseases, and other articles which are the legitimate subjects of commerce, amongst which intoxicating liquors must have been classed, or the decision could not possibly have been what it was. Even in the case of in re Raber, 140 U. S. Rep, at p. 556. Fuller, C. J., recognizes the same same doctrine, although that case arose after the passage of what is commonly known as the "Wilson bill," which was donbtless passed with a view to obviate the effect of the decision in Leisy vs Hardin, supra.

Indeed the whole course of legislation, both State and Federal, demonstrates that the sale of intoxicating liquors is a legitimate subject of commerce and trade; for otherwise it would be absolutely impossible to vindicate the United States internal revenue law, and the very numerous statutes which have been passed in this State ever since the foundation of the Government permitting the sale of intoxicating liquors, under such regulations as the law-making power may have from time to time deemed necessary, either to secure a revenue from such traffic or to surround it with such restrictions as have been thought necessary or expedient to prevent evil apt to grow out of such traffic.

To say, therefore, that the sale of intoxicating liquors belongs to that class of wrongs denominated as mala in se would be to cast a grave imputation upon the law-making department of the Government, both State and Federal, and this we are very far from being willing to do. Indeed the very highest of all authority might be cited to show that the manufacture and sale of spiritous liquors is not malum in se. Indeed the most ardent Prohibitionists, so far as their wishes have taken the shape of law, must be regarded as admitting the proposition for which we contend; for every prohibition law which has fallen under our notice contains provisions recognizing this proposition by excepting from its operation sales of liquor for certain purposes, namely: Medical, scientific, mechanical or sacramental purposes, thereby expressly admitting that the mere sale of intoxicating liquors is not wrong, but actually necessary for certain purposes.

The very Act now under consideration—the dispensary law—by its express terms shows beyond all dispute that the General Assembly did not intend to put its seal of condemnation upon the sale of intoxicating liquors, as morally wrong or even as subversive of the public welfare, for it makes ample provision for the sale of such liquors to an unlimited extent for any purpose whatsoever, and makes specific provision for the sale of liquor in just such quantities as would suit all classes of consumers.

Before, therefore, the sale of intoxicating liquors can be declared unlawful there must be some valid statute declaring it to be so, and we must say that we have been unable to find any such statute on the statute books of this State. Of course we can find many statutes forbiding such sale except upon certain prescribed conditions, but none making the sale absolutely unlawful, unless it be in certain specified localities under what are called "local option laws," which are exceptional in their character and need not be considered here While, therefore, without permitting ourselves to indulge in any sentimental declaration as to the evils flowing from an unregulated and unrestricted traffic in intoxicating liquors, which, however appropriate elsewhere, we do not regard as becoming in a judicial opinion, we freely remit all that can properly be said on the subject, and therefore we fully concede the power on the part of the Legislature to throw around such traffic all safeguards necessary and proper to prevent, or at least minimize, such evils; and while we further admit for the purposes of this discussion that the Legislature may go further and absolutely prohibit the sale of intoxicating liquors within the limits of this State, yet the practical question still remains whether the Dispensary Act falls within either of these classes.

It does not seem to us possible to regard the Dispensary Act as a law prohibiting the sale of intoxicating liquors. On the contrary it not only permits but absolutely encourages such sale to an unlimited extent, for by its profit feature it holds out an inducement to every taxpayer to encourage as large sales as possible, and thereby lessen the burden of taxation to the extent of the profits realized. If the Act, instead of confining the privilege of selling liquor to the State, had undertaken to confer such exclusive privilege upon one or more individuals, or upon a particular corporation, could there be any doubt that such an exercise of legislative power would be unconstitutional? We can see no difference in principle between the two cases. Even the Slaughter House cases, as they are called, 16 Wall, 36, decided by a bare majority of the Court, and which must be regarded as having gone to the extreme limit, did not go to the extent of holding that an Act forbiding all other persons except the favored corporation from pursuing the lawful occupation of a butcher, or from carrying on any other lawful business or trade, would be constitutional, for the opinion of the majority of the Court was rested expressly upon the ground that the Act there in question did not forbid any person who might desire to do so from pursuing the avocation of a butcher, but only required him, as a measure of police regulation, to have his slaughtering done at a specified place upon paying reasonable charges described by the Act to the corporation for the use of the conveniences for that purpose, which such corporation was bound under a heavy penalty to furnish anyone who desired to use them. It is very obvious, therefore, that the Act there under consideration differed very widely from the Act which we are now called upon to consider.

If, then, the Dispensary Act cannot be defended as a prohibitory law, it is contended that it may be sustained as a law regulating the sale of intoxicating liquors under what is called the police power, which, it is claimed, practically, is unlimited in its scope by constitutional provisions, and its exercise depends solely upon the legislative will, which cannot be controlled or restricted by the judiciary. It seems to us that such a claim is not only utterly at variance with any just conception of a constitutional government, but is entirely inconsistent with the numerous cases in which the Courts, both State and Federal, have undertaken to limit and restrict the exercise of such a power by State legislation; and, what is more to the point in this particular case, our own Court has distinctly repudiated the idea of the exercise of what is claimed to be the police power is beyond judicial control.

In the case of McCandless against the Richmond and Danville Railroad Company, 38 S. C., 103, Mr. Justice Pope, as the organ of the Court, after referring to the fact that the Circuit Judge had held that the statute there in question was a valid exercise of the police power, uses this language: "But a careful consideration of the latest official declarations of this law by the Supreme Court of the United States has led us to modify our conceptions of what is involved in what is called the police power of a State in this Union of States. The fundamental idea in ascribing such potency to this principle of the law is based upon the indisputable principles of self-defence." And upon this point of the case the Court was unanimous, though there was a general dissent upon another point.

Indeed, to hold that every Act of the General Assembly passed under the guise of an exercise of the police power, or sought to be defended upon that ground, is beyond judicial control would render every guaranty of personal rights found in the Constitution of little or no value. See also what is said by Mr. Justice Harlan in the case of Kugler against Kansas at p. 661, where, after recognizing the existence of and the necessity for the police power, and after admitting that such power belongs to the legislative department of the Government, he uses this language: "It belongs to that department to exert what are known as the police powers of the State, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the public safeties."

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, (Singing Fund cases, 99 U. S., 700,) the Courts must obey the Constitution rather than the law making department of Government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. "To what purpose," it was said in Narbury against Madison, 1 Crouch, 137, "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? * * *

"The Courts are not bound by mere forms nor are they to be misled by mere pretences. They are at liberty, indeed are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution." See also what was said by our own Court in the case of Whaley vs. Gaillard, 21 S C., at p. 578, where the same principle was applied to a totally different subject—the limitation of the power of the Legislature to contract a public debt.

It seems to us, therefore, that it is not only our right but our duty to inquire whether the Dispensary Act was intended to be an exercise of the police power to regulate the sale of intoxicating liquors, and if so whether its terms have any real or substantial relation to that object.

Now it is quite certain that the Act does not in terms purport to be an Act to regulate the sale of intoxicating liquors by persons who may be engaged or who may desire to engage in such traffic. On the contrary its declared purpose is to absolutely prohibit such sale by private individuals, and this is made more manifest by the numerous provisions found in the body of the Act.

Now, while the power of the Legislature to enact such laws as may be deemed necessary and proper to regulate the sale of intoxicating liquors by any person within the limits of the State, in order to prevent or at least reduce as far as possible the evils which are apt to flow from such a traffic is concerned, yet we cannot regard the dispensary law as such an Act. Indeed it must be a contradiction in terms to speak of an Act of such a character as this is as an Act to regulate the sale of liquor by the people of the State, for it is difficult to see how an Act forbidding a sale can be regarded as an Act regulating such sales. That which is forbidden cannot well be regulated.

But it may be said that the Dispensary Act, while forbidding all private persons to sell intoxicating liquors, does permit such sale to be made by the State itself through its authorized officers and agents, and that these sales may be and are regulated by the numerous provisions of the Dispensary Act. But when it is remembered that all such restrictions upon or regulations of sales of any lawful article of commerce can be vindicated only as an exercise of the police power, we do not see how such a view can be accepted. The police power, however, can only be resorted to for the government and control of the people of the State, and cannot with any propriety be appealed to for the purpose of controlling the action of the State itself; and as the State can only act through its authorized officers or agents, the police power cannot be resorted to for the purpose of controlling such officers and agents, if for no other reason, because it is wholly unnecessary, as the State has ample means of controlling its own officials without resorting to the undefined and therefore dangerous power know as the police power.

But even if this view be not sound, and this provision of the Dispensary Act whereby the State assumes to itself the exclusive right to engage in the sale of intoxicating liquors, taking to itself and its subordinate governmental agencies the entire profits of such traffic, to the utter exclusion of all private individuals, could with any propriety be regarded as a police regulation for the protection of the public health or public morals, there would still remain in the question whether such an exercise of the police power was necessary to effect these important purposes; for after all the exertion of the police power, especially where it abridges or destroys the constitutional rights of the citizen, can only be vindicated as a measure of self-defence, as it is expressed by Mr. Justice Pope, supra, or, as it is expressed by other authorities, by some overruling necessity.

If the various restrictions and regulations as to the sale of intoxicating liquors by the officers and agents of the State be designed only for the protection of the public health or the public morals and are fit and appropriate to that end we do not see why such restrictions and regulations could not be applied to the sale of such liquors by private individuals, and if so then, certainly, there was no necessity for such a sweeping Act whereby the constitutional rights of the citizen herinbefore referred to have been absolutely destroyed, but these rights would be reserved to the citizen and only restricted by such regulations as may be necessary for the public good.

But in addition to this we are compelled to say, without in the slightest degree intending to impeach the motives or to criticise the intentions of the members of the Legislature by which this Act was passed, and on the contrary, freely according to them the best motives and the purest intentions, that judging the Act from the terms employed in it (the only way in which a Court is at liberty to form an opinion) it cannot be justly regarded as a police regulation, but simply as an Act to increase the revenue of the State and its subordinate governmental agencies, This is apparent from the profit features of the Act, from the various stringent provisions designed to compel consumers of intoxicating liquors to obtain them only from the officers and agents of the State, and notably by the provisions authorizing the State commissioner to sell such liquors to persons outside of the limits of the State, which certainly cannot be regarded as bearing the finest resemblance to a police regulation for the purpose of protecting the public health or the public morals of the people of this State.

But it is earnestly contended by the Attorney General that if the power to prohibit absolutely the sale of intoxicating liquors be conceded it follows necessarily that the State may assume the monopoly of such a trade, and in support of this view he cites Tiedeman on the limitations of the police power, 318, where that author uses the following language: "There is no doubt that a trade or occupation which is inherently and necessarily injurious to society may be prohibited altogether; and it does not seem to be questioned that the prosecution of such a business may be assumed by the Government and managed by it as a monopoly" But the only authority which the author cites to sustain this rather extraordinary proposition is the case of Brennen's liquors, 25 Comm, 278, overlooking entirely the cases of Beebe vs State, 6 In D, 501, which holds an opposite view, and which had been previously cited by the same author at page 197, and quoted from, apparently with approval; but in addition to this we are unable to perceive how the right to prohibit a given traffic carries with it the power in the State to assume the monopoly of such traffic.

If the right to prohibit the sale of intoxicating liquors rests upon the ground that such a traffic "is inherently and necessarily injurious to society," as is involved in the statement by the author of his proposition, then it seems to us that the logical and necessary conclusion would be that the State could not engage in such traffic, for otherwise we should be compelled to admit the absurd proposition that a State Government established for the very purpose of pro-

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