incumbent, Senator Butler, and the contest is expected to be a very bitter one. What is the use and purpose of this unusual and rapid organization of militia?

Mr. McLaurin, a Tillmanite, and Congressman from South Carolina, says of Tillman's genius that it is "essentially destructive." The *Aikon Journal Review* comments thus on the remark: "Tillman has destroyed good feeling between the people of the State, he has destroyed confidence in the State, he has about destroyed the State altogether." If Tillman could be dropped out of sight and hearing, South Carolina, in a few months, would again be peaceful happy and prosperous.

LIQUOR LEGISLATION IN SOUTH CAROLINA.

By JOHN H. INGHAM, ESQ.

On December 24, 1892, the General Assembly of South Carolina passed an "Act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State except as herein provided." This act provides for the appointment by the Governor of a commissioner who shall purchase all intoxicating liquors for sale in the State and furnish them to County Dispensers, after they have been tested and declared to be pure and unadultered. He shall not receive from the Dispensers more than fifty per cent. above the net cost, and this amount is to be paid to the State Treasurer every month, and on this fund he is to draw for all necessary expenses, and in all his actions he is to be subject to the rules and orders of a State Board of Control, composed of the Governor, the Comptroller-General and the Attorney-General. Before entering upon his duties he is to execute a bond to the State Treasurer in the penal sum of $10,000 for the faithful performance of such

duties. The County Dispensers are to be appointed by County Boards of Control (appointed by the State Board of Control), but permits are not to be issued to them before they file petitions signed by a majority of the freehold voters of the town or city in which the permit is to be used, requesting the same and certifying to the character and sobriety of the petitioner, and they are to enter into bonds in the penal sum of $3,000 for the faithful performance of their duties. These duties are, among others, to sell intoxicating liquors only at the place designated in the permit, and at a charge not exceeding fifty per cent. above the net cost; not to furnish them to any person unknown to the Dispenser personally, or not duly identified, nor to any minor, intoxicated person or persons addicted to intoxication; to make accurate returns every month to the County Board of Control of all certificates and requests, and of all sales made during the month; to keep strict accounts of all liquors received from the State Commissioner, and to pay all profits, after paying the expenses of the County Dispensary, one-half to the County Treasury and one-half to the municipal corporation in which the Dispensary is located. Provision is made for the selling of liquors for medicinal purposes to licensed druggists at a net profit of not over ten per cent., and the sum of $50,000 is appropriated to the purchase of liquors that are to be distributed to the County Dispensers. Penalties are imposed for keeping liquor at clubs and all places where it is sold in violation of the Act are declared common nuisances and are to be searched, closed and abated. After July 1, 1893, no person shall manufacture or sell intoxicating liquors for any purpose whatsoever, otherwise than is provided in the Act, and licenses already authorized to be granted shall be in force only until July 1, 1893. The section of the Act relating to requests for purchase I quote in full: "Sec. 11. Before selling or delivering any intoxicating liquors to any person a request must be presented to the County Dispenser printed or written in ink, dated of the true date, stating the age and residence of the signer for whom and for whose use the liquor is required, the quantity and kind requested, and his or her true name and residence, and, where

numbered, by street and number, if in a city, and the request shall be signed by the applicant in his own true name and signature, attested by the County Dispenser or his clerk who receives and files the request, in his own true name and signature, and in his own handwriting. But the request shall be refused if the County Dispenser filling it personally knows the applicant applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicated liquors to an excess; or if the applicant is not so personally known to said County Dispenser before filling said order or delivering said liquor, he shall require identification, and the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors to excess."

These requests are to be made on blanks furnished to the Dispenser by the County Auditor. The Dispenser is to preserve the applications and return them to the Auditor who is to file and preserve them, to be used in the quarterly settlements between the County Dispenser and County Treasurer. The scenes of riot and bloodshed that followed the attempt to put this law (thereby proved to be an unpopular one), into execution are fresh within the memory of all and it is unnecessary to do more than allude to them. The validity of the Act was brought into question in the cases of McCullough *v.* Evans, State *v.* Jacobs, etc: (heard together), and the Supreme Court decided (Pope, A. J., dissenting) against its constitutionality, except in so far as it forbade the granting of licenses to retail spirituous liquors beyond June 30, 1893. The grounds of the decision were: 1. The traffic in intoxicating liquors not being in itself unlawful or immoral, but such liquor being, on the contrary, a lawful subject of commerce, an Act forbidding anyone in the State from engaging in such traffic conflicts with the rights of personal liberty, and private property secured by the Constitution, unless it is a legitimate exercise of the police power of the Covernment. "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 the State. . . . 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 burdens 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." In other words, the court seems to be led into the curious statement that, while an Act declaring a lawful trade unlawful for all purposes is perfectly valid, an Act restricting that trade is invalid simply for the want of such a declaration.

2. The Act is not a legitimate exercise of the police power *regulating* the sale of intoxicating liquors as it *forbids* the sale by all private persons, and if it be said that the sales by government officials are *regulated* by the Act, still "the police power 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. . . . The exertion of the police power, especially where it abridges or destroys the constitutional right of the citizen, can only be vindicated as a measure of self defence. . . . or . . . 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, there was no necessity for any such sweeping act, whereby the constitutional rights of the citizen, hereinbefore referred to, have been absolutely destroyed, but these rights should 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 from the officers and agents of the State, and notably by the provision 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 faintest 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 State *v.* Brennen's Liquors, 25 Conn. 278, overlooking entirely the case of Beebe *v.* State, 6 Ind. 501, which holds an opposite view and which had previously been 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 monoply of such traffic. If the right to probibit 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 this proposition, then it seems to us that the logical and necessary consequence 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 protecting society, could lawfully engage in a business which 'is inherently and necessarily injurious to society.' We must prefer then to follow the case of Beebe *v.* State, rather than State *v.* Brennen's Liquors." The court cites the case of Rippe *v.* Becker (Minn.), 57 N. W. Rep. 331, which I shall refer to later.

3. The Legislature have no authority to embark the State in a trading enterprise; not because there is any *express* prohibition, but because it is utterly at variance with the very idea of civil government. The conferring of legislative power in the Constitution does not involve "the unlimited power of legislating upon any subject or for any purpose according to its unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and only purpose for which the Constitution was adopted, to wit: the formation of a civil government . . . It is expressly declared that 'The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.' . . . It seems to us that the true construction of this clause is that, while there are many rights which are *expressly* reserved to the people with which the Legislature are forbidden to interfere, there are other rights reserved to the people, not expressly, but by necessary implication, which are beyond the reach of the legislative power, unless such power has been expressly delegated to the legislative department of the government. . . . It seems to us clear that any Act of the Legislature which is designed to or has the effect of embarking the State in any trade, which involves the purchase and sale of any article of commerce for profit is outside of and altogether beyond the legislative power conferred upon the

General Assembly by the Constitution, even though there may be no express provision in the Constitution forbidding such an exercise of legislative power. Trade is not and cannot properly be regarded as one of the functions of government. On the contrary its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the Constitution, and certainly has never been delegated to any department of the government."

Pope, A. J., dissented for the following reasons. 1. The legislative power is absolutely unlimited, except so far as restricted by the Federal and State Constitutions. The Dispensary Act is no infringement on rights of life, liberty or property. "It is unjust to the Act in question to ascribe to it as its leading and controlling feature the raising of a revenue for the State and its municipalities. The proper construction is that in the exercise of the State's undoubted police power in order to promote sobriety, preserve the health and provide for the safety of her citizens, the State has passed this law prohibiting the sale of spirituous liquors by private persons, but, recognizing the demand for pure, unadulterated liquors, she has created a governmental agency under strict regulations to sell those liquors with enough profit thereon to pay the expenses of the purchase of these liquors, the expenses of conducting the business and to police the State to prevent infractions of her laws in this Act provided." The entire right to control and regulate the liquor traffic has been held in innumerable decisions to belong to the Legislature in the exercise of its police power. 2. The Legislature has the power of conferring exclusive rights on municipal corporations and on the State itself, *a fortiori* where, as here, there are no inherent rights of others to be considered,—the right to manufacture and sell liquor, not being an inalienable one of a citizen as such, according to numerous Federal and State decisions. "No one is wronged when he is only excluded from that in which he never had a right. . . . Very ingeniously, it is suggested, how can the State regulate itself? This is specious and unsound. The people are the State. The government is their agency. Does not the State run the

health department, furnishing the plant necessary to conduct that beneficient work and pay all its expenses, under a system of regulation? So, too, the State Penitentiary, the Lunatic Asylum, the Deaf and Dumb Institute? Look at the Post Office of the General Government. Then it is again suggested, this is a monopoly created by the State. As to this matter it may be suggested that such a term of monopoly as applied to a sovereign State is a misnomer. Monopolies at the common law and against which all Englishmen protested, were grants to individual citizens. Here the State operates the business for the benefit of all her citizens. The people are the State; the government is their agent and any benefits under the Act are enjoyed by the whole people." Without attempting to treat the elementary principles of Constitutional Law that are discussed at great length in both opinions, it may be said that it has been decided over and over again that the whole matter of the control and regulation of the liquor traffic is one that belongs to the Legislatures of the different States by virtue of their police power and that, when they see fit, they may totally prohibit the manufacture and sale of liquor within the borders of their respective States: See The License Cases, 5 How. 504; Gilman *v.* Philadelphia, 3 Wall. 713; Bartemeyer *v.* Iowa, 18 Wall. 129; Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1; Crowley *v.* Christensen, 137 U. S. 86; Reynolds *v.* Geary, 26 Conn. 179; Com. *v.* Kendall, 12 Cush. (Mass.) 414; Com. *v.* Gague, 153 Mass. 205; Jones *v.* Peo., 14 Ill. 196; Pierce *v.* State, 13 N. H. 536; Preston *v.* Drew, 33 Me. 558; Paul *v.* Gloucester Co., 50 N. J. L. 585; Trageser *v.* Gray, 73 Md. 250; Lincoln *v.* Smith, 27 Vt. 328.

There is no inherent right of personal liberty or private property which such laws infringe on. In Crowley *v.* Christensen, 137 U. S. 86, 91, the court say: "The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with

danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the discretion of the governing authority."

So in Mugler *v.* Kansas, 123 U. S. 623, 660, it is said: "But by whom or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only, they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exercise 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 safety. . . . 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. . . . If . . a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution. . . . There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil."

In Trageser *v.* Gray, 73 Md. 250, 253, the court say: "No one can claim as a right the power to sell either at any

time or at any place, or in any quantity. If he is allowed to sell under any circumstances, it is simply by the free permission of the Legislature, and on such terms as it sees fit to impose. . . . It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticise its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this State. We regard it as included 'in that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government.'"

On the same principle, though somewhat extended, it was held in Powell *v.* Pennsylvania, 127 U. S. 678, that a State law prohibiting the manufacture and sale of oleomagarine was a lawful exercise of the police power. The court says, on p. 685: "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. . . . If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without unsurping powers committed to another department of government."

It is difficult to see in the South Carolina Act anything more than a plan (though a severe and, perhaps, unwise one) of the Legislature to regulate the liquor trade so as to promote public health and sobriety. Though there is a possibility of

the State's more than covering its expenses, and thereby making some profit, the main purpose of the revenue provisions would appear to be, as the dissenting judge said, "to pay the expenses of the purchases of these liquors, the expenses of conducting the business and to police the State to prevent infractions of her laws." The principal question in the case is, therefore, whether the Legislature in the exercise of its police power may grant exclusive privileges to the State itself as against the citizens. With regard to the power of the State to grant monopolies, it is said in Tiedeman, Limns. of Pol. Power, 326: "There is always this limitation to be recognized upon the power to make a monopoly of any trade to be conducted by itself, or by some private individual or corporation to whom it is granted as a privilege, viz.: that the general prosecutiou of the trade or occupation by everyone who chooses to engage in it, produces injurious results which can only be avoided by making a monopoly of the trade." That the extent to which the liquor traffic produces "injurious results" is a question for the Legislature to decide, is conclusively settled by the cases cited above. It is also certain that the State may grant to municipal corporations exclusive rights to carry on injurious trades. In the Slaughter-house Cases, 16 Wall. 36, it was held that an Act forbidding anyone but a particular corporation from carrying on the business of running a slaughter-house was valid. The court said: "If this statute had imposed on the city of New Orleans precisely the same duties; accompanied by the same privileges which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation, and on the public, would have been the same as it is now. Why cannot the Legislature confer the same power on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing?" In the same way, the exclusive right to supply water or gas-light, or to lay railway tracks in the streets may be given. The "obligation to serve the public impartially would seem to be an essential incident to any grant of a monopoly,

since without it it would be impossible to justify the grant on public grounds:" Cooley, Constl. Law, 247.

In State *v.* Brennan's Liquors, 25 Conn. 278, cited in the opinion of the court, it was held that the provisions in an Act with regard to the exclusive sale of liquors by the towns through agents appointed for that purpose, are not invalid as giving to the towns a monopoly of such sale. The court say: "The object of the Legislature in authorizing a sale by a public agent for certain purposes was not to raise a revenue for the town but to accommodate certain persons with spirits for particular uses, and at the same time to guard against the evils resulting from an indiscriminate sale by all persons and for all purposes." But in Beebe *v.* State, 6 Ind. 501, a case which the South Carolina court preferred to follow, similar provisions were held unconstitutional. This decision was, however, a mere corollary to the main one in the case which went so far as to assert that all probibitory statutes were unconstitutional and is opposed to nearly all the cases on the subject, both State and Federal. The Indiana case is, therefore, not entitled to the weight given to it in the opinion in the Dispensary case, especially as in a later case in the same State it is said: "It is undoubtedly true that the common law does not recognize any difference between intoxicating liquors as property and any other species of property. But while it is true that intoxicating liquor is property, still its inherent character is such that it is the proper subject of the police power. . . . Acting upon the just assumption that the unrestricted sale of intoxicating liquors results in much evil and that it is detrimental to society, the law-making power of each State in the Union has, in the exercise of its police power, assumed to control, regulate or prohibit the business, as seemed to it best. The extent to which such power shall be exercised must, of necessity, be left to the law-making power of the State exercising such right:" Welsh *v.* State, 126 Ind. 71, 77. . This certainly seems to impugn the authority of the earlier case. In Rippe *v.* Becker (Minn.), 57 N. W. Rep. 331, cited with approval in the opinion in the principal case, it was held that an Act to provide for the

erection of a State elevator or warehouse in a city for public storage of grain, was not an exercise of the police power to regulate the business of receiving, weighing and inspecting grain in elevators, "the evident sole purpose of the Act," the court said, being "to provide for the State erecting an elevator and itself going into the 'grain elevator' business. . . . The police power of the State to regulate a business does not include the power to engage in carrying it on." This broad statement, though applicable to a case where a State interferes with rights of citizens to engage in ordinary business and embarks in a trade for purposes of profit, can hardly be extended to a case like the present where the citizen has no "inherent right" to practice the trade unmolested by the Legislature, but where, on the contrary, that very trade is universally recognized as one that falls peculiarly within the scope of the police power. It is hard to see why the Legislature, possessing all powers not denied them by the Constitution and among others that of conferring exclusive franchises on individuals and corporations, private and municipal, in matters of a public character, should be debarred, without some express prohibition in the Constitution, from conferring similar franchises on the State itself. In other words, it should be for the Legislature itself, in a case like the present, to determine whether the business is "so far public and essential to the general welfare that it cannot properly be thrown open to all and should therefore be conducted by the government directly or through agencies which it constitutes and can control:" Hare, Am. Constl. Law, 784.