State Liquor Dispensaries as a Solution to the Prohibition Question

H. William Ihrig
STATE LIQUOR DISPENSARIES AS A SOLUTION TO THE PROHIBITION QUESTION

By H. William Ihrig*

The "liquor question" has always been with us and probably always will be. In other words, the use of alcoholic beverages will always be attended with abuses.

The regulation of that traffic has been attempted for many years, but had been primarily one of regulation for revenue.

With the application of sociological consideration to this question there has come a regulation of the three aspects thereof:

1. Of the manufacture thereof.
2. Of the transportation thereof.
3. Of the sale thereof.

In addition to the regulation for revenue purposes there came a regulation based on pseudo public grounds, i.e., licensing to limit the number of places of the sale of alcoholic beverages. Experience teaches that this was prompted mainly by self protective impulses of those already in the trade as against further competition.

Subsequently there came the limitation in the sale of alcoholic beverages under local option and state regulation or prohibition. This was crowned by the 18th Amendment and various Acts to enforce the same.

Under the present Federal law all state legislation in conflict therewith is null and void. The question here to be discussed is the extent to which states can go in regulating the liquor situation under the so-called Hardgrove Plan in the light of decisions considering the State Dispensary System covering the manufacture, transportation, and sale of alcoholic beverages.

Of the recognized evils of the old liquor trade there were those resulting from the bad quality or type of the beverage in question.

There were also those evils attendant the particular places and manner of the sale of the alcoholic beverages.

Of equal consequence was the temperance or lack of temperance in the use of alcoholic beverages on the part of the consuming public.

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THE THESIS OF THE HARDGROVE PLAN ASSUMED CORRECT.

The Hardgrove Plan has as its thesis that prior to the adoption of the 18th Amendment the dealing in intoxicating alcoholic beverages was the function of private persons or groups where the state did not prohibit them from so engaging, and was also the recognized function of a state in its sovereign capacity where it, under its police power, forbade such dealing to such private persons or groups and made a state monopoly of the manufacture and sale of alcoholic beverages to more effectively prevent the evils of the use of intoxicating beverages. The second point of the Hardgrove thesis is that, it being a recognized principle of constitutional law, that unless application thereof to the sovereign or state is expressly included in a law it will not be construed to apply to the sovereign or state, states could engage in their sovereign capacity in the manufacture, transportation, and sale of intoxicating beverages and not be in violation of the 18th Amendment or the Federal acts enforcing the same. The legal arguments to sustain this thesis appeared in a previous issue of this Law Review.¹

Mr. Hardgrove points out that if the manufacture, transportation, and sale of intoxicating alcoholic beverages can be made an act of the state in its sovereign capacity, inasmuch as the purchase of alcoholic beverages is not condemned by the 18th Amendment, any state that sought to do so could so solve its desire for legal alcoholic beverages.

POWERS AND LIMITATIONS ON STATE IN ESTABLISHING STATE DISPENSARY SYSTEM.

The powers and limitations on a state in establishing a State Liquor Dispensary System will be considered particularly herein.

The source of limitations on a state in establishing such a Dispensary System would be either in the Federal Constitution or in the constitution of the state in question.

LIMITATIONS FOUND IN FEDERAL CONSTITUTION.

In considering the limitation on a state from the Federal Constitution a four fold consideration must be had:

1. The law applicable prior to the enactment of the 18th Amendment.
2. That law as modified by the 18th Amendment.

¹ Issue of February, 1930, Vol. 14, issue No. 2 page 59
4. That law in view of possible modification of the 18th Amendment.

Consideration will be given this question in the order of the points named.

1. The Federal law applicable to State Dispensary Acts prior to the enactment of the 18th Amendment.

(a) As interfering with commerce between the states the following principles have been established by the Federal Courts as being limitations on the States in attempting to set up State Dispensary Systems:

A certificate can not be required by a state as a preliminary requisite to bringing alcoholic beverages into a state. Such a requirement is a regulation of commerce among the states which is void. Such a requirement is not an inspection law, nor a quarantine or sanitary law and is not a legitimate exercise of police power by a state.  

A citizen of one state has a right to import alcoholic beverages into another state and to sell it there in its original packages. Up to such sale, the state has no power to interfere, by seizure, or any other action, to prevent the importation and sale by a foreign or non-resident importer. This right of transportation of an article of commerce from one state to another includes the right of the consignee to sell it in unbroken packages at the place where the transportation terminates. Then only after the importation is completed and the property is mingled with and becomes a part of the general property of the state by a sale by the importer, that state regulations can act upon it. Commerce between the states is not within the jurisdiction of the police power of the state, unless placed therein by congressional action. And the absence of any such congressional Act as to any Article of commerce is equivalent to a declaration that the importation of that article into the states shall be unrestricted. It is for the courts to determine what state action is or is not a regulation of such commerce. A dispensary Act of a state which forbids the receipt of an imported commodity or its sale before it ceased to be an article of trade between one state and another, is void as a regulation of commerce between the states.  

When a state recognizes the manufacture, sale and use of intoxicating liquors through a state dispensary system as lawful, it cannot discriminate against the bringing of such article in, and importing them from other states. If it attempts to so discriminate such legislation is void as a hindrance to interstate commerce and an unjust preference against the products of the other states. Where the prohibition of the

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2 *Bowman v. C.N.W. Ry. Co.*, 125 U.S. 465; 31 Law Ed. 700
3 *Leisy v. Hudin*, 135 U.S. 100; 34 Law Ed. 128
*Scott v. Donald*, 165 U.S. 58; 41 Law Ed. 632
importation of alcoholic beverages from other states is absolute as to citizens of a state and such prohibition does not depend on the purity or impurity of the articles, and where the state functionaries are permitted to import into the state, such law is void as against the commerce power vested in the Federal government. In such a law to empower a state chemist to pass upon what the law calls the "alcoholic purity" of such importations by chemical analysis can scarcely come within any definition of a reasonable inspection law. The right of a citizen of another state to transport to and sell alcoholic beverages as a part of interstate commerce has its counterpart in the right of a citizen in a state where a state Dispensary system is in operation to purchase alcoholic beverages in another state and transport to his own place of destination such beverages.4

The negotiation of sales of goods which are in another state by citizens and residents of other states, for the purpose of introducing them into the state in which the negotiation is made is interstate commerce, and a state statute which attempts to prohibit the solicitation or imposed penalty therefore, within the state, of orders for such goods, though their sale within the state is prohibited by an exercise of the police power, is a burden on interstate commerce, and is void.5

Along with the right to import and sell alcoholic beverages in the original packages as a part of interstate commerce, it necessarily follows that there must exist a right to have a place for the receipt and exposure for sale of the original packages so imported. But when this has been accomplished the protection of the interstate commerce law ceases. This law protects the original package in its importation and in its sale. No resales or sales in less than in the original package are allowable nor at times or in quantities less than allowed by the state dispensary Act.6

(b) Under Section 2, Article 4, of the U. S. Constitution respecting rights of citizens of a state, in an other state, the following position has been taken by the Federal Courts respecting said Dispensary Systems:

There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the State, or of a citizen of the United States. It may be entirely prohibited by State legislation, or be permitted under such conditions as will limit its evils. The man-

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4 Scott v. Donald, 165 U.S. 58, 107; 41 Law Ed. 632, 648
5 Wilkerson v. Rahrer, 140 U.S. 545; 35 Law Ed. 572
6 Ex parte Leob, 72 Fed. 657, and cases cited
Entert v. State, 156 U.S. 319;
V. A. Vandercook Co. v. Fange, 80 Fed. 786
W. Moore v. Bahr, 82 Fed. 39
ner and extent of regulation rest in the discretion of the governing authority.7

(c) Under provisions of 14th Amendment declaring that no state shall make or enforce any law which shall avoid the privileges or immunities of citizens of the United States, the Federal Courts have held:

So far as the right to sell retail intoxicating beverages it is not one of the rights growing out of citizenship of the United States8.

(d) Constitutional limitations on States forbidding the taking of property without due process of law, and the taking of private property for public use without just compensation, or impairing the obligation of contracts the Federal Courts have held:

Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, although their consequences may impair its use, do not entitle the owner of such property to compensation from the state or its agents or give him a right of action, and this includes situations arising under lawful state legislation in the exercise of the police power respecting alcoholic beverages.9

(e) Legality of Dispensary activities as determined by U. S. Supreme Court on ground of uniformity.

It has been definitely settled that a state dispensary act giving state officers the exclusive right to purchase all the intoxicating liquors sold in the state (excepting sale through interstate commerce) does not make a state law discriminatory and therefore unconstitutional, on the ground that the officers have an arbitrary discretion in determining where and from whom they will purchase liquors.10

Likewise, if such act authorizes the use by a resident of wine or liquor made by him for such purpose it does not make an unconstitutional discrimination.11

(f) Dispensary activity of State is a sovereign rather than a private activity.

When the question was first raised in the Federal courts that states, under a dispensary Act monopoly, were engaging in such act in a

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7 Crowley v. Christensen, 137 U.S. 86; 34 Law Ed. 620
Mugler v. Kansas, 123 U.S. 659; 31 Law Ed. 205
Beer Co. v. Massachusetts, 97 U.S. 25;

8 Mugler v. Kansas, 123 U.S. 659; 31 Law Ed. 205.
Foster v. Kansas, 112 U.S. 201;
Cantini v. Tillman, 54 Fed. 969

9 Transportation Co. v. Chicago, 99 U.S. 635
Mugler v. Kansas, 123 U.S. 659; 31 Law Ed. 205
Cantini v. Tallman, 54 Fed. 969

10 Vance v. W. A. Vandercook Co., 170 U.S. 439; 42 L. Ed. 1100
11 Vance v. W. A. Vandercook Co., 170 U.S. 439; 42 L. Ed. 1100
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sovereign capacity, the contention was denied. For example, in Fleischmann Co. v. Murray, (C.C. D. So. Car.) 161 Fed. 152, the court, even granting the constitutionality of the dispensary acts, states: "It cannot be reasonably contended that in so doing the state was performing the functions usually exercised by a state necessary to preserve its autonomy and maintain its sovereignty. Nor can it be assumed that it was contemplated, at the time of the adoption of the eleventh Amendment, that a Sovereign State would ever engage in the purchase and sale of spirituous liquors for profit." After so considering the District Court took jurisdiction of the case, declining to accept the contention that the state was being sued.

This contention was overruled by the U. S. Supreme Court in a companion case which found that in actions against states involving Dispensary Acts otherwise valid, the suit involved the State in its sovereign capacity and reversed lower court decrees not recognizing the principle of the immunity of States from suits. In the case of Murray v. So. Carolina, 213 U.S. 151; 53 Law. Ed. 742, where the court stated as follows at 750, 751 and 752:

"* * * Underlying all the contentions made in the cause is the fundamental question whether the suits were, in substance, suits against the state, and therefore beyond the jurisdiction of the circuit court, because of the express prohibition of the 11th Amendment. As that question is the pivotal one, we come at once to its consideration.

"If we consider as an original question the provisions of the constitution of South Carolina on the subject, and the terms of the statutes of that state, establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers or agents, of liquor for consumption in South Carolina, were purchases made by the state for its account, and, therefore, that the relation of debtor and creditor arose from such transactions between the state and the persons who sold the liquor."

"* * * we are of opinion that there is no just ground for the conclusion that the state, in providing by that legislation for the liquidation of the affairs of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the state as to authorize a judicial tribunal to take the assets of the state out of the hands of those selected to manage the same, and, by means of a receiver, to administer such assets as property affected by a trust, irrecoverable in its nature, and thus to dispose of the same without the presence of the state."

* * * The decision of the questions arising upon this record, relating, as they do, to rights and remedies of a mere contract creditor
of the state of South Carolina, is not in anywise controlled by the ruling in *South Carolina v. United States*, 199 U.S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, where, although recognizing that official dispensers of liquors under the laws of South Carolina were agents of the state, it was held (p. 463), 'that the license taxes charged by the Federal government upon persons selling liquor are not invalidated by the fact that they are the agents of the state, which has itself engaged in that business.' That case was concerned with the power of a state, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the government of the United States. The ruling in this case but enforces an exemption of the state from suit in the courts of the United States upon its contract debts,—an exemption which existed by virtue of the Constitution of the United States at the time when the legislation was enacted out of which the alleged contracts arose.

"Deciding, as we do, that the suits in question were suits against the state of South Carolina, and within the inhibition of the 11th Amendment, the decree of the Circuit Court of Appeals is reversed."

This position was followed in *Carolina Glass Co. vs. So. Carolina*, 240 U.S. 305.

In *So. Carolina v. U. S.*, 199 U.S. 438; 50 Law Ed. 261 in a five to three decision it was held that the Federal license tax payable by dealers in intoxicating liquors could be collected from dispensing and selling agents who sold such beverages for a state. Those who dissented were Justices White, Peckham and McKenna. Their dissent was based on the ground that the United States could not tax the state agencies in question and that the agents in question were carrying out purely governmental functions.

In *Scott v. Donald*, 165 U.S. 107; 41 Law Ed. 648, it was held that the persons who attempted to execute the provisions of an unconstitutional dispensary Act were not representatives of a state and could be restrained in a Federal District Court from enforcing its terms.

See also *United States v. Lanza*, 260 U.S. 377, 67 Law Ed. 314 at 316 holding that under the 18th Amendment each State and also Congress may exercise an independent judgment in selecting and shaping measures to enforce prohibition.

2. **The Federal Law applicable to State Dispensary Acts as Modified by the 18th Amendment.**

(a) The primary considerations that a state had to give to the content of a State Dispensary Act under the Federal Constitution was that in its application it be uniform, and that said Act did not interfere with interstate commerce. To interfere with interstate commerce the
Article acted on had to be a recognized article of such commerce and the recognition accorded that article as a subject of commerce by the state in monopolizing such business was considered as quite conclusive in the determination that such article was an article of commerce. It must further be remembered that the purchase of intoxicating beverages is not prohibited by the Federal law except as such act constituted as part of the offense of conspiracy to violate said act. In view of the distinctions in the definition of intoxicating in theory of law at a certain percent of alcoholic content with the possible variance of such percentage and the definition of intoxicating beverages being so only in fact which is a jury issue, it appears probable that any State Dispensary System established under the regime of the 18th Amendment in order to be not void under the commerce clause of the Federal Constitution must make allowances for the aspects of commerce set forth above and well established by the U. S. Supreme Court. There is also the probability that, if the Hardgrove plan is sustained, that several states, might establish such dispensary systems and be held to have the benefits of the Commerce Clause in their activities. Even though no other state raises the issue it might be considered present and the Act declared invalid in respect of such rights under the commerce clause.

There can come no harm from framing a Dispensary Act to meet these principles of the Federal law. There also can come much effectiveness to a state in establishing a State Dispensary System under the protecting wing of the 18th Amendment inasmuch as the primary weakness under the previously tested State Dispensary System was the loophole in enforcing the Act monopolizing such business in the state to the state when individuals from other states could take mail orders for any type of alcoholic beverages and ship the same into a state where the Dispensary System was working and they could further store and display their beverages in such regulated state and even send around salesmen to take orders to be accepted and sent from another state, all under the protection of the Commerce clause of the Federal Constitution.

(b) Under the 18th Amendment the state in it Dispensary System would have to vest the persons and agencies engaged in the manufacture, transportation, and sale of alcoholic beverages condemned by the Federal Act with the nature of officers of the State engaged in executing its Sovereign Acts so as to prevent these persons and agencies from being considered as individuals activities and agencies within the condemnation of the Federal Acts. This question will be considered in detail at a subsequent place herein.

3. The Federal law applicable to State Dispensary Acts in view of
the apparent repeal of the Wilson Original Package Act by the National Prohibition Act.

After enactment of the state prohibition and Dispensary Acts, the Federal courts held such provisions of those acts as conflicted with the Federal law set out in subdivision 1 above void and unconstitutional. To strengthen the effect of the monopoly in the state to ensure effective control of the liquor traffic, Congress, in 1890 passed the Wilson Original Packages Act which provided as follows:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."12

In 1916 the Federal law was further amended, so as to assist the states in their fight to control the liquor traffic by the passage of the Webb-Kenyon Act which provided:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or District of the United States, or place non contiguous to but subject to the jurisdiction thereof, into any other state, Territory or District of the United States, or place non contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."13

In 1917, the proviso known as the Reed Amendment was passed: It provided

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale

12 Act of Aug. 8, 1890, c. 728, 26 Stat. 313
13 Act of March 1, 1913, c. 90. 37 Stat. 699
therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: provided that nothing shall authorize the shipment of liquor into any state contrary to the laws of such state.\textsuperscript{14}

There was also the Act of Feb. 24, 1919, c. 18 §601; 40 Stat. 1106 preventing importation of distilled spirits from foreign countries into states having prohibition.

It is generally questioned whether or not these acts have been repealed by the National Prohibition Act. of which Section 52 (U.S.C.A. Title 27) provides:

"All provisions of law that are inconsistent with this chapter are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws. This chapter shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor."\textsuperscript{15}

The issue was raised in \textit{Robileo v. U. S.}\textsuperscript{16} but was not decided.

There is also a discussion of this question in Volume 27 of U.S. A. Title 27 under Section 1, on pages 3 and 4

The Wilson Act caused intoxicating liquors when imported into one state from another, immediately upon delivery to the consignee, whether in the original package or not, to become subject to the law of the state.\textsuperscript{17}

Without the Wilson Act, it had been held by the U. S. Supreme Court, that under the vesting of the regulation of Commerce in the Federal Government a vendor could not only import alcoholic beverages from one state to another (having prohibition or a Dispensary System) and sell it there in the original package. The Wilson Act however did not allow a state to interfere with a continuous shipment of an original package from one state to another to a vendee in a prohibition state.

Under this Act, the imported original package becomes subject to state laws "upon arrival" and transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefore.\textsuperscript{19}

\begin{thebibliography}{9}
\item \textsuperscript{14} Act of March 3, 1917, c. 162, Sec. 5, 39 Stat. 1069
\item \textsuperscript{15} Act of Oct. 28, 1919, C. 85, Title II § 35, 41 Stat. 317
\item \textsuperscript{16} 291 Fed. 975 (C C A Tenn. 1923) Certiorari denied (1923 44 Sup. Crt. 263 U.S. 716 68 L. Ed. 522
\item \textsuperscript{17} \textit{Delamater v. So. Dakota}, (1907) 205 U.S. 93, 51 L. Ed. 724
\item \textsuperscript{18} \textit{Bowman v. C. & N. W. Ry. Co.} 125 U.S. 465
\item \textit{Leisy v. Hardin}, 135 U. S. 100.
\item \textit{Wilkerson v. Rahrer}, 140 U.S. 635.
\item \textit{Vance v. W. A. Vandercook Co.} 170 U.S. 438
\item \textsuperscript{19} \textit{Kermeyer v. Kansas}, (1915) 236 U.S. 568.
\item \textit{Rossi v. Pennsylvania}, (1915) 238 U.S. 62
\end{thebibliography}
The Wilson Act puts the article of commerce under the regulations of the state at an earlier date than they otherwise would, that is after delivery but before sale in the original packages.20

It was also held that since the passage of the Wilson Act a state may lawfully prohibit the advertising within the state of intoxicating liquors sold or kept for sale without the state.21

With the Wilson Act, a state could punish the resident solicitors of a dealer from another state for taking orders within its boundaries, orders to be filled by importation from another state or from that in a warehouse in the state.22

But the Wilson Act did not prevent a non-resident travelling salesman representing parties from other states from taking orders to be mailed or shipped in to the regulating state.23

The Webb-Kenyon Act was designed to stop the mischief of a transportation of intoxicating liquors into a state where the carrier knew that the use or resale in violation of the state law was anticipated.24

For general discussion of these statutes see Volume 4. Federal Statutes Annotated (2nd. Ed.) p. 585 et. seq.

The necessity of a consideration of these statutes arises from a possible necessity of including grape-extract used for making ready made wine allowed by the Federal regulations and the possible desire to include near beer, etc., in the provisions of such acts to insure effective regulation.

As to whether or not these statutes in effect would give rise to the question of whether they acted on private persons alone by their terms or whether they also were to be considered as to be effective against states engaging in the liquor trade under their sovereign nature based on the police power. In view of the thesis assumed that no law applies to the sovereign unless expressly so covered it would appear that these laws only covered the acts of private persons. Since it can be argued that states can engage in the liquor business in their sovereign right as a factor of interstate commerce within the control of

Rhodes v. Iowa, 170 U.S. 412
State v. State Capitol Co., (Okla.) 103 Pac. 1021.
22 Delamater v. So. Dakota, 205 U.S. 93
23 Rossi v. Pennsylvania, 238 U.S. 62
Louisville, etc., R. Co. v. F. W. Cook Brewing Co., 223 U.S. 70
Van Winkle v. State, (Del.) 91 Atl. 385
Congress, the states framing State Dispensary Acts now should consider the Federal law applicable to interstate commerce as set out in section 1 hereof as to be in effect.

4. The Federal law applicable to State Dispensary Acts in view of possible modification of the 18th Amendment.

To repeat, the main requirements of a State Dispensary Act, if permitted under the 18th Amendment is that it be uniform in its application and not contain provisions in disregard of Federal control of interstate commerce.

Secondly, in the matter of effectiveness of State control the Wilson Act and its successor acts served to assist the state by attempting to place the acts of private persons engaging in interstate commerce in intoxicating beverages under the state laws. Since, presumably, private persons have no right to engage in the manufacture, transportation, and sale of intoxicating alcoholic beverages in interstate commerce or otherwise, the state can effectively control its liquor problem as it sincerely wishes and not consider the factor of interstate commerce, except in framing a Dispensary Act so as to make it comply with the Federal inhibition of interstate commerce in intoxicating beverages which may be considered the necessary element to allow state dispensary systems to operate as successfully as the people of the state should demand of its own politicians.

The immediate prospects of possible modification of the Federal Prohibition Laws are:

1. The unrestricted manufacture, transportation and sale of grape products capable of becoming wine, but not intoxicating in fact at the time of sale.

2. The unrestricted manufacture, transportation and sale of wort for making beer and also not a beverage or intoxicating in fact at the time of sale.

3. The increase in percentage of alcohol in alcoholic beverages to a percent which might be held by a court or jury to be intoxicating in fact as to particular individuals but not to everyone.

4. The repeal of the 18th Amendment and Federal legislation.

5. The modification of the 18th Amendment placing entire control of the solution of the liquor problem in the hands of the respective states, but limiting the interstate commerce of intoxicating beverages as provided by state laws.

6. The change of the extent of the Prohibition Amendment so as to allow alcoholic beverages of low alcoholic content and which are intoxicating in fact.

In the framing of a State Dispensary Act consideration must be
given to the principle that if the Federal Government changes its view in any of the above respects and the Dispensary Acts were found to be in violation of such changed circumstances of interstate commerce the state acts would be held void.

LIMITATIONS FOUND IN STATE CONSTITUTION.

In establishing a state liquor dispensary the considerations which must be adhered to in addition to those set out above are

1. Recognition by courts of intoxicating liquors as subject of police power regulation.

2. Presence of limitations in constitution of State limiting state in creating monopoly to exercise police power through dispensary Act.

3. Presence of limitation in constitution of State respecting use of State funds for such a purpose.

4. Construction of courts of constitutional limitation against use of state credit and funds for internal improvements and limiting tax raising power to public use.

In the early years of attempt to regulate the liquor traffic there was some inclination to hold intoxicating liquors an article of commerce which was not subject to the police power as to be prohibited. This point of view was not general. In Wisconsin it was early recognized that the Legislature had the fullest power over the sale of intoxicating beverages.\(^2\)

The United States Supreme Court has also adopted such view.\(^2\)

With respect to the monopolizing of the sale of alcoholic beverages, if the state does so for the primary purpose of exercising its police power to control the evils of the liquor trade and not to enter such business for the purpose of making a profit, its power has been generally upheld. In this connection the manufacture, transportation, and general handling of the trade has been supported as incidental to the main purpose of exercising its police power with respect to the trade itself.

As to whether state funds can be used for such a purpose the principle usually depends on whether the courts of the state hold the state monopolization under the dispensary act as a due exercise of the police power or not. With respect to the state activities as grain elevators,

\(^2\) State v. Downer, 21 Wis. 274.
Silber v. Bloodgood, 177 Wis. 608.
Abley v. Smith, 178 Wis. 138.
State v. Thekan, 184 Wis. 42.

\(^2\) Crowley v. Christensen, 137 U.S. 86
the courts have held such police power as the state has with respect to grain elevators and the like to be exercised at most by regulation. Usually, if the state grants the legislature the power to establish a Dispensary System as within the police power, then it may use its funds for such purpose without it being considered for "internal improvements".

The requisite of uniformity of taxation and levying of taxation by the Legislature has not been held to prohibit a State Dispensary System of the general type.

The provisions of a Dispensary Act must fully show the relationship of the officers to the state, their powers and duties must be expressed, they must be responsible and subject to the state, there must be no private monopoly granted to any individual nor may the act be designed to grant a profit in any sense to private parties in a manner not uniform.

The Dispensary Acts have either made the duty of carrying out its terms a function of State officers and their appointees or have vested that duty in the local governments as an enlargement of their statutory powers or charter.

One of the outstanding state cases which considered a general dispensary act will be herein considerably quoted from in lieu of a separation of points and collation of cases thereon.

Herein the State Dispensary Act was attacked from most of the angles included in the various cases. It is the case of State ex rel George v. City Council of Aiken.27

In this case the South Carolina Dispensary Act of 1893 was considered and sustained as a valid police regulation. The court decided at page 224:

"Before proceeding to a consideration of the specific objections urged against the constitutionality of the act, we desire to state at the outset that in our opinion the following propositions embody the principles governing this case: (1) that liquor, in its nature, is dangerous to the morals, good order, health, and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc. (2) That the State, under its police power, can itself assume entire control and management of those subjects, such as liquor, that are dangerous to the peace, good order, health, morals, and welfare of the people, even when trade is one of the incidents of such entire control and management on the part of the state. (3) That the act of 1893 is a police measure. We are frank to say that if we are wrong as to either of these propo-

27 20 S.E. 221
tions the act should be declared unconstitutional. We will now cite authorities to sustain these propositions. We think differences of opinion as to the constitutionality of this act arise from the attempt on the part of some to apply to it the law applicable to the ordinary commodities of life. The sale of an article may be lawful unless restrained by law, and yet it may be of such a nature as to endanger the peace, safety, health, and morals of a people. We do not suppose there is a more potent factor in keeping up the necessity for asylums, penitentiaries, and jails, and in producing pauperism and immorality throughout the entire country, than liquor, and yet it is argued that it is to be placed on the same footing with the breadstuffs and other ordinary commodities of life."

The court in *Crowley v. Christensen*, 137 U. S. 90, 11 Sup. Ct. 13, says: "** 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 rest in the discretion of the governing authorities. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only."

"** The police power being fundamental in its nature, inherent in and so essential to government that its very existence is dependent thereon, the exercise of such power is necessarily one of the chief functions of government, and primarily devolves upon the government itself, although it has been allowed in certain cases to delegate and "farm out" such power to corporations and individuals. The licensed saloon keeper does not sell liquor by reason of an inalienable right inherent in citizenship, but because the government has delegated to him the exercise of such rights under its power of police . . . The question admits of graver doubts as to the right of the government to delegate the power than to exercise it directly. There are expressions of Mr. Justice McGowan in the case of *Town Council v. Pressley*, 33 S.C. 56, 11 S.E. 545, tending to sustain this view. That case also shows that the court cannot question the discretion exercised by the law making body in adopting such measures as, in its judgment, seemed best under its power of police."

"** The state has the right, through its own officers,—in fact it is its primary duty,—to enforce its police regulations, which right inheres in government itself, and is paramount to any right inherent in citizenship. But referring to the foregoing objection, as a matter of fact it would not be a efficiently enforced by private individuals, because there would be the constant temptation to make as large profits
as possible. Chief Justice McIver, in *McCullough v. Brown*, says: '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.' Now, if the indirect profits in the case mentioned are sufficient to induce the taxpayer to encourage large sales when the seller would get all the profits? The dispensary act itself is an outgrowth of a dissatisfaction on the part of the people with the manner in which the police power, when delegated, was abused. The law was enacted in self-defense, and vindicates the wisdom of our forefathers in allowing wide legislative discretion in the exercise of the police power. There is nothing in the act showing that its primary object is the raising of revenue. The sales are to be made under rules adopted by the county board of control, and approved by the state board of control. It is certainly possible for the objects of the act to be carried into effect under proper rules adopted for that purpose. It is within the power of the boards of control to eliminate the profit feature altogether. It is presumed that public officials will discharge the duties of office in a lawful manner, until the contrary appears. When a case is brought before this court contesting the legality of the rules adopted by the boards of control, it will be time enough then for this court to pass upon the revenue feature.

"* * * Objection has been urged against the act that it is repugnant to the provisions of the constitution as to taxation. This objection could only be sustained in case it should be decided that the object of the act is not the exercise of police power. Police power is a public purpose, and taxes levied to enable the government to enforce a law construed to be in pursuance of the police power have never been declared unconstitutional. * * * Objection is made as to the constitutionality of the act on the ground that it creates a monopoly. Those interposing this objection likewise assume that it is not a police measure. The objection is fully met by the decision of the court in the Slaughterhouse Cases, supra, in which the court says: 'That wherever the legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the power necessary to effect the desired lawful purpose, seems hardly to admit of debate.' Tied. Lim. 318 says: 'If it is lawful for the state to prohibit a particular business altogether, or to make a government monopoly of it, the pursuit of such business would if permitted to any one, be a privilege or franchise, and, being like any other franchise, may be made exclusive. This is but a logical consequence of the admission that the
state has the power to prohibit a trade altogether. Such an admission is fatal to a resistance of the power to make it a monopoly.' The doctrine of 'monopoly' cannot be applied to a state in exercising its governmental functions."

"** It is contended that the foregoing section prevents the legislature from embarking the state in a commercial enterprise. We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the absence of section 41, art. 1. As we have said, if the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation. Buying and selling on the part of the federal, state, and municipal governments take place every day, and as long as the buying and selling are in pursuance of police regulations they are entirely free from legal objection. The federal governments sells liquor and other articles that have been seized as contraband. Articles are purchased by the state to keep up the penitentiary and asylum and other public institutions and enterprises. We see it buying a farm to utilize the convict labor of the state, and selling the produce made on the farm. Municipal governments have the right to buy and dispose of property in administering their governmental affairs."

"** The case of Pippe v. Becker, (Minn.) N.W. 331, is also relied upon to sustain the constitutional objection to the act of 1893. The title of the act construed in Pippe v. Becker was, 'An act to provide for the purchase of a site and for the erection of a state elevator or warehouse at Duluth for public storage of grain.' The syllabus of the case prepared by the court states: 'The police power of the state to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it.' The language of the court as applying to that case was proper, and we think the case was properly decided in the light of the distinction between liquor and the ordinary commodities of life which we have pointed out. There was nothing in the business dangerous to the health, morals, and safety of the people, and the act should have been declared null and void."

*Is manufacture, transportation or sale of Alcoholic Beverages under police power internal improvement of State?*

In State ex rel Jones v. Froehlich, 115 Wis. 32, at 39 the case of Pippe v. Becker, (Minn.) 57 N.W. 331 discussed above is considered. The court agreed that a warehouse had no logical connection to police regulation of weighing and storing grain, and held a river levee an internal improvement. That is recognized. It recognized that the legislature could delegate to counties and municipalities authority to do
what the central state government could not for the reason that the limitation against internal improvements applies only against the state, quoting Bushnell v. Beloit, 10 Wis. 195 and Rogan v. Watertown, 30 Wis. 259. The present case does not help considerably in the solution of whether in Wisconsin such activities as listed above would be held internal improvements.

In this respect also see State ex rel Owen V. Donald, 160 Wis. 21, holding that a forest preserve was a work of internal improvement.

With respect to constitutional limitations against using state funds for internal improvements the question is one of construction as to whether the operation of a State Dispensary under the police power would be included within the limitation.

Some states as Georgia attempted to avoid this difficulty by authorizing the counties and municipalities to engage in Dispensary operations if they chose to. This method of operation did not come within the limitation since the limitation was against the state government only. Whether this form of procedure could be followed and it be held to be a sovereign act of the State so as to bring a situation within the Hardgrove Thesis is open to question.

Some states have held that State Dispensary activities were not internal improvements but solely under the police power.

If there is any question a state could pass a law applying to counties and then one to the State and if the State enactment were held invalid the county one could be used.

The cases in which various State courts have considered the constitutionality of State Dispensary Acts under their constitutions are numerous.28

28 Alabama: Commencing in 1900, Sheppard vs. Dowling, 28 So. 791; Mitchell v. State, 32 So. 687; Harlan v. State, 33 So. 858; Elba v. Rhodes, 38 So. 807; Childers v. Shepherd, 39 So. 235; Newman v. State, 39 So. 648; Lee v. State, 39 So. 720; Davis v. State, 40 So. 663; Schass v. McIntyre, 41 So. 11; Rose v. Lam ply, 41 So. 524; Ex parte Hall, 47 So. 197.


North Carolina: Commencing in 1899. Bennett v. Swain Co. 34 S.E. 632; Garsed v. Greensboro, 35 S.E. 254; Crocker v. Moore, 53 S.E. 229

There are several cases which have appended to them complete State Dispensary Acts.29

During the past year Mr. Harry J. Allen, a member of the Milwaukee Bar, drafted and presented to the press a model state constitutional amendment to give the states the necessary powers where there are insurmountable state constitutional limitations in any of the states desiring to establish a state dispensary system. It is believed by the writer, however, that such a provision would not be necessary in Wisconsin to set up this system.

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29 Act of So. Carolina of Dec. 24, 1892, in 54 Fed. 977 which Act was upheld in said case, but decision was reserved as to Section 25 thereof. This section was held to be objectionable in In Re Langford, 57 Fed. 570. Act of So. Carolina of Jan. 2, 1895 in 41 Law. Ed. 633.
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