FEDERAL HIGH COURT

The Central Provinces and Berar Sales of Motor Spirit

Vs

Lubricants Taxation

(Gwyer, C.J.)

02.12.1938

JUDGMENT

Gwyer, C.J.

1. This is a Special Reference which His Excellency the Governor-General has been pleased to make to the Court under Section 213, Constitution Act. The reference is in the following terms:

> Is the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act,1938 or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires the Legislature of the Central Provinces and Berar?

2. The Court directed notice of the Reference to be given to the Government of India and the Provincial Government; and intimated that in view of their contingent interest in the matter, the other Provinces ought to be informed. This the Advocate-General of India undertook to do; and subsequently leave was given to the Advocates-General of Bengal and Madras to appear and argue in support of the case of the Government of the Central Provinces and Berar, not on behalf of any particular Province but as representing the general provincial interest. The Court is much indebted to all the counsel engaged for the assistance which they have afforded it.

3. Notwithstanding the very wide terms in which the Special Reference is framed, the question to be determined lies essentially in a small compass. It has arisen in the following way. Section 3 (1), Provincial Act, to which it will be convenient to refer hereafter as the impugned Act, is in these terms:

> There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent on the value of such sales.
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> Retail dealer" is defined by Section 2 as any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased, and "retail sale" is given a Corresponding meaning.

4. Both motor spirit and lubricants are manufactured or produced (though not to any great extent)

in India Motor spirit is subject to an excise duty imposed by the Motor Spirit (Duties) Act, 1917, an Act of the Central Legislature; no excise duty at present has been imposed on lubricants.

5. By Section 100 (1), Constitution Act, the Federal Legislature (which up to the date of the Federation contemplated by the Act means the present Indian Legislature) has, notwithstanding anything in Sub-section (2) and (3) of the same Section, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in the Federal Legislative List, that is List 1 in Schedule 7 to the Act. Entry (45) in that List is as follows: "Duties of excise on tobacco and other goods manufactured or produced in India", with certain exceptions not here material; and it is said on behalf of the Government of India that the tax imposed by Section 3(1) of the impugned Act, in so far as it may fall on motor spirit and lubricants of Indian origin, is a duty of excise within Entry (45) and therefore an intrusion upon a field of taxation reserved by the Act exclusively for the Federal Legislature.

6. By Section 100(3) of the Act, a Provincial Legislature has, subject to the two preceding sub-sections of that Section, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List, that is List 2 of Schedule 7. Entry (48) in this List is as follows:"Taxes on the sale of goods and on advertisements" and it is said on behalf of the Provincial Government that the tax imposed by the impugned Act is within the taxing power conferred by that entry, and therefore within the exclusive competence of the Provincial Legislature.

7. It will be observed that by Section 100(1) the Federal Legislature are given the exclusive powers enumerated in the Federal Legislative List, "notwithstanding" anything in the two next succeeding sub-sections" of that Section Sub-section (2) is not relevant to the present case, but Sub-section (3) is, as I have stated, the enactment which gives to the Provincial Legislatures the exclusive powers enumerated in the Provincial Legislative List Similarly Provincial Legislatures are given by Section 100(3) the exclusive powers in the Provincial Legislative List "subject to the two preceding sub-sections", that is Sub-sections (1) and (2). Accordingly, the Government of India further contend that, even if the impugned Act were otherwise within the competence of the Provincial Legislature, it is nevertheless invalid, because the effect of the non obstante clause in Section 100(1), and a fortiori of that clause read with the opening words of Section 100(3), is to make the federal power prevail if federal and provincial legislatie powers overlap. The Provincial Government, on the other hand, deny that the two entries overlap and say that they are mutually exclusive. The Government of India raise a further point under Section 297, Constitution Act, but it will be more convenient to deal with this separately and at a later stage.I should add that it is common ground between the parties that if Section 3(1) of the impugned Act is held to be invalid, the rest of the Act must be invalid also, since it only provides the machinery for giving practical effect to the charging Section.

8. This is the first case of importance that has come before the Federal Court; and it is desirable, more particularly in view of some of the arguments addressed to us during the hearing, to refer briefly to certain principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it

was within the competence of the Legislature which enacted it: nor, will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere.

9. The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense: per Lord Wright in *James v. Commonwealth of Australia*[1] The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a Constitutional enactment. But their application is of necessity conditioned by the subject matter of the enactment itself and I respectfully adopt the words of a learned Australian Judge:

> Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be: (1908) 6 *Commonwealth Attorney-General for New South Wales v. Brewery Employees Union*[2] per Higgins J. at p. 611.

10. Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat.

11. Disputes with regard to central and provincial legislative spheres are inevitable under every federal Constitution, and have been the subject matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee Many of these cases were cited in the course of the argument. The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take AColour from its context and bear different senses accordingly.

12. The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists Whether this elaboration will be productive of more or less litigation than in Canada, where there is also a distribution by enumeration, time alone will show at least this Court will not be confronted with the additional problems created by the

interlacing provisions of Sections 91 and 92, British North America Act and the distribution of powers not only by the enumeration of specified subjects, but also by reference to the general or local nature of the subject matter of legislation. But the interpretation of the British North America Act has given rise to questions: analogous to that which is now before this Court and there are two decisions of the Judicial Committee which lay down most clearly the principles which should be applied by Courts before which such questions may come.

13. In *Att. Gen. for Ontario v. Att.Gen. for Canada*[3], the Committee observed that in the interpretation of the British North America Act, if the text is explicit, the text is conclusive, alike for what it directs and what it forbids When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

14. In the earlier case in *Citizens Insurance Co. v. Parsons*[4] the same principle had been more fully expounded After pointing out that with regard to certain classes of Dominion (or Central) subjects, generally described in Section 91, British North America Act, legislative power may nevertheless reside as to some matters falling within that general description in the Legislatures of the Provinces, under Section 92, the Committee proceeded thus:

> In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a Conflict should exist and in order to prevent such a result, the two Sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the Sections, so as to reconcile the respective powers they contain, and to give effect to all of them. In performing this difficult duty it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand.

15. The question before the Court admits of three possible solutions: (1) that the provincial entry covers the tax now challenged and that the federal entry does not; (2) that the federal entry covers it, but that the provincial entry does not; and (3) that the tax falls within both entries, so that there is a real overlapping of jurisdiction between the two. In the first case, the validity of the tax could not be questioned; in the second, the tax would be invalid as the invasion of an exclusively federal sphere; in the third, it would, because falling within both spheres, be invalid by reason of the non obstante clause. It is necessary therefore to scrutinies more closely the two entries, first separately and then in relation to each other and to the context and scheme of the Act.

16. The provincial legislative power extends to making laws with respect to taxes on the sale of goods. The words in which this power is given, taken by themselves and in their ordinary and natural sense, seem apt to cover such a tax as is imposed by the impugned Act; and it might indeed be difficult to find a more exact or appropriate formula for the purpose.

17. The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India "Excise" is stated in the Oxford Dictionary to have been originally accise", a word derived through the Dutch from the late Latin accensare, to tax; the modern form, which ousted accise" at an early date, being apparently due to a mistaken derivation from the Latin excide re, to cut out. It was at first a general word for a toll or tax, but since the 17th century it has acquired in the United Kingdom a particular, though not always precise, signification. The primary meaning of 'excise duty' or 'duty of excise' has come to be that of a tax on certain articles of luxury (such as spirits, beer or tobacco) produced or manufactured in the United Kingdom, and it is used in contradistinction to customs duties on articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to licence fees imposed for revenue, administrative, or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise; and, generally speaking, the expression is used to cover all duties and taxes which, together with customs duties, are collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry (45).

18. It was then contended on behalf of the Government of India that an excise duty is a duty which may be imposed upon home produced goods at any stage from production to consumption; and that therefore the federal legislative power extended to imposing excise duties at any stage. This is to confuse two things, the nature of excise duties and the extent of the federal legislative power to impose them. Authorities were cited to us, from Blackstone onwards, to prove that excise duties may be imposed at any stage; and if this means no more than that, instances are to be found where they have been so imposed, authority seems scarcely needed. It would perhaps not be easy without considerable research to ascertain how far Blackstone was justified at the time he wrote in saying that excise duties were an inland imposition, paid sometimes on the consumption of the commodity, and frequently on the retail sale. Blackstone's statement however is repeated, almost verbatim, in the latest edition of Stephen's Commentaries, and as a description of excise duties now in force in the United Kingdom it is demonstrably wrong for, a brief examination of those duties shows that in practically all cases it is the producer or manufacturer from whom the duty is collected. But there can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority, a duty on home produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends and it continues to be an excise duty, that is a duty on home produced or home manufactured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose them: for the duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

19. It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor for the reasons already given, is it possible to agree that in no circumstances could an excise duty be levied at a stage subsequent to production or manufacture.

20. If therefore a Legislature is given power to make laws "with respect to" duties of excise, it is a matter to be determined in each case whether on the true construction of the enactment conferring the power, the power itself extends to imposing duties on home produced or home manufactured goods at any stage up to consumption, or whether it is restricted to imposing duties, let us say, at the stage of the production or manufacture only. A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

21. The question must next be asked whether such a tax as is imposed by the impugned Act, though described as a tax on the sale of goods, could in any circumstances be held to be a duty of excise; for it is common ground that the Courts are entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says, in order to ascertain the true nature of the tax Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities, and I will assume for the moment in favour of the Government of India that it is on that ground capable of being regarded as a duty of excise.

22. It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province.

23. But the question before the Court is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitution Act. This is a very different problem and one on which cases decided under other Constitutions can never be conclusive. In the United Kingdom there are no competing jurisdictions at all and though in Canada, Australia and the United States there is a division or distribution of powers between the Centre and the Provinces or States, there is nowhere to be found set in opposition to one another the power of levying duties of excise and an express power of levying a tax on the sale of goods. In Canada there is, it is true, a double enumeration of legislative powers, but so far as taxation is concerned, the conflict is between direct and indirect taxation, the first being the prerogative of the Provinces, the second of the Dominion and though duties of excise (as well as those of customs) are mentioned in the British North America Act, it is nearly always as indirect taxes that constitutional questions arise with regard to them. In Australia all taxing powers belong to the States, except those which are specifically reserved to the Commonwealth. Among the latter are duties of customs and excise; and the question in Australia always is whether a

particular tax falls within the field of taxation reserved to the Commonwealth or not there can be no overlapping of particular legislative spheres. In the United States the Central Legislature has power to levy "taxes, duties, imposts and excises," provided that they are uniform throughout the States. This is not an exclusive power, and the States can levy what taxes they like (other than imposts or duties on imports or exports), subject to the provisions of the Constitution, though certain of those provisions, such as the commerce clause, operate in practice as a very effective restriction upon State powers. Only in the Indian Constitution Act can the particular problem arise which is now under consideration and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail: for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal craftsmanship.

24. It has been shown that if each legislative power is given its widest meaning, there is a Common territory shared between them and an overlapping of jurisdictions is the inevitable result and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess. I mention, only to dismiss, the argument that the new autonomy of the Provinces and the expenditure necessary to administer and maintain the vital services committed to their charge require that every intendment should be made in favour of the provincial taxing power. I should never deny the high importance of the provincial functions but the Centre has also great responsibilities, though of another kind, and it is not for this Court to weigh one against the other. The issue must be decided on other grounds than these.

25. The provincial legislative power defined in Entry (48) may be first considered. The Advocate General of India, when asked what was left to the Legislative power of the Provinces under this entry if the view of the Government of India prevailed, said that it was clearly within their power to levy the taxes commonly known as turnover taxes, which under that name or under the name of sales taxes have since the War proved so successful a fiscal expedient in many countries. Strictly, a turnover tax appears to be the correct description of a tax, usually calculated in the form of a percentage, on the gross receipts of wholesalers or of retailers or of both, and in some countries also on receipts in respect of services. It is however sometimes included under the more general name of sales tax, and it is evident from the various modern writers who have dealt' with the subject and to whose works we were referred Findlay Shirras, Science of Public Finance (3rd Edn., 1936), Vol. 2, ch. 25; Com stock, Taxation in the Modern State, Ch.8 that the latter expression is often used as a Convenient name for a number of taxes ranging from turnover taxes to taxes on the retail sale of specified classes of goods the so called sales taxes which have been imposed by a large number of the State Legislatures in the United States seem to be often of the latter variety. H. L. Lutz, Public Finance (3rd Edn., 1936),Ch. 26.Two citations from these writers will be sufficient to show that neither "turnover tax" nor 'sales tax" has yet achieved a recognizee and certain meaning:

> The scope of sales and turnover taxes has varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turnover taxes. Certain taxes include both goods and services, while others include only goods. The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services. Comstock, ibid., page 113.

And again:

> The tax (i.e. the sales or turnover tax) may be general, as in France or Germany, or retail transactions may be excluded,as in Belgium. It maybe, as is common in the States of the American Union, confined to retail transactions. It may be imposed, as in Canada and Australia, as a producers' or manufacturers' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempted unless carrying on manufacture as well as agriculture. Findlay Shirras, ibid., page 610.

26. Thus the expression "sales tax" may comprehend a good deal more than would be understood by" tax on the sale of goods" in the ordinary and natural meaning of those words and the expression "turnover tax" seems to be in some directions wider and in others narrower." Tax on the sale of goods "at any rate seems to include some varieties of turnover tax, but it seems also to include more than a turnover tax in the stricter sense could reasonably be held to cover. In these circumstances it may be thought hazardous to impute to Parliament any particular intentions with regard to turnover taxes. Parliament may have had them in mind. The Proposals for Indian Constitutional Reform, commonly known as the White Paper (Cmd. 4268,1933) and the report of the Joint Select Committee thereon (H.L.6 and H.C.5,1934) are historical facts, and their relation to the Constitution Act is a matter of common knowledge, to which this Court is entitled to refer and it may be observed that "taxes on the sale of commodities and on turnover" appeared in the White Paper as a suggestion for possible sources of provincial revenue, and that the suggestion was approved without comment by the Joint Select Committee. I do not know, and it would be idle to speculate, why a different formula was ultimately inserted in the Act; the Court is only concerned with what Parliament has in fact said and if the Government of India are right and "taxes on the sale of goods" was intended to refer to taxes on turnover alone, I find it difficult to understand why Parliament used so inappropriate and indeed misleading a formula "Taxes on turnover" may not be yet a term of art, but some of its meanings are tolerably plain. Taxes on the sale of goods" appears to me to be plainer still and though there may be general agreement that it includes some forms of turnover tax, it seems to me a straining of language to say that it can only mean a turnover tax to the exclusion of everything else. Certainly that would not be its ordinary meaning and I cannot persuade myself, even for the purpose of avoiding a Conflict between the two entries, that Parliament deliberately used words which cloaked its real intention when it would have been so simple a matter to make that intention clear beyond any possibility of doubt. I therefore proceed to inquire if it is reasonably possible to avoid the conflict by construing the power to make laws "with respect to" duties of excise as not extending to the imposition of a tax or duty on the retail sale of goods. This is the crucial issue in the case.

27. In my opinion the power to make laws with respect to duties of excise given by the

Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connexion with, manufacture or production, and that it extends no further. I think that this is an interpretation reasonable in itself, more consonant than any other with the context and general scheme of the Act, and supported by other considerations to which I shall refer.

28. I have said that it seems to me impossible, without straining the language of the Act, to construe a power to impose taxes on the sale of goods as a power to impose only turnover taxes. To construe the power to impose duties of excise, as I think it ought to be construed, involves no straining of language at all. The expression "duties of excise," taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which, the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but, so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a Competing legislative power, such as appears in entry (48).

29. Much stress was laid upon two cases which were cited to us. In (1901) 184 U S 608, *Patton v. Brady*[5] Ibid, at p. 623 a Case before the United States Supreme Court, tobacco, which had already paid excise duty, had been sold to the plaintiff. While it was still in his hands, an Act was passed doubling the current rate of duty and (no doubt lest persons in possession at the moment of duty paid tobacco should get an unearned increment on its sale) imposing a special duty on all tobacco which had paid the excise duty in force at the date of the Act and was at that date held and intended for sale. The Act was challenged as unconstitutional on the ground (inter alia) that the Legislature having once excised an article could not excise it a second time. The Court, upholding the Act on this particular point, referred to the account of excise duties given in Blackstone and Story and to definitions in various standard dictionaries, and then said:

> Within the scope of the various definitions we have quoted, there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer. Our conclusion then is that it is within the power of Congress to increase an excise, as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer Ibid. at p.623.

30. The case is thus a decision on the scope and extent of the power to impose excise duties given to the Central Legislature by the Constitution of the United States. No question was involved of a Competing legislative power. It is to be observed however that the imposition of an excise duty at a stage later than production or manufacture was obviously regarded as an unusual thing and that the duty about which the litigation arose was not intended as a permanent duty but was imposed once for all. The other case was 38 *Commonwealth Oil Refineries Co. v. South Australia*[6], There a State law had (inter alia) purported to impose an additional Income Tax (for so the duty was described) at the rate of 3d. for every gallon of motor spirit sold by any person who sold and delivered it within the State to persons within the State for the first time after its production or manufacture, but not including any purchaser who subsequently sold it. It was argued that this was in substance a duty of excise which under the Constitution only the Commonwealth had the right to impose, and that contention prevailed. It might at first sight

appear that this decision supported the Government of India's case for, as already pointed out, the taxing power of the Australian States is unlimited, save in so far as the Constitution reserves the right of imposing certain specified taxes to the Commonwealth and indirectly limits the power of the States by giving the Commonwealth power to regulate inter State trade and commerce. But a Closer examination of the judgments delivered shows that the majority of the Judges took the view that the duty on the first sale of the commodity was in fact a tax on the producer and for that reason a duty of excise without doubt. The case is no authority at all for the proposition that a tax on retail sales must necessarily be a duty of excise.

31. It cannot be too strongly emphasised that the question now before the Court is one of possible limitations On a legislative power, and not possible limitations on the meaning of the expression duties of excise" for, "duties of excise" will bear the same meaning whether the power of the Central Legislature to impose them is restricted or extended. It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other. Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for, the two are independent of one another and exist side by side.But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect can be given to the latter in its ordinary and natural meaning. So in *Bank of Toronto v. Lambe*[7]where a Provincial Legislature in Canada had imposed a tax upon banks carrying on business in the Province, varying in amount with the paid up capital and with the number of the offices of the bank, whether or not the bank's principal place of business was within the Province, it was argued that even if the tax imposed by the Act was direct taxation and therefore within the power of the Provincial Legislature under Section 92, British North America Act, it was nevertheless invalid because it was legislation relating to banking and the incorporation of banks, the making of laws on which was by Section 91 of the Act vested solely in the Dominion Parliament. The Judicial Committee rejected this argument. They pointed out that in (1882) 7 A.C. 96, to which reference has already been made, it was found absolutely necessary that the literal meaning of the words defining the powers vested in the Dominion Parliament should sometimes be restricted,"in order to afford scope for powers which are given exclusively to the Provincial Legislatures;" and they summed up the matter thus:

> The question they [the Committee] have to answer is whether the one body or the other has power to make a given law. If they find that on ' the due construction of the Act the legislative power falls within Section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.

32. This is not to ignore the non obstante clause, still less to bring into existence, as it were, a non obstante clause in favour of the Provinces; for if the two legislative powers are read together in

the manner suggested above, there will be a separation into two mutually exclusive spheres, and there will be no overlapping between them. Thus, the Central Legislature will have the power to impose duties on excisable articles before they become part of the general stock of the Province, that is to say at the stage of manufacture or production, and the Provincial Legislature an exclusive power to impose a tax on sales thereafter.

33. In discussing the possible overlapping of the federal and provincial jurisdictions, I assumed 'for the moment that a tax on retail sales might be a duty of excise. Whether it is so or not must depend upon circumstances; certainly I cannot agree that it must always be so regarded, even where the power to impose duties of excise extends to imposing them at stages subsequent to production or manufacture. There are some significant observations on this point in the judgment of Isaacs J. (afterwards Isaacs C. J.) in the Commonwealth Refineries case11 to which reference has already been made. After stating his conclusion that the words "excise duties" were not used in the constitution in the extended sense which had been suggested, the learned Judge proceeded as follows:

> I arrive at that conclusion notwithstanding the expression was in South Australia before Federation, as in Victoria, sometimes used in a sense large enough to include brewers' and wine licences. Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a license or tax on the sale appears to me to fall into a Classification of governmental power outside the true content of the words "excise duties" as used in the constitution...Therefore, if the taxation by the State Act under Section 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter State operation of trade or commerce, it would not be open to the challenge here made: *Commonwealth Oil Refineries Co. v. South Australia*[8],

34. There appears to be a sound basis for the above distinction and the case which the Court is now considering is indeed stronger than the Australian one, for in the latter the power of the State to levy taxes on sale other than duties of excise was implied in its general powers of taxation and was not conferred expressly as in Entry (48). No doubt there will be borderline cases, in which it may be difficult to say on which side a particular tax or duty falls; but that is one of the inevitable consequences of a division of legislative powers. If however the facts in (1901) 184 U S 6089 had been such as to make the decision turn upon the distinction between the two kinds of tax mentioned above, it seems probable that the special duty there imposed would still have been held to be a duty of excise, because it was an attempt, as it were, to relate the duty back to the stage of production, even though the person made liable for payment was not (and indeed could seldom have been) the original producer himself. In the present case it could not be suggested that the tax on retail sales has any connexion with production; it is also imposed indifferently on all motor spirit and lubricants, whether produced or manufactured in India or not. I do not say that this is conclusive, but it is to be taken into consideration. And I think that the distinction drawn by the learned Judge corresponds in substance with the distinction which it seems to me

ought to be drawn in the case of the federal and provincial spheres in India, that is, between the taxation of goods at the stage of manufacture or production and their taxation by the provincial taxing authority (as in Australia by the State) after they have become part of what I have called the common stock of the Province. The learned Judge's observations, it is true, were orbiter, and in any case are not binding upon us but I am strengthened in my own view by what he has said.

35. I am impressed also by another argument. The claim of the Government of India must be that any provincial Act imposing a tax on the sale of any goods (other than a turnover tax) is an invasion of Entry (45) in the Federal Legislative List, whether the goods are at the time the subject of a Central excise or not, and no matter how improbable it is that any excise will ever be imposed upon them. Duties of excise in the nature of things will always be confined to a Comparatively small number of articles but it is a necessary corollary of the argument of the Government of India that the power to impose excise duties, though only exercised with respect to this small group, is an absolute bar to the exercise by the Provinces of any jurisdiction by way of a tax on sales over every other material, commodity and article manufactured or produced in India and to be found in the Province. Nay, more for though excise duties can only be imposed in respect of goods manufactured or produced in India, it is part of the Government of India's case that to impose a tax on the sale of goods manufactured or produced elsewhere will infringe the provisions of Section 297(1)(b), Constitution Act, against discrimination. It is not necessary for me here to say whether I agree with the latter argument or not it is sufficient to point out how on one ground or the other this interpretation of the federal entry would exclude the Province from an immense field of taxation in which the Government of India does not now and probably would never in the future seek to compete. I should find it exceedingly difficult to adopt an interpretation of the two entries which would have consequences such as these.

36. Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties for Parliament must surely be presumed to have had Indian legislative practice in mind and unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. There were several central excise duties in force in India at the date of the passing of the Constitution Act, imposed respectively upon motor spirit, kerosene, silver, sugar, matches, mechanical lighters, and iron and steel. In all the Acts Motor Spirit (Duties) Act (No. II of 1917), extended to kerosene by Indian Finance Act (No. XII of 1922); Silver Excise Duty Act ' (No. XVIII of 1930); Sugar (Excise Duty) Act (No. XIV of 1934); Matches (Excise Duty) Act (No. XVI of 1934); Mechanical Lighters (Excise Duty) Act (No. XXIII of 1934), Iron & Steel Duties Act (No. XXXI of 1934)by which these duties were imposed it is provided (and substantially by the same words) that the duty is to be paid by the manufacturer or producer,and on the issue of the excisable article from the place of manufacture or production.The Acts which imposed the cotton excise, now repealed, were in the same form Cotton Duties Act (No. XVII of 1894); Cotton Duties Act (No. II of 1896).

37. The only provincial excise duty in force was that on alcoholic liquor and intoxicating drugs. The Devolution Rules, 1920, which were made under Section 45-A of the then Government of India Act, for the purpose of distinguishing the functions of the Local Governments and local Legislatures of Governors' Provinces.

Classified a variety of subjects, in relation to the functions of Government, as central and provincial subjects, respectively. Among the provincial subjects appears the following:

16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles....

38. The earlier part of this entry obviously describes an administrative and legislative sphere only, the taxing power being given in the last words quoted, which I take to mean excise duties on the articles mentioned and licence fees in relation to them. But here again, after examining various Provincial Acts relating to the control of alcohol, I have been unable to find any case of excise duties payable otherwise than by the producers or manufacturers or persons corresponding to them I am speaking, of course, only of alcohol manufactured or produced in the Province itself. The Advocate-General of India referred us to an Act of the Central Provinces [Central Provinces Excise Act (No. 2 of 1915)] which was said to make provision for the imposition of an excise duty on retail sales. I have been unable to find any such provision in the Act; it provides, it is true, as do other provincial Acts, for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for the privilege of selling alcohol, or as consideration for the temporary grant of a monopoly; but these are clearly not excise duties or anything like them. Provision was also made in most Provincial Acts for the payment of license fees in connexion with the production or sale of alcohol in the Province: but these fees are mentioned in the Devolution Rules Entry in addition to excise duties and are therefore something: different from them.

39. Thus, at the date of the Constitution Act, though it seems that the word "excise" was not infrequently used as a general label for the system of internal indirect taxation or for the administration of a particular indirect tax (as salt excise or opium excise), the only kind of excise duties which were known in India by that name were duties collected from manufacturers or producers, and usually payable on the issue of the excisable articles from the place of manufacture or production. This also may not be conclusive in itself, but it seems a not unreasonable inference that Parliament intended the expression "duties of excise" in the Constitution Act to be understood in the sense in which up to that time it had always in fact been used in India, where indeed excise duties of any other kind were unknown. Nor indeed are excise duties properly so called often to be found at the present day which are not collected at the stage of production or manufacture, whatever may have been the case in Black stone's time, and whatever may have been the reasons for Johnson's definition of "Excise" in the first edition of his Dictionary (1755) as a hateful tax levied on commodities and adjudged not by the common Judges of property but wretches hired by those to whom the excise is paid.

40. *Patton v. Brady* [9] was obviously a very special case. The United Kingdom Finance Act 1922, Section 9, to which we were referred, seems to me to impose a duty more properly classified as a privilege tax on clubs than as an excise duty in the ordinary sense, though I agree that it is called by the latter name; and in any case it is the only example of its kind which the industry of counsel was able to produce. Most of the dictionary definitions of the word "excise" seem to derive ultimately from Blackstone; and it has been seen how wholly incorrect Blackstone's description, as reproduced in Stephen's Commentaries, has now become. The Oxford Dictionary has a definition which purports to be a quotation from the Encyclopedia Britannica (though

apparently not from the title "Excise" in the latest edition of the Encyclopedia):

> A duty charged on home goods, either in process of their manufacture or before their sale to the home consumers.

41. In this definition the words "before their sale to the home consumers" do not seem to be necessarily a reference to retail sales; they might be equally a reference to a sale by the producer or manufacturer to the wholesaler for general distribution to consumers.

42. The conclusion at which I have arrived seems to me to be in harmony with what I conceive to be the general scheme of the Act and its method of differentiation between the functions and powers of the Centre and of the Provinces. It introduces no novel principle. It reconciles the conflict between the two entries without doing violence to the language of either, and it maps out their respective territories on a reasonable and logical basis. It would be strange indeed if the Central Government had the exclusive power to tax retail sales, even if the tax were confined to goods produced or manufactured in India, when the Province has an exclusive power to make laws with respect to trade and commerce, and with respect to the production, supply and distribution of goods, within the provincial boundaries. In the view which I take none of these inconsistencies will arise. Nor will the effect of this interpretation be to deprive the Centre of any source of revenue which it enjoys at present, nor of any which it is reasonable to anticipate that it might have enjoyed in the future. If I may be permitted to hazard a guess, the anxiety of the Government of India arises from the probability that a general adoption by Provinces of this method of taxation will tend to reduce the consumption of the taxed commodities and thus indirectly diminish the Central excise revenue. This however is a Circumstance which this Court cannot allow to weigh with it if, as I believe, the interpretation of the Act is clear; though it might be an element to take into consideration if there were real ambiguity or doubt. But I do not think there is either ambiguity or doubt, if the two entries are read together and interpreted in the light of one another. The difficulty with which the Government of India may be faced is of a kind which must inevitably arise from time to time in the working of a Federal Constitution, where a number of taxing authorities compete for the privilege of taxing the same taxpayer. In the present case, the result may well, be that the Central Government will find itself unable to make such a distribution of the proceeds of excise duties under Section 140 of the Act as it might otherwise desire to do; but these are not matters for this Court, and they must be left for adjustment by the interest concerned in a spirit of reasonableness and commonsense, qualities which I do not doubt are to be found in India as in other Federations.

42. The view which I have taken makes it unnecessary for me to consider the difficult question of the interpretation of Section 297(1)(b), and I express no opinion upon it.

43. I am of opinion that for the reasons which I have given the answer to the question referred to us is that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not ultra vires the Legislature of the Central Provinces and Berar, and since that is also the opinion of the whole Court we shall report, to His Excellency accordingly. There will be no order as to costs.

Sulaiman J.

44. I concur in the final conclusion of the Chief Justice, though partly on different grounds. The

question referred to us is whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars or to what extent is ultra vires of the Legislature of the Central Provinces and Berar. The Act is a short one, and the Advocate-General of India has expressly confined his objection to the provisions of Section 3(1) under which a tax is levied and collected from every retail dealer on the retail sales of motor spirit and lubricants at the rate of 5 per cent. on the value.

45. In Schedule 7, Government of India Act, 1935, the various heads are classified in an elaborate manner, and with respect to them the legislative powers between the Federation and the Provinces are carefully distributed. It contains two exclusive lists and one concurrent list. List 1 of the Schedule is the Federal Legislative List, comprising matters exclusively assigned to the Federation and Entry No. 45 therein is: "duties of excise on tobacco and other goods manufactured or produced in India," with three exceptions with which we are not concerned. List 2, which is the Provincial Legislative List, contains entry No. 48 "taxes on the sale of goods" and on advertisements.

46. The validity of the impugned Act therefore depends on the meanings to be given to these two competing entries, and on the question whether they are mutually exclusive or overlap. If the meaning of the words used in No. 45 includes taxes on retail sales, then the power of the Central Legislature to make laws with respect to the latter would follow as a matter of course. In such an inevitable overlap the Provinces must give way. The meaning of the latter expression "taxes on the sale of goods" is perfectly plain; the ambiguity, if any, lies in the interpretation of the words "duties of excise" which have not been defined in the Act.

47. Economists' definition of 'excise' cannot be conclusive. But there are even some economists who think that an excise duty does not include sales to consumers. Find lay Shirras in his Science of Public Finance, Vol. II (Edn. 3), p. 652, has defined 'excise' as ordinarily meaning:

> A tax or duty on home produced goods, either in the process of their manufacture or before their sale to consumers, especially on spirits, beverages, gasoline, sugar, and tobacco. It includes also certain licences, commodities, and licences to conduct certain trades. It is usual to exclude from excise or excises sales or turnover taxes.

48. At p. 653 he has again remarked, "it is, in short, the general rule to exclude sales or turnover taxes from excises." In the Encyclopedia of the Social Sciences by Selig man and Johnson, Vol. 5, page 669, 'excise' is defined as:

> A tax on commodities of domestic manufacture levied either at some stage of production or before the sale to home consumers.

At page 670 it is remarked:

> The excise tax may be levied on the raw material or the finished article or it may attach to an intermediate stage of the production process.

49. Even in Economics, there is a Clear distinction between customs and excise duties on the one hand, and retail sales tax on the other, the latter being levied upon the sale of tangible personal

property at retail.

50. The economists' distinction between direct and indirect taxation as a test of a duty being excise duty or not cannot be accepted in full. An excise duty is certainly an indirect tax, but the converse is not true. Every indirect inland tax is not necessarily an excise duty. A Statute of Parliament is not a thesis on Economics; and the question is really one of law and not of Economics. As remarked by Lord Hob house:

> Economists seek to trace the effect of taxation throughout the community. But the question is a legal one: *Bank of Toronto v. lambe*[10], at page 581.
>
> The excellence of an economists' definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer: Ibid, page 582.

51. The modern definitions in Economics of direct and indirect tax actions cannot now be accepted. To rely on the definitions of political economists was "inconsistent with the decisions of this Board going back to the year 1878": per Lord Thankerton in *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd*[11].

52. The meaning of "excise" as given in English Dictionaries is, of course, very comprehensive, as the writer of a dictionary has to include all possible uses to which the word is put. But in common parlance the duty of excise is more or less connected with home manufacture or production, even though its collection may be delayed till a later stage.

53. The Government of India Act was drafted after the deliberations of the Round Table Conference were over and the Joint Committee had re surveyed the field, and the drafting was done in England by British drafts men who again revised and re cast the Lists; and it was then passed by the Imperial Parliament. The English sense of the word ' excise" must therefore be examined first.

54. Stephen in his Commentary (Vol. II, Chap. 7) following Blackstone's old definition (Commentary, Vol. I, Chap. 8) has stated :

> Excise duties are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the Customs duties, for they are an inland imposition,paid sometimes on the consumption of the commodities, frequently upon the retail sale.

55. This was apparently based on the fact that about the middle of the 17th century there were excise duties laid on the makers and vendors of ale, etc. It does not however appear that their Lordships of the Privy Council have in any Dominion case adopted Blackstone's definition of 'excise'.

56. In the Encyclopedia Britannica, Vol.8, p.955 (Edn.14) it is pointed out that in modern times however the term generally connotes a tax on articles of home manufacture in contradistinction to customs duties which are levied on certain articles imported.

57. Thus the term has assumed a more restricted meaning since Stephen's adoption of Blackstone's definition.

58. In Halsbury's Laws of England (Hail sham Edition), Vol.28, p.330, Note (a), the dictionary meaning has been adopted and excise duties taken to be duties payable on goods produced at home, whereas customs duties are duties on goods imported into this country from abroad... Excise duties now however comprehend other duties, such as entertainments duty, etc.

59. Thus, in England they have a fairly wide range. Even a dog tax, a vehicle tax, a hawker's license tax, tax for wine licenses and pawn broker's licenses have been recognized in England to come within the range of excise duties, although in their nature' they are licenses. Again, in England excise duty is levied on the amount of the purchases of intoxicating liquor supplied in or to a Club or on behalf of AClub to its members (Ibid, Vol.28, para.639). A duty of excise is payable on all payments for admission to any place of entertainment (Ibid, para.681.) Indeed, all dues realized through the Commissioners of Customs and Excise are treated either as customs or excise duties.

60. There is an historical reason for the broad distinction in England between customs and excise.The system of excise duties was borrowed from the Low Countries and initially placed under the control of a Board of Commissioners, though later the excise revenue was for some time farmed out. When the excise duties were introduced into England by the Long Parliament in 1643 they were then laid on the makers and vendors of ale, beer, cider and perry (Whartons' Law Lexicon, Edn.13 pages,334-5).Half the excise revenue was permanently allotted to Charles I and his,heirs till ultimately the whole of it was transferred to the State.On this account customs and excise duties developed into two distinct categories.As in England the Imperial Parliament is supreme and there has been no rival autonomous Government, no occasion really arose for any possible conflict between legislative powers; nor could any question arise as to the niceties of distinction between direct and indirect taxation. As against excise duties the shar PC on tract was furnished by customs duties, which include export and import duties, affecting goods sent out abroad or brought in from abroad. As customs duties were imposed on the entry of foreign goods, and excise duties were an inland imposition, they could not as regards the stages of levy be co-extensive. It is no wonder therefore that the term "excise" is freely used, in England in a very general and comprehensive sense, and for convenience includes even collection of revenue on goods manufactured, produced or sold in the country, that is to say on home products and home consumption, as well as certain licenses.

61. There are several reasons why the wider English meaning may be inapplicable to the Indian Constitution,(1) There are no historical reasons for applying excise duty to all inland impositions in contrast with customs only. (2) Unlike England, where there can be no conflict of legislative powers, the Indian Constitution is a federal one and the Federation need not necessarily as against the Provinces have power to impose duties up to the stage of consumption. (3) In the Indian Act, the Federal and the Provincial Legislative Lists are separate and have to be read together and reconciled as far as possible. (4) The power to impose taxes on the sale of goods has been assigned exclusively to the Provinces, and the excise duties assigned to the Federation may not presumably include it. (5) In the Indian Act, the word used is not merely "excise" but "duties of excise on goods manufactured or produced in India", which may exclude licenses, contrary to the English practice of including within excise everything that is collected by Excise

Commissioners. (6) The words also show that the duty is connected with manufacture or production. (7) In the Provincial List, to give only one instance, there is a special head, No.50, which includes tax on entertainments, and would therefore, contrary to the English usage, not come within excise. (8) Even the Dominions, because of their Federal Constitutions, have found it impossible to adopt the word "excise "in its widest possible English sense. (9) The Devolution Rules, framed under the Government of India Act, 1919, were in force at the time the new Act was passed, and the present Lists are to some extent based on the previous Lists. It cannot therefore be presumed that the word "excise" used in the Government of India Act has necessarily the wider meaning which it has in England.

62. Story adopted Blackstone's definition in his Constitution of the United States. But the analogy of that old Constitution (1787) cannot be a good guide when considering a recent Act. Under Section 1(3) direct taxes have to be apportioned among the States, and under Section 8, the Congress possesses wide powers, though not exclusive, of laying and collecting uniform "taxes, duties, imposts and excises". The word "excise" has apparently been interpreted by the Courts in the United States to have the same wide significance as in England. It includes several things which may not in a narrower sense be regarded as excise: see Cooley: Principles of Constitutional Law in U. S. A., Ch. VI.

63. This view finds support from the case in *Patton v. Brady*[12] In that case Patton had in May 1898 purchased a large quantity of manufactured tobacco in the open market on which the existing excise duties had been duly paid when it was removed from the factory. Patton was not himself the consumer, but held the tobacco for sale. In June 1898 a new Act was approved by the Congress under which an additional tax upon all tobacco and snuff was imposed, and there was also a retrospective provision assessing a reduced tax on tobacco, among other articles, which was "manufactured, imported and removed from factory or customs house" subsequent to 14th April 1898. Patton claimed a refund of the duty levied and collected from him on his tobacco under the last provision. In argument it was practically conceded by one counsel that it was an excise tax, but they all "specifically insisted that the power of imposing an excise once exercised is gone." Brewer J. held (Harlan and Gray JJ. not taking part in the decision) that the tax was not a direct tax but an excise duty and also that an additional tax was not illegal. This conclusion was of course, obvious. The general tendency of the duty was to be passed on to the consumer, and it could not possibly be regarded as direct taxation. Further, the duty was on tobacco manufactured (or imported) and removed from factory (or customs house). It was intended to be one tax in relation to both manufacture and removal, and not two taxes in relation to manufacture and removal separately. It was in reality a tax on the manufacture and removal of tobacco, and was assessed at a subsequent stage, simply because it had not been paid previously at the time of the removal from the factory. The observations of the learned Judge however went a little further. He quoted with approval the definition of excise as laid down by Black stone and Stephen, and also as given in two standard dictionaries that it applied to internal or inland impositions, levied sometimes upon the consumption of a Commodity, sometimes upon the retail sale of it and sometimes upon the manufacture of it, applied to internal or inland impositions, levied sometimes upon the consumption of a Commodity, sometimes upon the retail sale of it and cometimes upon the manufacturer of it, and remarked that the power to exciso continues while the conumable articles are in the hands of the manufacturer or any intermediate dealer and until they reach the consumer.

64. As taxes on sales of goods are not specifically assigned to the States, the obiter dictum of the learned single Judge may possibly be justified in America, but it is not for me to express any opinion on this. It may however be pointed out that "today more than 30 States are using some kind of sales tax" (H. L. Lutz: Public Finance, pp. 631-2). In one year 1933 alone some 16 States enacted sales taxes.

65. Nearly all of the taxes adopted in 1933 are retail sales taxes...Customarily the vendor rather than the vendee is liable for taxation, although both may be held responsible for proper payment of the tax: [Seligman and Johnson, Encyclopaedia of the Social Sciences, Vol.13, p.517.]

66. The British North America Act, 1867, embodying the Canadian Constitution was based on the Quebec resolutions and was of Canadian origin, particularly as Canadian delegates had a hand in the actual drafting of the bill and so the word 'excise' was used 'therein in the Canadian sense.In that Constitution there is an elaborate distribution of Legislative powers, but in many respects there is the paramount authority and predominance of Dominion Laws. (Lefroy: Canada's Federal System, Ch. 10). Section 91 contains the list of subjects within the exclusive authority of the Dominion Parliament, and includes the raising of Money by any Mode of System of Taxation." But under Section 92, "direct taxation within the Province" is inter alia among matters within the exclusive power of the Provincial Legislatures, as also generally all matters of a merely local or private nature in the Province. Under Section 122, the Customs and Excise Laws can be altered by the Parliament of Canada Tax on the sale of goods is not specifically mentioned anywhere. The category of a tax not expressly mentioned in either list would ordinarily be determined according to its being direct or indirect taxation. Thus, generally Canadian decisions turn on the meaning and scope of the words "direct taxation" and are easily distinguishable.

67. Up to the Confederation, the distinction between direct and indirect taxation was solely of academic or scientific importance. Until the Act of 1867 was passed, the division of taxation into direct and indirect belonged solely to the province of political economy so far as taxation in Great Britain, Ireland or any of the Colonies was concerned, and there was no recognized definition of either class universally accepted. But it became from that moment essential for Courts for the purposes of that statute to ascertain and define the meaning of the phrase 'direct taxation" as used in such legislation: Per Lord Moulton in *Cotton v. Rex*[13]

68. According to the rule first laid down in *Attorney-General for Quebec v. Walter Reed*[14] one had to look, following John Stuart Mill to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid, a direct tax being one demanded from the very persons who it is intended or desired should pay it: p.143.

69. The best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then it cannot, in this view, be called direct taxation: p. 144 per Earl of Selbourne L. C.

70. Later in *Bank of Toronto v. Lambe*[15] where a tax had been imposed on banks varying in amount with the paid uPCapital and the number of offices, Lord Hobhouse adopted as a fair basis for testing the character of a tax, Mill's definition that taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it... Indirect taxes are those which are demanded from one person in the expectation and intention

that he shall indemnify himself at the expense of another, such are the excise or customs.

71. But Mill's condition that 'to be strictly direct a tax must be general,' which may be sound or unsound for economic purposes was rejected for legal purposes.

72. In Brewers and Maltsters Association of Ontariov. Attorney-Gen. for Ontario (1897) A.C. 231 the same definition was followed and it was held that requiring every brewer or distiller to obtain a license to sell wholesale was direct taxation.

73. The same test was applied by their Lordships in several later cases. In *Cotton v. Rex*[16] Lord Moulton remarked:

> The meaning to be attributed to the phrase 'direct taxation' in Section 92, British North America Act, is substantially the definition quoted above (i.e., in Lambe's case) from the treatise of John Stuart Mill, and that this question is no longer open to discussion.

74. In that case the Statute had authorized the collection of succession duty on the estate of a deceased person from the person making the declaration; it was held to be an indirect taxation as the declarant may happen to be a notary, even though under Section 3 of the Act, he was not personally liable. This case was explained by Lord Phillimore in a similar case in *Burland v. The King*[17] as containing not a wayside dictum but a Complete and fundamental decision, even though there was no common practice for the notary to make the declaration, because the principle remains the same and could equally well have been illustrated by the cases of the executor or administrator or legatee by a particular title.

75. In *City of Halifax v. Fairbanks Estate*[18] where a Statute had imposed a business tax to be paid by every occupier of real property for the purposes of any trade, profession or other calling carried on for the purpose of gain, the owner being deemed to be the occupier where property was let to the Crown or any person exempt from taxation, Viscount Cave laid down, "taxes on property or income were everywhere treated as direct taxes" and that Mill's formula Could not alter their classification.

76. In Attorney-General for British Columbia v.Canadian Pacific Ry. Co. (1927) A.C. 934 the Provincial Fuel Oil Tax Act, 1923, enacted that every person who purchases within the Province fuel oil sold for the first time after its manufacture in or importation into the Province should pay for Provincial purposes a tax equal to one half cent per gallon on the oil so purchased. "Purchaser" (who was to pay the tax) was defined as a person who within the Province purchases fuel oil when sold for the first time after its manufacture in or importation into the Province and "vendor" (who was to levy, collect and pay it to Government) was to mean any person who within the Province sells fuel oil for the first time after its manufacture or an importation into the Province. There was also a liability on every person who had in his possession for use or consumption fuel oil on which tax had not been paid. The Railway Company used to purchase oil in British Columbia from an Oil Company, and the oil they purchased was used by themselves alone and was not then re-sold. It was held that the tax was all the same indirect, and therefore beyond the competence of the Province. Viscount Haldane laid down that:

> Validity in accordance with (general) tendencies, and not according to results in insulated

or merely particular instances, must be the test.

77. The principle of construction as established was satisfied because the Railway Company could develop their business so as to include re-sale of the oil they bought. Fuel-oil being a marketable commodity, those who purchased it, even for their own use, acquire the right to take it into the market and therefore the tax comes within the general principle, determining that it is indirect. His Lordship emphasized that the first and the cardinal question was whether the tax was direct or indirect. His Lordship did not lay down that the tax was an excise duty.

78. The position has been reconsidered recently by Lord Thankerton in *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd*[19]*.,* where the Fuel-Oil Tax Act of British Columbia, 1930, as amended in 1932, required 'every person who consumes any fuel-oil in the Province to pay... a tax... at the rate of one half cent a gallon' and prohibited the keeping for sale or selling fuel-oil without a license. His Lordship has held that:

> The test to be applied in determining what is 'direct taxation' within the meaning of Section 92, head 2 of the Act of 1867, is to be found in Mill's definition of direct and indirect tax. If the tax is demanded from the very persons who it is intended as desired should pay it, the taxation is direct, and that it is none the less direct, even if it might, be described as an excise tax, for instance, or is collected as an excise tax (page 55). Duties of customs and excise were regarded by every one as typical instances of indirect taxation (page 56).

79. The tax was held to be a direct tax on three main grounds: (1) The Act purports to exact the tax from a person who has consumed fuel-oil, the amount of tax being: computed broadly according to the amount consumed. (2) It does not relate to any commercial transaction in the commodity between the tax payer and some one else. (3) There is no justification for the suggestion that the tax is truly imposed in respect, of the transaction by which the tax payer acquired the property in the fuel-oil, nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a Contract or arrangement. It was further held that except that the Act taxes persons in respect of a Commercial commodity, which is not produced in its raw state within the Province, there is nothing in the Act to suggest that its purpose was the regulation of trade or commerce. His Lordship laid down at page 57:

> The ultimate incidence of the tax in the sense of the political economist is to be disregarded when the tax is imposed in respect of a transaction, the taxing authority being indifferent as to which of the parties to the transaction ultimately bears the burden...there the tax is imposed in respect of some dealing with commodities, such as their import or sale or production for sale, the tax is not a peculiar contribution upon the one of tho parties trading in the particular commodity, who is selected as the taxpayer.

80. It must therefore be now taken as authoritatively settled that a tax on the consumer based on the amount consumed is a direct tax, and by no means an excise duty in Canada, and is fully within the competence of a Provincial Legislature. The English or American conception that excise may be an inland imposition on consumption of home commodities has therefore been

definitely negatived and is no longer tenable. It is equally clear that mere licenses would not be excise duty.

81. The Commonwealth of Australia Constitution Act, 1900, being the product of the Constituent Convention was practically drafted in Australia by Australians for Australia. Accordingly the word "excise" used in this Constitution would have the meaning which it had there about that time. The scheme is to confer definite powers on the Commonwealth, and preserve to the States all powers not exclusively conferred on the Commonwealth. Thus there can be overlapping. Section 107 provides that every power of the Parliament of A Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State as the case may be.

82. The Parliament has under Section 51 power to make laws, among others, "taxation, but so as not to discriminate between States or parts of States." Under Section 90 Parliament has exclusive power to impose "uniform duties of customs and of excise and to grant bounties on the production or export of goods." Under Section 92 on the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation, shall be absolutely free.

83. In the Australian Constitution also "taxation on the sale of goods" has not in so many terms been mentioned anywhere, nor is 'direct tax' mentioned specifically.

84. In *Peterswald v. Bartley*[20] the question arose as to a Liquor Act prohibiting the carrying on the business of a brewer without a proper license. In view of the words "the duties of excise paid on goods produced and manufactured in a State" used in Section 93, the High Court held that a license fee is not a tax on the goods themselves, and is not an indirect tax, as the amount in no way depends on the quantity of beer manufactured, and there is no expectation or intention that the person paying it should indemnify himself by passing it on. Rejecting the larger view, it was held that the basic principle of excise duties was that they were taxes on the production and manufacture of articles which could not be taxed through the Customs House (page 508), the fundamental conception of the term (excise) is that of a tax on articles produced or manufactured in a Country; and that the conclusion is almost inevitable that whenever it is used, it is intended to mean a duty analogous to a Customs duty imposed upon goods either in relation to quantity or value when produced or manufactured and not in the sense of a direct tax or personal tax (page 509).

It was further remarked that the term duties of excise in the Constitution was limited to taxes imposed upon goods in process of manufacture.

85. Notwithstanding the modern tendency in England to use the word "excise" as including all kinds of inland revenue taxation which come under the control of the Commissioners, the license fee was not a duty of excise, even though it was a kind of an inland revenue impost.

86. In the *King v. Barger* [21]the Commonwealth Excise Tariff Act, 1906, had imposed duties of excise on certain specified goods exempting goods manufactured under certain conditions of labour as to manufacture. It was held that the Act in substance was not an Excise Act, not being an exercise of the power of taxation, but an attempt to regulate internal trade and industry. The

restricted meaning given to the expression "the duties of excise paid on goods produced or manufactured in a State" in Peterswald v.Bartley (1903-04)1 C.L.R 497 was quoted with approval on pages 73-74 and 117.

87. Strong reliance has been placed on (1926-27) 38 *Commonwealth Oil Refineries Co. V. South Australia* [22]which is certainly an important case dealing with the power of a State to impose a tax on first sales of motor spirit. South Australia had passed a Statute in 1925, Taxation (Motor Spirit Vendors) Act, which by Section 2 defined a "vendor" as every person who sells and delivers motor spirit within the State to persons within the State for the first time after the entry of such motor spirit into the State, or, as the case may be, after production, refinement, manufacture or compounding of such motor spirit within the State, but not including any purchaser of such motor spirit who subsequently sells the same.

88. Under Section 4 a tax, under the name of Income Tax, was imposed at 3d. per gallon of motor spirit sold by any vendor within the State, excluding spirit sold or delivered for export. Under Section 7 there was also a tax on consumers of a Certain excess quantity. Under an Act of 1926 it was provided that if satisfactory arrangements are made between the Commonwealth and a State for payment of customs or excise on motor spirit, the Act would be satisfied and tax reduced. Motor spirit used to be imported into the State from U. S. A. and other places beyond the seas Refineries refined crude petrol oil in the State of Victoria and then consigned the refined oil to their agents in South Australia.

89. Various and not necessarily unanimous reasons were given by the several learned Judges in support of the view that the Act was beyond the power of the State. (1) The tax was called an Income Tax, which obviously it could not be as it was not a tax even on gross income, much less on net income but on the first sale of a quantity, irrespective of quality or value. (2) The tax on imported goods before they had become part of the general mass of property of the State, first sale taking place mostly while the spirit was still contained in the original tins and cases, would be in the nature of an impost levied on imports. (3) The tax on the first sales of the goods after production, refinement, manufacture or compounding was bound to be added on to the price and passed on to the vendee and ultimately to the consumer, and therefore was not a direct tax, but an excise duty. (4) Constitutional prohibition does not cease the moment the goods entered the State, and the tax on first sales though imposed after entry was as effectual in the way of hampering commerce between State and State as a tax imposed on entry. It is clear that the decision went in favour of the Commonwealth, because the tax was on first sales. The majority of the learned Judges held it to be an excise duty not merely because it was a tax on sales but because it was a tax on first sales. Knox C J, with whom Powers J., agreed, said:

> In effect, the tax is payable by every producer in the State of motor spirit on all spirit produced by him within the State except so much thereof as is not sold or is sold for export from the State (page 420).

Isaacs J. declining to adopt the extended meaning said:

> Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected

> with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a Classification of governmental power outside the true content of the words 'excise duties' as used in the Constitution (page 426).

Starke J. said:

> If a tax upon the sale of a Commodity be in substance a tax upon the commodity, here we have a tax which operates in many cases as a tax upon the producer and in respect of the production of the commodity by him. That, in my opinion, is an excise duty (page 439).

90. Garan Duffy J. agreed with the conclusion. Only Higgins and Rich JJ. based their judgments on the wider meaning of 'excise duty'. In Australia the States have no general power to impose taxes on sales. This was a Case of first sale and not the last retail sale to the consumer, to which much of the reasoning would have been inapplicable. Had excise duty included sales at every stage much of the elaborate discussions would have been wholly unnecessary.

91. In *James v. Commonwealth of Australia*[23] Lord Wright M.R. in delivering the judgment held that Section 92 binds the Commonwealth and approved of an Australian case in *Vacuum Oil Co. Pty. Ltd, v. Queensland*[24] in which it had been held that a burden placed (in substance) on the first seller in the State of imported petroleum was in truth, though not in form, a sort of tax or impost by remarking so regarded, it clearly infringed Section 92, though its operation and incidence only took effect at an interval after the border was passed.

92. It infringed Section 92 because it interfered with trade and commerce. The High Court unanimously held that it was neither a duty of customs, nor of excise nor a bounty within the meaning of Section 90. His Lordship did no say that Section 90 was infringed (pp.623-4).

93. There is thus no doubt whatsoever that in Australia a tax imposed on first sales being connected with either import or manufacture or production of goods is outside the competence of a State. But not a single Australian case has been cited where a tax on retail sale has been held to be an excise duty.

94. Fortunately in India it is not necessary to revive the fine niceties of distinction between direct and indirect taxation, as no such division exists in the Act. Indeed, there are several taxes like taxes on luxuries or trade which can be indirect; and some taxes like succession duties (and even excise) have in parts been assigned to both. The ultimate incidence of the tax is certainly not a Crucial test under the Indian Constitution. There is no justification for adopting any such principle as that certain classes of duties which are to be regarded as direct have been assigned to the Provinces, and other classes regarded as indirect have been reserved for the Federation.

95. The rules of interpretation are perfectly clear. It was observed by the Lord Chancellor in *Brophy v. Attorney-General for Manitoba*[25] that the function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact.

96. At page 216 it was remarked:

> The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape; but such a Course would, on the whole, be quite as likely to defeat as to further the object which was in view.

97. It was observed by Lord Wright M.R. in *James v. Commonwealth of Australia*[26]

> The question then is one of construction and in the ultimate resort must be determined upon the actual words used read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another. The constitution has been described as the federal compact and the construction must hold a balance between all its parts.

98. Schedule 7, Government of India Act, contains a Careful and detailed distribution of legislative powers enumerated in Federal, Provincial and Concurrent Legislative Lists. In this respect the classification differs very materially from those prevailing in the Dominions. There is no general power given to the Federation to impose indirect taxes, nor any general power given to the Provinces to impose direct taxes. The heads have been separately specified in great detail and a special head "taxes on the sale of goods" has been assigned to the Provinces which did not at all find a separate and distinct place in the State or Provincial list of any of the Dominions. This peculiarity is a unique feature of the Indian Constitution, having an important bearing on the present case, as taxes on sales have been adopted as a post War measure in most countries.

99. In spite of these separate lists a difficulty may arise from the fact that some heads overlap, as the groupings cannot be absolutely perfect. When overlapping is unavoidable, the provisions of Section 100 operate, as it provides that the Federal Legislature has power to make laws with respect to matters in List I "notwithstanding anything in the two next succeeding sub-sections" and has power to make laws with respect to matters in List III "notwithstanding anything in the next succeeding sub-sections". Whereas a Provincial Leisure also has power to make laws with regard to matters in List III "subject to the first sub-section" and has power to make laws with respect to matters in List II "subject to the two preceding sections". It follows that in the case of an inevitable conflict between the powers of the Federal and the Provincial Legislatures the former would prevail in respect of Lists I and III, Section 100 being the last refuge.

100. As two separate Lists exist, the Imperial Parliament should be presumed to have intended to keep the Federal and Provincial Lists mutually exclusive as far as possible. It should certainly be our earnest endeavour to avoid a Conflict between two apparently competing entries. Too liberal an interpretation given to both of them would; simply create a Conflict. As it is a Provincial Act which is challenged, the proper way of approach is to see whether the taxation imposed falls within the Provincial Entry, and then to see whether it is in any way cut down or restricted.

101. In The *Queen v. Burah*[27] Lord Selbourne remarked :

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in

> which they can properly do so, is by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions or restrictions (pages 904-905).

102. It was emphasised in *Citizens Insurance Co. v. Persons*[28] that it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a Conflict should exist and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and where necessary modified by that of the other. In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them.

103. In the above case at page 108 it was further said:

> Notwithstanding this endeavour to give preeminence to the dominion parliament in cases of a Conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament.

104. So far as the Government of India Act is concerned there is really no doubt that Parliament has chosen to use an expression which narrows the scope of Excise duties, and consequently limits the legislative power of the Centre. Entry No. 45 of List I refers to "duties of excise on tobacco and other goods manufactured or produced in India, etc." Unquestionably, no duty would be regarded as a duty of excise under Entry No. 45 unless it is on goods (at least other than tobacco) manufactured or produced in India. For purposes of such goods the wider English sense is necessarily excluded. And the word 'goods' has been used in the widest possible sense, for under Section 311 goods" includes all materials, commodities and articles.

105. It can hardly be disputed that if there were nothing else in the Act, tax on retail sale of motor spirits and lubricants would fall within the scope of the express words tax on the sale of goods" used in List II, Entry No. 48. The main question in the present case therefore is whether the tax on retail sales also comes within the category "duties of excise on goods manufactured or produced in India" so far at any rate as concerns goods manufactured or produced in this country.

106. In the same List IT there are two separate categories. Entry No. 40 refers to "duties of excise" on certain specified goods and Entry No. 48 to "taxes on the sale of goods". The Imperial Parliament presumably intended these categories to be separate and distinct, and not that "sale" of the specified goods be included in the "duties of excise" on them. Similarly it should be presumed that when "duties of excise" were assigned to the Federation and "taxes on the sale of goods" to the Provinces, it was intended that these categories were mutually exclusive, or at any rate not intended that the latter should be wholly included in and completely absorbed by the

former. Although in List II-49 the words used are "for consumption, use or sale therein", List I-45 does not say "goods manufactured or produced or sold or consumed in India". Obviously the power to tax the sale of goods is quite distinct from any right to impose taxes on use or consumption. It cannot be exercised at the earlier stage of import or manufacture or production, nor at the later stage of use or consumption, but only at the stage of sale. The successive stages of manufacture or production, sale, use or consumption are separate, and it is possible to impose duty at any of these stages. There is a fine distinction between taxes on the sale of goods and taxes on the goods themselves. The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If duty is imposed on the goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods have been manufactured or produced. Nor can it be levied merely because the goods have been consumed or used or even destroyed. The right to levy the duty would not at all come into existence before the time of the sale. It cannot at all be levied unless the goods are actually sold, and may not be leviable if they are transferred in some other form. Thus, a duty on goods manufactured or produced is distinct, separate and independent from a duty on their sale and, (except probably at the stage of the first sale) there seems to be no good reason why they may not co-exist without overlapping.

107. I doubt if it would be at all legitimate to examine the words previously used in the entries in the lists appended to the White Paper (which were professedly illustrative, not purporting to be either complete or final) or to those in the Joint Committee's Report (which were later carefully revised and largely recast), corresponding to the entries now under consideration, and then to speculate why the phraseologist were changed. If the removal of the words 'on the production and manufacture' in the old Entry No. 36 of List I would support one view, then the deletion of the word 'turn over' from the old Entry No. 10 of List II might strongly support the other. It would not, strictly speaking, have been correct to use the words duty of excise on manufacture or production of goods,' unless the duty were intended to be levied on the processes of manufacture or production, irrespective of the quantity manufactured or produced. Those words would also have necessarily excluded first sales. If the intention is to impose the duty on the goods themselves provided they are manufactured or produced in India, then the only correct way to express the idea is to say 'duty of excise on goods manufactured or produced in India'. Opinions expressed by Committees, prior even to the Joint Committee, are all the more irrelevant.

108. There is really nothing absolutely irreconcilable between excise duty mentioned in Entry No. 45 of List I and tax on retail sales included in Entry No. 48 of List II. They can be mutually exclusive, so as not to bring in operation the provisions of Section 100 at all. Excise duties can be imposed by the Centre on motor spirits and lubricants manufactured or produced at the place or in the Province of their origin, while the Central Provinces and Berar can impose a tax on the retail sale of all such goods (both foreign and Indian) within the Province. It is not at all clear why the Centre which can easily impose an excise duty at an earlier stage should try to follow the petrol after it has been exported from the Province of its origin into other autonomous Provinces and impose excise duties on retail sales there after the commodity has become a part of the general stock in such Provinces and in the case of some other goods, mixed up with and become indistinguishable from similar foreign products. The suggestion that manufacture or production

itself may be seriously affected is rather far-fetched.

109. Under the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, Section 3, a tax is to be levied and collected from every retail dealer...on the retail sales...at the rate of 5 per cent. on the value of such sales.

110. In Section 2 (e) a "retail dealer" is defined as a person who on commission or otherwise sells or keeps for sale motor spirit or lubricant for the purposes of consumption by the person by whom or on whose behalf it is or may be purchased; and "retail sale" means a sale by a retail dealer to a person for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased. The machinery for collecting the tax is a subsidiary thing.

111. It is clear that the tax is levied and collected from the last vendor who passes the goods on to the person who consumes them. The imposition is therefore on the last sale. If a tax has to be imposed on sales, this would be the last occasion on which it can be done, if at all. Tax on retail sale will immediately affect the consumer, who becomes known at that stage. According to the rule laid down in Walter Reed's case,18 at that point of time, 'the ultimate incidence is certain'. The tax relates to commercial transactions in the commodities between the tax payer and the consumer. It is wholly unconnected with manufacture or production. There is every reason to take it as a tax truly imposed in respect of the transaction of sale.

112. The object of the taxation is not to impose any special burden on goods manufactured or produced in India. The principal object is to recover revenue on all sales irrespective of the origin of the goods. The amount assessed depends exclusively on the sale price and on nothing else. A tax on the sale of goods, whether originally imported or locally produced or manufactured in a Province, which have become mixed up with the general mass of property in that Province about to pass into the hands of the consumer has hardly any resemblance to an import duty or even an excise duty on manufacture or production. In its nature, it is a purely domestic transaction with which the other Provinces or India as a whole cannot be concerned. When last sales are taxed, the imposition is simply on goods as an existing substance in the Province, no longer subject to all India Considerations and sold in the Province to local consumers for consumption or use. Such sales being a purely provincial operation ought to be within the power of the Province to tax them.

113. Some petrol is admittedly produced in Attock in the Punjab; but the vast bulk of petrol consumed in this country comes from outside, particularly as now Burma is no part of India. The tax on sales would affect equally both Attock petrol as well as foreign petrol. The Act does not earmark Attock petrol for the imposition of the duty. Indeed it makes no distinction as regards variety. It cannot therefore be suggested that Attock petrol would be at a disadvantage as compared to foreign petrol. As Attock production is insignificant when compared with the total quantity of motor spirits consumed in India, the tax on sales of all motor spirits in the Central Provinces and Berar can hardly be regarded as an excise duty imposed on the spirits produced in the Punjab. Indeed on the contrary it may with greater plausibility be said to be an import duty on foreign motor spirits.

114. In Canadian cases, the Privy Council has held that a tax on the producer or manufacturer is indirect, like the percentage tax upon the gross revenue received from the sales of coal by the owner of a Coal mine, as was the case in *The King v. Caledonian Collieries Ltd*[29]. There is the

direct authority of the case in *Attorney General for British Columbia v. Canadian Pacific Ry*[30]. that a tax on first sales is an indirect tax and therefore not within the competence of a State or Province. Their Lordships did not expressly say that it was an import or excise duty, much less that taxes on even subsequent sales would be excise duties. On the other hand, in *Attorney General for British Columbia v. Kingcome Navigation Co. Ltd*[31]. their Lordships have laid down that a Provincial tax on consumers is direct and therefore perfectly valid. The present case lies in between, involving a tax on retail sale which is midway between the first sale and the ultimate consumption. The demand would be made from the retail seller who would certainly add it on to the price and recover it from the consumer, on whom the burden will ultimately fall. At the time the tax is paid it is fully ascertained where the incidence would be, though the tax is demanded front a person who it is not intended should him self bear the burden. According to the test laid down in the series of cases decided by their Lordships of the Privy Council (subsequent to the case of Walter Reed)18 particularly the case of *Cotton v. The King*17 and' *Burland v. The King* there can be no doubt whatsoever that the retail tax in question is indirect. But that is not a Conclusive test under the Indian Act. The fact that it is an indirect taxation does not exhaust the whole question, as it would not necessarily follow that the tax is an excise duty within the meaning of Entry No. 45.

115. a Clear distinction exists between the first sale and the last sale, as the latter is not intimately connected with the manufacturer or the producer and cannot come within the scope of excise duty. In the Commonwealth Oil Refineries case,11 the observation of Isaacs J. at p. 426 already quoted supports the view that if the tax is unconnected with production or manufacture, then it is not an excise duty. His observation was not confined to licenses only but expressly referred to a tax on the sale'. In that case most of the learned Judges took the view that ordinarily a tax on first sale of home products is connected with production and manufacture and is therefore a tax on production and manufacture and as such an excise duty. They had not to consider and therefore did not deal with retail sales at all; nor could their reasoning have applied to the last retail sale to the consumer.

116. Taking goods manufactured or produced in India, the time of the first sale is ordinarily the time of the sale by the manufacturer. The manufacturer or producer is directly concerned with this transaction, and the tax is demanded from him when he sells the goods. It is not then certain, which consumer will bear it. For all practical purposes, it is a tax on the manufacturer or producer, and the burden is in the first instance imposed on him, though, of course, it being an indirect imposition, he can pass it on; but the essence is that the tax is imposed on a sale by the producer or the manufacturer and not on a sale by any subsequent vendor.

117. The case of tax on retail sale is just the reverse. There ordinarily the original manufacturer or producer is not directly concerned, but at the time of the retail sale the retail seller will charge the extra amount from the consumer directly. It is known at the time which consumer will bear it. The tax on retail sale is more or less connected with the consumer, while a tax on the first sale is similarly connected with the producer.

118. If the words of Entry No.48 "taxes on the sale of goods" were to be taken in their ordinary and natural meaning, they would include even first sales. It is not necessary to decide any such question in the present case, but it may as well be pointed out that there may be some difficulty in upholding a Provincial tax on first sales. For instance, if the Bombay Province were to impose

a duty on first sales of certain specified articles, which are mainly imported from abroad, the tax may well approach an import duty. Or again, if Bengal were to put a tax on first sales of Jute manufactured or produced in the Province, when Jute is principally produced in that Province, it may well resemble an excise duty. In extreme cases, the imposition of duty on sales may either be so closely connected with imports as to become a Customs duty, or so closely connected with production or manufacture as to become an excise duty, although it purports to be merely a tax on first sales of such goods. It is the pith and substance of the Act and not its form which will be the decisive factor: *Attorney-General for Ontario v. Reciprocal Insurers*[32] A Province may therefore not have power to tax such first sales; but taxation of retail sales is not governed by such considerations.

119. It is true that in some cases the first sale in the Province may itself be a retail sale to the consumer, for instance a sale by a manufacturing retailer. This would not ordinarily be so where the goods are manufactured or produced outside the Province, except in the very special case where a Consumer orders goods direct from an outside manufacturer or producer, and under the terms of the contract between them, the transaction of sale is completed within the Province. But an Act cannot be invalidated merely on account of its peculiar operation in special individual cases, and must be judged by its ordinary effect.

120. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies: per Lord Hobhouse in *Bank of Toranto v. Lambe*[33]

121. When the Centre may never impose excise duty except on a few selected classes of articles there seems to be no good reason for depriving the Provinces of their power to tax the retail sales of all. If tax on retail sales of every possible kind of home products were outside the power of a Province, then it is difficult to see how strictly speaking any tax can be imposed on the sale of any goods under Entry No.48 To give a natural meaning to this entry retail sales to consumers should not be regarded as excise. So long as the goods taxed are not produced in India and are wholly imported, a tax on their sale would, no doubt, not be an excise duty, and may remotely resemble an additional import duty in the case of first sales. But as soon as any quantity, howsoever small, begins to be produced or manufactured anywhere in India, the tax which was perfectly valid at first would suddenly become invalid at least qua such properties (even not considering for the moment the argument of the Advocate-General of India that it is invalid both as regards home and foreign products). The validity or invalidity would then depend on the identity of the goods. In most cases it may be impossible to trace the origin of the goods, although it must be conceded that in the case of petrol so long as it is contained in the original tins and cases, its origin may be easy to discover. But there may well be other kinds of goods which may be almost similar to goods imported from outside and it may well be difficult to distinguish one kind from another. A tax on the sale of such kinds of goods would according to the contention of the Advocate-General of India be invalid. So long as there is any small quantity produced in India which cannot be identified and distinguished from similar goods imported from abroad, the duty even on the last retail sale would become an excise duty. It could hardly have been intended that, in order to test the validity, Court should embark upon an enquiry into the varieties of home products. Such a Conclusion would lead to an almost impossible position and would practically nullify the power expressly given to the Provinces to impose taxes on the

sale of goods. It should be presumed that the Imperial Parliament did mean to give to the Provinces the power to tax sale of goods, as it has said, and not that the power was merely illusory. Unless at least retail sales come within the category "sale of goods", power to impose a tax on sales of home products under Entry No. 48 would be almost non existent. If retail sales tax on every possible kind of home commodities is wholly outside the legislative competence of the Provinces, then practically the only power which would remain under Entry No.48 would be to impose a tax on the sales of imported goods, which might in extreme cases conflict with Section 297 (1)(a).

122. The learned Advocate-General of India is forced to admit that if his contention prevails, then the only taxes that would not amount to excise duty and would be left over for the Provinces to impose under Entry No.48 would be certain licence fees and certain turnover taxes.

123. As regards licence fees, if we leave aside the wide meaning that has been given to the word 'excise' in England owing to historical reasons and convenience of collection, such fees can hardly be regarded as in themselves being a "tax on the sale of goods", and can come in only impliedly within that power.

124. It can also hardly be suggested that the words "taxes on the sale of goods" are the exact equivalent of 'sales tax" or "turnover tax". In the first place, it is dangerous to substitute for the words actually used in an Act new colloquial expressions which have come to connote a definite meaning in common parlance and then to interpret the words used in the light of the meaning of the latter colloquial words. It is safer to adhere strictly to the words actually employed. In the second place, even "a sales tax," which has come into vogue since the Great War, includes a variety of forms of taxation in various countries, without any definite uniformity. As shown below, it is by no means confined, even in the sense used by economists, to taxes on sales of goods generally, without specifying particular goods.

125. Findlay Shirras in his Science of Public Finance, Vol.2 (3rd Edn.), p. 606, has expressed the opinion that in reality there is no clear distinction between a sales tax and a turnover tax. It may possibly be difficult to agree with this view because a turnover tax in some countries includes taxation on services, fees, commissions, interest, and other payments (as in France) whereas a sales tax strictly speaking can hardly comprise these. As regards the variety of sales tax he has noted on p. 610:

> The tax may be general, as in France or Germany, or retail transactions may be excluded, as in Belgium. It may be, as is common in the states of the American Union, confined to retail transactions. It may be imposed, as in Canada and Australia, as a producers' or manufacturers' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempted unless they are carrying on manufacture as well as agriculture.

126. On pages 608-9 he has tabulated the bases of sales taxes as including total turnover sales of commodities except at retail, sales of producers, manufacturers, and importers only, sales of producers and importers only, sales of wholesalers and manufacturing retailers, sales of merchants, manufacturers, receipts of printers, publishers, contractors, public utilities, etc.

127. H.L. Lutz in his Public Finance (3rd Edn.), p. 632 has also pointed out that:

> The sales taxes now in effect are not easily classified. The most clearly defined type is the retail sales tax, which is levied upon the sale o tangible personal property at retail. The tax may apply to sales made by wholesalers and manufacturers as well as by retailers Or it may be still broader in scope and apply to the sales of services by public utilities and to admissions, in addition to sales of tangible property.

128. In the Encyclopedia of the Social Sciences by Seligman and Johnson, Vol.13,page 516, it is stated:

> The sales tax is a levy imposed upon the sales of commodities or services. The tax may be levied upon sales: in general, as in Germany; in general, except at retail, as in Belgium; in general, with other special taxes, as in France; of classified enterprises, as in Washington; of producers, as in Canada; or of retailers, as in Kentucky.

At page 517 it is also stated:

> Sales taxes may be imposed upon total receipts, with deductions for returns, allowances and possibly other items; upon the individual transaction: upon the privilege of conducting business, which is supposedly measured by sales; upon sales in general; or upon specified types of sales... Customarily the vendor rather than the vendee is liable for taxation, although both may be held responsible for proper payment of the tax.

129. A. Comstock in his Taxation in the Modern State page 113 has observed :

> The scope of sales and turnover taxes have varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turnover taxes. Certain taxes include both goods and services, while others include only goods. The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services.

130. It is thus obvious that a turnover tax or a sales tax is not by any means co-extensive with "tax on the sale of goods." The first (certainly includes services, fees, commissions, etc. which the third cannot. The second may be a mere producers' or manufacturers' tax and may also possibly cover, services and enterprises, which the third cannot. The third must necessarily be a tax imposed at the time of the sale of goods and must exclude other forms of transfer like mortgages, leases, etc. It is also certain that none of these can be confined strictly to taxes on sales generally without specifying any goods, that is to say, only on the total sale proceeds or turnover for the year; and they all include taxes on retail sales. |The words "taxes on the sale of goods" are very general, and I see no good reason for confining their meaning to a turnover tax on the gross sale proceeds only, which may also possibly come under No. 46-taxes on trades.Had that been the intention, the words would have been "taxes on sales of goods generally" and not the sale of goods. The singular, of course, includes the plural; 'but the singular by no means excludes the singular, and so the words used must also cover separate individual sales as well.

But even if we were so to confine the meaning, excise duty if it were to include taxes on the sales of goods may well coyer such turnover taxes as well.

131. It can hardly be doubted that taxes on the sale of goods is a special provision. In the Canadian cases *Attorney-General for Ontario v. Attorney-General for Canada*[34] Marriage Legislation (Ibis 880), and *Great West Saddlery Co. v. The King*[35] it was certainly said that what is particular may be regarded as an exception to what is general. But that can hardly apply to a Constitution where overlapping is definitely met by an express provision. The competing entries in the Federal and the Provincial Legislative lists have to be read together to avoid an overlap. As far as possible, an undefined term should not be given such a wide scope as to include a particular provision. If there is no help, then only the power of the Federation overrides that of the Provinces. The tax in question comes within the special and specific provision "taxes on the sale of goods" and can only by defining and enlarging the meaning of the words "duties of excise on goods manufactured or produced in India," be brought within the scope of the latter. The special provision, even from this point of view, should be considered to be exclusive of the other.

132. Another principle which emerges from the Dominion eases is that in a Federal Constitution, Provincial Legislatures are independent within the spheres allowed to them and within the prescribed limits. They are co-ordinate Governments and possess full legislative power and capacity to pass laws, so far as matters assigned to the Provinces exclusively are concerned. The Provinces are entrusted with the exclusive authority in certain specified matters, not of an all India Concern, but of Provincial interest. Subject to certain restrictions each Province retains its independence and autonomy and is not under the control of the Federal Legislature :

> Within these limits of area and subjects,...its local legislature was to be supreme and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces: *In re Initiative and Referendum Act* [36]

133. In *Hodge v. The Queen*[37] Sir Barnes Peacock stated that when the British North America Act enacted that the Provincial Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.

134. It follows that if the words of a statute confer a power on the Provinces, it should not be withheld on any extraneous grounds.

143. The Advocate-General of India has not contended that Section 297 (1)(a) is likely to be infringed inasmuch as the Provincial law, though not prohibiting, restricts the entry into the Province of these Punjab goods. But Section 297 (1)(b) has been relied upon. It has been argued that if the tax on goods manufactured or produced in India is bad, then the Act would operate against foreign goods, which as a result would involve a necessary discrimination. In the view that I have taken it is not necessary to decide this point finally. But that apparently may not be the idea underlying the sub-section which possibly does not deal with foreign countries at all. The marginal note, though not conclusive, is of some assistance, gives an indication of the drift of the

provision, and suggests that the Section applies to internal trade; but it may be said that internal trade may involve foreign goods as well. The first part of Sub-section (1)(b) refers to discrimination in favour of goods manufactured or produced in the Province as against goods not so manufactured or produced. Prima facie there is no such discrimination intended, as the tax is imposed on sales of motor spirit and lubricants in general; and also it so happens that none is produced within the Province in favour of which there could be any discrimination. Nor does it appear that intention is a necessary ingredient in this sub-section; it would be quite sufficient if the provisions result in discrimination. The power to tax is not taken away; only preference is prohibited. The second part also is probably inapplicable inasmuch as there is no discrimination at all between goods manufactured or produced in one locality and those in another locality. The word "locality" may mean a local area, i.e. some part of India, and may not refer to countries outside India, or it may possibly have a wider application. To hold that the taxation is wholly invalid we would have to hold that it is both an excise duty and an import duty, according to the respective origin of the goods sold. The nature and character of the taxation would then depend on particular goods sold, and not merely on the sales of goods of a particular class. These matters can be considered when it becomes necessary to decide the point.

135. Reliance has been placed on the observation in *E. R. Croft v. Sylvester Dunphy*[38] that :

> When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative pratice of the State which has conferred the power (p. 165).

136. That was a Case where the Dominion Parliament had enacted provisions similar in scope to those which had long been an integral part of Imperial customs legislation, as shown by the various Hovering Acts, and their Lordships held that in bestowing plenary powers to legislate in relation to customs it was difficult to conceive that the Imperial Parliament had withheld some.

137. Here there is nothing in the pre existing Legislative Practice to suggest that excise duty had been actually levied on retail sales. Under the Devolution Rules, framed, under Section 45-A, Government of India Act, 1919, Central and Provincial subjects were classified into two parts, and the subjects, enumerated in the second, which devolved, on the Provinces, included serial No.16:

> Excise, that is to say the control of production, manufacture, possession, transport, purchase and sales of alcoholic liquor and intoxicating drugs and the levying of excise duties and license fees on or in relation to such articles, but excluding in the case of opium, control of cultivation, manufacture and sale for export.

138. The provinces therefore possessed the administrative power to control sale of liquor and drugs, and as a legislative measure could levy excise duties on or in relation to such articles. The two are obviously not co-extensive. Power to levy excise duties on the "sale" of such articles was not in express terms conferred on them.

139. There are no less than seven Central Excise Acts imposing duties (i) Act 2 of 1917 on Motor Spirit, (ii) Act 12 of 1922 on Kerosene, (iii) Act 18 of 1930 on Silver, (iv),Act 14 of 1934

on Sugar, (v) Act 16 of 1934 on Matches (vi), Act 23 of 1934 on Mechanical Lighters and (vii) Act 31 of 1934 on Iron and Steel respectively; and in all these, duty is levied at the factory or manufacturing works and is payable by the manufacturer; and the same was true of the repealed Cotton Duties Act 17 of 1894.In none of these Acts has any duty been imposed on retail sales. For instance, under the Motor Spirit Duties Act, 1917, excise duty is levied and collected at every manufactory on all motor spirit produced in such manufactory, but not on retail sales of such, goods after they have by the first sale passed out of the factory. Provisions for rebate on exported goods would not establish that an excise duty must always be one imposed on consumption only.

140. Our attention has not been drawn to any Provincial enactment, which might have imposed any excise duty on the retail sale of motor spirits and lubricants, or for the matter of that on the retail sale of any other goods. In particular, the Central Provinces Excise Act 2 of 1915 did not do that. Under Section 17 a license is required for sales. Section 18 only provides that the Local Government may lease out the right among others "of selling by wholesale or retail" on the grant of a lease or license, but neither the premium (or monopoly price) nor the license fee can be regarded as a "tax on the sale of goods" itself. Under Section 25 duty is leviable on all excisable articles imported, exported, transported, manufactured, cultivated or collected. But that too is not an excise duty on the sale of goods. Under Section 26 duty is leviable on spirit or beer manufactured in any distillery, and on payment made upon the issue of excisable article for sale from a warehouse.' Here too retail sale is left out. The Provincial Excise Acts show that although there had been premia Charged for leases of the right to sell, and license fees made payable for carrying on business in excisable articles, there was no duty ever charged on actual sale of goods by retail. The reason is obvious. The Excise Acts make private sales of excisable articles penal. No one can sell them without holding a lease or license. That is why no tax is directly imposed on sales.

141. Opium, which had been a monopoly of the Government of India, was not a matter for Provincial Legislation at all. But Section 5, Opium Act 1 of 1878, authorized Provincial Governments to frame rules relating to possession, transport, importation or exportation or sale of opium and the "form of duties leviable on the sale of opium by retail." When the Provinces themselves purchased opium from the Government of India factory at Ghazipur, they could not impose excise duties on their own purchases but would sell opium at a higher price, a part of the profit representing what they would have got as excise duty on first sales in other circumstances. It has not been shown to us that any duty had been actually imposed on the retail sales of opium. Unlike the Excise Acts, the duty imposed on opium was not even called in the Act an excise duty, but merely a duty. Excise duties on opium have now been expressly taken away from the Centre and specifically assigned to the Provinces. The fact that the Government of India has at present the sole monopoly of manufacture is an accident which cannot affect the interpretation of the words used.

142. Had there been in existence any Excise Act imposing duties on retail sales of motor spirits and lubricants, it might have been possible to contend that this type of duty, being in existence at the time that the Act was passed, must be regarded as a recognised type of excise duty, and hence should be specially included within the connotation of that term. In the absence of any such legislative practice, it cannot be seriously argued that a duty on retail sales was understood in 1935 to be an excise duty in India. At the same time the absence cannot conclusively prove the

negative; otherwise in the absence of such practice neither the Central nor the Provincial Legislatures would have power to tax sales. In *E. R. Croft v. Sylvester Dunphy (1933) A.C. 156(Supra)* there had been Hovering Acts which established the affirmation. In India the absence can only show that it was not in point of fact known that excise duty would include taxes on retail sales as well. The fact is that neither any Central nor Provincial Excise Act imposed a duty on retail sales, because apparently this postwar fiscal measure had not been introduced in India till 1935. The previous Legislative practice can certainly not help the Centre.

143. There is, of course, a remote danger that a Province may impose an almost prohibitive duty on the sale of articles, which are not produced within the Province nor are manufactured or produced in other Provinces of India, with the result that the sale of such articles would be almost prevented, and the duty in such circumstances may amount to a restriction on imports of these articles. For example, if motor cars and radio sets are not manufactured in India, an extremely heavy duty on their sales may seriously handicap business dealings. In such cases, an imposition even after entry may be as effectual in the way of hampering commerce and trade as a direct import duty, unless the goods have become incorporated and mixed up with the mass of the property in the Province so as to be treated as part of the goods in existence at that time in that Province (e. g. second hand cars). If too wide an interpretation is put on words used in a Section, there is always a danger of the bounds being overstepped by mistake, even though not deliberately. But we have to trust that the Provinces would act fairly and reasonably, and should therefore not take any possible abuse into account. If the authority to legislate is clear, then the Act should not be held to be invalid merely because it may be feared that that authority may be abused in future. Such extreme cases can be left to be dealt with by tribunals when they arise.

144. In *Bank of Toranto v. Lambe*[39] Lord Hob house at p. 586 remarked:

> It is suggested that the Legislature may lay on taxes so heavy as to crush a bank out of existence. But it cannot be conceived that when Imperial Parliament conferred wide powers of local self, government on great countries, it intended to limit them on the speculation that they would be used in an inferior manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes.

145. At p. 587 his Lordship further remarked:

> If they find that on the due construction of the Act a legislative power falls within the section, it would be quite wrong of them to deny its existence because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament.

146. In *Attorney-General for Canada v. Attorney-General for Ontario*[40] Lord Hersch ell said:

> The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

147. Again, in *Brewers and Malters Association of Ontario v. Attorney-Gen. for Ontario*[41] Lord

Herschell observed:

> It was argued that the Provincial Legislature might impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a Case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a Case if it should ever arise.

148. We must therefore consider the Act as it stands, unperturbed by the possibility of any drastic consequences following if authority is held to be vested in any particular Legislature. Much less should our conclusion be affected by any consideration of the financial loss suffered by the Centre or the Provinces if one or the other view were to be accepted.

149. Nor am I able to apply the principle that where a particular power comes within both of two mutually exclusive jurisdictions, as in Canada, it should be regarded as an exception to the general rule. An exception falls within and not outside a general provision. The essence of the principle is that a particular exception restricts a general provision, although covered by it. In the Indian Constitution there is a definite provision in the case of an overlapping, and where such an overlapping is inevitable, the general power of the Centre would override even a particular power of a Province.

150. The Privy Council has held that an excise duty is a typical instance of indirect taxation, and that a tax on consumer or consumption is direct. Excise duties cannot therefore include taxes on consumption. Were I to hold that, I would feel compelled to go further and hold that the power of the Centre to tax consumption, if inclusive, would not admit of any exception in favour of the Provinces but must prevail. I do not think that the Provinces have any general power to impose taxes on consumers or on consumption, much less can such a power be derived from List II-48.

151. In answering the question referred to us, three great principles laid down by their Lordships of the Privy Council must be borne in mind. The first is that it will be wise to decide each case which arises, as best as they can without entering more largely upon an interpretation of the Statute than is necessary for the decision of the particular question in hand: *Citizens Insurance Co. v. Persons*[42]

152. In other words:

> The structure of (the sections), and the degree to which the connotation of the expressions overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of those expressions. Such definitions, in the case of language used under the conditions in which a Constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided: *John Deere Plow Co. v. Wharton*[43]

153. The second is that:

> The true test must, as always, be the actual language used...The problems of the constitution can only be solved as they emerge by giving effect to the language used: *James v. Commonwealth of Australia*[44]

154. And the third is that we have to look to "the pith and substance" of the Act in order to ascertain its "true nature and character" :

> If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province...the legislation will be invalid: *Attorney-General for Canada v. Attorney-General for Ontario*[45]

155. Without in any way attempting to give an exhaustive definition of 'duties of excise,' but giving to the words "taxes on the sale of goods" as used in the Provincial Legislative List, entry No.48, their ordinary and natural meaning, and comparing them with the words "duties of excise on goods manufactured or produced in India" as used in the Federal List, entry No.45, my conclusion is that the tax on the retail sales to the consumers is in pith and substance not an excise duty, and that therefore the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, and all the provisions thereof are not ultra vires of the Legislature of the Central Provinces and Berar.

156. As this Deference was made with mutual consent, the parties should bear their own costs. The Advocates-General, who on their own applications under Order 36, Rule 2, F.C.R. were permitted to appear and were heard, should also bear their own costs.

Jayakar J.

157. The material facts connected with this Eeference are stated in the opinion of the Chief Justice and I need not repeat them.

158. Cases of conflict between the jurisdiction of the Parliament of a Dominion and the provincial jurisdiction have frequently arisen before the Judicial Committee of the Privy Council and certain principles have been evolved as a result of the decisions of that Board. These will, I think, prove a useful guide to a proper elucidation of the question involved in this Reference and I shall therefore state, seriatim, such of them as appear to me to be applicable to the facts of this case:

> (1) That the provisions of an Act like [the Government of India Act, 1935, should not be cut down by a narrow and technical construction, but, considering the magnitude of the subjects with which it purports to deal in very few words, should be given a large and liberal interpretation, so that the Central Government, to a great extent, *Attorney-General for Canada v. Attorney-General for Ontario*[46] but within certain fixed limits, may be mistress in her own house, as the Provinces, to a great extent, but again within certain fixed limits, are mistresses in theirs: see (1930) A.C. 12436 at pp. 136 and 137.
>
> (2) In an enquiry like the one before us in this Reference, the Court must ascertain the true

nature and character of the challenged enactment, its pith and substance; and not the form alone which it may have assumed under the hand of the drafts man: *Attorney-General for Ontario v. Reciprocal Insurers*[47] (3) Where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine, with some strictness, the substance of the legislation, for the purpose of determining what it is that the Legislature is really doing: *Attorney-General for Ontario v. Reciprocal Insurers*[48]

(4) Even where there has been an endea bour to give preeminence to the Central Legislature in cases of a Conflict of powers, it is obvious that, in some cases where this apparent conflict exists, the Legislature could not have intended that powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Central Legislature.

It is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects (mentioned in the Central and Provincial Lists) exists in each Legislature and to define, in the particular case before them, the limits of their respective powers. It could not have been the intention that a Conflict should exist; and, in order to prevent such a result, the two Sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the Sections so as to reconcile the respective powers they contain and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand: *Citizen Insurance Co. v. Parsons (1882) 7 A.C. 96(supra)* at pages 108 and 109.

(5) In the interpretation of a Completely self governing constitution founded upon a written organic instrument (such as the Government of India Act of 1935) if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act: *Att. Gen. for Ontario v. Att. Gen. for Canada (1912) A.C. 571,at page 583(supra).*

159. The material items in this case are Item 45 in List I (the Federal Legislative List) and Item 48 in List II (the Provincial Legislative List). Item 45 (List I) is as follows:

Duties of excise on tobacco and other goods manufactured or produced in India except

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-para, (b) of this entry.

160. Item 48 (List II) is as follows:

Taxes on the sale of goods and on advertisements.

161. It may be mentioned, in this connexion, that the commodities excepted in Item 45, as stated above, are mentioned in Item 40 of List II, which is as follows :

Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-para, (b) of this entry.

162. In what category does the tax levied by the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (hereinafter briefly called the Central Provinces Act) fall? Does it fall under Item 45 (List I) as a "duty of excise ?" Does it, on the other hand, fall under Item 48 (List II) as a tax on the sale of goods ? Does the Act or any and what portion of it fall under both items? If so, to what extent is there an overlap and to whom does it go the Centre or the Provinces? These are the main questions before us. A subsidiary question was argued: that in the event of the tax levied by Section 3 of the Central Provinces Act being invalid with reference to motor spirit and lubricants manufactured or produced in India, is it not invalid also with reference to the same commodities manufactured out of India, under the provisions against discrimination in Section 297 (1)(b), Government of India Act, 1935? The last question I propose to leave out of consideration for the present.

163. The material provision of the Central Provinces Act is Section 3 which enacts that:

There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent, on the value of such sales.

164. "Lubricant" is defined in Section 2(b) as meaning any form of oil, grease or other lubricating substance ordinarily used for lubricating the internal machinery of motor vehicles. 'Motor spirit' is defined in Section 2(c) as meaning any inflammable hydrocarbon...which is ordinarily used for providing reasonably efficient motive power for any form of motor vehicle. "Retail dealer" is defined in Section 2(e) as meaning any person who, on commission or otherwise, sells, or keeps for sale, motor spirit or lubricant for the purpose of consumption by the

person by whom or on whose behalf it is or may be purchased. "Retail sale" is defined in Section 2(f) as meaning a sale by a retail dealer of motor spirit or lubricant to a person for the purpose of consumption by the person by whom or in whose behalf it is or may be purchased. (The italics are mine.)

165. It is clear that the tax in question is a tax on consumption within the Province as shown by the retail sales, or, as it may be otherwise stated, a tax on retail sales to persons who purchase for the purpose of such consumption within the Province. The tax is in no way connected with the production or manufacture of the commodities and is irrespective of their origin or seat of manufacture or production. It is levied on the commodities merely as existing articles of trade and commerce, circulating and consumed within the limits of the Province. Thus analyzed, the tax appears to fall within the well known category of an 'indirect tax" in so far as it is intended to be or capable of being passed on to the consumer by an advance in prices corresponding more or less to the amount of the tax. Though this distinction is not directly relevant to the question before us, it may be useful to consider what its nature is in the well known dichotomy of "direct" and ' indirect" taxes, as defined by the Privy Council who observe in (1934) A.C. 4515 at p.53, that a direct tax is one demanded from a person who it is intended or desired should pay it. An indirect tax is one demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, such as customs and excise taxes are.

The first question therefore is what does the expression "duties of excise" in Item 45 '(List I) mean? The method which I pro pose to follow in the elucidation of the question before us is first to ascertain the meaning of the expression "duties of excise" in that item, taken by itself and apart from Item 48 in List II, and then to ascertain how far it is necessary to cut down or modify this meaning in order to reconcile that item with Item 48 (List II), if there appears to be a Conflict between the two. For, it is clear that, according to the rule of interpretation No.(4), which I have stated in the beginning of this opinion, it is the duty of this Court to make every endeavour to reconcile the two items and to avoid a Conflict between them as far as possible; to give a meaning to both of them and to construe them in such a way as to avoid making the one or other of them unmeaning, superfluous or nugatory. As both sides have addressed us a detailed argument on this question, I shall discuss it in some detail.

166. The contention of the Government of India is that the expression "duties of excise" in Item 45 (List I) means an indirect tax on the consumption of indigenous goods, levied and collected at any stage between their production and manufacture on the one hand and the time when they reach the consumer on the other. Fortunately, we are not here troubled with the distinction, observed in some cases, between a duty" and a "tax", for according to Section 311, Government of India Act, 1935, "taxation" includes the imposition of any tax, whether general or local or special, and "tax" shall be construed accordingly.

167. The Advocate-General of the Central Provinces, on the other hand, defines an "excise duty" in Item 45 (List I) as a tax on the manufacture and production of indigenous goods, which can be levied up to, but not inclusive of, the stage of their first sale, and that a tax levied from and after that stage cannot be an "excise duty". The Advocate-General of Madras, when he at a later stage came in to reinforce the Central Provinces Government's argument, admitted that the Australian cases, which he cited in the course of his able argument, went further and included in the term excise duties" taxes levied on or at the time of the first sale. As will appear from my later

remarks, this difference in the argument of the two counsel is not material in the view I take of the expression "duties of excise" occurring in Item 45 (List I).

168. The question therefore is what is the meaning of the expression ' duties of excise" in Item 45 I (List I) taken by itself and apart from Item 48 (List II)? What strikes one at first sight is the fact that Item 45 occurs immediately after "duties of customs, including export duties" in Item 44 (List I). From this juxtaposition it may be fairly inferred that duties of excise in Item 45 are co-extensive with "customs" duties in Item 44 as a Coordinate source of Central revenues. The next thing that is to be remarked is the fact that the words "duties of excise" occur in item 45 of List I and also in Item 40 of List II. A strong argument was advanced at the bar, notably by the Advocate-General of Madras, that if the Act furnishes its own glossary, it is our duty to accept it. If so, it is not unfair to infer that the expression "duties of excise" has the same meaning in both the items, namely Item 45 in List I and IJ",em 40 in List II. Is it therefore possible to find out, with any degree of clearness, what the words "duties of excise" were intended to mean in Item 40 (List II)? Did they include taxes levied on goods manufactured or produced in the Province at any stage inclusive of their sale to the consumer or were those words confined only to taxes levied on and at the time of their manufacture or production, or up to their first sale, as is argued on behalf of the Provinces?

169. Some light is thrown on this matter by Item 16 occurring in the List of Provincial subjects given in Schedule 1 of the Devolution rules made under Section 45-A of the previous Government of India Act, 1919. That item reads as follows:

> 16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase, and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and license fees on or in relation to such articles, etc. (The italics are mine.)

170. It appears from this that, taking this item as the background of the Government of India Act, 1935, as we are entitled to do, it could be urged with fairness that, the word "excise" meant and included, in the said Item 16, the "control" of the excisable commodity (alcoholic liquor, etc.) from the stage of production and manufacture up to sale. The first part of this clause may relate only to the administrative power of control of the Provincial Government over the several stages from manufacture up to sale of the said commodity. Then follow the words "the levying of excise duties...on or in relation to such articles," that is alcoholic liquor and intoxicating drugs. This part of the clause clearly relates to the power of the Provincial Legislature to "levy excise duties" on the same commodity. It would not be unfair to infer from this juxtaposition that the power of control enjoyed by the Provincial administration under the first part of the item is coextensive with the power enjoyed by the Legislature of the same Province of levying excise duties mentioned in the second half of the item. For, it could hardly have been intended that the power of control of the Provincial Government was to be of a different range from their legislative power of levying excise duties" on the same commodity. On a proper interpretation of this item therefore, "the conclusion seems to me inevitable that the Provincial Legislature's power, under this item, of "levying excise duties" could be exercised, "on or in relation to" the excisable commodity, at any stage commencing with manufacture and production and going on to "sale," through the several intermediate stages mentioned in the item.

171. It should be further noted that Item 16 in Schedule 1, Devolution Rules is now split up in

the new Act of 1935 into two items namely Items 31 and 40 in the Provincial Legislative List, and these two items read with the provisions of Section 100(3) of the Act suggest the conclusion that, under its provisions, the power of the Provincial Legislature to make laws must be the same in respect of matters included in Items 31 and 40 in List II. They both appear in the same List and the legislative power of the Province is derived, equally in both cases, from the same sub-section [sub-s. (3) of Section 100]. It is clear therefore that the said legislative power must be the same in both cases. And it is but rational that it should be so, because very often the "control" of production, manufacture, possession, transport, purchase and sale of an excisable commodity in a Province can be exercised most effectively through the medium of an excise duty levied by the Provincial Legislature. A tax is very often an effective means of "controlling" production, manufacture, possession, transport, purchase and sale of an excisable commodity.

172. It is not difficult to imagine a Case which may sometimes arise; e. g, "prohibition" of intoxicating liquors, which some Provincial Governments have now introduced in India, may exist in one locality and may not exist in another and contiguous locality. This may, in certain cases, necessitate the control" of "transport" etc. of the goods from one locality to the other, and, in that event, an effective way of exercising such control" may be the levying of an excise duty upon entry into or consumption of the excised article in the prohibited area.

173. I therefore see no justification for inter, preting the two items (Items 31 and 40 is "List II) in such a way as to give a different range of powers to the two departments of a Provincial Government, both dealing with the same commodity, one through the medium of administrative control and the other by taxation.

174. I see no escape from the conclusion that the term "excise duties" in the latter half of Item 16 of the Devolution Rules and also the expression "duties of excise" in Item 40 (List II) of the present Act bear a wide signification, and include all duties levied on the consumption of the excisable commodity in the Province at any stage from production to sale. If this is so, I see no reason for withholding from that term the same signification in Item 45 (List I), taking that item as if it stood by itself and Item 48 (List II) did not exist.

175. There is no definition of the words ' excise duty" in the Act and one has therefore to find out its meaning from such indications as the above, which the Act itself provides, or from the definitions of that term occurring in recognized textbooks, or from circumstances throwing light on what the Legislature had in mind at the time of passing the Act. I have already commented upon the glossary which the Act itself provides, and I proceed now to the definitions given by textbook writers.

176. Stephen, in his Commentaries on the Laws of England, 1928 Edition, Vol.4, p.420, following Blackstone, says:

> Excise duties are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the customs duties, for they are an inland imposition paid sometimes on the consumption of the commodity, frequently upon the retail sale.

177. Similarly, Judge Story, in his work on the Constitution of the United States, Edn. 5, Vol.1,

Section 953, adopts almost identically the same definition:

> An inland imposition paid sometimes upon the consumption of the commodity or frequently upon the retail sale, which is the last stage before consumption.

178. Palgrave, in his Dictionary of Political Economy, states:

> Excise is the name given collectively to those duties which, in the fiscal system of the United Kingdom, are levied upon commodities produced within the Kingdom itself, as distinguished from customs duties which are levied at the ports upon commodities imported from abroad. The word 'excise' (Latin excide) signifies etymologically something cut off; as an excise duty may in effect ho considered something cut off or deducted, for the benefit of the State, from the price of the article as paid by tho consumer. If there were no duty, the consumer would pay a lower price for tho article. The price therefore that he actually pays includes the duty; whence it follows that the duty itself is something deducted or subtracted from the actual price paid. Tho price in fact is divided into two parts, one part being subtracted from the whole for tho benefit of the State and the remainder going to the vendor.

179. This is the sense in which the word excise" has been understood for many years in England and the question arises 'whether there is any reason why this meaning should, in the Government of India Act, 1935, be so cut down as to exclude duties charged and levied at some stage subsequent to their manufacture and production, e.g. at or in connexion with a sale to a Consumer. It was argued that the definitions of textbook writers on political economy, however eminent, prove hardly a valuable guide in legal matters, but an answer to this contention is provided by several rulings of the Privy Council, who in a series of decisions going back to 1878, have accepted Mill's definition of a "direct taxation" and "indirect taxation." See these cases referred to in *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd. (1934) A.C. 45 at pp.51 to 53(Suupra)*. Their Lordships' view appears to be that the definitions given by eminent textbook writers, like Mill, have a value even in the elucidation of legal questions, because such definitions embody the common understanding of those who knew the subject and were therefore to that extent, likely to have been present to the minds of those who passed the Federation Act.

180. The answer of the Provinces to the definition of "excise duties," as given above, is as follows: in Item 45 (List I) the words show that the duty mentioned in it is on manufacture or production. I find some difficulty in accepting this contention, for looking only to the words of Item 45, the duty is on the goods and the words "manufactured or produced in India" are descriptive of the goods only. In the corresponding Item 40 in List II, the same grouping appears, namely duties on goods manufactured or produced in the Province. Belying therefore on the words only, it is clear that the duty is not "on" the "manufacture or production," but "on" the "goods" manufactured or produced.

181. The words "manufactured or produced" in Item 45 (List I) are descriptive of the goods and are not mentioned as the basis of incidence. They also occur, as said above, in Item 40 of List II where too they are descriptive of the goods as in Item 45 (List I), the only difference between the

two items being that under Item 45 the "manufacture or production" is in the whole of India, whereas under Item 40 it is "in the Province." It further appears, from the juxtaposition of Item 44 in List I, "duties of customs," with Item 45, that the words "manufactured or produced in India" in Item 45 have a significance as marking a Contrast to the "customs" in Item 44 which relate to goods coming from outside India. This juxtaposition of the duties of customs in Item 44 is, in my opinion, not without significance. For, on a Careful perusal of the provisions of the several Constitutions relating to countries which form a part of the British Commonwealth of Nations, one finds.that "customs" and "excise duties" are generally grouped together and their imposition placed within the exclusive competence of the Dominion Parliament. See, for instance, Section 122, British North America Act, 1867. This grouping in that Act is explained by the Privy Council as no doubt due to the fact that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied;*Attorney-General for British Columbia v. McDonald Murphy lumber Co. Ltd. (1930) 17 AIR PC 173(Supra)*. at page 364.

182. It is further to be noted that in neither of the Items (45 in List I and 40 in List II) occur the words "in respect of" manufacture or production, though the Legislature has used this expression in some items, for instance in Item 56 of List I and in Item 43 of List II. If the intention of the Legislature was to place the incidence of the duty of excise "on the manufacture or production" we would have expected the said expressions to occur in the Section or some equivalent words indicating clearly that the incidence was either 'on" or in respect of" production or manufacture. On the contrary, the words are duties on" the "goods" indicating thereby that the duty arose in connexion with the goods and followed them through the several stages of their progress to the consumer and was not limited to the stage of their manufacture or production. An instance of an excise duty pursuing a Commodity through several stages, for instance, of increase, decrease or remission, is to be found in Section 10, Indian Tariff Act, 1934.

183. If it is pertinent to refer to the draft item which was historically the predecessor of Item 45 (List I) before the Joint Committee on Indian Constitutional Be forms, 1933-34, (and I think it is permissible to do so, as it is a part of the history of the legislation), I may state that the item, in the form in which it was placed before the Committee, was worded as follows Duties of excise on the manufacture and production of tobacco and other articles", etc. The wording of this draft was subsequently changed to its present form, and it is not unfair to infer that the alteration was made in order to include in Item 45 all duties 07i the goods (provided that they were duties of excise and the goods were manufactured or produced in India) and not only those which were levied at the stage of their manufacture or production.

184. And this, in my opinion, is as it should be, for if the proper import of an "excise duty" is that it is a tax on consumption, there is no reason why the State should not have power to levy and collect it at any stage before consumption, namely from the time the commodity is produced or manufactured up to the time it reaches the consumer. I will presently refer to certain authorities in support of the view that a duty of excise is essentially a tax on consumption, but apart from it, I see no rational ground for limiting the right of a State to levy an excise duty at any time it chooses before the commodity reaches the consumer. Admittedly the necessity of levying such a tax depends upon the exigencies of the State, the nature of the commodity and the expediency of excising it at any particular stage which is found convenient according to circumstances. It may be that, in most cases, a State may find it expedient to levy and collect the duty at the stage of manufacture or production or while it is in bond or is released there out for sale. These are all

questions of detail which a State should be left free to decide according to its convenience and necessities; and I confess I find it difficult to evolve any rational principle, distinguishing an excise from a non-excise, based upon the accident, or expediency that, in a particular case, a State charges the duty at the stage of production, manufacture, transport or sale. I do not see any reason for limiting the taxing power of the State to any of these earlier stages. If it is a tax on consumption, there is no reason why it should not be levied and collected at any of the stages between manufacture or production on the one hand and sale to the consumer on the other, which the State may find convenient, according to circumstances.

185. I may here invite attention to an important American ruling, *Potton v. Brady (1901) 183-186* (Supra)U.S. Supreme Court, Reports. Although American rulings may not be binding on this Court, I see no reason for not accepting, with respectful caution, any help they can give in the elucidation of questions which arise before this Court. This ease is important, because it arose under a Constitution in which there was no entry like Item 48 (List II) and consequently the term "excise tax" received its proper interpretation without the necessity of cutting it down in order to reconcile it with an item like 48 (List II). The plaintiff had purchased, in open market, a quantity of tobacco in May 1898; all requisites for completing the purchase which were required by the Act then under operation were satisfied; the price was paid, documents executed, goods removed and the entire tax due on them under the Act, then current was paid. In the next month in June 1898, before the goods were consumed or exported, the Congress imposed a fresh tax on tobacco to meet war expenditure, and under Section 3 of the new Act, an increased taxation was placed on all tobacco manufactured, sold and removed before the Act. This tax was said to be in lieu of the previous tax. Brady, the Collector of Internal Revenue, demanded the new tax, in addition to what had been paid only a month before on the entire quantity of the tobacco. The fresh tax was paid by the plaintiff under protest, and later an action was brought, asking for its refund, on the ground that the charging Section 3 under which the tax was levied was invalid and that the tax was not an excise.

Brewer J.

186. Went into the nature of the tax and denned an "excise tax" in terms which I find no difficulty in accepting. After going through several authorities, he defines "excise" as a tax on an article indigenously manufactured for consumption and imposed at a period intermediate the commencement of manufacture, and the final consumption of the article. This, he says, was the meaning of the word, as understood in England at the time the Act was framed, and he saw no necessity for giving the word a different meaning.

187. He then goes into the question, which was also suggested by the Provincial Advocates-General in their argument before us, that as the Government of India, in this particular case, have once taxed the motor spirit which is the subject matter of the sale in Section 3, Central Provinces Act, their power to levy taxation on the same commodity is exhausted and consequently all such revenue, as is raised in the Province by a subsequent taxation of the same commodity, must belong to the Province. Dealing with this doctrine of the "power being exhausted", Brewer J. makes some apposite observations which will bear quoting :

> Why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that, having once been

established and paid, all further liability of the individual to the Government has ceased. They are, as said Cooley on Taxation, p. 1: 'the enforced proportional contribution of persons and property levied by the authority of the State for the support of the Government and for all public needs.' And so long as there exist public needs, just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be 'the exigencies of the future, or determine in advance exactly what the Government must have, in order to provide for the common defence and promote the general welfare. Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be that, having made provision for times of peace and quiet, the Government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies?

188. It was urged before us that in interpreting the words "duties of excise" in the Government of India Act, 1935, regard should be had to the legislative practices of the Central and Provincial Governments which prevailed previously and up to the passing of that Act. I doubt, in the first place, whether this will be a good rule of interpretation, but apart from it, I think that whatever utility such legislative practices may have in the case of other Constitutions enacted under different circumstances, it is considerably weakened by the fact that the Government of India Act, 1935, is not so intimately connected with its predecessors, by the nature of the Constitution which it establishes, as to receive much guidance from legislative practices operative during the time of its predecessors. As is well known, the Government of India Acts previously to 1935 were all enacted as parts or instalments of an evolutionary or progressive scheme of unitary government, under which the Government of India were supreme except in such administrative and legislative matters as were given to the Provinces by devolution. The residuary powers mostly remained with the Government of India, which had the ultimate power of control and superintendence over Provincial Governments. This scheme of things was radically altered by the Act of 1935, which, in effect, replaced the previous unitary government by a form of Federal Government, under which it could not be said, as previously, that the Government of India had supreme control or superintendence, etc., over Provincial Governments. By the Act of 1935, the fields of the two Governments were demarcated and made distinct. Each was to be mistress in her own affairs. I doubt therefore whether the legislative practises of the previous times can furnish any decisive clue to the interpretation of a term forming part of the new Constitution.

189. Assuming, however, that such legislative practises could be useful, I am doubtful whether they are of such a Clear and unequivocal character as to compel an inference helpful in the matter of interpreting the new Act. Our attention in this connexion was called to Provincial Acts like Bombay Act 5 of 1878, Bengal Act 5 of 1909, Punjab Act 1 of 1914 and U. P. Act i of 1910. These are all Excise Acts relating to the charging of duties upon several excisable products. What is noteworthy is that in none of these Acts, so far as I have been able to discover, the word "excise" is defined. All that these Acts can show is the fact that, in those particular instances, the several duties of excise were levied and collected at the stage of manufacture or production or at a subsequent stage previous to actual sale to the consumer. For instance, in the Bombay Abkari Act 5 of 1878, Section 19-A (a), the duty was levied and collected on "issue for sale;" in the

Bengal Act, Section 27, on goods imported, exported, transported, etc., and so on.

190. Coming to Central Acts, the following i instances were quoted to us:

The Cotton Duties Act of 2 1896.

The Motor Spirit (Duties) Act 2 of 1917.

The Sugar (Excise Duty) Act 14 of 1934.

The Iron and Steel Duties Act 31 of 1934.

191. It was argued on behalf of the Central Provinces Government and of the Provinces generally that in none of these Acts the Central Legislature levied an excise at the stage of sale" of the respective excisable commodities. For instance, it is pointed out that in the case of the Cotton Duties Act, under Section 6, the cotton ' produced" in the mills is taxed. Under Section 3(1), Motor Spirit (Duties) Act, the duty is levied and collected 'at every manufactory on all motor spirit produced in such manufactory." In the Sugar (Excise Duty) Act, Section 3(1), the duty is levied on 'all sugar produced in any factory in British India" and either "issued" out of or "used" within such factory, according to the terms of the Section. Under the Iron and Steel Duties Act, Section 4, the duty is levied, at a Certain rate mentioned in the Section, "on all steel ingots produced in British India" after the commencement of that Act and "shall be payable by the manufacturer thereof."

192. After carefully considering this argument, I am inclined to hold that the mode in which the several duties have been charged under the various Sections of these Acts cannot be regarded as furnishing a glossary of the word "excise" as used in the new Act. To me, these several modes merely indicate that, having regard to the exigencies of the State in the days of the passing of those Acts and having regard also to the nature of the commodity, the mode of its manufacture, consumption, and transport, and also the possibility of the evasion of the tax, the Legislature thought, in these several instances, that the most effective way of levying and collecting the duty, so as to protect the fiscal interests of the State, was to charge it at the several initial stages mentioned in the said Acts. I am not inclined to attach a greater significance to the modes of charging under these Acts nor to construe them as limiting the right of the new Eederal Government, established for the first time under the Act of 1935, to charge any duties, which could be shown aliunde to be included within the words defining their powers of taxation under the new Act.

193. A State levies taxes for public needs and the obligation of the individual to the State is proportioned to the extent of the public wants which can never be foreseen or anticipated. Speaking for myself therefore, I would be unwilling, from equivocal considerations like the above, to limit the powers of the State, whether it is the Federal or a Provincial administration, which it enjoyed under the respective provisions relating to its powers of taxation. It would be, in my opinion, incorrect to interpret the new powers of the several Governments, merely by a reference to what the legislative practice was previous to the passing of the new Act. If "excise" means and includes a tax on goods manufactured or produced in the country and if I am right in saying that it is ultimately a tax on consumption and can be levied at any stage from manufacture to consumption according to the exigencies of the State and the nature and consumption of the

article, I cannot see why the word excise", as Understood in this way, should receive a limited signification by reason of the mere circumstance that, at some previous stages and under a form of Government entirely different from the present one (when perhaps the resources of the Central Government were more numerous or more easily recoverable) the State thought it expedient in particular instances to levy and collect an excise duty at an early stage like manufacture, production or transport. I would require a stronger proof than the mere so called legislative practices to induce me to deprive the words "excise duties" of a signification which they had and still have in England and in important parts of the British Commonwealth of Nations.

194. It is argued that the expression "excise duties" is understood in England in the widest signification, but that the expression has received a restricted meaning elsewhere in the British Commonwealth. I am well aware of this circumstance, but find that the alleged restriction of meaning amounts only to a rejection of taxes like a license tax, dog tax, etc.

195. I now turn to the definition of 'excise" duties to be found in more recent works.

196. In "Constitutional Law of the United States" by Hugh Evander Willis (1936 Edition, page 372), "excise" is defined as "an inland tax laid upon the manufacture, sale, or consummodities within a Country."

197. In the "Encyclopaedia of the Social Sciences" edited by Edwin E.A.Seligman, Vol.V, p.669, the following observations occur :

> Excise is a tax on commodities of domestic manufacture levied either at some stage of production or before the sale to home consumers.

198. In commenting on the power of the State to levy an excise tax at any convenient stage according to the requirements of the case, the editors say (page 670) :

> The excise tax may be levied on the raw material or the finished article or it may attach to an intermediate stage of the production process... a raw material tax is disadvantageous to producers inasmuch as it is collected at the very beginning of the production process, long before the manufacturer has the opportunity to recover it by selling the finished product...The manufacturer may also resort to storing the goods in bonded warehouses, thus postponing the payment of the tax until the commodities are withdrawn for sale.

199. Mr.Findlay Shirras, in his "Science of Public Finance", Vol. II, (Edn. 3) states (page 654) :

> Excises or taxes on commodities of domestic manufacture may be levied on the raw materials or at an intermediate stage of their production or when the articles arc ready for consumption... The taxes should be levied in accordance with the canon of convenience. [The italics are mine.]

200. He further observes that in recent years new excises have been discovered, for instance, on petroleum or gasoline which many countries have now adopted.

201. These are quotations from recent authors and they make clear inter alia that the stage at

which an excise tax is levied and collected is a matter dependent on the nature of the commodity and the facility of collecting the tax. It is not a vital element affecting the nature of the tax as an excise.

202. For all these reasons I hold the view that if Item 45 (List I) had stood by itself and Item 48 did not exist in the Provincial List and consequently no necessity arose to reconcile the two items, the expression "duties of excise" occurring in Item 45 (List I) would include all duties of excise on goods manufactured or produced in India, whether levied or collected at the stage of manufacture or production or at any of the subsequent stages up to consumption, and that the Central Legislature had, under that item, taken along with Section 100(1), the exclusive power to make laws with respect to the levying of all such duties.

203. The next question is whether the wide meaning I have attached to the expression in Item 45 (List I) has in any and what way to be curtailed or modified, so as to reconcile that item with Item 48 in List II.: Item 48 is "taxes on the sale of goods". The wording is as clear and precise as it can be. There is no doubt that the item was intended to be operative. The rule of interpretation No. (5), which I have stated! above, applies, that where the text is explicit, the text is conclusive in what it directs and what it forbids. The language of Item 48 (List II) has to be given effect to. Its plain and natural meaning would be a tax on the sale of goods, and the term "goods," according to its interpretation in Section 311, Government of India Act, 1935, would include "all materials, commodities and articles." These would necessarily in, elude goods mentioned in Item 45 (List I). Item 45, taken by itself, would, as I have shown above, include all duties from production up to and inclusive of "sale." Item 48 (List II) would include all taxes on the "sale" of the same goods. There will thus, be a Conflict and unless it is removed by a proper reconciliation between the two,. Item 45 (List I) would practically absorb Item 48 (List II) and render it completely nugatory. Consequently, an interpretation has to be placed upon the two items which must conform with the presumption that Parliament could not have intended that the powers exclusively assigned to the Provincial Legislature under Item 48 (List II) should be absorbed in those given to the Central Legislature in Item 45 (List I). The item therefore has to be reconciled with Item 48 and the reconciliation must be such as will not do violence to the words contained in the item. It could not have been the intention of the Legislature that a Conflict should exist between that item and Item 45, and, in order to prevent such a result, the two items must be read together and the language of the one interpreted, and, where necessary, modified by that of the other. I will add that the reconciliation to be made between the two items as stated in this paragraph is irrespective of the provisions of the non obstante clause in Section 100 which, as pointed out by the Chief Justice in his opinion, does not come into operation except in the last resort.

204. Item 48 (List II) is entirely a new item and did not occur in the classification of Central and Provincial subjects which found a place in the earlier Acts relating to the Government of India. Another circumstance of equal significance is the fact that a similar item does not find a place in the Constitutions relating to other parts of the British Commonwealth of Nations which were framed before the Great War. The item therefore has, in all probability, reference to conditions which arose since then and it is not unlikely that this item was inserted in List II and allocated to the Provinces, because recent experiences of economists in other parts of the world led to a realization that a tax on the sale of goods was a prolific source of revenue.

205. On scanning Lists I and II with a view to discover what sources of revenue have been left respectively in the hands of the two Governments, Central and Provincial, it will be found that an attempt has been made, as far as possible, to clearly mark out the field of each, and to avoid the possibility of a Conflict or overlap. If that is the general intention of the Legislature to be gathered from the tenor of the two Lists, it will be fair to interpret the two items in such a way as would avoid conflict and keep them out of the purview of each other.

206. On a Careful review of the whole question, I am therefore inclined to hold that Parliament intended:

> (1) That, as regards goods centrally excisable, taxes on their sale within the Province for purposes of consumption, when such taxes are in no way connected with their production, manufacture, etc. within the Province, but are imposed on their sale in the Province merely as existing articles of trade and commerce, should be exclusively within the competence of the Provincial Legislature.
>
> (2) That, save as aforesaid, all duties of excise on those goods, whether levied and collected at the stage of manufacture, production or any subsequent stage up to consumption (exclusive of sale in the Province, as stated above), should remain exclusively within the competence of the Centre. a Corollary of this rule will be that the residuary powers, if any, of levying and collecting excise duties on those goods (save on their sales as aforesaid) will remain exclusively within the competence of the Central Legislature.

207. I am further fortified in this view by the juxtaposition of Items 48, 49 and 50 (List II). On reading them together, it appears that the intention of the Legislature was that taxes on consumption of excisable goods within a Province, even when such goods fell under Item 45 (List I), should be given exclusively to the Provinces. Item 49 (List II) is particularly significant and throws light on Item 48 (List II). It relates to cesses on the entry of goods into a local area for consumption, use or sale therein." The word "goods" in that item includes, under Section 311, Government of India Act, 1935, all materials, commodities and articles. The expression is therefore wide enough to include goods which fall under Item 45 of List I. If so, "cesses" on commodities ordinarily excisable by the Centre under Item 45 (List I) would be within the exclusive competence of the Provincial Legislature, if levied on the entry of the goods into the local area for the purpose of consumption, use or sale therein. Similarly, Item 50 (List II) relates to "taxes on luxuries." These "luxuries" may be excisable under Item 45 (List I); yet, being objects of consumption within the Province, they appear to have been taken out of the purview of Item 45 (List I) and allocated to the Provinces. It is not therefore unfair to infer from this grouping that the scheme of taxation was intended to be that an excisable commodity is subject to the legislation of the Centre in respect of all taxes on or connected with its production, manufacture, etc. etc., but when such commodity enters the precincts of a Province and a tax has to be imposed on its sale within the Province for purposes of consumption therein and the tax is in no way connected with its production, etc. but is imposed with respect to its sale merely as an existing article of trade and commerce, the power to do so is exclusively with the Province. I may here refer to a Case where goods excisable by the Centre were held to be exclusively taxable by the Province in cases where their sale took place in the Province merely as existing articles of

trade and commerce and the sale was in no way connected with their production or manufacture within the Province: see 38 *Commonwealth Oil Refineries Co. v. South Australia, 38 Commonwealth L R 408 at page 426(Supra).*

208. This, I think, is an interpretation which is reasonable in itself and in keeping with the wording of the item and also of its context and the general scheme of the Act. In other words as I interpret the two items, Item 45 (List I) may be said to contain a general power to levy an excise duty at all stages. As an exception to this a portion of the power is cut out and allocated to the Provinces under Item 48 (List II). It operates as an exception to the general power conferred by Item 45. I will invite in this connexion attention to a ruling where a similar principle of reconciliation was adopted: In the matter of a Reference to he Supreme Court of Canada (1912) A.C. 880 at pages 885-887. In that case a Conflict arose between two entries, one in the Dominion List entitled "marriage and divorce" and the other in the Provincial List entitled "Solemnization of Marriage in the Province." The Privy Council reconciled the conflict between these two, by holding that the exclusive power conferred on the Provincial Legislature to make laws relating to the solemnization of a marriage in the Province operated by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion Parliament.

209. It is difficult to accept the contention of the Advocate-General of India, that the expression "tax on the sale of goods" in Item 48 (List II) means only a turnover tax and nothing more. Assuming, as he contends, that a tax on the sale of goods is only another expression for a ' sales tax" which became popular after the War, there is authority for the view that "sales taxes" include turnover taxes and something more. It is difficult to understand why, if Parliament intended only turnover taxes to be included in Item 48, they did not use that expression, which was certainly clearer than the somewhat inappropriate formula "taxes on the sale of goods." The interpretation of Item 48 (List II), at which I have arrived independently, may receive some support from the wording of the draft of Item 48, as it appeared in the White Paper and before the Joint Committee on Indian Constitutional Reform (1933-34). (See Item 10 at page 118 of the "Proposals for Indian Constitutional Reform" presented to Parliament in March 1933, and see also p. 158 of Vol.1, Part.I of the Report of the Committee.)

210. This interpretation of Item 48 (List II) will, I think, give a definite and clear field of taxation to the Provinces and another field, equally clear and definite, to the Centre, and thus the possibilities of conflict will be removed.

211. A powerful appeal was made to us by the Advocates-General of the Provinces that consistently with its terminology we should so interpret Item 48 (List II) as to give it AContent sufficiently extensive for the growing needs of the Provinces. It was argued that provincial autonomy granted by the new Scheme of Government would be unmeaning and empty, unless it was fortified by adequate sources of revenue. Whatever value such an appeal may have in a judicial decision, I personally appreciate it, and I feel no doubt that the interpretation that I am placing on Item 48 (List II) is sufficiently practical to leave an adequate source of revenue in the hands of the Provinces without making inroads on Central reserves. I may add here that the several authors I have been able to consult on this point agree in their opinion that, since the War, a tax on the sale of goods has proved to be both productive and practicable in many countries, under circumstances not very different from those prevailing in the Provinces of India. The yield naturally varies with the scope and rates of the tax, business conditions and administrative

efficiency, but it is stated that the tax itself has become a major source of revenue in a number of countries, yielding more than the Income Tax in a few instances and nearly as much as other sources of revenue in others.

212. For all these reasons I am of opinion that is the tax levied by Section 3, Central Provinces Act, falls within Item 48 of List II and consequently the provisions of that Act which affect the taxation of motor spirit and lubricants manufactured or produced in India are intra vires the Central Provinces and Berar Legislature. The remaining provisions of the Act being incidental to the charging Sections will also be valid.

213. In this view of the case, it is not necessary to deal with the contention of the Advocate-General of India under Section 297 (1) (b) of the Act. The contention becomes material only in the event of this Court holding that the tax is invalid in so far as it falls on commodities manufactured or produced in India. I confess however that I feel impressed with the argument of the Advocate-General of Madras that if it is found by this Court that the Central Provinces have no power to tax motor spirit manufactured or produced in India, then they can only tax foreign motor spirit, and that since that is the only power which the Central Provinces will in that event possess, its exercise cannot amount to discrimination. No case of discrimination, he argued, can arise except where there is a power in the Legislature to tax two sets of goods, and it has deliberately exercised the power in favour of one in preference to the other. It was also argued that there must be an intention to discriminate, which cannot exist in a Case where the Legislature has no power to tax one of the two sets of goods. These are all interesting questions, the solution of which is not without difficulty. But I do not wish to go into them on this occasion, because in my view of the case the question does not arise.

214. I am therefore of opinion that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not ultra vires the Legislature of the Central Provinces and Berar and that the question referred to us should be answered accordingly.

Cases Referred.

1(1936) A.C. 578 at p. 614
2(1908) 6 Commonwealth L R 469
3(1912) A.C. 571 at p. 583
4(1882) 7 A.C. 96 at page 108
5(1901) 184 U S 608, 10
638 Commonwealth L R 408
7 (1887) 12 A.C. 575 at p. 587
838 Commonwealth L.R 408 at p. 426
9(1901) 184 U S 608
10(1887)12AC 575
11(1934) A.C. 45 at page 51
12(1901) USSR 607
13(1914) A.C. 176 at p. 190
14(1884) 10 A.C. 141
15(1887)12 A.C. 575 at p.581
16(1914) AC 176 at page 193
17(1921) 8 AIR PC 163
18(1928) A.C. 117

191934 A.C. 45
20(1903-04) 1 CLR 497
21(1908) 6 CLR 41
2238 Commonwealth L R 408
23(1936) A.C. 578
24(1934) 51 CLR 108
25(1895) A.C. 202 at page 215
26(1936) A.C. 578 at page 613
27(1878) 3 A.C. 889
28(1882) 7 A.C. 96 at p. 109
29(1928) 15 AIR PC 282
30Co.,AC 934
31(1934) A.C. 45
32(1924) A.C. 328 at p. 337
33(1887) 12 A.C. 575 at page 581
34(1912) A.C. 571
35(1921) 2 A.C. 91 at page 115
36(1919) 6 AIR PC 145 at p. 942
37(1883) 9 A.C. 117 at page 132
38(1933) A.C. 156
39(1887) 12 AC 575
40(1898) A.C. 700 at p. 713
41(1897)AC 231 at p. 237
42(1882) 7 A.C. 96 at p. 109
43(1915) A.C. 330 at pp. 339-40
44 (1936) A.C. 578 at p. 614-5
45(1937) AIR PC 89 at p.367
46(1937) 24 AIR PC 89
47(1924) A.C. 328 at p.337
48(1924) A.C. 328 at p. 337