We are of opinion that the order of the High Court is correct and therefore dismiss the appeal with costs.

Appeal dismissed.

IN RE. THE BILL TO AMEND S. 20 OF THE SEA CUSTOMS ACT, 1878, AND S. 3 OF THE CENTRAL EXCISES AND SALT ACT, 1944

(B. P. SINHA C. J., S. K. DAS, P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO, M. HIDAYATULLAH, K.C. DAS GUPTA, J.C. SHAH, and N. RAJAGOPALA AYYANGAR JJ.)

President's Reference—Customs duties and duties of excise—Parliament's power to levy such duties on the property of States—Direct and indirect taxes—Distinction, if valid under Constitution—Customs duties and duties of excise, if taxes on property—"Taxation", Definition—Sea Customs Act, 1878 (8 of 1878), s 20—Central Excises and Salt Act, 1944 (1 of 1944). s. 3 (1)—Government of India Act, 1935 (25 & 26 Geo. 5, Ch. 42), ss. 154, 155—Constitution of India, Arts. 245, 246, 285, 289, 366 (28).

As a result of a proposal to introduce in Parliament a Bill to amend s. 20 of the Sea Customs Act, 1878, and s. 3 of the Central Excises and Salt Act, 1944, with a view to applying the provisions of the said two Acts to goods belonging to the State Governments, in regard to which certain doubts arose as to whether the provisions of the Bill were inconsistent with Art. 289 of the Constitution of India, the President of India referred under Art. 143 of the Constitution certain questions for the opinion of the Supreme Court to ascertain if the proposed amendments would be constitutional. The question was whether the provisions of Art. 289 of the Constitution precluded the Union from imposing, or authorising the imposition of (a) customs duties on the import or export, or (b) excise duties on the production or manufacture in India, of the

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property of a State used for purposes other than those specified in cl. (2) of that Article.

Held (S. K. Das, A. K. Sarkar, Hidayatullah and K. C. Das Gupta, JJ, *dissenting*), that the provisions of Art. 289 (1) of the Constitution of India were in the nature of an exception to the exclusive field of legislation reserved to Parliament and were limited to taxes on property and on income of a State; that the immunity granted in favour of States had to be restricted to taxes levied directly on property and income; and, that even though import and export duty or duties of excise had reference to goods and commodities, they were not taxes on property directly and were not within the exemption in Art. 289 (1).

Per Sinha C. J., Gajendragadkar, Wanchoo, Shah and Rajagopala Ayyangar JJ.—(1) Though the expression "taxation", as defined in Art. 366 (28), "includes the imposition of any tax or impost, whether general or local or special", the amplitude of that definition has to be cut down if the context otherwise so requires.

(2) Whereas the Union Parliament has been vested with the exclusive power to regulate trade and commerce and with the sole responsibility of imposing export and import duties and duties of excise, with a view to regulating trade and commerce and raising revenue, an exception has been engrafted in Art. 289 (1) in favour of States granting them immunity from certain kinds of Union taxation and it is necessary that the general words of the exemption in that Article should be limited in their scope so as not to come in conflict with the power of the Union to regulate trade and commerce.

(3) Though the Constitution of India does not make a clear distinction between direct and indirect taxes, the exemption provided in Art., 289 (1) from Union taxation to property must refer to what are known to economists as direct taxes on property and not to indirect taxes like duties of customs and excise which are in their essence trading taxes and not tax on property.

Per Das, Sarkar and Das Gupta JJ.—(1) The exemption clause under Art. 289 (1) has to be interpreted with the key furnished by Art. 366 (28). Under the Constitution the word "taxation" has been defined by the Constitution itself, and the Court is not free to give a different meaning to the word so as to make a distinction between direct and indirect

taxation, nor is the Court free to make a distinction between a tax on property and a tax in respect of it.

(2) The problem is not the nature of the impost, but rather the extent of the immunity granted by Art. 289 and the extent of the immunity really depends on the true scope and effect of Arts. 245, 285, 289, and 366 (28).

(3) The Union's power to legislate to regulate foreign trade contained in the legislative list is subject to the provisions of the Constitution, and the Union cannot, in view of Art. 289 (1), impose a customs duty on things imported by the State and seek to justify it as an exercise of its power to regulate foreign trade.

(4) The exemption given to State property from Union taxation by Art. 289 does not conflict in any way with the power of control which the Union has over foreign trade or inter-State trade.

(5) In the Constitution of India the "taxing power" is treated as different from the "regulatory power" and the classification between "direct" and "indirect" taxes hasot been adopted in the Constitution.

Per Hidayatullah J.—(1) The fact that the word "taxation" is used in one place only in the Constitution saves us from the task of examining the context, because the definition would become a dead letter if it were not used in Art. 289 in the sense defined.

(2) Taking the language of Art. 289 (1) by itself or even as modified by that of cls. (2) and (3) the conclusion is inescapable that properties of all kinds belonging to the States save those used or occupied for trade or business, were meant to be exempted from taxation. The scheme of Art. 289 does not admit that the word "property" should be read in any specialized sense and goods imported and goods manufactured or produced by the States are included in the word "property."

(3) The provisions of Art. 289 preclude the Union from imposing, or authorising the imposition, of customs duties on the import or export of the property of a State used for purposes other than those specified in cl. (2) of that Article, if the imposition is to raise revenue but not to regulate external trade.

(4) The intention being to raise revenue the amendment if made would be hit by Art. 289.

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Per Rajagopala Ayyangar J.—Though no express distinction has been made in the Constitution between direct and indirect taxes, taxes in the shape of duties of customs including export duties, and excise, particularly when imposed with a view to regulating trade and commerce in so far as such matters are within the competence of Parliament being covered by various entries in List I, cannot be called taxes on property; for they are imposts with reference to the movement of property by way of import or export or with reference to the production or manufacture of goods.

American, Australian and Candian cases reviewed.

ADVISORY JURISDICTION: Special Reference No. 1 of 1962.

Reference by the President of India under Art. 143 (1) of the Constitution regarding the proposed amendments to sub-section (2) of Section 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and sub-section 1 (a) of Section 3 of the Central Excise and Salt Act, 1944 (Act 1 of 1944).

C. K. Daphtary, Solicitor-General of India, H. N. Sanyal, Additional Solicitor General of India, G.N. Joshi and *R.H. Dhebar,* for the Union of India.

D. Narsa Raju, Advocate-General for the State of Andhra Pradesh and *T. V. R. Tatachari,* for the State of Andhra Pradesh.

B. C. Barua, Advocate-General for the State of Assam and *Naunit Lal,* for the State of Assam.

Mahabir Prasad, Advocate-General for the State of Bihar and *S. P. Varma,* for the State of Bihar.

A. V. Viswanatha Sastri, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the State of Maharashtra.

J. M. Thakore, Advocate-General for the State of Gujarat and *H.L. Hathi,* for the State of Gujarat.

D. Sahu, Advocate-General for the State of Orissa and *K. L. Hathi*, for the State of Orissa.

V. P. Gopalan Nambyar, Advocate-General for the State of Kerala and *Sardar Bahadur*, for the State of Kerala.

A. Ranganadham Chetty and *A. V. Rangam*, for the State of Madras.

G. R. Ethirajulu Naidu, Advocate-General for the State of Mysore and *R. Gopalakrishnan*, for the State of Mysore.

S. M. Sikri, Advocate-General for the State of Punjab, S. K. Kapur and *Gopal Singh*, for the State of Punjab.

G. C. Kasliwal, Advocate-General for the State of Rajasthan, S. K. Kapur, V. N. Sethi and *K. K. Jain*, for the State of Rajasthan.

B. Sen, M. K. Banerjee and *P. K. Bose* for the State of West Bengal.

M. Adhikari, Advocate-General for the State of Madhya Pradesh and *I. N. Shroff*, for the State of Madhya Pradesh.

K. S. Hajela and *C. P. Lal*, for the State of Uttar Pradesh.

1963. May 10. The opinion of B. P. Sinha, C. J., P. B. Gajendragadkar, K. N. Wanchoo and J. C. Shah JJ. was delivered by Sinha, C. J. The opinion of S. K. Das, A. K. Sarkar and K. C. Das Gupta JJ., was delivered by Das, J. M. Hidayatullah, J., and N. Rajagopala Ayyangar, J., delivered separate opinions.

Sinha C. J.

SINHA C. J.—The main question, on this reference by the President of India under Art. 143 (1) of

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the Constitution, depends upon the true scope and interpretation of Art. 289 of the Constitution relating to the immunity of States from Union taxation. On receipt of the reference notices were issued to the Attorney-General of India and to the Advocates-General of the States. In pursuance of that the case of the Union Government has been placed before us by the learned Solicitor-General and that of the States of Andhra Pradesh, Assam, Bihar, Gujarat, Kerala, Madhya Pradesh, Madras, Maharashtra, Mysore, Orissa, Punjab and West Bengal was presented to us by their respective counsel. On the date the hearing of this case started, an application was made on behalf of the State of Uttar Pradesh also to be heard, but no statement of case had been put in on behalf of that State, and as no grounds were made out for condoning the delay, we refused the application.

The reference is in these terms :

"Whereas sub-section (1) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878), provides for the levy of customs duties on goods imported or exported by sea to the extent and in the manner specified in the said sub-section ;

And whereas sub-section (2) of section 20 of the said Act applies the provisions of sub-section (1) of that section in respect of all goods belonging to the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government;

And whereas it is proposed to amend sub-section (2) of section 20 of the said Act so as to apply the provisions of sub-section (1) of that section in respect of all goods belonging to the Government of a State;

irrespective of whether such goods are used or not for the purposes set out in the said sub-section (2) as at present in force;

And whereas sub-section (1) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944), provides for the levy of duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into any part of India in the manner specified in the said sub-section;

And whereas sub-section (1A)of section 3 of the said Act applies the provisions of sub-section (1) of that section in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods which are not produced or manufactured by any Government;

And whereas it is proposed to amend sub-section (1A) of section 3 of the said Act so as to apply the provisions of sub section (1) of that section in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of the Government of a State, irrespective of whether such goods are used or not for the purposes set out in the said sub-section (1A) as at present in force;

And whereas it is proposed to introduce in Parliament a Bill, the draft of which is annexed here to and marked 'Annexure', to amend for the purpose aforesaid sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and sub-section (1A) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944);

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And whereas Governments of certain States have expressed the view that the amendments as proposed in the said draft of the Bill may not be constitutionally valid as the provisions of article 289 read with the definitions of 'taxation' and 'tax' in clause (28) of article 366 of the Constitution of India preclude the Union from imposing or authorising the imposition of any tax, including customs duties and excise duties; or in relation to any property of a State except to the extent permitted by clause (2) read with clause (3) of the said article 289;

And whereas the Government of India is on the other hand inclined to the view—

(i) that the exemption from Union taxation granted by clause (1) of article 289 is restricted to Union taxes *on* the property of a State and does not extend to Union taxes *in relation to* the property of a State and that clauses (2) and (3) of that article have also to be construed accordingly;

(ii) that customs duties are taxes *on* the import or export of property and not taxes on property as such and further that excise duties are taxes on the production or manufacture of property and not taxes on property as such; and

(iii) that the union is not precluded by the provisions of article 289 of the Constitution of India from imposing or authorising the imposition of customs duties on the import or export of the property of a State and other Union taxes on the property of a State which are *not* taxes on property as such;

And whereas doubts have arisen as to the true interpretation and scope of article 289 of the Constitution of India and, in particular, as to the constitutional validity of the amendments to the Sea Customs

Act. 1878 (Act 8 of 1878) and the Central Excises and Salt Act, 1944 (Act 1 of 1944) as proposed in the aforesaid draft Bill;

And whereas in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen and are of such a nature and are of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

Now, therefore, in exercise of the powers conferred upon me by clause (1) of article 143 of the Constitution of India, I, Rajendra Prasad, President of India, hereby refer the following question to the Supreme Court of India for consideration and report of its opinion thereon;

"(1) Do the provisions of article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that article ?

(2) Do the provisions of article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article ?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and sub-section (1A) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of article 289 of the Constitution of India ?"

New Delhi :
Dated the 19-4-1962.

Sd/-Rajendra Prasad,
President of India.

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Annexure

DRAFT BILL

A

BILL

Further to amend the Sea Customs Act, 1878, and the Central Excises and Salt Act, 1944.

Be it enacted by Parliament in the the year of the Republic of India as follows :—

1. Short title—This Act may be called the Sea Customs and Central Excises (Amendment) Act, 19.

2. Amendment of section 20, Act 8 of 1878, — In section 20 of the Sea Customs Act, 1878 for sub-section (2) the following sub-section shall be substituted, namely :—

"(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to the Government."

3. Amendment of section 3, Act 1 of 1944.— In section 3 of the Central Excises and Salt Act, 1944, for sub-section (1A) the following sub-section shall be substituted, namely :—

"(1A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government as they apply in respect of goods which are not produced or manufactured by the Government."

It has been argued on behalf of the Union of India that cl. (1) of Art. 289 properly interpreted would mean that the immunity from taxation granted by the Constitution to the States is only in respect of tax *on* property and *on* income, and that the immunity does not extend to all taxes; the clause should not be interpreted so as to include taxation *in relation to* property; a tax by way of import or export duty is not a tax on property but is on the fact of importing or exporting goods into or out of the country; similarly, an excise duty is not a tax on property but is a tax on production or manufacture of goods; though the measure of the tax may have reference to the value, weight or quantity of the goods, according to the relevant provisions of the statute imposing excise duty, in essence and truly speaking import or export duties or excise duty are not taxes on property, including goods, as such, but on the happening of a certain event in relation to goods, namely, import or export of goods or production or manufacture of goods; the true meaning of Art. 289 is to be derived not only from its language but also from the scheme of the Indian Constitution distributing powers of taxation between the Union and the States in and the context of those provisions; Arts. 285 and 289 of the Constitution are complementary and the true construction of the one has a direct bearing on that of the other; those articles have to be construed in the background of the corresponding provisions of the Government of India Act 1935, ss. 154 and 155; cl. (2) of Art. 289 is only explanatory and not an exception to cl. (1) in the sense that the entire field of taxation covered by cl. (1) is also covered by the terms of cl. (2); as Parliament has exclusive power to make laws with respect to trade and commerce with foreign countries and with respect to duties of customs, including export duties and duties of excise on certain goods manufactured or produced in India, the Union is competent to impose or to authorise the imposition of custom duties on

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the import or export of goods by a State which may be its property or excise duty on the production or manufacture of goods by a State; if cl. (1) of Art. 289 were to be interpreted as including the exemption of a State in respect of customs duties or excise duty, it will amount to a restriction on the exclusive competence of Parliament to make laws with respect to trade and commerce—a restriction which is not warranted in view of the scheme of the Constitution; that the term "taxation" has been used in a very wide sense, as per Art. 366 (28); the wide sweep of that expression has to be limited with respect to the words "property" or "income"; the juxtaposition of the words "property" and "income" in cl. (1) of Art. 289 would show that the exemption of the States from Union taxation was only in respect of tax on property and tax on income; in other words, the exemption granted by Art. 289 (1) is in respect of property taxes properly so called in the sense of taxes directly on property; a tax on property means a tax in respect of ownership, possession or enjoyment of property, in contradistinction to customs duties and duties of excise, which in their true meaning are not taxes *on* property but only *in relation to* property, on a particular occasion; Cl. (2) of Art. 289 of the Constutition shows clearly that trade or business carried on by States will be liable to taxation; by cl. (3) of Art. 289 Parliament has been authorised to legislate as to what trade or business would be incidental to the ordinary functions of government and which, therefore would not be subject to taxation by the Union; any trade or business not so declared by parliament will be within the operation of cl. (2), *i.e.*, liable to Union taxation.

On the other hand, it is argued on behalf of the States that in interpreting Art. 289 of the Constitution, on which the answer to the question referred by the President depends, it has to be borne in mind that our Constitution does not make a distinction

between direct and indirect taxation; that trade and commerce and industry have been distributed between the Union and the States; that the power of taxation is different from the power to regulate trade and commerce; that the narrower construction of the Article, contended for and on behalf of the Union, will seriously and adversely affect the activities of the States and their powers under the Constitution; that a comparison and contrast between the terms of s. 155 of the Government of India Act and those of Art. 289 of the Constitution would clearly emphasize that the wider meaning contended for on behalf of the States should be preferred; that the legislative practice in respect of excise and customs duties is a permissible guide to the interpretation of the Article in question and would support the wider construction, and that even on a narrower construction, insisted upon by the Union, customs duties and duties of excise affect property and are, therefore, within the immunity granted by Art. 289 (1); properly construed Art. 289 (1) grants complete immunity from all taxation on any kind of property; and any kind of tax *on* property or *in relation to* property is within the immunity; therefore, the distinction sought to be made on behalf of the Union between tax *on* property and tax *in relation to* property is wholly irrelevant; cl. (2) of Art. 289 is not explanatory, as contended on behalf of the Union, but is an exception or in the nature of a proviso to cl. (1) of the Article; cl. (2) really carves out something which is included in cl. (1) and similarly cl. (3) is an exception to cl. (2) and carves out something which is included in cl. (2).

It should be noted that all the States which were represented before us were agreed in their contention, as set out above, except the State of Maharashtra. The learned Counsel for the State of Maharashtra agreed with the contention on behalf of the Union that there was a clear distinction between

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tax on property and excise duties. In other words, excise duty is not within the immunity granted by cl. (1) of Art. 289, which is in the nature of an exception to the general power of a State to regulate trade and commerce and its right to tax, and as such it should be very strictly construed. But he supported the other States in so far as they contended that duties of import and export were within the exemption granted by cl. (1) of Art. 289.

It will thus be seen that whereas the Union is for interpreting cl. (1) of Art. 289 in the restricted sense of the immunity being limited to a direct tax on property and on the income of a State, the States contend for an all-embracing exemption from Union taxes which have any relation to or impact on State property and income. In spite of this wide gulf between the two view points, both are agreed that the terms "property", "income' and "tax" have been used in their widest sense. 'They are also agreed that the immunity granted to the Union in respect of its property by Art. 285 corresponds to the immunity granted to the States by Art. 289, and that, therefore, the term "property" "taxation" and "tax" have to be interpreted in the same comprehensive sense in both the Articles. It will be noticed that whereas not only the term "property" but also "income" occurs in Art. 289, in Art. 285 the term "income' is not used apparently because the Constitution makers were aware of the legal position that tax on "income" (as distinct from agricultural income) is exclusively in the Union List and was so even before the advent of the Constitution. It was agreed, and it is manifest that the terms of Art. 285 and 289 are very closely parallel to those of ss. 154 and 155, respectively, of the Government of India Act, 1935 (25 & 26 Geo. VC. 42), except for the differences in expression occasioned by the change in the constitutional position and the integration of the Indian States after

1947. The language of the two parellel provisions may be set out below in order to bring out the points of similarity and contrast.

Government of India Act.	*Constitution of India.*
S. 154 : Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State; Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.	Art. 285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any Authority within a State. (2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.
S. 155-(1) Subject as hereinafter provided, the Government of a Province and the	Art. 289. (1) The property and income of a State shall be exempt from Union

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Government of India Act.

Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India, or income accruing, arising or received in British India :

Provided that—

(a) where a trade or business of any kind is carried on by or on behalf of the Gevernment of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof;

(b) nothing in this sub-section shall exempt

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taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of any tax to such extent, if any as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accuring or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business which Parliament may by law declare to be incidental to the ordinary functions of government.

a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date.

It will thus appear that both s. 154 and Art. 285 set out above speak only of "property" and lay down that property vested in the Union shall be exempt from all taxes imposed by a State or by any authority within a State, subject to one exception of saving the pre-existing taxes on such property until Parliament may by law otherwise provide. Similarly, whereas s. 155 of the Government of India Act exempts from federal taxes the Government of a Province in respect of lands or buildings situate in British India or income accruing, arising or received in British India, Art. 289(1) says "the property and income of a State shall be exempt from Union taxation". Section 156 aforesaid has two provisos (a) & (b); (a) relating to trade or business of any kind carried on by or on behalf of the Government of a Province, and (b) which is not relevant, relating to a Ruler. It will be seen that "income" is repeated in both the provisions, but what was "lands" or "buildings" has become simply "property" in Art. 289(1).

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The question naturally arises why "income" was at all mentioned when it is common ground that "income" would be included in the generic term "property". It was suggested on behalf of the Union that the juxta-position of the terms "property" and "income" of a State which have been declared to be exempt from Union taxation would indicate that the tax from which they were to be immune was tax *on* "property" and *on* "Income", *i.e.*, in both cases a direct tax, and not an indirect tax, which may be levied *in relation to* the property of a State, namely, excise duty, which is a tax on the manufacture or production of goods and customs duty which is a tax on the event of importation or exportation of goods.

Before dealing with the argument on either side, whether the restricted meaning attributed to the words of Art. 289(1) on behalf of the Union, or the wider significance claimed for those words on behalf of the States, was intended by the Constitution makers, it is necessary to bear in mind certain general considerations and the scheme of the constitutional provisions bearing on the power of the Union to impose the taxes contemplated by the proposed legislation. Neither the Union nor the States can claim unlimited right as regards the are area of taxation. The right has been hedged in by considerations of respective powers and responsibilities of the Union in relation to the States, and those of the States in relation to citizens or *inter se* or in relation to the Union. Part XII of the Constitution relates to "Finances etc." At the very outset Art. 265 lays down that no tax shall be levied or collected except by authority of law. That authority has to be found in the three lists in the Seventh Schedule, subject to the provisions of Part XI which deals with the relations between the Union and the States, particularly Chapter I relating to legislative relations and distribution of legislative powers, with special reference to Art. 246. Under that Article the legislature of a State has exclusive powers to make laws with respect

to the matters enumerated in List II and Parliament and the Legislature of a State have powers to make laws with respect to the matters enumerated in List III (the Concurrent List), and notwithstanding those two lists, Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I (the Union List). Parliament also has power to make laws with respect to any of the matters enumerated in the State List with respect to any part of the territory of India which is not included in a State. By Art. 248 Parliament has been vested with exclusive power to make laws with respect to any matters not enumerated in the State list or the Concurrent list, including the power of making a law imposing a tax not mentioned in either of those lists. It is not necessary to refer to the extended power of legislation vested in Parliament in abnormal circumstances, as contemplated by Arts. 249, 250 and 252. In short, though the States have been vested with exclusive powers of legislation with respect to the matters enumerated in List II, the authority of Parliament to legislate in respect of taxation in List I is equally exclusive. The scheme of distribution of powers of legislation, with particular reference to taxation, is that Parliament has the exclusive power to legislate imposing taxes on income other than agricultural income (Entry 82); duties of customs including export duties (Entry 83); duties of excise on tobacco and other goods manufactured or produced in India, except alcoholic liquors for human consumption and opium, Indian hemp and other narcotic drugs and narcotics, which by entry 51 of List II is vested in the State legislature (Entry 84). It is not necessary to refer to the other taxes which Parliament may impose because they have no direct bearing on the questions in controversy in this case. Similarly, the State legislatures have the power to impose taxes on agricultural income (Entry 46), taxes on lands and buildings (Entry 49) and duties of excise on alcoholic liquors and opium etc., manufactured or

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produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India (Entry 51). It is also not necessary to refer to other heads of taxes which are contained in the State List. It would, thus appear that whereas all taxes on income other than agricultural income are within the exclusive power of the Union, taxes on agricultural income only are reserved for the States. All customs duties, including export duties, relating as they do to transactions of import into or export out of the country are within the powers of Parliament. The States are not concerned with those. They are only concerned with taxes on the entry of goods in local areas for consumption, use or sale therein, covered by entry 52 in the State List. Except for duties of excise on alcoholic liquors and opium and other narcotic drugs, all duties of excise are leviable by Parliament. Hence, it can be said that by and large, taxes on income, duties of customs and duties of excise are within the exclusive power of legislation by Parliament.

Those exclusive powers of taxation, as aforesaid vested in Parliament, have to be correlated with the exclusive power of Parliament to legislate with respect to trade and commerce with foreign countries; import and export duties across customs frontiers; definition of customs frontiers (Entry 41); inter-State trade and commerce (Entry 42). As the regulation of trade and commerce with foreign countries, as also inter-State, is the exclusive responsibility of the Union, Parliament has the power to legislate with respect to those matters, alongwith the power to legislate by way of imposition of duties of customs in respect of import and export of goods as also to impose duties of excise on the manufacture or production in any part of India in respect of goods other than alcoholic liquors and opium, etc, referred to above. Further, the imposition of customs duties

or excise duties may be either (1) with a view to raise revenue or (2) to regulate trade and commerce, both in land and foreign, or (3) both to regulate trade and commerce and to raise revenue. If therefore Art. 289 (1) completely exempts all property of the States from all taxes the power of Parliament to regulate foreign trade by the use of its power of taxation would be seriously impaired and this consideration will have to be kept in mind when interpreting Art. 289(1).

There is another general consideration which has also to be borne in mind in view of the provisions contained in Part XII of the Constitution. Though various taxes have been separately included in List I or List II and there is no overlapping in the matter of taxation between the two Lists and there is no tax provided in the Concurrent List except stamp duties (Item 44), the constitution embodies an elaborate scheme for the distribution of revenue between the Union and the States in Part XII, with respect to taxes imposed in List I. The scheme of the Constitution with respect to financial relations between the Union and the States, devised by the Constitution makers, is such as to ensure an equitable distribution of the revenue between the Centre and the States. All revenues received by the Government of India normally form part of the Consolidated Fund of India, and all revenues received by the Government of a State shall form part of the Consolidated Fund of the State. This general rule is subject to the provision of the Chapter I of Part XII in which occur Arts. 266 to 277. Though stamp duties and duties of excise on medicinal and toilet preparations which are covered by the Union List are to be levied by the Government of India, they have to be collected by the States within which such duties are leviable and are not to form part of the Consolidated Fund of India, but stands assigned to the State which has collected them (Art. 268). Similarly, duties and taxes

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levied and collected by the Union in respect of Succession Duty, Estate Duty, Terminal Taxes on goods and passengers carried by Railway, sea or air, taxes on rail fares and freights, etc. as detailed in Art. 269 shall be assigned to the States and distributed amongst them in accordance with the principles of distribution as may be formulated by Parliamentary legislation, as laid down in cl. (2) of Art. 269. Art. 270 provides that taxes on income, other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States. The taxes and duties levied by the Union and collected by the Union or by the States as contemplated by Arts. 268, 269 and 270 and distributed amongst the States shall not form part of the Consolidated Fund of India. Further Excise duties which are levied and collected by the Government of India and which form part of the Consolidated Fund of India may also be distributed amongst the States, in accordance with the principles laid down by Parliament in accordance with the provisions of Art. 272. Express provision has been made by Article 273 in respect of grants-in-aid of the revenue of the States of Assam, Bihar, Orissa and West Bengal in lieu of assignment of any share of the net proceeds of export duty on jute and jute products. Further a safeguard has been laid down in Art. 274 that no bill or amendment which imposes or varies any tax or duty in which States are interested or which affects the principles of distribution of duties or taxes amongst the States as laid down in Arts. 268—273 shall be introduced or moved in either House of Parliament except on the recommendation of the President. Parliament has also been authorised to lay down that certain sums may be charged on the Consolidated Fund of India in each year by way of grants-in-aid of the revenues of such States as it may determine to be in need of assistance. This aid may be different for different States, according to their needs, with particular reference to schemes of

development for the purposes indicated in Art. 275 (1).

Provision has also been made by Art. 280 for the appointment by the President of a Finance Commission to make recommendations to the President as to the distribution amongst the Union and the States of the net proceeds of taxes and duties as aforesaid, and as to the principles which should govern the grants-in-aid of the revenue of the States out of the Consolidated Fund of India.

It will thus appear that Part XII of the Constitution has made elaborate provisions as to the revenues of the Union and of the States, and as to how the Union will share the proceeds of duties and taxes imposed by it and collected either by the Union or by the States. Sources of revenue which have been allocated to the Union are not meant entirely for the purposes of the Union but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus all the taxes and duties levied by the Union and collected either by the Union or by the States do not form part of the Consolidated Fund of India but many of those taxes and duties are distributed amongst the States and form part of the Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing the revenues of the States in accordance with their needs. The question of the distribution of the aforesaid taxes and duties amongst the States and the principles governing them, as also the principles governing grants-in-aid of revenues of the States out of the Consolidated Fund of India, are matters which have to be decided by a high-powered Finance Commission, which is a responsible body designated to determine those matters in an objective way. It cannot, therefore, be justly

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contended that the construction of Art. 289 suggested on behalf of the Union will have the effect of seriously and adversely affecting the revenues of the States. The financial arrangement and adjustment suggested in Part XII of the Constitution has been designed by the Constitution-makers in such a way as to ensure an equitable distribution of the revenues between the Union and the States, even though those revenues may be derived from taxes and duties imposed by the Union and collected by it or through the agency of the States. On the other hand, there may be more serious difficulties in the way of the Union if we were to adopt the very wide interpretation suggested on behalf of the States. It will thus be seen that the powers of taxation assigned to the Union are based mostly on considerations of convenience of imposition and collection and not with a view to allocate them solely to the Union ; that is to say, it was not intended that all taxes and duties imposed by the Union Parliament should be expended on the activities of the Centre and not on the activities of the States. Sources of revenue allocated to the States, like taxes on land and other kinds of immovable property, have been allocated to the States alone. The Constitution makers realised the fact that those sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities out of the revenues levied and collected by the Union Government. Realising the limitations on the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made, as already indicated, specific provisions empowering Parliament to set aside a portion of its revenues, whether forming part of the Consolidated Fund of India or not, for the benefit of the States, not in stated proportions but according to their needs. It is clear, therefore, that considerations which may apply to those Constitutions which recognise

water-tight compartments between the revenues of the federating States and those of the federation do not apply to our Constitution which does not postulate any conflict of interest between the Union on the one hand and the States on the other. The resources of the Union Government are not meant exclusively for the benefit of the Union activities ; they are also meant for subsidising the activities of the States in accordance with their respective needs, irrespective of the amounts collected by or through them. In other words, the Union and the States together form one organic whole for the purposes of utilisation of the resources of the territories of India as a whole.

Bearing the scheme of our Constitution in mind let us now turn to the words of Art. 289 and also its complementary article, namely, Art. 285. The contention on behalf of the Union is that when Art. 289 provides for exemption of the property and income of a State from Union taxation, it only provides for exemption from such tax as may be levied directly on property and income and not from all Union taxes, which may have some relation to the property or income of a State. On the other hand, the contention on behalf of the States is that when Art. 289 (1) provides for exemption of the property and income of a State from Union taxation, it completely exempts the property and income of a State from all Union taxation of whatsoever nature it may be. So far as exemption of income is concerned, there is no serious dispute that the exemption there is with respect to taxes on income other than agricultural income (item 82, List I), for the simple reason that the only tax provided in List I with respect to income is in item 82 of List I. The ditpute is mainly with respect to taxes on "property". Now this fact in our opinion has an important bearing on the nature of taxation of "property" which is exempt under Art. 289 (1). If the income

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of a State is exempt only from taxes on income, the juxtaposition of the words "property and income" in Art. 289 (1) must lead to the inference that property is also exempt only from direct taxes on property. But it is said that there is no specific tax on property in List I and it is therefore contended on behalf of the States that when property of a State was exempted from Union taxation, the intention of the Constitution makers must have been to exempt it from all such taxes which are in any way related to property. Therefore, it is urged that the exemption is not merely from taxes directly on property as such but from all taxes which impinge on property of a State even indirectly, like customs duties, or export duties or excise duties. It is true that List I contains no tax directly on property like List II, but it does not follow from that that the Union has no power to impose a tax directly on property under any circumstances. Article 246 (4) gives power to Parliament to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. This means that so far as Union territories are concerned Parliament has power to legislate not only with respect to items in List I but also with respect to items in List II. Therefore, so far as Union territories are concerned, Parliament has power to impose a tax directly on property as such. It cannot therefore be said that the exemption of States' property from Union taxation directly on property under Art. 289 (1) would be meaningless as Parliament has no power to impose any tax directly on property. If a State has any property in any Union territory that property would be exempt from Union taxation on property under Art. 289 (1). The argument therefore that Art. 289 (1) cannot be confined to tax directly on property because there is no such tax provided in List I cannot be accepted.

Now the words in Art. 289, confining ourselves to "property", are that "the property of a State shall be exempt from Unio taxation". It is remarkable that the word "all" does not govern the words "Union taxation" in Art. 289 (1). It does not provide that the property of a State shall be exempt from all Union taxation. The question therefore is whether when Art. 289 provides for the exemption of State property from Union taxation, it only provides for exemption from that kind of Union taxation which is a tax directly on property. It is true that Art. 289(1) does not specifically say that the property of a State shall be exempt from Union taxation on property. It may however be properly inferred that that was the intention if one looks to the language of Art. 289 (2). That clause mainly deals with income accruing or arising to a State from trade or business carried on by it. At the same time it provides that where the State is carrying on a trade or business nothing in cl. (1) shall prevent the Union from imposing any tax to such extent as Parliament may by law provide in respect of any property used or occupied for the purposes of such trade or business, and the authority thus given to Parliament to tax property used or occupied in connection with trade or business can only refer to a tax directly on property as such, which is used or occupied for business, the tax being related to the use or occupation of the property. The meaning will be clearer if we look to Art. 285. Clause (1) of that Article provides that the property of the Union shall be exempt from all taxes imposed by a State or by any authority within a State. *Prima facie* the use of the words "all taxes" in cl. (1) would suggest that the property of the Union would be exempt from all taxes of whatsoever nature, which a State can impose. But if one looks to cl. (2) of Art. 285 the nature of taxes from which the property of the Union would be exempt is clearly indicated as a tax on property. Clause (2) provides that "nothing in clause (1) shall, until

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Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State". It will in our opinion be permissible in view of cl. (2) to read cl. (1) of Art. 285 when it speaks of all taxes as relating to taxes of the nature of taxes directly on property. We have already pointed out, when dealing with the general considerations which should govern the interpretation of Art. 289 (1) that the power of the Union would be crippled if Art. 289 is interpreted as exempting the property of a State from all Union taxes. We have also pointed out that even though the taxes may be collected and levied by the Union, there are provisions in Part XII for the assignment or distribution of many Union taxes to the States. There are also provisions for grants-in-aid by the Union from the Consolidated Fund of India to a State. In these circumstances it would in our opinion be in consonance with the scheme of the Constitution relating to taxation to read Art. 289 (1) as laying down that the property and income of a State shall be exempt from Union taxation *on property and income*. There is in our opinion better warrant for reading these words "on property and income" after the words "Union taxation" in Art. 289(1) in view of the scheme of our Constitution relating to taxation and also the provisions of Part XII thereof than to read the word "all" before the words "Union taxation" in that clause. The effect of reading the word "all" before the words "Union taxation" would in our opinion be so serious, and so crippling to the resources, which the Constitution intended the Union to have, as to make it impossible to give that intention to the words of cl. (1) of Article 289. On the other hand, the States would not be so seriously affected if we read the words "on property and income" after the words

"Union taxation" in Art. 289 (1), for unlike other Constitutions there is provision in Part XII of our Constitution for assignment or distribution of taxes levied and collected by the Union to the States and also for grants-in-aid from the Union to the States, so that the burden which may fall on the States by giving a restrictive meaning to the words used in cl. (1) of Art. 289 would be alleviated to a large extent in view of the provisions in Part XII of the Constitution for assignment and distribution of taxes levied by the Union to the States and also for grants-in-aid from the Union to the States.

Further it must not be forgotton that Arts. 285 and 289 are successors of ss. 154 and 155 of the Government of India Act, though there are differences in detail between them, in particular cl. (2) of Art. 289, which corresponds to the proviso to s. 154 seems in our opinion to make it clear by the change in the language, that cl. (1) of Art. 285 when it speaks of all taxes is referring to taxes on property of which cl. (2) definitely permits continuance provided such property of the Union immediately before the commencement of the Constitution was liable or was treated as liable to such tax. As to Art. 289 (1), a change has been made in the words, for s. 155(1), which corresponded thereto, provided that the Government of a Province shall not be liable to Federal taxation in respect of lands or buildings. Art. 289 on the other hand refers not only to lands and buildings but to all property of a State, whether movable or immovable and exempts it from Union taxation. Even so, we find no warrant for interpreting cl. (1) of Art. 289 as if it exempts all property of a State from all Union taxation. We are therefore of opinion reading Art. 289 and its complementary Art. 285 together that the intention of the Constitution makers was that Art. 285 would exempt all property of the Union from all taxes on property levied by a State or by any authority within the

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State while Art. 289 contemplates that all property of the States would be exempt from all taxes on property which may be leviable by the Union. Both the Articles in our opinion are concerned with taxes directly either on income or on property and not with taxes which may indirectly affect income or property. The contention therefore on behalf of the Union that these two Articles should be read in the restricted sense of exempting the property or income of a State in one case and the property of the Union in the other from taxes directly either on property or on income as the case may be, is correct.

In this connection, it is pertinent to refer to certain decision of the High Court of Australia, the Supreme Court of Canada, and the Privy Council bearing on the construction of similar, though not identical, provisions in the Constitutions of Australia and Canada.

The corresponding provisions of the Canadian Constitution are contained in ss. 91, 92 and 125 of the British North America Act, 1867 (30-31 Vict. Ch. 3). The relevant portion of s. 91 is as follows :—

> "It shall be lawful for the Queen.....to make laws for the peace, order and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say :
>
> ... ...

(2) The regulation of Trade and Commerce;

(3) The raising of money by any mode or system of taxation."

S. 92 provides for exclusive powers of the province including direct taxation within the Province in order to the raising of revenue for Provincial purposes.

Section 125 is in these terms :—

"No lands or property belonging to Canada or any Province shall be liable to taxation."

It will thus be seen that the above-quoted section runs very parallel to the provisions of Art. 289 (1) of our Constitution. These provisions of the Canadian constitution have come up for consideration before the Supreme Court of Canada, as also before the Judicial Committee of the Privy Council on a number of occasions. In the case of the Attorney-General of *The Province of British Columbia* v. *The Attorney-General of the Dominion of Canada* (64 Can. S.C.R. 377) the question arose whether the Province of British Columbia could import liquors into Canada for the purposes of sale, pursuant to the provisions of the Government Liquor Act (11 Geo. V, c. 30) without payment of customs duties imposed by the Dominion of Canada. It was argued, as has been argued before us, that the word "tax" was wide enough to include the imposition of customs duties, and that the word "property" in s. 125 included property of all kinds. The answer given by the Dominion was that customs duties did not constitute taxes within the meaning of the expression used in s. 125 but were merely in the nature of regulation of trade and commerce, and secondly, assuming that customs duties were included in the expression "taxation", they did not constitute taxation

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on property. It was also contended on behalf of the Dominion that the word "taxation" in s. 125 was not intended to comprehend customs duties inasmuch as the prohibition indicated by the section was intended to be reciprocal prohibition and did not extend as regards the Dominion to indirect taxation. The Supreme Court of Canada, by majority judgment, upheld the decision of the Exchequer Court of Canada, which had held that the import by the Province was liable to pay import duty to the Dominion. Thus the contention raised on behalf of the Dominion was accepted that customs duties were not taxes imposed on property as such but were levied on the importation of certain goods into Canada as a condition of their importation.

This decision of the Supreme Court was challenged before the Privy Council, by special leave. The judgment of the Privy Council is reported in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1924 A. C. 222). The Privy Council upheld the decision appealed from and held that import duties imposed by the Dominion upon alcoholic liquors imported into Canada by the Government of British Columbia for the purposes of trade was valid. The Privy Council based its decision on a consideration of the whole scheme of the Canadian Constitution under which the Dominion had the power to regulate trade and commerce throughout the Dominion, and held that "s. 125 must therefore be so considered as to prevent the paramount purpose thus declared being defeated". The Privy Council further observed that "the true solution is to be found in the adaptation of s. 125 to the whole scheme of Government which the statute defines". The *ratio decidendi* in the case just mentioned fully supports the contention raised on behalf of the Union in the present case and the interpretation of Art. 289 (1) must also be adapted to the whole scheme of the Constitution.

Turning now to the Constitution of Australia and the relevant cases decided by the High Court of Australia, it is necessary to set out the relevant part of s. 51 of the Commonwealth of Australia Constitution Act, 1900 (63 and 64 Vict. c. 12) :—

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good Government of Commonwealth with respect to—
>
> (i) Trade and Commerce with other countries, and among the States;
>
> (ii) Taxation; but so as not to discriminate between the States or parts of States."

This closely follows that part of s. 91 of the British North America Act, which has vested the Federal Parliament with the exclusive power to legislate in respect of such trade and commerce and taxation in respect thereof. Section 114 of the Commonwealth of Australia Constitution grants immunity from taxation in the following terms :—

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

This corresponds to the provision of s. 125 of the Canadian Constitution and Arts. 285 and 289 of our Constitution, which have laid down the provisions as to exemption from taxation. The question of the interpretation of those provisions of the Australian Constitution came before the High Court of Australia in the case of *the Attorney-General of New South*

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Wales v. *The Collector of Customs for New South Wales* (1907-8) 5 C.L.R. 818. In this case an action was brought by the State of New South Wales to recover the amount of customs duties realised by the Collector of Customs in respect of certain steel rails imported by the plaintiff from England for use in the construction of the railways of the State. The State claimed that those rails were not liable to customs duties on the ground that they were the property of the Government and as such exempt from customs duties by virtue of s. 114 of the Constitution. The majority of the Court decided that the imposition of customs duties being a mode of regulating trade and commerce with other countries as well as of exercising the taxing power, the goods imported by a State Government were subject to the customs laws of the Commonwealth. They also laid it down that the levying of the duties of customs is not an imposition of a tax on property within the meaning of s. 114 aforesaid. The Court added that even if the words of the section were capable of bearing that comprehensive meaning, that was not the only or necessary meaning and should be rejected as inconsistent with the provisions of the Constitution conferring upon the Commonwealth exclusive power to impose duties of customs and to regulate trade and commerce. Isaacs J. came to the same conclusion though on somewhat different grounds. In the result, the Court unanimously held, though not for the same reasons, that the goods imported by the State were liable to import duty. The High Court held that the words "impose any tax" might be capable of application to duties of customs. But it pointed out that the levying of customs duties was not within the comprehension of the expression "imposition of a tax on property." It also pointed out that customs duties were imposed in respect of goods and in a sense "upon" goods, even as the expression Stamp duties, Succession Duties and other forms of indirect taxes are said to be taxes on deeds and other real or personal property. The

Court recognised the legal position that customs duties are not really taxation upon property but upon operations or movements of property.

These authorities based on the interpretation of analogous provisions in the Canadian and Australian Constitutions fully support the contention raised on behalf of the Union that customs duties are not taxes on property but are imposts by way of conditions or restrictions on the import and export of goods, in exercise of the Union's exclusive power of regulation of trade and commerce read along with the power of taxation and that the general words of the exemption have to be limited in their scope so as not to come into conflict with the power of the Union to regulate trade and commerce and to impose duties of customs.

It is next urged on behalf of the States that even if Art. 289 (1) only exempts the property of the States from tax directly on property, the levy of excise on goods under item 84 of List I is a tax on property and therefore no excise can be levied on goods belonging to States and manufactured by them. It is further urged that duties of customs including export duties under item 83 of List I are equally duties on the goods imported or exported and therefore the property of the State must be exempt under Art. 289 (1), both from excise duties and from duties of customs including export duties. This raises the question of the nature of duties of excise and customs. This question with respect to excise duties was considered by this Court in the case of *Amalgamated Coalfields Ltd.* v. *Union of India* (A.I.R. 1962 S.C. 1281). After considering the previous decisions of the Federal Court *In re. The Central Provinces and Berar Sales of Motor and Lubricant Taxation Act* (1939 F.C.R. 18); *The Province of Madras* v. *M/s. Budhu Paidanna* (1942 F. C. R. 90) and of the *Judicial Committee of the Privy Council in Governor General in Council* v. *Province of Madras* (1945

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F. C. R. 179), this Court observed as follows at p. 1287 :—

> "With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts ; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income.

Similarly in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty? Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, *i.e.*, before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms on which goods may be brought into the country from a foreign land. Similarly an export duty is a condition precedent to sending goods out of the country to other lands. It is not a duty on property in the sense of Art. 289 (1). Though the expression "taxation", as defined in Art. 366 (28), "includes the imposition of any tax or impost, whether general or local or special", the amplitude of that definition has to be cut down if the context otherwise so requires. The position is that whereas the Union Parliament has been vested with exclusive power to regulate trade and commerce, both foreign and inter-State (Entries 41 and 42) and with the sole responsibility of imposing export and import duties and duties of excise, with a view to regulating trade and commerce and raising revenue, an exception has been engrafted in Art. 289 (1) in favour of the States, granting them immunity from certain kinds of Union taxation. It, therefore, becomes necessary so to construe the provisions of the Constitution as to give full effect to both, as far as may be. If it is held that the States are exempt from all taxation in respect of their export or imports, it is not difficult to imagine a situation where a State might import or export all varieties of things and thus nullify to

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a large extent the exclusive power of Parliament to legislate in respect of those matters. The provisions of Art. 289 (1) being in the nature of an exception to the exclusive field of legislation reserved to Parliament, the exception has to be strictly construed, and therefore, limited to taxes on property and on income of a State. In other words, the immunity granted in favour of States has to be restricted to taxes levied directly on property and income. Therefore, even though import and export duty or duties of excise have reference to goods and commodities, they are not taxes on property directly and are not within the exemption in Art. 289 (1).

We may in this connection refer to the *Attorney-General for British Columbia* v. *Kingcome Navigation Co. Ltd.* (1934 A. C. 45), to bring out the essence of duties of customs and excise which were held by the Privy Council to be in their essence trading taxes as distinguished from direct taxes.

But it is contended on behalf of the States that in the scheme of our Constitution no distinction has been made between direct and indirect tax and therefore this distinction is not relevant to the present controversy. It is true that no such express distinction has been made under our Constitution; even so taxes in the shape of duties of customs (including export duties) and excise, particularly with a view to regulating trade and commerce in so far as such matters are within the competence of Parliament and are covered by various entries in List I to which reference has already been made, cannot be called taxes on property; they are imposts with reference to the movement of property by way or import or export or with reference to production or manufacture of goods. Therefore even though our Constitution does not make a clear distinction between direct and indirect taxes, there is no doubt that the exemption provided in Art. 289 (1) from Union

taxation to property must refer to what are known to economists as direct taxes on property and not to indirect taxes like duties of customs and excise which are in their essence trading taxes and not taxes on property.

It is also contended on behalf of the States that the narrower construction suggested on behalf of the Union would very seriously and adversely affect activities of the States. This argument does not take into account the more serious consequences that would follow if the wider interpretation suggested on behalf of the States were to be adopted. For example, a State may decide to embark upon trade and commerce with foreign countries on a large scale in respect of different commodities. On the interpretation put forward by the States, the Union Parliament would be powerless to regulate such trade and commerce by the use of the power of taxation conferred on it by entry 83 of List I, thus largely nullifying the exclusive power of Parliament to legislate in respect of international trade and commerce, including the power to tax such trade. Trade and commerce with foreign countries, export and import across the customs frontriers and inter-State trade and commerce are all within the exclusive jurisdiction of the Union Parliament. This Court naturally will not adopt a construction of Art. 289(1) which will lead to such a startling result as to nullify the exclusive power of Parliament in these matters.

Lastly, it is urged on behalf of the States that s. 20 of the Sea Customs Act was recast and amended by Act. XLV of 1951 and that sub-s. (2) thereof has borrowed most of its words from the provisions of cl. (2) of Art. 289, and therefore, Parliament itself had understood cl. (2) of Art. 289 in the sense in which the States are contending that it should be interpreted. But that in our opinion does not

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conclude the matter, for we have to construe the provisions of the Constitution in their proper setting and we are entitled to come to the conclusion that Parliament may not have been correct in so interpreting the words of cl. (2) of Art. 289.

For the reasons given above, it must be held that the immunity granted to the States in respect of Union taxation does not extend to duties of customs including export duties or duties of excise. The answer to the three questions referred to us must, therefore, be in the negative. Let the opinion of this Court be reported to the President accordingly.

Das J.

S. K. DAS J.—In exercise of the powers conferred upon him by cl. (1) of Art. 143 of the Constitution, the President of India has referred three questions of law to this court for consideration and a report of its opinion thereon. These questions are :

(1) Do the provisions of article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that article ?

(2) Do the provisions of article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article ?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878), and sub-section (1A) of section 3 of the Central Excises and Salt Act, 1944 (Act I

of 1944) as amended by the Bill set out in the annexure be inconsistent with the provisions of article 289 of the Consitution of India ?

We have had the advantage of very full arguments on these questions. The learned Solicitor-General of India has put forward the point of view on behalf of the Union of India. Several States were represented before us by their Advocates-General or other counsel. Except for the State of Maharashtra which has taken a stand somewhat akin to that of the Union of India, there is a sharp conflict between the States and the Union as to the answers to be given to the three questions. We shall presently refer in greater detail to the points of conflict but it may be generally stated that except for the State of Maharashtra, the States have taken the stand that under Art. 289 of the Constitution the property of a State is exempt from the imposition of customs duties and excise duties except to the extent permitted under clause (2) of the said article. The Union of India has taken the stand that the amplitude of power given to the Union Legislature to impose duties of customs (entry 83 of List I of the Seventh Schedule) and duties of excise (entry 84 of List I of the Seventh Schedule) can be cut down only by a very strict interpretation of article 289 and that strict interpretation is that cl. (1) of Art. 289 is confined to a property tax only, namely, a tax on the goods as such and not on their importation or exportation or on their production and manufacture, and looked at from that point of view Art. 289 of the Constitution does not give any protection to a State in the matter of customs duties and excise duties.

It is necessary perhaps to say something at this stage about the constitutional background against which the questions fall for consideration. The Sea

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Customs Act, 1878 (8 of 1878) was enacted in March 1878 in order to consolidate and amend the law relating to the levy of sea customs-duties. The Central Excises and Salt Act, 1944 (1 of 1944) was enacted in February 1944 to consolidate and amend the law relating to central duties of excise and to salt. The Government of India Act, 1915 (5 and 6 Geo. 5, c. 61) was a consolidating measure repealing and re-enacting the numerous Parliamentary Statutes relating to the administration of British India which had been passed between the years 1770 and 1912. This Act was amended in certain minor respects by the Government of India Amendment Act, 1916 (6 and 7 Geo. 5, c. 37) which also contained certain substantive provisions not incorporated in the principal Act. In 1919 the Act again underwent amandment by the passing of the Government of India Act, 1919 (9 and 10 Geo. 5, c. 101) which was enacted for the purpose of bringing into effect the Indian constitutional reforms based on what is commonly known as the Montagu-Chelmsford Report. Section 45 of the Act of 1919 provided that the amendments made by that Act and the Act of 1916 be incorporated in the text of the Government of India Act, 1915, and that that Act as so amended be known as the Government of India Act. This Government of India Act constituted an Indian Legislature consisting of two Chambers, namely, the Council of States and the Legislative Assembly. This Legislature had the power to make laws for all persons, for all courts and for all places and things within British India and had also the power to repeal or alter any laws which were in force in any part of British India. Prior to the Government of India Act, 1935 (26 Geo. V, c. 2) the dominion and authority of the Crown, which extended over the whole of British India, was derived from many sources, in part statutory and in part prerogative, the former having their origin in Acts of the British Parliament and the latter in rights based upon conquest, cession or usage

some of which were directly acquired while others were enjoyed by the Crown as successor to the rights of the East India Company. The Secretary of State for India was the Crown's responsible agent for the exercise of all authority vested in the Crown in relation to the affairs of India. But the superintendence, direction and control of the civil and military government of India was declared by the Government of India Act to be vested in the Governor-General-in-Council; while the government or administration of the Governers' and Chief Commissioners' Provinces vested respectively in the local governments.

The Government of India Act, 1935 introduced a dual system of government in the shape of autonomous Provinces and a Federation; two sets of Legislatures were set up, one Federal Legislature and the other Provincial Legislature. In the Seventh Schedule were given three Lists, Federal Legislative List called List I, Provincial Legislative List called List II and the Concurrent legislative list called List III. Legislative power was distributed amongst the legislatures in accordance with those lists. Duties of custom, including export duties came within item 44 of List I and duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors, opium etc., came within item 45. The Indian Legislature amended the Sea Customs Act, 1878 as also the Central Excises and Salt Act, 1944 from time to time in exercise of the powers which it had either under the Government of India Act, or the Government of India Act, 1935. The Indian Independence Act, 1947 created the Dominion of India as from August 15, 1947 and the Secretary of State for India as the Crown's responsible agent for Indian affairs disappeared from the Indian constitutional scene. The Constitution of India came into force on January 26, 1950. This Constitution envisaged India as a Sovereign

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Democratic Republic, *viz.*, a Union of States but the scheme of the Government of India Act, 1935 with regard to distribution of legislative powers between Parliament, which is the Union Legislature, and the State Legislatures was continued. The Seventh Schedule of the Constitution contains three lists, Union List called List I, State List called List II, and Concurrent List called List III. Entry 83 of List I relates to duties of customs including export duties and entry 84 relates to duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors, opium etc. The distribution of legislative powers and the legislative relations between the Union and the States are controlled by various articles, namely, Arts. 245 to 258, in Chapter I of Part XI of the Constitution. We may indicate here briefly the constitutional position that in normal circumstances Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I, and the Legislature of any State has exclusive power to make laws for any such State with respect to any of the matters enumerated in List II; both Parliament and the Legislature of a State have power to make laws with respect to any of the matters enumerated in List III.

Under Art. 245 of the Constitution, the power of Parliament as also of the Legislature of a State to make laws is subject to the provisions of the Constitution. Some of these provisions are contained in Art. 285 and Art. 289 which occur in Chapter I of Part XII of the Constitution. This Part deals with several subjects, such as Finance (Chapter I), Borrowing (Chapter II) and Property, Contracts etc. (Chapter III). We may now read Art. 289 :

> "289 (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government."

The interpretation of this article is the main subject for consideration in this reference.

Soon after the coming into force of the Constitution, s. 20 of the Sea Customs Act, 1878 which stated what goods would be dutiable under the Act, was, amended by the Union Legislature by Act XLV of 1951. The amendment took the shape of inserting a sub-section in s. 20, sub-s. (2), which said that the provisions of sub-s. (1) shall apply in respect of goods belonging to the Government of a State and used for the purpose of a trade or business of any kind carried on by, or on behalf of, that Government or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government. A similar amendment was made in s. 3 of the Central Excises and Salt Act, 1944 by inserting sub-s. (1-A) in that section. That sub-section said that the provisions of sub-s. (1) shall apply to all excisable goods other than salt which are produced or manufactured in India by, or on behalf of a Government of a State (other than a Union territory) and used for the purposes

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of a trade or business of any kind carried on by or on behalf of that Government, or of any operations connected with such trade or business as they apply in respect of goods which are not produced or manufactured by any Government. It is obvious that these two amendments were intented to bring the Sea Customs Act, 1878 and the Central Excises and Salt Act, 1944 into harmony with Art. 289 of the Constitution. In 1962 the Union Government introduced a draft Bill in Parliament further to amend the Sea Customs Act, 1878 and the Central Excises and Salt Act, 1944. We may quote two clauses of this draft Bill in order to appreciate how this reference has come to be made to this court. These two clauses are clauses 2 and 3 of the draft Bill which run :

> 2. Amendment of section 20, Act 8 of 1878,—In section 20 of the Sea Customs Act, 1878, for sub-section (2) the following sub-section shall be substituted, namely :—
>
> "(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to the Government."
>
> 3. Amendment of section 3, Act I of 1944,—In section 3 of the Central Excises and Salt Act, 1944, for sub-section (1A) the following sub-section shall be substituted, namely :—
>
> "(1A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government as they apply in respect of goods which are not produced or manufactured by the Government."

This draft Bill gave rise to a controversy and the Governments of certain States expressed the view that the amendments proposed in the draft Bill would not be constitutionally valid as the provisions of Art. 289 read with the definitions of 'taxation' and 'tax' in cl. (28) of Art. 366 of the Constitution preclude the Union from imposing or authorising the imposition of any tax, including customs duties and excise duties, on or in relation to any property of a State, except to the extent permitted by cl. (2) read with cl. (3) of the said Art. 289. The Union Government was, however, of the view that the exemption from Union taxation granted by cl. (1) of Art. 289 was restricted to Union taxes *on* the property of a State and did not extend to Union taxes *in relation to* the property of a State; therefore, customs duties being taxes on the import or export of goods and not on goods as such and excise duties being taxes on the production or manufacture of goods and not on goods as such did not come within the protection of cl. (1) of Art. 289. This conflict of views gave rise to doubts as to the true interpretation and scope of Art. 289 of the Constitution and in particular, as to the constitutional validity of the amendments proposed in the draft Bill. This led the President to refer the three questions stated above to this court for consideration and a report of its opinion thereon.

In one of the very earliest references made to the Federal Court (*In re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (Central Provinces and Berar Act No. XIV of 1938)* (1), under s. 213 of the Government of India Act, 1935 (which corresponded to Art. 143 of the Constitution), Gwyer C. J. observed that the rules which would apply to the interpretation of other statutes would apply equally to the interpretation of a constitutional enactment, but their application must be conditioned of necessity by the

(1) [1939] F.C.R. 18.

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subject matter of the enactment itself, namely, the nature and scope of the Act itself which is a Constitution, "a mechanism under which laws are to be made and not a mere Act which declares what the law ought to be". He said that this was especially true of a Federal Constitution, with its nice balance of jurisdictions. We recognise that a broad and liberal spirit must inspire those whose duty it is to interpret an organic instrument which sets up a constitutional machinery, a machinery meant to control the life of a nation, to embody its ideals, and facilitate the realisation of such ideals for the present and the future; this does not however imply that those whose duty it is to interpret the Constitution 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.

Keeping these principles in mind let us consider the problem before us by an examination of the relevant articles of the Constitution bearing on that problem. The crux of the problem is the true scope and effect of Art. 289 of the Constitution which we have quoted earlier. Cl. (1) of Art. 289 states that the property and income of a State shall be exempt from Union taxation. Now, Art. 366 (28) says in clear terms that, unless the context otherwise requires, the expression "taxation" includes the imposition of any tax or impost whether general or local or special and the word "tax" shall be construed accordingly. We shall presently consider the question whether the context of Art. 289 requires a different meaning to be given to the word "taxation". But let us first see what happens if we read Art. 289 (1) by substituting for the expression "taxation" the words which Art. 366 (28) says the expression "taxation" includes. Cl. (1) of Art. 289 will then read as follows :

> "The property and income of a State shall be exempt from the imposition of any tax or

> impost, whether general or local or special, by the Union."

There can be no manner of doubt that customs duty or excise duty is an impost within the meaning of Art. 366 (28), and this the learned Solicitor-General has not contested. If therefore Art. 289 (1) is interpreted with the key furnished by Art. 366 (28), then it seems to us that however broad and liberal a spirit may inspire those whose duty it is to interpret the article, it would be impossible to stretch or pervert the language of the article which in the clearest of terms says that the property and income of a State shall be exempt from any impost, whether general or local or special, by the Union.

So far as the property of the Union is concerned the counter-part of Art. 289 is Art. 285 which reads :

> "(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.
>
> (2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

Now, the words of Art. 285 (1) are still more clear and emphatic. It says that the property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State. The expression "all taxes" must mean all taxes whether they be on property or in relation to property.

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Neither in Art. 289 (1) nor in Art. 285 (1) do we see any restricting words which would cut down the full meaning of the expression "taxation" in Art. 289 or "all taxes" in Art. 285. The distribution of legislative powers under Art. 245 is in express terms subject to the provisions of the Constitution. The result therefore is that Parliament cannot legislate to take away the exemption given by Art. 289 (1), nor can a State Legislature Legislate to take away the exemption given by Art. 285 (1). If one follows the principles of interpretation to which we have earlier referred, the plain effect of Arts. 245, 285 (1), 289 (1) and 366 (28) appears to be this : under Art. 285 (1) the property of the Union shall be exempt from all taxes imposed by the State or by any authority within a State, save in so far as Parliament may by law otherwise provide ; the property and income of a State shall be exempt from Union taxation save in so far as cl. (2) of Art. 289 allows or authorises the imposition of any tax on the property of a State.

Let us now consider whether the context of Art. 289 or any of the other articles in the Constitution requires that a different meaning should be given to the expression "taxation" or "taxes" in Art. 289 (1) or Art. 285 (1).

The learned Solicitor-General has emphasised the use of the words 'property' and 'income' in Art. 289 and has further submitted that the word 'income' was not necessary in Art. 285 (1) and has not been mentioned there, because "taxes on income other than agricultural income" is an item in List I of the Seventh Schedule of the Constitution and a State, or an authority within a State, has no legislative competence to impose a tax on income. From the use of the two words 'property' and 'income' in cl. (1) of Art. 289, the learned Solicitor-General has argued that the intention of the makers

of the Constitution must have been to restrict cl. (1) to a direct tax on property or income, that is, a tax on property as such or a tax on income as such. He has elaborated this argument in this way: as 'income shall be exempt from tax' means that income shall be exempt from income-tax, in the same way the expression 'property shall be exempt from tax' means that property shall be exempt from property tax. In other words, he contends, that the word 'property' must control the word 'taxation' and must be interpreted as modifying the comprehensive connotation of the word 'taxation'.

We are wholly unable to accept this line of argument as correct. The learned Solicitor-General has indeed conceded that the word 'property' in cl. (1) of Art. 289 has a comprehensive connotation and refers to all property and assets of a State. Article 294 which occurs in the same Part of the Constitution states that as from the commencement of the Constitution all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State. It is clear therefore that in the Constitution the word 'property' is used in a comprehensive sense to include all assets, movable or immovable. Apart from those assets which vested in the Union or a State at the commencement of the Constitution, the Union or a State may acquire new assets. This is also provided for in Arts. 296 to 298 of the Constitution. Therefore, in both Arts. 285 and 289 the word 'property' means all property and assets which vested in the Union or a State at the commencement of the Constitution and all property and assets which may thereafter be acquired by the Union or a State.

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In cl. (1) of Art. 289 the subject of the sentence is 'property and income' and the predicate is 'shall be exempt from Union taxation'. Grammatically, the clause can only mean this: all property and income of a State shall be exempt from all taxation by the Union, giving the word 'taxation' its comprehensive meaning, as required by Art. 366 (28). It is necessary to emphasise here that the word 'property' used in the sentence is not used as a word qualifying the word 'taxation'; rather it is used as a subject which gets the benefit of exemption from Union taxation. One can understand that when one says that State income shall be free from Union tax he means that such income shall be free from Union income-tax, particularly when there is only one legislative item with regard to a tax on income (other than agricultural income) which is entry 82 in List I. But we fail to appreciate how the word 'property' can be used as qualifying the word 'taxation' and thereby restricting the ambit of its comprehensive connotation. The Union power of taxation on or in relation to property of various kinds ranges over a wide field; see entries 82 to 92A of the Constitution. Why then should the use of the word 'property' in Arts. 285 and 289 refer only to those items which enable the imposition of a direct tax on property and not to others? We find no legitimate ground for such a restriction in the context of Art. 289. Such a restriction would, in our opinion, be clearly against the plain language of the article.

The learned Solicitor-General has conceded that Art. 285 (1) and 289 (1) are analogous and complementary articles and bear the same meaning. In Art. 285 (1) the word 'income' does not occur, but the word 'property' occurs. It states that the property of the Union shall be exempt from all taxes imposed by a State etc. We fail to see how in Art. 285 (1) the word 'property' can be taken to qualify and cut down the expression "all taxes"

occurring therein. It should be obvious that the expression 'all taxes' means all taxes, and the clear intention as expressed in Art. 285 (1) is that the property of the Union shall be exempt from all taxes imposed by a State or by any authority within a State, including even a tax on agricultural income derived from Union property. It is worthy of note here that the items in List II which deal with taxes or duties which can be imposed by a State Legislature are those contained in items 46 to 62 thereof. Some of these items are indeed taxes on property as such, *e. g.*, item 49, "taxes on lands and buildings"; item 56, "taxes on goods and passengers carried by road or on inland waterways"; item 57, "taxes on vehicles, whether mechanically propelled or not, suitable for use on roads etc"; and item 58, "taxes on animals and boats". Some other items are in relation to property, but are not on property as such; *e.g.*, item 51, "duties of excise on the manufacture or production of alcoholic liquors for human consumption manufactured in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India"; item 52, "taxes on the entry of goods into a local area for consumption, use or sale therein"; item 54, "taxes on the sale or purchase of goods other than newspapers"; and item 55, "taxes on advertisements other than advertisements published in the newspapers". If the argument of the learned Solicitor-General is correct, then the property of the Union will be exempt from such taxes imposed by a State, or by an authority within a State, as are property taxes, that is, taxes on property as such, but not exempt from taxes which are on the manufacture or production of goods, entry of goods, sale or purchase of goods etc. This would mean that the expression 'all taxes' occuring in Art. 285(1) would lose its meaning, and we must read the article as though when the Constitution makers used the expession 'all taxes', they meant some taxes only and not all taxes. It is to be

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noticed that under Art. 366(28) the word 'tax' has also to be construed in the same comprehensive way as the word 'taxation'. It is necessary to state here that fortunately for us, neither under the Government of India Act, 1935 nor under our present Constitution, it is necessary to examine the niceties of distinction between direct and indirect taxation, as no such division exists in the Government of India Act, 1935 or in the Constitution. 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 part been assigned to both.

In *M. P. V. Sundararamier & Co.* v. *The State of Andhra Pradesh* (1), this court observed that our Constitution was not written on a *tabula rasa*; and that a Federal Constitution had been established under the Government of India Act, 1935, and though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built. On an analysis of the subjects in List I and List II of the Seventh Schedule of the Constitution, this court observed :

> "The above analysis—and it is not exhaustive of the Entries in the Lists—leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Art. 248, Cls. (1) and (2), and of Entry 97 in List I of the Constitution."

The distinction is between the main subject of legislation and a tax in relation thereto; the main subject of legislation figures in one group and a tax in relation thereto is separately mentioned in a

(1) [1958] S. C. R. 1422.

second group, but no distinction is drawn between direct and indirect taxation. There are several taxing items in List I and List II which will take in both direct and indirect taxation. *In re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (Central Provinces and Berar Act No. XIV of 1938* (1)), Sulaiman J., after referring to the Canadian Constitution as embodied in the British North America Act, 1867, and the Australian Constitution as embodied in the Commonwealth of Australia Constitution Act, 1900, observed that unlike those Constitutions the Government of India Act, 1935, did not make any distiction between direct and indirect taxation and in the matter of legislative competence the ultimate incidence of the tax was not necessarily a crucial test and there was no justification for adopting any such principle as that certain classes of duties which were to be regarded as direct had been assigned to the Provinces, and other classes regarded as indirect had been reserved for the Federation (see the observations at page 73). As in the Government of India Act, 1935, so also in our Constitution the distinction for purposes of legislative competence is between the main subject of legislation and a tax in relation thereto.

If this be the correct position, then it is impossible to accept the argument advanced on behalf of the Union that the word 'property' in cl. (1) of Art. 289 or cl. (1) of Art. 285 makes a distinction between direct and indirect taxation, namely, a tax on property as such and a tax in relation to property.

If we examine cls. (2) and (3) of Art. 289 and cl. (2) of Art. 285, the position becomes still more clear. It seems clear to us that cl. (2) of Art. 289 carves out an exception to cl. (1) in the sense that it states that nothing in cl. (1) shall prevent the

(1) [1939] F.C.R. 18.

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Union from imposing or authorising the imposition of any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on, by or on behalf of, a Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith. Cl. (3) says that nothing in cl. 2 shall apply to any trade or business or to any class of trade or business which Parliament may by law declare to be incidental to the ordinary functions of Government. Cl. (2) creates an exception to cl. (1) and cl. (3) creates an exception upon an exception. The broad distinction drawn in these two clauses is between trading or business activities of the Government of a State and its governmental functions. In respect to its trading or business activities a tax may be imposed and if any property is used or occupied for the purpose of trade or business, it is liable to tax. If however the trade or business is declared by Parliament to be incidental to the ordinary functions of a Government, the exemption given by cl. (1) will operate and cl. (2) will not defeat that operation. The combined effect of cls. (1), (2) and (3) appears to be this: under cl. (1) the property and income of a State is exempt from Union taxation; cl. (2) however says that the income of a State derived from commercial activities or the property of a State in respect of a trade or business of any kind carried on by or on behalf of a Government of a State or any operations connected therewith or any property used or occupied for the purpose of such trade or business shall not be immune from Union taxation; under cl. (3) however Parliament may by law declare any trade or business or any class of trade or business of a State to be incidental to the ordinary functions of Government and if Parliament so declares, cl. (2) will not apply and the operation of cl. (1) will not be arrested. What

is a governmental function or what is a trading or business function is not always easy to determine? Thus, in Australia, activities of the Government have been held to be 'industrial' even though nothing is charged for the services, *e. g.* municipal road construction, harbour dredging, piloting and ferries. Our Constitution, avoids this difficulty by empowering Parliament to declare by law that any trade or business carried on by a State shall not come within the scope of cl. (2) of the article but shall be deemed to be 'incidental to the ordinary functions of government'. Upon such declaration no taxation by the Union of such trade or business or property or income connected therewith will be possible. This seems to us to be the true effect of the three clauses of Art. 289.

If cl. (1) of Art. 289 has a restricted meaning as is contended for by the learned Solicitor-General on behalf of the Union, then the distinction drawn between trading or business activities on one hand and governmental functions on the other in cl. (2) and cl. (3) of Art. 289 loses its full significance; for cls. (1) and (2) distinguish between trading and other functions and cls. (2) and (3) distinguish between ordinary trading and trading which is really governmental function. If all that the Union is prevented from doing is to put a tax on property as such, what was the purpose of drawing a distinction between the trading or business activities of Government and its governmental functions ? If the tax is to be levied on property as such, then obviously there cannot be any impost on a trading or business activity, as for example, on the production or manufacture of goods etc. Why was it necessary then to make a reference to trading or business activities or operations in cls. (2) and (3) of Art. 289 ? It would have been enough merely to say that property used or occupied in connection with a trade or business will be liable to a tax, but not other property. But

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the ambit of cl. (2) is much wider than the mere use or occupation of property in connection with trade or business. It has reference to trading or business activities, such as, the production and manufacture of goods, transportation of goods etc. Why was it necessary for the Constitution-makers to refer to such trading or business activities in cl. (2) if all that they had in mind in cl. (1) was a direct tax on property? In our opinion, the learned Solicitor-General has given no satisfactory explanation with regard to this aspect of the case. He suggested at first that cl. (2) was not an exception, but merely explanatory of cl. (1). It is difficult to understand why there should be a reference to business or trading activities in cl. (2) if the entire intendment was to confine the exemption to a direct tax on property. The learned Solicitor-General then said that even if cl. (2) was an exception, it was an exception only in the matter of property tax. That would mean that only the last portion of cl. (2) which refers to property used or occupied for the purpose of trading or business activities of a State Government has any significance and not the other parts which relate to trading or business activities, such as, production or manufacture of goods etc.

We have noticed earlier that the amendments which Parliament itself made in 1951 in s. 20 of Sea Customs Act, 1878 and s. 3 of the Central Excises and Salt Act, 1944 by inserting two sub-sections thereto showed that Parliament understood cl. (2) of Art. 289 as creating an exception to cl. (1). Those two amendments, sub-s. (3) of s. 20 of the Sea Customs Act, 1878 and sub-s. (1-A) of s. 3 of the Central Excises and Salt Act, 1944, draw a distinction between the trading activities of the Government of a State and its governmental functions; no exemption is given in respect of goods belonging to a State Government and used for the purpose of a trade or business of any kind carried on

by or on behalf of that Government or of any operations connected with such trade or business, but exemption is granted in respect of other goods belonging to Government.

If, therefore, we look to the context of Art. 289, particularly cls. (2) and (3) thereof, it becomes manifest that there is nothing in Art. 289 which restricts the comprehensive meaning to be given to the word 'taxation' in Art. 289. Similar is the position with regard to cl. (2) of Art. 285. That again creates an exception to cl. (1) of Art. 285 and saves any tax on any property of the Union to which such property was immediately before the commencement of the Constitution liable or treated as liable to tax, so long as that tax continues to be levied in that State.

One very serious objection to the contention of the learned Solicitor-General, an objection which appears to us to be almost fatal, is that in the taxing entries in List I (from entry 82 to entry 92A) there is no entry which would enable the Union to impose a tax on property as such, that is, a direct tax on property as property in the sense suggested by the learned Solicitor-General for his interpretation of Art. 289 (1). There are, however, entries in List II to some of which we have referred earlier, which would enable the State Legislature to impose a direct tax on property, such as, 'lands and buildings' and 'animals and boats' etc. If the learned Solicitor-General is right in his contention, then the only tax from which the property of a State can claim exemption under cl. (1) of Art. 289 is 'property tax' to be imposed by the Union, and yet under the legislative entries in List I the Union cannot impose a 'property tax' on State property at all. To this aspect of the case the reply of the learned Solicitor-General has been two-fold; he has first referred us to entry 89 (terminal taxes on goods and passengers carried by

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railway, sea or air), entry 86 (taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies) and entry 97, the residuary entry; secondly, he has referred us to Art. 246 (4) under which Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. His argument is that the Union can impose a property tax under any of the aforesaid three entries; secondly, under Art. 246 (4) the Union can impose a property tax on State property if that property is situate in a territory not included in a State. It appears to us that the argument does not really meet the objection raised on behalf of the States. Entry 86 relates to capital value of the assets of individuals and companies and has nothing to do with State property, for the State is neither an individual nor a company. Entry 89 relates to a terminal tax which is essentially different from a property tax in the sense contended for by the learned Solicitor-General. We find it difficult to believe that the exemption given by cl. (1) of Art. 289 was meant as a safeguard against the exercise of power under the residuary entry. Apart from that, we have considerable doubt if the residuary entry will take in a 'property tax' when there are entries relating to such tax in List II. /It would be a case of much ado about nothing if the Constitution solemnly provided for an exemption against 'property tax' on Stea property only for such rare cases as are contemplated in Art. 246 (4), the situation of State property in territory not included in a State. Such situation would be very rare, and could have hardly necessi tated a solemn safeguard at the inception of th- Constitution when the States were classed undae Part A or Part B of the First Schedule. If the widsr interpretation of cl. (1) of Art. 289 is accepted, sue property would also be exempt from Union taxatioch except in cases covered by cl. (2) of the article. Wne

find it difficult to accept the contention that cl. (1) of Art. 289 was meant only for cases covered by Art. 246 (4); for that would be the result of the interpretation canvassed for on behalf of the Union.

We proceed now to consider the problem from three other aspects : (1) against the background of similar provisions in the Government of India Act, 1935; (2) in the light of the scheme under the Constitution of the financial relations between the States and the Union; and (3) the distribution of taxing powers between the States and the Union.

As to the Government of India Act, 1935 the relevant provisions are contained in ss. 154 and 155. They read as follows (so far as relevant for our purpose) :

> "S. 154. Property vested in His Majesty for purposes of the government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State :
>
> Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.
>
> S. 155. (1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income

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accruing, arising or received in British India :

Provided that—

(a) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India, outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof;

(b) x x x

(2) x x x"

Before the Government of India Act, 1935 the scheme of government was essentially unitary though there were local legislatures with limited powers. For the purpose of distinguishing the functions of the local governments and local legislatures of Governor's Provinces from the functions of the Governor-General in Council and the Indian Legislature, subjects were classified in relation to the functions of Government as Central and Provincial subjects in accordance with the Lists set out in Schedule I of the Devolution Rules made under ss. 45-A and 129-A of the Government of India Act, 1919. All Government property then vested in His Majesty for the purpose of the Government of India and there was no necessity for any special provision granting immunity to that property from taxation. The Government of India Act, 1935 introduced a dual system of Government. Part III of the Government of India Act, 1935 came into force on April 1, 1937. Properties belonging to the Crown and in existence prior to that date were

governed by the general law enunciated by the courts. Judicial opinion was however not uniform. In some cases it was held that statutes imposing duties of taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government. On the other hand, in some cases it was held that the law was the same in India as in England, where the principle of immunity of Crown property from taxation followed from the prerogative that the Crown was not bound by any statutes unless expressly named. When the dual system of Government was first introduced by the Government of India Act, 1935 the question of immunity of taxation of property of one Government by the other arose.

The doctrine of Immunity of Instrumentalities was propounded by the Supreme Court of the United States in the case of *McCulloch* v. *Maryland* (1), to mean that when two separate Governments are established as in a Federal Constitution, each with a limited jurisdiction, the power of each Government shall be construed as being under an implied limitation that it shall be so exercised as not to impair the functions allotted to the other Government. Hence, any incidental or indirect interference with the functions of the Federal Government would make a State legislation bad even though the legislation might relate to a subject allotted to the State Legislature and conversely. It was held that a State could not tax the agencies or instrumentalities of the Federal Government and a similar limitation would apply as regards the Federal Legislature. This doctrine has had many vicissitudes of fortune in the decisions of the courts in America. We do not think that it is necessary to deal with the history of those vicissitudes.

The Government of India Act, 1935 as also the Constitution of 1950 contained provisions which accepted the principle with a limited application as regards the exemption from mutual taxation, in

(1) [1819] 4 Wh. 316.

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ss. 154 and 155 of the Act of 1935 and Arts. 285 and 289 of the Constitution. In the words of the Judicial Committee in *Webb* v. *Outrim* (1), it may be stated that the very inclusion of the aforesaid provisions shows that the question of interference on the part of the Federal and State powers as against each other was not left to an 'implied prohibition or limitation' but the provisions themselves define the extent of the immunity. Outside those provisions the State and Union Legislatures have the full power to legislate on the matters included within their respective Lists, subject always to the other provisions of the Constitution.

Like Arts. 285 and 289 of the Constitution, the aforesaid ss. 154 and 155 are complementary to each other and provide for the mutual exemption of the property of the Federation and the Provinces from taxation imposed by the other: this is consistent with the general practice of federal constitutions to exempt the governments of the units from Federal taxation, that being part of a reciprocal arrangement under which the Federal Government also is exempt from taxation by the several units (see Parliamentary Debates, Vol. 302, Cols. 523 and 524). One noticeable feature of the two sections is that whereas s. 154 speaks of the "property vested in His Majesty for the purpose of the Federation" so as to include movable property also (see *Bell* v. *Municipal Commissioner of Madras* (2), s. 155 which confers exemption on the property of the "units" is confined to lands and buildings. The result would be that movable property belonging to the Federation would be exempt from duties like octroi which might be levied under the Provincial law, while, goods of the Provincial Governments and "units" would be subject to the customs and excise duties levied by the Federal Government. Income from commercial undertakings and operations in the nature of trade carried on by the units, so long as they are confined

(1) [1907] A.C. 81. (2) 25 Madras 457.

within the territory of that unit is not liable to Federal income-tax. This, in short, was the scheme of ss. 154 and 155 of the Government of India Act, 1935. Now, if ss. 154 and 155 of the Government of India Act, 1935 are contrasted with Arts. 285 and 289 of the Constitution, one noticeable difference strikes one at once. The expression 'lands and buildings' in s. 155 is changed to 'property' in Art. 289; in other words, the Union and the States are practically put on the same footing so far as exemption from taxation of one by the other is concerned. Both Arts. 285 and 289 mention 'property' in a comprehensive sense, and the distinction between movable property and immovable property drawn in ss. 154 and 155 is done away with. The inevitable conclusion is that the Constitution makers consciously made the departure. They must have been aware of the distinction made in ss. 154 and 155 and also of the interpretation of courts that 'property' in s. 154 was used in a comprehensive sense so as to get exemption for the property of the Federation from all Provincial taxation. With that knowledge they used the word 'property' in Art. 289 and put State 'property' on a par with Union 'property'. It is impossible to accept in these circumstances the contention that the word 'property' or the juxtaposition of the words 'property and income' in Art. 289 was intended to qualify the word 'taxation' and thereby the plain meaning of the language used.

Now, as to the financial relations between the Union and the States. Chapter I of Part XII contains provisions which control and govern these relations. Put briefly the scheme is that there is a distribution of revenues between the Union and the States, even though the collection may be made in some cases by the State and in other cases by the Union ; some taxes collected by the Union are assigned to the States (Art. 269); some taxes levied and collected by the Union are distributed between the

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Union and the States (Arts. 270 and 272); there are provisions for grants in aid of the revenues of some States, in which jute is extensively grown, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products (Art. 273); there are also provisions for grants in aid of the revenues of such States as Parliament may determine to be in need of assistance (Art. 275), etc. These provisions indicate clearly that there is an attempt at adjustment on a financial integration so that neither the Union nor the States may be starved for want of financial resources to carry on the essential and expanding activities of a welfare State. We do not see in these provisions any determining consideration which would bear upon the exemption granted to Union property by Art. 285 and that granted to State property by Art. 289. We fail to see how a restricted meaning given to the aforesaid two articles will facilitate the financial adjustment referred to in the earlier articles in the same chapter or how it will retard the said adjustment if a wider meaning is given to them. We repeat that Arts. 285 and 289 must be construed on their own terms, and it is not open to us to pervert or change the language used therein unless there are compelling reasons to be gathered from other relevant articles of the Constitution. We find no such compelling reasons in the other articles of Part XII which deal with the financial relations between the States and the Union.

We have earlier referred briefly to the distribution of legislative power between the States and the Union. We have also pointed out that so far as the taxing powers are concerned, the legislative entries in the Seventh Schedule make a distinction, for purposes of legislative competence, between the main subject of legislation and a tax in relation thereto. Taxes on income other than agricultural income (entry 82), duties of customs including export duties (entry 83), and duties of excise on

tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption, opium, hemp and other narcotic drugs (entry 84) are in List I. Therefore, under Art. 246 Parliament alone has power to make laws imposing the aforesaid taxes. This power, it has been argued on behalf of the Union, will be seriously curtailed if a wider meaning is given to Art. 289. We do not think that this argument is any answer to the problem posed before us. The power to make laws given to Parliament is subject to the provisions of the Constitution. Art, 289 is one of such provisions. Therefore, it is no answer to the problem to say that if a wider meaning is given to Art. 289, it will curtail the powers of Parliament. If Art. 289 in its true scope and effect is capable of bearing only the wider meaning, then it must control the power of Parliament. Art. 245 says so in express terms.

Another argument on this aspect of the case is that the Union has exclusive power to regulate trade and commerce with foreign countries, import and export across customs frontiers, and definition of customs frontiers (entry 41 of List I) and inter-State trade and commerce (entry 42 of the same List), and the power to regulate trade and commerce with foreign countries or inter State trade includes the power to regulate by imposing customs duties or duties of excise. This power, it is contended, will be very seriously affected if the exemption from taxation given by Art. 289 is held to extend to customs duties and excise duties in respect of goods imported or exported by a State or goods produced or manufactured by a State. We are not impressed by the argument. The power to control trade and commerce with foreign countries and inter-State trade is with the Union, and in exercise of that power the Union can impose regulatory measures on the activities of a State. We are familiar now with control measures like the Import Control Order,

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Essential Supplies Act, etc. Through these regulatory measures the Union can carry into effect its power of control, and under Art. 302 Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Under Art. 256 the executixe power of every State shall be so exercised as to ensure compliance with the laws made by Parliament, and the excutive power of the Union shall extend to the giving of such directions to a State as may appear to the Union Government to be necessary for that purposes, Under Art. 257 the executive power of every State shall be so exercised as not to impede or projudice the exercise of the executive power of the Union, and the Union Government can give necessary directions in the matter to the State Government. So far as trade and commerce within the State is concerned, the State has power to make laws (entry 26 of List II). We think, therefore, that nothing serious is likely to happen, either with regard to foreign trade or inter State trade, if we hold on the terms of Art. 289 that State property is exempt from Union taxation including customs duties or excise duties. Such an interpretation is not likely to result in any interference with the power of control which the Union undoubtedly has over foreign trade or inter-State trade.

The contention that the Union has the power to regulate trade by imposition of customs duties and that power would be annulled if the State has immunity from them in respect of things imported or exported by it seems to us to be fallacious. The Union's power to legislate to regulate foreign trade contained in the legislative list is subject to the provisions of the Constitution one of which is contained in Art. 289(1). Therefore in the case of a conflict between Art. 289(1) and the legislative

power to regulate foreign trade, the former must prevail. The Union, therefore, cannot in view of Art. 289(1) impose a customs duty on things imported by the State and seek to justify it as an exercise of its power to regulate foreign trade. Then, again it seems to us that as stated in *M.P.V. Sundararamier & Co's* case[1] an item in the legislative list not giving expressly the power of taxation does not confer such a power. It would follow that the power in List I to regulate foreign trade cannot be exercised by imposition of a tax. That has to be done otherwise and without the imposition of a tax.

It is to be remembered that a striking feature of our Constitution, which perhaps distinguishes it from some other Constitutions, is its attempt to harmonise the interests of the individual with those of the community and the interests of a State with those of the Union. Our Constitution does not set up the States as rivals to one another or to the Union. Each is intended to work harmoniously in its own sphere without impediment by the other, with an over-riding power to the Union where it is necessary in the public interest. It is a nice balance of jurisdictions which has worked satisfactorily so far and, it is to be hoped will continue to so work in times to come with good sense prevailing on all sides. We are not prepared to say that the exemption given to State property from Union taxation by Art. 289 conflicts in any way with the power of control which the Union has over foreign trade or inter-State trade or disturbs the balance of jurisdictions referred to above. It is to be remembered in this context that under cl. (2) of Art. 289 the trading activities of a State and property used for such trading activities cannot claim any exemption from Union taxation, unless Parliament declares by law that the trading activities are incidental to the ordinary functions of government.

(1) [1958] S.C.R. 1422.

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We have so far dealt with the problem on the relevant articles of our Constitution. It may be helpful now to consider how a similar problem under other Federal Constitutions has been dealt with by the courts.

It is necessary here to strike a note of warning. Each Constitution must be interpreted on its own terms and in its own setting of history, geography and social conditions of the country and nation for which the Constitution is made; a decision on a constitutional problem having an apparent similarity with a problem arising under a different Constitution may not be sure guide as a solution of the problem. Basically, the problem must be solved on the terms of the Constitution under which it arises. Remembering this warning, we turn first to certain Canadian decisions on which the learned Solicitor-General has relied. The vital core of a federal constitution, it is said, is the division of legislative powers between the central authority and the component states or provinces. In Sections 91 to 95 of the British North America Act, 1867 the main lines of this division in Canada were set forth. In section 92 certain classes of subjects were enumerated and the provinces were given exclusive power to make laws in relation to matters coming within these classes of subjects. The opening paragraph of s. 91 gave the Dominion power "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." That is to say, the residue of powers not expressly given to the Provinces was reserved to the Dominion. The section then proceeded with a specific enumeration of twenty nine classes of subjects, illustrating but not restricting the scope of the general words used earlier in the section. Section 125 said, "No lands or property belonging to Canada or any province

shall be liable to taxation." In *The Attorney-General of British Columbia* v. *The Attorney-General for Canada*(1), the facts were these. The Government of the province of British Columbia in the exercise of its powers of control and sale of alcoholic liquors embarked on the business of dealing in alcoholic liquors and found itself under the necessity of importing 'Johnnie Walker Black Label" whiskey; it claimed it was exempt from payment of the usual customs duties imposed by the Dominion Parliament and rested its claim on s. 125. The Supreme Court of Canada held by a majority decision that the levying of customs duties on the goods in question was not "taxation" on "property" belonging to a province within the purview of s. 125. The ratio of the decision, as expressed by Duff, J., was that customs duties as an instrument for regulation of external trade came within the second enumerated head under s. 91; and customs duties when levied for the purpose of raising a revenue were, speaking broadly and in the general view of them, taxes on consumable commodities, taxes on consumption; while the taxation of capital, of assets, of property was a very different matter. Duff, J. then said :

> "Our first duty in construing the section is, of course, to ascertain the ordinary and grammatical meaning of the words but it is with the ordinary and grammatical meaning of the words in the setting in which they are found and as applied to the subject matter that we are concerned. What the section is dealing with is not taxation in general but the liability of "property" to "taxation" and the word "taxation" when used in this association has, I think *prima facie* a much less comprehensive import than that which would be ascribed to it standing by itself or in some other connections."

(1) 64 Canada Supreme Court Reports 377.

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It is pertinent to note here that the Canadian Constitution did not contain a key to the word 'taxation' as is contained in Art. 366 (28) of our Constitution. It was permissible, therefore, in the setting of the Canadian Constitution to draw a distinction between "taxation of property" and the "levying of customs duties" for purposes of raising revenue. Our Constitution says in express terms that 'taxation' includes the imposition of any tax or impost, whether general, local or special. It is reasonable to think that the makers of our Constitution were aware of the distinction between the more comprehensive and less comprehensive meaning that can be attached to the word 'taxation', and deliberately chose to mention expressly the more comprehensive meaning in the interpretation article, instead of leaving it to judicial determination. One may well speculate if the decision in Canada would have been the same if there were such a provision in the Canadian Constitution and if, as Duff, J. said, our first duty in construing a provision is to ascertain the ordinary and grammatical meaning of the words used. The aforesaid decision of the Supreme Court was approved by the Privy Council in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1). Referring to s. 125 of the British North America Act, Lord Buckmaster said :

> "Taken alone and read without consideration of the scheme of the statute, this section undoubtedly creates a formidable argument in support of the appellant's case. It is plain, however, that the section cannot be regarded in this isolated and disjunctive way. It is only a part of the general scheme established by the statute with its different allocations of powers and authorities to the Provincial and Dominion Governments. Sect. 91, which assigns powers to the Dominion, provides, among other things, that it shall enjoy exclusive legislative

(1) [1924] A.C. 222.

authority over all matters enumerated in the Schedule, included among which are the regulation of trade and commerce and raising of money by any mode or system of taxation. The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. It has not indeed been denied that such a general power does exist, but it is said that a breach is created in the tariff wall, which the Dominion has the power to erect, by s. 125, which enables goods of the Province or the Dominion to pass through, unaffected by the duties. But s. 125 cannot, in their Lordships' opinion, be so regarded. It is to be found in a series of sections which, beginning with s. 102, distribute as between the Dominion and the Province certain distinct classes of property, and confer control upon the Province with regard to the part allocated to them. But this does not exclude the operation of dominion laws made in exercise of the authority conferred by s. 91. The Dominion have the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Sect. 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated."

It is obvious that the observations made by Lord Buckmaster have reference to the special characteristics of the Canadian Constitution, particularly the paramountcy of Dominion Power to regulate trade and commerce throughout the Dominion to which

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s. 125 was made to yield. The scheme of our Constitution is different: (1) the legislative power of Parliament is expressly subject to other provisions of the Constitution; (2) the power to regulate trade and commerce is assigned both to the Union and the States; and (3) there is a distinction between the main subject of legislation and a tax in relation thereto. We are not emphasising the fact that in s. 91 of the British North America Act, 1867 occurs the expression "notwithstanding anything in this Act", because that expression may be said to relate to the enumeration of subjects rather than to s. 125. In our view the decision turned upon the peculiar characteristics of the Constitution under which the problem arose and is no safe guide for the interpretation of our Constitution. It may perhaps be added that if the Canadian case fell to be decided under our Constitution, cl. (2) of Art. 289 would have been given an adequate answer to the problem, for a State can claim no exemption in respect of its business activities and when British Columbia imported whiskey to embark on a business of alcoholic liquors, it could not claim any exemption under cl. (1) of Art. 289.

We now turn to certain Australian decisions. Speaking generally, the Commonwealth of Australia Constitution Act, 1900 creates a federation which resembles the United States in a manner in which powers are assigned to the Federal Government with a residue in the States or the people. It resembles the Canadian Constitution in the attempt to adapt the machinery of responsible government to a federal system, but differs from the Canadian and our Constitution in the division of powers. As regards the Commonwealth, s. 51 contains a list of thirty-nine enumerated powers with which it is vested. It says *inter alia* that, subject to the Constitution, the Parliament shall have power to make laws for the peace,

order and good government of the Commonwealth with respect to—

(i) Trade and commerce with other countries, and among the States; and

(ii) Taxation, but so as not to discriminate between the States or parts of States.

Section 52 defines the cases in which the power of the Commonwealth is to be exclusive. As regards the State, the broad principle of the division is found in s. 107 which in effect says that the powers of the States are left unaffected by the Constitution except in so far as the contrary is expressly provided; subject to that each State remains sovereign within its own sphere. Now, s. 114 of the Commonwealth of Australia Act, 1900 says :

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

The decision on which the learned Solicitor-General has placed the greatest reliance is *Attorney-General of New South Wales* v. *Collector of Customs for N.S.W.* (1). That was a case in which an action was brought by the Attorney-General of New South Wales to recover from the Collector of Customs for New South Wales a particular sum being the amount of duties of customs demanded by the defendant upon the importation into the Commonwealth of certain steel rails, and paid under protest by the Government of the State of New South Wales The rails in question were purchased in England by the State for use in the construction of the railways of

(1) 5 C.L.R. 818.

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the State. On their arrival at the port of Sydney the defendant claimed that they were liable to Customs duties. The State disputed its liability to pay duty and deposited the amount claimed under protest. A case was stated for the opinion of the High Court of Australia on two main questions : (1) whether the provisions of the Customs Act 1901 and the Customs Tariff 1922, affected the Crown as representing the community of New South Wales; and (2) whether the steel rails were exempt from duty by virtue of s. 114 of the Constitution. So far as the first question was concerned Griffith C. J. said that it was concluded by the decision in *The King* v. *Sutton* (1). So far as the second question was concerned, the majority of Judges held that customs duties whether capable or not of being included in the word "tax", are not a tax upon property in the sense in which that expression is used in s. 114. Isaacs J. held that duties of customs, as ordinarily understood and as enacted in the Customs Act, were imposed on the goods themselves, and, therefore, "on property" within the meaning of s. 114, but they did not come within the meaning of the word "tax" as used in that section and the Constitution generally. Griffith C. J. not only drew a distinction between direct and indirect taxation but also held that s. 114 applied only to property within the limits of the Commonwealth and did not apply to goods in process of coming within those limits. He further held that the power to impose taxation conferred by s. 51 (ii) as well as the power to regulate importation conferred by s. 51 (i) were paramount and unlimited and a construction which would make the words of s. 114 consistent with giving full effect to the plain intention of s. 51 should be preferred. He proceeded on the footing that the words of s. 114 were capable of two constructions. Then he observed :

> "There is no doubt that in some contexts the words "impose any tax" might be capable of

(1) 5 C.L.R. 89.

application to duties of Customs. Nor is there any doubt that the word "taxation" in sec. 51 (ii) includes the levying of duties of Customs. But these duties are nowhere in the Constitution described as a "tax", unless the use of the word "taxation" in sec. 51 (ii) is such a description of them; nor is the levying of them ever spoken of as the imposition of a tax on property. Sec. 86 speaks of "the collection and control of duties of Customs and of Excise". Ss. 88, 89, 90, 92, 93, 94, 95, all speak of the "imposition" of duties of Customs. Such duties are imposed in respect of "goods" and in one sense, no doubt, "upon" goods, which is only another way of saying that the word "upon" is sometimes used as synonymous with "in respect of." In the same way the word "upon" or "on" is used colloquially in speaking of stamp duties, succession duties, and other forms of indirect taxation, as taxes on deeds, etc., or on real and personal property. Yet it is recognised that these forms of taxation are not really taxation upon property but upon operations or movements of property."

Higgins J. based his decision on a somewhat different ground. He said that he could not confi dently take the ground that a customs duty could not be a tax within the meaning of the word "tax" in s. 114. He said that s. 114 did not use the expression "tax of any kind", but spoke of "any tax on property of any kind belonging to a State". He derived the idea of ownership as the crucial test by reason of the use of the expression "property of any kind b longing etc." The learned Judge observed :

"The prohibition as to State taxation was, no doubt, suggested by the British North America Act, sec. 125. But by substituting the word "property" for "lands or property", the

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intention—if it was the intention – to confine the prohibition to what are known as "property taxes" has been somewhat obscured. Property is, by the Constitution, subject to be taxed at the instance of the State as well as of the Commonwealth; Customs taxation is solely a matter for the Commonwealth (sec. 90). Taxes of retaliation, as between the States and the Commonwealth, are possible as to property taxes; but are impossible as to Customs taxes. But whatever may have been the motive which led to this express prohibition, in addition to the prohibition which this Court has held to be implied from the nature of the Constitution as to the taxation of State or Commonwealth agents, the phraseology is such as to point to taxation of property *as property* as being the subject of this express prohibition. "A State shall not, without the consent of the Parliament or the Commonwealth,.....impose any tax on *property* of any kind *belonging* to the Commonwealth, nor shall the Commonwealth impose any tax on *property* of any kind *belonging* to a State"."

We are of the view that the considerations which led the learned Judges to the conclusion at which they arrived are not considerations which are available to us under our Constitution. We are dealing with an exemption clause under Art. 289 (1); that exemption clause has to be interpreted with the key furnished by Art. 366 (28) Under our Constitution the word 'taxation' has been defined by the Constitution itself and we are not free to give a different meaning to the word so as to make a distinction between direct and indirect taxation, or between taxation on property within the limits of the Commonwealth and property in the process of coming within those limits; nor are we free to make a distinction between a tax

on property and a tax in respect of property. It is further significant that s. 114 of the Commonwealth of Australia Act, 1900 uses the expression "tax on property". Our exemption clause in Art. 289 uses a different phraseology, a phraseology which does not qualify the word 'tax' in any way, but says that the property and income of a State shall be exempt from any tax or impost whether general, local or special, to be imposed by the Union. Even in the matter of s. 114 of the Commonwealth of Australia Act, 1900 there was a difficulty in drawing the distinction between property, and the imporation of property, because of the use of the expression "of any kind" in s. 114. This difficulty is pointed out by Nicholas in *The Australian Constitution* (second edition, page 143). He says :

> "The solution was found in distinguishing between property and the importation of property, and between duties and taxation as those terms are used in the Constitution. Both distinctions involved some difficulties, for s. 114 uses the words "of any kind" and the only express authority to impose duties is to be found in s. 51 (ii). The policy thus sanctioned has not been approved in all States alike. States have been compelled to pay duties on imported materials, including locomotives of a type not made in Australia, so that the proceeds of their loans have been reduced for the benefit of the Commonwealth revenue and the power of exemption has not been used where it might have been (Report of the Royal Commission, p. 361)."

Apropos of the Australian case it may perhaps be pointed out that under our Constitution the 'taxing power' is treated as different from the 'regulatory power'. Again, as we have stated earlier, the classification between 'direct' and 'indirect' taxes has

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not been adopted by our Constitution. Moreover the problem which falls for our consideration under Art. 289 is not one which has to be examined from the point of view of legislative power. The problem before us is really the extent of the immunity or exemption granted by Art. 289. In *Attorney-General for Saskatchewan* v. *Canadian Pacific Railway Company* (1), the question arose of construing an exemption granted to the Canadian Pacific Railway Company by clause 16 of a contract between the Canadian Government and the said company. The exemption clause provided *inter alia* that "the Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property etc., shall be forever free from taxation by the Dominion, or by any province hereafter to be established, or by any municipal corporation therein." The Province of Saskatchewan was constituted in 1905 and in purported compliance with its obligations under the aforesaid exemption clause, the Dominion Parliament provided in section 24 of the Saskatchewan Act of 1905 that "the powers hereby granted to the said Province shall be exercised subject to the provisions of clause 16 of the contract". The Canadian Pacific Railway Company raised the question that it was free from business tax imposed by the City Act, 1947, of Saskatchewan by reason of the exemption clause. Before the Judicial Committee of the Privy Council it was argued on behalf of the Province of Saskatchewan that the exemption was limited to taxes imposed upon the owner in respect of the ownership of the property liable to taxation, but the exemption did not extend to taxes levied upon the company in respect of its business of operating it. Dealing with this argument the Judicial Committee said :

> "While the language of clause 16 is that the property shall be 'forever free from taxation' by any Province thereafter to be established,

(1) [1953] A.C. 594.

it is said that to tax the company in respect to the *use* of the property (itself a term of the exemption), is not to tax the property and that that alone is prohibited."

Their Lordships construed the exemption on its own terms and held that a tax upon the owner in respect of the use of the property was as much within the exemption as a tax on the property itself. In our view the exemption clause in Art. 289 must similarly be construed on its own terms. We further consider that no question of paramountcy of legislative power arises in that connection.

On behalf of the States, except the State of Maharashtra which has supported the stand of the Union in the matter of excise duties only, it has been very strongly contended before us that for the purpose of the exemption clause in Art. 289 nothing turns upon the distinction between a tax on property as such and a tax in relation to property. Both affect property and if property is to be free from Union taxation, it makes no difference whether the tax is on the ownership or possession of property or is on its prodcution or manufacture or its importation or exportation. A large number of decisions were cited before us as to the true nature of customs duties and excise duties. There are a number of decisions of this court where it has been held that a duty of excise is a tax on goods produced or manufactured in the taxing country; similarly customs or export duty is a duty imposed on goods which are the subject of importation or exportation. This is also clear from the provisions relating to "draw back" in the matter of customs duties and refund rules in the matter of excise duty. We consider it unnecessary to examine these decisions in detail for the purpose of the problem before us. It is enough to point out that in order to determine whether an impost, be it a tax, duty or fee, falls under one item or the other

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of the Legislative Lists in the Seventh Schedule, it may be necessary to examine the nature of the tax, duty or fee. As the Judicial Committee pointed out in *Governor-General in Council* v. *Province of Madras* (1), a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced; it is however a tax on goods, to be distinguished from tax on sales or the proceeds of sales of goods; the two taxes, the one levied on the manufacturer in respect of his goods, the other on a vendor in respect of his sales may in one sense overlap. But in law there is no overlapping, the taxes being separate and distinct imposts. But as we have said earlier, the problem before us is not the nature of the impost but rather the extent of the immunity granted by Art. 289 of the Constitution. The extent of that immunity, as we have indicated earlier, really depends on the true scope and effect of Arts. 245, 285, 289 and 366(28) of the Constitution. In the matter of the extent of the immunity the distinction between a tax on property as such or in relation to property is really of no materiality. A tax on property as such and a tax in relation to property —both affect property—and if the true scope and effect of the articles which we have mentioned is that State property must be exempt from imposition of any tax or impost, whether general or local or special, by the Union, then the distinction drawn between a tax on peoperty as such and a tax in relation to property loses its significance.

For the reasons given above our opinion is that the answers to the three questions referred to this court must be in the affirmative and against the stand taken by the Union.

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HIDAYATULLAH J.—As a result of a proposal to introduce in Parliament a Bill to amend s. 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and s. 3 of the Central Excises and Salt Act, 1944 (Act 1 of

(1) 72 I.A. 91, 103.

1944) with a view to applying the provisions of these two Acts to goods belonging to the State Governments, the President of India has been pleased to refer under Art. 143 of the Constitution, three questions for the opinion of this Court to ascertain if the proposed amendments would be constitutional. These questions are :

"(1) Do the provisions of article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that article ?

(2) Do the provisions of article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article ?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878), and sub-section (1A) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of article 289 of the Constitution of India ?"

The sections of the two Acts as they stand today provide for the levy of customs duties and duties of excise on all goods belonging to a State but only if used for purposes of trade or business of any kind carried on by or on behalf of that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging

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to any Government. These two sections as at present read :

"20. (1) Except as hereinafter provided, customs-duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, on—

(a) goods imported or exported by sea into or from any customs-port from or to any foreign port;

(b) opium, salt or salted fish imported by sea from any customs-port into any other customs-port;

(c) goods brought from any foreign port to any customs-port, and, without payment of duty, there transhipped for, or thence carried to, and imported at, any other customs-port; and

(d) goods brought in bond from one customs-port to another.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government.

Explanation.—In this sub-section 'State' does not include a Union territory".

"3. (1) There shall be levied and collected in such manner as may be prescribed duties

of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule.

(1A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government of a State other than a Union territory and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods which are not produced or manufactured by any Government".

x x x x

The proposal is to amend the two sections as follows :

"AMENDMENT OF SECTION 20, ACT 8 OF 1878.—In section 20 of the Sea Customs Act, 1878, for sub-section (2) the following sub-sections shall be substituted, namely :—

'(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to the Government.'

AMENDMENT OF SECTION 3, Act 1 OF 1944.—In section 3 of the Central Excises and Salt Act, 1944, for sub-section (1A) the following sub-section shall be substituted, namely :—

'(1A) The provisions of sub-section (1) shall apply in respect of all excisable goods

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other than salt which are produced or manufactured in India by, or on behalf of, the Government as they apply in respect of goods which are not produced or manufantured by the Government'."

The question is one of great importance not only to the States but also to the Union. What the Union wishes to do is to put the State Governments on its tax-payers' list, not only in respect of their trading activities but also in respect of their governmental functions. If the Constitution does not prohibit it their can be no doubt about the power. The sole question thus is whether the Constitution has not prohibited this by Art. 289 to which reference will be made presently.

Our Republic is composed of States with their own Governments. These Governments possess and exercise their own powers like any other Government. Then there is the Union Government which within its own sphere is supreme but its supremacy is not a general or undefined supremacy. It is in certain respects curtailed to give supremacy to the State Governments. One such curtailment is to be found in Art. 289(1) and the only question that can really arise is to what extent does that restriction go ?

We are concerned here with the taxing power of Parliament which admittedly extends to the levying of duties of customs including export duties (entry 83, List I, 7th Schedule) and duties of excise on tobacco and other goods manufactured in India except those expressly mentioned in the entry (entry 84, *ibid*). In addition to the powers of taxation, Parliament has exclusive regulatory power over "trade and commerce with foreign countries; import and export across customs frontiers" (entry 41, *ibid*) and also over "inter-State trade and commerce" (entry 42, *ibid*). The power derived from these

entries is plenary and can only be the subject of restraint if the Constitution so provides. Under Art. 245, this power is expressly stated to be subject to the provisions of the Constitution. By Art. 246, which divides the subject matter of laws to be made by Parliament and by the Legislatures of the States, exclusive power is given to Parliament in respect of matters enumerated in the Union List. Similarly, exclusive power is conferred on State Legislatures in respect of matters enumerated in the State List. There is a third list called the "Concurrent List" and it contains matters over which Parliament and the Legislatures of the States have power to make laws. Inconsistency between the laws is avoided by Art. 254 which makes the law made by Parliament, whether before or after the law made by the State Legislature, to prevail over the latter. In addition to these provisions, Parliament has power to make laws for the territory of India not included in a State even on matters enumerated in the State List and also exclusive power to make any law with respect to any matter not enumerated in the concurrent or the State Lists. This, in brief, is the scheme of legislative relations and the distribution of legislative power under our Constitution. The three Lists contain entries which enable the raising of money by way of taxes, duties and fees. The taxation entries are to be found in the Union and State Lists only. There are only two entries in the Concurrent List which deal with (a) stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duties (entry 44, Concurrent List,) and (b) fees in respect of any of the matters in that List but not including fees taken in any court (entry 47, *ibid*). The other two lists contain entries which enable the Union and the States to impose taxes, duties and fees to raise revenue for their respective purposes. These entries, as far as human ingenuity could achieve, attempt to make a clear-cut and fair

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division. There is an elaborate procedure for distribution of the proceeds of some of the taxes raised by the Union among the States to finance their activities but we are not presently concerned with it.

The powers of taxation being plenary except in so far as the exercise of the power could be said to trench upon the exclusive domain outlined and demarcated in a rival list, there was a danger in the dual form of government, which has been adopted in our Republic, of one Government taxing another whether to start with or as a retaliatory measure. Such a possibility had earlier been envisaged by other Federal Constitutions either expressly or as an implication of the dual form and immunity of some kind had been conferred in respect of property, etc., between the respective Governments. Our Constitution has also made provision in that behalf. Those provisions are to be found in Parts XII and XIII. The latter part has been the subject of much anxious thought recently in this Court, and it provides for freedom of trade, commerce and intercourse within the territory of India. Articles 285-289 of Part XII provide for immunity from tax in certain other circumstances. Of these, Art. 286, which involves restrictions on the imposition of tax on the sale and purchase of goods, has been before this Court on many occasions and need not be considered. Article 285 provides for exemption of the property of the Union from State taxes, and Article 289, for exemption of property and income of a State from Union taxation. We are primarily concerned with Art. 289 in this Reference. Articles 287 and 288 provide for special exemption from taxes on electricity in certain cases and are not relevant to the present purpose.

Putting aside Articles 286, 287 and 288, I set out below Articles 285 and 289 :

"285. (1) The property of the Union shall,

save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

"289. (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accuring or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government."

These are the provisions of the Constitution which the President of India has in mind in making this reference to determine whether the proposed extension

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of customs and excise duties to all goods belonging to the State Governments, imported or exported in the one case and manufactured or produced in the other, would not offend Art. 289.

It may be mentioned at this stage that under the Government of India Act, 1935, sections 154 and 155 also provided for similar immunity, but these sections were slightly differently worded. I quote these sections for future comparison :

> "154. Exemption of certain public property from taxation.—Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State :
>
> Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto."

> "155. Exemption of Provincial Governments and Rulers of Federated States in respect of Federal taxation.—(1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India :
>
> Provided that—
>
> (a) Where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any

part of British India outside that province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof ;

(b) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date."

As I have said already, dual government in a Federation requires the protection of one government from taxation by the other. In the United States of America, there is no specific provision but such an immunity is held to be implied in the nature of dual government. In Canada, s. 125 of the British North America Act, 1867, provides :

"No lands or property belonging to Canada or any province shall be liable to taxation."

In the Australian Constitution, which, one of its framers (Mr. Justice Higgins) described as a "pedantic imitation" of the American Constitution, s. 114 provides :

"A State shall not without the consent of the Parliament of the Commonwealth, raise or

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maintain any naval or military Force, or impose any tax on property of any kind belonging to the commonwealth, nor shall the commonwealth impose any tax on property of any kind belonging to a State."

Even in Constitutions which are comparatively recent, like those of Argentina and Brazil, we find similar provisions. Article 32 of the Constitution of Brazil provides:

> "The Union, the States and the Municipalities are forbidden—
>
> * * * *
>
> (c) to tax goods, income or services of each other."

In the arguments before us at which the Solicitor-General of India for the Union and Advocates-General of some of the States and other learned counsel assisted, two distinct lines of thought were discernible. One line was to rely upon certain American, Canadian and Australian decisions where restrictions under the respective Constitutions were either upheld or negatived, and then to reason from anology. The other line was to take the words of the Constitution and to see what the Constitution has meant to say. These two lines represent the classic approach to the interpretation and construction of a written Constitution. Cooley explained the difference between them ('Constitutional Limitations', p. 97) by saying that interpretation "is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey", while construction is "the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in the spirit, though not

within the letter of the text". With a written Constitution, such as we have, the task in most cases must be one of interpretation, but where the language of the Constitution suggests that what was previously passed upon by the Superior Courts of other countries in parallel matters has obviously been taken as a guide, one may have to go a little further than the text to find out what was being sought to be achieved and what was being avoided. I am aware that in *Webb* v. *Outtrim* (1), Lord Halsbury observed that it was impossible to say of the framers of the Australian Constitution what their supposed preferences were. I am also conscious of the fact that the Indian Constitution is a document framed by the Indian people for the Indian people. In interpreting the Constitution, one must not completely cast off the moorings to the text of the Constitution and drift into alien seas. I may say, however, that there are indications in the Constitution itself of compelling force which show that the framers were desiring to avoid some of the implications of these rulings of the Superior Courts of the United States, Canada and Australia. The observations of these learned Courts have been pressed into service by counsel before us, as they form the historical background of the provisions of our Constitution. I also find it convenient to deal with them first as they prepare us to understand our own Constitution. Perhaps by seeing the problem in other settings and environments, one is able to see it better in one's own.

I shall begin with the United States of America, because the doctrine had its first beginnings there. In the United States, the immunity of one Government from taxation by the other arose as an indispensible implication of the dual system. It had its roots in what Mr. Justice Frankfurter described as a "seductive cliche" of Chief Justice Marshall in *McCulloch* v. *Maryland* (2), that the power to tax involves the power to destroy by the tax. But the

(1) [1907] A.C. 81. (2) 4 Wheaton 316.

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doctrine was more than a mere cliche; it was stated by Chief Justice Marshall to be fundamental to dual government. Let me recall his words :

> "If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach, all those which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to the abuse of the power".

The Chief Justice, therefore, concluded in these famous words :

> "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that, the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations

of the Constitution laws enacted by Congress to carry into execution the powers vested in the general government. This is we think, the unavoidable consequence of that supremacy which the Constitution has declared".

This doctrine had early dissenters and chief among them was Mr. Justice Bradley who described it as founded on a fallacy which would lead to mischievous consequences. *Collector* v. *Day* (1). *McCulloch's case* involved a State tax which was really discriminatory against the operations of a national bank and could have been decided without laying down any such proposition. But the doctrine was accepted and it grew and grew. It took in not only the property and activities of a Government within its protection but also all means, agencies and instrumentalities by which Government acts. It was only after many years that the reach of the doctrine began to be curtailed. In the *Panhandle Oil Co.* v. *Missippi* (2), Mr. Justice Holmes did away with the cliche by the trenchant observation "the power to tax is not the power to destory while this Court sits". But it was only the increasing dissents which led to the overthrow of a good dozen cases in *Graves* v. *New York* (3).

I need not enter into the history of the process by which the doctrine was curtailed. I shall refer to that part only which has withstood the attrition to to which the doctrine was subjected. In the *State of South Carolina* v. *U. S.* (4), (a case relied upon by the States to explain Art. 289), the State had taken over the business of selling intoxicating liquors in the exercise of its sovereign powers. The dispensing and selling agents of the State were charged, under a Federal Revenue Statute, an excise licence tax which was imposed on all sellers of intoxicating liquors. It was held that the agents were not

(1) 11 Wall. 113 : 20 L. Ed. 122.
(2) 277 U.S 218, 223:72 L. Ed 857, 859.
(3) 306 U.S, 466 : 83 L.Ed. 927. (4) 199 U.S, 437 : 50 L. Ed, 261.

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protected by the doctrine because they were doing business and not carrying on functions of Government. Mr. Justice Brewer gave the reason in these words :

> "Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down".

Mr. Justice Brewer pointed out that in this way control of all public utilities, of gas, of water and of the rail-road systems would pass to the States and the States would become owner of all property and business and then what would the States contribute to the revenues of the nation ? He held that the tax was not imposed on any property belonging to the State, but was a charge on a business before any profits were realized therefrom, or in other words, upon the means by which that property was acquired but before it was acquired. In that case, the distinction between State as a trader and State as Government was made. This distinction was emphasized later in *Ohio Helvering*(1), where it was observed :

> "When a State enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto* and takes on the character of a trader, so far at least, as the taxing power of the federal government is concerned".

In subsequent cases this distinction between governmental functions and functions as a trader was preserved. The term 'governmental functions' was

(1) 292 U.S. 360 : 78 L. Ed. 1307.

further qualified by the words 'strictly', 'essential' or 'usual'. It was even said that these functions must be those in which State Governments must be 'traditionally engaged', otherwise they would not be able to withdraw from the taxing power of the general government. A certain amount of strictness in the application of the doctrine was noticeable in the *University of Illinois* v. *U.S.A.* (1). In that case, the University imported scientific apparatus for use in one of its departments. Customs duties were exacted which were paid under protest, the University claiming to be an instrumentality of the State of Illinois, discharging a governmental function. The Tariff Act of 1922, under which the impost was made, was an Act to provide revenue, to regulate commerce with foreign countries, and to encourage the industries of the U.S.A. Relying on *Gibbons* v. *Ogden* (1), it was pointed out in the case that the power to regulate was plenary and exclusive and its exercise could not be limited, qualified or impeded to any extent by State action and that there was a denial to the States to lay imposts or duties on imports and exports without the concent of the Congress (Articles 1, 10, 2). It was, therefore, laid down that the principle of duality did not touch regulation of commerce with foreign countries. It was argued that the Tariff Act laid a tax and the tax fell upon an instrumentality. It was conceded that it might be so, but it was pointed out that the imposition of customs duties could be for purposes of regulation and that the provisions took into account foreign trade and regulated it and revenue was incidental and the protection did not go beyond governmental functions. Chief Justice Hughes then observed :

> "The fact that the State in the performance of State functions may use imported articles does not mean that the imporation is a function

(1) 289 U.S. 48 : 77 L. Ed. 1025. (2) 9 Wheaton 1.

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of the State Government independent of federal power."

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"To permit the States or their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles."

The regulatory aspect of taxes on commerce was again recently the subject of discussion in the United States Supreme Court in what is popularly called the 'Soft drink case'. Natural mineral waters in the State were bottled and sold and it was held by majority that a non-discriminatory tax on all persons was payable by the Government of the State because in selling mineral waters, even though a part of the natural resources of the State, it was not carrying on a governmental function and the tax did not affect its sovereignty. Mr. Justice Frankfurter said :

"Surely the power of Congress to lay taxes has impliedly no less a reach than the power of the Congress to regulate commerce. There are of course State activities and State owned property that partake of uniqueness from the point of view of inter-governmental relations. These inherently constitute a class by themselves. Only a State can own a State house; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of tax payers without taxing the State as a State. But so long as Congress

> generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes such enterprises organised for private ends".

Mr. Justice Frankfurter rejected as untenable such criteria as 'proprietary' against 'governmental' activities of the States or 'historically sanctioned activities of Government' or 'activities conducted mostly for profit', and found "no restriction upon Congress to include the States in levying a tax exacted casually from private persons upon the same subject-matter". Mr. Justice Rutledge did not agree with the last extention but chose not to differ. Chief Justice Stone, with whom Justices Read, Murphy and Burton agreed, pointed out that in the United States the cases were divisible into two parts—those in which there was taxing of property, income or activities of the State, and those in which the tax was laid on agents and instrumentalities of the State, which tax was said to impede or cripple indirectly the State. They held that the distinction between governmental and proprietary interests was untenable, and agreed that a non-discriminatory tax could sometimes be laid on the State, provided it did not affect its sovereignty, but the essence of the matter was not that the tax was non-discriminatory but because it unduly interfered with the performance of the State's functions of Government. Holding, therefore, that the tax in question there did not curtail the State Government in its functions, it was pointed out that the Constitution could not be read to give "immunity to the State's mineral water business from federal taxation" or to deny to the federal government power to levy the tax. Mr. Justice Jackson took no

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part but Justices Douglas and Black entered a powerful dissent. The opinion was based on the theory that the taxing power of either Government if exercised against the other was likely to affect the cost of its operation and "if the federal Government can place the local Governments on its tax collectors' list, then, capacity to serve the needs of their citizens is at once hampered or curtailed."

From the above analysis of the American cases (and all of them were within the ken of our Constituent Assembly), we gather that the immunity now does not extend to agents, means or instrumentalities as it did previously, and that it does not extend to any trading or business activity of the State even though the trading involves natural resources (though it is conceded that the Congress may excuse trading in a suitable case). It extends to the property of the State owned as State but not in the course of trading. The marginal cases are those where the tax which is laid, interferes unduly with the State as a State, and it is held by narrow majority that except for such marginal cases, the States are not immune. The contention on behalf of some of the States is that the distinction made by Brewer, J., in the *South Carolina case* (1) has been preserved in the scheme of Art. 289, and if import and export are in the discharge of essential governmental functions, there must be exemption from customs duty but not if there is trading. Similarly, it is contended that there is exemption from excise duty based on the same or similar considerations. In other words, the claim is that our Constitution reproduces in its broad features the doctrine as understood in the United States till the time of the framing of our Constitution.

There can be no doubt that the broad features of Art. 289 correspond to the American doctrine as understood before our own Constitution was framed. Article 289 grants an exemption from taxation to

(1) 199 U.S. 437 : 50 L.Ed. 261.

the property and income of the States. What that comprehends I am leaving over for discussion till after I have touched upon the Canadian and Australian Constitutions and referred to cases decided in connection therewith. Article 289, however, quite clearly limits the exemption against taxation in such a way as to make the trading activities of the States and the property used or occupied for the purposes of such trade or business liable to taxation. This follows indubitably from cl. (2). Without attempting to expound exegetically the words of that clause and its relation to clauses (1) and (3), I find it sufficient to say that cl. (2) puts outside the exemption granted by cl. (1) all trading activities of the State and property used in that connection. The force of the opening words "Nothing in clause (1)" does not make cl. (2) an exception to cl. (1). Those words emphasize that the existence of the power declared by cl. (2) is really unaffected by cl. (1). This is the trend of opinion in the U.S.A., as I have pointed out. The same opening words are repeated in cl. (3) and the final words "incidental to the ordinary functions of government" show that even trading can be regarded, if Parliament so declares by law, as "incidental to the ordinary functions of Government." This is again recognized in the U.S.A., where statutes sometimes include special exemptions in favour of the trading activities of the States.

It follows, therefore, that the general outline of Art. 289 is based upon the American pattern that the property and income of the States are not to be taxed, that trading is not an ordinary function of Government though Parliament may by law declare that any trade or business or any class of trade or business is incidental to functions of Government.

So far I have dealt with the general pattern only and traced its similarity to the American

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doctrine. It may be pointed out even at this stage that there is no immunity in respect of the agents or instrumentalities of Government in our Constitution. The exemption is in respect of the "property and income of a State". The force of these words appears from other cases under the Canadian and Australian Constitutions. I shall deal with Australia first, because the leading case under that Constitution was decided before the leading case under the Canadian Constitution.

I have already quoted s. 114 of the Commonwealth of Australia Constitution Act. The material portion of it may be reproduced here :

> "A State shall not.....impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to the State".

The doctrine of immunity of instrumentalities as an implied prohibition in the Constitution was held inapplicable to Australian Constitution by the Supreme Court of Victoria before the High Court was constituted but the High Court in the first case applied the doctrine. See *D'Emden* v. *Pedder* (1). It is hardly necessary to trace the history of the doctrine as it was rejected in what is called the *Engineers' case* (2). It was, however, held in *D'Emden* v. *Pedder*(1), that s. 114 only referred to "tax on property" as such and was a prohibition different from that contained in the American Doctrine. The matter came to a head in two cases in 1908. In *King* v. *Sutton*(3), a quantity of wire netting purchased in England and imported into the Commonwealth by the Government of New South Wales was landed at the port of Sydney. Without any entry having been made or passed and without the permission of the customs officers, it was removed under the executive

(1) (1904) 1 C.L.R. 91. (2) (1920) 28 C.L.R. 129.
(3) (1908) 5 C.L.R. 786.

authority of the State. The customs authorities proceeded against the defendant under ss. 36 and 236 of the Customs Act of 1901. It was held that the Customs Act, 1901, was a valid exercise of the exclusive power of the Commonwealth conferred by ss. 52(ii), 86 and 90 of the Constitution Act, to impose, collect and control duties of customs and excise, and the Act applied to goods imported by the Government of a State just as it applied to private persons and the goods which were subject to the control of the Customs authorities under s. 30 could not be removed contrary to the provisions of the Act. On the following day, the High Court delivered judgment in the *Attorney-General of New South Wales* v. *The Collector of Customs* (1), in which s. 114 was considered. That was an action brought to recover from the defendant the amout of customs duties demanded and paid under protest in respect of the importation into the Commonwealth of certain steel rails by the Government of the State of New South Wales. The rails were purchased in England and were shipped to the Secretary for Public Works of the State. At that time the current of authority in Australia was in favour of applying the American doctrine of immunity of instrumentalities as laid down by the High Court in *D'Emden* v. *Pedder* (2), though in that case, it was already held that s. 114 dealt with "tax on property", and it was a very different matter. The State sought the protection of s. 114. It was held that the doctrine had no application to powers expressly granted to the Commonwealth which by their very nature involved control of some operations of the State Government and one such grant was the power to make laws with respect to external trade. It was further held that the imposition of customs duties being a mode of regulating trade and commerce with other coutries as well as an exercise of the taxing power, the right of the States to import goods must be subject to the

(1) (1908) 5 C.L.R. 818. (2) (1904) 1 C.L.R. 91.

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Commonwealth power. The Commonwealth power was said to flow from s. 51 [(i) and (ii)] which read :

> "51. The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to :—
>
> (i) Trade and commerce with other countries, and among the States,
>
> (ii) Taxation; but so as not to discriminate between States or parts of States".

In this connection, one other section may be quoted :

> "55. Tax Bill.—Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only".

In deciding that the State Government was required to pay customs duties on import by it, the provisions of s. 114 notwithstanding, the learned Judges gave widely different reasons. Those reasons were pressed into service in the arguments before us, and I shall briefly notice them. Chief Justice Griffith found entinomy in the power of taxation and regulation conferred by s. 51 on the one hand and the exemption granted by s. 114 on the other, and held that if a construction was possible which would harmonise the two, it was to be preferred. The

learned Chief Justice, therefore, examined the scheme of the Constitution Act and found that though the word 'taxation' in s. 51 (ii) included customs duties, the latter were not described as 'tax' in the Constitution or as 'tax on property'. He held that customs duties were a tax on the movement of goods and the word 'tax' in s. 114 could not be held to include customs duties because the section mentioned a tax 'on property' 'belonging to a State'. He was of opinion that such property must be within the geographical boundaries of the State and customs duties being collected at the confines of the State were collected before the goods became the property of the State. He concluded, therefore, that the levying of duties of customs on importation was not an imposition of the tax upon property within the literal meaning of s. 114, and even if it was, the section must be differently construed in the light of the general provisions of the Constitution Act. Barton and O'Connor, JJ., in separate judgments followed the same line of thought. Higgins, J., pointed out that before the prohibition applied, taxation of property must be 'as property'. His conclusion may be stated in his own words :

> "I prefer to base my judgment on the ground which I have stated. I cannot confidently, take the ground that customs duty cannot be a tax within the meaning of the word 'tax' in section 114. It is true that 'duties of customs' and 'duties of excise' are the usual expressions; but phraseology, such as is used in s. 55, shows that the Constitution treats the imposing of such duties as being the imposing of taxes. 'Laws imposing taxation, except laws imposing duties of customs or excise, shall deal with one subject of taxation only'. However the fact that section 114 uses the mere word 'tax'—not 'tax of any kind' although it speaks of 'property of any kind'—strengthens the view

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that the framers of the section could not have had customs duties in their minds at the time. They lay the emphasis on the thought on ownership—'property of any kind belonging' etc." (p. 855).

Isaacs, J., on the other hand, held that duties of customs as ordinarily understood or in the Customs Act, were imposed on the goods themselves and were therefore, 'on property' within the meaning of s. 114, but did not come within the meaning of 'tax' as used in that section and the Constitution genarally. He cited certain authorities to show that though the word 'taxation', when used to confer on Government a power, might carry the amplest meaning, being a generic word, the word tax might or might not be as wide in meaning when used in some other context. The learned Judge found that the word 'tax' was used only in s. 114 and did not carry the wide meaning, and coupled with the word 'property' could not be read to include customs duties.

This decision of the Australian High Court was strongly relied upon by the learned Solicitor-General. It will, however, be seen that the construction of the words used in s. 114 is so intimately connected with the scheme and language of the other parts of the Constitution Act as to be of little assistance to us. The words 'tax' and 'taxation' were not defined in the Australian Constitution, whereas they are, in our own. Further, the distinction between 'tax' and 'taxation' with all due respects is somewhat difficult to apprehand. I can only say in the words of Cassels, J., in a Canadian case to which I shall refer presently that :

> "I agree with the Attorney-General for British Columbia in his Statement before me as to the difference between taxation and a tax. As the Attorney.General states 'I am not relying very

> strongly upon that phase of the argument'. He thinks the distinction is rather subtle and thin, so do I."

We shall soon that the Privy Council did not rely upon this distinction when this case was cited before it.

The decision in the Australian case lays down certain general propositions which may be stated. It recognizes that customs duties have the dual aspect of raising revenue and of regulating external trade. This proposition, of course, is valid. It was also accepted in the American cases to which I have already referred and also in the Privy Council case from Canada to which I shall make reference. It also decided that the word 'taxation' is sufficiently wide to take in customs duties. This was laid down by Isaacs, J., and cannot be said to be dissented from by the other learned Judges. This proposition is hardly necessary as an aid to construction of our Constitution which uses the word 'taxation', as I pointed out during the course of arguments only, in Art. 289, and defines the term :

> "Art. 366 (28). 'Taxation' includes the imopsition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly".

This gets over the difficulty felt in Australian case generally and particularly by Higgins J., in the extract I have made from his judgment. The fact that the word 'taxation' is used in one place only in our Constitution saves us from the task of examining the context, because the definition would become a dead letter if it were not used in that place in the sense defined. As regards the scheme of the Australian Constitution, there is some similarity in that the powers of taxation conferred by s. 51 of the Australian

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Constitution Act on Parliament are subject to the provisions of that Constitution just as they are in our Constitution but unlike those conferred by the Constitution of Canada. I shall refer to these points which were used in arguments when I deal with our Constitution. I shall now refer to the Canadian case relied upon by the learned Solicitor-General.

Before dealing with the Canadian precedent or the decision on appeal by the Judicial Committee, I find it necessary to refer to a few cases in which the Privy Council explained the general scheme of the British North America Act and the principles on which that Act is to be construed, particularly ss. 91–95 of the Act, which deal with the powers of legislation in the Dominion and their distribution between the Dominion Parliament and the Legislatures of the Provinces. Without having those principles before one, there is a danger of misapprehending the implications of the cases relied upon by the learned Solicitor-General. It is not necessary to reproduce sections 91 and 92 in their entirety beyond the opening words which have a direct bearing upon the problem decided in the Privy Council case. Section 91, in so far as material to our purpose, reads :

> Section 91—
>
> "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters

coming within the classes of subjects next hereinafter enumerated, that is to say,—"

"Then follows an enumeration of twenty nine classes of subjects".

* * * * * *

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Section 92 is as follows :—

"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—"

"Then follows an enumeration of sixteen classes of subjects."

In dealing with the general scheme of the Act, the Board in *The Citizens Insurance Company of Canada* v. *William Parsons and The Queen Insurance Company* v. *Williams Parsons* (1), pointed out that the scheme was to give primacy to the Dominion Parliament in cases of conflict of power *notwithstanding anything in the Act* and explained how the exclusiveness of the spheres of the two legislatutes was intended to work. The position was again summed up the next year in *Russel* v. *Queen*, the report of which is to be found in the same volume at p. 829. Again, in *Tennant* v *Union Bank of Canada* (2), it was held that s. 91 (No. 15) of the British North America Act gave the Dominion

(1) (1881—82) 7 App. Cas. 96. (2) (1894) A.C. 31 at 41.

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Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interfered with property and civil rights in the province (ss. 92, 20, 13) and conferred upon the bank privileges as a lender which the provincial law did not recognise. The decision was rested once again on the doctrine of paramountcy of Dominion Parliament *notwithstanding anything in the Act* so long as it did not fall within the exclusive power of the Provincial Legislature under section 91. Lord Watson observed:

> "..... But sect. 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament."

This primacy of Dominion Parliament was in all matters legislative, subject, of course, to what was assigned exclusively to the Provincial Legislatures. But the primacy of Parliament of Canada was untrammelled by anything elsewhere to be found in the same Act.

From the above citations, it is obvious that the general scheme of the British North America Act assigns certain subjects to the exclusive and plenary power of the Dominion Parliament, and certain other subjects exclusively to the Provincial Legislatures. By s. 91, the Imperial Parliament has unequivocally placed everything not assigned to the local legislatures within the jurisdiction of the Dominion Parliament notwithstanding anything in the

Act. The British North America Act thus has to be construed as a whole and with reference first to the exclusive domain of the Provincial Legislatures, next, with reference to the Paramountcy of the Dominion Parliament and the general scheme of the Act. Unless a matter falls within s. 92 and does not fall within s. 91, the action of the Dominion Parliament is subject to no restraint by anything elsewhere to be found in the Act.

We are now in a position to consider the case so strongly relied upon by the learned Solicitor-General. To Understand that case, the facts must be seen first. It was a test case by way of an action by the Crown in the right of the Province to have it declared that it could import liquor into Canada for purposes of sale without paying customs duties imposed by the Crown in the right of the Dominion of Canada by virtue of the Customs Act of Canada. The action of the Province of British Columbia was based on the provisions of Government Liquor Act which was declared *intra vires* by the Privy Council in *Canadian Pacific Wine Company Limited* v. *Tuley* (1). Before the Exchequer Court, the following admission of facts was filed by the Attorney-General of Columbia :—

> "It is hereby admitted, for all purposes of this action, that the case of 'Johnnie Walker' 'Black label' whiskey, which was purchased and consigned to H.M. King George V in the right of the province of British Columbia care of Liquor Control Board, Victoria B. C. as alleged in para 1 of the Statement of the claim filed herein, was so purchased and consigned to meet the requirements of the Government Liquor Stores established in British Columbia under the Government Liquor Act Ch. 30 of the States of British Columbia, 1921 and for the purpose of sale at the said Government

(1) [1921] 2 A.C. 417.

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Liquor Stores pursuant to the provisions of the said Act".

The contention on the side of the Province was that s. 125 of the British North America Act which provides "No lands or property belonging to Canada or any Province shall be liable to taxation", gave protection against the customs duty. The contention on the side of the Dominion was that the whiskey was not imported for purposes of Government but for trade. It was pointed out that under s. 118, large sums were payable by the Dominion to the Provinces and reference was also made to ss. 122, 123 and 124, under which customs and excise laws as also certain other dues were to continue until altered by the Parliament of Canada. British Columbia was not a part of the Dominion to start with. It was admitted into the Dominion under s. 146 of the British North America Act on May 16, 1871, by an order of Her Majesty in Council. Section 7 of the Order provided that the existing customs tariff and excise duties would continue in force in British Columbia for sometime. The Dominion Act under which the customs duty was sought to be levied provided as follows :—

> "The rates and duties of customs imposed by this Act, or the customs tariff or any other law relating to the customs, as well as the rates and duties of customs heretofore imposed by any Customs Act or Customs Tariff or any law relating to the Customs enacted and in force at any time since the first day of July 1867, shall be binding, and are declared and shall be deemed to have been always binding upon and payable by his Majesty, in respect of any goods, which may be hereafter or have been heretofore imported by or for His Majesty whether in the right of His Majesty's Government of Canada or His Majesty's Government

of any Province of Canada, and whether or not the goods so imported belonged at the time of importation to His Majesty; and any and all such Acts as aforesaid shall be construed and interpreted as if the rates and duties of customs aforesaid were and are by express words charged upon and made payable by His Majesty.

Provided, however, that nothing herein contained is intended to impose or to declare the imposition of any tax upon, or to make or to declare liable to taxation, any property belonging to His Majesty either in the right of Canada or of a Province".

In the Exchequer Court, Cassells, J., based his decision on the fact that the whiskey was imported not for any governmental purpose but for trade. He, therefore, rejected the claim of the Province following Mr. Justice Brewer's dictum in the *South Carolina case*, and referred to two cases of the Privy Council, *Farnell* v. *Bowman* (1) and *Attorney-General of the Strait Settlement* v. *Wemyss* (2), in which it was stated that "if a State chooses to embark upon private business in competition with other trades, they should be liable just as other persons engaging in trade". The Australian case of *Attorney General of New South Wales* v. *Collector of Customs* (3), was referred to but was not followed.

An appeal was taken to the Supreme Court of Canada. The report of the decision is found in *The Attorney-General of the Province of British Columbia* v. *The Attorney-General of the Dominion of Canada* (4). It was argued on behalf of British Columbia that in s. 125, British North America Act, the word 'taxation' included the imposition of customs duties and the word 'property' included movable property of all kinds and not merely

(1) (1887) 12 App Cas. 643.
(2) (1888) 13 App. Cas 192.
(3) (1908) 5 C.L.R. 818.
(4) 64 Canada S.C.R. 377.

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property as may be incidental to the administration of the provincial government. On behalf of the Dominion, it was contended that customs duties did not come within 'taxation' but were merely in the nature of regulations of trade and commerce, and further this was not 'taxation on property', and *Attorney-General of New South Wales* v. *Collector of Customs* (1), was relied upon.

The Court consisted of five learned Judges and they delivered separate judgments. Iddington J., declined to go into the question whether the word 'taxation' would or would not include customs duties. He held that s. 125 was in a chapter which dealt with lands and property and thus was confined to property as was mentioned there or in the 3rd and 4th Schedules, and concluded that in view of this context and the nature of the powers given by Nos. 2 and 3 of s. 91, the power to demand customs duties must be upheld. Anglin J., held on the authority of *Attorney-General of New South Wales* v. *Collector of Customs* (1), that s. 125 could not have been intended to give exemptions of this kind, and that customs duties were not only taxes but were also regulatory and were imposed rather on movement across the border than on the goods themselves and were thus not a tax 'on property' in Canada. Mignault J., followed a similar line. Duff J., entered into a more detailed discussion of the sheme of the British North America Act. He observed that it was a fundamental part of the scheme of Confederation to give amplest authority in relation to external trade exclusively to the Dominion, and customs duties were an instrument of regulation. He, therefore, held that the theory of Dominion primacy must on such a construction of s. 125 postulate a power of disallowance of anything which would weaken that control and primacy. He also held that 'taxation' in relation to property was less comprehensive in significance than 'taxation'

(1) (1908) 5 C.L.R. 818.

simpliciter, and though customs duties were taxes on commodities in one sense, they were not 'taxes on property' as used in s. 125 where the word 'property' was used in the sense of distribution of 'lands' and 'property' between the Dominion and the Provinces. Brodeur J., held that customs duties in Canada both regulated and raised revenue and the Act under which they were levied laid them 'on or upon goods' and this attracted s. 125.

All these reasons were of course pressed into service in the arguments before us. I shall now address myself to the Privy Council judgment on appeal from the Supreme Court. The Privy Council did not express any opinion on these reasons.

Lord Buckmaster referred to the width of s. 125 but pointed out that it could not be read in an isolated and disjunctive way. It was to be read as a part of the general scheme of the Constitution Act by which the Dominion was to enjoy exclusive legislative authority over matters enumerated in s. 91 which included regulation of trade and commerce and raising of money by any mode or system of taxation. He pointed out that customs duties had these dual functions and whether it was the one function or the other or both, the Dominion alone had the power. The claim of the Provinces that though the Dominion had the power to erect a tariff wall, the provinces could make a breach in it by virtue of s. 125 through which the goods could pass unaffected by the Customs duties, was not accepted, because s. 125 was a part of a group of sections which distributed property between the Dominion and the Provinces and gave control to the Provinces over properties allocated to them. This did not affect authority conferred by s. 91, which power extended to regulation of trade and commerce throughout the Dominion and irrespective of the area of its operation. Lord Buckmaster, therefore,

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held that this purpose was paramount and s. 125 must not be read to defeat it. In other words, the primacy of Dominion Parliament in the matter of regulation of external trade and commerce and taxation of this type was held to be unaffected by s. 125. Lord Buckmaster referred to *Attorney-General of New South Wales* v. *Collector of Customs* (1), but did not apply it and observed that "the true solution is to be found in the adaptation of s. 125 to the whole scheme of Government" which the British North America Act defined.

The Canadian decisions are based upon the scheme of the British North America Act which gives paramountcy to the Dominion Parliament which was unaffected by s. 125 which found place in a group of sections dealing with the distribution of property between the Dominion and the Provinces.

Now, the arguments in the present case follow the lines taken in the cases I have reviewed. It is contended for the Union that the exclusive power to levy duties of customs and regulation of external trade belongs to Parliament, that customs duties both raise revenue and regulate, that they are not 'taxes' much less 'taxes on property', and Art. 289 must be interpreted to preserve the exclusive and plenary power of Parliament. On the other side, it is contended that clauses (2) and (3) indicate that the right of Parliament is to tax the trading activities of State Governments but to leave free their ordinary functions as the Governments of the States, and the prohibition in cl. (1) of Art. 289 is absolute subject only to what is expressly excluded by cl. (2). To understand the arguments and to see how the precedents of other countries serve us to understand our Constitution, I shall first analyse the scheme of taxation under our Constitution.

To begin with, it is a matter for reflection whether the word 'property' in Art. 289 excludes

(1) (1908) 5 C.L.R. 818.

property imported from foreign countries which has to bear a tax before it can enter the territory of India. The Article bans taxation of property belonging to the Government of a State. If by property is meant only that property which is within the geographical limits of a State, then, property outside those limits and seeking to enter the State across customs frontiers may have to bear customs duty. Similarly, if customs duties do not come within the word 'taxation', the Article is again ineffective to save the property of the State Governments. The Union claims that customs duty is neither 'taxation' nor a 'tax on property'. It is a tax on the movement of goods across the customs frontier and the protection given by Article 289(1) does not apply. The scheme of the Constitution clearly shows that neither claim of the Union can be upheld.

The Union List does not include any tax which in the technical or popular sense can be said to be 'property tax' or a tax laid on property as property. These tax entries begin at No. 82 which is "taxes on income other than agricultural income". Then follow Nos. 83 and 84 which deal with duties of customs and duties of excise. It is these entries which are the subject of controversy. If these are not to be regarded as taxes on 'property', then, no other tax can be remotely connected with the property of the State in the sense suggested by the learned Solicitor-General, Nos. 85 and 86 deal with companies, and Nos. 87 and 88, with death duties. In extremely rare cases, a State might be the legatee as in *U. S.* v. *Perkins* (1) and *Snyder* v. *Bettman* (2), but it is difficult to imagine that such a case was in contemplation. Terminal taxes and taxes on railway fares and freights of No. 89 may fall upon the States, but under Art. 269, the proceeds have to be assigned to the States. No. 90 deals with taxes other than stamp duties on transactions in stock exchanges and future markets. They are seldom, if at all, likely to

(1) 163 U.S. 625 : 41 L.Ed. 287.
(2) 190 U.S. 249 : 47 L.Ed. 1035.

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fall on the States and the proceeds are also assignable to the States. No. 91 is Rates of stamp duties, and No. 92, taxes on the sale or purchase of newspapers and on advertisements published therein, and No. 92-A, taxes on the sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce, are again not taxes such as may be considered to be 'on property'. The net proceeds of these taxes are again to be given to the States. When the question was put to the learned Solicitor-General as to which tax on property was in contemplation, he could only point to the residuary power of Parliament. This shows that unless Art. 289(1) took in entries relating to customs duties and excise duties, the protection granted by the clause would be largely superfluous or nugatory.

The Government of India Act, 1935, granted exemption in respect of lands and buildings only. The present Article changed the words to 'property and income'. The pharse is exhaustive of all the assets and income of the States. Clause (2) of the Article indicates that the exemption is not to apply to the trade or business carried on by the State and *any tax* can be imposed in respect of such trade or business of *any kind* or *any operations* connected therewith and *any* property *used* or *occupied* for the purpose of such trade or business and *any* income accuring or arising in connection therewith. The repeated use of the word 'any' shows that the distinction sought to be made in Australia from the use of the word in one place and its omission in another is not admissible. The words 'used or occupied' show that movable and immovable properties are included. Clause (3) shows that power is reserved to Parliament to declare by law which trade or business or class of trade or business is incidental to the ordinary functions of Government, thus, taking the matter out of the

jurisdiction of courts. Till Parliament so declares, all trade and business of any kind must remain subject to taxation.

From the above, it follows that the three clauses of Art. 289 must be read together and harmoniously together their correct import. It is not possible to read cl. (1) with the assistance of rulings of other Courts. The problem to be faced is: What is included in the expression 'property of a State'? It must obviously include all property to which the State can lay claim. The word 'property' is wide enough to include immovable as well as movable varieties. Art. 289 departed from the language of the Government of India Act, 1935 by discarding 'lands or buildings' and using the more comprehensive expression 'property', and in cl. (2) qualified that word by 'any' and by 'used or occupied'. The collocation of these expressions clearly indicates that the property of the State in whatever circumstances situated, was meant and was exempt from taxation and the only property which was made subject to taxation was any property used or occupied for business. Property, which is brought into ownership and possession abroad, or property, which is produced or manufactured by the State, is property of the State. If not, the question may be asked, "Whose property is it then ?", and no answer to such a question can be given. I am, therefore, of the opinion that taking the language of Art. 289 (1) by itself or even as modified by that of clauses (2) and (3), the conclusion is inescapable that properties of all kinds belonging to the States save those used or occupied for trade or business, were meant to be exempted from 'taxation'. Such property may be immovable or movable and need not be within the geographical limits. This Article is in the part dealing with "Finance" and is included in a sub-chapter entitled "Miscellaneous Financial Provisions". Its significance is thus not made less

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by any special considerations as was the case with s. 125 of the British North America Act. The powers of legislation, which Parliament enjoys by virtue of the taxation entries in List I, are *expressly subject to the provisions of the Constitution,* and Art. 289 must, therefore, override unless it be inapplicable. The Scheme of Art. 289 does not admit that the word 'property' should be read in any specialized sense. I am, therefore, of opinion that goods imported and goods manufactured or produced by the States are included in the word 'property'.

It is next contended that neither customs duties nor excise duties can be said to be "taxation", and even if they can be described as "taxation" or "tax", they are not tax on property. They are said to be taxes on movement of goods in the one case, and taxes on production or manufacture, in the other. Many rulings were cited to show that this is the way in which Judges have described these levies. I shall deal with customs duties first, because, in my opinion, excise duties are simpler to deal with. Some Judges have described excise duties as "on goods produced", and some, as "on production and manufacture", and it is easy to cite an equal number of cases on either side.

The definition of the word 'taxation' in our Constitution is the most significant fact. It serves to distinguish the Australian cases and it tells us what kind of levy would be hit by Art. 289 (1). This is what it states :

> " 'Taxation' includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly".

Though it is not an exhaustive definition and only shows what is included in the word, one is struck

immediately by its width of language. Though it speaks of *any* tax or impost, it goes a step further and adds "whether general, or local or special" indicating thereby that no special or local considerations are relevant and even a general non-discriminatory levy must be regarded as taxation. I have already stated that the word "taxation" is used only in Art. 289 (1) and it must be read with all its wealth of meaning into the first clause of the Article. Not to do so would be to make the definition entirely redundant. When the clause is expanded in the light of the definition, it reads :

> "The property and income of a State shall be exempt from *any* Union *tax or impost, whether general or local or special*".

The underlined portion represents the definition.

The question thus arises why use the word and define it in this comprehensive way if there was no tax in the legislative entries in List 1 which could be said to fall on the property of the States unless one thought in terms of customs duties and excises ? According to *Wells* (1),

> "Scientifically considered taxation is the taking or appropriating such portions of the product or property of a country or community as is necessary for the support of its Government by methods that are not in the nature of extortions, punishments or confiscations".

Viewed in this broad way and having in mind that the term 'taxation' as used in the Article was specially defined with great width, the answer to the question posed by me is obvious. But that is not all. The definition speaks of "impost". The word "impost" in its general sense means a tax or tribute or duty and may be on persons or on goods. In a

(1) Theory and Practice of Taxation, p. 204.

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special sense it means *a duty on imported goods and on merchandise.* See *Pacific Ins. Co.* v. *Sonle*(1). In *Ward* v. *Maryland* (2), it is stated :

> "An impost, or a duty on imports, is a custom or tax levied on articles brought into a country".

The Oxford Dictionary does say that this special meaning is after Cowell and that there is no evidance of the origin. But every dictionary of legal terms will bear out the special meaning. Indeed, the American Constitution classifies "impost" with "duties" and "excises" as indirect taxes in contradistinction to taxes on property or capitation. The word "duties" is sometimes used as synonymous with tax, but in a special sense, it means an indirect tax imposed on the importation or consumption of goods. See *Pollock* v. *Farmers' Loan & Trust Co* (3).

In Art. 289(1), property of the States is exempted from Union taxation. One cannot go by the word "property" alone but must take into consideration the ambit of the word "taxation" also. I have read the definition into the first clause of Art. 289. Reading further into the definition the meaning of the word "impost" not as a "tax" (which is unnecessary as the word "tax" has already been used and there is a presumption against tautology) but as a "duty on importation or consumption", one gets this result :

> "The property and income of a State shall be exempt from any Union tax or duty on imported goods or merchandise of all kinds".

In other words, property of the States shall be free from direct taxes and indirect taxes.

It will thus be seen that both from the angle of the word "property" as also from the angle of the

(1) 7 Wall. (U.S.) 433 : 19 L.Ed. 95.
(2) 12 Wall. (U.S.) 418 : 20 L.Ed. 449.
(3) 158 U.S. 601, 622 : 39 L. Ed. 1108.

word "taxation" we reach the two kinds of taxes which are the subject matter of controversy here. On the other hand, all this width of language is lost completely if these taxes are left out and one goes in search of other possible taxes. The definition may conceivably cover some of them in very special circumstances but the proceeds of those taxes are assignable to the States, and it seems pointless to include them for taxation and then to hand over the proceeds to the States. The distinction between the trading activity of the State Governments and their ordinary functions of government, which is worked out with such elaborate care on the American pattern, also loses its point. Clause (2) would scarcely be necessary and cl. (3), even less.

The next question is whether customs duties and excises are in their true nature taxes on the occasion of importation in the one case and production in the other, and cannot be described as "taxes on property". To begin with, the expression "taxes on property" is not used; nor is the expression "taxes in respect of property", with which the former expression was compared. The former expression was used in the Australian Constitution Act and the distinction was made by the High Court of that country. We are only concerned to see whether the imports of the States would be free from Union taxation. If by the nature of customs duties as a tax on movement of goods, it cannot be said that the exemption has been earned, there should be an answer in favour of the validity of the amendment. If customs duties can be said to be "tax on property", the answer must be the other way.

In this connection, there is the High authority of Chief Justice Marshall in *Brown* v. *Maryland* (1), where he observed :

> "An impost, or duty on imports, is a custom or a tax levied on articles brought into a

(1) 12 Wheaton 419, 437 : 6 L.Ed. 678, 685.

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country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports'? The lexicons inform us, they are 'things imported'. If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports', then, is not merely a duty on the act of importation, but is a duty on the thing imported."

In *Marriot* v. *Brune* (1), later approved in *Lawder* v. *Stone* (2), it was laid down that customs are duties charged upon commodities on their being imported into or exported from a country. It follows, therefore, that it is not right to say that customs duties are on movement of goods and not upon the goods themselves. A glance at the Sea Customs Act, 1878, which is sought to be amended, shows that the legislative practice in our country has been to describe customs duties as laid on the goods or commodities. Section 20 itself, which is sought to be amended, says :

".....customs duties shall be levied..... on

(a) goods imported or exported, etc.

(b) opium, salt or salted fish imported, etc.

(1) 9 Haward (U.S.) 619 at 632 : 13 L. Ed. 282.
(2) 187 (U.S.) 281 : 47 L.Ed. 178.

(c) goods brought from any foreign port to.....etc.

(d) goods brought in bond from one customs port to another".

Similarly, ss. 25, 26, 27, 28, 29, 29A, 31, 32 and several others mentioned goods as being the subject of the tax. Section 43, which deals with drawbacks, may be seen in this connection :

> "43. When any goods, having been charged with import duty at one customs-port and thence exported to another, are re-exported by Sea as aforesaid, drawback shall be allowed on such goods as if they had been so re-exported from the former port."

* * * * *

The duty is laid on goods and it is the goods which earn the drawback. It would be not wrong to say that the whole of the Sea Customs Act speaks of *goods* all the time.

If then the goods be the property of the States and those goods have to bear the tax before rights of ownership can be exercised in respect of them, is it an error to say that the exemption of Art. 289 (1) will be available to them, regard being had to the language of the clause read with the definition of "taxation"—

> "The property.....of a State shall be exempt from any Union tax or impost, whether general or local or special"?

Indeed, Parliament in 1951, soon after the Constituent Assembly had adopted the Constitution, amended s. 20 of the Sea Customs Act, 1878, by inserting sub-s. (2) which read:

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"The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government of a State and used for the purpose of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government."

This sub-section reproduces cl. (2) of Art. 289. It views the goods imported as property, customs duties as "taxation", and declares that such goods though belonging to a State Government would bear the tax under the circumstances mentioned in the said clause. If there ever was a perfect instance of *contemporanea expositio*, this must be it. It is not a case of a modern statute being interpreted with reference to an old one. Nor is their any judicial interpretation involved. This is a case of the same body of men enacting a provision in an Act to carry out the intent and meaning of a provision of the Constitution adopted earlier by them. In their understanding of the Constitution, customs duties as levied under the Sea Customs Act, 1878, were affected by the change from "lands and buildings" of s. 154 of the Government of India Act, 1935, to "property" and the grant of exemption to such property from Union taxation. If I had any doubts about the construction of Art. 289, this would have served me to show the way. I, however, think that the matter hardly admits of any doubt.

The learned Solicitor-General again and again referred to the dual purpose achieved by the imposition of customs duties, namely, the raising of revenue and the regulation of foreign trade. He associated excise duties with customs in the same breath and cited the Privy Council case from Canada to argue that if the proposed amendment is declared in either case to be unconstitutional, then, the regulatory part

of the same law would fail without being in any way imperilled by Art. 289 or anything elsewhere to be found in the Constitution. This argument needs serious consideration.

There can be no doubt that the power of Parliament to regulate foreign trade is plenary and is untrammelled by anything contained in Art. 289. A similar assumption may also be made in favour of duties of excise, though the element of regulation may be somewhat weaker there than in the duties of customs. The question, however, is what purpose is the proposed amendment intended to serve ? It is a little difficult to dissociate the regulatory aspect from taxation. Even in Australia, where tax laws must deal only with taxation and no other subject, the regulatory aspect of customs duties was adverted to. In the United States of America also, this regulatory aspect of customs duties did play a prominent part. Can we, therefore, say that the combined effect of entries 83 and 41 of List I would sustain the proposed amendment ? If it were a question of regulation being inextricably woven into the tax, I would have paused to consider the matter. I am not expounding a law already made but am giving an opinion on certain questions. These questions definitely refer to the revenue aspect of customs duties. If the law were framed to regulate and even to prohibit the importation, by the State Government in common with others, of certain goods or classes of goods, I would have no hesitation in saying that such a law would not offend the exemption in Art. 289. Even if the law was intended to achieve 'both ends' there would be an argument in favour of the Union. But if the advice is sought on the plain question whether the goods of the States can be taxed to raise revenue, the answer is equally plain that it is not permissible except in the circumstances already mentioned respectively in the two sub-sections which are sought to be amended.

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Section 20 of the Sea Customs Act, and s. 3 of the Central Excises & Salt Act, do not pretend to regulate external trade in the one case and production and manufacture, in the other. They are provisions for raising revenue in much the traditional English way. Whatever little pretence there might be is shed completely by the proposed amendment which, to borrow once again from Mr. Justice Douglas, is a "measure designed to put the States on the tax collectors' list". In these circumstances, I answer the question in respect of customs duties without adverting to entry 41 of the Union list. It is argued that the States would import goods not only free but also freely and, thus, lose valuable exchange. But the question can only be answered as posed and not on the basis of horrible imaginings. It can be argued with equal force that the State Governments may be expected to evince a sane attitude towards our finances.

In so far as excise duties are concerned, no question of regulation of trade or of production or of manufacture can really arise except in certain rare circumstances. Much of this power of regulation of production and manufacture (except in respect of certain essential commodities mentioned in No. 33 of List III and those specially mentioned in List I) belongs to the States. In entry No. 84, we are concerned with tobacco and other goods except alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics. If regulation can serve the purpose, power will have first to be found either in List I or List III. But if it were a case of pure taxation, then, the excise duty is laid on goods in much the same way as customs. We cannot treat the observations of Judges, where they speak of excises as "on production and manufacture", to be as binding as statutes. Other Judges have used other language, like "on goods produced or manufactured". The Central Excise & Salt Act

uses the latter, and so do the lists in the Constitution. There is, therefore, no difference in this respect between excises and customs. The case of excises is simpler and *a fortiori*, because the goods produced in the States by the States for their ordinary functions of Government and not for trade or business, are property of the States and directly within their ownership. If such property is taxed, it is directly hit by Art. 289 (1), and the arguments on the analogy of customs have little place. It follows, therefore, that neither customs duties nor excise duties can be levied on goods properly belonging to a State if the goods are imported or produced not for the purpose of trade or business but for purposes incidental to the ordinary functions of Government. It also follows that the sections of the two Acts as they stand today reflect the true position under the Constitution. I may add that if the Union Government desires to put a curb on the excessive importation of goods by the States, the power to regulate external trade is available and it is unaffected by Art. 289. A measure designed to achieve regulation by a system of controls, licensing and all such devices, would not be affected by the exemption contained in the Article, but a pure taxing measure, which seeks to tax property used for State or governmental purposes, is within the exemption.

My answers to the questions are:

(1) The provisions of Art. 289 of the Constitution preclude the Union from imposing, or authorizing the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in cl. (2) of that Article, if the imposition is to raise revenue but not to regulate external trade.

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(2) The provisions of Art. 289 of the Constitution of India preclude the Union from imposing, or authorizing the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in cl. (2) of that Article.

(3) The answer is in the affirmative.

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RAJAGOPALA AYYANGAR J.—I entirely agree with the opinion expressed by my Lord the Chief Justice both as regards the answers to the questions referred to this Court as well as the reasoning on which the same is based. My only justification for venturing to add a few words of my own, is because of my feeling that certain matters on which great stress was laid by learned Counsel appearing for the States, might be dealt with a little more fully.

When the learned Solicitor-General submitted that on a proper construction of Art. 289 (1), the immunity from Union taxation in its relation to property was confined to a direct tax on property—and did not extend to indirect taxes—which were not on property but on an incident or an event in relation to property, it was urged by learned Counsel for the States that this was introducing a distinction between direct and indirect taxes which formed no part of our constitutional structure. It is true that no such express distinction has been made by our Constitution, even so, taxes in the shape of duties of customs (including export duties) and excise, particularly when imposed with a view to regulating trade and commerce in so far as such matters are within the competence of Parliament being covered by various entries in List I, these cannot be called taxes on property; for they are

imposts with reference to the movement of property by way of import or export or with reference to the production or manufacture of goods. Therefore, even though our Constitution does not confer or distribute legislative power to tax based on any distinction between direct and indirect taxes, it is wrong to suggest that for construing the exemption in Art. 289 (1), the distinction would necessarily be irrelevant. Learned Counsel for the States are perfectly correct in their submission that the Constitution does not distribute legislative power in regard to taxation between the Union and the States or any distinction between direct and indirect taxes as in Canada. In passing I might observe that even in Australia, there is no distribution of taxing power on such a basis, for while the Commonwealth Parliament has an exclusive power to levy duties of customs and excise (subject to the same having to be uniform) it has power, generally speaking, to impose direct taxes also, provided they do not discriminate, and the States have also a similar power to levy such direct taxes. This however does not by itself eliminate the relevance of the distinction for any particular purpose. That there is a distinction between direct and indirect taxes cannot be disputed and I heard no submission to the contrary. The question is whether that distinction has any materiality for interpreting the meaning of the words 'the property of a State not being subject to Union taxation'. The question at once arises whether when reference is made to "property" and "its taxation" what is meant is merely a tax on property as such, *i. e.* on the beneficial ownership by the State of the property or whether it is intended to include a tax which bears merely some relationship to or has some impact on such property. For in ultimate analysis the distinction between a direct and an indirect tax is a distinction based upon the difference in impact which is also expressed as a distinction based upon its being one not on property

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but on a taxable event in relation to property. If the taxable event is merely the ownership of the property and on the beneficial interest therein, it would be a direct tax, whereas if the connection between the property and the tax-payer is not merely ownership but something else such as a transaction in relation to it, then it would be an indirect tax. The argument therefore that under the Constitution legislative power in relation to taxation is not distributed between the Union and the States on any distinction between direct and indirect taxes as in Canada is not very material and of course not decisive on the question under consideration by us.

It was strenuously urged on behalf of the States that if Art. 289 (1) were construed in the manner suggested by the Union, *i. e.*, confining the immunity to direct taxes on property as distinct from taxes on property which merely impinged on or had an impact on property, the States could derive no benefit at all from the provision, because the Union Parliament had no legislative competence under the entries in the Union list to impose any direct taxes on property and that if some meaning and content has to be given to the exemption it would only be if its scope were to be held to extend to indirect taxes on property such as excise duty and duties of customs. The learned Solicitor-General submitted that even on the construction which he desired us to adopt there would be scope for the operation of the immunity because the exemption might very well have been framed in view of the possible direct taxation on certain forms of property under entry 97 of the Union List, read with Art. 248, though such taxes had not yet been imposed. His further argument was that the exemption might be capable of being invoked in cases where any State owned property in the Union territories, for in such a situation the Union Government would have under

Art. 246 (4) power to legislate on the items enumerated in the State List and thus levy direct taxes on property. On the other side, it was urged that it would not be reasonable to construe the words as having some meaning by reference to such unlikely eventualities, but that it would be proper to attribute to the Constitution makers an intention to make provision for the usual and the normal.

I must say that the submissions of the learned Solicitor-General are not without force. That apart, I consider that the history of this clause should be sufficient to preclude an argument of the type urged for the States having any great or decisive validity. It is common ground that Art. 289 (1) was taken over from s. 155 (1) of the Government of India Act, 1935, with however a variation to which I shall advert. In that earlier statute, that section ran :

> "Subject as hereinafter provided, the Government of a Province shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accuring or arising or received in British India."

The only change which is material which this section has undergone is the substitution of the word 'property' for the words "lands and buildings", thus extending the immunity not only to immovable property of the type specified but to other forms of property, including movable property as well. The distribution of legislative power in regard to taxation under the Government of India Act in the field relevant to the present context was identical with that which is found in the Constitution. Then as now, there was no power in the Central Legislature to levy any direct taxes on lands and buildings, besides there being no entry like 97 in the Union list, the residuary power remaining after the distribution in the three lists being vested in the Governor

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General for allocation under s. 104. It would have been impossible to find any scope for the operation of this exemption under the scheme of distribution of taxing power under the Government of India Act except possibly on some such line as suggested by the learned Solicitor-General. The fact therefore that if one had regard merely to the distribution of taxing power between the Centre and the Provinces there was no scope for imparting a wider meaning to the expression "taxes on lands and buildings" appears to me to support the view that the circumstance that direct taxes on property are not within Union Legislative power is not by itself a ground for reading the exemption from taxation as necessarily having any particular or a wider connotation.

The next question is whether the inclusion of property other than "lands and buildings" in the Article by itself brings within the immunity taxation not merely of the property itself but on some incident or event in relation to property such as production or manufacture, import or export (to refer to the incidents which are relevant to the context) or does the Article contemplate the same type of taxes in relation to movable property as were within the exemption under the Government of India Act in regard to "lands and buildings"? In other words, just in the case of "lands and buildings" under the Government of India Act, 1935, is the type of taxation of other species of property now brought in one which is direct and which arises from the mere ownership of such property or does it include a tax levied not on the property itself but on an incident or event in relation to it? The analogy of the immunity from direct taxes on "lands and buildings" which formed the feature of the exemption in regard to "property" under the Government of India Act, 1935, would appear to favour the view that it is also a direct taxation in relation to the other forms

of property that was intended to be brought within Art. 289 (1). Of course, this view could be overborne by sufficient reason pointing the other way.

It was in this context that a reference was made to the use of the expression "taxation" in Art. 289, a term which has been defined in Art. 366 (28) thus :—

> "366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—
>
> (28) "Taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly."

There is no doubt that if this definition were applied and every "tax, duty or impost" were within the scope of the exemption, the submissions made on behalf of the States would be formidable. A subsidiary and related point was also made that the expression "taxation" occurs only in Art. 289 and that if the width of the definition in Art. 366(28) is not held to be applicable to understand the content of that word in Art. 289, the definition itself would be rendered wholly unmeaning. Before considering these arguments it is necessary to advert to some matters. It is true that the expression "taxation" occurs only in Art. 289(1) but it is also to be noted that the definition of the term "taxation" in Art. 366 has been bodily taken from s. 311(2) of the Government of India Act, 1935. Just as under the Constitution the word "taxation" also occurs only once in the Government of India Act, 1935, *viz.*, in s. 155(1) corresponding to Art. 289(1). The definition, it would be seen, applies to define not merely the word "taxation" but also to the grammatical

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variations of that expression—for instance "taxes". In the circumstances the only question is whether in the context in which the word occurs having regard to the antecedent history and the form of the provision and to the other provisions of the Constitution there is justification for the word being understood as meaning something less than the full width of which it is capable under the definition.

In this connection it would be pertinent to refer to the terms of Article 285 in which the corresponding immunity of the Union from State taxation is provided. That Article runs :—

> "285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.
>
> (2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

In regard to this provision there are two matters to which attention might be directed. The first of them is the use of the expression "all" in clause (1)—(taken from the corresponding s. 154 (1) of the Government of India Act 1935)—which is absent from Art. 289 (1). It is manifest that some significance has to be attached to this variation. If the definition of the word "taxes" in Art. 366 (28) were applied to that word in Art. 285 (1), it would be apparent that the word "all" would be wholly superfluous and otiose, as the definition itself—and that

is the contention urged before us on behalf of the States—embraces all and every tax. This would suggest that it would not be wrong to take the view that the Constitution makers felt that notwithstanding the definition of "taxes" in Art. 366 (28), it might not always have that width of connotation so that it was necessary to affirm and if need be supplement its width by the addition of the word "all". The other matter is this. If the definition of "taxes" were read into Art. 285 and the Article read literally, it would be seen that property of which the Union was the owner would be entitled to the exemption, whether or not the beneficial occupation and use of the property was in the Union. In other words, the literal reading of the Article would bring within the exemption a tax on a private occupier of Union land—even when imposed on the beneficial interest of such occupier. S. 125 of of the British North America Act 1867 ran :

> "No lands or property belonging to Canada... shall be liable to taxation (Provincial)".

A lessee of Dominion Crown lands taken on lease for grazing purposes was assessed to land tax under an enactment of Saskatchewan in respect of the lessee's interest in the lands. The dominion challenged the validity of the imposition on the ground of the land itself being within the immunity conferred by s. 125. Rejecting this contention Viscount Haldane speaking for the Judicial Committee said :

> ".....although the appellant is sought to be taxed in respect of his occupation of land, the fee of which is in the Crown, the operation of the Statute imposing the tax is limited to the appellants' own interest." (1).

My object in referring tothese observations is that provisions of this sortxcannot always be read literally

(1) Smith v. Vermillion Hills. [1916] 2 A.C. 569, 574.

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and that the object of the framers as disclosed by the general scheme of distribution of powers has to be borne in mind to arrive at their proper construction. It is in this context that the intimate correlation between the exclusive legislative power of the Union in regard to "trade and commerce with foreign countries", and related to it, "import and export across customs frontiers" and the duties with which we are now concerned and particularly import and export duties on movements across the customs frontier assume crucial importance; and pose the question whether this power confided to the Union was intended to be broken into by every component State imparting its requirements free of duty.

There was one other further submission made to us by learned Counsel for the States which requires some detailed examination and this was based upon the impact of cl. (2) of Art. 289 on the import of cl. (1). The argument was this: The non-obstante clause with which cl. (2) opens should be taken to indicate that but for that clause, the exemption would be operative so as to deprive the Union of the power to levy tax in the converse circumstance, in other words that but for clause (2) even where the State was engaged in a trading activity it would be entitled to claim exemption from Union taxes. It was therefore submitted that light could be gathered from the content of cl. (2) on the types of taxation from which exemption was granted under cl. (1) or in other words for determining the ambit of the immunity covered by cl. (1). The argument proceeded. Cl. (2) permits the Union to impose the following taxes notwithstanding the blanket exemption granted by cl. (1). These taxes are: (1) A tax in respect of a trade or business of any kind carried on by or on behalf of the State. The taxes leviable in respect of a trade or business would be, having regard to the entries in the Union

List—(a) income tax (item 82), (b) possibly corporation tax (item 85) where the State carries on business through a State owned or State controlled corporation, (c) taxes on the capital value of assests of companies (item 86) in cases where the State carries on business through a State owned corporation; (2) Taxes in respect of operations connected with a trade or business. These might include a tax on freights, sales tax, and it was added duties of customs and duties of excise; (3) Taxes in respect of property used or occupied in connection with such a trade or business or any income accuring or arising in connection therewith. It was strongly pressed upon us that not merely direct taxes on property and direct taxes on income, but other types of taxes which were incidental to the "operations connected" with a trade or business (and it was suggested that customs and excise duties were such) could be imposed by the Union upon the States in cases where the latter was carrying on a trade or business. It necessarily followed, it was urged, that if these were not used for a trade or business, the taxes would fall within the scope of the exemption under Art. 289 (1). In other words, the argument was that as there was a limited power in Parliament to impose taxation on States or on those acting on behalf of the States it necessarily connoted that in cases not covered by cl. (2), that is in cases where it was not connected with a trade or business the exemption under cl. (1) would operate.

The precise relationship between clauses (2) and (1) and the question whether the former was a proviso properly so called which had been carved out of the main provision of cl. (1) and which but for such carving out would be within cl. (1) was the subject of considerable debate before us but I consider that it is not necessary to deal with this rather technical point for in my view the history of cl. (2) throws

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considerable light on its significance and place in the scheme of tax exemption. At the Imperial Economic Conference of 1923 a resolution was adopted to the effect that the Parliaments of Great Britain, the Dominions and India should be invited to enact a declaration that the general and particular provisions of their respective Acts imposing taxation might be made to apply to any commercial or industrial enterprises carried on by any other such Government in all respects as if it were carried on by or on behalf of a subject of the British Crown.

This resolution drew a distinction between the trading and business activities of the several constituent units owing allegiance to the Crown of England and their governmental activities. In pursuance of this resolution the Imperial Parliament enacted s. 25 in the Finance Act of 1925 (15 and 16 George V, Ch. 36) which read to quote the material words :

> "25. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions which is outside Great Britain and Northern Ireland, that Government shall, in respect of the trade or business and of all operations in connection therewith, all property occupied in Great Britain or Northern Ireland and all goods owned in Great Britain or Northern Ireland for the purposes thereof, and all income arising in connection therewith, be liable, in the same manner as in the like case any other person would be, to all taxation for the time being in force in Great Britain or Northern Ireland.
>
> (2) ... ...
>
> (3) Nothing in this section shall—
>
> (a) affect the immunity of any such Government as aforesaid from

taxation in respect of any income or property to which sub-section (1) of this section does not apply ; or

(b) ... ..."

A similar provision was enacted in India in the Government Trading Taxation Act, 1926 (Act 3 of 1926). Its preamble recited :

"WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government. It is hereby enacted as follows :—"

The operative provision was s. 2 and it ran :—

"2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of his Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable;

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(b) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1) any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly.

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions."

This, it would be seen, applied to a foreign Government carrying on a trade or business or owning property or using property within British India. The Act has been adapted subsequently to bring it into line with the constitutional changes that have taken place since 1926, but it is unnecessary to refer to them. Proviso (a) to sub-s. (1) of s. 155 enacted the exemption in the same terms as in the Act of 1926 in favour of the Provinces under the Government of India Act, 1935. This bodily incorporation was done without any reference to the distribution of legislative powers effected by Sch. 7 of the Government of India Act.

This being the historical origin of this provision, it is not easy to relate it to the exemption in Art. 289. (1) or to construe the exemption with its aid. Bearing in mind this antecedent history it

appears to me that it would not be proper to read the scope of the saving in favour of the Union in cl. (2) as reflecting on the scope of Art. 289 (1).

There is also another angle from which the relevance of clause (2) to the construction of clause (1) of Art. 289 might be tested. One of the more serious arguments put forward on behalf of the States to which I have adverted was that if the expression 'taxes' in relation to the exemption of property from tax were confined to direct taxes on property the exemption would be unmeaning, as such taxes could not be imposed by the Union. Now, let me take the taxes specified in Art. 289 (2). They include, for instance, taxes on "property used or occupied for the purpose of such trade or business". A tax on the use of property or on the property itself which is occupied for the purpose of trade would obviously be a direct tax on property which ex-concessis the Central legislature under the Government of India Act and Parliament under the Constitution are incompetent to impose. It is not the contention of the States that the Centre has such a power to levy a tax on occupation or use of property where it is in connection with a trade or business. This would at least show that it is not justifiable to imply from clause (2) that but for that provision Parliament would be entitled to impose such a tax. The other points urged have been dealt with in the opinion of my Lord the Chief Justice and I do not propose to cover the same ground. I concur in the view that the questions referred to this Court for its opinion should be answered as they have been by the Chief Justice.

BY COURT : In view of the opinion of the majority the answer to the three questions referred to is in the negative.

Questions answered accordingly.