PETITIONER:
THE AUTOMOBILE TRANSPORT(RAJASTHAN) LTD.

Vs.

RESPONDENT:
THE STATE OF RAJASTHAN AND OTHERS(And Connected Appeals)

DATE OF JUDGMENT:
09/04/1962

BENCH:
MUDHOLKAR, J.R.
BENCH:
MUDHOLKAR, J.R.
DAS, S.K.
SINHA, BHUVNESHWAR P.(CJ)
KAPUR, J.L.
SARKAR, A.K.
SUBBARAO, K.
HIDAYATULLAH, M.
AYYANGAR, N. RAJAGOPALA

CITATION:
1962 AIR 1406 1963 SCR (1) 491
CITATOR INFO :

R	1963 SC 928	(8,9)
F	1963 SC1207	(34)
R	1963 SC1667	(14,21)
R	1964 SC 925	(2,9,12,13,14,57)
R	1964 SC1006	(9)
R	1967 SC1189	(5,7)
F	1967 SC1575	(12)
RF	1967 SC1643	(96)
E	1968 SC 599	(14)
RF	1969 SC 147	(8,9,26,33)
E	1970 SC1864	(5)
RF	1970 SC1912	(7)
RF	1972 SC1061	(52)
RF	1972 SC1804	(11)
RF	1973 SC1461	(887,1229)
RF	1974 SC1389	(173)
RF	1974 SC1505	(7)
RF	1975 SC 17	(15)
R	1975 SC 583	(13,19,25,27)
E	1975 SC 594	(4)
RF	1975 SC1443	(19,21)
RF	1977 SC1825	(18)
E&R	1978 SC 68	(252,253,254)
RF	1979 SC1459	(33)
RF	1981 SC 463	(24,25,26)
RF	1981 SC 711	(11)
R	1981 SC 774	(9,10,11)
RF	1982 SC 29	(2)
R	1983 SC 634	(12,14,15)
OPN	1983 SC1005	(7)
F	1983 SC1283	(5)
D	1987 SC 56	(1)
F	1987 SC1911	(6,7)
RF	1988 SC 567	(11)
RF	1988 SC2038	(4)
RF	1989 SC1119	(14)
R	1989 SC2015	(8)
RF	1990 SC 781	(74)
C	1990 SC 820	(12,20)

RF 1991 SC1650 (3)

ACT:
Freedom of Trade-State carriages-Tax on Vehicles--State law imposing tax on vehicles used in public place or kept for use--Constitutional validity-Rajasthan Motor Vehicles Taxation Act, 1951 (Rajasthan 11 of 1951),ss. 4, 11, Schedules--Constitution of India, Arts. 19, 245, 301, 304 Seventh Sch. List, I, entry 42, List II, entry 57.

HEADNOTE:
Sub-section (1) of s. 4 of the Rajasthan 'Motor Vehicles Taxation Act, 1951, provided : "..... No motor vehicle shall be used in any public place or kept for use in Rajasthan unless the owner thereof has paid in respect of it, a tax at the appropriate rate specified in the schedule 5 to this Act within the time allowed......."
The appellants were carrying on the business of plying stage carriages in the State of Ajmer. They held permits and plied their buses on diverse routes. There was one route which lay mainly in Ajmer State but it crossed narrow strips of the territory of the State of Rajasthan. Another route, Ajmer to Kishangarh, was substantially in the Ajmer State, but a third of it was in Rajasthan. Formerly, there was an agreement between the Ajmer State and the former State of Kishangarh, by which neither State charged any tax or fees on vehicles registered in Ajmer or Kishangarh. Later, Kishangarh became a part of Rajasthan. On the passing of the Rajasthan Motor Vehicles Taxation Act, 1951, and the promulgation of the rules made thereunder, the Motor Vehicles Taxation Officer Jaipur, demanded of the appellants payment of the tax due on their motor Vehicles for the period April 1, 1951, to March 31, 1954. By virtue of the provisions of s. 4 of the Act read with the Schedules no one could use or keep a motor vehicle in Rajasthan without paying the appropriate tax for it and if he did so he was made liable to the penalties imposed under s. II of the Act. The appellants challenged the legality of the demand on the grounds that s. 4 of the Act read with the Schedules constituted a direct and immediate
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restriction on the movement of trade and commerce with and within Rajasthan inasmuch as motor vehicles which carried passengers and goods within or through Rajasthan had to pay the tax which imposed a pecuniary burden on a com mercial activity and was, therefore, hit by Art. 301 of the Constitution of India and was not saved by Art. 304(b) inasmuch as the proviso to Art. 304(b) was not complied with, nor was the Act assented to by 'the President within the meaning of Art. 255 of the Constitution. The respondents claimed that taxation for the purpose of raising revenue or for the maintenance of roads etc., was not hit by Art. 301 and that the Act did not constitute an immediate or direct impediment to the movement of trade and commerce inasmuch as the tax imposed was a consolidate tax on the vehicle itself though the quantum of the tax was fixed in some instances with reference to the seating capacity or loading capacity etc.
Held (per S. K. Das, Kapur, Sarkar and Subba Rao, jj.), that the Rajasthan Motor Vehicles Taxation Act 195 1, did not violate the provisions of Art. 301 of the Constitution of India and that the taxes imposed under the Act were comp-

ensatory or regulatory taxes which did not hinder the freedom of trade, commerce and intercourse assured by that Article. Such taxes, therefore, were legal.

Per S. K. Das, Kapur and Sarkar, JJ--(1) The concept of freedom of trade, commerce and intercourse postulated by Art. 301 must be understood in the context of an ordinary society and as part of a Constitution which envisaged a distribution of powers between the States and the Union, and if so understood, the concept must recognised the need and legitimacy of some degree of regulatory control, whether by the Union or the States. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities did not hamper trade, commerce and intercourse but rather facilitated them and, therefore, were not hit by the freedom declared by Art. 301 ; such measures need out comply with the requirements of the provisions of Art. 304(b) of the Constitution. (2) In view of the provision,.; of Art. 245, the restrictions in Part XIIT of the Constitution applied to taxation laws ; and such laws were not confined only to legislation with respect to entries relating to trade and commerce in any of the lists in the Seventh Schedule. (3) On a proper construction of the Act and the Schedules, the taxes imposed were really taxes for the use of the roads in Rajasthan. In basing the taxes on passenger capacity or loading capacity, the legislature had merely evolved a method and measure of compensation demanded by the State, but the taxes were still compensation and charge for regulation.

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Per Subba Rao, J.--(1) The freedom declared under Art. 301 of the Constitution of India referred to the right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State, or other impediments operating as such barriers ; and the said freedom was.not impeded, but on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provisions for services, maintenance of roads, provision for aerodromes, wharfs etc., with or without compensation. (2) Parliament may by law impose restrictions on such freedom in the public interest, and the States also, in exercise of its legislative power, may impose similar restrictions, subject to the proviso mentioned therein. (3) Laws of taxation were not outside the freedom enshrined either in Art. 19 or Art. 301.

Per Hidayatullah, Rajagopala Ayyangar and Mudholkar, JJ.--(1) Section 4(1) of the Rajasthan Motor Vehicles Taxation Act, 1951, as read with Schs. 11, III and Part I of Sch. IV, offended Art. 301 of the Constitution, and as resort to the procedure prescribed by Art. 304(b) was not taken it was ultra vires the Constitution. (2) The pith and substance of the Act was the levy of tax on motor vehicles in Rajasthan or their use in that State irrespective of where the vehicles came from and not legislation in respect of interState trade or commerce. The Act was within entry 57 of the List of the Seventh Schedule and not under entry 42 of Union List. (3) A tax which is made the condition precedent of the right to enter upon and carry on business is a restriction on the right to carry on trade and commerce within Art. 301. In the present case, the trade, which consisted in making use of motor vehicles for carriage of passengers and goods, could be carried on only if the tax was paid, and, therefore, the taxes imposed by Schs. 11, III and IV(1) operated on trade and commerce directly. (4) The tax levied under the Act was not, truly a fair recompense for wear and tear of roads, but a restriction, which Art,

301 forbade. (5) The Act was not, in its true character, regulatory because there was no provision therein, which could be regarded as regulatory of motor vehicles. The Act plainly levied a tax upon possession or use of motor vehicles.
Atiabari Tea Co., Ltd. v. The State of Assam and Others [1961] 1. S.C.R. 809, discussed.
American and Australian decisions with regard to the Commerce Clause or the American Constitution and s. 92 of the Australian Constitution, considered.
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JUDGMENT:
CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 42 to 44 of 1959.
Appeals from the final judament and order dated August 9, 1957, of the Rajasthan High Court (Jaipur Bench) at Jaipur in Civil Writ Petitions Nos. 400 to 402 of 1954.
G. S. Pathak, J. B. Dadachanji, S. N. Andley, Rameshwar Nath and P. L. Vohra, for the appellants.
G. C. Kasliwal, Advocate-General for the State of Rajasthan, A. V. Viswanatha Sastri, S. K. Kapur and P. D. Menon, for the. respondents.
H. M. Seervai, Advocate-General for the State of Maharashtra and Naunit Lal, for the State of Assam' (Intervener).
V. K. T. Chari, Advocate-General for the State of Madras, R. Ganapathy Iyer, T. M. Sen and P. D. Menon, for the State of Madras (Intervener)
S. N. Sikri, Advocate-General for the State of Punjab, N. S. Bindra, T. M. Sen and P. D. Menon, for the State of Punjab (Intervener).
H. M. Seervai". Advorate-General for the State of Maharashtra, T. M. Sen and P. D. Menon, for the State of Maharashtra (Intervener).
K. Bhimsankaram, T. M. Sen and P. D. Menon, for the State of Andhra Pradesh (Intervener).
B. Sen, S. C. Bose and P. K. Bose, for the State of West Bengal (Intervener).
Lal Narain Sinha, Lakshman, Saran, Singh, D. P. Singh, R. K. Garg, M. K. Ramamurthi and S. C. Aggarwal, for the State of Bihar (Intervener).
Dinbandhu Sahu, Advocate-General for the State of Orissa, B. K.P. Sinha, T. M. Sen and P. D. Menon, for the State of Orissa (Intervener).
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K. L. Hathi and P. D. Menon, for the State of Gujarat (Intervener).
M. Adhikari, Advocate-General for the State of Madhya Pradesh, B. Sen, B. K. B. Naidu, and I. N. Shroff, for the State of Madhya Pradesh (Intervener).
Ranadeb Chaudhuri, S. N. Andley, Rameshwar Nath and P. L. Vohra, for M. A.Tulloch and Co. (Intervener).
K. Srinivasmurty and D. Goburdhun, for Nazeeria Motor Service, Motor, and Andhra Pradesh Motor Union (Interveners).
N. C. Chatterjee, S. C. Mazumdar and R. H. Dhebar, for the Attorney-General for India (Intervener).
1962. April 9. The following judgments were delivered. The judgment of S. K. Das, J. L. Kapur and A. K. Sarkar, JJ., was delivered by S. K. Das, J. The judgment of M. Hidayatullah, N. Rajagopala Ayyangar and J. R. Mudholkar, JJ., was delivered by M. Hidayatullah, J.

S. K. DAS, J.-These are three consolidated appeals which arise from the judgment and order of a Division Bench of Rajasthan High Court dated August, 9, 1957. They have been preferred to this Court on the strength of a certificate granted by the said High Court under Art. 132 of the Constitution certifying that the cases involve a substantial question of law as to the interpretation of Art. 301 and other connected articles relating to trade, commerce and intercourse within the territory of India, contained in Part XIII of the Constitution. These appeals were originally heard by a Bench of five Judges and on April 4, 1961, that Bench recorded an order to the effect that having regard to the importance of the constitutional issues involved
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and the views expressed in the decision of this Court in Atiabari Tea Co. Ltd. v. The State of Assam (1) the appeals should be heard by a larger Bench. The appeals were then placed before the learned Chief Justice for necessary orders, and on his orders have now come to this Bench of seven Judges for disposal. As the constitutional issues involved affect the state of the Union, notices were issued to the Advocates-General concerned. A notice was also issued to the Attorney General on behalf of the Union of India. The States of Andhra Pradesh, Assam, Bihar Gujrat, Madras, Maharashtra, Orissa, Punjab, Uttar Pradesh and West Bengal intervened and were represented before us either through their respective Advocates-General or other Counsel M/s. M. A. Tulloch & Co., Andhra Pradesh Motor Congress and Nazeeria Motor Service, Nellore, applied for intervention on the ground that they would be affected in a pending litigation by the decision of this Court on the constitutional issues involved. Those applications were allowed by us. The result has been that we have heard very full arguments not only from Counsel appear for the appellants and the respondents, but also from the learned Counsel appearing on behalf of the Union of India, the learned Advocates General or Counsel appearing for the intervening States and also from learned Counsel appearing on behalf of the three interveners referred to above.
The appellants in the there appeals are (1) the Automobile Transport (Raj.) Ltd., Ajmer in Civil Appeal No. 42 of 1959. (2) the Rajasthan Roadways Ltd., Ajmer in Civil Appeal No. 43 of 1959, and (3) Framji C. Framji and others in Civil Appeal No. 44 of 1959. The respondents are (1) the State of Rajasthan, (2) the Regional Transport Officer who is ex-officio Motor Vehicles Taxation Officer, Jaipur, and
(1) [1961] 1. S. C. R. 809.
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(3) the Collector of Jaipur. The first two Appellants are private, limited liability companies registered under the Indian Companies Act, 1913 and having their registered offices at Ajmer. The third appellant is a partnership firm named Framji Motor Transport registered under the India Partnership Act. These three appellants carried on the business of plying stage carriages. The first appellant bad nine transport vehicles plying between two stations in the State of Ajmer and between Ajmer and Kishangarh, a town in Rajasthan at the relevant period. The two stations in Ajmer were Nasirabad and Deoli. The road from Nasirabad to Deoli was mainly in the former State of Ajmer but for some distance it passed through certain narrow strips of territory of the State of Rajasthan. Similarly, the road from Ajmer to Kishangarh was partly in the former State of Ajmer and partly in the State of Rajasthan, approximately two-thirds of the road lying in Ajmer and one-third in

Rajasthan. The second and the third appellant also had some transport vehicles which plied on the Nasirabad-Deoli route or from Kishangarh to Sarwar, a town situated on the Nasirabad-Deoli road in the State of Rajasthan. On the passing of the Rajasthan Motor Vehicles Taxation Act, 1951 (Rajasthan Act XI of 1951) (hereinafter referred to as the Act), and the promulgation of the rules made thereunder, the second respondent demanded of the appellants payment of the tax due on their motor Vehicles for the period beginning on April 1, 195 1, and ending on March 3 1, 1954. The first appellant was called upon to pay Rs. 22,260, the second appellant Rs. 6,540 and the third appellant Rs. 10,260 under r. 23 of the Rajasthan Motor Vehicles Taxation Rules. When the appellants failed to pay the tax demanded from them, the second respondent issued certificates under s. 13 of the Act to the, third respondent for the recovery of the tax due as arrears

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of land revenue. On receipt of the demand notices the second and the third appellants filed appeals before the Transport Commissioner, Jaipur, under s. 14 of the Act. These appeals were however, dismissed by an order of the Transport Commissioner dated October 21, 1953. The first appellant did not file any appeal. Thereafter the three appellants filed three separate writ petitions in the Rajasthan High Court in which their main contention was that the relevant provisions of the Act imposing a tax on their motor vehicles were unconstitutional and void as they contravened the freedom of trade, commerce and intercourse through out the territory of India declared by Art.301 of the Constitution and therefore the demand and attempted collection of such tax were illegal and should be prohibited. The prayers which the appellants made in their respective writ petitions were mainly there-(1) that it be declared that the Rajasthan Motor Vehicles Taxation Act of 1951 and the Rules made thereunder are invalid and not in accordance with the provisions of the Constitution of India and consequently null and void and inoperative, and (2) that a writ of prohibition or mandamus or any other appropriate writ, direction or order directing the respondents not to realise any tax from the appellants under the provisions of the Rajasthan Motor Vehicles Taxation Act of 1951 be issued. The three writ petition were heard together by a Division Bench consisting of Bapna and Bhandari, JJ. They dealt with and disposed of certain other objection to the validity of the Act, with which we are no longer concerned; but as to the contravention of Art. 301 of the Constitution, they felt that in view of the complexity of the points involved and the apparent conflict between certain decisions of other High Courts, the question should be referred to a Full Bench. Accordingly, they referred the question whether ss. 4 and 11 of the Act infringed

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the right of freedom of trade, commerce or intercourse granted under Art. 301 of the Constitution. The Full Bench dealt with the question from two different stand points. Firstly, they considered the validity of the Act from the stand point of Act, 19 St (1) of the Constitution which guarantees, to all citizens of India the right to move freely throughout the territory of India; this the Full Bench dealt with under the heading of' freedom of intercourse from the stand point of the individual citizen and came to the conclusion that restrictions which the Act imposed on the individual citizen were reasonable restrictions having regard to the necessity of raising funds

for the maintenance of roads and the making of new roads in the State of Rajasthan. Then the High Court considered the validity of the relevant provisions of the Act from the stand point of trade, commerce and came to the conclusion that the regulation of trade, commerce and intercourse within the territory of India, both inter-State and intra-State. was not incompatible with its freedom and in the matter of such regulation of trade, commerce and intercourse a distinction must be drawn between restrictions which are direct and immediate and restrictions which are indirect and consequential. The High Court expressed its final conclusion in the following words :

> "Transport vehicles are provided by individuals carrying on business in them and those who carry on trade and commerce as a whole, can use these transport vehicles. The fact that on account of this taxation, the charges of transport vehicles are higher, let us say by an anna a maund is, in our opinion, merely an indirect or consequential result of this Act, and such an impediment may fairly be called remote. It would be a different matter if the taxation is so high that
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> it virtually kills trade and commerce by compelling the traders to raise their prices to an exorbitant rate. But this being not the nature of the tax in this case, and the taxation being not directly on trade, commerce or intercourse..... we are of opinion that this taxation can not be said to offend against Art. 301, for its effect on trade and commerce is only indirect and consequential and the impediment, if any, may fairly be regarded as remote."

In view of that conclusion the Full Bench answered the question referred to it in the negative. The cases then went back to the Division Bench with the answer given by the Full Bench and the writ petitions were dismissed by the Division Bench by its judgment and order dated August 9, 1957. The three appellants then moved the High Court for a certificate under Art. 132 of the Constitution which certificate the High Court granted by its order dated October 16, 1957.

It may be here stated that neither the Division Bench nor the Full Bench of the Rajasthan High Court had the advantage of the decision of this Court in Atiabari Tea Co., case (1), which decision came much later in point of time. The main argument on behalf of the appellants before us has been that the provisions of the Act under which the appellants were sought to be taxed in respect of their motor vehicles plying on the Nasirabad-Deoli or Kishangarh road contravened Art. 301 of the Constitution and were not saved by Art. 304 (b) of the Constitution. We shall presently read the relevant provision of the Act, but before we do so we may briefly refer to one short point by way of clearing the ground for the discussion which will follow. Article 305 of the Constitution as it originally stood said that nothing in Arts, 301 and 303 shall affect

(1) [1961] 1. S. C. R. 809.

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the provisions of any existing law except in so far as the President may by order otherwise provide. This article was substituted by another article, some what wider in scope, by the Constitution (Fourth Amendment) Act, 1955. The new

article repeated the words of the old article in the first part thereof and in the second part it said that nothing in Art. 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relates to, any such matter as is referred to in sub-cl. (ii) of cl. (6) of Art. 19 that sub-clause refers to the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. The first part of Art. 305 does not apply in the present cases because the expression "existing law" means any law, ordinance, order, bye-law etc. passed or made before the commencement of the Constitution. The Act which we are considering now in the present appeals was made in 1955, i.e., after the commencement of the Constitution. The second part of Art. 305 has also no hearing on the questions which we have to consider in these appeals. Article 305, old or new, is, therefore, out of our way.

We now proceed to read the relevant provisions of the Act. The Act was made by the Rajpramukh of the State of Rajasthan on April 1, 1951. The history of the constitution of the United State of Rajasthan and the powers of the Rajpramukh under the covenant creating the State were stated in Thakur Amar Singhji v. State of Rajasthan(1) at pp. 312 to 316 of the report. With that history ,we are not concerned in the present cases. The competence of the Rajpramukh to make the Act

(1) [1955] 2. S.C.R. 303.

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was challenged in the High Court but was decided against the appellants. That point has not been agitated before us and we must proceed on the footing that the Act was validly made by the Rajpramukh. Section 4 of the Act is the charging section, the validity of which has been challenged before us on the ground that it violates the freedom of trade, commerce and intercourse granted under Art. 301 of the Constitution. It is, therefore, necessary to quote s. 4.

> "4. Imposition of tax.-(1) Save as otherwise provided by this Act or by rules made thereunder or by any other law for the time being in force, no motor vehicle shall be used in any public place or kept for use in Rajasthan unless the owner thereof has paid in respect of it, a tax at the appropriate rate specified in the Schedules to this Act within the time allowed by section 5 and, save as hereinafter specified, such tax shall be payable annually notwithstanding that the motor vehicle may from time to time cease to be used.
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> (2) An owner who keeps a motor vehicle of which the certificate of fitness and the certificate of registration are current, shall, for the purposes of this Act be presumed to keep such vehicle for use.
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> (3) A person who keeps more than ten motor vehicles for use solely in the course of trade and industry shall be entitled to a deduction of ten per cent on the aggregate amount of tax to which he is liable.
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> "4. Explanation.-The expression trade and industry" includes transport for hire,"

Sections 5 to 7 deal with (1) payment of tax, (2) tax

payable on first liability to tax, and (3) refund of tax. With these details we are not concerned here. Section 8 imposes on the owner of every motor
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vehicle an obligation to make a declaration every year in respect of the motor vehicle in the prescribed form stating the prescribed particulars etc.; it also imposes an obligation on every owner to pay the tax which he is liable to pay in respect of the motor vehicle. This section is also challenged as unconstitutional and it is obvious that it is connected with s. 4. If s. 4 is unconstitutional, so must be s. 8. Section 9 deals with the payment of additional tax in circumstances which need not be stated here. Section 10 deals with the grant of receipt and token. Section 11 says :

> "11. Penalties under this Act.-whoever contravenes any of the provisions of this Act or of any rule made thereunder shall on conviction be punishable with fine which may extend to Rs. 100 and in the event of such person having been previously convicted of an offence under this Act or under any rule made thereunder with fine which may extend to Rs. 200."

Section 12 deals with the compounding of offences and s. 13 lays down that when any person without any reasonable cause fails or refuses to pay the tax, the Taxation Officer may forward to the Collector of the district concerned a certificate over his signature specifying the amount of tax due from such person and the Collector shall recover the tax as if it were an arrears of land revenue. Section 14 provides for appeals to the Transport Commissioner. Section 16 lays down that the liability of a person to pay the tax shall not be questioned or determined otherwise than as provided in the act or in the rules made thereunder. Sections 17 to 21 deal with certain ancillary matters and s. 22 enables the Government to make rules for carrying into effect the purpose of the Act. There are four Schedules to the Act to which a more detailed reference will be made later. It is enough to state here that the
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Schedules divide motor vehicles into two parts Schedule I deals with vehicles other than transport vehicles plying for hire or reward; Schedule II deals with transport vehicles of two kinds transport vehicles and goods vehicles; Schedule III deals with goods vehicles registered outside Rajasthan but using roads in Rajasthan; and Schedule IV deals with vehicles used for the carriage of goods in connection with a trade or business carried on by the owner of the vehicle under a private carrier's permit. Various rates of tax are provided for various kinds of vehicles in these Schedules. The High Court has pointed out that Schedule I is concerned with vehicles other than transport vehicles and is mainly concerned with what would come within the term ",intercourse" in Art. 301 and the other Schedules deal with what would come within the term "trade and commerce" in that article. The result of reading s. 4 of Act with the Schedules is that on one can use ox keep a motor vehicle in Rajasthan without paying the appropriate tax for it and if he does so he is made liable to the penalties imposed under s. 11 of the Act. In brief, this appears to be the scheme of the Act.

Is this scheme in conflict with the freedom of trade, commerce and intercourse within the territory of India assured by Art. 301 and other connected articles in Part

XIII of the Constitution ? That is the problem before us. It is necessary, therefore, to read at this stage the relevant articles in Part XIII of the Constitution. For this purpose we must read Arts. 301 to 304 as they stood at the relevant time.

"301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

302. Parliament may by law impose such restrictions on the freedom of trade,

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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.

303. (1) Notwithstanding anything in Articles 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law-

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no Bill or amendment for

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the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President".

Article 305 we have already stated is out of our way. Article 306, which was later repealed by the Constitution (Seventh Amendment) Act, 1956, is also not material for the consideration of the problem before us. Article 307 is also not material as it relates to the appointment of an appropriate authority for carrying out the purposes of Arts. 301 to 304.

The series of articles on the true scope and effect of which the decision of the problem before us depends were the subject matter of consideration of this Court in the Atiabari Tea Co. case (1), In that decision three views were expressed and one of the questions mooted and argued before

us is whether the principle of the majority decision in that case requires reconsideration, or modification in any respect; or whether any of the other two views expressed therein is the correct view. Another connected question is that if the majority view is the correct view, does the principle underlying it apply to the facts of the present cases It is, therefore, necessary to set out briefly the facts of the Atiabari Tea Co. case (1) and the three views expressed therein. The three appellants in that case were tea companies, two of which carried on the trade of growing tea in Assam and the other carried on its trade in Jalpaiguri in West Bengal. They carried their tea to Calcutta in order that it might be sold in the Calcutta market for home consumption or export outside India. Tea produced in Jalpaiguri had to pass through a few miles of territory in Assam, while the tea produced in Assam had to go all the way through Assam to reach Calcutta. Besides the tea which was carried by rail, a substantial quantity had to go by road or by inland water-ways and as such

(1) (1961) 1 S.C.R. 809.

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became liable to pay the tax leviable under the Assam Taxation (on goods carried by Roads or Inland Waterways) Act, 1954. That Act levied a tax on certain goods carried by road or inland waterways in the State of Assam and the validity of the levy of such a tax was in question in the Atiabari Tea Co. case. (1). The principal ground of attack was that the Assam Act violated the provisions of Art. 301 of the Constitution and was not saved by the provisions of Art. 304(b). We may now summarise the views expressed in that decision. First, as to the views of the learned Chief Justice: He expressed the view that taxation simpliciter was not within the terms of Art. 301 and a tax on movement of or passenger did not necessarily connote impediment or restraint in the matter of trade and commerce. He draw a distinction between taxation as such for the purpose of revenue on the One hand and taxation for the purpose of making discrimination or giving preference on the other hand; the letter, he said, could be treated as impediment to free trade and commerce. He expressed his final conclusion in these words.

> "Thus, on a fair construction of the provisions of Part XIII, the following propositions emerge: (1) trade, commerce, and intercourse throughout the territory of India are not absolutely free, but are subject to certain powers of legislation by Parliament or the Legislature of a State; (2) the freedom declared by Art. 301 does not mean freedom from taxation simpliciter, but does mean freedom from taxation which has the effect of directly impeding the free flow of trade, commerce and intercourse; (3) the freedom envisaged in Art. 301 is subject to non-discriminatory restrictions imposed by Parliament in public interest (Art. 392); (4) even discriminatory or
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> (1) [1961] 1.S.C.R.809.
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> preferential legislation may be made by Parliament for the purpose of dealing with an emergency like a scarcity of goods in any part of India (Art. 303(2)); (5) reasonable restrictions may be imposed by the Legislature of a State in the public interest (Art.

304(b)); (6) non-discriminatory taxes may be imposed by the Legislature of a State on goods imported from another State or other States, if similar taxes are imposed on goods produced of manufactured in that State (Art. 304(a); and lastly (7) restrictions imposed by existing laws have been continued, except in so far as the President may by order otherwise direct(Art. 305)." (pp. 831-832.)

The majority view differed from that of the learned Chief Justice in that it did not accept as correct the contention that tax laws were governed by the provisions of Part XII of the Constitution only and were outside Part XIII. The majority expressed the view that when Art. 301 provided that trade shall be free throughout the territory of India, it was the movement or transport part of the trade that must be free. The majority said:

"It is a federal constitution which we are interpreting, and so the impact of Art. 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the Article we are construing imposes a constitutional limitation on the power of the Parliament and the State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is

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guaranteed by Art. 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Art. 301. The argument that all taxes should be governed by Art. 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld." (p. 860.)

The third view held by Shah, J., was that the freedom contemplated was freedom of trade, commerce and intercourse in ill their varied aspects inclusive of all activities which constitute commercial intercourse and not merely restrictions on the movement aspect. He said :

"The guarantee of freedom of trade and commerce is not addressed merely against prohibitions, complete or partial; it is addressed to tariffs, licensing, marketing regulations, price-control, nationalization, economic or social planning, discriminatory tariffs, compulsory appropriation of goods, freezing or stand-still orders and similar other impediments operating directly and immediately on the freedom of commercial intercourse as well. Every sequence in the series of operations which constitutes trade or commerce is an act of trade or commerce and

> burdens or impediments imposed on any such step are restrictions on the freedom of trade commerce and intercourse. What is guaranteed is freedom in its widest amplitude-freedom from prohibition, control, burden or impediment in commercial intercourse." (p. 874.)

So far we have set out the factual and legal background against which the problem before us

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has to be solved. We must now say a few words regarding the historical background. It is necessary to do this, because extensive references have been made to Australian and American decisions, Australian decisions with regard to the interpretation of s. 92 of the Australian Constitution and American decisions with regard to the Commerce Clause of the American Constitution. This Court pointed out in the Atiabari Tea Co. case (1) that it would not be always safe to rely upon the American or Australian decisions in interpreting the provisions of our Constitution. Valuable as those decisions might be in showing how the problem of freedom of trade, commerce and intercourse was dealt with in other federal constitutions, the provisions of our Constitution must be interpreted against the historical background in which our Constitution was made; the background of problems which the Constitution makers tried to solve according to the genius of the Indian people whom the Constitution-makers represented in the Constituent Assembly. The first thing to be noticed in this connection is that the Constitution-makers were not writing on a clean slate. They had the Government of India Act. 1935, and they also had the administrative set up which that Act envisaged. India then consisted of various administrative units known as Provinces, each with its own administrative set up. There were differences of language, religion etc. Some of the Provinces were economically more developed than the others. Even inside the same Province, there were under-developed and highly developed areas from the point of view of industries, communications etc. The problem of economic integration with which the Constitution-makers were faced was a problem with many facts. Two questions, however, stood out,; one question was how to achieve a federal, economic and fiscal integration, so that economic policies affecting the interests of India as a whole could be carried out

(1) [1961] 1. S. C. R. 809.

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without putting an ever-increasincg strain on the unity of India, particularly in the context of a developing economy. The second question was how to foster the development of areas which were under developed without creating too many preferential or discriminative barriers. Besides the Province, there were the Indian States also known as Indian India. After India attained political freedom in 1947 and before the Constitution was adopted, the process of merger and integration of the Indian States with the rest of the country had been accomplished so that when the Constitution was first passed the territory of India consisted of Part A States, which broadly stated, represented the Provinces in British India, and Part B States which were made up of Indian States. There were trade barriers raised by the Indian States in the exercise of their legislative powers and the Constitution-makers had to make provisions with regard to those trade barriers as well. The evolution of a federal structure or a quasi-federal structure necessarily

involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or quasi-federal Constitution, namely, that the units of the Union have also certain powers as has the Union itself One of the grievances made on behalf of the intervening States before us was that the majority view in the Atiabari Tea Co. case(1) did not give sufficient importance to the power of the States under the Indian Constitution to raise revenue by taxes under the legislative heads entrusted to them, in interpreting the series of articles relating to trade, commerce and intercourse in Part XIII of the Constitution. It has been often stated that freedom of

(1) [1931] 1.S.C.R. 809.

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inter-State trade and commerce in a federation has been a baffling problem to constitutional experts in Australia, in America and in other federal constitutions. In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations which may be broadly stated thus: first, in the larger interests of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether; and third, there must be a power of intervention by the Union in any case of crisis to deal with particular problems that may arise in any part of India. As we shall presently show, all these three considerations have played their part in the series of articles which we have to consider in Part XIII of the Constitution. Therefore, in interpreting the relevant articles in Part XIII we must have regard to the general scheme of the Constitution of India with special reference to Part III (Fundamental Rights), Part XII (Finance, Property etc. containing Arts. 276 and 286) and their inter-relation to Part XIII in the context of a federal or quasi-federal constitution in which the States have certain powers including the power to raise revenues for their purposes by taxation.

On behalf of the appellants it has been contended before us that s. 4 of the Act read with the Schedules constitutes a direct and immediate restriction on the movement of trade and commerce with and within Rajasthan inasmuch as motor vehicles which carry passengers and goods within or through Rajasthan have to pay the tax which, it is stated, imposes a pecuniary burden on a commercial activity and is, therefore, hit by Art. 301 of the Constitution and is not saved by Art. 304(b) in as much as the proviso to Art. 304(b) was not complied with nor was the Act assented to by the President within the meaning of Art. 255 of the Constitution.

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Learned Counsel for the appellants has submitted before us that the correct interpretation of the series of relevant articles in Part XIII of the Constitution is the one made by Shah, J., in the Atiabari Tea Co. case(1). He has, however, submitted that even on the interpretation accepted by the majority of Judges in the Atiabari Tea Co. case(1) he is entitled to succeed, because the relevant provisions of the Act constitute a direct and immediate restriction on the movement part of trade, commerce and intercourse. On behalf of the respondents the argument has proceeded on the footing that taxation per so i.e. taxation for the purpose of

raising revenue or for the maintenance of roads etc. is not hit by Art. 301 and the impugned provisions of the Act in question did not constitute an immediate or direct impediment on the movement of trade and commerce inasmuch as the tax imposed was a consolidated tax on the vehicle itself though the quantum of the tax was fixed in some instances with reference to the seating capacity or loading capacity etc The argument is that in this respect the facts of the present cases differ from the facts of the Atiabari Tea Co. case(1); it is argued that in the latter the tax was on the carriage of goods, whereas in the present cases the tax is a consolidated tax on the vehicle itself, like a property tax, and, therefore, it does not relate to the movement part of trade, commerce and intercourse, though it may have an indirect effect on trade, and commerce by raising the tariff or fare for passengers and goods. The learned Counsel for the respondents has in this way tried to distinguish the majority decision in the Atiabari Tea Co. case(1), but he has mainly argued in favour of the view expressed by the learned Chief Justice. On behalf of the interveners, some have supported the majority view with or without modifications and some the other two views. Mr. N. C. Chatterjee appearing on behalf of the Union of India supported the majority view, though the stand taken by the Attorney

(1) [1961] 1. S. C. R. 809.

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General on behalf of the Union of India in the Atiabari Tea Co. case(1) was somewhat different. Mr. Ranadeb Chaudhuri appearing on behalf of one of the interveners (M/s. M.A. Tulloch & Co.) has accepted the majority view with some modifications. He has stated that Art. 301 relates to movement or carriage; he has called it the "channeling" of trade and commerce. He has, however, tried to reconcile the various provisions in Part XIII by suggesting that there are two connected but independent subjects dealt with therein; one is freedom of movement of trade, and commerce and in course (this, he has described, as "channeling" of trade, commerce and intercourse), and the second is protection from discrimination and preference which is not necessarily connected with movement but may arise from subsidy etc. These are the two ideas which, according to him, inspired the relevant series of articles in Part XIII. On behalf of some of the interveners the argument has been that the freedom declared under Art. 301 is not freedom from such regulatory measures as do not impede trade, commerce and intercourse but rather facilitate such trade, commerce and intercourse, e.g. traffic regulations for safeguarding public health, such as, prohibiting the sale of adulterated food etc. This view suggests that in the matter of taxation, such taxes are compensatory in nature, namely, those levied for the maintenance of roads on which traffic, is to move, do not come within the restrictions freedom from which is contemplated by Art. 301. This is the view which Mr. Sikri, Advocate-General of Punjab, has mainly contended for. Mr, Seervai appearing on behalf of the State of Maharashtra and some other States has contended that Part XIII of the Constitution is confined to such action, legislative or executive, as is taken in relation to any of the entries relating to trade and commerce in any of the lists in the Seventh Schedule, namely, entries relating to 41 and 42 in list

(1) [1964] 1. S. C. R. 809.

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I, entry 26 of list II, and entry 33 of list III. The

expression "throughout the territory of India" occurring in Art. 301 has reference, according to this view, to space rather than to movement. According to Mr. Seervai the mode of approach should be to consider (i) the position of the States in the Indian Constitution with plenary powers in their respective fields; (ii) the historical background of s. 297 of the Government of India Act, 1935; (iii) the decisions of the Australian cases upto 1950 when the Constitution of India was made; and (iv) Part XIII of the Constitution as compared and contrasted with Part III and Part XII thereof. As to taxation, his contention is that it does not come within Part XIII except to the extent mentioned in Art. 304(a). Mr. Lalnarain Sinha appearing for the State of Bihar has supported the view of the learned Chief Justice in Atiabari Tea Co. case(1) though the reasons given by him are somewhat different. His argument has been that Art. 301 secures for trade, commerce and intercourse throughout the territory of India a qualified freedom from restrictions based on geographical classifications only; the freedom thus secured is in regard to barriers (in the geographical sense) impeding trade, commerce and intercourse between one State and another or between one territory and another within or without the same State, and also against territorial discriminations in respect of trade, commerce and intercourse either inter-State or intra-state. With regard to taxation, his contention is that taxes (meant for raising revenue only and called fiscal taxes) do not operate as inter-State or inter-territorial barriers nor involve any territorial discriminations, and they do not come within Part XIII. Mr. D. Sahu appearing for the State of Orissa argued that the freedom granted by Art. 301 was confined to (i) inter-State barriers, and (ii) customs-barriers which at one time existed between the Indian States and adjacent

(1) [1961] 1 S.C.R. 809.

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British Indian territory. According to him, the intraState aspect of the freedom assured by Art. 301 was confined to old customs-barriers only which some of the Indian States which have now merged in particular States of the Indian Republic had earlier imposed. Mr. C. B. Agarwala appearing for the State of Uttar Pradesh argued that the subject matter of Art. 301 was trade, commerce and intercourse, namely the entries relating to trade and commerce in any of the lists in the Seventh Schedule ; but the restrictions from which freedom was granted might come from any direction ; they might come from legislative or executive action relating to other entries also.

We have tried to summarise above the various stand points and views which were canvassed before us and we shall now proceed to consider which, according to us, is the correct interpretation of the relevant articles in Part XIII of the Constitution. We may first take the widest view, the view expressed by Shah, J., in the Atiabari Tea Co. case(1) a view which has been supported by the appellants and one or two of the interveners before us. This view, we apprehend, is based on a purely textual interpretation of the relevant articles in part XIII of the Constitution and this textual interpretation proceeds in the following way. Article 301 which is in general terms and is made subject to the other provisions of Part XIII imposes a general limitation on the exercise of legislative power, whether by the Union or the States, under any of the topics-taxation topics as well as other topics-enumerated in the three lists of the Seventh Schedule, in order to make certain that "trade, commerce and intercourse thought the territory of India shall be free".

Having placed a general limitation on the exercise of legislative powers by Parliament and the State Legislatures, Art. 302 relaxes that restriction in favour of Parliament by providing that

(1) [1961] 1. S. C. R. 809.

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authority "may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part the territory of India as may be required in the public interest". Having relaxed the restriction in respect of Parliament under Art. 302, a restriction is put upon the relaxation by Art. 303(1) to the effect that Parliament shall not have the power to make any law giving any preference to any one State over another or discriminating between one State and another by virtue of any entry relating to trade and commerce in lists I and III of the Seventh Schedule. Article 303(1) which places a ban on Parliament against the giving of preferences to one State over another or of discriminating between one State and another, also provides that the same kind of ban should be placed upon the State Legislature also legislating by virtue of any entry relating to trade and commerce in lists II and III of the Seventh Schedule. Article 303 (2) again carves out an exception to the restriction placed by Art. 303(1) on the powers of Parliament, by providing that nothing in Art. 303(1) shall prevent Parliament from making any law giving preference to one State over another or discriminating between one State and another, if it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. This exception applies only to Parliament and not to the State Legislatures. Article 304 comprises two clauses and each clause operates as a proviso to Arts. 301 and 303. Clause (a) of that article provides that the Legislature of a State may "impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced." This clause, therefore, permits the levy on goods imported from

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sister States any tax which similar goods manufactured or produced in that State are subject to under its taxing laws. In other words, goods imported from sister States are placed on a par with similar goods manufactured or produced inside the State in regard to State taxation within the State allocated field. Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter interState trade and commerce. As was observed by Patinjali Sastri, C.J., in State of Bombay v. United Motors(1) the commercial unity of India is made to give way before the State power of imposing 'any' non-discriminatory tax on goods imported from sister States. Now cl. (b) of Art. 301 provides that notwithstanding anything in Art. 301 or Art. 303, the Legislature of a State may by law impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. The proviso to el. (b) says that no bill or amendment for the purpose of cl. (b) shall be introduced or moved in the Legislature of a State without

the previous sanction of the President. This provision appears to be the State analog to the Union Parliament's authority defined by Art. 302, in spite of the omission of the word "reasonable' before the word restrictions' in the latter article. Leaving aside the prerequisite of previous Presidential sanction for the validity of State legislation under cl. (b) provided in the proviso thereto, there are two important differences between Art. 302 and Art. 301(b) which require special mention. The first is that while the power of Parliament under

(1) [1953] S.C.R. 1069.

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Art. 302 is subject to the prohibition of preferences and discriminations decreed by Art. 303(1) unless Parliament makes the declaration contained in Art. 303(2), the State's power contained in Art. 304(b) is made expressly free from the prohibition contained in Art. 303(1), because the opening words of Art. 304 contain a non obstante clause both to Art. 301 and Art. 303. The second difference springs from the fact that while Parliament's power to impose restrictions under Art. 302 upon freedom of commerce in the public interest is not subject to the requirement of reasonableness, the power of the States to impose restrictions on the freedom of commerce in the public interest under Art. 304 is subject to the condition that they are reasonable.

On the basis of the aforesaid textual construction, which is perhaps correct so far as it goes, the view expressed is that the freedom granted by Art. 301 is of the widest amplitude and is subject only to such restrictions as are contained in the succeeding articles in Part XIII. But even in the matter of textual construction there are difficulties. One of the difficulties which was adverted to during the Constituent Assembly debates related to the somewhat indiscriminate or inappropriate use of the expressions "subject to" and ""notwithstanding" in the articles in question. Article 302, as we have seen, makes a relaxation in favour of Parliament. Article 303 again imposes a restriction on that relaxation "notwithstanding anything in Article 302 but Art. 303 relates both to Parliament and the State Legislature, though Art. 302 makes no relaxation in favour of the State Legislature. The non obstante clause in Art. 303 is, therefore, somewhat inappropriate. Clause (2) of Art. 303 carves out an exception from the restriction imposed on Parliament by cl. (1) of Art. 303. But again cl. (2) relates only to Parliament and not to the State Legislature even though cl. (1) relates to both. Article 304

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again begins with a non obstante clause mentioning both Art. 301 and Art. 303, though Art. 304 relates only to the Legislature of a State. Article 303 relates to both the State Legislature and Parliament and again the non obstante clause in Art. 304 is somewhat inappropriate. The fact of the matter is that there is such a mix up of exception upon exception in the series of articles in]Part XIII that a purely textual interpretation may not disclose the true intendment of the articles. This does not mean that the text of the articles, the words used therein, should be ignored. Indeed, the text of the articles is a vital consideration in interpreting them; but we must at the same time remember that we are dealing with the Constitution of a country and the inter-connection of the different parts of the constitution forming part of an integrated whole must not be lost sight of. Even textually, we must ascertain the

true meaning of the word "free' occurring in Art. 301. From what burdens or restrictions is the freedom assured ? This is a question of vital importance even in the matter of construction. In s. 92 of the Australian Constitution the expression used was 'absolutely free' and repeatedly the question was posed as to what this freedom meant. We do not propose to recite the somewhat checkered history of the Australian decisions in respect of which Lord Porter, after a review of the earlier cases, said in Commonwealth of Australia v. Bank of New South Wales (1) that in the "labyrinth of cases decided under s. 92 there was no golden thread." What is more important for our purpose is that he expressed the view that two general propositions stood out from the decisions: (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that s. 92 of the Australian Constitution is violated only when a legislative or

(1) [1950] A.C. 235,

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executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or inconsequential impediment which may fairly be regarded as remote. Lord Porter admitted "that in the application of these general propositions, in determining whether an enactment is regulatory or something more or, whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion." It seems clear, however, that since "the conception of freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual", that freedom must necessarily be delimited by considerations of social orderliness. In one of the earlier Australian decisions (Duncan v. The State of Queensland) (1), Griffith, C.J., said :

> "'But the word "free" does not mean extra legem, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law". (p. 573)

As the language employed in Art. 301 runs unqualified the Court, bearing in mind the fact that provision has to be applied in the working of an orderly society, has necessarily to add certain qualifications subject to which alone that freedom may be exercised. This point has been very lucidly discussed in the dissenting opinion which Fullagar, J., wrote in Mc Carter v. Brodie (2), an opinion which was substantially approved by the Privy Council in Hughes and Vale Proprietary Ltd. v. State of New South Wales (3). The learned Judge gave several examples to show the distinction between what was merely permitted regulation and what true interference with freedom of trade and commerce. He pointed out that in the matter of motor vehicles

(1) [1916] 22 C.L.R. 556 (2) [1950] 80 C.L.R. 432.
(3) [1955] A.C. 241.

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most countries have legislation which requires the motor vehicle to be registered and a fee to be paid on registration. Every motor vehicle must carry lamps of a specified kind in front and at the rear and in the hours of darkness these lamps must be alight if the vehicle is being driven on the road, every motor vehicle must carry a warning device, such as a horn; it must not be driven at a speed or in a manner which is dangerous to the public. In certain localities a motor vehicle must not be driven at more than a certain speed. The weight of the load which may be carried

on a motor vehicle on a public highway is limited. Such examples may be multiplied indefinitely. Nobody doubts that the application of rules like the above does not really affect the freedom of trade and commerce; on the contrary they facilitate the free flow of trade and commerce. the reason is that these rules cannot fairly be said to impose a burden on a trader or deter him from trading: it would be absurd, for example, to suggest that freedom of trade is impaired or hindered by laws which require a motor vehicle to keep to the left of the road and not drive in a manner dangerous to the public. If the word 'free' in Art. 301 means 'freedom to do whatever one wants to do, then chaos may be the result; for example, one owner of a motor vehicle may wish to drive on the left of the road while another may wish to drive on the right of the road. If they come from opposite directions, there will be an inevitable clash. Another class of examples relates to making a charge for the use of trading facilities, such as, roads, bridges, aerodromes etc. The collection of a toll or a tax for the use of a road or for the use of a bridge or for the use of an aerodrome is no barrier or burden or deterrent to traders who, in their absence, may have to take a longer or less convenient or more expensive route. such compensatory taxes are no hindrance to anybody's freedom so long as they remain reasonable; but they could of course be converted into a hindrance to the freedom of trade. If the

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authorities concerned really wanted to hamper anybody's trade, they could easily raise the amount of tax or toll to an amount which would be prohibitive or deterrent or create other impediments which instead of facilitating trade and commerce would hamper them. It is here that the contrast, between 'freedom' (Art. 301) and restrictions' (Arts. 302 and 304) clearly appears: that which in reality facilitates trade and commerce is not a restriction, and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade; but the distinction: if it has to be drawn, is real and clear. For the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. So long as a tax remains compensatory or regulatory it cannot operate as a hindrance.

The most serious objection to the widest view canvassed before us is that it ignores altogether that in the conception of freedom of trade, commerce and intercourse in a community regulated by law freedom must be understood in the context of the working of an orderly society. The widest view proceeds on the footing that Art. 301 imposes a general restriction on legislative power and grants a freedom of trade, commerce and intercourse in all its series of operations, from all barriers, from all restrictions, from all regulation, and the only qualification that is to be found in the article is the opening clause, namely, subject to the other provisions of Part XIII. This in actual practice will mean that if the State Legislature wishes to control or regulate trade, commerce and intercourse in such a way as to facilitate its free movement, it must yet proceed to make a law under Art. 304(b) and

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no such bill can be introduced or moved in the Legislature

of a State without the previous sanction of the President. The practical effect would be to stop or delay effective legislation which may be urgently necessary. Take, for example, a case where in the interests of public health, it is necessary to introduce urgently legislation stopping trade in goods which are deleterious to health, like the trade in diseased potatoes in Australia. If the State Legislature wishes to introduce such a bill, it must have the sanction of the President. Even such legislation as imposes traffic regulations would require the sanction of the President. Such an interpretation would, in our opinion, seriously affect the legislative power of the State Legislatures which power has been held to be plenary with regard to subjects in list 11. The States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in list 11. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State list (list II) and the Concurrent list (list III) under which a State Legislature has power to make laws. Under some of these entries the State Legislature may impose different kinds of taxes and duties, such as property tax,, sales tax, excise duty etc., and legislation in respect of any one of these items, may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by

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the Legislature of a State which has repercussion on tariffs, licensing marketing regulations, price-control etc., must have the previous sanction of the President, then the Constitution in so far as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless. In our view the concept of freedom of trade, commerce and intercourse postulated by Art. 301 must be understood in the context of an orderly society and as part of a Constitution which envisages a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and the legitimacy of some degree of regulatory control, whether by the Union or the States: this is irrespective of the restrictions imposed by the other articles in Part XIII of the Constitution. We are, therefore, unable to accept the widest view as the correct interpretation of the relevant articles in Part XIII of the Constitution.

We proceed now to deal with another interpretation of the relevant provisions in Part XIII : this interpretation may be characterised as the narrow interpretation. According to this interpretation taxing laws are governed by the provisions of Part XII of the Constitution and except Art. 304(a) none of the other provisions of Part XIII extend to taxing laws. An additional argument is that the provisions of Part XIII apply only to such legislation as is made under entries in the Seventh Schedule which deal with trade, commerce and intercourse. According to this argument entry 42 in list 1, which refers to inter. State trade and commerce, entry 26 in list II which deals with trade and

commerce within the State subject to the provisions of entry 33 in list III, and entry 33 in list III which deals with trade and commerce as specified therein, are the only entries legislation relating to which attracts the provisions of Part XIII, and legislation on other topics is not affected by these provisions. In support argument

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assistance has been sought from the heading of Part XIII and from the use of the expression "subject to' in Art.301. It has been pointed out that the title of Part XIII is trade, commerce and an intercourse ; intercourse, it is stated, means commercial intercourse there being no separate legislative entry in any of the three list relating to intercourse and the word throughout' has reference to space rather than to movement. The expression ,subject to' it is stated, means conditional upon', thus connecting the provisions of Art. 303 with the provisions of Art. 301. Article 303 specifically uses the expression "by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule." It is argued that by reason of the connection between Art. 301 and Art. 303, the words "by virtue of any entry relating to trade and commerce etc." must be read into Art. 301 also so that Art. 301 will then be construed as a fetter on the commerce power i. e., the power given to the Legislature to make laws under entries relating to trade and commerce only. As to taxation being out of the provisions of Part XIIL of the Constitution except for Art. 304(a), the argument is that we must look to the historical background of s. 297 of the Government of India Act, 1935, and Arts. 274, 276 and 285 to 288 in Part XII of the Constitution. It is pointed out that the power to tax is an incident of sovereignty and it is divided between the Union and the States under the Constitution ; Part XII of the Constitution deals with several aspects of taxation and all the restrictions on the power to tax are contained in Part XII which, according to this interpretation, is self contained. Therefore, so it is argued, the freedom guaranteed by Art.301 does not mean freedom from taxation, because taxation is not a restriction within the meaning of the relevant articles in Part XIII.

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It would appear from what we have stated above that this interpretation consists of two main parts : one part is that taxation simpliciter is not within the terms of Art. 301 and the second part is that Art. 301 must take colour from the provisions of Art. 303 which, it is said, is restricted to legislation with respect to entries relating to trade and commerce in any of the lists in the Seventh Schedule, In Atiabari Tea Co. Case (1) this Court deal with the correctness or otherwise of this narrow interpretation and by the majority decision held against it. The majority judgement in the Atiabari Tea Co. Case (1) deals, with the arguments advanced in support of the interpretation in detail and as we are substantially in agreement with the reasons given in that judgment, we do not think that any useful purpose would be served by repeating them. It is enough to point out that though the power of levying tax is essentially for the very existence of government, its exercise may be controlled by constitutional provisions made in that behalf. It cannot be laid down as a general proposition that the power to tax is outside the purview of any constitutional limitations. We have carefully examined the provisions in Part XII of the Constitution and are unable to agree that those provisions exhaust all the limitations on the power to impose a tax. The effect of

Art. 265 was considered in the majority decision and it was pointed out that the power of taxation under our Constitution was subject to the condition that no tax shall be levied or collected except by authority of law. Article 245 which deals with the extent of laws made by Parliament and by the Legislatures of States expressly states that the power of Parliament and of the State Legislatures to make laws is 'subject to the provisions of this Constitution." The expression "subject to the provisions of this Constitution" is surely wide enough to take in

(1) [1961] 1. S. C. R. 809.

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the provisions of both Part XII and Part XIII. In view of the provisions of Art, 245, we find it difficult to accept the argument that the restrictions in Part XIII of the Constitution do not apply to taxation laws. As to the argument that Art. 301 must take colour from Art. 303, we are unable to accept as correct the argument that the provisions of Art. 303 must delimit the general terms of Art. 301. It seems to us that so far as Parliament is concerned, Art. 303(1) carves out an exception from the relaxation given in favour of Parliament by Art. 302 ; the relaxation given by Art. 302 is itself in the nature of an exception to the general terms of Art. 301. It would be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.

After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed for on behalf of the majority of the State cannot be accepted, namely, that the relevant articles in Part XIII apply only to legislation in respect of the entries relating to trade and commerce in any of the lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Art. 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them. This disposes of two of the main interpretations which have been canvassed before us. We

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accept neither the widest interpretation nor the narrow interpretation for the reasons which we have already indicated. It remains now to consider some of the other interpretations which have been canvassed before us. Mr. Lalnarain Sinha has in substance contended that Art. 301 is restricted to freedom from geographical barriers only ; Mr. D. Sahu has contended that Art. 301 is confined to (i) interstate barriers, and (ii) customs-barriers which at one time existed between the Indian States and the adjacent British Indian territory. In our opinion both these interpretations proceed on a somewhat narrow basis and are not justified by the general words used in Art. 301 and the other relevant articles in Part XIII of the Constitution. In our opinion the ambit of the relevant articles in Part XIII is wider than what these interpretations assume it to be. While on this point it may be advisable to refer to the contrast between Art. 19 in Part III and Art. 301 in Part XIII of the Constitution. Article 19 guarantees to all

citizens certain rights which are compendiously stated to be the right to freedom ; two such rights are (i) to move freely throughout the territory of India and (ii) to carry on any occupation, trade or business. The right to move freely throughout the territory of India is subject to reasonable restrictions in the interests of the general public or for the protection of any scheduled tribe. The right to carry on any occupation, trade or business is subject to reasonable restrictions in the interests of the general public and in particular to any law relating to the carrying on by the State, of any trade, business etc., whether to the exclusion, complete or partial, of citizens or otherwise. The first contrast between Art. 19 and Art. 301 is that Art. 19 guarantees the right to freedom to a citizen whereas freedom granted by Art. 301 is not confined to citizens. Another distinction which has been drawn is that Art. 19 looks at the right from the
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point of view of an individual, whereas Art. 301 looks at the matter from the point of freedom of the general volume of trade, commerce and intercourse. We do not think that this distinction, if any such distinction at all exists, is material in the present cases, because an individual trade may complain of a violation of his freedom guaranteed under Art. 19(1)(g) and he may also complain if the freedom assured by Art. 301 has been violated. In a particular set of circumstances the two freedoms need not be the same or need not coalesce. In some of the Australian decisions a distinction was sought to be drawn between the free flow of the same volume of inter-State trade and the individual's right to carry on his trade in more than one State and it was argued that s. 92 of the Australian Constitution related to the free flow of the volume of trade as distinguished from an individual's right to carry on his trade. Such a distinction was negatived and the Privy Council pointed out that the redoubtable Mr. James who fought many a battle for the freedom, of his trade and occupation was after all an individual. Another aspect of this contrast between Art. 19 and Art. 301 of the Constitution which has been adverted to before us is this; it has been argued that if a law imposing a restriction on the right of a citizen to carry on his trade or business is justified under el. (6) of Art. 19 as being in the interests of the general public, that law cannot again be impeached as being violative of Art. 301; otherwise, so it is argued, the Constitution will be taking away by Art. 301 what it has granted by cl. (6) of Art. 19. The argument is that trade or business must be such as a person is entitled to carry on before be can complain of any impediment to the freedom of that trade or business. This is an aspect of the problem which may require a more detailed and careful examination in an appropriate case. If we
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across geographical barriers. We are for this reason unable to accept Mr. Sinha's contention. Mr. Ranadeb Chaudhuri appearing on behalf of one of the interveners accepted the majority view that Art. 301 was aimed at the movement aspect of trade, commerce and intercourse; this lie called the "channelling". of trade, commerce and intercourse. But he raised the question of subsidy and said that Art. 303 which related to discrimination and preference also aimed at the mischief of subsidy which might be given to a State by way of preference or discrimination; that mischief, he said, would come within Art. 303 even if it did not relate to the movement aspect of trade and commerce. We are not concerned

in the present cases with the question of subsidy and need not, therefore, consider the argument of Mr. Ranadeb Chaudhuri with regard to it.

As to the word ,intercourse" there bar, also been some argument before us. On behalf of some of the States it has been contended that the word ,intercourse' in the context in which it occurs in Art. 301 means commercial intercourse. On behalf of the appellants it hat; been argued that the word ,intercourse' takes in not merely trade and commerce in the strict sense, but also activities, such as, movement of persons for the purpose of friendly association with one another, telephonic communications etc. For the purpose of the cases which we are considering nothing very much turns upon whether we take the word intercourse' in a wide sense or in a narrow sense. Even taking the word ,intercourse' in a wide sense, the question will still be what does the word ,free' mean? Does it mean free from all regulation which is necessary for an orderly society? We have already stated that the word 'free' in Art. 301 cannot be given that wide meaning.

We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow

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interpretations canvassed before us are acceptable. The interpretation which was accepted by the majority in the Atiabari Tea Co. case (1) is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the s use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b) of the Constitution.

Now the question is, do the relevant provisions of the Act read with the Schedules fall within what we have called permitted regulation which does not really or materially affect freedom of trade, commerce and intercourse; or do the taxes imposed by the relevant provisions of the Act read with the Schedules come within the category of compensatory taxes which are no hindrance to freedom of trade, commerce and intercourse, being taxes for the use of trading facilities in the shape of roads, bridges, etc. In an earlier part of this judgment we have quoted s. 4 which is the charging section. That section makes it quite clear that the tax is imposed on a motor vehicle which shall be used in any public place or kept for use in Rajasthan; the tax is to be at appropriate rates specified in the Schedules to the Act and save as specified in the Act the tax shall be payable annually notwithstanding that the motor vehicle may, from time to time, cease to be used. Section 7 says in effect that if the motor vehicle in respect of which such tax has been paid has not been used for a continuous period of not less than three months, then the owner shall be entitled to a refund of an amount equal to 1/12 of the annual rate of the tax paid. It appears from the Schedules that a vehicle other than a transport vehicle is charged with a consolidated tax, according as the motor vehicle is fitted with pneumatic tyres or not. The rate of tax varies

(1) [1961] 1. S. C. R. 809.

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according to the nature of the vehicle, whether it is a motor cycle, or a motor tricycle drawing a tractor, or a side car etc. Schedule If relates to transport vehicles with again are classified into various categories, those fitted with pneumatic tyres and those not so fitted, motor vehicles plying for conveyance of passengers and light

personal luggage goods vehicles plying under public carrier's permit etc. The quantum of tax fixed with regard to the seating capacity in some cases and loading capacity in other cases. The tax on some goods vehicles is fixed per day or per annum. Schedule III relates the goods vehicles only. A classification is again made between different classes of goods vehicles fitted with pneumatic tyres, conveying a trailer etc. The tax fixed is a tax for use per day. Schedule IV deals with vehicles plying with a private carrier's permit. Here again a classification is made of vehicles fitted with pneumatic tyres, with a general permit for use in Rajasthan and those with a permit for lying within the limits of one region only. The tax varies according to the loading capacity etc.

An examination of these provisions indicates clearly enough that the taxes imposed are really taxes on motor vehicles which use the roads in Rajasthan or are kept for use therein, either throughout the whole area or parts of it. The tax is payable by all owners of motor vehicles, traders or otherwise. In dealing with the question whether these taxes were reasonable restrictions on the right of individuals to move freely throughout the territory of India etc. the High Court said:

> "In this connection, it is well to remember that the State maintains old roads, and makes new ones, and these roads are at the disposal of those who use motor vehicles either for private purposes or for trade or commerce. This naturally costs the State. It has, therefore, to find funds for making
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> new roads and maintenance of those that are already in existence. These funds can only the raised through taxation, and if the State taxes the users of motor vehicles in order to make and maintain roads, it can hardly be said that the State is putting unreasonable restrictions on the individuals' right to move freely throughout the territory of India, or to practice any profession or to carry on any occupation, trade or business. We have looked into figures of income and expenditure in this connection of the Rajasthan State to judge whether this taxation is reasonable. We-find that in 1952-53 income from motor vehicles taxation under the Act was in neighbourhood of 34 lakhs. In that very year, the expenditure on new roads and maintenance of old roads was in the neighbourhood of 60 lakhs. In 1954-55, the estimated income from the tax was 35 lakhs, while the estimated expenditure was over 65 lakhs. It is obvious from these figures that the State is charging from the users of motor vehicles something in the neighbourhood of 50% of the cost it has to incur in maintaining and making roads."

The High Court further pointed out that in the case of private motor cars the tax was Rs. 12 per seat and for an ordinary five-seater car, it came to Rs. 60 per year. On payment of this amount the owner of the motor vehicle could use the car anywhere in Rajasthan and the roads were open to him. In the case of a goods vehicle, the tax was Rs. 2000 per year for a goods vehicle with a load capacity of over five tons i.e. over 135 maunds. Assuming that such a vehicle could be reasonably used for 200 days in a year, the

tax amounted to Rs. 10 per day for about 140 maunds of goods carried over any length of the road in Rajasthan. This worked out to about Rs. 1 for 14 maunds i. e. almost
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an anna a maund. If the Act and the Schedules appended thereto are examined in this manner, it will be noticed that the tax imposed is really a tax for the use of the roads in Rajasthan and it cannot be said that it hinders the free movement of trade, commerce and intercourse. The taxes are compensatory taxes which instead of hindering trade, commerce and intercourse facilitate them by providing roads and maintaining the roads in a good state of repairs. Whether a tax is compensatory or nor cannot be made to depend on the preamble of the statute imposing it. Nor do we think that it would be right to say that a tax is not compensatory because the precise or specific amount collected is not actually used to providing any facilities. It is obvious that if the preamble decided the matter, then the mercantile community would be helpless and it would be the easiest thing for the Legislature to defeat the freedom assured by Art. 341 by stating in the preamble that it is meant to provide facilities to the tradesmen. Likewise actual user would often be unknown to trades. men and such user may at some time be compensatory and at others not so. It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test, and in the nature of things that cannot be done.
Nor do we think that it xi ill make any difference that the money collected from the tax is not put into a separate fund so long as facilities for the trades people who pay the tax are provided and the expenses incurred in providing them are born by the State out of whatever source it may be. In
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the instruments of commerce that have been mentioned is no violation of the freedom of inter-State trades lies in the relation to inter-state trade which their nature and purpose give them. The reason why public authority must maintain them is in order that the commerce may use them, and so for the commerce to bear or contribute to the cost of their upkeep can involve no detraction from the freedom of commercial inter. course between States." (p. 43)
The learned Chief Justice reiterated the same view in Commonwealth Freighters Property Ltd. v. Sneddon (1)
We have, therefore, come to the conclusion that the Act does not violate the provisions of Art. 301 of the Constitution and the taxes imposed under the Act are compensatory taxes which do not binder the freedom of trade, commerce and intercourse assured by that article. The taxes imposed were, therefore, legal and the High Court rightly dismissed the writ petitions filed by the appellants. In the result the appeals fail and are dismissed with costs ; one hearing fee.

SUBBA RAO, J.-I agree with the conclusion arrived at by my learned brother, S. K. Das, J., but, in view of the importance of the question raised, I would prefer to give my own reasons for the construction of the relevant provisions of Part XIII of the Constitution.
The question in these appeals is, what is the ambit of the freedom enshrined in Art. 301 of the Constitution and what are the limitations implicit in it or envisaged in the

succeeding articles ?
The conflicting and sometimes mutually destructive arguments of learned counsel appearing for the various parties and interveners, omitting the
(1) (1959) 102 C. L. R. 280, 291.
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immaterial variations, may conveniently be placed under following heads: (1) Trade, commerce and intercourse" is a term of widest amplitude taking in the gamut of activities starting from production or manufacture and ending with the completion of a particular commercial transactions ; and every restriction imposed by any law or executive action on any part of the said integrated activity would be violative of the freedom under Art. 301. (2) The expression "trade, commerce and intercourse" means only transportation in the course of trade across the State or interState barriers, and any law be, it taxation or otherwise, directly and materially affecting the said transportation, would infringe the freedom. (3) The freedom recognized under Art. 301 is only the freedom against geographical barriers between States or intrastate units created by law ; and laws, including only discriminatory laws of taxation, creating the said barriers would offend against Art. 301. (4) The freedom envisaged by Art. 301 is only a freedom from laws showing preference to one State over another and discrimination between one State and another made only by virtue of entry, 42 of List I entry 26 of List If and entry 33 of List III of the Seventh Schedule to the Constitution. (5) The law of fiscal
taxation is entirely outside the domain of freedom declared by Art. 301. All the learned counsel appearing in the case has agreed, or at any rate no argument was advanced to the contrary, that the freedom, whatever may be its content or scope on which there is difference of opinion, relates to both inter-State and intra-State trade.
Before considering the provisions of the said articles, it will be useful to make certain general observations. We have to bear in mind in approaching the problem presented before us that our Constitution was not written on clean slate. Many of the concepts were borrowed from the Government
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of India Act or from other Constitutions and adapted to suit the conditions of our country. We cannot ignore the fact that the Constitution was drafted by persons some of whom had a deep knowledge of the constitutional problems of other countries; and therefore, they must be assumed to have had the knowledge of the interpretation put upon certain legal concepts by the highest tribunals of those countries. At the same time, it can be reasonably assumed that they have made a sincere attempt to accept the good and to avoid the defects found by experience in the other constitutions and also to could them to suit our conditions. Further, a brief survey of the relevant provisions of those constitutions, which form the background of this article, and the interpretation put on them by the highest tribunals of the respective countries would not only be relevant but also be necessary for appreciating the correct scope of Art. 301 of our Constitution. Our Constitution provides for a federal structure with a bias towards a Central Government. But real and substantial autonomy was conferred on the States within the boundaries of the fields chalked out for them. Therefore, in approaching the problem of construing the provisions of Part XIII of our Constitution, unless the terms of the provisions of the said Part are clear and

unambiguous, it would be the duty of this Court to construe them in such a manner as not to disturb the framework of the Constitution. Before I attempt to construe the relevant provisions of the Constitution, it would be convenient at this stage to consider briefly the American and Australian law material to the present inquiry.

Clause 3 of s. 8 of Art. 1 of the Constitution of the United States of America says that the Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. This clause has two aspects, namely, (i) it is a source of national power and (ii) it operates as a curb on state power. This clause gave rise,

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among others, to two questions, namely, (i) what was the scope and content of the commerce power? and (ii) bow to resolve the conflicts that arose between the, law made by the Congress in exercise of that power and the law made by the State in exercise of its police power, or their powers expressed or implied, when they came into conflict with each other? An authoritative definition of the word "commerce" was given by Marshall, C. J., in Gibbons v. Oden (1), wherein he observed:

> "This would restrict a general term applicable to many objects to one of its significations Commerce, undoubtedly. is traffic but something more-it is intercourse."

The decisions of the Supreme Court of the United States of America on the subject are not uniform. Indeed, they have adopted the commerce power to meet all the demands, namely, economic, commercial, industrial and transport revolutions of that country. It is not necessary for the purpose of this case to consider the conflict or the various nuances of the decision the concept of commerce was enlarged or reduced to meet the exigencies of different situations; but the common thread was that transportation across the borders, either physically or conceptually, was uniformly held to be a necessary ingredient of the expression "commerce". After noticing the conflict, Willis in his book on Constitutional Law, summarizes the latest position thus, at p. 288:

> "..... today the correct definition of commerce is that it is traffic and commercial intercourse. This, of course, gives Congress power wherever traffic or intercourse concerns an inter-State market. When "commerce" is properly defined as traffic, and the mental picture is formed, not of an isolated journey across a state boundary line, but of an onward
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> (1) (1824) 9 Wheat 1; 6 L. ed. 23.
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> coursing stream of business which knows no state lines, which is constantly fed and as constantly feeds the streams of production, and which debauches into the inter-state market, then regulations of it by Congress, J. whether taking the form of a prohibition of certain phases of transportation or some other form " ceases to be open to the charge of an ulterior intention to usurp their power, because it operates most upon the very subject matter entrusted to Congress or, at most, upon local incidents thereof, the fringe, so to speak, of a nation-spread fabric."

In this context the following references are instructive: Carter v. Carter Coal Company(1), Kidd v. Pearson(2), Welton v. State of Mussouri (3), Public Utilities Commission v. Landon (4). It may be stated broadly that in America "commerce" means traffic in its operation across the State borders.

On the second question some of the American decisions adopted a pragmatic approach to resolve the conflict. To solve the conflict that arose between the laws made by the Congress regulating commerce and those made by the State in exercise of its police power, the Supreme Court of America evolved certain doctrines, such as, "original package", ,silence of Congress", "preemption", "undue and unreasonable burden", and "direct and indirect effect". The following decisions dealing with 'direct and indirect effect" on inter-State trade can be usefully referred to in this regard, for, in my view, they afford some guide to resolve the difficulties that might arise under our Constitution: M' Culloch v. The State of Maryland (5) John T. Hendrick v. The State of Maryland(6),

(1) (1936) 298 U.S. 238. 80 L. ed.1160.
(2) (1888) 128 U.S. 132 L. ed. 346.
(3) (1876) 91 U.S. 27S; 23 L. ed. 347.
(4) (1919) 249 U.S. 2 36; 63 L. ed. 577.
(5) (1819) 17 U.S. 316; 4 L. ed. 579.
(6) (1915) 235 U.S. 610; 59 L. ed. 385,

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Interstate Busses Corporation v. William H. Blodgett(1), Interstate Transit v Dick Lindsey(2), and A. L.A. Schechter Poultry Corporation v. United State of America(3). The said decisions show that in America the principle accepted was that every restriction imposed by a State law did not offend the commerce clause, unless it directly affected it, and that even taxation was permissible, if it was for services rendered by the State to promote trade.

The Commonwealth of Australia Constitution Act was passed in 1900. At the time that Act was made, the framers of that Act had the background of the evolution of the American law on the commerce clause. Under that Act, certain defined powers of legislation are conferred on the Commonwealth in respect of trade and commerce. Section 51 reads: "Trade and commerce with other countries and among the States". Section 98 says: "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping and to railways the property of any State". Section 99 prohibits the Commonwealth, by any law or regulation of trade, commerce, or revenue, from giving preference to one State or any part thereof over another State or any part thereof. Section 100 prohibits the Commonwealth from abridging, the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. Other legislative powers are conferred in respect of specific subjects' of trade and commerce, such as, bounties, currency, coinage, bills of exchange, bankruptcy, copy-rights, customs, excise, etc. Section 92 says: "On the imposition of uniform duties of customs, trade, commerce, and intercourse, among the States, whether by means of internal carriage or ocean navigation, shall be

(1) (1928) 276 U.S. 245; 72 L. ed. 551.
(2) (1931) 283 U.S. 183; 75 L. ed. 953.
(3) (1935) 72 U.S 495; 79 L. ed. 1570.

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absolutely free". Unlike the American Constitution, the Australian Constitution confers a legislative power on the

Commonwealth Parliament to make laws in respect of trade and commerce with other countries and among the States, and also in respect of certain specific subjects of trade and commerce and then declares that trade, commerce and intercourse among the States shall be absolutely free. Unlike the American Constitution, in the Australian Constitution, there is a declaration of freedom of trade, commerce and intercourse among the States. While in America the expression used is "commerce", in a. 92 of the Australian Constitution the expression, "trade, commerce and intercourse" is used. The Australian Constitution Act not only does not provide for any restrictions on the freedom of trade, commerce and intercourse, but also used an expression of the widest amplitude, viz., "absolutely free" emphasizing the freedom declared by the section, This section, just like the commerce clause in the American Constitution, was the subject of judicial scrutiny and conflict of decision. The interpretation of this sub-section fell to be considered in the context of marketing, banking and transport legislation. The question raised was whether the freedom of trade, commerce and intercourse was interfered by the laws made by the State. Paradoxically, the Courts of Australia and, in appeals from some decisions of those Courts, the Privy Council evolved the power to restrict the said freedom by the States from the concept, of absolute freedom itself. This was necessitated because there were no statutory provisions limiting the absolute freedom and, as uncontrolled freedom in the field of interState Commerce may lead to chaos, limitations of the freedom were evolved to save the said freedom The scope of the limitations so evolved would be useful to construe the relevant provisions of all Constitution which expressly provides for similar limitations. The scope of the freedom and it

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limitations are found in the leading decisions on the subject, which throw considerable light on the question now raised, and they are : Smither's case(1), W. & A. McArthur Ltd. v. The State of Queensland (2), James v. Commonwealth of Australia (3) Commonwealth of Australia v. Bank of New South Wales (4). In the aforesaid Australian decisions the expression "trade, commerce, and intercourse among the States" has been understood in the widest sense as including trade in all its manifestations involving transportation or movement across the frontiers of the State it also includes non-commercial intercourse.

On the second question, some of the leading Australian decisions contain an interesting and instructive exposition of the conflict of jurisdiction and useful suggestions for resolving it. In this context the following decisions may usefully be consulted : James v. Cowan (5), Commonwealth of Australia v. Bank of New South Wales (4),Hughes and Vale Proprietary Ltd. v. State of New South Wales (6), Hughes and Vale Private Limited v. The State of New South Wales [No. 2] (7) Grannall v. Marrickville Margarine Proprietary Ltd. (8), Armstrong v. State of Victoria [No. 2] (9), Commonwealth Freighters Proprietary Ltd. v. Sneddon (10). The Australian decisions broadly laid down the following three propositions : (i) the impugned law, whether fiscal or otherwise, shall directly and immediately restrict traffic across the borders before it could be said to violate the freedom under a. 92 of the Commonwealth of Australia Constitution Act ; (ii) compensatory measures for the purpose of regulating commerce are not restrictions on the said freedom ; and (iii) when a question arises whether a fiscal statute amounts to a restriction on

(1) (1912) 16 C.L.R. 99.(2) (1920) 28 C.L.R. 530.
(3) [1936] A.C. 578. (4) [1950] A.C. 235.
(5) [1930] 43 C.L.R. 386.(6) (1955] A.C. 241.
(7) [1956] 93 C.L.R. 127.(8) [1955] 93 C.L.R. 155.
(9) [1957] 99 C.L.R. 28.(10) [1959] 102 C.L.R. 280.
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the said freedom, a careful scrutiny of the provisions may rebut the presumption that otherwise may arise that the impugned Act is really a compensatory measure for the amenities provided or services rendered.

The following principles emerge from the foregoing American and Australian decisions : (1) Though in American law the commerce clause only confers a power upon the Congress, under the Australian Constitution Act, freedom of trade, commerce and intercourse is enshrined in s. 92 as a cherished freedom : the composite expression in s. 92 of the said Act was borrowed from the American decisions. (2) The expression "trade commerce and intercourse", though it is not an expression of art, has acquired a definite significa-tion in the constitutional law of both the countries, namely, it is traffic and commercial intercourse concerning an inter-State market, or, to put it differently, the free flow or movement of trade across the State borders. (3) The said freedom should not ,be infringed by any law, whether taxation or otherwise or by executive action. (4) The restriction may be before or after movement : it may be a prior restraint or a subsequent burden. (5) The word "freedom" does not mean anarchy, but assumes transactions based on law and carried out under the superintendence and direction of law : such laws are, (a) laws of contract, property, tort, etc., (b) regulations for preserving and maintaining the freedom, such as, police regulations about safety, speed, lighting, rule of the road, etc., (e) laws providing for services and for compensation for services rendered, namely, the construction and maintenance of wharfs, roads, aerodromes, etc., and the levy of taxes to meet the expenditure incurred in connection therewith ; the said laws are not restrictions on the said freedom but only facilities to promote the same.

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Now, let us look at the provisions of Art. 301 of the Constitution. The article reads :

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

Three groups of words in the said article, in their juxtaposition and interaction, furnish the key to the problem, and they are : (i) trade, commerce and intercourse, (ii) throughout the territory of India, and (iii) shall be free. The expression "trade, commerce and intercourse" is a composite one and has received, as already noticed, the fullest judicial attention from the highest courts of America and Australia : though they may not be words of art, they have acquired a secondary meaning or significance. I shall accept the meaning acquired by that expression by the gradual evolution of law in those countries.

Now, let us analyse the words "shall be free". Three questions occur to one’s mind in regard to this, namely, (i) what is free ? (ii) free from what ? and (iii) where is it free ? As I have already indicated, the said composite expression means trade across the borders: what is free is that trade. It is implicit in the concept of freedom that there will be obstructions to it. Such obstructions or barriers may be, in the present context, to the freedom to trade across the borders. Article 301 provides for freedom

from the said barriers or impediments in effect operating as barriers. This freedom from barriers cannot operate in vacuum and must be limited by space. A barrier may be put up between two States at the boundary of the States or between two districts, two taluks, two towns or between two parts of a town. The barrier may be at a particular point at a boundary or might take the form of a continuous impediment till the boundary is
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crossed. It may take different forms. The restrictions may be before or after movement. It may be a prior restraint or a subsequent burden. But the essential idea is that a barrier is an obstacle put across trade in motion at a particular point or different points. The expression "shall be free" declares in a mandatory from a freedom of such transport or movement from such barriers.
The next question is, where is it free ? The second expression "throughout the territory of India" demarcates the extensive field of operation of the said freedom. The said intercourse shall be free throughout the territory of India. The use of the words "territory of India" instead of "'among the several States" found in the American Constitution or "among the States" found in the Australian Constitution, removes all inter-State or intra-State barriers and brings out the idea that for the purpose of the freedom declared, the whole country is one unit. Trade cannot be free throughout the territory of India, if there are barriers in any part of India, be it inter-State or intra-State. So long as there is impediment to that freedom, its nature or extent is irrelevant. The difference will be in degree and not in quality. The freedom declared under Art. 301 may be defined as a right to free movement of persons or things, tangible or intangible, commercial or non-commercial, unobstructed by barriers, inter-State or intra-State or any other impediment operating as such barriers. To State it differently all obstructions or impediments whatever shape they may take, to the free flow or movement of trade, or non-commercial intercourse, offend Art. 301 of the Constitution except in so far as they are saved by the succeeding provisions. But we are not concerned in this case with non-commercial intercourse.
The next question is, what is the content of the concept of freedom ? The word "freedom" is
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not capable of precise definition, but it can be stated what would infringe or detract from the said freedom. Before a particular law can be said to infringe the said freedom, it must be ascertained whether the impugned provision operates as a restriction impeding the free movement of trade or only as a regulation facilitating the same. Restrictions obstruct the freedom, whereas regulations promote it. Police regulations, though they may superficially appear to restrict the freedom of movement, in fact provide the neces-sary conditions for the free movement. Regulations such a provision for lighting, speed, good condition of vehicles, timings, rule of the road and similar others, really facilitate the freedom of movement rather than retard it. So too, licensing system with compensatory fees would not be restrictions but regulatory provisions ; for without it, the necessary lines of communication, such as roads, waterways and air-ways cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one. So too, regulations providing for necessary services to enable the free movement of traffic, whether charged or not, cannot also be described as restrictions impeding the

freedom. To say all these is not to say that every provision couched in the form of regulation but in effect and substance a restriction can pass off as a permissible regulation. It is for the Court in a given case to decide whether a provision purporting to regulate trade is in fact a restriction on freedom. If it be a colourable exercise of power and the regulatory provision in fact a restriction, unless the said provision is one of the permissible restrictions under the succeeding articles, it would be struck down. This view is consistent with the principles laid down by the Australian High Court and the Privy Council in the context of interpretation of the words "absolutely free" in a. 92 of the Commonwealth of Australia Constitution Act, which is more emphatic than the word "free" in Art. 301 of our Constitution.

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The Constitution confers on the Parliament and the State Legislatures extensive powers to make laws in respect of various matters. A glance at the entries in the Lists of the Seventh Schedule to the Constitution would show that every law so made may have some repercussion on the declared freedom. Property tax, Profession tax, sales-tax, excise duty and other taxes may all have an indirect effect on the free flow of trade. So too, laws, other than those of taxation,made by virtue of different entries in the Lists, may remotely affect trade. Should it be held that any law which may have such repercussion must either be passed by the Parliament or by the State Legislature with the previous consent of the President, there would be an end of provincial autonomy, for in that event, with some exceptions, all the said laws should either be made by the Parliament or by the State Legislature with the consent of the Central Executive Government. By so construing, we would be making the Legislature of a State elected on adult franchise the handmaid of the Central executive. We would be re-writting the Constitution and introducing by sidewind autocracy in the field of legislation allotted to the States, while our Constitution has provided meticulously for democracy. Therefore, any construction which may bring about such an unexpected result shall be avoided, unless the Constitution compels us by express words to do so. There are admittedly no such words of compulsion. At, the same time it is also difficult to accept the argument advanced by the States that the laws made under entry 42 of List I, entry 26 of List II and entry 33 of List III, of the Seventh Schedule to the Constitution only are subject to that freedom ; for firstly, the article does not restrict the freedom to the area covered by those entries, and, secondly, laws made under the other entries may more effectively and directly affect the movement of trade. If a law directly

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and immediately imposes a tax for general revenue purposes on the movement of trade, it would be violating the freedom. On the other hand, if the impact is indirect and remote, it would be unobjectionable. The Court will have to ascertain whether the impugned law in a given case affects directly the said movement or indirectly and remotely affects it.

At this stage, an argument elaborated by Mr. Lalnarain Sinha may also be noticed. The learned Advocate said that the filed occupied by Art. 19 of Part III of the Constitution and that occupied by Part XIII thereof are distinct, that Art. 19 deals generally with freedom of trade and that Art. 301 with discriminatory barriers and that fiscal statutes could not be restrictions under Art. 19 and, therefore, they could not equally be restrictions under Art. 301. He would

say that whatever might be said of "regulatory taxes" or ','destructive ones". fiscal taxes are always in public interest and it is not possible for a court to decide whether a particular tax is reasonable or not. On this premises, the argument proceeds, a reasonable restriction is a restriction, the reasonableness whereof can be ascertained by court, and in a case where the reasonableness of a particular restriction is impossible of ascertainment by a court, such as a law fixing a rate, the Constitution must be deemed to have released such a restriction from the impact of the concept of the freedom. This is an argument in reverse gear. The freedom declared by the Constitution cannot be controlled by an involved process of reasoning. It is not permissible to limit the content of the freedom by the criterion of a court's ability to ascertain the reasonableness of a restriction imposed thereon. What is guaranteed to a citizen by the Constitution is a fundamental right to carry on business. If cl. (5) of Art. 19 were not in the Constitution, every restriction on that right, be it by a

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law of taxation or otherwise, which limited the freedom, would certainly violate the same. The fact that the Constitution saves laws made imposing reasonable restrictions on the freedom has no relevance to the content of the freedom, though it protects certain laws made infringing that freedom. If on a construction of the provisions of Art. 19(6), it should be held that a fiscal taxation was not a restriction within the meaning of the said clause, every law imposing such a tax would infringe the fundamental right. This result could not have been intended by the makers of the Constitution. Therefore, the contention should be that every law of taxation is a reasonable restriction in public interest. There are no merits in the contention either. It is said that taxation is always in public interest, and that it is not possible for any court to ascertain on the material placed before it that a rate is reasonable or not. It is conceded that regulatory taxes or laws of taxation intended to prohibit or restrict an activity and not to raise a general tax in the interest of revenue may be a restriction and a court may be in a position to see whether such laws pass the test laid down in Art. 19 (6) of Constitution. The arguments is confined only to what is described as "fiscal taxation" that is taxation solely intended for raising revenue for the State. It is also not denied that unreasonable procedural restrictions imposed by law of taxation would infringe the freedom. It is also admitted that a fiscal law may offend the fundamental right enshrined in Art. 14 of the Constitution. If so, it is beyond my comprehension on what principle the law of taxation could offend with impunity the freedom enshrined in Art. 19 (1) (g). Article 13(2) says in express terms

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention, be void."

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A law of taxation is made by Parliament or the Legislature of a State, as the case may be, in exercise of the power conferred under the Constitution by virtue of the entries, found therein. It is a law just like any other law made under the Constitution. This Court, in K. Thathunni Moopil Nair v. State of Kerala (1) and in Balaji v. I. T. Officer

(2), hold that a law of taxation would be void if it infringed the fundamental right guaranteed under Art. 19 of the Constitution. Therefore, the law of taxation also should satisfy the two tests laid down in Art. 19(6) of the Constitution. It is said that a law of taxation is always in public interest. Ordinarily it may be so, but it cannot be posited that there cannot be any exceptions to it. A taxing law may be in public interest in the sense that the income realised may be used for public good, but there may be occasions, when the rate or the mode of taxation may be so abhorrent to the principles of natural justice or even to well settled principles of taxation that it may cause irremediable harm to the public rather than promote public good, that the Court may have to hold that it is not in public interest. Nor can I agree with the contention that it is impossible for a court to hold in any case that a rate of taxation is reasonable or not. As a proposition it is unsound. It may be legitimately contended that it is difficult for a court to come to a definite conclusion on the correctness of a rate fixed by the Legislature. Dixon, C. J., in Commonwealth Freighters Proprietary Limited v. Sneddon (3), gives a very cogent answer to such an argument in a different context. The learned Chief Justice said :

> "Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject-matter to purpose or otherwise, that the validity of
> (1) [1961] 3 S.C.R.77. (2) [1962] 2 S.C.R. 98 3.
> (3) (1959) 102 C. L.R. 280, 292.
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> the exercise of the power must sometimes depend on facts, facts which some how must be ascertained by the court responsible for deciding the validity of the law..... All that is necessary is to make the point that if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity."

I entirely agree with these observations. It is common place to point out that intricate problems come before a court involving decision on different and complicated aspects of human activity. Questions involving science, medicine, engineering, geology, biology, economics, Psychology, etc. all come for judicial scrutiny, and I have never heard any court saying that it is difficult to decide upon such a question and, therefore, the proceeding raising such a question is outside the jurisdiction of such a court. In saying this, I am not ignoring the difficulties inherent in a problem of fixing the rate of taxes by a court. Experience shows that the court applies certain presumptions, such as that of the wisdom, knowledge and the good intentions of the Legislature, and does not also meticulously go in to the question, but only looks at the broad features. On the argument of learned counsel when it is permissible and possible for a court to ascertain whether a tax is fiscal or regulatory, I do not see how it becomes impossible, though it may be difficult, to hold whether a fiscal tax is reasonable or not. The distinction lies not in the nature of the enquiry but only in degree. That apart, no restriction, if it is unreasonable, can be more

deleterious to the freedom than the imposition of fiscal burden on it, which may in certain circumstances destroy the very freedom. I, therefore, hold, on a true construction of the expressed words of Art. 19

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of the Constitution, that it is not possible or even permissible to hold that laws of taxation are outside the scope of the freedom enshrined therein. As the premises of Mr. Lalnarain Sinha's argument lack a reasonable basis his further argument that the freedom in Art. 301 excludes from its scope fiscal laws must be rejected.

Having ascertained the scope and content of the freedom envisaged in Art. 301 of the Constitution, let us look at the succeeding provisions which place limitations on the said freedom. 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."

This is an exception to Art. 301. The restrictions contemplated therein are restrictions on the said freedom. But the restrictions can be imposed by Parliament only by law. Parliament's power to make law is derived from Arts. 245 and 246 of the Constitution. Thereunder it can make laws with respect to any of the matters enumerated in Lists I and III of the Seventh Schedule and in respect of a territory not included in a States with respect to matters enumerated in any of the three Lists. Therefore, in exercise of the said power and by virtue of the language of the entries correlated to that power, Parliament can make any law imposing restrictions on the said freedom. The article in terms, or even by necessary implication, does not exclude restrictions by way of taxation. It is not the source or the nature of the law that matters but the impact of that law, be it a law of taxation or otherwise, on the freedom that is crucial. It is

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also not possible to accept the argument that Art. 302 confers an independent power on the Parliament, that is, a power in addition to that conferred on it by Arts. 245 and 246. There is no room for this argument, for the words ,,by law" in the article clearly refer to the power of the Parliament to make law under the Constitution. That apart, if it was the intention of the Constituent Assembly to confer a fresh power, those world not have been used in Art. 302, but instead world suitable to confer a new power, namely, '"shall have the power" would have been used. Therefore, under this article the Parliament can only impose restrictions by virtue of any of the entries in the Lists in respect of which it can make laws. peruse on the entries in List I shows that laws can be made restricting the said freedom under most of the entries, for instance, entries 22, 23, 24, 25, 27, 29, 42, 52, 53, 56, 81, 89, 91, etc. Whether there is a restriction or not, does not depend upon the relevant entry, but on the nature of the impact of the law on the freedom. But a limitation is sought to be placed upon this power by an attempt to confine it to the entries mentioned in Art. 303. Article 303, which prohibits the Parliament from making a law giving preference to one State over another or making any discrimination between one State and another, is confined only to the entries relating to trade and commerce. But Art. 303 is in the nature of an exception or proviso to Art. 302. "The proviso leaves the generality of the substantive enactment unqualified except in so far as it concerns the particular subjects to which

the proviso relates." "Where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it, by implication, what clearly falls within its expressed terms": see M. & S. M. Railway v. Bezwada Municipality (1). The words

(1) A. I. R. 1944 P. C. 71, 73.

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in Art. 302 are clear and unambiguous and they do not confine its operation to any particular entries and, therefore, the limitation imposed under Art. 303 cannot curtail the generality of the provisions of the said article.

But the more difficult question is, what does the word ",restrictions" mean in Art. 302? The dictionary meaning of the word ,'restrict" it "to confine, bound, limit." Therefore, any limitations placed upon the freedom is a restriction on that freedom. But the limitation must be real, direct and immediate, but not fanciful, indirect or remote. In this context, the principles evolved by American and Australian decision in their attempt to reconcile the commerce power and the State police power or the freedom of commerce and the Commonwealth power to make laws affecting that freedom can usefully be invoked with suitable modifications and adjustments. Of all the doctrines evolved, in my view, the doctrine of "direct and immediate effect" on the freedom would be a reasonable solvent to the difficult situation that might arise under our Constitution. If a law, whatever may have been its source, directly and immediately affects the free movement of trade, it would be restriction on the said freedom. But a law which may have only indirect and remote repercussion on the said freedom cannot be considered to be a restriction on it. Taking the illustration from taxation law, a law may impose a tax on the movement of goods or persons by a motor-vehicle it directly operates as a restriction on the free movement of trade, except when it is compensatory or regulatory. On the other hand, a law may tax a vehicle as property, or the garage wherein the vehicle used for conveyance is kept. The said law may have indirect repercussion on the movement but the said law is not one directly imposing restrictions on the free movement. In this context, two difficulties may have to be faced: firstly, though a law purporting

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to impose a tax on a property or a motor-vehicle, as the case may be, may in fact and in reality impose a tax on the movement itself, secondly, a law may not be on the movement of trade, but on the property itself, but the burden may be so high that it may indirectly affect the free flow of trade. In the former case, the court may have to scrutinize the provisions of a particular statute to ascertain whether the tax is on the movement. If the provisions disclose a tax on the movement, it will be a restriction within the meaning of Art. 302. In the latter case, if the provisions show that the tax is on property, the reasonableness of the tax may have to be tested against the provisions of Art. 19 of the Constitution. The question whether a law imposes a restriction or not depends on the question whether the said law imposes directly and immediately a limitation on the freedom of movement of trade. If it does, the extent of the impediment relates to the question of degree rather than to the nature of it. If it is a restriction, it must satisfy the conditions laid down in Art. 302 of the Constitution.

Article 303 is an exception or a proviso to Art. 302. Article 303 opens out with a non-obstante clause, namely,

"Notwithstanding anything in article 302". This phrase is equivalent to saying that "in spite of article 302" or that "article 302 shall be no impediment to the operation of article 303". It is accepted on all hands that there is a defect in the phraseology used in this article. This article prohibits both Parliament and the State Legislature from making a law giving preference to a State or States or making a discrimination among the States. The non-obstante clause has no relevance so far as the Legislature of a State is concerned, for Art. 302 does not deal with Legislature of a State. In these circumstances, the non-obstante clause can only be made applicable to that to which it is appropriate i.e., only to the limitations imposed on Parliament under Art. 303. The
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article, so far as it relates to Parliament, may be read :

> "Notwithstanding anything in article 302, the Parliament shall not have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule".

Now this provision prohibits the making of laws of the nature mentioned therein only by virtue of the entries relating to trade and commerce in any of the Lists in the Seventh Schedule. This article clearly says that neither Parliament nor the Legislature of a State can make a law imposing a restriction which has the effect of giving preference or making discrimination as the case may be, among the States. But a difficulty that confronts one is whether the limitation on the laws is confined only to the law made by virtue of the entries referring to trade and commerce or by virtue of any entry in the Seventh Schedule, which may affect trade and commerce. 'The entries which refer to trade and commerce are entries 41 and 42 of List I, entry 26 of List II and entry 33 of List III of the Seventh Schedule to the Constitution. But it is contended that the words "by virtue of the entries relating to trade and commerce in any of the Lists in the Seventh Schedule" are of wider import than the words ,by virtue of the said entries" and, therefore, any law specified in Art. 303 made by virtue of any entry in any of the Lists in the Seventh Schedule, if it relates to trade and commerce, would be covered by the exception. The words "any entry relating to trade and commerce in any of the Lists" are of the widest import and they yield to a very liberal interpretation. The phraseology used supports
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this interpretation. The reason for the exception also sustains it. There cannot be any distinction on principle, from the standpoint of the mischief sought to be averted, between a law made by virtue of an entry ex facie referring to trade and commerce and that made by virtue of any entry affecting trade and commerce. For instance, a law may be made by Parliament under entries relating to railways, highways, shipping etc.-these entries do not expressly refer to trade and commerce, though they may directly affect trade and commerce. If a law made under entry 26 of List If giving preference or making discrimination among the States is objectionable, it should also be objectionable, if made by virtue of any other entry. I would, therefore, hold that any law made by Parliament by virtue of any entry imposing

the said discriminatory restrictions would be bad Under the said article.

Article 303 (2) lifts the ban imposed on Parliament under Art. 303 (1), if a law made by Parliament imposing such discriminatory restrictions is necessary for the purpose of dealing with a situation arising out of scarcity of goods in any part of the territory of India. That part of Art. 303, which prohibits the Legislature of a State from making a law of the nature mentioned therein, also bears the same constructions and it is not necessary to restate it, except to mention that clause (2) of Art. 303 does not lift the ban in respect of the State Legislature.

Coming to Art. 304, we are again confronted with a defect in phraseology. The article opens out again with a non-obstante clause, namely, "Notwithstanding anything in article 301 or article 303". Under Art. 301 (a), the Legislature of a State may by law impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject so, however, as not to discriminate between

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them; and Art. 304 (b) enables the State Legislature to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or without that State as may be required in the public interest. But no Bill or amendment for the purpose St. of cl. (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. Clause (a), therefore, only enables the Legislature of a State to impose non-discriminatory taxes on goods imported from other States or the Union territories. The non-obstante clause vis-a-vis Art. 304 (a) may have some relevance so far as Art. 301 is concerned, for it enables the Legislature of a State to impose an impediment on the free movement of trade in spite of the freedom declared under Art. 301. But it has no relevance to Art. 303, which only prohibits the State Legislature from making a discriminatory law and it does not in any way prohibit the State Legislature from imposing a non-discriminatory tax permitted under Art. 304 (a). But, with reference to Art. 304 (b), the non-obstante clause has significance and meaning even in regard to Art. 303, as cl. (b) lifts the ban imposed by Art. 303, subject to the limitations mentioned therein. Therefore, the non-obstante clause must be deemed to apply only to that part of Art. 304 appropriate to the said clause. If so read, the difficulty in the construction disappears. Article 304 (a) lifts the general ban imposed by Art. 301 in respect of imposition of non-discriminatory taxes on goods imported, which indicates that but for the said provision the law of taxation in that regard would infringe the freedom declared under Art. 301. Clause (b) of Art. 304 enables a State to make laws imposing reasonable restrictions on the freedom of trade, commerce and intercourse; and I would interpret the word "restrictions" in the same way as I have interpreted the said expression in Art. 302. It cannot be said, as it is contended, that cl. (b) only lifts the ban imposed by Art. 303

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on the power of the Legislature of a State, but it does more than that. It enables the State Legislature to impose all reasonable restrictions on the said freedom in the sense I have already explained, all subject to the proviso.

Again, in the context of Art. 304 (b), a strong plea is made by some of the learned Advocates appearing for the States, relying upon the other provisions of the Constitution for holding that taxation laws are outside the ken of the said

provisions. Reference is made to Arts. 31 (5) (b) (i), 248, 265, 276, 285, 287 and 288. I do not propose to consider the arguments based on the said articles in detail, as, in my view, these and similar articles of the Constitution do not even remotely touch the question raised before us. They fit in the scheme of the Constitution. The Constitution confers power on the Legislatures to make laws of taxation, circumscribes that power with reference to the entries in the Seventh Schedule and other constitutional provisions, and provides for resolving conflict of powers. The aforesaid articles, except Art. 31 (5) (b) (i) and Art. 248, appear in Ch. I of Part XII under the general heading Finance", Article 265 declares that no tax shall be levied or collected except by authority of law; that is to say, tax cannot be levied or collected by an executive flat. Article 276 fixes a ceiling on taxes payable to local boards on professions, trades, callings and employments. Article 285 exempts property of the Union from State taxation Article 286 prohibits the States from imposing a tax on inter-State sales, subject to a proviso. Article 287 exempts the Union from the State law of taxation on electricity; and Art. 288 gives a similar exemption to the Union from taxes by States in respect of water or electricity in certain cases. Article 31(5)(b)(i) exempts a law imposing or levying any tax from the impact of the fundamental rights enshrined in Art. 31(2)

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of the Constitution. Article 248 preserves the residuary power of the Parliament in respect of any matter not enumerated in the Concurrent-List or the State-List, including the power to impose taxes. These articles, therefore, generally impose limitations on the appropriate legislative power of taxation of States or give exemption in special cases. By and large, the said articles and similar others operate as limitations, or restrictions on the power of taxation conferred upon Parliament and the appropriate Legislatures under Art. 246 of the Constitution. But, in exercise of the power of taxation, subject to these limitations, the appropriate legislature cannot make a law infringing the freedoms conferred under the Constitution. The conditions prescribed for imposing a tax or the ceilings fixed thereon may affect the ambit of the power but cannot either sanction encroachment on the freedom guaranteed by Art. 331 or curtail the same. Assuming that some of the conditions prescribed in Art. 286 appear to come into Conflict with those in Art. 304(b) in my view, there is no such conflict-the said articles can co-exist by a process of harmonious construction. In short, these articles may limit the power of the appropriate legislature in imposing tax, but cannot be relied upon to curtail the ambit of the freedom under Art. 301 of the Constitution.

Reliance is also placed on Art. 26 which provides that every religious denomination or any section thereof shall have the right, inter alia, to own and acquire movable and immovable property. It is said that the freedom conferred by that article cannot preclude the State from imposing a tax on the said property, and that, by the same parity of reasoning, Art. 301 which confers the freedom cannot preclude the Legislative power imposing a tax affecting that freedom. It is true that the marginal heading of this article is "Freedom to manage religious affairs", but the subject-matter of Art. 26 cannot be equated to that of the freedom of trade

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declared under Art. 301. I should not be understood to have

expressed any view on the construction of that article in the present case.

Article 305, as it stood before the Constitution (Fourth Amendment) Art. 1955, only saves the existing laws from the operation of Art. 301, and Art. 303, and it does not throw any light on the construction of Art. 301. Article 306 was omitted 'by the Constitution (Seventh Amendment) Act, 1956; but the said article saved the operation of any law made by any States specified in Part B in the First Schedule before the commencement of the Constitution levying any tax or duty on the import of any goods in to the State from other States or on the export of goods from the State to other States and enacted that if there be an agreement between the Government of India and the Government of that State in that behalf, the said tax or duty might be levied or collected for such period not exceeding ten years from the commencement of the Constitution, subject to the terms of the said agreement. If a law of taxation cannot, under any conceivable circumstances, be a restriction on the freedom of trade, why did it become necessary to introduce a saving clause in terms of Art. 306 in the group of articles in Part XIII? It is suggested that the saving clause might have become necessary as there was an impediment under the other provisions of the Constitution. But that circumstance cannot deprive the force of the non-obstante clause in Art. 301 in its application to the provisions of Part XIII. This article indicates the consciousness of the makers of the Constitution that restrictions contemplated in that Part take in restrictions by way of taxation and, therefore, it was necessary to provide for an exemption in the case of Part B States for a specified period of time.

The foregoing discussion may be summarized in the following propositions (1) Art. 301 declared

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a right of free movement of trade without any obstructions by way of barriers, inter-State, or intraState or other impediments operating as such barriers. (2) The said freedom is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, Wharfs etc., with or without compensation. (3) Parliament may be law impose restrictions on such freedom in the public interest; and the said law can be made by virtue of any entry with respect where of Parliament has power to make a law. (4) The State also, in exercise of its legislative power, may impose similar restrictions, subject to the two conditions laid down in Art. 304 (b) and subject to the proviso mentioned therein. (5) Neither Parliament nor the State Legislature can make a law giving preference to one State over another or making discrimination between one State and another, by virtue of any entry in the Lists,, infringing the said freedom. (6) This ban is lifted in the case of Parliament for the purpose of dealing with situations arising out of scarcity of goods in any part of the territory of India and also in the case of a State under Art. 304 (b), subject to the conditions mentioned therein. And (7) The State can impose a non-discriminatory tax on goods imported from other States or the Union territory to which similar goods manufactured or produced in that State are subject.

The construction I have placed on the provisions of the Constitution brings out the harmony between the various articles in Part XIII of the Constitution and also discloses an integrated scheme of freedom of trade,, commerce and intercourse maintaining a balance between federalism and

provincial autonomy.
I agree with my learned brother., Dan, J... that the provisions of the Rajasthan Motor Vehicles Taxation Act (XI of 1951) are regulatory in character
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and that they do not infringe the freedom enshrined in Art. 301 of the Constitution.
The appeals fail and are dismissed with costs.
HIDAYATULLAH, J.-The Rajasthan Motor Vehicles Taxation Act, 1951 (No. XI of 1951), in s. 4 provided:

> "(1) Save as otherwise provided by this Act or by rules made thereunder or by any other law for the time being in force, no motor vehicle shall be used in any public place or kept for use in Rajasthan unless the owner thereof has paid in respect of it, a tax at the appropriate rate specified in the schedules to this Act within the time allowed by section 5 and, save as hereinafter specified, such tax shall be payable actually notwithstanding that the motor vehicle may from time to time cease to be used.
> (2)An owner who keeps a motor vehicle of which the certificate of fitness and the certificate of registration are current shall, for the purposes of this Act be presumed to keep such vehicle for use.
> (3)A person who keeps more than ten motor vehicles for use solely in the course of trade and industry shall be entitled to a deduction of ten per cent on the aggregate amount of tax to which he his liable.
> Explanation.-The expression "trade and industry" includes transport for hire."
> The Schedules referred to in the first sub-section are four in number. They specify the kind of vehicles liable to the tax, the rates of the tax applicable to each kind, and some other conditions. A detailed reference to the Schedules will be made by
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> us later. Section 11, which created penalties for contravention of the Act, was follows:
> "Whoever contravenes any of the provisions of this Act or of any rule made thereunder shall on conviction be punishable with fine which may extend to Rs. 100 and in the event of such person having been previously convicted of an offence under this Act or under any rule made thereunder with fine which may extend to Rs. 200."
> The appellants who held permits, plied their buses from the State of Ajmer. Their routes passed through the territory of Rajasthan, and they were required to pay the tax in Rajasthan. They filed petitions under Art. 226 of the Constitution in the High Court of Rajasthan, impugning the demand as a contravention of the provisions of Part XIII and of Art. 19 of the Constitution. A Divisional Bench of the High Court, which heard the petition, referred for the decision of a Full Bench the following question:
> "Whether ss. 4 and II of the Rajasthan Motor Vehicles Taxation Act, 1951, infringe the

right of freedom of trade, commerce or intercourse granted under Article 301 of the Constitution?"

The Full Bench answered the question in the negative, and in view of the answer, the petitions were dismissed. The appellants were, however, granted a certificate under Art. 132 of the Constitution, and the present appeals have been filed.

The appellants contend that the Rajasthan Motor Vehicles Taxation Act, 1951, is outside the competence of the State Legislature inasmuch as its pith and substance is ",Inter-State trade and commerce which is a Union subject under Entry 42 of

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Union List; that it is null and void being in violation of Art. 19(1) (d), (f) and (g) of the Constitution; that it is ultra vires and illegal, as it contravenes the freedom guaranteed under Art. 301; that even if permissible, it is not a reasonable restriction of =and commerce within Art. 304, and that not having been enacted with the previous sanction of the President, it is not effective as law under Art. 265.

At an earlier hearing, the attention of the Constitution Bench of this Court was drawn to Atiabari Tea Co. Ltd. v. State of Assam (1), where this Court struck down by majority the Assam Taxation (on Goods Carried by Roads or Inland Waterways) Act, 1954, as offending against the freedom of trade, commerce and intercourse. On that occasion, three views were expressed. Sinha, C. J.. held that the freedom guaranteed by Art. 301 was against "trade barriers, tariff walls, or imposts which have a deleterious effect on the free flow of trade, commerce and intercourse" but not against taxation Simpliciter. Shah, J., held that the freedom envisaged was wide enough to comprehend within itself a ban of prohibition, control or impediment of any kind whatever and of taxes whether they fell on movement of trade or commerce or otherwise. The majority (Gajendragadkar, Das Gupta and Wanchoo, JJ.) hold that though taxes as such were not within the ban of Part XIII, such taxes as impeded the free flow of trade and were directly placed on movement were included in it. The appellants relied on the views of Shah, J., and failing that, on the majority view which, they contended, also held good here, while the State Government based its case upon the views of the learned Chief Justice. The Constitution Bench was thus of the opinion that "having regard to the importance of the Constitutional issues involved and the views expressed in Atiabari Tea Co. Ltd. v. State of Assam (1)", this case

(1) [1961] 1 S.C.R. 809.

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should be heard by a larger Bench, and these appeals have thus come before this special Bench.' Certain other parties obtained permission to intervene, and notices having issued to the Advocate-General of States, we have had the benefit of arguments from various angles.

That freedom of trade, commerce and intercourse is secured by Art. 301, subject to the other provisions of Part XIII, has not been disputed in this case. The dispute is only as to what is comprehended within that freedom, and a further question is whether the powers of Parliament and the State Legislatures to levy taxes according to the Sundry Entries in the Legislative Lists are meant to be circumscribed in any way, and if so, to what extent.

Art. 301 of the Constitution, so far as its language goes,

is fairly modelled on s. 92 of the Australian Commonwealth Act, 1900, and numerous decisions of the High Court of Australia and on appeal, by the Privy Council, were cited before us to define the content and extent of the freedom envisaged. Besides, the Government of India Act, 1935, also contained in a. 297 a provision on the subject of freedom of trade and commerce, and the contention of the State partly has been that Part XIII enacts little more than what was contained there.

Since the arguments made much of these two analogies, it is necessary to state first certain well. known and well-accepted propositions relating to the interpretation of Constitutions, in which there are fundamental limits upon the power to legislate. In Queen v. Burah (1), Lord Selborne laid down a proposition which in its exposition of the subject and the manner of expression can hardly be improved. Lord Selborne said:

> "The established Courts of justice when a question arises whether the prescribed limits
> (1) (1878) 3 App.cas.889.
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> have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court of Justice to inquire further, or two enlarge constructively those conditions or restrictions."
>
> We have thus to see what powers have affirmatively been conferred on the legislatures of the State and what are the restrictions on that power. In this connection, we must also bear in mind the weighty observations of Gwyer, C. J., in Bhola Prasad v. The King Emperor (1)
>
> "We must again refer to the fundamental proposition enunciated in The Queen. v. Burah(2) that Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. If that was true in 1878, it cannot be less true in 1942. Every intendment ought therefore to be made in favour of a Legislature which is exercising the powers conferred on it."

The legislative powers of the States after the establishment of the Republic of India are certainly not any the less; and it must be conceded at once that within the range of their powers as conferred the legislative entries in Sch. VII, the State Legislatures are supreme, subject, of course, to such restrictions as are to be found in the Constitution itself

(1) [1942] F.C.R. 17, 27. (2) (1878) 3 App. cas. 889

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The power to tax motor vehicles is the subject of Entry 57 in the State List, and it reads:-

> "Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions

of entry 35 of List III."

The words "suitable for use on roads" describe the kinds of vehicles and not their condition. They exclude from the Entry, farm machinery, aeroplanes, Railways etc. which though mechanically propelled are not suitable for use on roads. The inclusion of trams using tracks which may be on roads or off them, makes the distinction still more apparent. It is thus clear that the power to tax motor vehicles is plenary, subject to Entry 35 of the Concurrent List or any other restriction to be found elsewhere in the Constitution. Entry 35 above referred to reads:

"35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied."

The existence of such an Entry in the Concurrent List cuts down the supremacy of the State Legislatures, and in respect of taxation of motor vehicles, if the principles of taxation are laid down by Parliamentary legislation, the State laws repugnant thereto must be void, in view of the provision of Art. 254 of the Constitution. The question whether the power of Parliament to legislate and lay down principles of taxation under Entry 35 of the Concurrent List would also have to be considered under Part XIII, does not arise in this case, for admittedly there is no law by Parliament that Entry either prior or subsequent to the State Act. Thus, so far as the taxing power of the State Legislature is concer-ned, it must be admitted that it was not only exercised under Entry 57, but, if judged solely under that Entry, that it was properly exercised.

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The question thus is whether on the exercise of this power there are to be found other curbs in other parts of the Constitution, and whether those curbs have not been observed. Such curbs may be of three kinds. The first may arise from the operation of the power of legislation granted to Parliament by Entry 42 of the Union List, and the contention in this connection is that the present impugned Act in its pith and substance is legislation under that Entry and thus void. The second may arise from Art. 19, sub-cls. (d), (f) and (g) if the law deprives the motor operators of the right (a) to move freely throughout the territory of India' (b) to acquire, hold and dispose of property, and (c) to practice any profession, or to carry on any occupation, trade or business, and the restriction is incapable of being justified as reasonable. The third may arise from the provisions of Part XIII where freedom of trade, commerce and intercourse throughout the territory of India has been ,guaranteed', subject only to the provisions of that Part. These, in the main, are also the contentions. and these appeals can be effectively disposed of from these three view points.

The first contention that the impugned Act is bad because it is legislation directly under Entry 42 of the Union List need not detain us long. The subject of Entry 42 of the Union List is not taxation but "inter-State trade and commerce". The scheme of the Legislative Lists shows that taxation entries are separate from other entries, and the other entries do not include a power to impose a tax, though the power to levy fees is included as it is expressly so stated. The subject of Entry 57 of the State List is taxation on vehicles. An Act which seeks directly to levy a tax on motor vehicles even though there may be incidental and subsidiary provisions about the regulation of a particular inter-State trade carried on with the aid of or in

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motor vehicles is legislation really within Entry 57 and not within the other Entry though it may, touch it, and is thus within the competence of the State Legislature. That these motor vehicles come into the taxing State from an extra State point and are taxed within the taxing State by reason of their use or presence there, may raise problems under Part XIII but not under Entry 42 of the Union List. The words of the charging section are :

> "No motor vehicle shall be used in any public place or kept for use in Rajasthan unless the owner thereof has paid, in respect of it, a tax at the appropriate rate specified in the Schedule to this Act....."

The pith and substance of the Act is the levy of a tax on motor vehicles in Rajasthan or their use in that State irrespective of where the vehicles come from. In one sense, it does not seek directly or immediately to legislate on inter-State trade or commerce or to prohibit the entry of such motor vehicles it the tax be paid, except in so far as a person deterred by the tax may keep out. This may be a point for consideration under Part XIII or even Art. 19 of the Constitution, but not under Entry 42 of the Union List. Even if the levy of the tax may be said to touch inter-State trade or commerce, it is not legislation in respect of interstate trade or commerce. It has been held consistently by this Court, the Privy Council and the Federal Court that a law substantially in its pith and substance under an Entry in one List may touch incidentally on a topic of legislation in a rival List without being void or ultra vires. This, in our opinion, is sufficient to dispose of the first point.

The next attack is with the aid of Art. 19 of the Constitution. That Article guarantees to the citizens of India certain basic freedoms. Freedom from taxation is not one of them. It is hardly

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necessary in this case to examine the subject from the angle of Art. 19, because a law to be good under that Article must satisfy the test of reasonableness. If the impugned sections here are declared to be unreasonable restrictions upon the freedom of trade, commerce and intercourse, they would fall also under Part XIII. If this were to happen, it would be wholly unnecessary to decide whether taxation laws are within the reach of Art. 19 and also whether the impugned provisions have to pass the independent scrutiny of Art. 19 before they can be sustained.

This brings us to the consideration of the last point on which arguments occupied the Court for several days. It would be necessary (if not, impossible) to try to discuss the arguments which, though proceeding from the same side, were often conflicting. The use of language borrowed from a. 92 of the Australian Constitution in Art. 301 of our Constitution led to the citation of many Australian rulings. Those rulings are so numerous that they provoked a former Chief Justice of the High Court of that Country to say that when he died, s. 92 would be found to be written on his heart But it is reasonable to suppose that those who borrowed the language in India were fully aware of the conflict of opinion in Australia. It is reasonable to assume that the framers of our Constitution must have sought to avoid there dangers. It must not also be overlooked that the decisions of the Privy Council in Commonwealth of Australia v. Bank of New South Wales(1) and Hughes and Vale Pty. Ld. v. State of N.S.W. (2), which to some extent have narrowed down the controversy in Australia, were not

rendered when the draft Constitution was framed or the Constitution was adopted. A note has, however, to be taken of the fact that the history of the establishment of federation in the two Countries is so vastly different that in spite of

(1) [1950] A.C. 235.
(2) [1955] A.C. 241.

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certain resemblance in the language employed in the comparable provisions of the two Constitutions, they cannot mean the same thing. Indeed, they differ in so many respects that nothing is more dangerous than to suppose that the Indian Constitution wished to secure freedom of trade, commerce and intercourse in the same way as did the Australian Commonwealth. These differences are not to be found solely in the language of the corresponding provisions but in the evolution of the two Countries and the checks and balances provided in our Constitution which are not to be found in the Australian Constitution. We shall refer to these differences briefly before examining what checks and balances have been provided in our Constitution.

The Commonwealth of Australia was formed out of a number of Colonies which were separated by high tariff walls and numerous differential inter-Colonial duties. The idea of a federation was born out of a desire to secure free trade on a reciprocal basis between the Colonies. The Federation was, however, delayed by the failure to reach agreement on the financial aspects of the Constitution. Numerous conventions took place which tried unsuccessfully to solve the problem which was aptly described ",as the lion in the path of unity". It was after surmounting many difficulties that the financial clauses were settled by agreement. It is in the background of these historical facts that the provisions relating to freedom of trade, commerce and intercourse have been interpreted by the High Court of Australia. The provisions of the Australian Constitution themselves enact the underlying agreements. Sections 51, 88, 89, 90, 100 and 102 insist upon uniformity and the absence of discrimination in matters of trade and commerce after the imposition of uniform duties of customs which was to be achieved in two years.

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Section 92 then epitomizes the whole concept of this unity and freedom from preferential treatment by enacting :

> "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."
>
> It may be pointed out here that the alternative phrase "throughout the Commonwealth" was not accepted, though it was suggested as an amendment more than once.
>
> The provisions of the Australian Constitution such as bear on trade and commerce, are no more than covenants entered into at the Conventions, which have been introduced bodily into the Australian Constitution, the fate of which depended for a long time on how to secure an agreement about uniform tariffs customs, excises and bounties. The declaration of freedom of trade, commerce and intercourse was the logical culmination of the negotiations for the establishment of the Federation. The language of s. 92 was thus

made emphatic, even though its full purport remained vague. As observed by Viscount Haldane, L. C., in Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Company Limited (1) :

"It is a matter of historical knowledge that Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great

(1) [1914] A.C. 237.

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deliberation, and if there is as points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter from of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by larger assemblages."

But declarations in a Constitution, however worded, must be given effect to, and they always loom large on the horizon of law-making, if they curtail legislative power, and it is not surprising that the Australian High Court was faced with the problem of deciding which laws rendered trade, commerce and intercourse unfree and which did not. In the course of these decisions, a wide cleavage in opinion soon appeared. one view holding that any burden on trade, commerce or intercourse between the States was bad, and the other view attempting justification to save laws which were impugned. Various grounds for such justification were evolved. Some laws were upheld on the ground that they were merely regulatory but some others were declared void as having crossed the line of legitimate regulatory action. Some taxation laws were upheld on the ground that though they burdened trade or commerce, they were compensatory in character. Even there, differences arose about the tests to be applied to discover when such laws could be said to have exceeded the limits. The number of such cases is legion, and almost any view can be supported by citations from some judgment or other from the Australian law Reports. Lord Porter in Commonwealth of Australia v. Bank of New South Wales (1) aptly summed up : "In this labyrinth there is no golden thread" (p. 310). The maze of law round s. 92 was, of course, something of which the framers of our Constitution were not unaware. They knew (1) [1950] A. C. 235.

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that in spite of the force of the words "absolutely free", it was well-settled that the freedom so contemplated was a qualified freedom. In Duncan v. State of Queensland (1) Griffith, C. J., had observed, what was generally accepted, that "the word free' does not mean extra legem, any more than freedom means anarchy". The task of the Bench as also the Bar was to ascertain the limits of freedom or more appropriately, the limits to which restrictions could go. In this, the Australian High Court was the actor in the main ; but the Privy Council also delivered four judgments. Of these, two were before our draft Constitution and two, thereafter. It is, therefore necessary to investigate, to

find out what was the accepted position in about 1948 to be able to see if any of the principles so laid down were accepted and to what extent they were modified to suit our Constitution in the light of our own history. We shall first notice those cases which were decided before our Constitution was drafted in 1948.

This first point on which difference arose in Australia was whether s. 92 of the Commonwealth of Australia Act was addressed only to the States, or whether it bound the Commonwealth as well. In W. & A. McArthur Ltd v. State of Queensland (2) the majority held that the Commonwealth was not bound.' Gavan Duffy, J., alone held that the language of the section clearly controlled both the powers conferred on the Federal Parliament and those reserved to State Parliament. The view of the majority was negatived by the Privy Council in James v. Commonwealth of Australia (3). Indeed, the High Court of Australia had already doubted the correctness of the view, but it felt itself bound by it. The Privy Council traced the development of that view and pointed out that though in The King v. Vizzard (4) the Commonwealth agreed to be

(1) (1916) 22 C. L. R. 536, 573
(2) (920) 20 C. L. R. 530.
(3) [1936] A. C. 578.
(4) (1933) 50 C.L.R. 30.

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bound within certain limits, the ruling in McArthur's case (1) was not departed from and that though the view was reaffirmed in Australia from time to time, it was not applied in practice. The Board, however, did not "shelter under the decision in McArthur's case (1), and decided that the Commonwealth was also bound. Thus, the opinion of Issacs, J., in Foggitt Jones & Co. Ltd. v. The State of New South Wales (2) that s. 92

> "makes Australia one indivisible Country for the purpose of commerce and intercourse between Australians" and that it was "beyond the power of any State Parliament, or even of the Commonwealth Parliament, by any regulation of trade and commerce, to impair that fundamental provision"

was accepted at least in its first part.

The second point was what was meant by $(absolutely free". The Attorney-General for Australia in the course of his arguments in James v. Commonwealth of Australia (3) summarised the propositions which were urged and supported by authorities in the arguments before the Privy Council in that case, and they were six, as follows :

> "(1) The first meaning of 'free' is free of all law of every description ;
> (2)Free of any restrictions imposed upon trade and commerce by reason of its interState character. That is, free of any discriminating trade law ;
> (3)Free as trade and commerce of all interference whether specially directed to it or not ;
> (4) Free of all laws the pith and substance

(1) (1920) 28 C.L.R. 530. (2) (1916) 21 C.L.R. 557.
(3) [1936] A.C. 578.

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of which is a regulation of interstate trade

or commerce;
(5)Freedom attaches to trade and commerce regarded as a whole and not distributively. Individuals are not guaranteed freedom in relation to their trade and commerce so long as trade and commerce as a whole are not impaired.
(6)Free from pecuniary imposts-that is the narrowest meaning of s. 92."

These six propositions fairly represent the view in the various judgments of the Australian High Court. Isaacs, J., in Rex v. Smithers (1) had observed :

"In my opinion, the guarantee of inter-State freedom of transit and access for persons and property under a. 92 is absolute-that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians."

In McArthur'a Case (2), the claim was made against all Governmental control and the majority also held that to be its meaning. The Privy Council examined the scheme of the Constitution of Australia and drew the line thus :

"The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of s. 112, in respect of 'goods passing into or out of the State'. What is meant by that needs explanation, The idea starts with the admitted fact that federation in Australia was intended (inter alia) to abolish the frontiers between the different States and create one Australia. That conception involved freedom from customs duties, imports, border prohibitions and restrictions of every

(1) [1912] 16 C. L. R.99.
(2) [1920] 28 C. L. R. 533
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kind:the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrances or restrictions based merely on the fact that they were no members of the same State."

After referring to some cases in which the burdens and hindrances took diverse forms and appeared under various disguises, the Board observed that it must be a question of fact in every case whether there was an interference with the freedom of passage, and finally observed :

"As a matter of actual language, freedom in s. 92 must be somehow limited, and the only limitation which emerges from the context, and which can logically and realistically be applied, is freedom at what is the crucial point in inter-State trade, that it is at the State barrier."

The language of s. 92, particularly "among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free", taken with the history to which we have already referred apparently decided the controversy.

This was departed from later in Commonwealth of Australia v. Bank of New South Wales (1), but after our Constitution was drafted.

The next question decided was: what was meant by "trade and commerce". Again, in McArthur's Case (2), the meaning given was a very wide one. It was not confined to the "mere act of transportation of merchandise over the frontier." It was said that "all the commercial arrangements of which transportation is the direct and necessary result from part of "trade and commerce". In

(1) [1950] A. C. 235.
(2) [1920] 82 C. L. R. 530

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the concept of "trade and commerce" were thus included-

> "the mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls trade and commerce'."
>
> In reaching this conclusion, Knox, C.J., referred to Bank of India V. Wilson (1) and Commissioners of Taxation v. Kirk(2), where Lord Davey observed:
>
> "The word trade' no doubt primarily means traffic by way of sale or exchange or commercial dealing," but also added that "it may have a large meaning."

The view of Knox, C.J., was expressly disapproved by a Privy Council in James v. Commonwealth of Australia (3) involving, as it did, a conception of inter-State trade, commerce and intercourse commencing at whatever stage in the State of origin, and continuing until the moment in the other State when the operation of inter-State trade could be said to end, the freedom attaching to every stop in the transaction from beginning to end. It was said that such a view would lead to an immunity from law of a whole body of acts or dealings by the mere fact "that they are parts of an inter-State transaction." The concept of trade and commerce was thus limited to that movement to which crosses a State barrier.

As regards "intercourse" also, the earlier meaning was wide. The question was whether such ,,intercourse" must be "commercial". It was held in earlier cases that this conferred a personal right on an Australian and "independent of any commercial attributes he may possess, to pass over the

(1) (1877) 3 Ex. D FOR. (2) [1900] A.C. 588 592.
(3) [1936] A.C 578.

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Continent irrespective of any State border as a reason in itself for interference" (per Isaacs, J., in R. v. Smithers Ex Parte Benson (1). This view was affirmed in Duncan v. State of Queensland (2) and also in McArthur's case (3). Later, it was held that the concept of "'trade, commerce and intercourse " meant what was held to be included in the concept of "commerce" as understood in the United States: (per Dixon, J., in the Bank case) (4). With the exact meaning of the word, we are not presently concerned.

We shall next see how the doctrine of the freedom of trade, commerce and intercourse was applied in practice. In this connection, three cases filed by one James to question the marketing legislation of the States and the Commonwealth did much to settle some of the controversies. The two cases decided by the Privy Council before our draft Constitution

were due to his efforts. His first case did not reach the Privy Council, and is reported in James v. South Australia (5), but it was approved by the Privy Council in James v. Cowan (6). These cases may be noticed briefly.

In James v. South Australia (5), State legislation creating a Dried Fruits Board and empowering it to five maximum prices (s. 19) and to determine where and in what quantities dried fruits should be marketed (s. 20), and to acquire on behalf of the Minister dried fruits from dealers (s. 28), was challenged under s. 92. Section 28 was expressly made subject to s. 92. Section 20 was declared invalid by the High Court of Australia, but ss. 28 and 29 were hold to be valid.

In James v. Cowan(6), the question was the compulsory acquisition of dried fruits in South Australia by the Minister of Agriculture through a Board, after

(1) (1912) 16 C. L. R. 99.
(2) (1916) 22 C. L. R. 556 573.
(3) (1925) 28 C.L.R. 530.
(4) (1948) 76 C.L. R. 1, 380, 381.
(5) (1927) 40 C.L.R. 1.(6) [1932] A.C. 542.

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determination by the Board in its absolute discretion what quantities should be marketed locally and fixing quotas for the other States. The question was whether this affected freedom of commerce among the States. The Privy Council emphatically answered that it did. But it made remarks which showed that if the primary object of the legislation was not directed to trade or commerce but such matters as defence., famine, disease and the like., the incidental effect on the trade and commerce was immaterial. The action of the Minister was declared ultra vires, and James was held entitled to succeed in his claim for damages.

The legislation by the State having been declared invalid, the Commonwealth made the Dried Fruits Act (1928-35). Under that law, no person could send dried fruit from one State to another unless he exported his quota outside Australia. This was challenged by James. When the case reached the Privy Council, three points were Considered by the Privy Council and decided. The first was that. 92 bound also the Commonwealth, the second was that it created a ban against prohibitions or burdens at the frontier, and lastly, that it protected commerce in motion and passing the frontiers of the States. A large number of cases were noticed in which it was decided that trade and commerce was validly burdened in the exercise of power to make laws without impairing movement of trade at the borders. These laws dealt with various subjects like monopolies, price fixation, health regulations, licensing systems, entry of goods or persons and transport.

The last group consisted of cases in which restrictions applying to motor vehicles as integers of trade and commerce or their owners were considered. Willard v. Raw-ion (1) was concerned

(1) (1933) 48 C.L.R. 31 S.

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with a law which required registration of all motor vehicles on payment of a fee. The King v. Vizzard (1) was concerned with the licensing of motor vehicles acting as common carriers. O' Gilpin's case (2) was concerned with owners of vehicles carrying their own goods, and Bessell v. Dayman (3) was concerned with law affecting inter. State journeys. These laws were declared valid by the High Court, and special leave to appeal having been refused, it was understood that the Privy Council had approved them. In all

these cases, the decisions were by majority, but Dixon and Starke, JJ. dissented. In James v. Commonwealth of Australia (4) the Privy Council selected The King v. Vizzard as the best example. In that case, the question was whether the State Transport (Co-ordination) Act, 1931 (N.S.W.) contravened s. 92. Under that Act, no public motor vehicle could operate in the State unless the motor vehicle was licensed. Licensing was by a Board which had complete discretion, and a fee had to be paid. The lorry of the appellant in that case plying between Melbourne and Now South Wales was unlicensed, and the driver was convicted for breach of the Act. The Australian High Court held by majority that the Act did not contravene s. 62. The Privy Council described the judgment of Evatt, J., as of great importance and quoted the following passage from it:

"Section 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co operating in the delivery and marketing of the commodities, and each of his servants and

(1) (1933) 50 C L. R. 30.
(2) (1935) 52 C.L.R. 189.
(3) (1935) 52C.L.R.215.
(4) [1936] A.C. 5 78.

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agents, possesses, until delivery and market-ing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities."

This was before the decision of Riverina Transport Pty. Ltd v. Victoria (1), which was decided on the basis of Rex. v. Vizzard (2) though not without some doubts.

In 1945, the Australian High Court decided Australian National Airways Pty. Ltd. v. The Commonwealth (3). Under the Airlines Act, 1945, authority was given to establish State-managed services to the exclusion of existing commercial lines whose business was to terminate, whenever a line, was effectively started by the Government Airlines Commission. The validity of the entire Act was challenged by private operators who stood excluded from field, on the ground of an infringement of s. 92 of the Commonwealth of Australia Act. The establishment of the Airlines Commission was upheld, but the creation of monopoly was held to be invalid. Latham, C.J observed:

"I venture to repeat what I said in the former case (Milk Board case) (4): 'One proposition which I regard as established is hat simple legislative prohibition (Federal or State), as distinct from regulation, of inter State trade and commerce is invalid. Further a law which is directed against' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules &is to

(1) (1937) 57 C. L. R. 327.
(2) (1933) 50 C. L. R. 30.
(3) (1945) 71 C. L. R. 29.

(4) (1939) 62 C. L. R. 116, 127.

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the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State, notwithstanding s. 92."

One other important case was decided by the High Court of Australia before our draft Constitution was prepared, and to that we next turn. That case is Bank of New South Wales v. The Commonwealth (1). The question was about the constitutionality of the Banking Act, 1947, and alternatively of some of its sections. The Act provided for the acquisition of shares in certain private banks by the Commonwealth Bank by agreement or compulsion and generally for their closure and management by the Commonwealth Bank. Five grounds were taken in attacking the Act. One such ground was that the acquisition provisions, the management provisions and the prohibition provisions were contrary to s. 92 of the Australian Constitution. Latham, C. J., after holding that banking was not trade or commerce, held that banking was an instrument which was used in inter-State trade and commerce. He held, therefore that since the overthrow of McArthur's case (2) by the Privy Council, the legislative control by the Act did not offend s. 92, because it was a general control and not a control of any inter-State element. McTiernan, J., agreed in this conclusion. The majority, however held otherwise. Rich and Williams, JJ., in their judgement laid down that the freedom in s.92 was a personal right attaching to the individual, that a banker who carried on business in more than one State was engaged in trade, commerce and intercourse among the States, that James v. Commonwealth (3) could not be understood to have laid down that s. 92 protected only the actual passage of goods or persons from one State to another and the Act prohibiting such trade, commerce or inter-

(1) (1948) 76 C. L. R. 1, 180, 38
(2) (1920) 28 C. L. R. 530.
(3) (1936) A. C. 578.

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course offended s. 92. Starke, J., began his judgment on this part by saying Is. 92 of the Constitution prescribes but judicial decisions have much weakened" the freedom of trade, commerce and intercourse. He then summarised the position as at that date as follows:

(1) The prohibition of a. 92 was addressed to the States as well as to Commonwealth Parliament.

(2) The freedom was from both legislative and executive control.

(3) The freedom was available to the individual as also to trade and commerce viewed as a whole.

(4) The individuals were to conduct their commercial dealings independently of State boundaries.

(5) The freedom was assured not only to tangibles but also to intangibles, and the words of the section by means of internal carriage or ocean navigation" in s. 92 could not be hold to mean only tangibles. Starke, J., himself said that these words "'trade, commerce and intercourse" were wide enough to include intangibles and took the aid of some American decisions which had held that insurance was within the Commerce power.

(6) Though the freedom was at the frontiers of the States but any restraint put upon trade, commerce and intercourse even before some tangible property leaves the State of origin was also contemplated.
(7) Dixon, J's dictum in O' Gilpin's case(1) where he observed "It is not, therefore every regulation of commerce or of movement
(1) (1935) 52 C. L. R. 189.
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that involves a restriction or burden constituting an impairment of freedom. Traffic regulations affecting the lighting and speed of vehicles, tolls for the use of a bridge, prohibition of fraudulent descriptions upon s goods, and provisions for the safe carriage of dangerous things, supply examples of regulatory provisions not strictly restrictions within s. 92.

According to State, J., all Transport cases precept Willard v. Rawson (1) were wrongly decided. Willard v. Rawson (2), according to the learned judge was a pure case of traffic regulation, but in a other cases the burdens imposed directly and immediately upon the transport and movement of passengers and goods whether engaged in domestic inter-State or other trade or commerce, were wrong held to be merely regulatory of the freedom had not its restriction.

Dixon, J., in dealing with the words "trade, commerce and intercourse" stated that the compensations expression was evidently used to "include I forms and variety of inter-State transactions whether byway of commercial dealing or all personal converse or passage". He also held that intangibles like insurance, banking, etc. were included that concept, and agreed with the view that though regulation of trade, commerce and interCoarse was compatible with freedom of inter-State passage or converse, anything which restricted the freedom of such an intercourse was excluded by 1992. The analysis of the Banks' case(1) in the High Court in the judgment of Starke, J., represents adequately the views entertained on the subject of freedom of trade, commerce and intercourse in action to s. 92 of the Commonwealth of Australia it before our Constitution was framed.

(1) (1933) 48 C.L.R. 316.
(2) (1948) 76 C.L.R. 1, 380, 381
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We shall now leave the Australian scene for the time being, but will revert to it to show how further difficulties arising in Australia from these settled views were solved, to begin with by the Privy Council and subsequently thereto, by the High Court of Australia, We shall also refer to the late cases that were decided in reference to s. 92 of the Australian Commonwealth Act, but which were not available to the Constituent Assembly in India when our Constitution was framed. We shall then be in a position to see how in Australia the difficulties were surmounted and how in India those difficulties were envisaged and tried to be met by proper legislative enactments:

Before we proceed to an examination of the provisions in the Indian Constitution and their evolution, we will refer to the provisions on the subject of freedom of trade and commerce in the Constitutions of Canada and the United States of America because they were also precedents which were available. In the British North America Act, 1867 s. 91(2) places "The Regulation of Trade and Commerce" in the

exclusive power of Parliament. Section 121 then provides:

> "All Article of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

Several important decisions were rendered by the Privy Council and to some of theme we find it necessary to refer. In Citizens Insurance Co. v. Parssons (1) and. again in Bank of Toronto v. Lamb(3) the Privy Council found it necessary to limit the general words of No. 2 of s. 91 'to afford scope for powers given exclusively to the Provincial Legislatures'. In City of Montreal v. Montreal Street Railway (3), the same was observed again. Lord

(1) (1881) 7 App. Cas. 96.
(2) (1887) 12 App. Cas. 575.
(3) (1912) A. C. 333, 344.

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Halsbury, L. C., in Attorney-General for Onterio v. Attorney General for the Dominion (1) said that the words must be given 'a statutory meaning'. There is, however no definite statement of the limits to be placed but generally the exercise of regulation of trade and commerce within the Provinces is upheld under No. 16 of s. 92, which gives the following power to the Provinces:

"Generally all matters of a merely local or private nature in the Province."

And this is even where some prohibitions and restrictions affect the importation, exportation, manufacture, keeping sale, purchase and use of commodities and must in some way interfere with business operations beyond the Province. In Bank of Toronto v. Lambe (2) at p. 586, the Privy Council said that if the general power of regulation given to Parliament could be said to prohibit provincial taxation on the persons or things regulated, it could only be by straining those general words to their widest extent. In the Liquor Prohibition Appeal 1895 (2), Lord Watson asked the question which we may well ask: "Do you regulate a man when you tax him?" and Lord Herschel said thereupon:

> "May it not be necessary to regard it from this point of view, to find what is within regulation of trade and commerce, what is the object and scope of the legislation.? Is it some public object which incidentally involves some fetter on trade or commerce or is it the dealing with trade and commerce for the purpose of regulating it ? May it not be that, in the former ease, it is not a regulation of trade and commerce, while in the latter it is, though in each case trade and commerce in a sense may be affected ?"
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> (1) [1896] A. C. 348 (2) (1817) 12 App. Cas. 575.
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>
> Lord Watson then said:
>
> "It would be difficult to imply from these words the regulation of trade and commerce' whilst the power of direct taxation is given the province the clauses must be reasonable read together it would be difficult to suppose that regulating commerce meant the passing of an Act by the Dominion legislator exempting banks from provincial taxation, for practically that is what the argument in that case" [Bank of Toronto v. Lambe (1)] had come to; that under the words regulating commerce

was implied a power of exempting a bank from provincial taxation, or the liability to by taxed by the provincial parliament." (Lefroy Canada's Federal System (1913) p. 391).

We do not consider it necessary to refer to more cases but would refer later to the words of Lord, Watson and Lord Herschell, which we have quote, here.

The law in United States of America need not detain us long. Article 1. s. 8 gives the commerce power in the following terse words :

"The Congress shall have power..... T regulate Commerce with foreign Nations, an, among the several States, and with the India Tribes."

In 1824, in the well-known case of Gibbone Ogden (2), this clause was considered. Marshall, C.J gave the definition of commerce :

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. I describes the commercial intercourse between nations and parts of nations, in all it branches, and is regulated by prescribing rule for carrying on that intercourse."

(1) [1837] 12 App, Cas. 575.

(2) (1824) 9 Wheat 16 L. ed. 23.

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The principle of federation as understood in the United States is that sovereign States have surrendered a part of their power to the United states and barring what has been surrendered and what is prohibited by the constitution of the States, the residue belongs to the United States. This is brought, out in the Tenth Amendment:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Most of the cases in the American Reports are concerned with what rights belong to the States and how far the Congress can regulate commerce. That is not a subject with which we are concerned in the present enquiry.

We now come to the Indian scene. In M. P. V. Sundararamier & Co. v. The State of Andhra Pradesh Venkatarama Aiyar, J., rightly pointed out that

"Our Constitution was not written on a tabula rasa, that a Federal Constitution bad been established under the Government of India Act, 1935, and though that has under. gone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built, and that the provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act (1935)"

The history of India during the last hundred years was one of continual transition. From the fully centralised Government at the Centre and in the administrative units then called provinces to partial responsibility in the provinces called Dyarchy, from

(1) [1958] S. C. R. 1422, 1478.

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Dyarchy to provincial Autonomy in a federation of mere administrative units in which the Indian States were expected to join, and from thence to a Dominion under the Crown and lastly to a Republic of a Union of States are transitions within one's memory. Earlier still, there was the rule of East India Company under the Crown through the Secretary of State for India and the Governor-General.

The transition in India was thus in the converse order. Whereas several independent units joined together in Australia to form a federation to evolve a Central Government, in India the transition was from a highly centralised Government to a federation of States which were made autonomous units. The history of the last hundred years or more thus saw the emergence of self governing States with separate legislatures, executives and financial resources, albeit controlled by the Centre. The union of these States makes them members of a Sovereign Democratic Republic. We shall briefly notice the steps in this transformation. Our survey must begin somewhat earlier than the Government of India Act, 1935, but it need only embrace the degree of independence in the legislative and financial fields.

Under the East India Company, the notion of a Central Government did not emerge till the Charter of the Company was renewed in 1833, and the Governor-General and his Council in Bengal began to exercise control over the presidential of Madras and Bombay. There was thus a move towards a unitary form of government. In, view of the bitter lessons learnt in the days of Warren Hastings, the Governor-General was also authorised by the Charter Act of 1833 to overrule his Council, a power which he continued to exercise down to 1935. There was thus, in truth and reality, only one Government and the so-called Governments of

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the Presidencies and Provinces were agents of the Central Government. After 1858, the Government of the country was carried on in the name of the Queen through her Secretary of State for India. The general pattern was, however, the same, though as time passed, democratic institutions in Government slowly emerged.

When the Reforms came in 1919 and introduced a system of local governments, the process was not decentralisation but reconcentration, as is known in France. By stages, the Councils at the Centre and in the Provinces were greatly expanded, a large number of nominated members being added. When elections came, they included the representation of some special interests. Legislation was even then from the Centre in the shape of Regulations or under instructions from the Centre, unless it was of a wholly local character.

We shall. pass over the details of the preparatory periods. When Parliament began to modify all this, the aim was to give to the Provinces a separate existence, though under a strong Centre. When the Government of India Act, 1915 was amended, there was a definite break up of the legislative machinery into two. There emerged then the Legislative Assembly and local Legislatures. In the field of local Legislatures, the first experiments in Democracy were tried. To invest separate powers, there was a classification of subjects between the Centre and the Provinces, and the topics of legislation, taxation and administration were separated to distinguish the different spheres. Such provision was to be made under S. 45A and the rules that

were framed, go under the name of the Devolution Rules and its Schedules were the precursors of the Lists under the Government of India Act, 1935 and the present Constitution. The only difference was that there
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was no third List, which was hardly necessary, ax the residual power was in the Centre. The powers of the local Legislatures were, however, not unlimited. Apart from the limitations arising from the allotment of subjects under the Devolution Rules, there was a control of the Centre. Any Act passed by the local Legislature could be disallowed by the Governor-General or the Crown. In certain circumstances, it could be repealed by the Indian Legislature. Thus, though the seed of federation was sowed, there was no semblance of a federation.

We shall now analyse the financial arrangements, including taxation, during the period covered by us already. The finances of India during the early stages were also centralised. The Provinces were given what was considered to be their 'needs' and provincial taxation as well as Provincial expenditure were centrally controlled. The process of decentralisation in finance, however, may be said to have commenced earlier. The Act of 1858 by which the rule of the East India Company was terminated also vested the revenues of India in the Crown with the necessary control in the Secretary of State. Mr. Wilson, the founder of the 'Economist' and the first Member for Finance, advocated that the Provinces should not depend on ",grants" but should have independent resources. His suggestions bore fruit in Lord Mayo's regime, when in addition to fixed grants some sources of revenue were "provincialised". By 1882 there came to exist a bifurcation which was described in the phrase "divided heads of revenue"-a phrase used for years afterwards. The Montagu-Chelmsford Report was the next important landmark and led to proper provincial enfranchisement. The Report said:

> "The existing financial relations between the Central and Provincial Governments must
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> be changed if the popular principle in Govern-ment is to have fair play in the Provinces. Our first aim has therefore been to find some means of entirely separating the resources of the Central and Provincial Governments."
>
> Under the Government of India Act, the Devolution Rules (Rules 2 and 14) made the separation of the resources. From this, it is not to be gathered that the Provinces had a separate fisc. By R. 16, it was provided that all moneys were to be paid into an account in the custody of the Governor-General and he made rules with the sanction of the Secretary of State and issued orders, both general and special, for payments, withdrawals or disbursements from that account. By far the greater part of the Devolution Rules dealt with these matters and, in addition, there were congeries of rules and instructions.
>
> Taxation in the Provinces was under Entry 48 in Part II of the First Schedule of the Devolution Rules, which read:
>
> "48. Sources of Provincial Revenue not included under previous heads, whether-
>
> (a) taxes included in the Schedule to the Scheduled Tax Rules

or
(b) taxes, not included in those schedules, which are imposed by or under provincial legislation which has received the general previous sanction of the Governor-General"

The Scheduled Tax Rules made by the Governor-General in Council under s. 80A (3)(a) of the Government of India Act divided the heads of taxes into two parts. The first part dealt with taxes

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which the Legislative Councils could impose without the previous sanction of the Governor General for the purposes of Local Government. The second part dealt with taxes which the local Legislatures could impose or authorise the imposition of, without the previous sanction of the Governor-General for purposes of local authority. The first contained eight heads: six taxes, one registration fee and one stamp duty. The six taxes were (a) tax on land put to non-agricultural uses, (b) tax on succession, (c) tax on betting and gambling, (d) tax on advertisements, (e) tax on amusements and (f) tax on specified luxuries. In the second part were (a) tolls, (b) taxes on vehicles or boats, (c) octroi, (d) terminal taxes if octroi was not levied in that area before a particular date, (e) taxes on trades, professions or callings, and (f) tax on private markets. There were also taxes and fees on certain services which the local authorities render. The six taxes in the second part were taxes on trade and commerce in motion. They were of course taxes for local authorities, but the Indian Legislature, the Governor-General and finally the Crown could annul any law if not acceptable to them. We shall pass over the Report of the Committee of Inquiry presided over by Lord Mestan, which recommended the amounts payable to Local Governments from income-tax etc. We shall also pass over the Reforms Inquiry Committee presided over by Sir Alexander Muddiman and that presided over by Lord Incheape. Under the recommendations of the first and as a result of the retrenchment made by the second, in 1927-28 the contributions by the Provinces ceased. Thus, just before the establishment of the Indian Statutory Commission in 1927 there was not only Dyarchy working but the sources of revenue were divided between the Centre and the Provinces.

It was at this stage that the Indian Statutory

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Commission (popularly known as the Simon Commission) was appointed. The Commission recommended that the Organic Instrument to be framed should have provisions for its own development; in other words, that India should have act flexible and not a rigid Constitution, and that any development should have regard to India as a whole and not merely British India. In this, there was the echo of what the Montagu-Chelmsford Report said:

"Our conception of the eventual future of India is a sisterhood of States, self-governing in all matters of purely local or provincial interest In this picture there is a place for the Native States."

The Commission emphasised one fact more than any other. They observed:

"Economic forces are such that the States and British India must stand or fall together. The increasing importance of industry brings problems that must be faced by both together The States themselves have their own tariff policies, and there is a serious possibility

that, unless provision can be made for the reconciliation of divergent interests, numbers of tariff walls will be perpetuated in an area where fiscal unity is most desirable."

The Commission also suggested that-

"the now Constitution should provide an open door whereby, when it seems good to them, the Ruling Princes may enter on just and reasonable terms."

The Commission, therefore, recommended a federal Constitution composed of British India and the Indian States. They said:

"We are inclined ourselves to think that the easier and more speedy approach to the

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desired end can be obtained by reorganising the Constitution of India on a federal basis in such a way that individual States or groups of States may have the opportunity of entering as soon as they wish to do so. "

When the Government of India Act, 1935, was being fashioned, the Committee was assisted by a Financial Adviser in Mr. (later, Sir) Walter Leyton, whose task was to evolve some scheme under which the Provinces could get adequate revenues. The Indian States, if they were to join in the Federation, also insisted that their position be safeguarded. Mr. Leyton then pointed out that before the Indian States Committee, 1928-29 (commonly known as the Butler Committee) the Indian States had urged that they must receive a share of the customs which bad by then risen to as much as Rs. 50 crores, and the Butler Committee had also suggested that this claim should be examined by a panel of experts. When the Round Table Conference met, the question of the shares of the Indian States in the customs and excise revenues was again raised. The Federal Structure Committee was commissioned among other matters, to report on the powers of Federal Legislature and the Provincial Constitution Committee, to report in the same way on the powers of the Provincial Legislatures. In the report of the Federal Structure Committee, the subject of trade and taxes on it was dealt with only from the angle of discrimination, but emphasis appears to have been placed only on British trade and the fiscal conventions. Thus, the discussions before the Conference also centered round two questions: (a) the protection of British interests and (b) no commercial discrimination on the ground of race etc.

When the Joint Parliamentary Committee on the Indian Constitutional Reforms went into these questions, and recommended the abolition of

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Dyarchy in the federating units and the establishment of Provincial Autonomy, the Committee sensed the dangers of breaking up the unity of India and said:

"...in transferring so many of the powers of Government to the Provinces, and in encouraging them to develop a vigorous and independent political life of their own, we have been running the inevitable risk of weakening or even destroying that unity. Provincial Autonomy is, in fact, an inconceivable policy unless it is accompanied by such an adaptation of the structure of the Central Legislature as will bind these autonomous units together".

They also pointed out that the unity of India on which they had laid so much emphasis was

dangerously imperfect so long as the Indian States had no constitutional relationship with British India. The Committee recognised the difficulties of economic ties between the Provinces inter se and also British India as a whole on the one hand, and the Indian States on the other, and observed :

"On the one band, with certain exceptions, the States are free themselves to impose internal customs policies, which Cannot but obstruct the flow of trade. Even at the maritime ports situated in the States, the administration of the tariffs is imperfectly coordinated with that of the British Indian ports, while the separate rights of the States in these respects are safeguarded by long standing treaties or usage acknowledged by the Crown. On the other hand, tariff policies, in which every part of India is interested, are laid down by a Government of India and British India Legislature in which no Indian State has a voice, though the States constitute

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only slightly less than half the area, and one-fourth of the population of India. Even where the Government of India has adequate powers to impose internal indirect taxation or to control economic development, as in the case of salt and opium, the use of these powers has caused much friction and has often left behind it, in the States, a sense of in-justice. "

They suggested the means by which internal trade and commerce could be secured some measure of freedom and their recommendations must be quoted in extenso. In para 264 of the Report, they observed :

"It is greatly to be desired that States adhering to the Federation should, like the Provinces, accept the principle of internal freedom for trade in India and that the Federal Government alone should have the power to impose tariffs and other restrictions on trade. Many States, however, derive substantial revenues from customs duties levied at the frontiers on goods entering the State from other parts of India. These duties are usually referred to as internal customs duties, but in many of the smaller States are often more akin to octroi and terminal taxes than to customs. In some of the larger States the right to impose them is specifically limited by treaty. We recognise that it is impossible to deprive States of revenue Upon which they depend for balancing their budgets and that they must be free to alter existing rates of duty to suit varying conditions. But internal customs barriers are in principle inconsistent with the freedom of interchange of a fully developed Federation, and we are strongly of the opinion that every effort should be made to substitute other forms of taxation for these internal-

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customs the accession of a State to the Fede-

ration should imply its acceptance of the principle that it will not set up a barrier to free interchange so formidable as to constitute a threat to the future of Federation..."

However, in dealing with commercial discrimination, the Joint Parliamentary Committee was more concerned with British Imports and the Fiscal Convention which it was anticipated, would lapse on the new Constitution coming into force. The Committee, therefore, suggested that the Governor-General and the Governors should be empowered to withhold their assent to Bills which were discriminatory in fact or bad that tendency. They also recommended statutory prohibition against certain specified kinds of discrimination, and added :

"We need hardly add that the effect of our recommendation for the statutory prohibition of certain specified forms of discrimination would lay open to challenge in the Courts as being ultra vires any legislative enactment which is inconsistent with these prohibitions, even if the Governor-General or Governor has assented to it."

With these suggestions in respect of the freedom of Grade and commerce, a Federal Constitution was recommended. It was also recognised that it would be the Provinces which would carry on the ,national building activities' and the need for more finances 'or the Provinces was acutely recognised. The establishment of self-governing units and self-governing constitutions, the creation of deficit Provinces, the corporation of Burma and the cost of establishment of a Federation, were matters which were gone into by the Federal Finance Committee. The Federal Structure Committee, Sir Walter Leyton, the Davidson Committee and experts like Sir Malcolm Hailey and Sir Otto Niemeyer. The Report

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of the First Taxation Inquiry Committee (1926) was also available from which guidance was taken, and just as the topics of legislation were demarcated between the Centre and the Provinces, so also the sources of revenue were allocated between the Centre and the Provinces. The intention was to create financially stable governments with well defined powers of taxation. This was, of course, absolutely necessary if the autonomous Provinces were to exist without subventions, which were necessary to support the deficit Provinces. The legislative heads were, therefore, completely divided between the Centre and the Provinces one List being exclusive to each and a third List was added by which certain subjects were to be within their concurrent jurisdiction. The intention was to avoid the assignment of residual powers to a minimum, and as observed by Gwyer, C. J., in In re The Central Provinces and Berar Act No. XIV of 1938 (1), this ",made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists." The Government of India Act, 1935, provided by s. 5 that His Majesty was to declare by proclamation that as from a date to be appointed "there shall be united in a Federation under the Crown, by name of the Federation of India,-

(a) Provinces.....

(b) The Indian States which have or may thereafter accede

to the Federation.....
The proclamation never issued.
The freedom of trade and commerce which was the subject of such anxious thought received short treatment in the Government of India Act, 1935. Chapter III in Part V (Legislative Powers)
(1) [1939] F.C.R. 18, 38.
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dealt with discrimination in a series of sections which Dr. Keith described as "liable to be regarded as oppressive and unfair." Though lip service was paid to caste, creed, colour etc. the provisions were really designed to protect British interests. The freedom of internal trade simpliciter was dealt with in Part XII (Miscellaneous and General), and s. 297 provided :

> "297 (1). No Provincial Legislature or Government shall-
> (a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities have power to pass any law or take any executive action prohibiting or restricting the entry into or export from, the Province of goods of any class or description :
> (b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Provinces and similar goods not so manufactured or produced, discriminates in favour of the former, or, which, in the case of goods manufactured or produced outside the Provinces, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.
> (2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid"
> By this section, power was denied to the Provincial Legislatures under two Entries in the

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Provincial List to impair free entry and export of goods in the Provinces. The two Entries were referred to separately and expressly by their content and were
"27. Trade and Commerce within the Province" and
29. Production, supply and distribution of goods."
The word ,'commodities" was used instead of "goods" in the White Paper, and the change to "goods" appears to have been lost sight of in s. 297(1). However, the definition of "goods" took in commodities, and the words "goods of any class or description" were wide enough to show what was meant. The subject of taxation was not dealt with in cl. (a) but cl. (b), and that provided that taxation in the Provinces was not to have a differential basis. In this connection, reference may also be made to Entries 19, 20, 21, 22, 23, 24 and 26 of List I and Entries 20 and 32 in List III, which 'in some measure) involve regulation of trade, commerce and intercourse.
The detailed examination of the history lying at the back of the Government of India Act, 1935, lays bare some fundamental facts and premises. It shows that the process through a whole century was the breakup of a highly

centralised Government and the creation of autonomous Provinces with distinct and separate political existence, to be combined inter se and with the Indian States, at a later period, in a federation. To achieve this, not only was there a division of the heads of legislation but the financial resources were also divided and separate fiscs for the federation and the Provinces were established. The fields of taxation were demarcated, and those for the Provinces were chosen with special care to make these units self supporting as far as possible with enough to spare

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for "nation-building activities." In this arrangement, the door was open for the Indian States to join on the same basis and on terms of equality. The most important fact was that unlike the American and the Canadian Constitutions the commerce power was divided between the Centre and the Provinces as the Entries quoted by us clearly show. The commerce power of the Provinces was exercisable within the Provinces. The fetter on the commercial power of the Provinces was Placed by s. 297. This was in two directions. Clause (a) of sub-s. (1) banned restrictions at the barriers of the Provinces on the entry and export of goods, and cl. (b) prohibited discrimination in taxing goods between goods manufactured and produced in the Province as against goods not so manufactured or produced and local discriminations.

When drafting the Constitution of India, the Constituent Assembly being aware of the problems in various countries where freedom of trade, commerce and intercourse has been provided differently and also the way the Courts of those countries have viewed the relative provisions, must have attempted to evolve a pattern of such freedom suitable to Indian conditions. The Constituent Assembly realised that the provisions of s. 297 and the Chapter on Discriminations in the Government of India Act, 1935, hardly met the case, and were inadequate. They had to decide the following questions : (a) whether to give the commerce power only Parliament or to divide it between Parliament and the State Legislatures ; (b) whether to ensure freedom of trade, commerce and intercourse interState, that is to say, at the borders of the States or to ensure it even intra-States ; (c) whether to make the prohibition against restrictions absolute or qualified, and if so, in what manner ; (d) if qualified by whom was the restriction to be imposed and to

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what extent; (e) whether the freedom should be to the individual or also to trade and commerce as a whole ; (f) what to do with the existing laws in British India and more so, in the acceding Indian States ; (g) whether any special provisions were needed for emergencies; (h) what should be the special provisions to enable the States to levy taxes on sale of goods, which taxes were to be the main source of income for the States according to the experts. All-these matters have, in fact, been covered in Part XIII, and the pitfalls which were disclosed in the Law Reports of the Countries which had accepted freedom of trade and commerce have been attempted to be avoided by choosing language appropriate for the purpose. In addition to this, the broad pattern of the political set-up, namely, a federation of autonomous States was not lost sight of. These autonomous conditions had strengthened during the operation of the 1935 Constitution and led to what Prof. Coupland described as "Provincial patriotism", for which the reason, according to the learned Professor was :

> "In the course of the last few years the sense of Provincial patriotism has been,

strengthened by the advent of a full Provincial self-government. The peoples took a now pride in Governments that were now in a sense theirs." (The Constitutional problem in India, part III. p. 40)

With this historical background of our country and the historical setting in which other Federations have dealt with the problems of trade and commerce, we now proceed to examine the Constitution to discover the meaning of the various Articles in Part XIII. We begin by reading Part XIII here indicating in each Article the changes made and the relevant dates on which they were made

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"Part XIII

Trade, Commerce and Intercourse within the Territory of India.

301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

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.

303. (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, of authorising the making of, any discrimination of it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

(In its application to the State of Jammu and Kashmir, in cl. (1) of art. 303, the words "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule" shall be omitted).

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304. Notwithstanding anything in Art. 301, or Art. 303, the Legislature of a State may by law-

(a) impose on goods imported from other States (or the Union territories) any tax to which similar goods manufactured or produced in that State are subject, so, however as not to discriminate between goods so imported and good so manufactured or produced, and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest ;

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Ins. by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.)

305. Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far an the President may by order otherwise direct, and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to any such matter as is referred to in sub-clause

(ii) of clause (6) of article 19.
(This Article was substituted for original Article which was as follows:
Nothing in Articles. 301 and 303 shall affect the provisions of any existing law ex-
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cept in so far as the President may by order otherwise provide.')
306. Deleted.
(The original Article before its deletion read :
'Notwithstanding anything in the foregoing provisions of this Part or in any other provisions of this Constitution, any State specified in Part B of the First Schedule which before the commencement of this Constitution was levying any tax or duty on the import of goods into the State from other States or on the export of goods from the State to other States may, if an agreement in that behalf has been entered into between the Government of India and the Government of that State, continue to levy and collect such tax or duty subject to the terms of such agreement and for such period not exceeding ten years as may be specified in the agreement :
Provided that the President may at any time after the expiration of five year,% from such commencement terminate or modify any such agreement if, after consideration of them report of the Finance Commission constituted under Article 280, he thinks it necessary to do so').
307. Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of Articles 301, '302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.
Part XIIL unlike some of the Constitutions which we have considered, contains within itself
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and in one place the provisions regarding the freedom of trade, commerce and intercourse. The commerce power as a head of legislation is divided in the Constitution, and figures in all the three Lists. Apart from other Entries under which trade and commerce can be affected and which are to be found in all the three Lists, there are two Entries in the Union List, two in the State List and one in the Concurrent List, which bear directly upon trade and commerce.
Union List
41. Trade and commerce with foreign, countries, import and export across custom
s
frontiers;
42. Inter-State trade and commerce.
State List :
26. Trade and Commerce within the State subject to the provisions of entry 33 of List III.
27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.
Concurrenl List

33. (Trade and Commerce in, and the production, supply and distribution of : (a) the products of any industry where the control of such industry by the Union is declared by Parliamentary law to be expedient in the public interest) and imported goods of the same kind as such products ;
(b) food-stuffs, including edible oilseeds and oils;
(c) cattle fodder, including oilcakes and other concentrates;
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(d) raw cotton, whether ginned or unpinned and cotton seed or
(e) raw jute.
The words in brackets show the entry as it was prior to its amendment by the Constitution (Third Amendment) Act, 1954. The word industries' occurred in place of the word industry' there.

By dividing the commerce power and by enacting the provisions of Part XIII, the problems which arose in the United States of America and Canada have been avoided. In Canada, as we have shown already, the question was whether in passing a law the Provinces were encroaching upon the commerce power of the Dominion given by No. 2 of s. 91 and conversely, whether- the regulation of trade by the Dominion meant an encroachment of the powers of the Provinces. In our Constitution, questions of conflict under two rival Lists may arise, but on the plane of exercise of commerce power, such questions can hardly arise. In the United States, the controversy is between the powers of the Congress and the powers of the States. American and Canadian precedents were thus avoided by dividing the commerce power.

The constitution deliberately chose the Australian pattern in Art. 301, but made certain other provisions, and this was done to avoid the controversy as it had raged in Australia. Article 301 states in general words (like s. 92 of the Australian Constitution) that trade, commerce and inter-course shall' be free. But the opening words "Subject to the other provisions of this Part" serve to direct attention to the provisions next following. These words achieve two purposes. They indicate

(a) freedom is not absolute but subject to what is next provided ; and
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(b) that the curbs on freedom of trade and commerce are primarily to be found in Part XIII.

Next, the words "throughout the territory of India" avoid disputes which took place in Australia till the Banks case (1) was decided by the Privy Council namely whether, freedom is secured only at the frontiers of the States or also within the States. The form of words adopted by our Consti-tution (,"throughout the territory ") was suggested Australia as an amendment but was not accepted, and the Privy Council in James v. Commonwealth (2) was understood to have endorsed the view that freedom only at the barriers of the States was meant. Our Constitution chose the form which was rejected do Australia thereby anticipating the decision of the Privy Council in the Banks's case. It must be remembered that the Banks' case was not decided by the Privy Cousteau when our Constitution was drafted. The freedom in India is inter-State as well as intrastate. This

freedom is addressed to Parliament as well as to the State Legislatures, as the next Article clearly show.
Article 302 then makes the first exception to the freedom. That, Article gives power to Parliament to put restrictions on this freedom. This shows clearly that Parliament is bound by Art. 301. Disputes similar to those which took place in Australia in which it was hotly debated whether the Commonwealth was bound or not have thus been avoided. By providing separate releases from Art. 301 for Parliament and the State Legislatures, that controversy can never arise. Parliament which is authorised by Art. 302 can impose restrictions on trade, commerce and intercourse in two aspects. They are :

(a) between one State and another; or
(1) [1948] 76 C. L. R. I. 38, 381.
(2) (1936) A. C. 578.
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(b) within any part of the territory of India.

By the first is meant trade and commerce in motion across the frontiers of States. It means the inter-State character of trade, commerce and intercourse. By the second, the power is made more general. Parliament may put restriction in " any part' of the territory of India. The territory of India is defined by Art. 1(3), which says :

"(3) The territory of India shall comprise-
(a) the territories of States;
(b) the Union territories specified in the First Schedule ;
(Before the Constitution (Seventh Amendment) Act, 1956 the clause read the territories specified in Part D of the First Schedule')
and (c) such other territories as may be acquired."

The words ",within any part of the territory of India" give power to Parliament to legislate for 'any part' not only generally but also locally. This power is subject to two restrictions. The first is that this must be done by law', which means that without a valid law the power cannot be exercised. The second is that the law must be in the 'public interest.' Since law is made the prerequisite of action, mere executive action is out of the question. This obviates the argument emphatically rejected by the Privy Council in James v. Cowan (1) that the executive was not under the fetter of a. 92 of the Australian Commonwealth Act. The word 'required' limits the restrictions to the necessities of the situation so that the Article may not be liberally construed as a free charter. The word
(1) (1932) A. C. 542.
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"reasonable' is not included as qualifying restrictions' as it does in Art. 304 ; but it is impossible that the freedom granted in Art. 301 was to be ,mocked at' by making "unreasonable' restrictions permissible at the hands of Parliament. Normally Parliament is the best judge of public interests, and a question of policy can hardly arise before the Courts. But if a question arises whether Parliament has under color of Art. 302 encroached upon Art. 301, the matter may in exceptionable circumstances be justifiable. It will be useless in this connection to invoke the voice of Parliament.
Next comes Art. 303. It begins with the nonobstructive clause "Dotwithetanding anything in Article 302." The effect of these words is to take away the power granted to Parliament to fetter freedom in this preceding Article in

the circumstances stated in this Article. This nonobstructive Clause has been criticised as not being wholly related to what follows. We do not agree. The answer to the objection will appear from what we say next. The Article says that neither (a) Parliament nor (b) Legislature of a State shall have power (i) to make any law giving or (ii) to make a law authorising the giving of-

(A) any preference to one State over an; other

(B) any discrimination between one State and another,

by virtue of any Entry relating to trade and commerce in any of the Lists in the Seventh Schedule. The main idea underlying this Article is to ban preference and discrimination between one State and another in matters of trade, commerce and intercourse. This principle of uniformity is is high that by the non-obstante clause the powers of Parliament under Art. 302 are completely nullified and along with the powers of Parliament, all

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derivative powers of the State Legislatures where Parliament declares by law that a restriction is in the public interest and the State Legislature (legislates under the shelter of such a declaration, are also nullified, see Entry 33(a). Entry 35 of the Concurrent List or Entry 57 of List If read with Entry 35 of List 111, to confine the citation to Entries, with which we are primarily concerned here. In the Seventh Schedule to the Constitution in addition to Entries 41 and 42 (List 1), 26 and 27 (List II) and 33 (List III) there are many other Entries regulating special trades. In some of them, the formula by law made by Parliament' is again repeated out of abundant caution. By the words of Art. 303 'by virtue of any entry relating to trade and commerce' is meant not the five Entries last named by us but others also, e.g., Entry 8 of List II, Entries 29, 30, 81 of List 1 Entry 29, 15 of List III (to mention only a few from each List), Thus is achieved one purpose which is paramount viz., that the exercise of the commerce power, however derived, is not to be exercised to create preferences and discrimination between one State and other whether the action proceeds from Parliament or a State Legislature or both acting in union. No question of the content of the power or its source can arise in this context, because the prohibition is absolute., The article makes a great advance upon a. 297 of the Government of India Act, 1935. In the section, the inhibition was only againstt I Provincial Legislature or Government. Here the inhibitions embraces not only these but is also against Parliament and the Central executive. The executive limb bag been made powerless, because the source of restrictions must be law,' and if a law cannot be made, executive action per se would be ineffective without more. Future, S. 297 was concerned only with goods and their taxation differentially. The Article takes in its stride not only the passage of goods or their taxation but all

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other matters inherent in free trade, commerce and intercourse. The Article has its echo in a. 99 of the Australian Constitution, which reads;

"99. Commonwealth not to give preference. The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof."

It is to be read with s. 102, under which Parliament can forbid preferences by State. Article 303, however, goes much further. It emasculates the total legislative power in

the country from achieving a single preference or discrimination in trade, commerce and intercourse by a united or concerted action by Parliament and State Legislature thus insuring equality to all peoples of India from whatever part they may be drawn and wherever they may be living.

There is, however, one exception to it, and that it is contained in cl. (2). Preference or discrimination may be made in one instance by Parliament by law. The ambit of that exception plainly appears from the words of cl. (2), which are explicit in themselves. Let us quote them again :

> "Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India."

The question of famine is primarily in mind. and secondarily the readjustment or even distribution of goods due to some economic imbalance. Clause (2) is self-explanatory, and questions such as fixing

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of quotas of dried fruits or their even distribution in home and outside markets which agitated the Australians can hardly &rise, and similar questions can adequately be dealt with by Parliament under this power.

Next comes Art. 304. It beings with the non-obstante clause "Notwithstanding anything in article 301 or article 303." It is contended that one can understand the mention of Art. 301 but not of Art. 303, and the Article is thus said to be inaccurately drafted. We have already shown why in Art. 303 the State Legislatures found a mention, and unless Art. 303 was also put aside in Art. 304, there would arise a question of balancing it against Art. 304. To avoid this, both Arts. 301 and 303 have been excluded from consideration.

Article 304 is divided into two parts. It enables the Legislatures of States to pass laws which affect trade, commerce and intercourse. Clause (a) of the Article enables taxation of good from other States pari passu taxation of similar goods in the State but so as not to discriminate between them. The ban of Art. 301 is lifted but uniformity is imposed. Compared with s. 297(1)(b) the Article is narrower in its enabling portion and shorter in it reaches. Section 297 inhibited 'tax, cess, tolls or due' taking in its reach all kinds of imposts on movement, but the Article gives per. mission to impose only taxes on goods on nondifferentiation basis between State and State, saying nothing about other imposts. Further, unlike the ,section, local areas are Dot mentioned in the Article treating the purely intera-State matters on a different footing. Trade, commerce and intercourse generally are next enabled by cl. (b) to be restricted. They can be restricted on two places- the first in their inter-State aspect denoted by the words "with..... that State" and second, in their intera-State aspect denoted by the words ,within

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that State." Both these aspects are open to restrictions provided that the restrictions are "reasonable" and are "required in the public interest." The use of the word 'reasonable" brings in the justicability of the law. It is useless in this context to invoke the voice of the legisla- ture. The opinion of the legislature as expressed in the

law may of course raise a strong presumption, and create a heavy burden for one challenging the law, but the extent of the restriction and whether it is commensurate with the requirements of the public interest (though a matter for the legislature to decide in the first instance) may have to be decided ultimately by the Courts. Of course, laws can be made without affecting trade, commerce and intercourse directly without having to be considered by Courts or processed under the proviso. It is only a law which directly and immediately affects trade, commerce and intercourse which will need to be submitted to the President for his sanction, though the sanction of the President will not save it from being questioned. The Joint Committee on Indian Constitutional Reform in its Report (para 367) correctly pointed out:

> "We need hardly add that the effect of our recommendations for the statutory prohibition of certain specified forms of discrimination would lay open to challenge in the Courts as being ultra vires any legislative enactment which is inconsistent with these prohibitions, even if the Governor-General or the Governor has assented to it."

The same will operate even if the President gives his sanction.

Article 305 saved existing laws to start with, and at the time of the passing of the Constitution (Fourth Amendment) Act, 1955, room was made for the operation of laws by which a State or a corporation owned or controlled by the State carries

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on any trade, business, industry or service whether as a monopoly or otherwise. Article 305 does not apply to the statute here impugned as it was not an ‚existing law'.

Article 306 was a transitory provision which enabled certain Part B States to Continue levy of existing taxes or to restrict trade, commerce and intercourse for a period, notwithstanding the provisions of Part XIII. With that, we are not concerned after 1955 due to the repeal of that Article. Article 307 also is immaterial in this case. It provides for the appointment of an authority for carrying out the purposes of Arts. 301-304, and is a counterpart of s. 101 of the Australian Constitution. We shall now notice some cases which were decided by the High Court of Australia and the Privy Council, because it is these cases which have been cited to us in support by the rival parties. After the Constitution of India came into force on January 26 1950, came the decision of the Privy Council in Commonwealth of Australia v. Bank of New South Wales(1). In that case, the Privy Council departed from what had been understood to be some of its former opinions. While adhering to its view that the test was whether an impugned law not 'remotely or incidentally' but directly and immediately restricted the inter-State business of banking at the barriers of the States, the Privy Council observed that such phrases as "freedom at the frontier..... in respect of goods passing into or out of the State," and "freedom of what is the crucial point in inter-State trade, that is at the State harrier" which it had used in James v. The Commonwealth (2) were to be read secundum subjectam materiam, and in the context in which they occurred, and observed:

(1) (1950 A.C. 23S.
(2) (1936) A.C. 578.

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"They cannot be interpreted

as a decision either that it is only the passage of goods which is protected by s. 92 or that it is only at the frontier that the stipulated freedom may be impaired. It is not to be doubted that a restriction, applied not at the border but at a prior or subsequent stage of inter State trade, commerce or intercourse, may offend against s. 92. Nor, as their Lord ships hold, in accordance with the view long entertained in Australia, is it in respect of the passage of goods only that such trade commerce and intercourse is protected."

The Privy Council also corrected the view entertained in Australia that a full and unqualified approval was given to the opinion of Evatt,J., in The King v. Vizzard (1), by Lord Wright in Jaimes v. The commonwealth The Privy Council observed:

"But it does not appear to their Lord,ships that the whole of the learned Judge's reasoning received the considered approval of the Board."

The Privy Council next approved of the following passage from the Australian National Airways case (3) which has already been quoted by us:

"I venture to repeat what I said in the former case (the Milk case) (4): 'One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of interState trade and commerce is invalid. Further law which is "directed against" inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules at to the manner in which trade (including transport) is to be conducted is not a

(1) (1933) 50 C.T.R. 30.
(3) (1945) 71 C.L.R. 29.
(2) (1936) A, C. 578.
(4) (1939) 62. C.L.R. 116, 127.

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mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92'.",

observing:

"With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree."

The Privy Council also made it clear that in some cases "'regulation" may take the form of prohibition, thus endorsing the statement of Harrison Moore that the power of legislation, is not merely a power to regulate; it ranges from creation to destruction, it may establish as well as prohibit: The Commonwealth of Australia, 2nd Edn., p. 280.

The Advocates-General of Bombay and the Punjab and Mr. G. S. Pathak relied upon many decisions of the Australian High Court after the Banks' case. (1) Strictly speaking, these decisions could not have influenced the framing of our Constitution, because by the time they were rendered, our Constitution had already been framed. The Banks case, (1) having drawn the distinction between regulation and simple prohibition, the later Australian cases began to allow a

play for regulation of trade and commerce. There being no machinery for achieving restrictions, reasonable in them. selves, restrictions to be valid had to be within the limits of regulation. Indeed, this way of justifying legislation, otherwise restrictive, as regulatory was being adopted even before the Bank8' case., (1) and the Transport cases were all examples of justification of many laws as regulatory. In some Transport cases, taxes which burdened trade and commerce were justified as compensatory being, it was said, a recompense for the wear and tear of roads. We

(1) (1948) 76 C.L.R. 1, 380, 381.

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shall notice these cases briefly, since justification for the sections impugned here was attempted on the ground that the provisions were merely regulatory or compensatory. We shall examine these cases as representing two different phases:

In McCarter v. Brodie (1), which was a transport case, the High Court of Australia was invited to overrule the Transport cases and to declare that the minority judgments throughout had been right. The Chief Justice basing himself on the Banks' case (2) opined that the Privy Council had finally decided that laws directly operating upon persons engaging in inter-State trade and commerce were not infringements of a. 92 if they were what could fairly be described as regulation'. If, however, they were laws which directly dealt with the subject-matter of trade and commerce and exceeded regulation and passed into prohibition, they were invalid. The law was thus upheld, but Dixon and Fullagar, JJ., dissented.

Then came the decision of the Privy Council in Hughes and Vale Pty. Ltd. v. State of N. S.W.(3) By that decision, Rex v. Vizzard (4) and all Transport cases following that decision and the majority judgment in McCarter v. Brodie (1) were overruled and the opinions of Dixon and Fullagar, JJ., in the last mentioned case were upheld. The decision of the Privy Council in Hughes and Vale Pty. Ltd. v. State of N. S. W. (3) must be examined a little closely. All the earliest Transport cases were decided after the decision of the Privy Council in James v. Cowan(5) but before James v. The Commonwealth(6) was decided. The Riverina case (7) and the Austrailan National Airways case (8) preceded the Banks' ease (2) and McCarter v. Brodie (1) followed

(1) (1950) 80 C.L.R. 432.(2) (1948) 76 C.L.R. 1, 380, 38 1.

(3) (1955) A.C. 241.(4) (1933) 50 C.L.R. 30.

(5) (1932) A.C. 542.(6) (1936) A.C. 579.

(7) (1937) 57 C.L.R. 327.(8) (1945) 71 C.L.R. 29.

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it, and then came Hughes and Vale Pty. Ltd. v. State of N.S.W. (1) from which the appeal went to the Privy Council. Leave to appeal in McCarter v. Brodie (2) was refused.

Before we examine the decision of the Privy Council, lot us recall and re-state the main events in brief. In James v. South Australia (3), what was struck down by the High Court as. a contravention of s. 92 was the executive determination of where and in what quantities dried fruit were to be marketed. In James v. Cowan (4), the action of the Minister expropriating the surplus dried fruits was also held to be a contravention. In James v. The Commonwealth (5), it was held that s. 92 bound not only the States but also the Commonwealth. The last case was also generally understood as laying down that by "free" was meant freedom at the frontiers. An extract from the judgment of Evatt, J., in The King v. Vizzard (6) was quoted to ,show that freedom did

not attach itself to each and every part of transaction, and the other parts were not free from regulation or control. Then came the Bank's case, (7) which laid down that regulation of trade, commerce and intercourse among the States was not incompatible with their absolute freedom; and that there was a breach of s. 92 only when the legislature or the executive acted to restrict such trade, commerce or intercourse directly and immediately as distinct from creating some indirect or consequential impediment, which could only be regarded as remote. Thus, regulation was considered as the antithesis of ',simple prohibition'.

The Transport cases involved almost always:

(i) a licensing system of motor transport vehicles by a Board;

(1) (1955) A. C. 241.
(3) (1927) 40 C.L.R. 1.
(5) (1936) A. C. 578.
(2) [1950] 8 0C.L.R.432.
(4) (1932) A. C 542.
(6) (1933) 50 C.L.R. 30.
(7) (1948) 76 C. L.R. 1, 380, 381.

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(ii) a discretion to the Board to grant a licence or not;

(iii) a payment of a licence fee which had a maximum limit;

and

(iv) sometimes a mileage charge as in O' Gilpin's case (1).

How were these cases affected by the pronouncement of the Privy Council ? The earlier view that The King v. Vizzard (2) was approved by the Privy Council in James v. The Commonwealth (3) fell to the ground when the Privy Council in the Bank's case (4) abjured this. There was also the approval given to the Australian National Airways case (5), to which we have referred. The implications of this approval had also to be considered. These Questions arose before the High Court in McCarter v. Brodie (6). In that case, the Transport Regulatiou Acts, 1933-47 provided for licensing of commercial goods vehicles by a Board with discretionary powers and for payment of a fee. The effect of the Bank's case upon the Transport cases was urged, and it was contended that they must be overruled, but the majority applying Rex v.Vizzard (2) and the Riverina case held the law to be valid. Dixon and Fullagar, JJ., however dissented. In describing what was hold by these learned Judges, we shall borrow their language, as was also done by the Privy Council.

According to Dixon, J., the Banks' case (4) had proved wrong three propositions, and they were :

(1) that s. 92 did not guarantee freedom of the individual;

(2) "that' if the same volume of trade

(1) (1935) 52 C.L.R. 189.
(3) (1936) A.C. 578.
(5) (1945) 71 C.L.R. 29.
(2) (1933) 50 C.L.R. 30.
(4) (1948) 76 C.L.R. 1, 380, 38 1.
(6) (1990) 80 C.L.R. 432.
(7) (1937) 501 C.L.R. 327.

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flowed from State to State before as after the interference with individual trader then the freedom of trade among the States remained unimpaired.'

(3) that because a law applied alike to inter-State commerce and to domestic commerce of a State, it might escape objection notwithstanding that it prohibited, restricted or burdened inter-State commerce.

Next, according to him two further points were settled by the Bank's case: (1).

(1) That the object or purpose of an Act, challenged as contrary to s. 92 was to be ascertained from what was enacted and consisted in the necessary legal effect of the law itself and not in its ulterior effect socially or economically and

(2) that the doctrine of 'pith and sub stance though of help to find out whether it Wag nothing but a regulation of a class of transactions forming part of a trade and commerce was beside the point when the law amounted to a prohibition or the question of regulation could not fairly arise.

According to Dixon, J.,, the Transport cases involved a pragmatical solution. The main reason of the error according to him was that trade and commerce Was treated 'as a sum of activities' and "the interState commercial activities of the individual, and his right to engage in them were ignored", and much importance was attached to absence of discrimination against inter-State trade considered as a whole. Dixon, J., then added to the five points a sixth, viz., "the distinction taken between, on the one hand, motor vehicles as integers of traffic, and, on the other hand, the trade of carrying by motor vehicle

(1) [1948] 76 C.L.R. 1. 380,381.

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as part of commerce." This distinction, according to him, was not valid.

Fullagar, J., in a concurring judgment drew a good picture of how a regulation by its severity could become a prohibition. He observed that though traffic regulations and even licensing of motor vehicles including commercial vehicles could be said not to cross the line of regulation but both had to be reasonable so as not to impair the freedom. And the same could be said also about licence fees, etc. which had to be reasonable and nondiscriminatory, lest they passed from regulation into what the Privy Council called simple prohibition. The majority opinion, of course, prevailed but not for long.

The case of Hughes and Vale Pty. Ltd. v. State of N. S. W. (1) came after McCarter v. Brodie (1). The High Court followed the earlier decision,, but Dixon, C.J., observed :

"..... to my mind the distinction appears both clear and wide between, on the one hand, such levies and such provisions prohibiting transportation without licence as the foregoing and on the other hand the regulations and registrations of motor traffic using the roads and the imposition of registration fees. In the same way the distinction is wide between such provisions and the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by

other traffic. The validity of such laws must depend upon the question whether they

(1) [1955] A.C. 241.

(2) [1950]80 C.L.R. 432.

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impose a real burden or restriction upon inter-State traffic".

When the case reached the Privy Council, it was contended that where the tax was on the movement itself, the tax could not be regarded as regulatory and the reasons in the judgments of Dixon, C.J., and Fullagar, J., were urged. This was accepted by the Privy Council. On the other side, it was contended that the provisions which were State-wide were regulatory and were imposed on all vehicles, and the effect on inter-State trade or commerce was indirect or consequential. This was not accepted. Even the other side conceded that :

"the imposition of charges in respect of vehicles used on inter-State journeys would infringe section 92 if the charges (a) discriminated against inter-State road transport or vehicles engaged therein; (b) were imposed at such a rate as to be prohibitive of inter-State road transport, whether alone or in common with all road transport".

The Privy Council pointed out that in the Transport cases, (1) sufficient weight was not given to James v. Cowan (2), where determinations of executive in its discretion were said to be invalid. It accepted the six propositions of Dixon, J., and followed the unusual practice of quoting in extenso the opinions of Dixon and Fullagar, JJ., in McCarter v. Brodie (3) and expressed them as their own. The Board overruled the Transport, cases, and observed :

"In their opinion it follows that if the validity of the Transport Act is to be established in the present case, it can only be upon the ground that the restrictions contained therein are regulatory' in the sense in which that word is used in the Bank case."

(1) [1938] 57 C.L.R. 327. (2) [1932]A.C. 542.

(3) [1950] 80 C.L.R. 432.

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We now come to the last phase. The distinction between laws which merely regulate and those that restrict or prohibit having thus been established at the cost of all the Transport cases except Willard v. Rawson (1), a new method was adopted by the Australian Legislatures. Wynes in "Legislative Executive and Judicial Powers in Australia" (1956), tells us that the transport legislation was amended by four of the States and the amended law was challenged in several cases We shall not trouble ourselves with them or with those in which laws in bar of claims arising out of the decision of the Privy Council were considered, but must draw attention to the difference between "regulation" and "restriction" made in Hughes and Vale Pty Ltd. v. The State of New South Wales [No. 2] (2). For the present purpose, however, we borrow the following summary, inadequate though it is, form Wynes:

"Speaking of 'regulation', their Honours said that see. 92 of course assumed that the transactions protected would be carried out in accordance with the general law ; merel

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because a transaction was apart of inter-State

trade, commerce or intercourse, the persons engaging in it were not excluded from the operation of that law. 'What was precluded were restrictions of a real character preventing or obstructing the dealing across the border or the inter-State passage or interchange. There was a clear distinction in conception between laws interfering with freedom to carry out the very activity constituting interState trade and laws imposing on those engaged therein rules of proper conduct or other restraints directed to the due and orderly manner of carrying it out. This distinction was naturally described as 'regulation', a word

(1) [1933]48 C.L.R. 316. (2) [1955] 93 C.L.R. 125 1S9-162.

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of anything but fixed legal import which differed according to the nature of the thing to which it applied. Perhaps the true solution in any given case could be found by distinguishing between the features of the activity in virtue of which it fell within the category of trade, commerce and intercourse among the States and those features which, though invariably found to occur in some form or another in the activity, were not essential to the conception."

It was pointed out also that under the guise of what may legitimately be regulation, real burdens and restrictions could be placed.

There was a divergence of opinion again over the question of licence charges and registration fees. The majority was prepared to sustain charges if imposed "as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make." The minority thought that (except for a fee for a specific service) no charges could be levied. In two cases viz., Nilson v. The State of South Australia (1) and Pioneer Tourist Coaches Pty. Ltd. v. The State of South Australia (2), it was held that a State could not require commercial motor vehicles to register and pay a fee exceeding mere administrative charges.

There is yet another line of cases recently decicided in Australia. The taxing of commercial vehicles employed in inter-State or intrastate transport has been justified in some cases on the ground that such taxes are compensatory, and the tax is a recompense for the wear and tear of roads. In Armstrong v. The State of Victoria [No. 2] (3), Part II of the

(1)[1955]93C.L.R 292. (2) (1955] 93 C.L.R. 307.

(3) [1957] 99 C.L.R. 28.

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Commercial Goods Vehicles Act, 1955 (Victoria) was challenged. That Act required the owner of every commercial vehicle of load capacity exceeding four tons to pay compensation for the wear and tear caused to the roads. There was a schedule under which the payment was determined. Every vehicle paid one-third of a penny per ton of the sum of-(a) the tare weight of the vehicle and (b) forty per cent of the load capacity of the vehicle- per mile of public highway along which the vehicle traveled in Victoria. The receipts were paid to the credit of a special account and

applied solely for the maintenance of the highway. This law was upheld under s. 92 by a narrow majority of 4 to 3 in its application to inter-State trade. in the same, case. s. 3 of the Motor Car Act, 1951 (Viet.), which levied fees on a motor car used for carrying goods for hire or in the course of trade according to the powerweight and varying according to the number of wheels and types of types etc., was upheld by a majority of 6 to 1. The main reason given was what these payments served to maintain roads at a standard by which inter-State operations of trade, commerce and intercourse were improved. It was, however, said that the charge must not be more than a fair recompense for the actual use of the roads. McTierman, J., relied on a passage in Adam Smith's "The Wealth of Nationals", where public 'works as roads, bridges, etc. are discussed as facilities of commerce.

The question was again considered in (commonwealth Freighters Pty. Ltd. v. Sneddon where the Road Maintenance (Contribution) Act, 1958 (N. S. W.) which imposed upon owners of commercial goods vehicles a, road charge at a rate per mile was upheld. It will thus appear that tax legislation in Australia has now to resort to the creation of a separate fund to which State collections have to go

(1) [1959] 102 C.L.R. 280.

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ear-marked for the maintenance of roads and to provide elaborate criteria for determining the amount payable. On this subject as well as on the subject of regulations as described by Fullagar, J., in McCarter v. Brodie (1), the law for the time being seems settled.

Having dealt with the historical background of the Constitution, the possible models which were considered in the drafting of Part XIIL we proceed to consider the three views expressed in the Atiabari Tea Company case (1). These views are not sharply divided. The majority accepts the view expressed by the learned Chief Justice, but goes beyond it, while Shah, J., accepts the views of the majority but goes still further. The main question that arose then, as it has arisen here, is : Do taxation laws come within the reach of Art. 301 ? Now, it cannot be laid down as a general proposition that all taxes are hit by that Article. We have shown above that the financial independence of the States was secured by an elaborate division of heads of taxation, which were. well-thought out to provide the States with the means of independent existence and the wherewithal of nation-building activities. There is hardly any tax which the States are authorised to collect which could not be said to fall on traders. Property tax, sales tax, municipal taxes, electricity taxes (to mention only a few) are paid by traders as well as by non-traders. To say that all these taxes are so many restrictions upon the freedom of trade, commerce and. intercourse is to make the entire Constitutional document subordinate to trade and commerce. Since it is axiomatic that all taxes which a tradesman pays must burden him, any tax which touches him must fall within Art. 304, if the word "restriction" is given such a wide meaning. Every such legislation will then be within the pleasure of the President, and this could

(1) [1950] 80 C. L.R. 432. (2) [1961] 1. S.C.R. 309.

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not have been intended. Restriction" must, there fore, mean something more than a mere tax burden In our opinion, the issue of taxation cannot made justifiable with reference to Art. 301 in those cases where the tax is a general tat which a trade pays in common with others, We would, therefore

respectfully disagree with the view of Shah, J. when he holds :

> "Not merely discriminative tariffs restricting movement of goods are included in the restrictions which are bit by Article 301, but all taxation on commercial intercourse even imposed as a measure for collection of revenue is so hit. Between discriminatory tariffs and trade barriers on the one hand and taxation for raising revenue on commercial intercourse, the difference is one of purpose and not of quality. Both these forms of burdens on commercial intercourse trench upon the freedom guaranteed by Article 301."

That a tax is a restriction when it is placed upon a trade directly and immediately may be admitted. But there is difference between a tax which burdens a trader in this manner and a tax, which being general, is paid by tradesmen in common with others. The first is a levy from the trade by reason of its being trade, the other is levied from all, and tradesmen pay it because every one has to pay it. There is a vital difference between the two, viewed from the angle of freedom of trade and commerce. The first is an impost on trade as such, and may be said to restrict it; the ,second may burden the trader, but it is not a restriction' of the trade. To refuse to draw such a distinction would mean that there is no taxing entry in Lists 1 and 11 which is not subject to Arts. 301 and 304, however general the tax and however non. discriminatory its imposition. To bring all the taxes within the reach of Art. 301 and thus to bring them

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also within the reach of Art. 304 is to overlook the concept of a Federation, which allows freedom of action to the States, subject, however, to the needs of the unity of India. Just as unity cannot be allowed to be frittered away by insular action, the existence of separate States is not to be sacrificed by a fusion beyond what the Constitution envisages. No doubt, Part XIII ensures economic unity to India and combines the federating States into the larger State called India. The Constitution also permits independent powers of taxation. What the Constitution does not permit is that trade, commerce and intercourse should be rendered 'unfree'. Trade and commerce remain free even when general taxes are paid by tradesmen in common with non-tradesmen. The Question whether a tax offends Part XIII can only arise when it seeks to tax trade, commerce and inter-course. Support for the contrary proposition is not to be found in James v. The Commonwealth The Privy Council in James v. The Commonwealth did not lay down:

> "Every step in the series of operations which constitutes the particular transaction is an act of trade, and control under the State law of any of these steps must be an interference with its freedom as trade." (p. 629)

The passage represents the view hold in McArthur's case (2). That case was disapproved at p. 631. We have already dealt with this view at some length.

Thus, taxation laws and taxes must be divided into two kinds. Taxes which are general and for revenue purposes which fall on those engaged in trade, commerce and intercourse in the same way as they fall on others not so engaged cannot

(1) (1936) A.C. 578.
(2) (1920) 28 C.L.R. 530.

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normally be within the reach of Part XIII. A motor transport owner cannot claim that be will not pay property tax in respect of his garage buildings or electricity tax for the electricity he consumes in lighting them, or income-tax on his profits. Part XIII has nothing to do with such taxes even though they fall upon tradesmen.
But this is not to say that we accept the view that all taxes or taxing laws are outside the reach of Part XIII. We find ourselves unable to accept the argument that there must be a discernible point in the operations of trade, commerce and intercourse at which the tax becomes a barrier to the freedom of the movement of trade before it will offend the freedom guaranteed. This argument considers the subject of freedom in terms of barriers, tariff walls and imposts, erected in the way of the free flow of trade, commerce and intercourse. Of course, if the tax does create barriers, tariff walls and imposts at some discernible point, the restriction is easy to detect. But restrictions may be diverse, subtle and disguised, and a tax may be a direct and immediate restriction without appearing to be so at a particular point in the movement of trade. A law which prohibits trade, commerce and intercourse and releases them on the fulfillment of some unreasonable condition including the payment of an unreasonable or discriminatory tax will just as much be a restriction offending the freedom as a tariff wall or any other barrier. No question of pith and substance in this context arises, as was pointed out by the Privy Council in the Banks' case. The nature of the tax and its relation to trade, commerce and intercourse are the matters to consider.
In trying to establish that taxation entries are entirely out side the reach of Part XIII, it is contended that Part XII, which deals with taxa-
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tion, is a code by itself and taken with the Legislative Lists, lays down the power of taxation which cannot be taken away by the provisions of Part XIII. The power of taxation is, therefore, said to be not subject to the declaration of freedom in Art. 301. The imposition of a tax is conditioned on the existence of a law. Article 265 lays down that "no tax shall be levied or collected except by authority of law". Article 301 is a curb on the law-making power, because by the unambiguous declaration contained in it, the freedom of trade, commerce and intercourse is secured. The prohibition is addressed not only to the EXecutive but also to the Legislature, because Arts. 302 and 304 lift the ban which has been imposed in favour of action by law made by Parliament and the State Legislatures respectively. Article 304 expressly mentions the power to impose taxes which must include at least excise duties and sales tax, and from this, also, it is quite clear that taxation is within the prohibition contained in Part XII. This argument was also rejected by the majority in Atiabari Tea Company case (1), and we respectfully agree.
Before, however, a tax can be struck down, the incidence of the tax and the method of its collection must be examined. If the tax falls upon trade, commerce and intercourse as such, irrespective of whether it falls on trade viewed as a whole or upon individual traders, and restricts the freedom guaranteed, a question will immediately arise about the legality of the tax. In this connection, even trade not in motion and more so trade in motion will be protected unless the law, if made by Parliament is in the public interest, and if made by the State Legislature it is reasonably in the

public interest and the previous sanction of the President has been obtained. What we have said about taxation and taxes is also

(1) (1961) 1. S.C.R. PC(1).

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true of other restrictions though not of a pecuniary character. A restriction from whatever source it may proceed, must be backed by law made in the manner indicated and the law must comply equally with those conditions. It may be stated there that it is not open under Part XIII to courts to devise their own technique for exempting patent and palpable interferences with the freedom of trade and commerce. In the Australian Constitution, there was no machinery for determining what freedom of trade, commerce and intercourse meant in given circumstances, and the Courts stepped in with its own interpretation of s. 92 of the Commonwealth of Australia Act. In our Constitution, many problems which agitated the Australian High Court have been obviated, and in so far as restriction of the freedom is concerned it can only be achieved by law made in the public interest and in the manner indicated. In so far as State legislation is concerned, the law must be reasonably in the public interest, and the sanction of the President must be obtained. Thus, the President in the first instance and finally the courts will be the judges of the reasonableness of the restriction and the existence of public interest.

Part XIII, which has created the freedom has thus also shown the way for restricting the freedom. The Privy Council in the Banks' case observed:

> "If these two tests are applied : first whether the effect of the Act is in a particular respect direct or remote; and secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower."

This may be true where the law attempts to regulate freedom but not true where the law restricts

(1) [1978] 76. C.L.R. 1, 380, 38 1,

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freedom. There is a real difference between regulation and restriction. Traffic rules are regulations, not restrictions. Trade, commerce and intercourse are regulated so that they may flow freely. The rule of the road is not a restriction of commercial traffic, but is one designed to make the flow of traffic smooth. The prescription that cars should have reliable brakes or lights or a sound device are not restrictions of trade. These regulations are needed both for ensuring safety for those engaged in traffic as also for securing that every one engaged in traffic might equally enjoy that right. The classification of heavy transport vehicles, the tare weight, the kinds of tares they must have, the seating capacity of buses and go on and so forth are not normally restrictions of trade, commerce and intercourse but are meant for the better and more effective flow of trade, commerce and intercourse. Such laws can not be viewed as restrictions at all, and do not come within the freedom angle, nor do they require the process under which freedom can be curtailed. Just as a tax of a general character payable by all and sundry and not placed upon a trade directly and immediately cannot be considered as a restriction of trade even though it burdens a trader, so also regulations of trade without hampering it or impairing its freedom cannot be described as restrictions. A regulation, when it ceases to be a regulation and becomes a prohibition may require

justification as a reasonable restriction. Fullagar, J., in Mc Carter v. Brodie (1) pointed out that a regulation of speed on the high ways does not offend the freedom guaranteed, but a rule that commercial vehicles should travel at one miles per hour ceases to be regulation and becomes a restriction. Here, the question is not one of degree but of the essence of the purpose. The technique of justifying laws as regulatory was

(1) [1950] 80 C.L.R. 432.

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evolved in Australia in view of the intractable language of s. 92 without any indication of the circumstances in which the absolute freedom could be curtailed. The detailed pro-visions contained in Part XIII render such a construction of Art. 301 at once unnecessary and impermeable.

Let us now see whether the validity of taxation laws directly impinging on trade and commerce can be upheld on the ground that they are regulatory. Here, a distinction must be made between fees and taxes. Fees charged as quid pro quo for services rendered or as representing adminis-trative charges are quite different from taxes, pure and simple. Fees may partake of regulation when they are demanded to enable Government to meet the cost of administration. But the tax, with which we are concerned, is hardly a fee in that narrow sense. It is a tax for raising revenue. Of such a tax, Lord Watson asked the question: "Do you regulate a man when you tax him ?" As was pointed out by Lord Herschell during the arguments in the Liquor Prohibition Appeal 1895 (1) in a passage which we have quoted earlier, the matter may be looked at in two ways. Lord Herschell observed:

> "May it not be necessary to regard it from this point of view, to find what is within regulation of trade and commerce, what is the object and scope of the legislation ? Is it some public object which incidentally involves some fetter on trade or commerce or is it the dealing with trade and commerce for the purpose of regulating it ? May it not be that, in the former case, it is not a regulation of trade and commerce, while in the
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> (1) [1896] A.C. 348.
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> latter it is, though in each case trade and commerce in a sense may be affected ?"

In our judgment, the first test to apply is what is the object and scope of the legislation? A regulation of trade and commerce may achieve some public purpose which affects trade and commerce incidentally but without impairing the freedom.Sometimes, however, the regulation it self may amount to a restriction, and if such a stage is reached, then under our Constitution there striation must be reasonably in the public interest, and the President's prior sanction must be obtained, if the law imposing such restriction is made by the State Legislature. If, however, it does not reach the stage of restriction of trade and remains only a regulation incidentally touching trade and commerce, the regulation is outside the operation of Arts. 301 and 304. It is on this ground that laws prescribing the rule of the road and like provisions already referred to as well as a regulation that the height to which trucks may be loaded must be such as not to endanger the overhead bridges or wires, do not have to go before the President, since they do hot affect the freedom guaranteed. The object of such laws cannot be regarded as a

restriction of trade and commerce. Freedom in Art. 301 does not mean anarchy. Similarly, a demand for a tax from traders in common with others is not a restriction of their right to carry on trade and commerce. A system of 'licensing of motor vehicles is a regulation, but does not impair the freedom of trade and commerce unless the licensing is made to depend upon arbitrary discretion of the licensing authority. Similarly, a fee for administrative purposes may also be viewed as a part as regulation. Such licensing and fees fall outside Art. 301, because they cannot be viewed as restrictions, and therefore do not need to be processed under Art. 304.

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Such regulations are designed to give equal opportunity to everyone, subject to a certain standard. The object being a public object, such regulations cannot be questioned unless they amount to res trictions. A tax, however, which is made the condition precedent of the right to enter upon and carry on business at all is a very different matter. It is a restriction on the right to carry on trade and commerce, and the restriction is released on the payment of the tax, which is the price of such release. It is from this point of view that the impugned provisions in this case must be examined.

We have to examine the precise nature of the tax imposed, which has to be gathering from the charging section read with the Schedules, and the plain question is whether so read, there can be said to be anything other than a tax on a trader and on his activity as a trader. The Act consists of 24 sections, and 4 Schedules. Section 4(1) which imposes the tax is the charging section and has, on its terms, to be read with each of the Schedules to the Act. Apart from the usual sections generally found in every taxing measure such as prescribing the time the tax has to be paid, cases in which refund may be had, declarations which have to be made, and provisions for recovery of tax, appeals, etc. there are provisions for penalties and for compounding. There is one other provision, to which attention may be drawn and that is s. 20, which reads:

> "20. Levy of toll on certain bridges.- Notwithstanding anything contained in this Act it shall be lawful for the Government to levy tolls on motor vehicles under any law or usage for the time being in force, such rates as it may from time to time fix-
> (i) for the use of any bridges, or

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> (ii) on any bridge constructed, reconstructed or repaired after the commencement of this Act."

The four Schedules, as their headings amply show, deal with different subjects. Schedule 1 is divided into two parts A and B. They deal with the subjects indicated in the headings.

> "A. Vehicles (other than Transport Vehicles plying for hire or required) if fitted solely with pneumatic tyres.
> B. If the above motor vehicles are fitted with resilient or non-resilient tyres, extra tax will be levied at 5% of the above rate."

Part A is then divided into three sections dealing with different classes of vehicles and prescribe different rates for each such class. We are not at present concerned with vehicles which are not used as transport vehicles plying for

hire. Schedule II is also divided into two parts dealing respectively with vehicles fitted with pneumatic tyres and vehicles not so fitted. The first part deals with two categories marked respectively "A" and "B". ,A" comprises motor vehicles plying for hire for the conveyance of passengers and light personal luggage of passengers, while "B" cornprises goods vehicles plying under Public Carrier's Permit. There are further sub-divisions in each category "A" and "B" according to the seating capacity of the vehicles on the basis of which different rates of tax are imposed, but it is not necessary to go into their details.
Schedule III comprises goods vehicles registered outside the State using roads in Rajasthan, and they are required to pay a tax calculated at a specified sum per day. Schedule IV is headed:

> "Vehicles used for the carriage of goods
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> in connection with a trade or business carried on by the owner of the vehicle under a Private Carrier's Permit."

These vehicles are again classified according to the kind of tyres with which they are fitted as well as by their load capacity and different amounts of tax are payable by each class. Part II of this Schedule specified the tax payable by dealers in or manufacturers of motor vehicle, which is described as a payment "for a general licence" dependent upon the number of vehicles which they manufacture or deal in.
From the above analysis, it will be seen that the tax in Schs.II to IV is laid upon trade and commerce directly and immediately. It cannot be described as a property tax. Motor Vehicles employed by a trader for transport of passengers and goods are integers of trade and commerce. The tax is not like the property tax which a transport operator pays on buildings employed by him in his business. There, the tax is payable also but not as a condition precedent to the business. The tax, with which we are concerned, is one directly and immediately laid on trade and commerce and also on trade and commerce in movement. In this connection, Sch. 1 and Part 11 of Sch. IV need not be considered for we are dealing with motor vehicles used as integers of trade and commerce. The tax is evidently not a fee for administrative purposes; therefore, it cannot be justified as representing payment for services. Its object is the raising of revenue, which distinguishes a tax from a fee.
We may next consider whether the tax can be justified as regulatory or compensatory. For this purpose, some facts must be stated. The appellants are three. They owned buses which were registered in the former State of
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Ajmer. They plied on diverse routes. There was one route. Nasirabad to Deoli, which lay mainly in Ajmer State, but it crossed narrow strips of the territory of Rajasthan. Another route, Ajmer to Kishengarh, was substantially in the Ajmer State, one-third of which was only in Rajasthan. Kishengarh was, at the material time, a part of Rajasthan. The appellants were required to charge fares prescribed by the Ajmer authorities, and could not change them to cover extra expenditure in the shape of taxes, which they had to bear in Rajasthan. Formerly, there was an agreement between the Ajmer State and. Kishengarh State, by which either State did not charge any tax or fees on vehicle registered in the respective States. Later, Kishengarh became a part of Rajasthan, and the tax was demanded from these appellants

for the period, April 1, 1951, to March 31, 1954. The demand was made by virtue of s. 4, the charging section, under pain of the application of s. 1 1, which provides of penalties.

The taxes, which are imposed by Schs. II, III and IV(1), operate on trade and commerce directly. It is not denied that the carriage of passengers and goods amounts to trade. It was, in fact, so help in the Transport cases in Australia and also by the Privy Council. Under the Act, this trade can only be carried on, if the tax is paid. The Act, therefore, involves a prohibition against a trade, which prohibition is released on payment of tax. The Schedules affect motor vehicles for carriage of passengers and goods on hire in Rajasthan and also similar vehicles coming from outside. In so far as vehicles coming from outside are concerned, their entry into the State is barred unless the tax is paid. The tax is thus not incidental to trade but is directly on it and is on its movement. This is not tax which the trader has to bear in common with others, and the tax is

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for revenue purposes. This is a case in which if the tax is not paid, the trade is destroyed. The charging provisions do not take into account what distance a particular vehicle travels within the State. A vehicle traveling a hundred miles and another traveling only one mile have to pay an identical sum as tax. How then can it be said that it involves a fair recompense for the wear and tear of roads? To say that such tax is compensatory and is a recompense for the wear and tear of the roads is to misdescribe it. Section 20, which we quoted earlier, may be compensatory for use of a bridge and may even be described as regulatory within the decision of Fullagar, J., in McCarter v. Brodie (1) but not the taxing provisions which even in Australia would not be regarded either as compensatory or regulatory. It is impossible, therefore, to turn to the Australian precedents for help.

Further, the duty of maintaining roads is a duty of the State, and it performs it not from any special fund which is created from the receipt of these taxes but from its general funds. The wear and tear of the roads is not caused by the transport vehicles only but other vehicles not employed in the trade of transport. The tax which is levied is not based on any theory of recompense, which has been evolved in Australia. There, the distance traveled, the load carried are taken into account, and a charge is payable by each operator according to the distance actually travelled by him in consonance with the weight carried. A further circumstance which goes into the determination of the amount payable is the kind of tyres and the number of wheels which the vehicle has. To say that the impugned tax is compensatory without any attempt to apportion the charge according to the actual wear and tear, is to borrow a theory for justification which does not apply to the facts here.

(1) [1950] 80 C.L.R.432.

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The only other question is whether the Act is, in its true character, regulatory. There is no provision in the Act which can be regarded as regulatory of motor vehicles or their use. The Act plainly levies a tax upon the possession or use of motor vehicles. A tax does not regulate trade ordinarily; it imposes a charge on trade. The question thus remains: does the tax burden trade or impair the free, flow of trade and commerce as contemplated Art: 301? It is clear that the tax is on trade. It is also clear that it is on

the movement of trade. It is further clear that it creates a barrier between one State and another, which trade cannot cross except on a heavy payment. The tax is not truly a fair recompense for wear and tear of roads even if a justification on the doctrine of compensatory taxes is applied. It is nothing except a restriction, which Art. 301 forbids. The Bill which became the Act, was not submitted to the President for his Previous sanction, nor was it assented to subsequently after it passed the Legislature. The question, therefore, whether the restriction imposed by the Act is reasonable or not,, does not arise.

We are, therefore, of opinion that s. 4(1) as read with Schs. IT, III and Part 1 of Sch. IV offends Art. 301 of the Constitution, and as resort to the procedure prescribed by Art. 301(b) was not taken, it is ultra vires the Constitution. We wish to make it clear that we pronounce no opinion about the constitutional validity of s. 4(1) as read with Sch. 1 or the second Part of Sch. TV. The first raises a question as to the meaning of the expression "intercourse" in Part XIII and as that matter is not relevant for the appeal before us, and thus no arguments were heard on that point, we refrain from expressing any opinion on it. The second involves many other questions, which are far remote from the controversy with which we are now concerned, and therefore need not be considered here.

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We would, therefore, allow the appeals, and quash the demand made upon the appellants.

By COURT: In accordance with the opinion of the majority, these appeals are dismissed with costs, one hearing fee,.

Appeal dismissed.